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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1997

JUNE 1 THROUGH SEPTEMBER 29, 1998

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

487 U. S. 4, n.*, lines 4–5: Insert "*Lynn Hecht Schafran,*" following "for the NOW Legal Defense and Education Fund et al. by".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

RETIRED

LEWIS F. POWELL, Jr., Associate Justice.*
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
SETH P. WAXMAN, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.
SHELLEY L. DOWLING, Librarian.

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*Justice Powell, who retired effective June 26, 1987 (483 U. S. VII), died on August 25, 1998.

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 September 30, 1994, 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, Ruth Bader Ginsburg, 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, Clarence Thomas, Associate Justice.

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

For the Tenth Circuit, Stephen Breyer, Associate Justice.

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

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

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. vi, 509 U. S., p. v, and 512 U. S., p. v.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1994 edition.

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

	Page
Ab *v.* Boone	939
Abbott; Bragdon *v.*	624
Abdeslem *v.* U. S. Embassy, Manila, Philippines	958
Abdullah *v.* Moore	958
Abrams *v.* Barnett	949
Adames *v.* Batista	918,971
Adamson; King *v.*	930,971
Adelman *v.* Colonial Park Apartments	917
Aerojet-General Corp.; Bestfoods *v.*	924
Aham-Neze, *In re*	902
Ahwinona *v.* Alaska	925
Aircraft Equipment Co.; Kiowa Tribe of Okla. *v.*	901
Akins; Federal Election Comm'n *v.*	11
Alabama; McLeod *v.*	929
Alabama; South Central Bell Telephone Co. *v.*	981
Alabama; Williams *v.*	929
Alachua County School Bd.; Long *v.*	915
Alameda County Network of Mental Health Clients; Darden *v.*	969
Alaska; Ahwinona *v.*	925
Alexander & Alexander of N. Y., Inc.; Christy *v.*	912
Aljami *v.* Kentucky	909
Allah *v.* United States	940
Allard *v.* Elo	933
Allen *v.* Stewart	941
Allen *v.* United States	920
Allery *v.* United States	962
Allin; Rivera *v.*	978
Allmond *v.* Fauver	957
Almeida *v.* Florida	929

Page
American-Arab Anti-Discrimination Committee; Reno *v.* 903
American Broadcasting Cos.; Deteresa *v.* 968
American Constitutional Law Foundation, Inc.; Buckley *v.* 949,975
American Life & Casualty Ins. Co. *v.* Trostel 945
American Mfrs. Mut. Ins. Co. *v.* Sullivan 981
American Medical Assn. *v.* Practice Mgmt. Information Corp. . . . 952
American Medical Security, Inc.; Larsen *v.* 936
American Telephone & Telegraph Co. *v.* Central Office Telephone 972
America Online, Inc.; Zeran *v.* 937
Ameritech Corp. *v.* Federal Communications Comm'n 949
Amos *v.* Maryland Dept. of Public Safety and Correctional Servs. 935
Amsterdam Video, Inc. *v.* New York City 966
AMTRAK; Lebron *v.* 927
Anchorage Ed. Assn. *v.* Patterson 904
Anderson *v.* Illinois 918
Anderson *v.* Roe 982
Anderson Corp.; Clark *v.* 905
Andrade *v.* United States 963
Angel *v.* Texas 911
Angelo, *In re* 973
Angelone; Eaton *v.* 934
Angelone; Stewart *v.* 978
Anheuser-Busch, Inc.; Teamsters *v.* 916
Apfel; Arneson *v.* 926
Apfel; Booker *v.* 958
Apfel; Eastern Enterprises *v.* 498
Apfel; Forney *v.* 266
Apfel; Kerekes *v.* 943
Apker *v.* United States 935
Arizona; Carrillo *v.* 958
Arizona; Follett *v.* 933
Arizona; Gretzler *v.* 912
Arizona; Owens *v.* 906
Arkansas; Brown *v.* 909
Armenis *v.* Cramer 905
Armstrong; Wilson *v.* 937
Arneson *v.* Apfel 926
Arroyo *v.* United States 905
Arshal *v.* Dalton 954
Ashmus; Calderon *v.* 968
Ashton *v.* Grievance Comm., 2d & 11th Jud. Dists. of N. Y. 917
Association. For labor union, see name of trade.
Association for Local Telecom. Services *v.* Iowa Utilities Bd. 949
Atkins *v.* United States 911

Page
AT&T Co. *v.* Central Office Telephone, Inc. 214
AT&T Corp. *v.* California 949
AT&T Corp.; Hassan *v.* 911
AT&T Corp. *v.* Iowa Utilities Bd. 949
Attorney General *v.* American-Arab Anti-Discrimination Comm. 903
Attorney General of Conn. *v.* Philip Morris, Inc. 937
Attorney General of Md.; Carter *v.* 969
Avery *v.* United States 932
Ayala *v.* Speckard 958
Ayars, *In re* 950
B. *v.* New York City 917
Babbitt; Mausolf *v.* 951
Babbitt; National Assn. of Home Builders of U. S. *v.* 937
Baez, *In re* 950
Bajakajian; United States *v.* 321
Baksh *v.* United States 959
Balsys; United States *v.* 666
Bankhead *v.* Mississippi 946
Bank of America Nat. Tr. & Sav. Assn. *v.* 203 N. LaSalle St. P'ship 914,975
Baptist Medical Center Hospital; Davis *v.* 916
Baptist Memorial Hospital System; Davis *v.* 916
Barandiaran *v.* TCW Special Credits 952
Barbary *v.* Wisconsin 930
Barbir *v.* White 943
Barcena *v.* Illinois Dept. of Public Health 958
Barker *v.* Leeds 938,970
Barkin, *In re* 935,972
Barnes *v.* United States 909
Barnett; Abrams *v.* 949
Barnett; Bialczak *v.* 913,954
Barrier *v.* Johnson 933
Barrier *v.* Marin General Hospital 933
Bartlett; Walton *v.* 906
Bartley *v.* United States 945
Baruch *v.* Smith 969
Bates *v.* Tennessee 907
Batista; Adames *v.* 918,971
Battelle Memorial Institute; Roberts *v.* 957,972
Bauchman *v.* West High School 953
Bayer *v.* Stanford Univ. School of Medicine/Medical Center 968
Bazzetta *v.* McGinnis 953
B. C. Rogers Processors, Inc. *v.* BOC Group, Inc. 947
Beckwith Machinery Co.; Zerebnick *v.* 946
Beggerly; United States *v.* 38

Page

Belflower *v.* United States 921
Belhomme *v.* Widnall 969
Bell, *In re* 970
Beltran *v.* United States 922
Bende *v.* Brogdon 926
Beneficial Cal., Inc.; Viray *v.* 971
Bennett *v.* New York 918
Berg, *In re* 902
Bernard *v.* New York City Health and Hospital Corp. 969
Berry *v.* Louisiana Dept. of Public Safety 949
Bestfoods *v.* Aerojet-General Corp. 924
Bestfoods; Michigan Dept. of Environmental Quality *v.* 924
Bestfoods; United States *v.* 51
Betka, *In re* 950,972
Beverly *v.* Ohio 943
B. F. Goodrich Co.; Zollo Drum Co. *v.* 926
Bialczak *v.* Barnett 913,954
Biddle *v.* United States 928
Bieri *v.* United States 945,959,972
Billemeyer *v.* Missouri 971
Biofilm, Inc. *v.* Boynton 938
Bittaker *v.* Calderon 906
Blackburn *v.* Blue Mountain Women's Clinic 905
Blackmon, *In re* 914
Blackmon *v.* Poindexter 919,970
Blackwell; Wilson *v.* 942
Blair *v.* Thompson 919,971
Blais *v.* United States 919
Blakley *v.* United States 928
Bleecker, *In re* 902
Blodgett *v.* United States 955
Blue Fox, Inc.; Department of Army *v.* 951
Blue Mountain Women's Clinic; Blackburn *v.* 905
Blumenthal, *In re* 948
Blumenthal *v.* Philip Morris, Inc. 937
Board of Attorneys Professional Responsibility of Wis.; Goetz *v.* 927
Board of Ed. of New York City; Bronx Household of Faith *v.* 934
Board of Governors, FRS; Inner City Press/Community on Move *v.* 937
Boatwright *v.* Singletary 957
Boca Raton; Faragher *v.* 775
BOC Group, Inc.; B. C. Rogers Processors, Inc. *v.* 947
Boeing Co.; Buck *v.* 943
Boeing Co.; Father *v.* 918,971
Bogins; Dias *v.* 934

Page

Bolling *v.* United States 945
Bond *v.* United States 961
Bonner *v.* United States 928
Booher *v.* Tennessee 931
Booker *v.* Apfel 958
Boone; Oy Partek Ab *v.* 939
Booth *v.* Maryland 905
Borck *v.* Oregon 930
Bourie, *In re* 914
Bowden, *In re* 902,966
Bowen *v.* Gundy 907
Bowen *v.* Oistead 938
Bowens *v.* United States 922
Bower *v.* Illinois 905
Bowersox; Kilgore *v.* 942
Bowersox; Tyler *v.* 919
Boxer, *In re* 966
Boyd *v.* Oregon 944
Boynton; Biofilm, Inc. *v.* 938
Bozza; Cozzens *v.* 930
Bradin, *In re* 914,971
Bradley *v.* Illinois 931
Bragdon *v.* Abbott 624
Branch *v.* United States 921,931
Brand Management, Inc. *v.* Menard, Inc. 927
Branstad; Gavin *v.* 955
Brauer, *In re* 966,975
Breeze, *In re* 948
Bridge, *In re* 967
Brincat *v.* California 919
Brito *v.* United States 962
Brockman *v.* Sweetwater County School Dist. No. 1 933
Brogdon; Bende *v.* 926
Bronx Household of Faith *v.* Board of Ed. of New York City 934
Brooker *v.* Durocher Dock & Dredge 982
Brooks *v.* Missouri 957
Brooks *v.* United States 928
Brookshire *v.* United States 961
Brotherhood. For labor union, see name of trade.
Brown, *In re* 913
Brown *v.* Arkansas 909
Brown *v.* Florida 923
Brown *v.* Ford Motor Co. 916
Brown *v.* Plaut 939

Page

Brown *v.* Rubin 968
Brown *v.* San Diego Police Dept. 941
Brown *v.* Singletary 906
Brown; Southeastern Maritime Co. *v.* 951
Brown *v.* Superior Court of Cal., San Diego County 941
Brown *v.* United States 911
Brown & Williamson; Kessler *v.* 936
Bryan *v.* Clayton 933
Bryan *v.* United States 184
Bryant *v.* Caddo Parish School Bd. 938
Bryant *v.* Speckard 907
Buck *v.* Boeing Co. 943
Buck *v.* United States 962
Buckley *v.* American Constitutional Law Foundation, Inc. 949,975
Bunker Group, Inc. *v.* United States 952
Burge *v.* Colorado 913
Burlington Industries, Inc. *v.* Ellerth 742
Burlington Industries, Inc.; Ellerth *v.* 951
Burnham; Federation of Conn. Taxpayer Organizations *v.* 938
Burns *v.* United States 910
Burton; Wilson *v.* 944
Bush *v.* Zeeland Bd. of Ed. 904
Butler *v.* California 955
Buzzetti *v.* New York City 924
Byas *v.* United States 910
Byrd *v.* Gillis 943
C. *v.* Iowa 918
Cabazon Band of Mission Indians; S. Cal. Off-Track Wagering *v.* 926
Cabazon Band of Mission Indians; Wilson *v.* 926
Cabrales; United States *v.* 1
Caddo Parish School Bd.; Bryant *v.* 938
Cahnmann *v.* Sprint Corp. 952
Cain; Williams *v.* 934
Caine *v.* United States 929
Calderon *v.* Ashmus 968
Calderon; Bittaker *v.* 906
Calderon; Cooper *v.* 963
Calderon; Thompson *v.* 965
Cale *v.* State Retirement and Pension System of Md. 908
California; AT&T Corp. *v.* 949
California; Brincat *v.* 919
California; Butler *v.* 955
California; Chavez *v.* 955
California *v.* Clark 937

Page
California *v.* Deep Sea Research, Inc. 925
California; Federal Communications Comm'n *v.* 949
California; Huffman *v.* 907
California; Kimble *v.* 908
California; MCI Telecommunications Corp. *v.* 949
California; Monge *v.* 721
California; Robinson *v.* 929
California; Salguero *v.* 938
California; Swinney *v.* 944
California; Williams *v.* 909
California; Wood *v.* 941
California Bd. of Equalization; Lyon Metal Products, Inc. *v.* 916
California Dental Assn. *v.* Federal Trade Comm'n 980
California Public Employee's Retirement System *v.* Felzen 980
Call *v.* United States 906
Camacho *v.* Johnson 974
Camacho *v.* Texas 974
Caminero *v.* United States 922
Camp *v.* Riley 915
Campbell *v.* United States 970
Campbell *v.* U. S. Postal Service 931
Canaan *v.* Indiana 906
Cannon *v.* Savage 906
Cantu Martinez, *In re* 914
Capaldi *v.* United States 910
Caranchini, *In re* 940
Cardenas *v.* United States 922
Cargill, *In re* 923
Cargill *v.* Turpin 923
Carlon; NationsMart Corp. *v.* 927
Carlson *v.* Nebraska State Bank 905
Carlton; Williams *v.* 923
Carlyle *v.* Saint-Evens 939
Carmichael; Kumho Tire Co. *v.* 936
Carnegie Center Associates; Rhett *v.* 938
Caron *v.* United States 308
Carr; Graves *v.* 906
Carr *v.* United States 917
Carrillo *v.* Arizona 958
Carter *v.* Curran 969
Carter; Minnesota *v.* 975
Carter *v.* United States 945,971
Caruso; Pierce *v.* 930
Cash *v.* Tennessee 917

Page
Cassan Enterprises, Inc. *v.* Dollar Systems, Inc. 926
Cass County *v.* Leech Lake Band of Chippewa Indians 103
Castapheny *v.* White 931
Castaphney *v.* White 931
Castillo *v.* Johnson 979
Castro-Nino *v.* United States 920
Cayetano; Tataii *v.* 907,969
Ceminchuk *v.* Cohen 972
Central Office Telephone; American Telephone & Telegraph *v.* . . . 214,972
Champion *v.* Sack 922
Chandler *v.* Greene 974
Chanin; Parnar *v.* 965
Chao Hui Lin *v.* United States 921
Chargualaf *v.* United States 928
Chase *v.* United States 905
Chase Manhattan Bank *v.* San Francisco 945
Chavez *v.* California 955
Chavez-Ramirez *v.* United States 955
Chester Residents Concerned for Quality Living; Seif *v.* 915,974
Chicago *v.* Morales 975
Chief Justice, Supreme Court of Fla.; Schwarz *v.* 954
Chief Justice, Supreme Court of Utah; Peterson *v.* 918
Childress *v.* Richmond 927
Chiles; Coastal Petroleum Co. *v.* 953
Chittim, *In re* 966
Christiani; Lu *v.* 939
Christy *v.* Alexander & Alexander of N. Y., Inc. 912
Chun; Nakamura *v.* 938
Cimino *v.* Zuk 909
Citibank, N. A.; Greene *v.* 968
Citizen Potawatomi Nation *v.* C&L Enterprises, Inc. 901
City. See name of city.
Clark; California *v.* 937
Clark; Griffin *v.* 923
Clark; McClain *v.* 917
Clark *v.* Roy Anderson Corp. 905
Clayton; Bryan *v.* 933
C&L Enterprises, Inc.; Citizen Potawatomi Nation *v.* 901
Cleveland *v.* United States 125
Clinton *v.* New York City 417
Clinton; Turkowski *v.* 908,969
Clinton; United States *v.* 912
Clipper *v.* United States 962
Cloutier *v.* Illinois 906

Page
Clymore *v.* United States 960
Coastal Petroleum Co. *v.* Chiles 953
Coates *v.* Seaton 938,970
Coffey *v.* Collester 938
Cohen; Ceminchuk *v.* 972
Cohen; General Media Communications, Inc. *v.* 951
Cohen *v.* Little Six, Inc. 903
Cohen *v.* Mystic Lake Casino 903
Cohn, Lifland, Perlman, Hermann & Knopf; Weissman *v.* 968
Colbert *v.* INOVA Health Care Services 942
Cole *v.* United States 921
Coleman *v.* Minnesota 924
Collagen Corp.; Worthy *v.* 954
Collester; Coffey *v.* 938
Collins, *In re* 948
Collins *v.* Hazlehurst 904
Colonial Park Apartments; Adelman *v.* 917
Colorado; Burge *v.* 913
Commissioner; Fraser *v.* 959
Commissioner; Jeppsen *v.* 916
Commissioner; Sherwood *v.* 955
Commissioner; Springer *v.* 920
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Connor *v.* Flynn 939
Consolidated Rail Corp.; Engelhart *v.* 963
Cooke; Frohwirth *v.* 963
Cookish *v.* New Hampshire 917,971
Cooksey; Pashuck *v.* 927
Cooper *v.* Calderon 963
Cooper *v.* Schriro 906
Corcoran; Johnson *v.* 921
Corn *v.* United States 960
Corrections Commissioner. See name of commissioner.
Cossett, *In re* 946
Cossett Construction Co., *In re* 946
Cotton *v.* United States 961
Couch *v.* Sprint Corp. 952
County. See name of county.
Cox *v.* United States 960
Cozy Cabin *v.* New York City 924
Cozzens *v.* Bozza 930
Crabtree; Delancy *v.* 932
Crafton *v.* Crafton 958

Page

Cramer; Armenis *v.* 905
Cranston School Committee; Jo-Ann G. *v.* 956
Craw *v.* Horn 931
Crawford & Co. *v.* Sonnier 950
Crist; Johnson *v.* 971
Cromartie; Hunt *v.* 980
Crooms, *In re* 925,971
Crosby *v.* Shreves 903
Cross *v.* Newark 930
Crosslin *v.* United States 921
Crow Tribe of Indians; Montana *v.* 968
Cruz *v.* Johnson 983
CSX Transportation, Inc. *v.* McDaniel 915
CSX Transportation, Inc.; Reynolds *v.* 947
Cummings; Moore *v.* 945
Cummings *v.* West 954
Cummins, *In re* 914
Cunningham *v.* Nazario 904
Curran; Carter *v.* 969
Cuthbert *v.* District Court of Appeal of Fla., Fifth Dist. 963
Cyars *v.* Michigan 942
Dallas Independent School Dist.; Marsh *v.* 955
Dalton; Arshal *v.* 954
Dalton; Darden *v.* 908
Dameron Hospital Assn.; Mason-Neubarth *v.* 971
D'Amico *v.* New York City 911
Daniels *v.* United States 910
Darden, *In re* 923
Darden *v.* Alameda County Network of Mental Health Clients . . 969
Darden *v.* Dalton 908
Darling *v.* Savers Life Ins. Co. 927
Darne *v.* Juntunen 908
Davis *v.* Baptist Medical Center Hospital 916
Davis *v.* Baptist Memorial Hospital System 916
Davis *v.* Florida 930
Davis *v.* Monroe County Bd. of Ed. 980
Davis *v.* Singletary 969
Davis *v.* United States 910,919,928
Day; Liberty National Life Ins. Co. *v.* 950
Day *v.* Walker 944
Dayton; Karasek *v.* 909
Dayton; Mays *v.* 942
Dearborn; Yinger *v.* 926
Decker *v.* Johnson 923

Page
Deep Sea Research, Inc.; California *v.* 925
Deer Park Independent School Dist. *v.* Harris County App. Dist. 938
Defense Logistics Agency; Diaconu *v.* 944
Dehler *v.* Schotten 944
De La Cruz *v.* Johnson 942
Delancy *v.* Crabtree 932
Del Monte Dunes at Monterey, Ltd.; Monterey *v.* 977
DeLoach *v.* General Dynamics Corp. 919,972
Demore; Dolenc *v.* 962
Department of Air Force; Miller *v.* 927
Department of Air Force; Ricketts *v.* 908,969
Department of Army *v.* Blue Fox, Inc. 951
Department of Commerce *v.* U. S. House of Representatives 978
Department of Interior; Federal Employees *v.* 903,950,977
Department of Interior; FLRA *v.* 903,950,977
Depree *v.* Library of Congress 908
DePrins *v.* Van Damme 904
DesAnges *v.* United States 911
Deteresa *v.* American Broadcasting Cos. 968
DeVaney; Thriftway Marketing Corp. *v.* 915
Dever *v.* Ohio 969
Devery *v.* Vaughn 958
DeWig *v.* Stewart 969
DeYoung *v.* Georgia 972
Diaconu *v.* Defense Logistics Agency 944
Dias *v.* Bogins 934
Dickey *v.* United States 947
Dillon; Doyle *v.* 914
DiMartini *v.* United States 916
Director of penal or correctional institution. See name or title of director.
Discon, Inc.; NYNEX Corp. *v.* 976
Dismuke *v.* United States 919
District Court. See U. S. District Court.
District Court of Appeal of Fla., Fifth Dist.; Cuthbert *v.* 963
District Court of Tex., Harris County; Walkoviak *v.* 969
District Judge. See U. S. District Judge.
District Lodge. For labor union, see name of trade.
District of Columbia Bd. of Elections; Malone *v.* 902
Dixon *v.* Stewart 971
Dixon *v.* Texas 956
Dixon *v.* United States 929
D & M Contracting Co. *v.* First Union National Bank 963
Doakes *v.* United States 939

Page

Doe; Johnson *v.* 918
Doherty *v.* United States 917
Dolenc *v.* Demore 962
Dollar Systems, Inc.; Cassan Enterprises, Inc. *v.* 926
Donahey *v.* Livingstone 924
Dong *v.* Smithsonian Institution, Hirshhorn Museum 922
Donohue *v.* Pennsylvania 929
Dooley *v.* Korean Air Lines Co. 116
Dorsey *v.* Dorsey 952,970
Dorsey; Luman *v.* 919
Doucette *v.* San Diego Unified Port Dist. 955
Dougan *v.* Singletary 956,971
Doyle, *In re* 969
Doyle *v.* Dillon 914
Doyle *v.* Jefferson County 939
Dreher *v.* New Jersey 943
Drew, *In re* 973
DuBois *v.* Greene 976
DuBoise; Gilday *v.* 918
DuBuc *v.* Oklahoma 907
Dumas *v.* Illinois 971
Duncan; Lara *v.* 959
Duncan; Wasko *v.* 906
Durocher Dock & Dredge; Brooker *v.* 982
Easter *v.* United States 911
Eastern Enterprises *v.* Apfel 498
East St. Louis; Mays *v.* 904
Eaton *v.* Angelone 934
Eddy Potash, Inc. *v.* Harrison 947
Edwards *v.* United States 936
Egbert *v.* Reis 953,970
Eggena *v.* Social Security Administration 908
Eidson, *In re* 950
Eisenhauer *v.* Massachusetts Bar Counsel 919
El Al Israel Airlines, Ltd. *v.* Tsui Yuan Tseng 975,977
Ellerth *v.* Burlington Industries, Inc. 951
Ellerth; Burlington Industries, Inc. *v.* 742
Elliott *v.* Pennsylvania 955
Elliott *v.* United States 922
Ellis *v.* Illinois 978
Elo; Allard *v.* 933
Engelhart *v.* Consolidated Rail Corp. 963
Enoch *v.* Illinois 923
Epps *v.* West 940

Page

Estate. See name of estate.
Estep *v.* Texas 930
Evans *v.* Johnson 907
Evans *v.* Nevada Dept. of Motor Vehicles and Public Safety 916
Eyoum *v.* Immigration and Naturalization Service 965
Fairfax County Dept. of Human Development; Sobin *v.* 906
Falcone; Stewart *v.* 947
Falick, *In re* 949
Falkenberry *v.* Taylor 904,968
Faragher *v.* Boca Raton 775
Father *v.* Boeing Co. 918,971
Fauver; Allmond *v.* 957
Fayetteville State Univ. Bd. of Trustees; Viswananthan *v.* 946
Federal Aviation Administration; Professional Pilots Federation *v.* 968
Federal Bureau of Investigation; Martinez *v.* 903
FCC; Ameritech Corp. *v.* 949
FCC *v.* California 949
FCC; GTE Midwest Inc. *v.* 949
FCC *v.* Iowa Utilities Bd. 949
FCC; Keller Communications, Inc. *v.* 954
FCC; Southern New England Telephone Co. *v.* 949
FCC; U S WEST, Inc. *v.* 949
Federal Election Comm'n *v.* Akins 11
Federal Employees *v.* Department of Interior 903,950,977
FLRA *v.* Department of Interior 903,950,977
Federal Trade Comm'n; California Dental Assn. *v.* 980
Federation of Conn. Taxpayer Organizations *v.* Burnham 938
Federowicz *v.* United States 932
Felzen; California Public Employee's Retirement System *v.* 980
Ferguson; Haley *v.* 907
Ferguson *v.* Johnson 957
Ferreira *v.* United States 960
Fey, *In re* 935
Fibreboard Corp.; Ortiz *v.* 936
Fields; Willoughby *v.* 905
Finley; National Endowment for Arts *v.* 569
First Union National Bank; D & M Contracting Co. *v.* 963
First Union National Bank; McDuffie *v.* 963
Fitch; Rojas *v.* 937
Flores *v.* Garcia 943
Flores-Ochoa *v.* United States 959
Florida; Almeida *v.* 929
Florida; Brown *v.* 923
Florida; Davis *v.* 930

Page
Florida; Hamilton *v.* 956
Florida; Howell *v.* 958
Florida; Meyers *v.* 958
Florida; Monlyn *v.* 957
Florida; Payne *v.* 943
Florida; Powell *v.* 916
Florida; Rivera *v.* 933
Florida Dept. of Corrections; Jackson *v.* 929
Florida Dept. of Corrections; Marquez *v.* 917
Floyd; Markland *v.* 917
Fludd *v.* Miller 919
Flynn, *In re* 970
Flynn; Connor *v.* 939
Flynn; Sanders *v.* 942
Foley, *In re* 967,972
Follett *v.* Arizona 933
Fonoimoana; Valdez *v.* 911
Ford Motor Co.; Brown *v.* 916
Forney *v.* Apfel 266
Forsyth; Humana Inc. *v.* 936,976
Fortes *v.* United States 961
Francisco *v.* Office of Personnel Management 932
Franklin *v.* Mazurkiewicz 957
Fraser *v.* Commissioner 959
Frejomil *v.* Goord 907
French; Hill *v.* 959
Frey; Fulcomer *v.* 911
Frohwirth *v.* Cooke 963
Fulcomer *v.* Frey 911
Fuller *v.* Johnson 968
Funches *v.* United States 962
G. *v.* Cranston School Committee 956
Gaerttner *v.* Love 969
Gagliardi *v.* United States 955
Galen of Va., Inc.; Roberts *v.* 915
Gallant *v.* United States 961
Gallego *v.* McDaniel 917
Gallego; McDaniel *v.* 922
Gangopadhyay *v.* Gangopadhyay 970
Gant *v.* United States 920
Garcia; Flores *v.* 943
Garcia *v.* United States 931,961
Garcia-Rosell *v.* United States 923
Garner *v.* Head 929

Page
Garrison; Haddle *v.* 973,977
Garrity *v.* Massachusetts 954
Garrity; Moss *v.* 938
Gavin *v.* Branstad 955
Gavle *v.* Little Six, Inc. 911
Gavle *v.* Mystic Lake Casino 911
Gay *v.* United States 944
Gebser *v.* Lago Vista Independent School Dist. 274
Gecas *v.* United States 951
Geissal *v.* Moore Medical Corp. 74
General Dynamics Corp.; DeLoach *v.* 919,972
General Media Communications, Inc. *v.* Cohen 951
General Motors Corp.; Greb *v.* 963
General Motors Corp.; Sprague *v.* 923
Georgia; DeYoung *v.* 972
Georgia; Raulerson *v.* 969
Giaimo *v.* United States 940
Gianetta *v.* United States 931
Gibbons *v.* Larkins 959
Gibson *v.* United States 922,973
Gilday *v.* DuBois 918
Gillis; Byrd *v.* 943
Gilluhugh; Kendrick *v.* 958
Gilmartin *v.* United States 910
Gleason *v.* Noyes 933
Godfrey *v.* United States 909
Godiva Chocolatier; Lambing *v.* 954
Goetsch; Ma *v.* 953
Goetz *v.* Board of Attorneys Professional Responsibility of Wis. . 927
Goldflam, *In re* 901
Gonzalez *v.* United States 910,961
Gonzalez-Gonzalez *v.* United States 910
Goodnow; Zankich *v.* 957
Goodrich Co.; Zollo Drum Co. *v.* 926
Goodson; Inoco Ltd. *v.* 933
Goodson; Rowland *v.* 933
Goodwin; Hesterlee *v.* 969
Goord; Frejomil *v.* 907
Gottlieb, *In re* 901
Government of Honduras *v.* Honduras Aircraft Registry, Ltd. . . . 952
Governor of Ala., *In re* 936
Governor of Cal. *v.* Armstrong 937
Governor of Cal. *v.* Cabazon Band of Mission Indians 926
Governor of Fla.; Coastal Petroleum Co. *v.* 953

Page
Governor of N. C. *v.* Cromartie 980
Grant *v.* United States 928,932
Graves *v.* Carr 906
Gray; Lockheed Aeronautical Systems Co. *v.* 924
Grayson; Hayden *v.* 953
Greb *v.* General Motors Corp. 963
Green, *In re* 903,924,946,972
Greene; Chandler *v.* 974
Greene *v.* Citibank, N. A. 968
Greene; DuBois *v.* 976
Greene; King *v.* 965
Greene; Strickler *v.* 978
Greenwell; Raytheon Aerospace, Inc. *v.* 904
Greer, *In re* 948
Greer *v.* United States 920
Gregory *v.* United States 940
Grenada *v.* Hubbard 979
Gretzler *v.* Arizona 912
Gretzler *v.* Stewart 912
Griesa; Moore *v.* 941
Grievance Comm., 9th Judicial Dist. of N. Y.; Klein *v.* 953
Grievance Comm., 2d & 11th Judicial Dists. of N. Y.; Ashton *v.* . . 917
Griffin, *In re* 933
Griffin *v.* Clark 923
Griffin *v.* Illinois 956
Griffin *v.* United States 909
Grigas; Harvey *v.* 929
GTE Midwest Inc. *v.* Federal Communications Comm'n 949
Guam; Palomo *v.* 962
Guanipa *v.* United States 959
Gundy; Bowen *v.* 907
Gunn *v.* United States 932
Gurney *v.* United States 951,970
Haddle *v.* Garrison 973,977
Hadix *v.* McGinnis 952
Hadji-Elias *v.* Los Angeles County Superior Court 911
Hadji-Elias *v.* Shahbaz 911
Haggar Apparel Co.; United States *v.* 981
Haley *v.* Ferguson 907
Hall, *In re* 948
Hall *v.* Tennessee 941
Hall *v.* United States 932
Hamilton *v.* Florida 956
Hamilton *v.* Roe 979

Page

Hamilton *v.* United States 940
Hanley; Rudd *v.* 918
Harakal *v.* United States 920
Harding *v.* United States 920
Harmon *v.* United States 962
Harms *v.* United States 971
Harold *v.* Singletary 943
Harris *v.* Higgins 931
Harris County Appraisal Dist.; Deer Park School Dist. *v.* 938
Harrison; Eddy Potash, Inc. *v.* 947
Harshbarger; Lu *v.* 939
Harvey *v.* Grigas 929
Harvey; Phillips *v.* 968
Hassan *v.* AT&T Corp. 911
Hatcher; Kell *v.* 917
Hatcher; Rayborn *v.* 957
Hauck *v.* Mills 931
Hawkins *v.* United States 921
Hayden, *In re* 950
Hayden *v.* Grayson 953
Hayes *v.* Western Weighing and Inspection Bureau 946
Haynes *v.* Kepka 971
Haynes *v.* United States 914
Hazlehurst; Collins *v.* 904
Head; Garner *v.* 929
Henderson, *In re* 964
Henderson *v.* Norris 964
Hennessey; Nary *v.* 957
Hernandez; Santa Ana *v.* 936
Hernandez *v.* United States 931,963
Herzog, *In re* 935
Herzog; Rawles *v.* 970
Hesterlee *v.* Goodwin 969
Hetzel *v.* Prince William County 934
Hickey *v.* Illinois 955
Higgins; Harris *v.* 931
High Tech Medical Instrumentation; New Image Industries *v.* . . 953
Higley; Sikora *v.* 941,971
Hill, *In re* 973
Hill *v.* French 959
Hilliard *v.* Kaiser 941
Hilt *v.* United States 959
Hinchliffe *v.* Prudential Home Mortgage Co. 968
Hindin, *In re* 901

Page
Hines; Pearson *v.* 936
Hobbs *v.* United States 945
Hoechst Celanese Corp. *v.* United States 952
Hoffpauir's Estate; Sudwisher *v.* 940
Hogan *v.* Kaiser 929
Hohn *v.* United States 236
Holden; Missourians for Tax Justice Ed. Project, Inc. *v.* 916
Holt *v.* United States 922
Home Savings of America *v.* Maynard 905
Honduras *v.* Honduras Aircraft Registry, Ltd. 952
Honduras Aircraft Registry, Ltd.; Government of Honduras *v.* . . 952
Honeycutt *v.* United States 922
Hooker *v.* United States 945
Hooper *v.* Oklahoma 943
Hoovler *v.* Indiana 905
Hopkins *v.* Reeves 88,968
Hopkins; Reeves *v.* 926,968
Hopkins; Thompson *v.* 908
Horn; Craw *v.* 931
Horton *v.* Mississippi State Senate 929
Horton *v.* United States 961
Houghton; Wyoming 983
Houser *v.* United States 910
Housing Authority of St. Louis County; Snelling *v.* 960
Howell *v.* Florida 958
Hubbard; Grenada *v.* 979
Huffman *v.* California 907
Hui Lin *v.* United States 921
Humana Inc. *v.* Forsyth 936,976
Humphreys *v.* Oklahoma 930
Hung Thanh Le *v.* Oklahoma 930
Hunt *v.* Cromartie 980
Hunt; Shong-Ching Tong *v.* 927
Hunter *v.* South Carolina 943
Hynes, *In re* 948,974
Ignacio *v.* United States 908
Ijemba, *In re* 950,972
Illinois; Anderson *v.* 918
Illinois; Bower *v.* 905
Illinois; Bradley *v.* 931
Illinois; Cloutier *v.* 906
Illinois; Dumas *v.* 971
Illinois; Ellis *v.* 978
Illinois; Enoch *v.* 923

Page
Illinois; Griffin *v.* 956
Illinois; Hickey *v.* 955
Illinois; Irby *v.* 916
Illinois; Thomas *v.* 955
Illinois; Woolley *v.* 955
Illinois Dept. of Professional Regulation; Krain *v.* 939
Illinois Dept. of Public Health; Barcena *v.* 958
Immigration and Naturalization Service; Eyoum *v.* 965
Indiana; Canaan *v.* 906
Indiana; Hoovler *v.* 905
Inmates of Suffolk County Jail *v.* Rouse 951,970
Inner City Press/Community on Move *v.* Board of Governors, FRS 937
Inoco Ltd. *v.* Goodson 933
INOVA Health Care Services; Colbert *v.* 942
In re. See name of party.
Internal Revenue Service; White *v.* 960
International. For labor union, see name of trade.
Iowa; J. C. *v.* 918
Iowa; Knowles *v.* 970
Iowa; Trobaugh *v.* 943
Iowa Utilities Bd.; Association for Local Telecom. Services *v.* . . . 949
Iowa Utilities Bd.; AT&T Corp. *v.* 949
Iowa Utilities Bd.; Federal Communications Comm'n *v.* 949
Iowa Utilities Bd.; MCI Telecommunications Corp. *v.* 949
Irby *v.* Illinois 916
Irons, *In re* 948
J. *v.* United States 961
Jackson *v.* Florida Dept. of Corrections 929
Jackson *v.* LeBlanc 942
Jackson *v.* New York 946
Jackson *v.* Singletary 971
Jackson *v.* West Virginia 942,971
Jacobs *v.* Morgan 908
J. A. J. *v.* United States 961
Jakoby *v.* United States 939
James, *In re* 936
James *v.* United States 945
Jarvi *v.* McCarthy 946
Jarvis; Smith *v.* 957
J. C. *v.* Iowa 918
Jefferson County; Doyle *v.* 939
Jenson; Oglebay Norton Co. *v.* 953
Jeppsen *v.* Commissioner 916
Jiles *v.* United States 961

Page

Jo-Ann G. *v.* Cranston School Committee 956
John A. Chanin; Parnar *v.* 965
Johns; Minnesota *v.* 975
Johns *v.* United States 961
Johnson, *In re* 946
Johnson; Barrier *v.* 933
Johnson; Castillo *v.* 979
Johnson *v.* Corcoran 921
Johnson *v.* Crist 971
Johnson; Cruz *v.* 983
Johnson; Decker *v.* 923
Johnson; De La Cruz *v.* 942
Johnson *v.* Doe 918
Johnson; Evans *v.* 907
Johnson; Ferguson *v.* 957
Johnson; Fuller *v.* 968
Johnson; King *v.* 946
Johnson; Lucas *v.* 965
Johnson; Martinez *v.* 946
Johnson; Narvaiz *v.* 947
Johnson; Pyles *v.* 933
Johnson; Ruiz Camacho *v.* 974
Johnson; Shaw *v.* 963
Johnson; Teague *v.* 976
Johnson; Thomas *v.* 944
Johnson *v.* United States 962
Johnson; White *v.* 957
Johnson *v.* Wyoming 969
Jones *v.* Pennsylvania Bd. of Probation and Parole 942
Jones *v.* United States 946,961
Joos *v.* Joos 938
Juarez-Juarez *v.* United States 960
Judge, Superior Court, Morristown; Coffey *v.* 938
Judicial Council of Fifth Judicial Circuit *v.* McBryde 937
Jumonville *v.* Kenner 953
Juntunen; Darne *v.* 908
Kahn; Movies, Inc. *v.* 927
Kaiser; Hilliard *v.* 941
Kaiser; Hogan *v.* 929
Kalyvas, *In re* 967
Kantor, *In re* 948
Karasek *v.* Dayton 909
Katz; Orlick *v.* 906
Kearns *v.* Wood Motors, Inc. 940,970

Page
Keep; Moore *v.* 938
Kell *v.* Hatcher 917
Keller *v.* Oklahoma 929
Keller *v.* United States 932
Keller Communications, Inc. *v.* Federal Communications Comm'n 954
Kendall *v.* Kendall 953
Kendrick *v.* Gilluhugh 958
Kennedy, *In re* 969
Kennedy *v.* Paramount Pictures Corp. 909,970
Kenner; Jumonville *v.* 953
Kentucky; Aljami *v.* 909
Kentucky; Troxell *v.* 931
Kepka; Hayes *v.* 971
Kerekes *v.* Apfel 943
Kessler *v.* Brown & Williamson 936
Key, *In re* 936
Keyser *v.* United States 921
Kilgore *v.* Bowersox 942
Kimble *v.* California 908
King *v.* Adamson 930,971
King *v.* Greene 965
King *v.* Johnson 946
King *v.* United States 961
Kiowa Tribe of Okla. *v.* Aircraft Equipment Co. 901
Kirby *v.* United States 920
Klein *v.* Grievance Committee for Ninth Judicial Dist. of N. Y. . . 953
Klopp *v.* United States 940
Knights of Ku Klux Klan *v.* Mayor of Lansing 904
Knowles *v.* Iowa 970
Knupp *v.* Texas 910
Kogan; Schwarz *v.* 954
Korean Air Lines Co.; Dooley *v.* 116
Krain *v.* Illinois Dept. of Professional Regulation 939
Kramer; Villacres *v.* 968
Kreiger *v.* Virginia 968
Krishnamurthy *v.* Nimmagadda 930
Krupa, *In re* 948
Kucera *v.* United Nebraska Bank 905
Kuku *v.* United States 909
Kumho Tire Co. *v.* Carmichael 936
Kurtz, *In re* 935
Labor Union. See name of trade.
Laessig *v.* Philadelphia 944
Laessig *v.* Vaughn 971

Page
Lago Vista Independent School Dist.; Gebser *v.* 274
Lambing *v.* Godiva Chocolatier 954
Landress; Nocon *v.* 941
Lane; Wilson *v.* 908
Langley *v.* United States 931
Lara *v.* Duncan 959
Larkins; Gibbons *v.* 959
Larsen *v.* American Medical Security, Inc. 936
Law *v.* United States 928
Law Offices of John A. Chanin; Parnar *v.* 965
Le *v.* Oklahoma 930
LeBlanc; Jackson *v.* 942
Lebron *v.* National Railroad Passenger Corporation (AMTRAK) 927
Lee *v.* United States 920
Leech Lake Band of Chippewa Indians; Cass County *v.* 103
Leeds; Barker *v.* 938,970
Lefcourt *v.* United States 937
Leuro-Rosas *v.* United States 962
Levesque *v.* Yamaguchi 927
Lewis, *In re* 969
Lewis; Wegner *v.* 908
Lexington; Yeo *v.* 904
Liberty National Life Ins. Co. *v.* Day 950
Library of Congress; Depree *v.* 908
Lin *v.* United States 921
Little Six, Inc.; Cohen *v.* 903
Little Six, Inc.; Gavle *v.* 911
Livingstone; Donahey *v.* 924
Lloyd *v.* United States 944
Local. For labor union, see name of trade.
Lockheed Aeronautical Systems Co. *v.* Gray 924
Lonardo, *In re* 914
Long *v.* Alachua County School Bd. 915
Longariello *v.* School Bd. of Dade County 909
Long Island Univ.; Maher *v.* 933
Lopez *v.* Monterey County 950,977
Lopez-Murcia *v.* United States 920
Los Angeles County Superior Court; Hadji-Elias *v.* 911
Louisiana; Ortiz *v.* 943
Louisiana; Pizzo *v.* 919,972
Louisiana; Williams *v.* 934
Louisiana Dept. of Public Safety; Berry *v.* 949
Love; Gaerttner *v.* 969
Love *v.* Tippy 956

Page
Lowell; Windham *v.* 916
Lu *v.* Christiani 939
Lu *v.* Harshbarger 939
Lucas *v.* Johnson 965
Luman *v.* Dorsey 919
Luna-Herrera *v.* United States 961
Luna-Madellaga *v.* United States 910
Lundahl, *In re* 936
Lyon Metal Products, Inc. *v.* California Bd. of Equalization 916
Lyons *v.* Tennessee 959
M.; North Lawrence Community School Corp. *v.* 952
Ma *v.* Goetsch 953
Machinists *v.* National Labor Relations Bd. 926
MacKall *v.* United States 960
Madrid *v.* Marshall 956
Maher *v.* Long Island Univ. 933
Malone *v.* District of Columbia Bd. of Elections 902
Malpeso *v.* United States 951
Mann *v.* Missouri Highway and Transportation Comm'n 937
Mann *v.* Tennessee 956
Marin General Hospital; Barrier *v.* 933
Markland *v.* Floyd 917
Marquez *v.* Florida Dept. of Corrections 917
Marsh *v.* Dallas Independent School Dist. 955
Marshall, *In re* 924,972
Marshall; Madrid *v.* 956
Marshall; Valenzuela Rodriguez *v.* 919
Martin, *In re* 913
Martin *v.* United States 946
Martinez, *In re* 914
Martinez *v.* Federal Bureau of Investigation 903
Martinez *v.* Johnson 946
Martinez *v.* Moore 942
Martinez; Munoz *v.* 956
Marutz *v.* United States 960
Maryland; Booth *v.* 905
Maryland Dept. of Public Safety & Correctional Services; Amos *v.* 935
Mary M.; North Lawrence Community School Corp. *v.* 952
Mason-Neubarth *v.* Dameron Hospital Assn. 971
Massachusetts; Garrity *v.* 954
Massachusetts Bar Counsel; Eisenhauer *v.* 919
Matrix Communications Corp. *v.* MCI Telecommunications Corp. 953
Maurice, *In re* 902,966
Mausolf *v.* Babbitt 951

Page

May *v.* Mountain Village 938
May *v.* Shuttle, Inc. 927
Maynard; Home Savings of America *v.* 905
Mayor of Lansing; Knights of Ku Klux Klan *v.* 904
Mays, *In re* 901
Mays *v.* Dayton 942
Mays *v.* East St. Louis 904
Mazurkiewicz; Franklin *v.* 957
McBryde; Judicial Council of Fifth Judicial Circuit *v.* 937
McCabe *v.* United States 909
McCarthy; Jarvi *v.* 946
McClain *v.* Clark 917
McClain *v.* United States 960
McClatchy Newspapers, Inc. *v.* National Labor Relations Bd. . . . 937
McClellan *v.* United States 910
McClinton *v.* United States 921
McDaniel; CSX Transportation, Inc. *v.* 915
McDaniel *v.* Gallego 922
McDaniel; Gallego *v.* 917
McDonald *v.* Tennessee 969
McDonald *v.* United States 928
McDuffie *v.* First Union National Bank 963
McGinnis; Bazzetta *v.* 953
McGinnis; Hadix *v.* 952
McGowen, *In re* 966
McGrew *v.* Whitaker 906
MCI Telecommunications Corp. *v.* California 949
MCI Telecommunications Corp. *v.* Iowa Utilities Bd. 949
MCI Telecommunications Corp.; Matrix Communications Corp. *v.* 953
McLaughlin *v.* United States 951
McLeod *v.* Alabama 929
McMillan; White *v.* 968
McQuown *v.* Safeway, Inc. 969
Meisler, *In re* 902
Melendez *v.* Metropolitan Life Ins. Co. 963
Menard, Inc.; Brand Management, Inc. *v.* 927
Mendelson, *In re* 925,948
Merkobrad *v.* United States 918
Messino; United States *v.* 937
Metropolitan Life Ins. Co.; Melendez *v.* 963
Metropolitan School Dist. Perry Township; Smith *v.* 951
Meyer, *In re* 966
Meyers *v.* Florida 958
Mezzetta *v.* United States 920

Page
Michigan; Cyars *v.* 942
Michigan; Seaton *v.* 941,971
Michigan; Solomon *v.* 930
Michigan *v.* United States 923
Michigan Dept. of Environmental Quality *v.* Bestfoods 924
Michigan Public Service Comm'n; Walker *v.* 963
Michigan State Housing Development Authority; Toth *v.* 954
Mille Lacs Band of Chippewa Indians; Minnesota *v.* 915,977
Miller *v.* Department of Air Force 927
Miller; Fludd *v.* 919
Miller *v.* United States 905
Mills; Hauck *v.* 931
Miner *v.* Missouri 943
Minnesota *v.* Carter 975
Minnesota; Coleman *v.* 924
Minnesota *v.* Johns 975
Minnesota *v.* Mille Lacs Band of Chippewa Indians 915,977
Minnesota; Sutherlin *v.* 942
Mississippi; Bankhead *v.* 946
Mississippi *v.* Roderick 926
Mississippi State Senate; Horton *v.* 929
Missouri; Billemeyer *v.* 971
Missouri; Brooks *v.* 957
Missouri; Miner *v.* 943
Missouri; Perry *v.* 905
Missouri; Rousan *v.* 961
Missouri; Schleeper *v.* 930,969
Missourians for Tax Justice Ed. Project, Inc. *v.* Holden 916
Missouri Highway and Transportation Comm'n; Mann *v.* 937
Missouri State Treasurer; Missourians for Tax Justice Project *v.* 916
Mitchell *v.* Norris 919
Mitchell *v.* United States 908,925,932
Mizuno *v.* Salisbury 904
Modrak *v.* United States 962
Monge *v.* California 721
Monlyn *v.* Florida 957
Monroe; Stewart *v.* 931
Monroe County Bd. of Ed.; Davis *v.* 980
Montague, *In re* 901
Montana *v.* Crow Tribe of Indians 968
Monterey *v.* Del Monte Dunes at Monterey, Ltd. 977
Monterey County; Lopez *v.* 950,977
Montgomery, *In re* 903
Moore, *In re* 967

Page

Moore; Abdullah *v.* 958
Moore *v.* Cummings 945
Moore *v.* Griesa 941
Moore *v.* Keep 938
Moore; Martinez *v.* 942
Moore; Plath *v.* 964
Moore; Roberts *v.* 949,979
Moore; Slezak *v.* 907
Moore *v.* United States 921
Moore; Williams *v.* 969
Moore Medical Corp.; Geissal *v.* 74
Morales; Chicago *v.* 975
Morgan; Jacobs *v.* 908
Moriarty; Tunnicliff *v.* 918
Morris *v.* United States 960
Morris, Inc.; Blumenthal *v.* 937
Moss *v.* Garrity 938
Mosseri *v.* U. S. District Court 931
Mountain Village; May *v.* 938
Movies, Inc. *v.* Kahn 927
Mullens *v.* United States 922
Munoz *v.* Martinez 956
Murillo *v.* Terhune 942
Muscarello *v.* United States 125
Mystic Lake Casino; Cohen *v.* 903
Mystic Lake Casino; Gavle *v.* 911
Nakamura *v.* Chun 938
Narron *v.* Vance 946
Narvaiz *v.* Johnson 947
Nary *v.* Hennessey 957
National Assn. of Home Builders of U. S. *v.* Babbitt 937
National Collegiate Athletic Assn. *v.* Smith 982
National Endowment for Arts *v.* Finley 569
National Environmental Waste Corp. *v.* Riverside 952
National Environmental Waste Corp.; Riverside *v.* 952
National Labor Relations Bd.; Machinists *v.* 926
National Labor Relations Bd.; McClatchy Newspapers, Inc. *v.* . . . 937
National Labor Relations Bd.; Yen *v.* 972
National Railroad Passenger Corporation (AMTRAK); Lebron *v.* 927
NationsMart Corp. *v.* Carlon 927
Nazario; Cunningham *v.* 904
Nebraska State Bank; Carlson *v.* 905
Neill, *In re* 914
Nelson *v.* United States 920,956

Page
Nevada; Phenix *v.* 958
Nevada Dept. of Motor Vehicles and Public Safety; Evans *v.* 916
Newark; Cross *v.* 930
New Hampshire; Cookish *v.* 917,971
New Image Industries *v.* High Tech Medical Instrumentation . . . 953
New Jersey; Dreher *v.* 943
New Jersey *v.* New York 968
New Jersey Council on Affordable Housing; Pecaro *v.* 916
New Mexico; Scott *v.* 958
New Mexico; Texas *v.* 925
New Mexico *ex rel.* Ortiz *v.* Reed 151
Newmont Mining Corp.; Pinal Creek Group *v.* 937
New York; Bennett *v.* 918
New York; Jackson *v.* 946
New York; New Jersey *v.* 968
New York City; Amsterdam Video, Inc. *v.* 966
New York City; Buzzetti *v.* 924
New York City; Clinton *v.* 417
New York City; Cozy Cabin *v.* 924
New York City; D'Amico *v.* 911
New York City; Tonia B. *v.* 917
New York City Health and Hospital Corp.; Bernard *v.* 969
Nghiem *v.* Toshiba America Electronic Components, Inc. 971
Nimmagadda; Krishnamurthy *v.* 930
Nocon *v.* Landress 941
Nohara *v.* United States 932
Norris; Henderson *v.* 964
Norris; Mitchell *v.* 919
North Dakota; Nowik *v.* 907,971
Northern Telecom, Inc.; Phonometrics *v.* 936
North Lawrence Community School Corp. *v.* Mary M. 952
Norwood *v.* United States 970
Nowik *v.* North Dakota 907,971
Noyes; Gleason *v.* 933
NYNEX Corp. *v.* Discon, Inc. 976
O'Brien; Smith *v.* 923
Octel Communications Corp.; Theis Research, Inc. *v.* 963,970
Office of Personnel Management; Francisco *v.* 932
Oglebay Norton Co. *v.* Jenson 953
Ohio; Beverly *v.* 943
Ohio; Dever *v.* 969
Ohio; Reynolds *v.* 930
Oistead; Bowen *v.* 938
Oklahoma; DuBuc *v.* 907

Page
Oklahoma; Hooper *v.* 943
Oklahoma; Humphreys *v.* 930
Oklahoma; Hung Thanh Le *v.* 930
Oklahoma; Keller *v.* 929
Oklahoma; Shown *v.* 957
Oklahoma; Toles *v.* 958
Oklahoma; Willingham *v.* 930
Ooley; United States *v.* 963
Oregon; Borck *v.* 930
Oregon; Boyd *v.* 944
Oregon Dept. of Revenue; Pollin *v.* 954
O'Riley *v.* United States 956
Orlick *v.* Katz 906
Ortiz *v.* Fibreboard Corp. 936
Ortiz *v.* Louisiana 943
Ortiz *v.* Reed 151
Osman *v.* United States 929
Owens *v.* Arizona 906
Oy Partek Ab *v.* Boone 939
Pabst Brewing Co.; Rossetto *v.* 927
Padilla-Pena *v.* United States 905,906
Pahl, *In re* 935,972
Painters Local Union No. 109 Pension Fund *v.* Smith Barney, Inc. 915
Palomo *v.* Territory of Guam 962
Panetti *v.* Texas 914
Paramount Pictures Corp.; Kennedy *v.* 909,970
Parks *v.* Rivers 941
Parks *v.* United States 909
Parnar *v.* Law Offices of John A. Chanin 965
Partek Ab *v.* Boone 939
Pashuck *v.* Cooksey 927
Patterson, *In re* 913
Patterson; Anchorage Ed. Assn. *v.* 904
Payne *v.* Florida 943
Pearson *v.* Hines 936
Pecaro *v.* New Jersey Council on Affordable Housing 916
Peguero *v.* United States 982
Pena *v.* United States 960
Penilla; Settles *v.* 904
Pennsylvania; Donohue *v.* 929
Pennsylvania; Elliott *v.* 955
Pennsylvania; Washington *v.* 955
Pennsylvania Bd. of Probation and Parole; Jones *v.* 942
Pennsylvania Bd. of Probation and Parole *v.* Scott 357

Page
Pennsylvania Dept. of Corrections *v.* Yeskey 206
Percival *v.* Stine 941
Perkins; West Covina *v.* 976,977
Perlman, *In re* 972
Perry *v.* Missouri 905
Peters *v.* United States 961
Peterson *v.* Wisconsin Dept. of Industry, Labor and Human Rel. 933
Peterson *v.* Zimmerman 918
Pfaff *v.* Wells Electronics, Inc. 950,975
Phenix *v.* Nevada 958
Philadelphia; Laessig *v.* 944
Philip Morris, Inc.; Blumenthal *v.* 937
Phillips, *In re* 948
Phillips *v.* Harvey 968
Phillips *v.* United States 928
Phillips *v.* Washington Legal Foundation 156
Phonometrics, Inc. *v.* Northern Telecom, Inc. 936
Pickering *v.* United States 909
Pierce *v.* Caruso 930
Pierce *v.* United States 959
Pierson *v.* Wilshire Terrace Corp. 940,970
Pikitus *v.* Shenandoah Borough Council 918
Pinal Creek Group *v.* Newmont Mining Corp. 937
Pinckney, *In re* 973
Pizzo *v.* Louisiana 919,972
Plath *v.* Moore 964
Plato, *In re* 968
Plaut; Brown *v.* 939
Poindexter; Blackmon *v.* 919,970
Pollin *v.* Oregon Dept. of Revenue 954
Pomona Fairplex; Shephard *v.* 911
Post, *In re* 967
Postmaster General; Said *v.* 933
Potash, Inc. *v.* Harrison 947
Powell *v.* Florida 916
Practice Mgmt. Information Corp.; American Medical Assn. *v.* . . 952
President of U. S. *v.* New York City 417
President of U. S.; Turkowski *v.* 908,969
President of U. S.; United States *v.* 912
Priamos, *In re* 967
Price, *In re* 975
Princeton Baptist Medical Center; Walton *v.* 946
Prince William County; Hetzel *v.* 934
Prochaska; Toegemann *v.* 946

Page

Proctor *v.* United States 960
Professional Pilots Federation *v.* Federal Aviation Administration 968
Provident Life & Accident Ins. Co.; Shephard *v.* 911
Prudential Home Mortgage Co.; Hinchliffe *v.* 968
Pruitt *v.* Waco Independent School Dist. 939
Pyle *v.* United States 928
Pyles *v.* Johnson 933
Queen *v.* United States 932
Ramirez *v.* Texas 939
Ramirez-Morales *v.* United States 921
Ratelle; Sinn *v.* 941
Raulerson *v.* Georgia 969
Rawles *v.* Herzog 970
Rayborn *v.* Hatcher 957
Raytheon Aerospace, Inc. *v.* Greenwell 904
Redd; Tal-Mason *v.* 907
Reed; New Mexico *v.* 151
Reed *v.* United States 910
Reeves *v.* Hopkins 926,968
Reeves; Hopkins *v.* 88,968
Reis; Egbert *v.* 953,970
Rendish *v.* Tacoma 952
Reno *v.* American-Arab Anti-Discrimination Committee 903
Reyes *v.* United States 928
Reynolds *v.* CSX Transportation, Inc. 947
Reynolds *v.* Ohio 930
Reynolds *v.* United States 944
Rhett *v.* Carnegie Center Associates 938
Rhode Island; Vingi *v.* 954
Richard *v.* Texas 956
Richardson *v.* Turtle Wax, Inc. 918
Richmond; Childress *v.* 927
Ricketts *v.* Department of Air Force 908,969
Riebold *v.* United States 944
Riley; Camp *v.* 915
Rivera, *In re* 903,969
Rivera *v.* Allin 978
Rivera *v.* Florida 933
Rivero-Cabanas *v.* United States 928
Rivers; Parks *v.* 941
Riverside *v.* National Environmental Waste Corp. 952
Riverside; National Environmental Waste Corp. *v.* 952
Roberts *v.* Battelle Memorial Institute 957,972
Roberts *v.* Galen of Va., Inc. 915

Page

Roberts *v.* Moore 949,979
Roberts *v.* University of Louisville Hospital 915
Robinson, *In re* 963
Robinson *v.* California 929
Rodrick; Mississippi *v.* 926
Rodriguez *v.* Marshall 919
Rodriguez-Moreno; United States *v.* 915
Roe; Anderson *v.* 982
Roe; Hamilton *v.* 979
Rogers Processors, Inc. *v.* BOC Group, Inc. 947
Rojas *v.* Fitch 937
Roper *v.* United States 920
Rose, *In re* 966
Rosen; Swinick *v.* 944
Rossetto *v.* Pabst Brewing Co. 927
Rothman *v.* University of Mass. Medical Center 971
Rotter, *In re* 948
Rousan *v.* Missouri 961
Rouse; Inmates of Suffolk County Jail *v.* 951,970
Rowland *v.* Goodson 933
Roy Anderson Corp.; Clark *v.* 905
Rubin; Brown *v.* 968
Rubin *v.* United States 1301
Rubin; United States *v.* 912
Ruck *v.* Transportation Union, Executive Bd. 964
Rudd, *In re* 950
Rudd *v.* Hanley 918
Ruiz Camacho *v.* Johnson 974
Ruiz Camacho *v.* Texas 974
Runyon; Said *v.* 933
Russell *v.* VBR 925
Sack; Champion *v.* 922
Sadler, *In re* 901
Safeway, Inc.; McQuown *v.* 969
Said *v.* Runyon 933
Saile *v.* United States 928
Saint-Evens; Carlyle *v.* 939
Salas *v.* United States 956
Salazar *v.* United States 946
Salguero *v.* California 938
Salisbury; Mizuno *v.* 904
Sanborn, *In re* 966
Sanchez *v.* Sprunk 929
Sanchez *v.* United States 955,971

Page
Sanchez-Zubia *v.* United States 905
Sancho *v.* United States 971
Sanders *v.* Flynn 942
Sanders *v.* United States 940
San Diego Police Dept.; Brown *v.* 941
San Diego Unified Port Dist.; Doucette *v.* 955
San Francisco; Chase Manhattan Bank *v.* 945
Santa Ana *v.* Hernandez 936
Sapp *v.* United States 961
Sarkar *v.* Temple Univ. 930
Sarraulte *v.* United States 962
Sasser *v.* United States 926
Savage; Cannon *v.* 906
Savers Life Ins. Co.; Darling *v.* 927
Sawchyn *v.* Scottsdale Ins. Co. 939
Schacht; Wisconsin Dept. of Corrections *v.* 381
Schaner, *In re* 913
Scheumann *v.* United States 940
Schleeper *v.* Missouri 930,969
School Bd. of Dade County; Longariello *v.* 909
Schotten; Dehler *v.* 944
Schriro; Cooper *v.* 906
Schwarz *v.* Kogan 954
Scott *v.* New Mexico 958
Scott; Pennsylvania Bd. of Probation and Parole *v.* 357
Scott *v.* United States 910
Scottsdale Ins. Co.; Sawchyn *v.* 939
Seals *v.* United States 928
Seaton; Coates *v.* 938,970
Seaton *v.* Michigan 941,971
Secretary of Air Force; Belhomme *v.* 969
Secretary of Defense; Ceminchuk *v.* 972
Secretary of Defense; General Media Communications, Inc. *v.* . . . 951
Secretary of HHS; University Health Services, Inc. *v.* 904
Secretary of HHS; Your Home Visiting Nurse Services, Inc. *v.* . . 925
Secretary of Interior; Mausolf *v.* 951
Secretary of Interior; National Assn. of Home Builders of U. S. *v.* 937
Secretary of Navy; Arshal *v.* 954
Secretary of Navy; Darden *v.* 908
Secretary of State of Colo. *v.* American Const. Law Foundation 949,975
Secretary of Treasury; Brown *v.* 968
Secretary of Treasury; United States *v.* 912
Secretary of Veterans Affairs; Cummings *v.* 954
Secretary of Veterans Affairs; Epps *v.* 940

Page
Seif *v.* Chester Residents Concerned for Quality Living 915,974
Sentenn *v.* United States 944
Service Employees; Washington *v.* 957
Settles *v.* Penilla 904
Shahbaz; Hadji-Elias *v.* 911
Shalala; University Health Services, Inc. *v.* 904
Shalala; Your Home Visiting Nurse Services, Inc. *v.* 925
Shannon *v.* United States 962
Shaw *v.* Johnson 963
Shelby *v.* United States 928
Shenandoah Borough Council; Pikitus *v.* 918
Shephard *v.* Pomona Fairplex 911
Shephard *v.* Provident Life & Accident Ins. Co. 911
Sheppard *v.* United States 932
Sherwood *v.* Commissioner 955
Shoemaker *v.* United States 954
Shong-Ching Tong *v.* Hunt 927
Shown *v.* Oklahoma 957
Shreves; Crosby *v.* 903
Shuttle, Inc.; May *v.* 927
Siddall *v.* United States 920
Sidles, *In re* 914,971
Sikora *v.* Higley 941,971
Silva *v.* United States 960
Sindram *v.* United States 910
Singer, *In re* 935
Singletary; Boatwright *v.* 957
Singletary; Brown *v.* 906
Singletary; Davis *v.* 969
Singletary; Dougan *v.* 956,971
Singletary; Harold *v.* 943
Singletary; Jackson *v.* 971
Sinn *v.* Ratelle 941
Slezak *v.* Moore 907
Smith; Baruch *v.* 969
Smith *v.* Jarvis 957
Smith *v.* Metropolitan School Dist. Perry Township 951
Smith; National Collegiate Athletic Assn. *v.* 982
Smith *v.* O'Brien 923
Smith *v.* Supreme Court of Colo. 954,970
Smith *v.* Texas 946
Smith *v.* United States 920,959
Smith Barney; Painters Local Union No. 109 Pension Fund *v.* 915
Smithsonian Inst., Hirshhorn Museum & Sculpture Garden; Dong *v.* 922

Page
Snelling *v.* Housing Authority of St. Louis County 960
Snyder, *In re* 950
Sobin *v.* Fairfax County Dept. of Human Development 906
Social Security Administration; Eggena *v.* 908
Solomon *v.* Michigan 930
Sonnier; Crawford & Co. *v.* 950
Sorto *v.* United States 921
Southard, *In re* 913
South Carolina; Hunter *v.* 943
South Central Bell Telephone Co. *v.* Alabama 981
Southeastern Maritime Co. *v.* Brown 951
Southern Cal. Off-Track Wagering *v.* Cabazon Mission Indians . . 926
Southern New England Telephone Co. *v.* FCC 949
Speckard; Ayala *v.* 958
Speckard; Bryant *v.* 907
Sprague *v.* General Motors Corp. 923
Springer *v.* Commissioner 920
Sprint Corp.; Cahnmann *v.* 952
Sprint Corp.; Couch *v.* 952
Spruill *v.* United States 940
Sprunk; Sanchez *v.* 929
Stacy *v.* United States 927
Stanford Univ. School of Medicine/Medical Center; Bayer *v.* 968
State. See also name of State.
State Automobile Ins. Co.; Stinson *v.* 965
State Retirement and Pension System of Md.; Cale *v.* 908
Steele *v.* United States 944
Stein, *In re* 969
Steuer; Viray *v.* 969
Stewart; Allen *v.* 941
Stewart *v.* Angelone 978
Stewart; DeWig *v.* 969
Stewart; Dixon *v.* 971
Stewart *v.* Falcone 947
Stewart; Gretzler *v.* 912
Stewart *v.* Monroe 931
Stewart *v.* Virginia 979
Stine; Percival *v.* 941
Stinson *v.* State Automobile Ins. Co. 965
Stinson; Vasquez *v.* 959
Strachan *v.* Tillery 908
Strickler *v.* Greene 978
Sudwisher *v.* Hoffpauir's Estate 940
Sullivan; American Mfrs. Mut. Ins. Co. *v.* 981

Page

Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., San Diego County; Brown *v.* 941
Supreme Court of Colo.; Smith *v.* 954,970
Sust *v.* United States 962
Sutherlin *v.* Minnesota 942
Swain *v.* United States 909
Sweetwater County School Dist. No. 1; Brockman *v.* 933
Swidler & Berlin *v.* United States 399
Swinick *v.* Rosen 944
Swinney *v.* California 944
Swint *v.* United States 969
Tacoma; Rendish *v.* 952
Tal-Mason *v.* Redd 907
Tataii *v.* Cayetano 907,969
Taub, *In re* 966
Taylor, *In re* 925
Taylor; Falkenberry *v.* 904,968
Taylor *v.* United States 960
TCW Special Credits; Barandiaran *v.* 952
Teague *v.* Johnson 976
Teamsters *v.* Anheuser-Busch, Inc. 916
Temple Univ.; Sarkar *v.* 930
Tennard *v.* Texas 956
Tennessee; Bates *v.* 907
Tennessee; Booher *v.* 931
Tennessee; Cash *v.* 917
Tennessee; Hall *v.* 941
Tennessee; Lyons *v.* 959
Tennessee; Mann *v.* 956
Tennessee; McDonald *v.* 969
Terhune; Murillo *v.* 942
Territory. See name of Territory.
Terry *v.* United States 932,940
Texas; Angel *v.* 911
Texas; Dixon *v.* 956
Texas; Estep *v.* 930
Texas; Knupp *v.* 910
Texas *v.* New Mexico 925
Texas; Panetti *v.* 914
Texas; Ramirez *v.* 939
Texas; Richard *v.* 956
Texas; Ruiz Camacho *v.* 974
Texas; Smith *v.* 946

Page
Texas; Tennard *v.* 956
Texas; Watson *v.* 942
Texas; Willingham *v.* 917
Thanh Le *v.* Oklahoma 930
Theis Research, Inc. *v.* Octel Communications Corp. 963,970
Thomas *v.* Illinois 955
Thomas *v.* Johnson 944
Thomas *v.* United States 921,940
Thomas; Walker *v.* 907
Thompson, *In re* 964
Thompson; Blair *v.* 919,971
Thompson *v.* Calderon 965
Thompson *v.* Hopkins 908
Thompson *v.* United States 920,959
Thriftway Marketing Corp. *v.* DeVaney 915
Tice *v.* United States 922
Tillery; Strachan *v.* 908
Tippy; Love *v.* 956
Toegemann *v.* Prochaska 946
Toledo *v.* United States 932
Toles *v.* Oklahoma 958
Tong *v.* Hunt 927
Tonia B. *v.* New York City 917
Toshiba America Electronic Components, Inc.; Nghiem *v.* 971
Toth, *In re* 936,970
Toth *v.* Michigan State Housing Development Authority 954
Tovar-Valencia *v.* United States 932
Town. See name of town.
Transportation Union, Executive Bd.; Ruck *v.* 964
Treasurer of Conn.; Federation of Conn. Taxpayer Organizations *v.* 938
Trobaugh *v.* Iowa 943
Trostel; American Life & Casualty Ins. Co. *v.* 945
Troxell *v.* Kentucky 931
Tseng; El Al Israel Airlines, Ltd. *v.* 975,977
Tunnicliff *v.* Moriarty 918
Turkowski *v.* Clinton 908,969
Turner, *In re* 973
Turner *v.* United States 909,921
Turpin; Cargill *v.* 923
Turtle Wax, Inc.; Richardson *v.* 918
Tutt; Wilkerson *v.* 943
203 N. LaSalle St. P'ship; Bank of Am. Nat. Tr. & Sav. Assn. *v.* . 914,975
Tyler *v.* Bowersox 919
Union. For labor union, see name of trade.

Page

United. For labor union, see name of trade.
United Nebraska Bank; Kucera *v.* 905
United States. See name of other party.
U. S. District Court; Mosseri *v.* 931
U. S. District Judge; Judicial Council of Fifth Judicial Circuit *v.* . . . 937
U. S. Embassy, Manila, Philippines; Abdeslem *v.* 958
U. S. House of Representatives; Department of Commerce *v.* . . . 978
U. S. Postal Service; Campbell *v.* 931
Universal Life Church, Inc. *v.* United States 952
Universal Maritime Service Corp.; Wright *v.* 949
University Health Services, Inc. *v.* Shalala 904
University of Louisville Hospital; Roberts *v.* 915
University of Mass. Medical Center; Rothman *v.* 971
U S WEST, Inc. *v.* Federal Communications Comm'n 949
Utterback, *In re* 967
Valdes *v.* United States 923,972
Valdez *v.* Fonoimoana 911
Valenzuela Rodriguez *v.* Marshall 919
Valera *v.* United States 945
Valeriano *v.* United States 932
Vallejo *v.* United States 945
Vance; Narron *v.* 946
Van Damme; DePrins *v.* 904
Vann *v.* United States 926
Vasquez *v.* Stinson 959
Vaughn; Devery *v.* 958
Vaughn; Laessig *v.* 971
VBR; Russell *v.* 925
Verbeck, *In re* 946
Victoria *v.* United States 911
Villacres *v.* Kramer 968
Village. See name of village.
Vingi *v.* Rhode Island 954
Viray *v.* Beneficial California, Inc. 971
Viray *v.* Steuer 969
Virginia; Kreiger *v.* 968
Virginia; Stewart *v.* 979
Viswanathan *v.* Fayetteville State Univ. Bd. of Trustees 946
Waco Independent School Dist.; Pruitt *v.* 939
Walker; Day *v.* 944
Walker *v.* Michigan Public Service Comm'n 963
Walker *v.* Thomas 907
Walker *v.* United States 910
Walkoviak *v.* District Court of Tex., Harris County 969

Page
Walter *v.* United States 960
Walton *v.* Bartlett 906
Walton *v.* Princeton Baptist Medical Center 946
Warden. See name of warden.
Warkow, *In re* 902,966
Warren *v.* United States 907
Washington, *In re* 903,963
Washington *v.* Pennsylvania 955
Washington *v.* Service Employees 957
Washington *v.* United States 940
Washington Legal Foundation; Phillips *v.* 156
Wasko *v.* Duncan 906
Watson *v.* Texas 942
Wayne *v.* United States 944
Wegner *v.* Lewis 908
Weisser, *In re* 913
Weissman *v.* Cohn, Lifland, Perlman, Hermann & Knopf 968
Wellons, *In re* 901
Wells *v.* United States 932
Wells Electronics, Inc.; Pfaff *v.* 950,975
Wesley *v.* Wesley 941
West; Cummings *v.* 954
West; Epps *v.* 940
West Covina *v.* Perkins 976,977
Western Weighing and Inspection Bureau; Hayes *v.* 946
West High School; Bauchman *v.* 953
West Virginia; Jackson *v.* 942,971
Whatley *v.* United States 940,945
Whitaker; McGrew *v.* 906
Whitaker *v.* Whitaker 968
White, *In re* 913
White; Barbir *v.* 943
White; Castapheny *v.* 931
White; Castaphney *v.* 931
White *v.* Internal Revenue Service 960
White *v.* Johnson 957
White *v.* McMillan 968
White *v.* United States 928
Whitehall Realty Co.; Whitehall Tenants Corp. *v.* 926
Whitehall Tenants Corp. *v.* Whitehall Realty Co. 926
Whiteside, *In re* 914
Widnall; Belhomme *v.* 969
Wilkerson *v.* Tutt 943
Williams *v.* Alabama 929

Page
Williams *v.* Cain 934
Williams *v.* California 909
Williams *v.* Carlton 923
Williams *v.* Louisiana 934
Williams *v.* Moore 969
Williams *v.* United States 917,962
Williams Lewis, *In re* 969
Willingham *v.* Oklahoma 930
Willingham *v.* Texas 917
Willis *v.* United States 921
Willoughby *v.* Fields 905
Wilshire Terrace Corp.; Pierson *v.* 940,970
Wilson *v.* Armstrong 937
Wilson *v.* Blackwell 942
Wilson *v.* Burton 944
Wilson *v.* Cabazon Band of Mission Indians 926
Wilson *v.* Lane 908
Wilson *v.* United States 922
Windham *v.* Lowell 916
Winfield *v.* United States 962
Wisconsin; Barbary *v.* 930
Wisconsin Dept. of Corrections *v.* Schacht 381
Wisconsin Dept. of Industry, Labor and Human Rel.; Peterson *v.* 933
Wolff *v.* United States 929
Wood *v.* California 941
Wood Motors, Inc.; Kearns *v.* 940,970
Woodruff *v.* United States 945,956
Woolley *v.* Illinois 955
Worthy *v.* Collagen Corp. 954
Wright *v.* United States 921
Wright *v.* Universal Maritime Service Corp. 949
Wronka *v.* United States 929
Wyoming *v.* Houghton 983
Wyoming; Johnson *v.* 969
Yamaguchi; Levesque *v.* 927
Yankee Atomic Electric Co. *v.* United States 951
Yen *v.* National Labor Relations Bd. 972
Yeo *v.* Lexington 904
Yeskey; Pennsylvania Dept. of Corrections *v.* 206
Yinger *v.* Dearborn 926
Young *v.* United States 928,941
Your Home Visiting Nurse Services, Inc. *v.* Shalala 925
Ysui Yuan Tseng; El Al Israel Airlines, Ltd. *v.* 975,977
Yuan Tseng; El Al Israel Airlines, Ltd. *v.* 975,977

Page
Zamora-Martinez *v.* United States 959
Zankich *v.* Goodnow 957
Zaragoza *v.* United States 945
Zeeland Bd. of Ed.; Bush *v.* 904
Zeran *v.* America Online, Inc. 937
Zerebnick *v.* Beckwith Machinery Co. 946
Zimmerman; Peterson *v.* 918
Zollo Drum Co. *v.* B. F. Goodrich Co. 926
Zuckerman *v.* United States 932
Zuk; Cimino *v.* 909

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1997

UNITED STATES *v.* CABRALES

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

No. 97–643. Argued April 29, 1998—Decided June 1, 1998

An indictment returned in the United States District Court for the Western District of Missouri charged respondent Cabrales, as sole defendant, with conspiracy under 18 U. S. C. § 371 to violate § 1956(a)(1)(B)(ii) (conducting a financial transaction to avoid a transaction-reporting requirement) (Count I), and with money laundering in violation of the latter section (Count II) and § 1957 (engaging in a monetary transaction in criminally derived property of a value greater than $10,000) (Count III). The indictment alleged that, in January 1991, Cabrales deposited $40,000 with the AmSouth Bank of Florida and, within a week, made four separate $9,500 withdrawals from that bank. The money deposited and withdrawn was traceable to illegal cocaine sales in Missouri. Cabrales moved to dismiss the indictment in its entirety for improper venue. The District Court denied the motion as to Count I, the conspiracy count, but dismissed Counts II and III, the money-laundering counts, because the money-laundering activity occurred entirely in Florida. In affirming that dismissal, the Eighth Circuit noted that the Constitution, Art. III, § 2, cl. 3, and Amdt. 6, as well as Federal Rule of Criminal Procedure 18, requires that a person be tried where the charged offense was committed. While recognizing that a continuing offense "begun in one district and completed in another . . . may be . . . prosecuted in any district in which such offense was begun, continued, or completed," 18 U. S. C. § 3237(a), the court said that Cabrales was not accused of a continuing offense, but was charged with

money-laundering transactions that began, continued, and were completed only in Florida. It was of no moment that the money came from Missouri, the court explained, because Cabrales dealt with it only in Florida, the money-laundering counts alleged no act committed by Cabrales in Missouri, and the Government did not assert that Cabrales transported the money from Missouri to Florida.

Held: Missouri is not a place of proper venue for the money-laundering offenses with which Cabrales is charged. The *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it. *United States* v. *Anderson*, 328 U. S. 699, 703. Here, the crimes charged in Counts II and III are defined in statutory proscriptions, §§ 1956(a)(1)(B)(ii) and 1957, that interdict only the financial transactions (acts located entirely in Florida), not the anterior criminal conduct that yielded the funds allegedly laundered. Contrary to the Government's contention, the crimes charged in those counts do not fit under § 3237(a) as offenses begun in Missouri and completed in Florida, but are crimes that took place wholly within Florida. Notably, the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. Nor do they charge her as an aider or abettor, punishable as a principal, in the Missouri drug trafficking, see 18 U. S. C. § 2. Rather, those counts charge her with criminal activity "after the fact" of an offense begun and completed by others. Cf. § 3. Whenever a defendant acts "after the fact" to conceal a crime, it might be said, as the Government urges, that the first crime is an essential element of the second, and that the second facilitated the first or made it profitable by impeding its detection. But the question here is the *place* appropriate to try the "after the fact" actor. It is immaterial whether that actor knew where the first crime was committed. The money launderer must know she is dealing with funds derived from specified unlawful activity, here, drug trafficking, but the Missouri venue of that activity is, as the Eighth Circuit said, of no moment. Money laundering arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another, but that is tellingly not this case. Neither *Hyde* v. *United States*, 225 U. S. 347, nor *In re Palliser*, 136 U. S. 257, supports the Government's position that money launderers can in all cases be prosecuted at the place where the funds they handled were generated. *Hyde* involved a conspiracy prosecution in which the Court held venue proper in the District of Columbia based on overt acts committed by a co-conspirator in the District. *Palliser* concerned a prosecution for mailings from New York to Connecticut in which the Court held Connecticut venue

proper because the mailings were completed in that State. By contrast, the counts here at issue allege no conspiracy, but describe activity in which Cabrales alone engaged. Nor do they charge that she dispatched any missive from one State into another; instead, they portray her and the money she deposited and withdrew as moving inside Florida only. Finally, the Court rejects the Government's contention that efficiency warrants trying Cabrales in Missouri because evidence there, and not in Florida, shows that the money she allegedly laundered derived from unlawful activity. The Government is not disarmed from showing that Cabrales is in fact linked to the drug trafficking. She can be, and indeed has been, charged with conspiring with the drug dealers in Missouri. If the Government can prove the agreement it has alleged in Count I, Cabrales can be prosecuted in Missouri for that confederacy, and her Florida money laundering could be shown as overt acts in furtherance of the conspiracy. See § 371. As the Government acknowledged, the difference in her sentence probably would be negligible. Pp. 6–10.

109 F. 3d 471 and 115 F. 3d 621, affirmed.

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

Malcolm L. Stewart argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *Daniel S. Goodman.*

John W. Rogers, by appointment of the Court, 522 U. S. 1106, argued the cause and filed a brief for respondent.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a question of venue, specifically, the place appropriate for trial on charges of money laundering in violation of 18 U. S. C. § 1956(a)(1)(B)(ii) (conducting a financial transaction to avoid a transaction-reporting requirement) and § 1957 (engaging in a monetary transaction in criminally derived property of a value greater than $10,000). The laundering alleged in the indictment occurred entirely in Florida. The currency purportedly laundered derived

**Steven Wisotsky* and *Lisa B. Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

from the unlawful distribution of cocaine in Missouri. The defendant, respondent Vickie S. Cabrales, is not alleged to have transported funds from Missouri to Florida. Nor is she charged, in the counts before us, with participation in the Missouri cocaine distribution that generated the funds in question. In accord with the Court of Appeals for the Eighth Circuit, we hold that Missouri is not a proper place for trial of the money-laundering offenses at issue.

I

In a three-count indictment returned in the United States District Court for the Western District of Missouri, Cabrales, as sole defendant, was charged with the following offenses: conspiracy to avoid a transaction-reporting requirement, in violation of 18 U. S. C. §§ 371, 1956(a)(1)(B)(ii) (Count I); conducting a financial transaction to avoid a transaction-reporting requirement, in violation of § 1956 (a)(1)(B)(ii) (Count II); and engaging in a monetary transaction in criminally derived property of a value greater than $10,000, in violation of § 1957 (Count III). The indictment alleged that, in January 1991, Cabrales deposited $40,000 with the AmSouth Bank of Florida and, within a week's span, made four separate withdrawals of $9,500 each from that bank. The money deposited and withdrawn was traceable to illegal sales of cocaine in Missouri.

Cabrales moved to dismiss the indictment in its entirety for improper venue. On recommendation of the Magistrate, the District Court denied the motion as to Count I, the conspiracy count, based on the Government's assertions that Cabrales "was present in Missouri during the conspiracy, lived with a conspirator in Missouri, and participated in various activities in Missouri in furtherance of the conspiracy." App. to Pet. for Cert. 11a, 14a–15a. Also on the Magistrate's recommendation, the District Court granted the motion to dismiss Counts II and III, the money-laundering counts, because the deposit and withdrawals occurred in Florida and

"[n]o activity of money laundering . . . occurred in Missouri." *Id.*, at 11a, 14a.

On the Government's appeal, the Eighth Circuit affirmed the District Court's dismissal of the money-laundering counts. 109 F. 3d 471, as amended, 115 F. 3d 621 (CA8 1997). The conspiracy charge was not part of the appeal, and that count remains pending in the Missouri District Court. 109 F. 3d, at 472, n. 2, as amended, 115 F. 3d 621.

The Court of Appeals first recounted law that is not in doubt: "Both Rule 18 of the Federal Rules of Criminal Procedure and the Constitution require that a person be tried for an offense where that offense is committed," 109 F. 3d, at 472; also, the site of a charged offense "'must be determined from the nature of the crime alleged and the location of the act or acts constituting it,'" *ibid.* (quoting *United States* v. *Anderson*, 328 U. S. 699, 703 (1946)). "Continuing offenses," the Court of Appeals recognized, those "begun in one district and completed in another," 18 U. S. C. § 3237(a), may be tried "'in any district in which such [an] offense was begun, continued, or completed.'" 109 F. 3d, at 472 (quoting § 3237(a)).

But "Cabrales was not accused of a 'continuing offense,'" the Eighth Circuit said, *ibid.;* "[s]he was charged with money laundering, for transactions which began, continued, and were completed only in Florida," *ibid.* "That the money came from Missouri is of no moment," the Court of Appeals next observed, for "Cabrales dealt with it only in Florida." *Ibid.* The money-laundering counts "include[d] no act committed by Cabrales in Missouri," the Eighth Circuit emphasized, nor did "the [G]overnment charge that Cabrales transported the money from Missouri to Florida." *Ibid.*

The Government urges that, in conflict with the Eighth Circuit, other Courts of Appeals "have held that venue for money laundering offenses is proper in the district in which the funds were unlawfully generated, even if the financial transaction that constitutes the laundering occurred wholly within another district." Pet. for Cert. 9–10 (citing *United*

States v. *Heaps*, 39 F. 3d 479, 482 (CA4 1994); *United States* v. *Beddow*, 957 F. 2d 1330, 1335–1336 (CA6 1992); *United States* v. *Sax*, 39 F. 3d 1380, 1390–1391 (CA7 1994); *United States* v. *Angotti*, 105 F. 3d 539, 544–545 (CA9 1997)). We granted certiorari to resolve the conflict, 522 U. S. 1072 (1998), and now affirm the Eighth Circuit's judgment.

II

Proper venue in criminal proceedings was a matter of concern to the Nation's founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists "beyond Seas to be tried."[1] The Constitution twice safeguards the defendant's venue right: Article III, § 2, cl. 3, instructs that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed"; the Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." Rule 18 of the Federal Rules of Criminal Procedure, providing that "prosecution shall be had in a district in which the offense was committed," echoes the constitutional commands.

We adhere to the general guide invoked and applied by the Eighth Circuit: "[T]he *locus delicti* must be determined

[1] The Declaration recited among injuries and usurpations attributed to the King: "transporting us beyond Seas to be tried for pretended offences." The Declaration of Independence, para. 21 (1776). A complaint of the same tenor appeared earlier, in the 1769 "Virginia Resolves." See Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 Mich. L. Rev. 59, 64 (1944). Parliament had decreed that colonists charged with treason could be tried in England. See 16 Parliamentary History of England from the Earliest Period to Year 1803, pp. 476–510 (T. Hansard ed. 1813). In response, the Virginia House of Burgesses unanimously passed a resolution condemning the practice of sending individuals "beyond the Sea, to be tried" as "highly derogatory of the Rights of British subjects." Journals of the House of Burgesses of Virginia, 1766–1769, p. 214 (J. Kennedy ed. 1906).

from the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U. S., at 703. Here, the crimes described in Counts II and III are defined in statutory proscriptions, 18 U. S. C. §§ 1956(a)(1)(B)(ii), 1957, that interdict only the financial transactions (acts located entirely in Florida), not the anterior criminal conduct that yielded the funds allegedly laundered.

Congress has provided by statute for offenses "begun in one district and completed in another"; such offenses may be "prosecuted in any district in which [the] offense was begun, continued, or completed." 18 U. S. C. § 3237(a). The Government urges that the money-laundering crimes described in Counts II and III of the indictment against Cabrales fit the § 3237(a) description. We therefore confront and decide this question: Do those counts charge crimes begun in Missouri and completed in Florida, rendering venue proper in Missouri, or do they delineate crimes that took place wholly within Florida?

Notably, the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. Nor do they charge her as an aider or abettor in the Missouri drug trafficking. See 18 U. S. C. § 2 (one who aids or abets an offense "is punishable as a principal"). Cabrales is charged in the money-laundering counts with criminal activity "after the fact" of an offense begun and completed by others. Cf. § 3 ("Whoever, knowing that an offense against the United States has been committed, . . . assists the offender in order to hinder or prevent his . . . punishment, is an accessory after the fact," punishable not as a principal, but by a term of imprisonment or fine generally "not more than one-half the maximum . . . prescribed for the punishment of the principal[.]").

Whenever a defendant acts "after the fact" to conceal a crime, it might be said, as the Government urges in this case, that the first crime is an essential element of the second, see Brief for United States 9, and that the second

facilitated the first or made it profitable by impeding its detection, see *id.*, at 14. But the question here is the *place* appropriate to try the "after the fact" actor. As the Government recognizes, it is immaterial whether that actor knew where the first crime was committed. See Tr. of Oral Arg. 5–6. The money launderer must know she is dealing with funds derived from "specified unlawful activity," here, drug trafficking, but the Missouri venue of that activity is, as the Eighth Circuit said, "of no moment." 109 F. 3d, at 472.[2]

Money laundering, the Court of Appeals acknowledged, arguably might rank as a "continuing offense," triable in more than one place, if the launderer acquired the funds in one district and transported them into another. *Id.*, at 473. But that is tellingly not this case. In the counts at issue, the Government indicted Cabrales "for transactions which began, continued, and were completed only in Florida." *Id.*, at 472. Under these circumstances, venue in Missouri is improper.

The Government identified *Hyde* v. *United States*, 225 U. S. 347 (1912), and *In re Palliser*, 136 U. S. 257 (1890), as the two best cases for its position that money launderers can in all cases be prosecuted at the place where the funds they handled were generated. See Tr. of Oral Arg. 6. Neither decision warrants the ruling the Government here seeks.

In *Hyde*, the defendants were convicted in the District of Columbia of conspiracy to defraud the United States. Although none of the defendants had entered the District as part of the conspiracy, venue was nevertheless appropriate, the Court ruled, based on the overt acts of a co-conspirator there. 225 U. S., at 363. By contrast, the counts at issue in this case allege no conspiracy. They describe activity in which Cabrales alone, untied to others, engaged.

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[2] Cf. *United States* v. *Lanoue*, 137 F. 3d 656, 661 (CA1 1998) (stating that crime of being a felon in possession of a firearm, in violation of 18 U. S. C. § 922(g)(1), occurs only where the firearm is actually possessed).

In re Palliser concerned a man who sent letters from New York to postmasters in Connecticut, attempting to gain postage on credit, in violation of then-applicable law. The Court held that the defendant could be prosecuted in Connecticut, where the mail he addressed and dispatched was received. 136 U. S., at 266–268. The *Palliser* opinion simply recognizes that a mailing to Connecticut is properly ranked as an act completed in that State. Cf. 18 U. S. C. § 3237(a) ("Any offense involving the use of the mails . . . is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such . . . mail matter . . . moves."); *United States* v. *Johnson*, 323 U. S. 273, 275 (1944) (consistent with the Constitution "an illegal use of the mails . . . may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district"). Cabrales, however, dispatched no missive from one State into another. The counts before us portray her and the money she deposited and withdrew as moving inside Florida only.

Finally, the Government urges the efficiency of trying Cabrales in Missouri, because evidence in that State, and not in Florida, shows that the money Cabrales allegedly laundered derived from unlawful activity. Although recognizing that the venue requirement is principally a protection for the defendant, Reply Brief 10, the Government further maintains that its convenience, and the interests of the community victimized by drug dealers, merit consideration.

But if Cabrales is in fact linked to the drug-trafficking activity, the Government is not disarmed from showing that is the case. She can be, and indeed has been, charged with conspiring with the drug dealers in Missouri. If the Government can prove the agreement it has alleged, Cabrales can be prosecuted in Missouri for that confederacy, and her money laundering in Florida could be shown as overt acts in furtherance of the conspiracy. See 18 U. S. C. § 371 (requiring proof of an "act to effect the object of the conspiracy").

As the Government acknowledged, the difference in the end result "probably . . . would be negligible." Tr. of Oral Arg. 52; see United States Sentencing Commission, Guidelines Manual §1B1.3 (Nov. 1995) (providing for consideration of "Relevant Conduct" in determining sentence).

* * *

We hold that Missouri is not a place of proper venue for the money-laundering offenses with which Cabrales is charged. For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

Syllabus

FEDERAL ELECTION COMMISSION *v.* AKINS ET AL.

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

No. 96–1590. Argued January 14, 1998—Decided June 1, 1998

The Federal Election Campaign Act of 1971 (FECA) seeks to remedy corruption of the political process. As relevant here, it imposes extensive recordkeeping and disclosure requirements upon "political committee[s]," which include "*any* committee, club, association or other group of persons which receives" more than $1,000 in "contributions" or "which makes" more than $1,000 in "expenditures" in any given year, 2 U. S. C. § 431(4)(A) (emphasis added), "for the purpose of influencing any election for Federal office," §§ 431(8)(A)(i), (9)(A)(i). Assistance given to help a particular candidate will not count toward the $1,000 "expenditure" ceiling if it takes the form of a "communication" by a "membership organization or corporation" "to its members"—as long as the organization is not "organized primarily for the purpose of influencing [any individual's] nomination . . . or election." § 431(9)(B)(iii). Respondents, voters with views often opposed to those of the American Israel Public Affairs Committee (AIPAC), filed a compliant with petitioner Federal Election Commission (FEC), asking the FEC to find that AIPAC had violated FECA and, among other things, to order AIPAC to make public the information that FECA demands of political committees. In dismissing the complaint, the FEC found that AIPAC's communications fell outside FECA's membership communications exception. Nonetheless, it concluded, AIPAC was not a "political committee" because, as an issue-oriented lobbying organization, its major purpose was not the nomination or election of candidates. The District Court granted the FEC summary judgment when it reviewed the determination, but the en banc Court of Appeals reversed on the ground that the FEC's major purpose test improperly interpreted FECA's definition of a political committee. The case presents this Court with two questions: (1) whether respondents had standing to challenge the FEC's decision, and (2) whether an organization falls outside FECA's definition of a "political committee" because "its major purpose" is not "the nomination or election of candidates."

Held:

1. Respondents, as voters seeking information to which they believe FECA entitles them, have standing to challenge the FEC's decision not to bring an enforcement action. Pp. 19–26.

Syllabus

(a) Respondents satisfy prudential standing requirements. FECA specifically provides that "[a]ny person" who believes FECA has been violated may file a complaint with the FEC, § 437g(a)(1), and that "[a]ny party aggrieved" by an FEC order dismissing such party's complaint may seek district court review of the dismissal, § 437g(a)(8)(A). History associates the word "aggrieved" with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. *E. g.*, *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470. Moreover, respondents' asserted injury—their failure to obtain relevant information—is injury of a kind that FECA seeks to address. Pp. 19–20.

(b) Respondents also satisfy constitutional standing requirements. Their inability to obtain information that, they claim, FECA requires AIPAC to make public meets the genuine "injury in fact" requirement that helps assure that the court will adjudicate "[a] concrete, living contest between adversaries." *Coleman* v. *Miller*, 307 U. S. 433, 460 (Frankfurter, J., dissenting). *United States* v. *Richardson*, 418 U. S. 166, distinguished. The fact that the harm at issue is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts where the harm is concrete. See *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 449–450. The informational injury here, directly related to voting, the most basic of political rights, is sufficiently concrete. Respondents have also satisfied the remaining two constitutional standing requirements: The harm asserted is "fairly traceable" to the FEC's decision not to issue its complaint, and the courts in this case can "redress" that injury. Pp. 20–25.

(c) Finally, FECA explicitly indicates a congressional intent to alter the traditional view that agency enforcement decisions are not subject to judicial review. *Heckler* v. *Chaney*, 470 U. S. 821, 832, distinguished. P. 26.

2. Because of the unusual and complex circumstances in which the case arises, the second question presented cannot be addressed here, and the case must be remanded. After the FEC determined that many persons belonging to AIPAC were not "members" under FEC regulations, the Court of Appeals overturned those regulations in another case, in part because it thought they defined membership organizations too narrowly in light of an organization's First Amendment right to communicate with its members. The FEC's new "membership organization" rules could significantly affect the interpretative issue presented by Question Two. Thus, the FEC should proceed to determine whether or not AIPAC's expenditures qualify as "membership communications" under the new rules, and thereby fall outside the scope of "expendi-

tures" that could qualify it as a "political committee." If it decides that the communications here do not qualify, then the lower courts can still evaluate the significance of the communicative context in which the case arises. If, on the other hand, it decides that they do qualify, the matter will become moot. Pp. 26–29.

101 F. 3d 731, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 29.

Solicitor General Waxman argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger*, *Malcolm L. Stewart*, *Lawrence M. Noble*, *Richard B. Bader*, and *David Kolker*.

Daniel M. Schember argued the cause for respondents. With him on the brief was *Abdeen Jabara*.*

JUSTICE BREYER delivered the opinion of the Court.

The Federal Election Commission (FEC) has determined that the American Israel Public Affairs Committee (AIPAC) is not a "political committee" as defined by the Federal Election Campaign Act of 1971 (FECA or Act), 86 Stat. 11, as amended, 2 U. S. C. § 431(4), and, for that reason, the FEC has refused to require AIPAC to make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require. We hold that respondents, a group of voters, have standing to challenge the

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Joel M. Gora*, *Steven R. Shapiro*, and *Arthur N. Eisenberg;* and for the National Right to Life Committee, Inc., by *James Bopp, Jr.*

A. Stephen Hut, Jr., *Roger M. Witten*, *Jeffrey P. Singdahlsen*, and *Donald J. Simon* filed a brief for Common Cause as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Israel Public Affairs Committee by *Theodore B. Olson*, *Mel Levine*, *Thomas G. Hungar*, and *Philip Friedman;* and for the Brennan Center for Justice by *Burt Neuborne*.

Commission's determination in court, and we remand this case for further proceedings.

I

In light of our disposition of this case, we believe it necessary to describe its procedural background in some detail. As commonly understood, the FECA seeks to remedy any actual or perceived corruption of the political process in several important ways. The Act imposes limits upon the amounts that individuals, corporations, "political committees" (including political action committees), and political parties can contribute to a candidate for federal political office. §§ 441a(a), 441a(b), 441b. The Act also imposes limits on the amount these individuals or entities can spend in coordination with a candidate. (It treats these expenditures as "contributions to" a candidate for purposes of the Act.) § 441a(a)(7)(B)(i). As originally written, the Act set limits upon the total amount that a candidate could spend of his own money, and upon the amounts that other individuals, corporations, and "political committees" could spend independent of a candidate—though the Court found that certain of these last-mentioned limitations violated the First Amendment. *Buckley* v. *Valeo*, 424 U. S. 1, 39–59 (1976) *(per curiam); Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 497 (1985); cf. *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 613–619 (1996) (opinion of BREYER, J.).

This case concerns requirements in the Act that extend beyond these better-known contribution and expenditure limitations. In particular, the Act imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of a "political committee." Those groups must register with the FEC, appoint a treasurer, keep names and addresses of contributors, track the amount and purpose of disbursements, and file complex FEC

reports that include lists of donors giving in excess of $200 per year (often, these donors may be the group's members), contributions, expenditures, and any other disbursements irrespective of their purposes. §§ 432–434.

The Act's use of the word "political committee" calls to mind the term "political action committee," or "PAC," a term that normally refers to organizations that corporations or trade unions might establish for the purpose of making contributions or expenditures that the Act would otherwise prohibit. See §§ 431(4)(B), 441b. But, in fact, the Act's term "political committee" has a much broader scope. The Act states that a "political committee" includes "*any* committee, club, association or other group of persons which receives" more than $1,000 in "contributions" or "which makes" more than $1,000 in "expenditures" in any given year. § 431(4)(A) (emphasis added).

This broad definition, however, is less universally encompassing than at first it may seem, for later definitional subsections limit its scope. The Act defines the key terms "contribution" and "expenditure" as covering only those contributions and expenditures that are made "for the purpose of influencing any election for Federal office." §§ 431(8)(A)(i), (9)(A)(i). Moreover, the Act sets forth detailed categories of disbursements, loans, and assistance-in-kind that do not count as a "contribution" or an "expenditure," even when made for election-related purposes. §§ 431(8)(B), (9)(B). In particular, assistance given to help a candidate will not count toward the $1,000 "expenditure" ceiling that qualifies an organization as a "political committee" if it takes the form of a "communication" by an organization "to its members"—as long as the organization at issue is a "membership organization or corporation" and it is not "organized primarily for the purpose of influencing the nomination . . . or electio[n] of any individual." § 431(9)(B)(iii).

This case arises out of an effort by respondents, a group of voters with views often opposed to those of AIPAC, to

persuade the FEC to treat AIPAC as a "political committee." Respondents filed a complaint with the FEC, stating that AIPAC had made more than $1,000 in qualifying "expenditures" per year, and thereby became a "political committee." 1 Record, Exh. B, p. 4. They added that AIPAC had violated the FEC provisions requiring "political committee[s]" to register and to make public the information about members, contributions, and expenditures to which we have just referred. *Id.*, at 2, 9–17. Respondents also claimed that AIPAC had violated § 441b of FECA, which prohibits corporate campaign "contribution[s]" and "expenditure[s]." *Id.*, at 2, 16–17. They asked the FEC to find that AIPAC had violated the Act, and, among other things, to order AIPAC to make public the information that FECA demands of a "political committee." *Id.*, at 33–34.

AIPAC asked the FEC to dismiss the complaint. AIPAC described itself as an issue-oriented organization that seeks to maintain friendship and promote goodwill between the United States and Israel. App. 120; see also Brief for AIPAC as *Amicus Curiae* (AIPAC Brief) 1, 3. AIPAC conceded that it lobbies elected officials and disseminates information about candidates for public office. App. 43, 120; see also AIPAC Brief 6. But in responding to the § 441b charge, AIPAC denied that it had made the kinds of "expenditures" that matter for FECA purposes (*i. e.*, the kinds of election-related expenditures that corporations cannot make, and which count as the kind of expenditures that, when they exceed $1,000, qualify a group as a "political committee").

To put the matter more specifically: AIPAC focused on certain "expenditures" that respondents had claimed were election related, such as the costs of meetings with candidates, the introduction of AIPAC members to candidates, and the distribution of candidate position papers. AIPAC said that its spending on such activities, even if election related, fell within a relevant exception. They amounted, said AIPAC,

to communications by a membership organization with its members, App. 164–166, which the Act exempts from its definition of "expenditures," § 431(9)(B)(iii). In AIPAC's view, these communications therefore did not violate § 441b's corporate expenditure prohibition. 2 Record, Doc. No. 19, pp. 2–6. (And, if AIPAC was right, those expenditures would not count toward the $1,000 ceiling on "expenditures" that might transform an ordinary issue-related group into a "political committee." § 431(4).)

The FEC's General Counsel concluded that, between 1983 and 1988, AIPAC had indeed funded communications of the sort described. The General Counsel said that those expenditures were campaign related, in that they amounted to advocating the election or defeat of particular candidates. App. 106–108. He added that these expenditures were "likely to have crossed the $1,000 threshold." *Id.*, at 146. At the same time, the FEC closed the door to AIPAC's invocation of the "communications" exception. The FEC said that, although it was a "close question," these expenditures were not membership communications, because that exception applies to a membership organization's communications with its members, and most of the persons who belonged to AIPAC did not qualify as "members" for purposes of the Act. App. to Pet. for Cert. 97a–98a; see also App. 170–173. Still, given the closeness of the issue, the FEC exercised its discretion and decided not to proceed further with respect to the claimed "corporate contribution" violation. App. to Pet. for Cert. 98a.

The FEC's determination that many of the persons who belonged to AIPAC were not "members" effectively foreclosed any claim that AIPAC's communications did not count as "expenditures" for purposes of determining whether it was a "political committee." Since AIPAC's activities fell outside the "membership communications" exception, AIPAC could not invoke that exception as a way of escaping

the scope of the Act's term "political committee" and the Act's disclosure provisions, which that definition triggers.

The FEC nonetheless held that AIPAC was not subject to the disclosure requirements, but for a different reason. In the FEC's view, the Act's definition of "political committee" includes only those organizations that have as a "major purpose" the nomination or election of candidates. Cf. *Buckley* v. *Valeo*, 424 U. S., at 79. AIPAC, it added, was fundamentally an issue-oriented lobbying organization, not a campaign-related organization, and hence AIPAC fell outside the definition of a "political committee" regardless. App. 146. The FEC consequently dismissed respondents' complaint.

Respondents filed a petition in Federal District Court seeking review of the FEC's determination dismissing their complaint. See §§ 437g(a)(8)(A), 437g(a)(8)(C). The District Court granted summary judgment for the FEC, and a divided panel of the Court of Appeals affirmed. 66 F. 3d 348 (CADC 1995). The en banc Court of Appeals reversed, however, on the ground that the FEC's "major purpose" test improperly interpreted the Act's definition of a "political committee." 101 F. 3d 731 (CADC 1997). We granted the FEC's petition for certiorari, which contained the following two questions:

> "1. Whether respondents had standing to challenge the Federal Election Commission's decision not to bring an enforcement action in this case.
>
> "2. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has its major purpose the nomination or election of candidates, is a 'political committee' within the meaning of the [Act]." Brief for Petitioner I.

We shall answer the first of these questions, but not the second.

II

The Solicitor General argues that respondents lack standing to challenge the FEC's decision not to proceed against AIPAC. He claims that they have failed to satisfy the "prudential" standing requirements upon which this Court has insisted. See, *e. g., National Credit Union Admin.* v. *First Nat. Bank & Trust Co.*, 522 U. S. 479, 488 (1998) *(NCUA); Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970) *(Data Processing)*. He adds that respondents have not shown that they "suffe[r] injury in fact," that their injury is "fairly traceable" to the FEC's decision, or that a judicial decision in their favor would "redres[s]" the injury. *E. g., Bennett* v. *Spear*, 520 U. S. 154, 162 (1997) (internal quotation marks omitted); *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). In his view, respondents' District Court petition consequently failed to meet Article III's demand for a "case" or "controversy."

We do not agree with the FEC's "prudential standing" claim. Congress has specifically provided in FECA that "[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission." § 437g(a)(1). It has added that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in district court seeking review of that dismissal. § 437g(a)(8)(A). History associates the word "aggrieved" with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940); *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994 (CADC 1966) (Burger, J.); *Associated Industries of New York State* v. *Ickes*, 134 F. 2d 694 (CA2 1943) (Frank, J.). Cf. Administrative Procedure Act, 5 U. S. C. § 702 (stating that those "suf-

fering legal wrong" or "adversely affected or aggrieved . . . within the meaning of a relevant statute" may seek judicial review of agency action).

Moreover, prudential standing is satisfied when the injury asserted by a plaintiff "'arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question.'" *NCUA*, *supra*, at 488 (quoting *Data Processing*, *supra*, at 153). The injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address. *Buckley*, *supra*, at 66–67 ("political committees" must disclose contributors and disbursements to help voters understand who provides which candidates with financial support). We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees.

Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit. Consequently, respondents satisfy "prudential" standing requirements. Cf. *Raines* v. *Byrd*, 521 U. S. 811, 820, n. 3 (1997) (explicit grant of authority to bring suit "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch").

Nor do we agree with the FEC or the dissent that Congress lacks the constitutional power to authorize federal courts to adjudicate this lawsuit. Article III, of course, limits Congress' grant of judicial power to "cases" or "controversies." That limitation means that respondents must show, among other things, an "injury in fact"—a requirement that helps assure that courts will not "pass upon . . . abstract, intellectual problems," but adjudicate "concrete, living contest[s] between adversaries." *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (Frankfurter, J., dissenting); see also *Bennett*,

supra, at 167; *Lujan*, *supra*, at 560–561. In our view, respondents here have suffered a genuine "injury in fact."

The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute. *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). See also *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 373–374 (1982) (deprivation of information about housing availability constitutes "specific injury" permitting standing).

The dissent refers to *United States* v. *Richardson*, 418 U. S. 166 (1974), a case in which a plaintiff sought information (details of Central Intelligence Agency (CIA) expenditures) to which, he said, the Constitution's Accounts Clause, Art. I, § 9, cl. 7, entitled him. The Court held that the plaintiff there lacked Article III standing. 418 U. S., at 179–180. The dissent says that *Richardson* and this case are "indistinguishable." *Post*, at 34. But as the parties' briefs suggest—for they do not mention *Richardson*—that case does not control the outcome here.

Richardson's plaintiff claimed that a statute permitting the CIA to keep its expenditures nonpublic violated the Ac-

counts Clause, which requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." 418 U. S., at 167–169. The Court held that the plaintiff lacked standing because there was "no 'logical nexus' between the [plaintiff's] asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the [CIA's] expenditures." *Id.*, at 175; see also *id.*, at 174 (quoting *Flast* v. *Cohen*, 392 U. S. 83, 102 (1968), for the proposition that in "taxpayer standing" cases, there must be "'a logical nexus between the status asserted and the claim sought to be adjudicated'").

In this case, however, the "logical nexus" inquiry is not relevant. Here, there is no constitutional provision requiring the demonstration of the "nexus" the Court believed must be shown in *Richardson* and *Flast*. Rather, there is a statute which, as we previously pointed out, *supra*, at 19–20, does seek to protect individuals such as respondents from the kind of harm they say they have suffered, *i. e.*, failing to receive particular information about campaign-related activities. Cf. *Richardson*, 418 U. S., at 178, n. 11.

The fact that the Court in *Richardson* focused upon taxpayer standing, *id.*, at 171–178, not voter standing, places that case at still a greater distance from the case before us. We are not suggesting, as the dissent implies, *post*, at 32–34, that *Richardson* would have come out differently if only the plaintiff had asserted his standing to sue as a voter, rather than as a taxpayer. Faced with such an assertion, the *Richardson* Court would simply have had to consider whether "the Framers . . . ever imagined that *general directives* [of the Constitution] . . . would be subject to enforcement by an individual citizen." 418 U. S., at 178, n. 11 (emphasis added). But since that answer (like the answer to whether there was taxpayer standing in *Richardson*) would have rested in significant part upon the Court's view of the Accounts Clause, it still would not control our answer in this case. All this is

to say that the legal logic which critically determined *Richardson*'s outcome is beside the point here.

The FEC's strongest argument is its contention that this lawsuit involves only a "generalized grievance." (Indeed, if *Richardson* is relevant at all, it is because of its broad discussion of *this* matter, see *id.*, at 176–178, not its basic rationale.) The FEC points out that respondents' asserted harm (their failure to obtain information) is one which is "'shared in substantially equal measure by all or a large class of citizens.'" Brief for Petitioner 28 (quoting *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975)). This Court, the FEC adds, has often said that "generalized grievance[s]" are not the kinds of harms that confer standing. Brief for Petitioner 28; see also *Lujan*, 504 U. S., at 573–574; *Allen* v. *Wright*, 468 U. S. 737, 755–756 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 475–479 (1982); *Richardson*, *supra*, at 176–178; *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 487 (1923); *Ex parte Levitt*, 302 U. S. 633, 634 (1937) *(per curiam)*. Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance. *Warth*, *supra*, at 500; *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 222 (1974); *Richardson*, 418 U. S., at 179; *id.*, at 188–189 (Powell, J., concurring); see also *Flast*, *supra*, at 131 (Harlan, J., dissenting).

The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the "common concern for obedience to law." *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295, 303 (1940); see also *Allen*, *supra*, at 754; *Schlesinger*, *supra*, at 217. Cf. *Lujan*, *supra*, at 572–578 (injury to interest in seeing that certain procedures are fol-

lowed not normally sufficient by itself to confer standing); *Frothingham, supra,* at 488 (party may not merely assert that "he suffers in some indefinite way in common with people generally"); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125 (1940) (plaintiffs lack standing because they have failed to show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"). The abstract nature of the harm—for example, injury to the interest in seeing that the law is obeyed—deprives the case of the concrete specificity that characterized those controversies which were "the traditional concern of the courts at Westminster," *Coleman,* 307 U. S., at 460 (Frankfurter, J., dissenting); and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion. Cf. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937).

Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact." See *Public Citizen,* 491 U. S., at 449–450 ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [their] asserted injury"). Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. Cf. *Lujan, supra,* at 572; *Shaw* v. *Hunt,* 517 U. S. 899, 905 (1996). We conclude that, similarly, the informational injury at issue here, di-

rectly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Respondents have also satisfied the remaining two constitutional standing requirements. The harm asserted is "fairly traceable" to the FEC's decision about which respondents complain. Of course, as the FEC points out, Brief for Petitioner 29–31, it is possible that even had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require AIPAC to produce the information. Cf. App. to Pet. for Cert. 98a (deciding to exercise prosecutorial discretion, see *Heckler* v. *Chaney*, 470 U. S. 821 (1985), and "take no further action" on § 441b allegation against AIPAC). But that fact does not destroy Article III "causation," for we cannot know that the FEC would have exercised its prosecutorial discretion in this way. Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. See, *e. g.*, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (discussing presumption of reviewability of agency action); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971). If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

Finally, the FEC argues that we should deny respondents standing because this case involves an agency's decision not to undertake an enforcement action—an area generally not subject to judicial review. Brief for Petitioner 23, 29. In *Heckler*, this Court noted that agency enforcement decisions "ha[ve] traditionally been 'committed to agency discretion,'" and concluded that Congress did not intend to alter that tradition in enacting the APA. 470 U. S., at 832; cf. 5 U. S. C. § 701(a) (courts will not review agency actions where "statutes preclude judicial review," or where the "agency action is committed to agency discretion by law"). We deal here with a statute that explicitly indicates the contrary.

In sum, respondents, as voters, have satisfied both prudential and constitutional standing requirements. They may bring this petition for a declaration that the FEC's dismissal of their complaint was unlawful. See 2 U. S. C. § 437g(a)(8)(A).

III

The second question presented in the FEC's petition for certiorari is whether an organization that otherwise satisfies the Act's definition of a "political committee," and thus is subject to its disclosure requirements, nonetheless falls outside that definition because "its major purpose" is not "the nomination or election of candidates." The question arises because this Court, in *Buckley*, said:

> "To fulfill the purposes of the Act [the term 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U. S., at 79.

The Court reiterated in *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 252, n. 6 (1986):

> "[A]n entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control

> of a candidate or the major purpose of which is the nomination or election of a candidate.' "

The FEC here interpreted this language as narrowing the scope of the statutory term "political committee," wherever applied. And, as we have said, the FEC's General Counsel found that AIPAC fell outside that definition because the nomination or election of a candidate was not AIPAC's "major purpose." App. 146.

The en banc Court of Appeals disagreed with the FEC. It read this Court's narrowing construction of the term "political committee" as turning on the First Amendment problems presented by regulation of "independent expenditures" (*i. e.*, "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate," § 431(17)). 101 F. 3d, at 741. The Court of Appeals concluded that the language in this Court's prior decisions narrowing the definition of "political committee" did not apply where the special First Amendment "independent expenditure" problem did not exist. *Id.*, at 742–743.

The Solicitor General argues that this Court's narrowing definition of "political committee" applies not simply in the context of independent expenditures, but across the board. We cannot squarely address that matter, however, because of the unusual and complex circumstances in which this case arises. As we previously mentioned, *supra*, at 16–17, the FEC considered a related question, namely, whether AIPAC was exempt from § 441b's prohibition of corporate campaign expenditures, on the grounds that the so-called "expenditures" involved only AIPAC's communications with its members. The FEC held that the statute's exception to the "expenditure" definition for communications by a "membership organization" did not apply because many of the persons who belonged to AIPAC were not "members" as defined by FEC regulation. The FEC acknowledged, however, that this was a "close question." App. to Pet. for Cert. 98a; see also App.

144–146, 170–171. In particular, the FEC thought that many of the persons who belonged to AIPAC lacked sufficient control of the organization's policies to qualify as "members" for purposes of the Act.

A few months later, however, the Court of Appeals overturned the FEC's regulations defining "members," in part because that court thought the regulations defined membership organizations too narrowly in light of an organization's "First Amendment right to communicate with its 'members.'" *Chamber of Commerce* v. *Federal Election Comm'n*, 69 F. 3d 600, 605 (CADC 1995). The FEC has subsequently issued proposed rules redefining "members." Under these rules, it is quite possible that many of the persons who belong to AIPAC would be considered "members." If so, the communications here at issue apparently would not count as the kind of "expenditures" that can turn an organization into a "political committee," and AIPAC would fall outside the definition for that reason, rather than because of the "major purpose" test. 62 Fed. Reg. 66832 (1997) (proposed 11 CFR pts. 100 and 114).

The consequence for our consideration of Question Two now is that the FEC's new rules defining "membership organization" could significantly affect the interpretive issue presented by this question. If the Court of Appeals is right in saying that this Court's narrowing interpretation of "political committee" in *Buckley* reflected First Amendment concerns, 101 F. 3d, at 741, then whether the "membership communications" exception is interpreted broadly or narrowly could affect our evaluation of the Court of Appeals' claim that there is no constitutionally driven need to apply *Buckley*'s narrowing interpretation in this context. The scope of the "membership communications" exception could also affect our evaluation of the Solicitor General's related argument that First Amendment concerns (reflected in *Buckley*'s narrowing interpretation) are present whenever the Act requires disclosure. In any event, it is difficult to decide the

basic issue that Question Two presents without considering the special communicative nature of the "expenditures" here at issue, cf. *United States* v. *CIO*, 335 U. S. 106, 121 (1948) (describing relation between membership communications and constitutionally protected rights of association). And, a considered determination of the scope of the statutory exemption that Congress enacted to address membership communications would helpfully inform our consideration of the "major purpose" test.

The upshot, in our view, is that we should permit the FEC to address, in the first instance, the issue presented by Question Two. We can thereby take advantage of the relevant agency's expertise, by allowing it to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion. In our view, the FEC should proceed to determine whether or not AIPAC's expenditures qualify as "membership communications," and thereby fall outside the scope of "expenditures" that could qualify it as a "political committee." If the FEC decides that despite its new rules, the communications here do not qualify for this exception, then the lower courts, in reconsidering respondents' arguments, can still evaluate the significance of the communicative context in which the case arises. If, on the other hand, the FEC decides that AIPAC's activities fall within the "membership communications" exception, the matter will become moot.

For these reasons, 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 SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforce-

ment of the law against a third party. Despite its liberality, the Administrative Procedure Act does not allow such suits, since enforcement action is traditionally deemed "committed to agency discretion by law." 5 U. S. C. § 701(a)(2); *Heckler* v. *Chaney*, 470 U. S. 821, 827–835 (1985). If provisions such as the present one were commonplace, the role of the Executive Branch in our system of separated and equilibrated powers would be greatly reduced, and that of the Judiciary greatly expanded.

Because this provision is so extraordinary, we should be particularly careful not to expand it beyond its fair meaning. In my view the Court's opinion does that. Indeed, it expands the meaning beyond what the Constitution permits.

I

It is clear that the Federal Election Campaign Act of 1971 (FECA or Act) does not intend that *all* persons filing complaints with the Federal Election Commission have the right to seek judicial review of the rejection of their complaints. This is evident from the fact that the Act permits a complaint to be filed by "[a]ny *person* who believes a violation of this Act . . . has occurred," 2 U. S. C. § 437g(a)(1) (emphasis added), but accords a right to judicial relief only to "[a]ny *party aggrieved by* an order of the Commission dismissing a complaint filed by such party," § 437g(a)(8)(A) (emphasis added). The interpretation that the Court gives the latter provision deprives it of almost all its limiting force. *Any voter* can sue to compel the agency to require registration of an entity as a political committee, even though the "aggrievement" consists of nothing more than the deprivation of access to information whose public availability would have been one of the consequences of registration.

This seems to me too much of a stretch. It should be borne in mind that the agency action complained of here is not the refusal to make available information in its possession that the Act requires to be disclosed. A person de-

manding provision of information that the law requires the agency to furnish—one demanding compliance with the Freedom of Information Act or the Federal Advisory Committee Act, for example—can reasonably be described as being "aggrieved" by the agency's refusal to provide it. What the respondents complain of in this suit, however, is not the refusal to provide information, but the refusal (for an allegedly improper reason) to commence an agency enforcement action against a third person. That refusal *itself* plainly does not render respondents "aggrieved" within the meaning of the Act, for in that case there would have been no reason for the Act to differentiate between "person" in subsection (a)(1) and "party aggrieved" in subsection (a)(8). Respondents claim that each of them is elevated to the special status of a "party aggrieved" by the fact that the requested enforcement action (if it was successful) would have had the effect, among others, of placing certain information in the agency's possession, where respondents, along with everyone else in the world, would have had access to it. It seems to me most unlikely that the failure to produce that effect—*both* a secondary consequence of what respondents immediately seek, *and* a consequence that affects respondents no more and with no greater particularity than it affects virtually the entire population—would have been meant to set apart each respondent as a "party aggrieved" (as opposed to just a rejected complainant) within the meaning of the statute.

This conclusion is strengthened by the fact that this citizen-suit provision was enacted two years after this Court's decision in *United States* v. *Richardson*, 418 U. S. 166 (1974), which, as I shall discuss at greater length below, gave Congress every reason to believe that a voter's interest in information helpful to his exercise of the franchise was *constitutionally inadequate* to confer standing. *Richardson* had said that a plaintiff's complaint that the Government was unlawfully depriving him of information he needed to

"properly fulfill his obligations as a member of the electorate in voting" was "surely the kind of a generalized grievance" that does not state an Article III case or controversy. *Id.*, at 176.

And finally, a narrower reading of "party aggrieved" is supported by the doctrine of constitutional doubt, which counsels us to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions. See *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As I proceed to discuss, it is my view that the Court's entertainment of the present suit violates Article III. Even if one disagrees with that judgment, however, it is clear from *Richardson* that the question is a close one, so that the statute ought not be interpreted to present it.

II

In *Richardson*, we dismissed for lack of standing a suit whose "aggrievement" was precisely the "aggrievement" respondents assert here: the Government's unlawful refusal to place information within the public domain. The only difference, in fact, is that the aggrievement there was more direct, since the Government already had the information within its possession, whereas here respondents seek enforcement action that will bring information within the Government's possession and *then* require the information to be made public. The plaintiff in *Richardson* challenged the Government's failure to disclose the expenditures of the Central Intelligence Agency (CIA), in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a claim was a nonjusticiable "generalized grievance" because "the impact on [plaintiff] is plainly undif-

ferentiated and common to all members of the public." 418 U. S., at 176–177 (internal quotation marks and citations omitted).

It was alleged in *Richardson* that the Government had denied a right conferred by the Constitution, whereas respondents here assert a right conferred by statute—but of course "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 576 (1992). The Court today distinguishes *Richardson* on a different basis—a basis that reduces it from a landmark constitutional holding to a curio. According to the Court, "*Richardson* focused upon taxpayer standing, . . . not voter standing." *Ante*, at 22. In addition to being a silly distinction, given the weighty governmental purpose underlying the "generalized grievance" prohibition—viz., to avoid "something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts," 418 U. S., at 179—this is also a distinction that the Court in *Richardson* went out of its way explicitly to eliminate. It is true enough that the narrow question presented in *Richardson* was "'[w]hether a federal taxpayer has standing,'" *id.*, at 167, n. 1. But the *Richardson* Court did not hold only, as the Court today suggests, that the plaintiff failed to qualify for the exception to the rule of no taxpayer standing established by the "logical nexus" test of *Flast* v. *Cohen*, 392 U. S. 83 (1968).* The plaintiff's complaint in *Richardson* had also alleged that he was "'a member of the electorate,'" 418 U. S., at 167, n. 1, and he asserted injury in that capacity as well.

*That holding was inescapable since, as the Court made clear in another case handed down the same day, "the *Flast* nexus test is not applicable where the taxing and spending power is not challenged" (as in *Richardson* it was not). *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 225, n. 15 (1974).

The *Richardson* opinion treated that as fairly included within the taxpayer-standing question, or at least as plainly indistinguishable from it:

> "The respondent's claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, *nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.*
>
> "*This is surely the kind of a generalized grievance described in both Frothingham* and *Flast* since the impact on him is plainly undifferentiated and common to all members of the public." *Id.*, at 176–177 (citations and internal quotation marks omitted) (emphasis added).

If *Richardson* left voter standing unaffected, one must marvel at the unaccustomed ineptitude of the American Civil Liberties Union Foundation, which litigated *Richardson*, in not immediately refiling with an explicit voter-standing allegation. Fairly read, and applying a fair understanding of its important purposes, *Richardson* is indistinguishable from the present case.

The Court's opinion asserts that our language disapproving generalized grievances "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature." *Ante*, at 23. "Often," the Court says, "the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Ante*, at 24. If that is so—if concrete generalized grievances (like concrete particularized grievances) are OK, and abstract generalized grievances (like abstract particularized grievances) are bad—one must wonder why we ever *developed* the superfluous distinction between generalized and particularized grievances at all. But of course the Court is

wrong to think that generalized grievances have only concerned us when they are abstract. One need go no further than *Richardson* to prove that—unless the Court believes that deprivation of information is an abstract injury, in which event this case could be disposed of on that much broader ground.

What is noticeably lacking in the Court's discussion of our generalized-grievance jurisprudence is all reference to two words that have figured in it prominently: "particularized" and "undifferentiated." See *Richardson*, *supra*, at 177; *Lujan*, 504 U. S., at 560, and n. 1. "Particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id.*, at 560, n. 1. If the effect is "undifferentiated and common to all members of the public," *Richardson*, *supra*, at 177 (internal quotation marks and citations omitted), the plaintiff has a "generalized grievance" that must be pursued by political, rather than judicial, means. These terms explain why it is a gross oversimplification to reduce the concept of a generalized grievance to nothing more than "the fact that [the grievance] is widely shared," *ante*, at 25, thereby enabling the concept to be dismissed as a standing principle by such examples as "large numbers of individuals suffer[ing] the same common-law injury (say, a widespread mass tort), or . . . large numbers of voters suffer[ing] interference with voting rights conferred by law," *ante*, at 24. The exemplified injuries are widely shared, to be sure, but each individual suffers a particularized and differentiated harm. One tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are *different* arms. One voter suffers the deprivation of *his* franchise, another the deprivation of *hers*. With the generalized grievance, on the other hand, the injury or deprivation is not only widely shared but it is *undifferentiated*. The harm caused to Mr. Richardson by the alleged disregard of the Statement-of-Accounts Clause was precisely the same as the harm caused to everyone else: unavailability of a de-

scription of CIA expenditures. Just as the (more indirect) harm caused to Mr. Akins by the allegedly unlawful failure to enforce FECA is precisely the same as the harm caused to everyone else: unavailability of a description of AIPAC's activities.

The Constitution's line of demarcation between the Executive power and the judicial power presupposes a common understanding of the type of interest needed to sustain a "case or controversy" against the Executive in the courts. A system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts, rather than the President, are given the primary responsibility to "take Care that the Laws be faithfully executed," Art. II, §3. We do not have such a system because the common understanding of the interest necessary to sustain suit has included the requirement, affirmed in *Richardson*, that the complained-of injury be particularized and differentiated, rather than common to all the electorate. When the Executive can be directed by the courts, at the instance of any voter, to remedy a deprivation that affects the entire electorate in precisely the same way—and particularly when that deprivation (here, the unavailability of information) is one inseverable part of a larger enforcement scheme—there has occurred a shift of political responsibility to a branch designed not to protect the public at large but to protect individual rights. "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty . . . ." *Lujan*, *supra*, at 577. If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper.

This is not the system we have had, and is not the system we should desire.

* * *

Because this statute should not be interpreted to confer upon the entire electorate the power to invoke judicial direction of prosecutions, and because if it is so interpreted the statute unconstitutionally transfers from the Executive to the courts the responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, I respectfully dissent.

Syllabus

UNITED STATES *v.* BEGGERLY ET AL.

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

No. 97–731. Argued April 27, 1998—Decided June 8, 1998

In 1979, the United States sued respondents and others to quiet title to land it sought for a federal park, contending that respondents did not have clear title because the Government had never patented the disputed land after acquiring it as part of the Louisiana Purchase. Government officials searched public land records during discovery, but reported to respondents that they found no proof of a grant to a private landowner. A 1982 settlement agreement quieted title in the Government's favor in return for a payment to respondents. In 1994, respondents sued to set aside the settlement agreement and obtain damages, claiming that they had evidence showing that the land had been granted to a private owner before the Louisiana Purchase, but the District Court concluded that it had no jurisdiction to hear the case. The Fifth Circuit reversed, finding two jurisdictional bases: (1) the suit was an "independent action" to set aside the settlement under Federal Rule of Civil Procedure 60(b); and (2) the Quiet Title Act (QTA or Act). In reaching the second conclusion, the court found that the QTA's 12-year statute of limitations was subject to equitable tolling and therefore suit was not barred by the fact that respondents had known about the Government's claim since 1979. The court then vacated the settlement agreement and instructed the District Court to quiet title in respondents' favor.

Held: The Fifth Circuit had no jurisdiction over respondents' suit. Pp. 42–49.

(a) Rule 60(b)'s history and language are inconsistent with the Government's position that an "independent action" to set aside a judgment requires an independent source of jurisdiction. The original Rule 60(b) established a new system to govern requests to reopen judgments. Because it was unclear whether that Rule provided the exclusive means for obtaining postjudgment relief, the Rule was amended in 1946 to clarify that nearly all of the old forms of obtaining relief from a judgment were abolished but that the "independent action" survived. However, this does not mean that the requirements for a meritorious independent action have been met here. Such actions should be available only to prevent a grave miscarriage of justice. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 244. Respondents' allegation that the United States failed to thoroughly search its records and make

full disclosure to the District Court regarding the land grant obviously does not approach this demanding standard. Pp. 42–47.

(b) Equitable tolling is not available in a QTA suit. Such tolling is not permissible where it is inconsistent with the relevant statute's text. The QTA's express 12-year statute of limitations runs from the date the plaintiff or his predecessor in interest "knew or should have known" of the United States' claim. 28 U. S. C. § 2409(g). Thus, the Act has already effectively allowed for equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96. Given this fact and the QTA's unusually generous limitations period, extension of the statutory period would be unwarranted. Pp. 47–49.

114 F. 3d 484, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 49.

Paul R. Q. Wolfson argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Deputy Solicitor General Schiffer*, *Deputy Solicitor General Kneedler*, *Martin W. Matzen*, *William B. Lazarus*, *John D. Leshy*, and *Margaret P. Fondry*.

Ernest G. Taylor, Jr., argued the cause for respondents. With him on the brief were *Robert M. Arentson, Jr.*, and *Nancie G. Marzulla*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979, the United States brought a quiet title action (the *Adams* litigation) in the Southern District of Mississippi against respondents and nearly 200 other defendants. On the eve of trial, the Government and respondents entered into a settlement whereby title to the disputed land was quieted in favor of the United States in return for a payment of $208,175.87. Judgment was entered based on this settlement agreement. In 1994, some 12 years after that judgment, respondents sued in the District Court to set aside the settlement agreement and obtain a damages award for the disputed land. Their claims for relief were based on the

court's ancillary jurisdiction, relating back to the *Adams* litigation, and on the Quiet Title Act (QTA). 28 U. S. C. § 2409a. We hold that respondents were not entitled to relief on either of these grounds.

The land in dispute between the United States and respondents is located on Horn Island. Situated in the Gulf of Mexico approximately 13 miles southwest of Pascagoula, Horn Island is currently within the State of Mississippi. It was, at various times during the late 18th and early 19th centuries, controlled by France, Britain, and Spain. It is part of the territory that came under the control of the United States as a result of the Louisiana Purchase of 1803. In 1950, Clark Beggerly, respondents' predecessor-in-interest, purchased color of title to two tracts of land on Horn Island at a tax sale in Jackson County. Beggerly paid $51.20 for one 626-acre tract. He and a friend also purchased a second tract for $31.25. Beggerly retained 103 acres upon a later division of this second tract.

In 1971, Congress enacted legislation authorizing the Department of the Interior to create the Gulf Islands National Seashore, a federal park on lands that include Horn Island. 16 U. S. C. § 459h. The legislation authorized the Secretary of the Interior to acquire privately owned lands within the proposed park's boundaries. § 459h–1. The National Park Service (NPS) began negotiating with respondents to purchase the land. Before any deal could be completed, however, the NPS learned that the United States Government had never patented the property. Believing that this meant that respondents could not have had clear title, the NPS backed out of the proposed deal.

During discovery in the *Adams* litigation, respondents sought proof of their title to the land. Government officials searched public land records and told respondents that they had found nothing proving that any part of Horn Island had ever been granted to a private landowner. Even after the settlement in the *Adams* litigation, however, respondents

continued to search for evidence of a land patent that supported their claim of title. In 1991 they hired a genealogical record specialist to conduct research in the National Archives in Washington. The specialist found materials that, according to her, showed that on August 1, 1781, Bernardo de Galvez, then the Governor General of Spanish Louisiana, granted Horn Island to Catarina Boudreau. If the land had been granted to a private party prior to 1803, title presumably could not have passed to the United States as a result of the Louisiana Purchase. Respondents believed that the Boudreau grant proved that their claim to the disputed land was superior to that of the United States.

Armed with this new information, respondents filed a complaint in the District Court on June 1, 1994. They asked the court to set aside the 1982 settlement agreement and award them damages of "not less than $14,500 per acre" of the disputed land. App. 26. The District Court concluded that it was without jurisdiction to hear respondents' suit and dismissed the complaint.

The Court of Appeals reversed. It concluded that there were two jurisdictional bases for the suit. First, the suit satisfied the elements of an "independent action," as the term is used in Federal Rule of Civil Procedure 60(b). According to the Court of Appeals, those elements are:

> "(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law." 114 F. 3d 484, 487 (CA5 1997).

In its view, the settlement agreement could therefore be set aside. Second, the Court of Appeals concluded that the QTA conferred jurisdiction. The QTA includes a 12-year statute

of limitations, which begins to run from the date the plaintiff knows or should have known about the claim of the United States. 28 U. S. C. § 2409a(g). The Court of Appeals noted that respondents knew about the Government's claim for more than 12 years before it filed this suit, but concluded that the 12-year statute was subject to equitable tolling and should be tolled in this case.

Satisfied as to its jurisdiction, the Court of Appeals then addressed the merits. Relying on the Boudreau grant, the court concluded that the "United States has no legitimate claim to the land [and that] the validity of the Beggerlys' title is a legal certainty." 114 F. 3d, at 489. It therefore vacated the settlement agreement and remanded the case to the District Court with instructions that it enter judgment quieting title in favor of respondents. One judge dissented. We granted certiorari, 522 U. S. 1038 (1998), and now reverse.

The Government's primary contention is that the Court of Appeals erred in concluding that it had jurisdiction over respondents' 1994 suit. It first attacks the lower court's conclusion that jurisdiction was established because the suit was an "independent action" within the meaning of Rule 60(b). The Government argues that an "independent action" must be supported by an independent source of jurisdiction, and, in the case of a suit against the United States, an independent waiver of sovereign immunity. Whereas the District Court had jurisdiction over the original *Adams* litigation because the United States was the plaintiff, 28 U. S. C. § 1345, there was no statutory basis for the Beggerlys' 1994 action, and the District Court was therefore correct to have dismissed it.

We think the Government's position is inconsistent with the history and language of Rule 60(b). Prior to the 1937 adoption of the Federal Rules of Civil Procedure, the availability of relief from a judgment or order turned on whether the court was still in the same "term" in which the challenged judgment was entered. If it was, the judge "had ple-

nary power . . . to modify his judgment for error of fact or law or even revoke it altogether." *Zimmern* v. *United States*, 298 U. S. 167, 169–170 (1936). If the term had expired, resort had to be made to a handful of writs, the precise contours of which were "shrouded in ancient lore and mystery." Advisory Committee's Notes on 1946 Amdt. to Fed. Rule Civ. Proc. 60, 28 U. S. C. App., p. 787. The new Federal Rules of Civil Procedure did away with the notion that the continuation or expiration of a term of court had any affect on a court's power. Fed. Rule Civ. Proc. 6(c), rescinded 1966. New Rule 60(b)[1] sought to establish a new system to govern requests to reopen judgments. The original Rule 60(b) provided:

> "(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified." Fed. Rule Civ. Proc. 60(b) (1940).

In the years following the adoption of the Rules, however, courts differed over whether the new Rule 60(b) provided the exclusive means for obtaining postjudgment relief, or whether the writs that had been used prior to the adoption of

[1] Rule 60(a) dealt then, as it deals now, with relief from clerical mistakes in judgments.

the Federal Rules still survived. This problem, along with several others, was addressed in the 1946 amendment to Rule 60(b). The 1946 amendment revised the Rule to read substantially as it reads now:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as pre-

scribed in these rules or by an independent action." Fed. Rule Civ. Proc. 60(b).

The new Rule thus made clear that nearly all of the old forms of obtaining relief from a judgment, *i. e.*, *coram nobis*, *coram vobis*, *audita querela*, bills of review, and bills in the nature of review, had been abolished. The revision made equally clear, however, that one of the old forms, *i. e.*, the "independent action,"[2] still survived. The Advisory Committee notes confirmed this, indicating that "[i]f the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." Advisory Committee's Notes, *supra*, at 787.

The "independent action" sounded in equity. While its precise contours are somewhat unclear, it appears to have been more broadly available than the more narrow writs that the 1946 amendment abolished. One case that exemplifies the category is *Pacific R. Co. of Mo.* v. *Missouri Pacific R. Co.*, 111 U. S. 505 (1884).[3]

In *Pacific* the underlying suit had resulted in a court decree foreclosing a mortgage on railroad property and ordering its sale. This Court enforced the decree and shortly thereafter the railroad company whose property had been foreclosed filed a bill to impeach for fraud the foreclosure decree that had just been affirmed. The bill alleged that the plaintiffs in the underlying suit had conspired with the attorney and directors of the plaintiff in the subsequent suit to ensure that the property would be forfeited. The plaintiff in the subsequent suit was a Missouri corporation, and it

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[2] This form of action was also referred to as an "original action."

[3] The authorities that the Advisory Committee cited in its notes accompanying the 1946 amendment to the Rule list *Pacific* as an example of this cause of action. Moore & Rogers, Federal Relief from Civil Judgments, 55 Yale L. J. 623, 656 (1946); 3 J. Moore & J. Friedman, Moore's Federal Practice 3257, n. 12 (1938).

named several other Missouri citizens as defendants in its bill seeking relief from the prior judgment.

When the matter reached this Court, we rejected the contention that the federal courts had no jurisdiction over the bill because the plaintiff and several of the defendants were from the same State. We first noted that there was no question as to the court's jurisdiction over the underlying suit, and then said:

> "On the question of jurisdiction the [subsequent] suit may be regarded as ancillary to the [prior] suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties . . . . The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court." *Id.*, at 522.

Even though there was no diversity, the Court relied on the underlying suit as the basis for jurisdiction and allowed the independent action to proceed. The Government is therefore wrong to suggest that an independent action brought in the same court as the original lawsuit requires an independent basis for jurisdiction.

This is not to say, however, that the requirements for a meritorious independent action have been met here. If relief may be obtained through an independent action in a case such as this, where the most that may be charged against the Government is a failure to furnish relevant information that would at best form the basis for a Rule 60(b)(3) motion, the strict 1-year time limit on such motions would be set at naught. Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 244 (1944).

Such a case was *Marshall* v. *Holmes,* 141 U. S. 589 (1891), in which the plaintiff alleged that judgment had been taken against her in the underlying action as a result of a forged document. The Court said:

> "According to the averments of the original petition for injunction . . . the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, laches or other fault upon the part of petitioner, [respondent] has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution." *Id.*, at 596.

The sense of these expressions is that, under the Rule, an independent action should be available only to prevent a grave miscarriage of justice. In this case, it should be obvious that respondents' allegations do not nearly approach this demanding standard. Respondents allege only that the United States failed to "thoroughly search its records and make full disclosure to the Court" regarding the Boudreau grant. App. 23. Whether such a claim might succeed under Rule 60(b)(3), we need not now decide; it surely would work no "grave miscarriage of justice," and perhaps no miscarriage of justice at all, to allow the judgment to stand. We therefore hold that the Court of Appeals erred in concluding that this was a sufficient basis to justify the reopening of the judgment in the *Adams* litigation.[4]

The Court of Appeals did not, however, merely reopen the *Adams* litigation. It also directed the District Court to quiet title to the property in respondents' favor. The Court of Appeals believed that the QTA, 28 U. S. C. § 2409a, provided jurisdiction to do this. The QTA permits "plaintiffs

[4] We therefore need not address the additional requirement that evidence of the Boudreau grant would have changed the outcome of the original action. See, *e. g., Pickford* v. *Talbott,* 225 U. S. 651, 657 (1912).

to name [the United States] as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest." *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 275–276 (1983). The QTA includes an express 12-year statute of limitations, which begins to run from the date upon which the plaintiff's cause of action accrued. An action under the QTA "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." § 2409a(g).

The Court of Appeals acknowledged that the Beggerlys had known about the Government's claim to the land since at least 1979, more than 12 years before they filed this action in 1994. It concluded that the suit was not barred, however, because the QTA's statute of limitations was subject to equitable tolling, and that, "in light of the diligence displayed by the [respondents] in seeking the truth and pursuing their rights," equity demanded that the statute be tolled in this case. 114 F. 3d, at 489. In our view, the Court of Appeals was wrong in deciding that equitable tolling is available in a QTA suit.

Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. *United States* v. *Brockamp*, 519 U. S. 347 (1997). Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff "knew or should have known of the claim of the United States," has already effectively allowed for equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96 (1990) ("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, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). Given this fact, and the unusually generous

nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted. This is particularly true given that the QTA deals with ownership of land. It is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge. Equitable tolling of the already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights, and we hold that it is incompatible with the Act.

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, concurring.

As the Court correctly observes, the text of the Quiet Title Act, 28 U. S. C. § 2409a(g), expressly allows equitable tolling by providing that the statute of limitations will not begin to run until the plaintiff or the plaintiff's predecessor "knew or should have known of the claim of the United States." Because the Beggerlys were aware of the Government's claim more than 12 years before they filed this action, the Court correctly holds that there is no basis for any additional equitable tolling in this case. We are not confronted with the question whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim. Those doctrines are distinct from equitable tolling, see 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (Supp. 1998); cf. *United States* v. *Locke*, 471 U. S. 84, 94, n. 10 (1985) (referring separately to estoppel and equitable tolling), and conceivably might

apply in such an unlikely hypothetical situation. The Court need not (and, therefore, properly does not) address that quite different type of case. Accordingly, I join the Court's opinion without reservation.

Syllabus

UNITED STATES *v.* BESTFOODS ET AL.

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

No. 97–454. Argued March 24, 1998—Decided June 8, 1998

The United States brought this action under § 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) against, among others, respondent CPC International Inc., the parent corporation of the defunct Ott Chemical Co. (Ott II), for the costs of cleaning up industrial waste generated by Ott II's chemical plant. Section 107(a)(2) authorizes suits against, among others, "any person who at the time of disposal of any hazardous substance owned or operated any facility." The trial focused on whether CPC, as a parent corporation, had "owned or operated" Ott II's plant within the meaning of § 107(a)(2). The District Court said that operator liability may attach to a parent corporation both indirectly, when the corporate veil can be pierced under state law, and directly, when the parent has exerted power or influence over its subsidiary by actively participating in, and exercising control over, the subsidiary's business during a period of hazardous waste disposal. Applying that test, the court held CPC liable because CPC had selected Ott II's board of directors and populated its executive ranks with CPC officials, and another CPC official had played a significant role in shaping Ott II's environmental compliance policy. The Sixth Circuit reversed. Although recognizing that a parent company might be held directly liable under § 107(a)(2) if it actually operated its subsidiary's facility in the stead of the subsidiary, or alongside of it as a joint venturer, that court refused to go further. Rejecting the District Court's analysis, the Sixth Circuit explained that a parent corporation's liability for operating a facility ostensibly operated by its subsidiary depends on whether the degree to which the parent controls the subsidiary and the extent and manner of its involvement with the facility amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary. Applying Michigan veil-piercing law, the court decided that CPC was not liable for controlling Ott II's actions, since the two corporations maintained separate personalities and CPC did not utilize the subsidiary form to perpetrate fraud or subvert justice.

Held:

1. When (but only when) the corporate veil may be pierced, a parent corporation may be charged with derivative CERCLA liability for its

subsidiary's actions in operating a polluting facility. It is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. CERCLA does not purport to reject this bedrock principle, and the Government has indeed made no claim that a corporate parent is liable as an owner or an operator under § 107(a)(2) simply because its subsidiary owns or operates a polluting facility. But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf. CERCLA does not purport to rewrite this well-settled rule, either, and against this venerable common-law backdrop, the congressional silence is audible. Cf. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267. CERCLA's failure to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that, to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law. *United States* v. *Texas*, 507 U. S. 529, 534. Pp. 61–64.

2. A corporate parent that actively participated in, and exercised control over, the operations of its subsidiary's facility may be held directly liable in its own right under § 107(a)(2) as an operator of the facility. Pp. 64–73.

(a) Derivative liability aside, CERCLA does not bar a parent corporation from direct liability for its own actions. Under the plain language of § 107(a)(2), any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution, and this is so even if that person is the parent corporation of the facility's owner. Because the statute does not define the term "operate," however, it is difficult to define actions sufficient to constitute direct parental "operation." In the organizational sense obviously intended by CERCLA, to "operate" a facility ordinarily means to direct the workings of, manage, or conduct the affairs of the facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. Pp. 64–67.

(b) The Sixth Circuit correctly rejected the direct liability analysis of the District Court, which mistakenly focused on the relationship between parent and subsidiary, and premised liability on little more than CPC's ownership of Ott II and its majority control over Ott II's board

of directors. Because direct liability for the parent's operation of the facility must be kept distinct from derivative liability for the subsidiary's operation of the facility, the analysis should instead have focused on the relationship between CPC and the facility itself, *i. e.*, on whether CPC "operated" the facility, as evidenced by its direct participation in the facility's activities. That error was compounded by the District Court's erroneous assumption that actions of the joint officers and directors were necessarily attributable to CPC, rather than Ott II, contrary to time-honored common-law principles. The District Court's focus on the relationship between parent and subsidiary (rather than parent and facility), combined with its automatic attribution of the actions of dual officers and directors to CPC, erroneously, even if unintentionally, treated CERCLA as though it displaced or fundamentally altered common-law standards of limited liability. The District Court's analysis created what is in essence a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability. Such a rule does not arise from congressional silence, and CERCLA's silence is dispositive. Pp. 67–70.

(c) Nonetheless, the Sixth Circuit erred in limiting direct liability under CERCLA to a parent's sole or joint venture operation, so as to eliminate any possible finding that CPC is liable as an operator on the facts of this case. The ordinary meaning of the word "operate" in the organizational sense is not limited to those two parental actions, but extends also to situations in which, *e. g.*, joint officers or directors conduct the affairs of the facility on behalf of the parent, or agents of the parent with no position in the subsidiary manage or direct activities at the subsidiary's facility. Norms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points, both for determining whether a dual officer or director has served the parent in conducting operations at the facility, and for distinguishing a parental officer's oversight of a subsidiary from his control over the operation of the subsidiary's facility. There is, in fact, some evidence that an agent of CPC alone engaged in activities at Ott II's plant that were eccentric under accepted norms of parental oversight of a subsidiary's facility: The District Court's opinion speaks of such an agent who played a conspicuous part in dealing with the toxic risks emanating from the plant's operation. The findings in this regard are enough to raise an issue of CPC's operation of the facility, though this Court draws no ultimate conclusion, leaving the issue for the lower courts to reevaluate and resolve in the first instance. Pp. 70–73.

113 F. 3d 572, vacated and remanded.

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

Counsel

Assistant Attorney General Schiffer argued the cause for the United States. With her on the briefs were *Solicitor General Waxman*, *Deputy Solicitor General Wallace*, *Jeffrey P. Minear*, *Martin W. Matzen*, *Michael J. McNulty*, and *Evelyn S. Ying*. *Frank J. Kelley*, Attorney General of Michigan, *Thomas L. Casey*, Solicitor General, and *Kathleen L. Cavanaugh* and *Robert P. Reichel*, Assistant Attorneys General, filed a brief for the Michigan Department of Environmental Quality, respondent under this Court's Rule 12.6, urging reversal.

Kenneth S. Geller argued the cause for respondents. With him on the briefs for respondent Bestfoods were *Donald M. Falk* and *J. Michael Smith*. *John D. Tully*, *John V. Byl*, and *Robert J. Jonker* filed briefs for respondents Aerojet-General Corp. et al.*

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*A brief of *amici curiae* urging reversal was filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Jocelyn F. Olson*, *Paschal O. Nwokocha*, and *Alan C. Williams*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Drew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Hardy Myers* of Oregon, *Jeffrey B. Pine* of Rhode Island, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw* of West Virginia, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Atlantic Legal Foundation by *Martin S. Kaufman* and *Douglas Foster;* for the American Forest & Paper Association et al. by *Donald B. Mitchell, Jr.*, and *John C. Chambers;* for Atlantic Richfield Co. et al. by *Michael J. Gallagher*, *Andrew M. Low*, and *Karl M. Tilleman;* for the National Association of Manufacturers et al. by *Bruce J. Ennis, Jr.*, *Paul M. Smith*, *Ann M. Kappler*, *Jan S. Amundson*, *Quentin Riegel*, *Robin S. Conrad*, and

JUSTICE SOUTER delivered the opinion of the Court.

The United States brought this action for the costs of cleaning up industrial waste generated by a chemical plant. The issue before us, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U. S. C. § 9601 *et seq.*, is whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. We answer no, unless the corporate veil may be pierced. But a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility.

I

In 1980, CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution. See *Exxon Corp.* v. *Hunt*, 475 U. S. 355, 358–359 (1986). "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814 (1994). If it satisfies certain statutory conditions, the United States may, for instance, use the "Hazardous Substance Superfund" to finance cleanup efforts, see 42 U. S. C. §§ 9601(11), 9604; 26 U. S. C. § 9507, which it may then replenish by suits brought under § 107 of the Act against, among others, "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U. S. C. § 9607(a)(2). So, those actually "responsible for any damage, environmental harm, or injury from chemical poi-

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Robert L. Graham; for the United States Business & Industrial Council by *David G. Palmer;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Thomas R. Mounteer.*

sons [may be tagged with] the cost of their actions," S. Rep. No. 96–848, p. 13 (1980).[1] The term "person" is defined in CERCLA to include corporations and other business organizations, see 42 U. S. C. § 9601(21), and the term "facility" enjoys a broad and detailed definition as well, see § 9601(9).[2] The phrase "owner or operator" is defined only by tautology, however, as "any person owning or operating" a facility, § 9601(20)(A)(ii), and it is this bit of circularity that prompts our review. Cf. *Exxon Corp.* v. *Hunt*, *supra*, at 363 (CERCLA, "unfortunately, is not a model of legislative draftsmanship").

II

In 1957, Ott Chemical Co. (Ott I) began manufacturing chemicals at a plant near Muskegon, Michigan, and its intentional and unintentional dumping of hazardous substances significantly polluted the soil and ground water at the site. In 1965, respondent CPC International Inc.[3] incorporated a wholly owned subsidiary to buy Ott I's assets in exchange for CPC stock. The new company, also dubbed Ott Chemical Co. (Ott II), continued chemical manufacturing at the site, and continued to pollute its surroundings. CPC kept the

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[1] "CERCLA . . . imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 7 (1989). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Id.*, at 21 (plurality opinion of Brennan, J.).

[2] "The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

[3] CPC has recently changed its name to Bestfoods. Consistently with the briefs and the opinions below, we use the name CPC herein.

managers of Ott I, including its founder, president, and principal shareholder, Arnold Ott, on board as officers of Ott II. Arnold Ott and several other Ott II officers and directors were also given positions at CPC, and they performed duties for both corporations.

In 1972, CPC sold Ott II to Story Chemical Company, which operated the Muskegon plant until its bankruptcy in 1977. Shortly thereafter, when respondent Michigan Department of Natural Resources (MDNR)[4] examined the site for environmental damage, it found the land littered with thousands of leaking and even exploding drums of waste, and the soil and water saturated with noxious chemicals. MDNR sought a buyer for the property who would be willing to contribute toward its cleanup, and after extensive negotiations, respondent Aerojet-General Corp. arranged for transfer of the site from the Story bankruptcy trustee in 1977. Aerojet created a wholly owned California subsidiary, Cordova Chemical Company (Cordova/California), to purchase the property, and Cordova/California in turn created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova/Michigan), which manufactured chemicals at the site until 1986.[5]

By 1981, the federal Environmental Protection Agency had undertaken to see the site cleaned up, and its long-term remedial plan called for expenditures well into the tens of millions of dollars. To recover some of that money, the

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[4] The powers and responsibilities of MDNR have since been transferred to the Michigan Department of Environmental Quality.

[5] Cordova/California and MDNR entered into a contract under which Cordova/California agreed to undertake certain cleanup actions, and MDNR agreed to share in the funding of those actions and to indemnify Cordova/California for various expenses. The Michigan Court of Appeals has held that this agreement requires MDNR to indemnify Aerojet and its Cordova subsidiaries for any CERCLA liability that they may incur in connection with their activities at the Muskegon facility. See *Cordova Chemical Co.* v. *MDNR*, 212 Mich. App. 144, 536 N. W. 2d 860 (1995), leave to appeal denied, 453 Mich. 901, 554 N. W. 2d 319 (1996).

United States filed this action under § 107 in 1989, naming five defendants as responsible parties: CPC, Aerojet, Cordova/California, Cordova/Michigan, and Arnold Ott.[6] (By that time, Ott I and Ott II were defunct.) After the parties (and MDNR) had launched a flurry of contribution claims, counterclaims, and cross-claims, the District Court consolidated the cases for trial in three phases: liability, remedy, and insurance coverage. So far, only the first phase has been completed; in 1991, the District Court held a 15-day bench trial on the issue of liability. Because the parties stipulated that the Muskegon plant was a "facility" within the meaning of 42 U. S. C. § 9601(9), that hazardous substances had been released at the facility, and that the United States had incurred reimbursable response costs to clean up the site, the trial focused on the issues of whether CPC and Aerojet, as the parent corporations of Ott II and the Cordova companies, had "owned or operated" the facility within the meaning of § 107(a)(2).

The District Court said that operator liability may attach to a parent corporation both directly, when the parent itself operates the facility, and indirectly, when the corporate veil can be pierced under state law. See *CPC Int'l, Inc.* v. *Aerojet-General Corp.*, 777 F. Supp. 549, 572 (WD Mich. 1991). The court explained that, while CERCLA imposes direct liability in situations in which the corporate veil cannot be pierced under traditional concepts of corporate law, "the statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law." *Id.*, at 573. As the District Court put it:

> "a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business

[6] Arnold Ott settled out of court with the Government on the eve of trial.

> during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates 'operator' liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not." *Ibid.*

Applying that test to the facts of this case, the District Court held both CPC and Aerojet liable under § 107(a)(2) as operators. As to CPC, the court found it particularly telling that CPC selected Ott II's board of directors and populated its executive ranks with CPC officials, and that a CPC official, G. R. D. Williams, played a significant role in shaping Ott II's environmental compliance policy.

After a divided panel of the Court of Appeals for the Sixth Circuit reversed in part, *United States* v. *Cordova/Michigan*, 59 F. 3d 584, that court granted rehearing en banc and vacated the panel decision, 67 F. 3d 586 (1995). This time, 7 judges to 6, the court again reversed the District Court in part. 113 F. 3d 572 (1997). The majority remarked on the possibility that a parent company might be held directly liable as an operator of a facility owned by its subsidiary: "At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary." *Id.*, at 579. But the court refused to go any further and rejected the District Court's analysis with the explanation:

> "[W]here a parent corporation is sought to be held liable as an operator pursuant to 42 U. S. C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil [under state law] are met. In other words, . . . whether the parent will be liable as an operator depends

> upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary." *Id.*, at 580.

Applying Michigan veil-piercing law, the Court of Appeals decided that neither CPC nor Aerojet[7] was liable for controlling the actions of its subsidiaries, since the parent and subsidiary corporations maintained separate personalities and the parents did not utilize the subsidiary corporate form to perpetrate fraud or subvert justice.

We granted certiorari, 522 U. S. 1024 (1997), to resolve a conflict among the Circuits over the extent to which parent corporations may be held liable under CERCLA for operating facilities ostensibly under the control of their subsidiaries.[8] We now vacate and remand.

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[7] Unlike CPC, Aerojet does not base its defense in this Court on a claim that, absent unusual circumstances, a parent company can be held liable as an operator of a facility only by piercing the corporate veil. Rather, Aerojet denies liability by claiming that (1) neither it nor its subsidiaries disposed of hazardous substances during their operation of the facility, see Brief for Respondents Aerojet-General Corp. et al. 27–36, and (2) it is entitled to a third-party defense under § 107(b)(3) of CERCLA, 42 U. S. C. § 9607(b)(3), see Brief for Respondents Aerojet-General Corp. et al. 38–46. The Court of Appeals expressed some measure of agreement with Aerojet on these points and instructed the District Court to consider them on remand. See 113 F. 3d, at 577, 583. These issues are not before this Court.

[8] Compare *United States* v. *Cordova/Michigan*, 113 F. 3d 572, 580 (CA6 1997) (case below) (parent may be held liable for controlling affairs of subsidiary only when the corporate veil can be pierced), and *Joslyn Mfg. Co.* v. *T. L. James & Co.*, 893 F. 2d 80, 82–83 (CA5 1990) (same), cert. denied, 498 U. S. 1108 (1991) (but cf. *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F. 2d 327, 330 (CA5) (parent companies that actually participate in the wrongful conduct cannot hide behind the corporate veil, and can be held directly liable without veil piercing), cert. denied, 502 U. S. 1004 (1991)), with *United States* v. *Kayser-Roth Corp.*, 910 F. 2d 24, 27

III

It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L. J. 193 (1929) (hereinafter Douglas); see also, *e. g.*, *Buechner* v. *Farbenfabriken Bayer Aktiengesellschaft*, 38 Del. Ch. 490, 494, 154 A. 2d 684, 687 (1959); *Berkey* v. *Third Ave. R. Co.*, 244 N. Y. 84, 85, 155 N. E. 58 (1926) (Cardozo, J.); 1 W. Fletcher, Cyclopedia of Law of Private Corporations § 33, p. 568 (rev. ed. 1990) ("Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate"); Horton, Liability of Corporation for Torts of Subsidiary, 7 A. L. R. 3d 1343, 1349 (1966) ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary"); cf. *Anderson* v. *Abbott*, 321 U. S. 349, 362 (1944) ("Limited liability is the rule, not the exception"); *Burnet* v. *Clark*, 287 U. S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities"). Thus it is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability

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(CA1 1990) (parent actively involved in the affairs of its subsidiary may be held directly liable as an operator of the facility, regardless of whether the corporate veil can be pierced), cert. denied, 498 U. S. 1084 (1991), *Schiavone* v. *Pearce*, 79 F. 3d 248, 254–255 (CA2 1996) (same), *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F. 3d 1209, 1220–1225 (CA3 1993) (same), *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F. 2d 1107, 1110 (CA11 1993) (same), and *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F. 2d 837, 842 (CA4) (parent having authority to control subsidiary is liable as an operator, even if it did not exercise that authority), cert. denied, 506 U. S. 940 (1992).

beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal." Douglas 196 (footnotes omitted). Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, see, *e. g.*, Note, Liability of Parent Corporations for Hazardous Waste Cleanup and Damages, 99 Harv. L. Rev. 986 (1986), nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible. Cf. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979) ("[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"). The Government has indeed made no claim that a corporate parent is liable as an owner or an operator under § 107 simply because its subsidiary is subject to liability for owning or operating a polluting facility.

But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf. See, *e. g.*, *Anderson* v. *Abbott*, *supra*, at 362 ("[T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied"); *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic and Commerce Assn.*, 247 U. S. 490, 501 (1918) (principles of corporate separateness "have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose . . . of controlling a subsidiary company so

that it may be used as a mere agency or instrumentality of the owning company"); P. Blumberg, Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations §§ 6.01–6.06 (1987 and 1996 Supp.) (discussing the law of veil piercing in the parent-subsidiary context). Nothing in CERCLA purports to rewrite this well-settled rule, either. CERCLA is thus like many another congressional enactment in giving no indication that "the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," *Burks* v. *Lasker*, 441 U. S. 471, 478 (1979), and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law," *United States* v. *Texas*, 507 U. S. 529, 534 (1993) (internal quotation marks omitted). The Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced,[9] may a parent corporation

[9] There is significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing. Compare, *e. g.*, 113 F. 3d, at 584–585 (Merritt, J., concurring in part and dissenting in part) (arguing that federal common law should apply), *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F. 3d, at 1225 ("[G]iven the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil-piercing is justified under CERCLA"), and Aronovsky & Fuller, Liability of Parent Corporations for Hazardous Substance Releases under CERCLA, 24 U. S. F. L. Rev. 421, 455 (1990) ("CERCLA enforcement should not be hampered by subordination of its goals to varying state law rules of alter ego theory"), with, *e. g.*, 113 F. 3d, at 580 ("Whether the circumstances in this case warrant a piercing of the corporate veil will be determined by state law"), and Dennis, Liability of Officers, Directors and Stockholders under CERCLA: The Case for Adopting State Law, 36 Vill. L. Rev. 1367 (1991) (arguing that state law should apply). Cf. *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 33

be charged with derivative CERCLA liability for its subsidiary's actions.[10]

IV

A

If the Act rested liability entirely on ownership of a polluting facility, this opinion might end here; but CERCLA liability may turn on operation as well as ownership, and nothing in the statute's terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary. As Justice (then-Professor) Douglas noted almost 70 years ago, derivative liability cases are to be distinguished from those in which "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management" and "the parent is directly a participant in the wrong complained of." Douglas 207, 208.[11]

(Mass. 1987) (noting that, since "federal common law draws upon state law for guidance, . . . the choice between state and federal [veil-piercing law] may in many cases present questions of academic interest, but little practical significance"). But cf. Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982) (arguing that federal common law need not mirror state law, because "federal common law should look to federal statutory policy rather than to state corporate law when deciding whether to pierce the corporate veil"). Since none of the parties challenges the Sixth Circuit's holding that CPC and Aerojet incurred no derivative liability, the question is not presented in this case, and we do not address it further.

[10] Some courts and commentators have suggested that this indirect, veil-piercing approach can subject a parent corporation to liability only as an owner, and not as an operator. See, *e. g.*, *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, *supra*, at 1220; Oswald, Bifurcation of the Owner and Operator Analysis under CERCLA, 72 Wash. U. L. Q. 223, 281–282 (1994) (hereinafter Oswald). We think it is otherwise, however. If a subsidiary that operates, but does not own, a facility is so pervasively controlled by its parent for a sufficiently improper purpose to warrant veil piercing, the parent may be held derivatively liable for the subsidiary's acts as an operator.

[11] While this article was written together with Professor Shanks, the passages quoted in this opinion were written solely by Justice Douglas. See Douglas 193, n. *.

In such instances, the parent is directly liable for its own actions. See H. Henn & J. Alexander, Laws of Corporations 347 (3d ed. 1983) (hereinafter Henn & Alexander) ("Apart from corporation law principles, a shareholder, whether a natural person or a corporation, may be liable on the ground that such shareholder's activity resulted in the liability"). The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent "corporation is [itself] responsible for the wrongs committed by its agents in the course of its business," *Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 395 (1922), and whereas the rules of veil piercing limit derivative liability for the actions of another corporation, CERCLA's "operator" provision is concerned primarily with direct liability for one's own actions. See, *e. g.*, *Sidney S. Arst Co.* v. *Pipefitters Welfare Ed. Fund*, 25 F. 3d 417, 420 (CA7 1994) ("[T]he direct, personal liability provided by CERCLA is distinct from the derivative liability that results from piercing the corporate veil" (internal quotation marks omitted)). It is this direct liability that is properly seen as being at issue here.

Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. See 42 U. S. C. § 9607(a)(2). This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice. If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability. See *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F. 2d 327, 330 (CA5) ("CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act"),

cert. denied, 502 U. S. 1004 (1991); *United States* v. *Kayser-Roth Corp.*, 910 F. 2d 24, 26 (CA1 1990) ("[A] person who is an operator of a facility is not protected from liability by the legal structure of ownership").[12]

This much is easy to say: the difficulty comes in defining actions sufficient to constitute direct parental "operation." Here of course we may again rue the uselessness of CERCLA's definition of a facility's "operator" as "any person . . . operating" the facility, 42 U. S. C. § 9601(20)(A)(ii), which leaves us to do the best we can to give the term its "ordinary or natural meaning." *Bailey* v. *United States*, 516 U. S. 137, 145 (1995) (internal quotation marks omitted). In a mechanical sense, to "operate" ordinarily means "[t]o control the functioning of; run: *operate a sewing machine.*" American Heritage Dictionary 1268 (3d ed. 1992); see also Webster's New International Dictionary 1707 (2d ed. 1958) ("to work; as, to *operate* a machine"). And in the organizational sense more obviously intended by CERCLA, the word ordinarily means "[t]o conduct the affairs of; manage: *operate a business.*" American Heritage Dictionary, *supra*, at 1268; see also Webster's New International Dictionary, *supra*, at 1707 ("to manage"). So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having

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[12] See Oswald 257 ("There are . . . instances . . . in which the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator. Imagine, for example, a parent who strictly observed corporate formalities, avoided intertwining officers and directors, and adequately capitalized its subsidiary, yet provided active, daily supervision and control over hazardous waste disposal activities of the subsidiary. Such a parent should not escape liability just because its activities do not justify a piercing of the subsidiary's veil").

to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

B

With this understanding, we are satisfied that the Court of Appeals correctly rejected the District Court's analysis of direct liability. But we also think that the appeals court erred in limiting direct liability under the statute to a parent's sole or joint venture operation, so as to eliminate any possible finding that CPC is liable as an operator on the facts of this case.

1

By emphasizing that "CPC is directly liable under section 107(a)(2) as an operator because CPC actively participated in and exerted significant control over Ott II's business and decision-making," 777 F. Supp., at 574, the District Court applied the "actual control" test of whether the parent "actually operated the business of its subsidiary," *id.*, at 573, as several Circuits have employed it, see, *e. g.*, *United States* v. *Kayser-Roth Corp.*, *supra*, at 27 (operator liability "requires active involvement in the affairs of the subsidiary"); *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F. 2d 1107, 1110 (CA11 1993) (parent is liable if it "actually exercised control over, or was otherwise intimately involved in the operations of, the [subsidiary] corporation immediately responsible for the operation of the facility" (internal quotation marks omitted)).

The well-taken objection to the actual control test, however, is its fusion of direct and indirect liability; the test is administered by asking a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent's interaction with the subsidiary's facility (the source of any direct liability). If, however, direct liability for the parent's operation of the facility is to be kept distinct from derivative liability for the subsidiary's own operation, the focus of the enquiry must

necessarily be different under the two tests. "The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language." Oswald 269; see also *Schiavone* v. *Pearce*, 79 F. 3d 248, 254 (CA2 1996) ("Any liabilities [the parent] may have as an *operator*, then, stem directly from its control over the plant"). The District Court was therefore mistaken to rest its analysis on CPC's relationship with Ott II, premising liability on little more than "CPC's 100-percent ownership of Ott II" and "CPC's active participation in, and at times majority control over, Ott II's board of directors." 777 F. Supp., at 575. The analysis should instead have rested on the relationship between CPC and the Muskegon facility itself.

In addition to (and perhaps as a reflection of) the erroneous focus on the relationship between CPC and Ott II, even those findings of the District Court that might be taken to speak to the extent of CPC's activity at the facility itself are flawed, for the District Court wrongly assumed that the actions of the joint officers and directors are necessarily attributable to CPC. The District Court emphasized the facts that CPC placed its own high-level officials on Ott II's board of directors and in key management positions at Ott II, and that those individuals made major policy decisions and conducted day-to-day operations at the facility: "Although Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC, CPC actively participated in this decision-making because high-ranking CPC officers served in Ott II management positions." *Id.*, at 559; see also *id.*, at 575 (relying on "CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management, including the positions of president and chief

executive officer," and on "the conduct of CPC officials with respect to Ott II affairs, particularly Arnold Ott"); *id.*, at 558 ("CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors"); *id.*, at 559 ("CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management").

In imposing direct liability on these grounds, the District Court failed to recognize that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *American Protein Corp.* v. *AB Volvo*, 844 F. 2d 56, 57 (CA2), cert. denied, 488 U. S. 852 (1988); see also *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. 2d 265, 267 (CA2 1929) (L. Hand, J.) ("Control through the ownership of shares does not fuse the corporations, even when the directors are common to each"); Henn & Alexander 355 (noting that it is "normal" for a parent and subsidiary to "have identical directors and officers").

This recognition that the corporate personalities remain distinct has its corollary in the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *Lusk* v. *Foxmeyer Health Corp.*, 129 F. 3d 773, 779 (CA5 1997); see also *Fisser* v. *International Bank*, 282 F. 2d 231, 238 (CA2 1960). Since courts generally presume "that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary," P. Blumberg, Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations § 1.02.1, p. 12 (1983); see, *e. g.*, *United States* v. *Jon-T Chemicals, Inc.*, 768 F. 2d 686, 691 (CA5 1985), cert. denied, 475 U. S. 1014 (1986), it cannot be enough to establish liability

here that dual officers and directors made policy decisions and supervised activities at the facility. The Government would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as CPC officers and directors, and not as Ott II officers and directors, when they committed those acts.[13] The District Court made no such enquiry here, however, disregarding entirely this time-honored common-law rule.

In sum, the District Court's focus on the relationship between parent and subsidiary (rather than parent and facility), combined with its automatic attribution of the actions of dual officers and directors to the corporate parent, erroneously, even if unintentionally, treated CERCLA as though it displaced or fundamentally altered common-law standards of limited liability. Indeed, if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic. There would in essence be a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability. But, as we have said, such a rule does not arise from congressional silence, and CERCLA's silence is dispositive.

2

We accordingly agree with the Court of Appeals that a participation-and-control test looking to the parent's supervi-

[13] We do not attempt to recite the ways in which the Government could show that dual officers or directors were in fact acting on behalf of the parent. Here, it is prudent to say only that the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.

sion over the subsidiary, especially one that assumes that dual officers always act on behalf of the parent, cannot be used to identify operation of a facility resulting in direct parental liability. Nonetheless, a return to the ordinary meaning of the word "operate" in the organizational sense will indicate why we think that the Sixth Circuit stopped short when it confined its examples of direct parental operation to exclusive or joint ventures, and declined to find at least the possibility of direct operation by CPC in this case.

In our enquiry into the meaning Congress presumably had in mind when it used the verb "to operate," we recognized that the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate "operation" as including the exercise of direction over the facility's activities. See *supra,* at 66–67. The Court of Appeals recognized this by indicating that a parent can be held directly liable when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture. See 113 F. 3d, at 579. We anticipated a further possibility above, however, when we observed that a dual officer or director might depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility. See n. 13, *supra.* Yet another possibility, suggested by the facts of this case, is that an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility.

Identifying such an occurrence calls for line-drawing yet again, since the acts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary. Again norms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points. Just as we may look to such norms in identifying the limits of the presumption that a dual office-

holder acts in his ostensible capacity, so here we may refer to them in distinguishing a parental officer's oversight of a subsidiary from such an officer's control over the operation of the subsidiary's facility. "[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." Oswald 282. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

There is, in fact, some evidence that CPC engaged in just this type and degree of activity at the Muskegon plant. The District Court's opinion speaks of an agent of CPC alone who played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant. G. R. D. Williams worked only for CPC; he was not an employee, officer, or director of Ott II, see Tr. of Oral Arg. 7, and thus, his actions were of necessity taken only on behalf of CPC. The District Court found that "CPC became directly involved in environmental and regulatory matters through the work of . . . Williams, CPC's governmental and environmental affairs director. Williams . . . became heavily involved in environmental issues at Ott II." 777 F. Supp., at 561. He "actively participated in and exerted control over a variety of Ott II environmental matters," *ibid.*, and he "issued directives regarding Ott II's responses to regulatory inquiries," *id.*, at 575.

We think that these findings are enough to raise an issue of CPC's operation of the facility through Williams's actions, though we would draw no ultimate conclusion from these findings at this point. Not only would we be deciding in the first instance an issue on which the trial and appellate courts did not focus, but the very fact that the District Court did not see the case as we do suggests that there may be still

more to be known about Williams's activities. Indeed, even as the factual findings stand, the trial court offered little in the way of concrete detail for its conclusions about Williams's role in Ott II's environmental affairs, and the parties vigorously dispute the extent of Williams's involvement. Prudence thus counsels us to remand, on the theory of direct operation set out here, for reevaluation of Williams's role, and of the role of any other CPC agent who might be said to have had a part in operating the Muskegon facility.[14]

V

The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded with instructions to return it to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[14] There are some passages in the District Court's opinion that might suggest that, without reference to Williams, some of Ott II's actions in operating the facility were in fact dictated by, and thus taken on behalf of, CPC. See, *e. g.*, 777 F. Supp., at 561 ("CPC officials engaged in . . . missions to Ott II in which Ott II officials received instructions on how to improve and change"); *id.*, at 559 ("CPC executives who were not Ott II board members also occasionally attended Ott II board meetings"). But nothing in the District Court's findings of fact, as written, even comes close to overcoming the presumption that Ott II officials made their decisions and performed their acts as agents of Ott II. Indeed, the finding that "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC," *ibid.*, indicates just the opposite. Still, the Government is, of course, free on remand to point to any additional evidence, not cited by the District Court, that would tend to establish that Ott II's decisionmakers acted on specific orders from CPC.

Syllabus

GEISSAL, BENEFICIARY AND REPRESENTATIVE OF THE ESTATE OF GEISSAL, DECEASED *v.* MOORE MEDICAL CORP. ET AL.

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

No. 97–689. Argued April 29, 1998—Decided June 8, 1998

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to permit a beneficiary of an employer's group health plan to elect continuing coverage when he might otherwise lose that benefit because of a "qualifying event," such as the termination of employment. When respondent Moore Medical Corporation fired James Geissal, it told him that COBRA gave him the right to elect continuing coverage under Moore's health plan. He so elected, but six months later, Moore told him that he was not entitled to COBRA benefits because on his date of election he was already covered by a group plan through his wife's employer, Trans World Airlines (TWA). Geissal filed suit against respondents (collectively, Moore), claiming, *inter alia*, that Moore was violating COBRA by renouncing an obligation to provide continuing coverage. He died while this suit was pending, and his wife replaced him as plaintiff. The Magistrate granted partial summary judgment to Moore, concluding that an employee with coverage under another group health plan on the date he elects COBRA coverage is ineligible for COBRA coverage under 29 U. S. C. § 1162(2)(D)(i), which allows an employer to cancel such coverage as of "[t]he date on which the qualified beneficiary first becomes, after the date of the election . . . covered under any other group health plan." The Eighth Circuit affirmed.

Held: An employer may not deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary because he is covered under another group health plan at the time he elects COBRA coverage. Pp. 79–87.

(a) Section 1162(2)(D)(i) speaks in terms of "becom[ing] covered," an event that is significant only if it "first" occurs "after the date of the election." Because James Geissal was a beneficiary of the TWA plan before he elected COBRA coverage, he did not "first become" covered under the TWA plan after the date of election, and Moore could not cut

off his COBRA coverage under § 1162(2)(D)(i)'s plain meaning. Moore's contrary reading—that, for a beneficiary covered under a pre-existing plan, the first moment of coverage on the day following the election is the moment of first being covered after the date of election—ignores the condition that the beneficiary must "first becom[e]" covered after election, robbing the modifier "first" of any consequence, thereby equating "first becomes . . . covered" with "remains covered." Pp. 82–83.

(b) Moore argues that the plain reading should be rejected because it would permit a beneficiary to claim continuation coverage even if he has obtained entirely new group coverage between the qualifying event and the election. The statute, however, is not cast expressly in terms of preserving the status quo of the beneficiary's health care coverage as of the date of the qualifying event. In addition, there is no reason to assume that a beneficiary with pre-existing coverage receives a windfall as a result of his ability to elect COBRA coverage. Since a beneficiary must pay for whatever COBRA coverage he obtains, there is no reason to think he will make an election for coverage he does not need. Even Moore would permit a beneficiary with coverage under a group health plan to elect COBRA coverage whenever there is a "significant gap" between the coverage offered by the employer's group health plan and that offered by the beneficiary's other group health plan. This "significant gap" approach to § 1162(2)(D)(i) is plagued with difficulties, however, beginning with the sheer absence of any statutory support for it. Furthermore, this approach requires courts to make policy judgments about the adequacy of the coverage provided by the beneficiary's other group health plan. This sort of inquiry is so far unsuitable for the courts that this Court would expect a clear mandate before inferring that Congress meant to foist it on the judiciary. Pp. 83–87.

114 F. 3d 1458, vacated and remanded.

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

S. Sheldon Weinhaus argued the cause for petitioner. With him on the briefs was *Marc A. Greidinger.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Kneedler*, *Gary R. Allen*, and *Teresa E. McLaughlin.*

Bradley J. Washburn argued the cause and filed a brief for respondents.*

JUSTICE SOUTER delivered the opinion of the Court.

The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), authorizes a qualified beneficiary of an employer's group health plan to obtain continued coverage under the plan when he might otherwise lose that benefit for certain reasons, such as the termination of employment. The issue in this case is whether 29 U. S. C. § 1162(2)(D)(i) allows an employer to deny COBRA continuation coverage to a qualified beneficiary who is covered under another group health plan at the time he makes his COBRA election. We hold that it does not.

I

On July 16, 1993, respondent Moore Medical Corporation fired James Geissal, who was suffering from cancer. While employed, Geissal was covered under Moore's group health plan as well as the health plan provided by his wife's employer, Trans World Airlines (TWA), through Aetna Life Insurance Company.

According to Geissal, soon after he lost his job, Moore told him that he had a right under COBRA to elect to continue coverage under Moore's plan. Geissal so elected, and made the necessary premium payments for six months. On January 27, 1994, however, Moore informed Geissal it had been mistaken: he was not actually entitled to COBRA benefits

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**Gill Deford, Mary Ellen Signorille, Melvin Radowitz, Daniel Feinberg,* and *Ronald G. Dean* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging reversal.

Ray M. Aragon, Barbara J. Bacon, and *Jeffrey Gabardi* filed a brief for the Health Insurance Association of America as *amicus curiae* urging affirmance.

because on the date of his election he was already covered by another group health plan, through his wife's employer.

Geissal then brought this suit against Moore, the Group Benefit Plan of Moore Medical Group, Herbert Walker (an administrator of the plan), and Sedgwick Lowndes (another administrator) (collectively, Moore).[1] Geissal charged Moore with violating COBRA by renouncing an obligation to provide continuing health benefits coverage (Count I); he further claimed that Moore was estopped to deny him continuation coverage because it had misled him to think that he was entitled to COBRA coverage (Count II), that Moore's misrepresentation amounted to a waiver of any right to assert a reading of the plan provisions that would deprive him of continuation coverage (Count III), and, finally, that Walker had violated COBRA by failing to provide him with certain plan documents (Count IV).

After limited discovery, Geissal moved for partial summary judgment on Counts I and II of the complaint. He argued that Moore's reliance upon 29 U. S. C. § 1162(2)(D)(i) as authority to deny him COBRA continuation coverage was misplaced. Although that subsection provides that an employer may cancel COBRA continuation coverage as of "[t]he date on which the qualified beneficiary first becomes, after the date of the election . . . covered under any other group health plan (as an employee or otherwise)," Geissal was first covered under the TWA plan before he elected COBRA continuation coverage, not after. In any event, Geissal maintained, Moore was estopped to deny him health benefits, because he had detrimentally relied upon its assurances that he was entitled to them. While the summary judgment motion was pending, Geissal died of cancer, and petitioner Bonnie Geissal, his wife and personal representative of his estate, replaced him as plaintiff.

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[1] On November 8, 1994, the District Court granted the plaintiff's motion to dismiss Lowndes without prejudice.

The Magistrate Judge hearing the case[2] first rejected Moore's arguments that Geissal lacked standing and that Aetna was a necessary party under Federal Rule of Civil Procedure 19(a). The Magistrate concluded that even if Moore was correct that Geissal had no claim for compensatory damages because Aetna paid all of the medical bills, Geissal could seek statutory damages under 29 U. S. C. § 1132(a)(1).[3] The Magistrate held that Aetna was not a necessary party to the suit, since complete relief could be granted between Moore and Geissal without joining Aetna, a verdict in Geissal's favor would not subject Moore to the risk of inconsistent or double obligations, and Aetna's joinder was not necessary to determine primacy as between the two plans.

The Magistrate denied summary judgment for Geissal, however, and instead *sua sponte* granted partial summary judgment on Counts I and II in favor of Moore, concluding that an employee with coverage under another group health

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[2] Pursuant to 28 U. S. C. § 636(c), the parties agreed to have a magistrate judge conduct all proceedings in this case.

[3] This subsection provides that a beneficiary may seek relief under 29 U. S. C. § 1132(c), which provides that a plan administrator who fails to comply with a beneficiary's request for plan information within 30 days of the request is personally liable to that beneficiary in the amount of up to $100 a day from the date of the failure.

Before us, Moore suggests that Geissal lacks standing to maintain this suit. They assert that Aetna has paid all of the medical bills, and that the only apparent difference between the Aetna and Moore policies was a $350 difference in their respective deductibles, a difference far exceeded by the premiums Geissal would owe for COBRA coverage if successful. Despite Moore's assertions to the contrary, however, nothing in the record indicates one way or another whether Aetna has fully reimbursed Geissal for James Geissal's medical bills. Geissal's counsel represented at oral argument that at a minimum there are unpaid medical bills incurred on a trip to the Greek Islands. Quite apart from this, we cannot tell from the record whether Geissal may be entitled to recover from Moore even if sometime later Aetna would have a claim against Geissal to recover the insurance costs that it paid.

plan as of the date he elects COBRA continuation coverage is ineligible for COBRA coverage under § 1162(2)(D)(i), and that James Geissal presented insufficient evidence of detrimental reliance on Moore's representation that he was entitled to benefits under COBRA. The Magistrate also found that there was no significant difference between the terms of coverage under Aetna's plan and Moore's; they differed only in the amount of their respective deductibles, and there was no evidence that Aetna's plan excluded or limited coverage for James Geissal's condition.

The Magistrate then granted Geissal's unopposed motion under Federal Rule of Civil Procedure 54(b) for the entry of final judgment on Counts I and II, and so enabled Geissal to seek immediate review of the Magistrate's decision. The Court of Appeals for the Eighth Circuit affirmed, 114 F. 3d 1458 (1997), and we granted certiorari, 522 U. S. 1086 (1998), to resolve a conflict among the Circuits on whether an employer may deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary covered under another group health plan at the time he elects coverage under COBRA.[4]

II

A

The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, 100 Stat. 82, 222–237, amended the Employee Retirement Income Security Act, among other stat-

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[4] Compare *Lutheran Hosp., Inc.* v. *Business Men's Assurance Co.*, 51 F. 3d 1308 (CA7 1995) (an employer may not cease providing COBRA continuation coverage under its plan merely because its former employee has pre-existing coverage under another group health plan), and *Oakley* v. *City of Longmont*, 890 F. 2d 1128 (CA10 1989) (same), cert. denied, 494 U. S. 1082 (1990), with *National Cos. Health Benefit Plan* v. *St. Joseph's Hosp., Inc.*, 929 F. 2d 1558 (CA11 1991) (an employer may suspend the COBRA continuation coverage of a former employee who had pre-existing coverage under another group health plan), and *Brock* v. *Primedica, Inc.*, 904 F. 2d 295 (CA5 1990) (same).

utes. The amendments to ERISA require an employer[5] who sponsors a group health plan to give the plan's "qualified beneficiaries" the opportunity to elect "continuation coverage" under the plan when the beneficiaries might otherwise lose coverage upon the occurrence of certain "qualifying events," including the death of the covered employee, the termination of the covered employee's employment (except in cases of gross misconduct), and divorce or legal separation from the covered employee. 29 U. S. C. § 1163. Thus, a "qualified beneficiary" entitled to make a COBRA election may be a "covered employee" (someone covered by the employer's plan because of his own employment), or a covered employee's spouse or dependent child who was covered by the plan prior to the occurrence of the "qualifying event." § 1167(3).

COBRA demands that the continuation coverage offered to qualified beneficiaries be identical to what the plan provides to plan beneficiaries who have not suffered a qualifying event. § 1162(1). The statute requires plans to advise beneficiaries of their rights under COBRA both at the commencement of coverage and within 14 days of learning of a qualifying event,[6] § 1166(a), after which qualified beneficiaries have 60 days to elect continuation coverage, § 1165(1). If a qualified beneficiary makes a COBRA election, continuation coverage dates from the qualifying event, and when the event is termination or reduced hours, the maximum period of coverage is generally 18 months; in other cases, it is generally 36. § 1162(2)(A). The beneficiary who makes the election must pay for what he gets, however, up to 102 percent of the "applicable premium" for the first 18 months of continuation coverage, and up to 150 percent thereafter. § 1162(3).

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[5] Employers with fewer than 20 employees are exempt from COBRA's requirements. 29 U. S. C. § 1161(b).

[6] Under § 1166(a)(2), an employer has a duty to report most qualifying events, including the termination of employment, to its group health plan administrator within 30 days of the qualifying event.

The "applicable premium" is usually the cost to the plan of providing continuation coverage, regardless of who usually pays for the insurance benefit. § 1164. Benefits may cease if the qualified beneficiary fails to pay the premiums, § 1162(2)(C), and an employer may terminate it for certain other reasons, such as discontinuance of the group health plan entirely, § 1162(2)(B). COBRA coverage may also cease on

> "[t]he date on which the qualified beneficiary first becomes, after the date of the election—
>
> "(i) covered under any other group health plan (as an employee or otherwise), which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary, or
>
> "(ii) entitled to benefits under title XVIII of the Social Security Act." § 1162(2)(D).[7]

[7] When originally enacted, § 1162(2)(D)(i) provided that coverage could cease when a qualified beneficiary "first becomes, after the date of the election . . . a covered employee under any other group health plan," and a separate provision, § 1162(E), provided that in the case of an individual who was a qualified beneficiary as the result of being a spouse of a covered employee, coverage could cease on "the date on which the beneficiary remarries and becomes covered under a group health plan." COBRA, Pub. L. 99–272, 100 Stat. 228. Congress later struck § 1162(E) and amended subsection (i) to provide that coverage could cease when a qualified beneficiary "first becomes, after the date of the election . . . covered under any other group health plan (as an employee or otherwise)." Tax Reform Act of 1986, Pub. L. 99–514, 100 Stat. 2938–2939. Congress again amended subsection (i) in 1989, when it added the qualification, "which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary." Omnibus Budget Reconciliation Act of 1989, Pub. L. 101–239, 103 Stat. 2297, 2432. The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104–191, 110 Stat. 2087–2088, amended § 1162(2)(D)(i) yet again by inserting before ", or": "(other than such an exclusion or limitation which does not apply to (or is satisfied by) such beneficiary by reason of chapter 100 of the Internal Revenue Code of 1986, part 7 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or title XXVII of this Act)." The 1996 amendment was not in effect at the time this case arose.

B

Moore, like the Magistrate, believes that James Geissal's coverage under the TWA plan defeats the claim for COBRA coverage after his election to receive it. As Moore reads § 1162(2)(D)(i), it is not relevant when a qualified beneficiary first obtains other health insurance coverage; instead, Moore submits, all that matters is whether, at any time after the date of election, the beneficiary is covered by another group health plan. In any event, Moore claims, James Geissal first became covered under the TWA plan only after his COBRA election, because it was only at that moment that his TWA coverage became primary.

Moore's reading, however, will not square with the text. Section 1162(2)(D)(i) does not provide that the employer is excused if the beneficiary "is" covered or "remains" covered on or after the date of the election. Nothing in § 1162(2)(D)(i) says anything about the hierarchy of policy obligations, or otherwise suggests that it might matter whether the coverage of another group health plan is primary. So far as this case is concerned, what is crucial is that § 1162(2)(D)(i) does not speak in terms of "coverage" that might exist or continue; it speaks in terms of an event, the event of "becom[ing] covered." This event is significant only if it occurs, and "first" occurs, at a time "after the date of the election." It is undisputed that both before and after James Geissal elected COBRA continuation coverage he was continuously a beneficiary of TWA's group health plan. Because he was thus covered before he made his COBRA election, and so did not "first become" covered under the TWA plan after the date of election, Moore could not cut off his COBRA coverage under the plain meaning of § 1162(2)(D)(i).

Moore argues, to the contrary, that there is a reasonable sense in which a beneficiary does "first becom[e]" covered under a pre-existing plan "after the date of the election," even when prior coverage can be said to persist after the election date: the first moment of coverage on the day follow-

ing the election is the moment of first being covered after the date of the election. See *National Cos. Health Benefit Plan* v. *St. Joseph's Hosp., Inc.*, 929 F. 2d 1558, 1570 (CA11 1991) ("[I]t is immaterial when the employee acquires other group health coverage; the only relevant question is when, after the election date, does that other coverage take effect. In the case of an employee covered by preexisting group health coverage, . . . the first time after the election date that the employee becomes covered by a group health plan other than the employer's plan is the moment after the election date"). But that reading ignores the condition that the beneficiary must "first becom[e]" covered after election, robbing the modifier "first" of any consequence, thereby equating "first becomes . . . covered" with "remains covered." It transforms the novelty of becoming covered for the first time into the continuity of remaining covered over time.

Moore argues, further, that even if our reading of the statute is more faithful to its plain language, Congress could not have meant to give a qualified beneficiary something more than the right to preserve the status quo as of the date of the qualifying event.[8] Moore points out that if the phrase "first becomes covered . . . after" the date of election does not apply to any coverage predating election, then the beneficiary is quite free to claim continuation coverage even if he has obtained entirely new group coverage between the qualifying event and the election; in that case, on our reading, COBRA would not be preserving the circumstances as of the date of the qualifying event.

[8] Moore also argues that Congress could not have intended to render COBRA eligible those individuals with pre-existing coverage under another health plan at the time of election, because such individuals who in fact elect COBRA coverage are typically high risk. As a result, Moore contends, covering them under COBRA tends to increase an employer's overall cost of providing a group health plan, and may cause some employers to cease offering a group health plan entirely. This may or may not be true. If substantiated, the argument would be considered in construing the scope of a vague provision; § 1162(2)(D)(i), however, is not vague.

That the plain reading does not confine COBRA strictly to guardianship of the status quo is, of course, perfectly true, though it is much less certain whether this fact should count against the plain reading (even assuming that the obvious reading would be vulnerable to such an objection, see *Ardestani* v. *INS*, 502 U. S. 129, 135 (1991)). The statute is neither cast expressly in terms of the status quo, nor does it speak to the status quo on the date of the qualifying event except with reference to the coverage subject to election. Nor does a beneficiary's decision to take advantage of another group policy not previously in effect carry any indicia of the sort of windfall Congress presumably would have disapproved. Since the beneficiary has to pay for whatever COBRA coverage he obtains, there is no reason to assume that he will make an election for coverage he does not need, whether he is covered by another policy in place before the qualifying event or one obtained after it but before his election.

Still, it is true that if during the interim between the qualifying event and election a beneficiary gets a new job, say, with health coverage (having no exclusion or limitation for his condition), he will have the benefit of COBRA, whereas he will not have it if his new job and coverage come after the election date. Do we classify this as an anomaly or merely a necessary consequence of the need to draw a line somewhere? For the sake of argument we might call it an anomaly, but that would only balance it against the anomaly of Moore's own position, which defies not only normal language usage but the expectations of common sense: since an election to continue coverage is retroactive to the date of the qualifying event, under Moore's reading of § 1162(2)(D)(i) an election that is ineffective to bring about continuation coverage for the roughly 18 (or 36) month statutory period would nonetheless have the surprising effect of providing continuation coverage for the period of weeks, or even days, between

the event and the election. One wonders why Congress would have wanted to create such a strange scheme. Thus, assuming that our reading of § 1162(2)(D)(i) produces an anomaly, so does Moore's.

But this is not all, for the anomalous consequences of Moore's position are not exhausted without a look at the interpretative morass to which it has led in practice. To support its thesis that Congress meant individuals situated like James Geissal to be ineligible for COBRA benefits, Moore points to a statement in the House Reports on the original COBRA bill, that "[t]he Committee [on Ways and Means] is concerned with reports of the growing number of Americans without any health insurance coverage and the decreasing willingness of our Nation's hospitals to provide care to those who cannot afford to pay." H. R. Rep. No. 99–241, pt. 1, p. 44 (1985); see 114 F. 3d, at 1463 (quoting House Report). Of course, if this concern (expressed in one House Committee Report) were thought to be a legitimate limit on the meaning of the statute as enacted, there would be no COBRA coverage for any beneficiary who had "any health insurance" on the date of election, or obtained "any" thereafter. But neither Moore nor any court rejecting the plain reading has gone quite so far. Instead, that draconian alternative has been averted by a nontextual compromise.

The compromise apparently alludes to the proviso that § 1162(2)(D)(i) applies so as to authorize termination of COBRA coverage only if the coverage provided by the other group health plan "does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary." Moore urges us to hold, as some Courts of Appeals have done, that although Congress generally intended to deny COBRA coverage to individuals with other group insurance on the election date, there will still be COBRA eligibility in such cases if there is a "significant gap" between the coverage offered by the employer's plan and that offered by

the beneficiary's other group health plan.[9] See 114 F. 3d, at 1464–1465; accord, *National Cos. Health Benefit Plan* v. *St. Joseph's Hosp., Inc.*, 929 F. 2d, at 1571; *Brock* v. *Primedica, Inc.*, 904 F. 2d 295, 297 (CA5 1990). When there is such a gap, some courts have explained, it cannot be said that the employee is truly "covered" by his pre-existing insurance coverage. See 114 F. 3d, at 1463; *National Cos. Health Benefit Plan* v. *St. Joseph's Hosp., Inc.*, *supra*, at 1571.

This "significant gap" approach to § 1162(2)(D)(i) is plagued with difficulties, however, beginning with the sheer absence of any statutory support for it. Section 1162(2)(D)(i) makes no mention of what to do when a person's other coverage is generally inadequate or inferior; instead, it provides merely that coverage under a later acquired group health plan will not terminate COBRA rights when that plan limits or excludes coverage for a pre-existing condition of the beneficiary. The proviso applies not when there is a "gap" or difference between the respective coverages of the two policies, but when the later acquired group coverage excludes or limits coverage specific to the beneficiary's pre-existing condition. It is this "gap" between different coverage provisions of the non-COBRA plan, not a gap between the coverage provisions of the COBRA plan and the non-COBRA plan, that Congress was legislating about.

But even leaving textual inadequacy aside, there is further trouble under the "significant gap" approach. Needless to say, when the proviso (as written) arguably does apply, its applicability is easy to determine. Once the beneficiary's pre-existing condition is identified, a court need only look among the terms of the later policy for an exclusion or limita-

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[9] The lower courts have disagreed about whether this "significant gap" interpretation should be made by evaluating the actual expenses an employee incurs as a result of COBRA cancellation, or by comparing the policies' provisions in light of the information available to the employer on the day of the COBRA election. See 114 F. 3d, at 1464–1465 (comparing approaches).

tion peculiar to that condition. If either is found, COBRA continuation coverage is left undisturbed; if neither is found, the consequence of obtaining this later insurance is automatic. Applying the significant gap rule, on the other hand, requires a very different kind of determination, essentially one of social policy. Once a gap is found, the court must then make a judgment about the adequacy of medical insurance under the later group policy, for this is the essence of any decision about whether the gap between the two regimes of coverage is "significant" enough. This is a powerful point against the gap interpretation for two reasons. First, the required judgment is so far unsuitable for courts that we would expect a clear mandate before inferring that Congress meant to foist it on the judiciary.[10] What is even more strange, however, is that Congress would have meant to inject the courts into the policy arena, evaluating the adequacy of non-COBRA coverage that happened to be in place prior to the COBRA election, while at the same time intending to limit the judicial intrusion, and leave the beneficiary to the unmediated legal consequences of the terms of the non-COBRA coverage that happened to become effective after the election. One just cannot credibly attribute such oddity to congressional intent.

In sum, there is no justification for disparaging the clarity of § 1162(2)(D)(i). 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.

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[10] The unlikelihood, indeed, appears overwhelming when one considers that the same comparison would have to be made when the beneficiary was covered under Medicare, which is treated like a separate group plan for present purposes, see § 1162(2)(D)(ii).

Syllabus

HOPKINS, WARDEN *v.* REEVES

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

No. 96–1693. Argued February 23, 1998—Decided June 8, 1998

Respondent was indicted on two counts of felony murder under Nebraska law. The Nebraska first-degree murder statute defines felony murder as murder committed in the perpetration of certain enumerated felonies, including, as relevant here, sexual assault and attempt to commit sexual assault in the first degree. Under Nebraska law, intent to kill is conclusively presumed if the State proves intent to commit the underlying felony. A felony-murder conviction makes a defendant eligible for the death penalty, which in Nebraska is imposed judicially, not by the trial jury. The trial court refused respondent's request to instruct the jury on second-degree murder and manslaughter on the ground that the State Supreme Court consistently has held that these crimes are not lesser included offenses of felony murder. Respondent's jury then convicted him on both felony-murder counts, and a three-judge panel sentenced him to death. After exhausting his state remedies, respondent filed a federal habeas corpus petition, claiming, *inter alia*, that the trial court's failure to give the requested instructions was unconstitutional under *Beck* v. *Alabama*, 447 U. S. 625, in which this Court invalidated an Alabama law that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases. The District Court granted relief on an unrelated due process claim, which the Eighth Circuit rejected. However, the Eighth Circuit also held that, in failing to give the requested instructions, the trial court had committed the same constitutional error as that in *Beck*.

Held: *Beck* does not require state trial courts to instruct juries on offenses that are not lesser included offenses of the charged crime under state law. Pp. 94–101.

(a) *Beck* is distinguishable from this case in two critical respects: The Alabama statute prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, and it did so only in capital cases. Alabama thus erected an artificial barrier that restricted its juries to a choice between conviction for a capital offense and acquittal. By contrast, when the Nebraska trial court declined to give the requested instructions, it merely followed the State Supreme Court's 100-year-old rule that second-degree murder and man-

slaughter are not lesser included offenses of felony murder. The trial court neither created an artificial barrier for the jury nor treated capital and noncapital cases differently. By ignoring these distinctions, the Eighth Circuit limited the State's prerogative to structure its criminal law more severely than does the rule in *Beck*, for it required in effect that States create lesser included offenses to all capital crimes when no such offense exists under state law. Pp. 94–97.

(b) The Eighth Circuit again overlooked significant distinctions between this case and *Beck* when it found that there was a distortion of the factfinding process because respondent's jury had been forced into an all-or-nothing choice between capital murder and innocence. The fact that Beck's jury was told that if it convicted him of the charged offense it must impose the death penalty threatened to make the issue at trial whether he should be executed or not, and not whether he was guilty beyond a reasonable doubt. The distortion of the trial process carried over to sentencing because an Alabama jury unwilling to acquit had no choice but to impose death. These factors are not present here. Respondent's jury did not impose sentence, and the sentencing panel's alternative to death was not setting respondent free, but rather sentencing him to life imprisonment. Moreover, respondent's proposed instructions would have introduced another kind of distortion at trial, for they would have allowed the jury to find beyond a reasonable doubt elements that the State, having assumed the obligation of proving only one crime, had not attempted to prove and indeed had ignored during trial. Pp. 98–99.

(c) The requirement of *Tison* v. *Arizona*, 481 U. S. 137, and *Enmund* v. *Florida*, 458 U. S. 782, that a culpable mental state with respect to the killing be proved before the death penalty may be imposed for felony murder does not affect the showing that a State must make at a defendant's felony-murder trial, so long as the requirement is satisfied at some point thereafter, such as at sentencing or on appeal. *Cabana* v. *Bullock*, 474 U. S. 376, 385, 392. As such, these cases cannot override state-law determinations of when instructions on lesser included offenses are permissible and when they are not. Respondent's argument that the Nebraska Supreme Court's longstanding interpretation that felony murder has no lesser included homicide offenses is arbitrary is without merit. That contention is certainly strained with respect to the crime of second-degree murder, which requires proof of intent to kill, while felony murder does not; respondent did not present such a challenge with respect to manslaughter to the Nebraska Supreme Court, and therefore that claim is not considered here. Pp. 99–101.

102 F. 3d 977, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 101.

Don Stenberg, Attorney General of Nebraska, argued the cause for petitioner. With him on the briefs was *J. Kirk Brown*, Assistant Attorney General.

Roy W. McLeese III argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.

Paula Hutchinson, by appointment of the Court, 522 U. S. 1074, argued the cause for respondent. With her on the brief were *Kent Gipson* and *Timothy K. Ford*.*

JUSTICE THOMAS delivered the opinion of the Court.

In *Beck* v. *Alabama*, 447 U. S. 625 (1980), we held unconstitutional a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases. In this case, we consider whether *Beck* requires state trial courts to instruct juries on offenses that are not lesser included offenses of the charged crime under state law. We

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*A brief of *amici curiae* urging reversal was filed for the State of Arizona et al. by *Grant Woods*, Attorney General of Arizona, *Paul J. McMurdie*, and *Jon G. Anderson*, Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mark W. Barnett* of South Dakota, *John Knox Walkup* of Tennessee, and *Richard Cullen* of Virginia.

David Porter and *Helen C. Trainor* filed a brief for the National Association of Criminal Defense Lawyers as *amici curiae* urging affirmance.

conclude that such instructions are not constitutionally required, and we therefore reverse the contrary judgment of the Court of Appeals.

I

In the early morning hours of March 29, 1980, police received an emergency call from the Religious Society of Friends meetinghouse in Lincoln, Nebraska. Responding to the call, they found Janet Mesner, the live-in caretaker, lying on the floor in the rear of the house with seven stab wounds in her chest. When an officer asked who had stabbed her, Mesner gave respondent's name. The officers then went to an upstairs bedroom and found the partially clad dead body of Victoria Lamm, a friend of Mesner who had been visiting the meetinghouse. She had been stabbed twice, the first blow penetrating the main pulmonary artery of her heart and the second her liver. A billfold containing respondent's identification was lying near Lamm's body. The police found underwear, later identified as respondent's, in the middle of the blood-soaked sheets of the bed; subsequent examination of the underwear revealed semen of respondent's blood type. Near the bed, the police found a serrated kitchen knife with Mesner's blood on it. Before dying, Mesner told an officer that respondent had raped her. Shortly thereafter, the police arrested respondent, who told them that although he could not remember much about the murders due to severe intoxication, he did recall stabbing and raping Mesner.

The State proceeded against respondent for both murders on a felony-murder theory. Under Nebraska law, felony murder is a form of first-degree murder and is defined as murder committed "in the perpetration of or attempt to perpetrate" certain enumerated felonies, including sexual assault or attempt to commit sexual assault in the first degree. Neb. Rev. Stat. § 28–303 (1995). When proceeding on such a theory, Nebraska prosecutors do not need to prove a culpable mental state with respect to the murder because intent to kill is conclusively presumed if the State proves intent to

commit the underlying felony. *State* v. *Reeves*, 216 Neb. 206, 217, 344 N. W. 2d 433, 442 (1984). Although a conviction for felony murder renders a defendant eligible for the death penalty, see § 28–303, the jury is not charged with sentencing the defendant; under Nebraska law, capital sentencing is a judicial function, § 29–2520.

At trial, respondent requested that the jury be instructed on both murder in the second degree and manslaughter, which, he argued, were lesser included offenses of felony murder. App. 6–9.[1] The trial court refused on the ground that the Nebraska Supreme Court consistently has held that second-degree murder and manslaughter are not lesser included offenses of that crime. *Id.*, at 10. Respondent's jury thus was presented with only the two felony-murder counts.[2] Although respondent raised an insanity defense, the jury rejected it and convicted him on both counts. A three-judge sentencing panel then convened to consider aggravating and mitigating circumstances. It sentenced respondent to death on both convictions.

After the Nebraska Supreme Court affirmed his convictions and sentences, *State* v. *Reeves*, 216 Neb. 206, 344 N. W. 2d 433, cert. denied, 469 U. S. 1028 (1984), respondent unsuccessfully pursued state collateral relief, *State* v. *Reeves*, 234 Neb. 711, 453 N. W. 2d 359 (1990). This Court then vacated the Nebraska Supreme Court's judgment for further consideration in light of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), because respondent's death sentence had been based in part on an invalid aggravating factor. See *Reeves* v. *Nebraska*, 498 U. S. 964 (1990). On remand, the Nebraska Su-

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[1] Under Nebraska law, second-degree murder is defined as "caus[ing] the death of a person intentionally, but without premeditation," § 28–304, and manslaughter as "kill[ing] another without malice, either upon a sudden quarrel, or caus[ing] the death of another unintentionally while in the commission of an unlawful act," § 28–305.

[2] Respondent did not request an instruction on sexual assault in the first degree.

preme Court followed *Clemons*, independently reweighed the applicable aggravating and mitigating factors, and reaffirmed respondent's sentences. *State* v. *Reeves*, 239 Neb. 419, 476 N. W. 2d 829 (1991), cert. denied, 506 U. S. 837 (1992).

Respondent then filed a petition for a writ of habeas corpus in Federal District Court. He raised 44 claims, including a claim that the trial court's failure to give his requested instructions was unconstitutional under *Beck*. The District Court rejected the *Beck* claim but granted relief on an unrelated ground. 871 F. Supp. 1182, 1202, 1205–1206 (Neb. 1994). After the Court of Appeals for the Eighth Circuit reversed the latter determination and remanded the case, 76 F. 3d 1424, 1427–1431 (1996), the District Court again granted respondent's petition, finding a due process violation arising out of the reaffirmance of his sentences by the Nebraska Supreme Court. See 928 F. Supp. 941, 959–965 (Neb. 1996).

On the State's appeal, the Court of Appeals held that although respondent was not entitled to relief on his due process claim, the Nebraska trial court had committed constitutional error in failing to give the requested second-degree murder and manslaughter instructions. 102 F. 3d 977 (1997). The Court of Appeals reasoned that the constitutional error was the same as that in *Beck*, despite the fact that there are no lesser included homicide offenses to felony murder under Nebraska law: In both cases, state law "*prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible." 102 F. 3d, at 983 (emphasis in original). Because respondent "could have been convicted and sentenced for either second degree murder or manslaughter," the Court of Appeals concluded that he was constitutionally entitled to his proposed instructions. See *id.*, at 984. It further stated that denial of the instructions could not be justified by the fact that felony murder in Nebraska does not require a culpable mental state with respect to the killing, because in *Enmund* v. *Flor-*

ida, 458 U. S. 782 (1982), and *Tison* v. *Arizona*, 481 U. S. 137 (1987), this Court held that the death penalty could not be imposed in a felony-murder case if the defendant was a minor participant in the crime and neither intended to kill nor had shown reckless indifference to human life. See 102 F. 3d, at 984–985. The Court of Appeals therefore granted respondent's petition and, relying on Circuit precedent holding that *Beck* applies only where the defendant is in fact sentenced to death, gave the State the option of retrying respondent or agreeing to modify his sentence to life imprisonment. See 102 F. 3d, at 986.

Because the decision below conflicted with a prior decision of the Court of Appeals for the Ninth Circuit, see *Greenawalt* v. *Ricketts*, 943 F. 2d 1020 (1991), cert. denied, 506 U. S. 888 (1992), we granted certiorari. 521 U. S. 1151 (1997).[3]

II

The Court of Appeals erred in concluding that its holding was compelled by *Beck*, as the two cases differ fundamentally. In *Beck*, the defendant was indicted and convicted of the capital offense of "'[r]obbery or attempts thereof when the victim is intentionally killed by the defendant.'" 447 U. S., at 627 (quoting Ala. Code § 13–11–2(a)(2) (1975)). Although state law recognized the noncapital, lesser included offense of felony murder, see 447 U. S., at 628–630, and although lesser included offense instructions were generally available to noncapital defendants under state law, the Ala-

[3] One of the questions on which we granted certiorari was whether the Court of Appeals' holding was a "new rule" under *Teague* v. *Lane*, 489 U. S. 288 (1989). See Pet. for Cert. i. Because the State raised this argument for the first time in its petition for a writ of certiorari, we choose to decide the case on the merits. Cf. *Godinez* v. *Moran*, 509 U. S. 389, 397, n. 8 (1993) (declining to address whether the Court of Appeals created a "new rule" because the petitioner did not raise a *Teague* defense in the lower courts or in its petition for certiorari).

bama death penalty statute prohibited such instructions in capital cases, *id.*, at 628. As a result, Alabama juries had only two options: to convict the defendant of the capital crime, in which case they were required to impose the death penalty,[4] or to acquit. *Id.*, at 628–629. We found that the denial of the third option of convicting the defendant of a noncapital lesser included offense "diminish[ed] the reliability of the guilt determination." *Id.*, at 638. Without such an option, if the jury believed that the defendant had committed some other serious offense, it might convict him of the capital crime rather than acquit him altogether. See *id.*, at 642–643. We therefore held that Alabama was "constitutionally prohibited from withdrawing that option from the jury in a capital case." See *id.*, at 638.

In Nebraska, instructions on offenses that have been determined to be lesser included offenses of the charged crime are available to defendants when the evidence supports them, in capital and noncapital cases alike.[5] Respondent's proposed instructions were refused because the Nebraska Supreme Court has held for over 100 years, in both capital and noncapital cases, that second-degree murder and manslaughter are not lesser included offenses of felony murder. See, *e. g.*, *State* v. *Price*, 252 Neb. 365, 372, 562 N. W. 2d 340, 346 (1997); *State* v. *Masters*, 246 Neb. 1018, 1025, 524 N. W. 2d 342, 348 (1994); *State* v. *Ruyle*, 234 Neb. 760, 773, 452 N. W. 2d 734, 742–743 (1990); *State* v. *McDonald*, 195 Neb. 625, 636–637, 240 N. W. 2d 8, 15 (1976); *Thompson* v. *State*,

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[4] If the jury imposed the death penalty, the trial judge had the authority to reduce the sentence to life imprisonment without the possibility of parole. The jury, however, was not instructed to this effect; rather, it was told that it was required to impose the death penalty if it found the defendant guilty. See 447 U. S., at 639, n. 15.

[5] We noted this fact in *Beck* in distinguishing Alabama's scheme from the practices in the rest of the States. See 447 U. S., at 636, n. 12 (citing *State* v. *Hegwood*, 202 Neb. 379, 275 N. W. 2d 605 (1979)).

106 Neb. 395, 184 N. W. 68 (1921); *Morgan* v. *State*, 51 Neb. 672, 695, 71 N. W. 788, 794–795 (1897). If a Nebraska trial court gives instructions on those offenses, and the defendant is convicted only of second-degree murder or manslaughter, that conviction must be reversed on appeal. See *Thompson* v. *State*, *supra*, at 396, 184 N. W., at 68. Thus, *as a matter of law*, Nebraska prosecutors cannot obtain convictions for second-degree murder or manslaughter in a felony-murder trial.

Beck is therefore distinguishable from this case in two critical respects. The Alabama statute prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, and it did so only in capital cases. Alabama thus erected an "artificial barrier" that restricted its juries to a choice between conviction for a capital offense and acquittal. Brief for United States as *Amicus Curiae* 20 (citing *California* v. *Ramos*, 463 U. S. 992, 1007 (1983)). Here, by contrast, the Nebraska trial court did not deny respondent instructions on any existing lesser included offense of felony murder; it merely declined to give instructions on crimes that are not lesser included offenses. In so doing, the trial court did not create an "artificial barrier" for the jury; nor did it treat capital cases differently from noncapital cases. Instead, it simply followed the Nebraska Supreme Court's interpretation of the relevant offenses under state law.

By ignoring these distinctions, the Court of Appeals limited state sovereignty in a manner more severe than the rule in *Beck*. Almost all States, including Nebraska, provide instructions only on those offenses that have been deemed to constitute lesser included offenses of the charged crime. See n. 5, *supra*.[6] We have never suggested that the Consti-

[6] In determining *whether* an offense is a lesser included offense of a particular crime, the States have adopted a variety of approaches. See, *e. g.*, *State* v. *Berlin*, 133 Wash. 2d 541, 550–551, 947 P. 2d 700, 704–705

tution requires anything more. The Court of Appeals in this case, however, required in effect that States create lesser included offenses to all capital crimes, by requiring that an instruction be given on some *other* offense—what could be called a "lesser related offense"—when no lesser included offense exists. Such a requirement is not only unprecedented, but also unworkable. Under such a scheme, there would be no basis for determining the offenses for which instructions are warranted. The Court of Appeals apparently would recognize a constitutional right to an instruction on any offense that bears a resemblance to the charged crime and is supported by the evidence. Such an affirmative obligation is unquestionably a greater limitation on a State's prerogative to structure its criminal law than is *Beck*'s rule that a State may not erect a capital-specific, arti-

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(1997) (en banc) (comparing statutory elements of the lesser offense to determine whether all of them are contained in the greater offense); *People* v. *Beach*, 429 Mich. 450, 462, 418 N. W. 2d 861, 866–867 (1988) (applying the "cognate evidence" approach: a lesser included offense instruction may be given even though all of the statutory elements of the lesser offense are not contained in the greater offense, if the "overlapping elements relate to the common purpose of the statutes" and the specific evidence adduced would support an instruction on the cognate offense (internal quotation marks and citation omitted)); *State* v. *Curtis*, 130 Idaho 522, 524, 944 P. 2d 119, 121–122 (1997) (court looks both to the statutory elements and to the information to determine whether it "charges the accused with a crime the proof of which necessarily includes proof of the acts that constitute the lesser included offense"). Cf. *Schmuck* v. *United States*, 489 U. S. 705 (1989) (adopting statutory elements test for federal criminal law).

Since the time of respondent's conviction, Nebraska has alternated between use of the statutory elements test and the cognate evidence test; it currently employs the former. See *State* v. *Williams*, 243 Neb. 959, 963–965, 503 N. W. 2d 561, 564–565 (1993) (readopting statutory elements test), overruling *State* v. *Garza*, 236 Neb. 202, 207–208, 459 N. W. 2d 739, 743 (1990) (reaffirming cognate evidence test), disapproving *State* v. *Lovelace*, 212 Neb. 356, 359–360, 322 N. W. 2d 673, 674–675 (1982) (applying statutory elements test). It has nonetheless consistently reaffirmed its holding that felony murder has no lesser included homicide offenses.

ficial barrier to the provision of instructions on offenses that actually are lesser included offenses under state law.

The Court of Appeals justified its holding principally on the ground that respondent had been placed in the same position as the defendant in *Beck*—that there had been a distortion of the factfinding process because his jury had been "'forced into an all-or-nothing choice between capital murder and innocence.'" 102 F. 3d, at 982 (quoting *Spaziano* v. *Florida*, 468 U. S. 447, 455 (1984)). In so doing, the Court of Appeals again overlooked significant distinctions between this case and *Beck*. In *Beck*, the death penalty was automatically tied to conviction, and Beck's jury was told that if it convicted the defendant of the charged offense, it was required to impose the death penalty. See *Beck* v. *Alabama*, 447 U. S., at 639, n. 15. This threatened to make the issue at trial whether the defendant should be executed or not, rather than "whether the State ha[d] proved each and every element of the capital crime beyond a reasonable doubt." *Id.*, at 643, n. 19. In addition, the distortion of the trial process carried over directly to sentencing, because an Alabama jury unwilling to acquit had no choice but to impose the death penalty. There was thus a significant possibility that the death penalty would be imposed upon defendants whose conduct did not merit it, simply because their juries might be convinced that they had committed some serious crime and should not escape punishment entirely.

These factors are not present here. Respondent's jury did not have the burden of imposing a sentence. Indeed, with respect to respondent's insanity defense, it was specifically instructed that it had "no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction or . . . acquittal by reason of insanity." App. 24. In addition, the three-judge panel that imposed the death penalty did not have to consider the dilemma faced by Beck's jury; its alternative to death was not

setting respondent free, but rather sentencing him to life imprisonment.[7]

Moreover, respondent's proposed instructions would have introduced another kind of distortion at trial. Nebraska proceeded against respondent only on a theory of felony murder, a crime that under state law has no lesser included homicide offenses. The State therefore assumed the obligation of proving only that crime, as well as any lesser included offenses that existed under state law and were supported by the evidence; its entire case focused solely on that obligation. To allow respondent to be convicted of homicide offenses that are *not* lesser included offenses of felony murder, therefore, would be to allow his jury to find beyond a reasonable doubt elements that the State had not attempted to prove, and indeed that it had ignored during the course of trial. This can hardly be said to be a reliable result: "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Spaziano* v. *Florida*, *supra*, at 455.

The Court of Appeals also erroneously relied upon our decisions in *Tison* v. *Arizona*, 481 U. S. 137 (1987), and *Enmund* v. *Florida*, 458 U. S. 782 (1982), to support its holding. It reasoned that because those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. See 102 F. 3d, at 984. In so doing, the Court of Appeals read *Tison* and

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[7] We are not, of course, presented with a case that differs from *Beck* *only* in that the jury is not the sentencer, and we express no opinion here whether that difference alone would render *Beck* inapplicable. The crucial distinction between *Beck* and this case, as noted, is the distinction between a State's prohibiting instructions on offenses that state law recognizes as lesser included, and a State's refusing to instruct on offenses that state law does not recognize as lesser included.

Enmund as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing.[8] In *Cabana* v. *Bullock*, 474 U. S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." *Id.*, at 385 (internal quotation marks and citation omitted). For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. See 474 U. S., at 392. Accordingly, *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's *trial* for felony murder, so long as their requirement is satisfied at some point thereafter. As such, these cases cannot override state-law determinations of when instructions on lesser included offenses are permissible and when they are not.

Finally, respondent argues that the Nebraska Supreme Court's longstanding interpretation that felony murder has no lesser included homicide offenses is arbitrary because, in his view, it is based only on recitations from prior cases, rather than on application of the lesser included offense tests in place since his conviction. See Brief for Respondent 40–43. This contention is certainly strained with respect to the crime of second-degree murder, which requires proof of intent to kill, while felony murder does not. See Neb. Rev. Stat. §§ 28–303, 28–304 (1995). It appears that the Nebraska Supreme Court has not undertaken respondent's suggested analysis with respect to unlawful act manslaughter—unintentional killing, committed in the perpetration of an unlawful act. See § 28–305. On his direct appeal, however, respondent did not challenge the Nebraska Supreme Court's

[8] The dissent also appears to be of this view, contending that Nebraska's justification for not providing an instruction on second-degree murder is inapplicable when the death penalty is sought. See *post*, at 101–102.

interpretation on this ground, and the clearest statement in his briefs on why a manslaughter instruction should have been given referred to manslaughter generally, for the following reason: "As the Court ruled in *State* v. *Ellis*, 208 Neb. 379, 303 N. W. 2d 741 (1981), such an instruction is necessary 'where there is no eye witness to the act, and the evidence is largely circumstantial.'" Reply Brief for Appellant in No. 81–706 (Neb. Sup. Ct.), p. 11. We will not second-guess the Nebraska Supreme Court's 100-year-old interpretation of state law when respondent failed to present his challenge to that court in the first instance.

For the foregoing reasons, the Court of Appeals' judgment granting respondent a conditional writ of habeas corpus is reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

As a matter of Nebraska law, second-degree murder is not ordinarily a lesser included offense of felony murder.[1] Based in part on this fact, the Court holds that it was not necessary for the trial judge to grant respondent's request for an instruction authorizing the jury to find respondent guilty of that offense. The Court's logic would be unassailable if the State had not sought the death penalty.

The reason that Nebraska generally does not consider second-degree murder a lesser included offense of felony murder is that it requires evidence of an intent to cause the death of the victim, whereas felony murder does not. But in this case the State sought to impose the death penalty on respondent for the offense of felony murder. As a matter of federal constitutional law, under *Enmund* v. *Florida*, 458 U. S. 782 (1982), it could not do so without proving that re-

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[1] See, *e. g.*, *State* v. *Price*, 252 Neb. 365, 373, 562 N. W. 2d 340, 346 (1997); *State* v. *Masters*, 246 Neb. 1018, 1025, 524 N. W. 2d 342, 348 (1994); *State* v. *Ruyle*, 234 Neb. 760, 773, 452 N. W. 2d 734, 742–743 (1990); *State* v. *McDonald*, 195 Neb. 625, 636–637, 240 N. W. 2d 8, 15 (1976).

spondent intended to kill his victim, or under *Tison* v. *Arizona*, 481 U. S. 137 (1987), that he had the moral equivalent of such an intent. The rationale for Nebraska's general rule that second-degree murder is not a lesser included offense of felony murder does not, therefore, apply to this case.[2] To be faithful to the teaching of *Beck* v. *Alabama*, 447 U. S. 625 (1980), the Court should therefore hold that respondent was entitled to the requested instruction.

Accordingly, I respectfully dissent.

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[2] Moreover, a recent Nebraska Supreme Court decision suggests that Nebraska law may be in flux on the question whether second-degree murder is a lesser included offense of felony murder. Only a few weeks ago, the Nebraska Supreme Court held that a jury verdict finding a defendant guilty of second-degree murder constituted an implied acquittal of the crime of first-degree murder, as defined in § 28–303 of Nebraska's criminal code, and therefore barred a second prosecution under that section for either felony murder or premeditated murder. *Nebraska* v. *White*, 254 Neb. 566, 577 N. W. 2d 741 (1998). In reaching that holding the Court explained: "The conduct prohibited by § 28–303 is first degree murder. Premeditated murder and felony murder are not denominated in Nebraska's statutes as separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted." *Id.*, at 577, 577 N. W. 2d, at 748. The difference between a charge of premeditated murder and a charge of felony murder "is a difference in the State's *theory* of how [the defendant] committed the single offense of first degree murder. . . . Therefore, we hold that the crime of first degree murder, as defined in § 28–303, constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska." *Ibid.* Given this holding, the Nebraska Supreme Court may conclude that second-degree murder is a lesser included offense of both premeditated and felony murder, as they are both part of the "one offense" of first-degree murder.

Syllabus

CASS COUNTY, MINNESOTA, ET AL. *v.* LEECH LAKE BAND OF CHIPPEWA INDIANS

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

No. 97–174. Argued February 24, 1998—Decided June 8, 1998

During the late 19th century, the Federal Government instituted a policy of removing portions of reservation land from tribal ownership and federal protection, allotting some parcels to individual Indians in fee simple and providing for other parcels to be sold to non-Indians. Most allotments were implemented pursuant to the General Allotment Act (GAA), which provided that land would be patented to individual Indians and held in trust for 25 years, after which title would be conveyed in fee simple, § 5, and that Indian allottees were subject to plenary state jurisdiction, § 6. The Burke Act amended § 6 to provide that state jurisdiction did not attach until the end of the trust period, and contained a proviso to the effect that the Secretary of the Interior could issue a fee simple patent before the trust period's end and thereafter restrictions as to, *inter alia,* taxation would be removed. Allotment of the Minnesota reservation lands of respondent Leech Lake Band of Chippewa Indians (Band) was implemented through the Nelson Act of 1889, which provided for the reservation land to be alienated from tribal ownership in three ways: under § 3, parcels were allotted to individual Indians as provided by the GAA; under §§ 4 and 5, pine lands were sold at public auction to non-Indians; and under § 6, agricultural lands were sold to non-Indian settlers as homesteads. After Congress ended the allotment practice, the Band began purchasing back parcels of reservation land that had been allotted to individual Indians or sold to non-Indians. Based on this Court's decision, in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation,* 502 U. S. 251, 253–254, that a county could assess ad valorem taxes on reservation land owned in fee by individual Indians or the tribe that had originally been made alienable when patented under the GAA, petitioner Cass County began assessing such taxes on 21 parcels of reservation land that had been alienated under the Nelson Act and reacquired by the Band. Thirteen of the parcels had been allotted to Indians and the remaining eight had been sold to non-Indians. The Band paid the taxes, interest, and penalties under protest and filed suit seeking a declaratory judgment that the county could not tax the parcels. The District Court granted the county summary judgment, holding that the parcels were taxable be-

cause, under *Yakima*, if Congress has made Indian land freely alienable, States may tax the land. The Eighth Circuit affirmed in part and reversed in part, holding that the parcels allotted to Indians could be taxed if patented under the Burke Act proviso, which made "unmistakably clear" Congress' intent to allow such taxation, but that the eight parcels sold to non-Indians could not. Only those eight parcels are at issue here.

Held: State and local governments may impose ad valorem taxes on reservation land that was made alienable by Congress and sold to non-Indians, but was later repurchased by the tribe. Pp. 110–115.

(a) Congress' intent to authorize state and local taxation of Indian reservation land must be "'unmistakably clear.'" *Yakima*, *supra*, at 258. Congress has manifested such an intent when it has authorized reservation lands to be allotted in fee to individual Indians, making the lands freely alienable and withdrawing them from federal protection. This was the case in both *Yakima* and *Goudy* v. *Meath*, 203 U. S. 146. The *Goudy* Court concluded that, because it would be unreasonable for Congress to withdraw federal protection and permit an Indian to dispose of his lands as he pleased, while releasing the lands from taxation, Congress would have to "clearly manifest" such a contrary purpose in order to counteract the consequence of taxability that ordinarily flows from alienability. *Id.*, at 149. The *Yakima* Court found that both the Burke Act proviso and § 5 of the GAA manifested an unmistakably clear intent to allow state and local taxation of allotted land. The Eighth Circuit thus erred in concluding that *Yakima* turned on the Burke Act proviso's express reference to taxability. Both it and *Goudy* stand for the proposition that when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is "clearly manifested." *Yakima*, *supra*, at 259. Pp. 110–113.

(b) The foregoing principle controls the disposition of this case. By providing for the public sale of reservation land to non-Indians in the Nelson Act, Congress removed that land from federal protection and made it fully alienable. Under *Yakima* and *Goudy*, therefore, it is taxable. The Eighth Circuit's contrary holding attributes to Congress the odd intent that parcels conveyed to Indians are taxable, while parcels sold to the general public remain tax exempt. Contrary to the Band's argument, a tribe's subsequent repurchase of alienable reservation land does not manifest any congressional intent to reassume federal protection of the land and to oust state taxing authority, particularly when Congress relinquished such protection many years before. Further,

Syllabus

holding that tax-exempt status automatically attaches when a tribe acquires reservation land would render unnecessary § 465 of the Indian Reorganization Act, which gives the Secretary of the Interior authority to place land in trust, held for the Indians' benefit and tax exempt, and which respondent has used to restore federal trust status to seven of the eight parcels at issue. Pp. 113–115.

108 F. 3d 820, reversed in part.

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

Earl E. Maus argued the cause for petitioners. With him on the briefs were *Mark B. Levinger* and *James W. Neher*, Assistant Attorneys General of Minnesota.

James M. Schoessler argued the cause for respondent. With him on the brief were *Steven G. Thorne* and *Joseph F. Halloran.*

Barbara McDowell argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *James C. Kilbourne.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Frank J. Kelley,* Attorney General of Michigan, *Thomas L. Casey,* Solicitor General, and *R. John Wernet, Jr.*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Joseph P. Mazurek* of Montana, *Dennis C. Vacco* of New York, *W. A. Drew Edmondson* of Oklahoma, and *Jan Graham* of Utah; for Lewis County, Idaho, et al. by *Tom D. Tobin*, *James M. Johnson*, *Kimron Torgerson*, *Michael Jesse*, and *Herbert Wm. Gillespie;* and for the National Association of Counties et al. by *Richard Ruda* and *Carter G. Phillips.*

Briefs of *amici curiae* urging affirmance were filed for the Confederated Tribes and Bands of the Yakama Indian Nation by *Tim Weaver;* for the Grand Portage Band of Chippewa et al. by *Vanya S. Hogen-Kind;* for the Hoopa Valley Tribe et al. by *Michael J. Wahoske;* for the Lummi Indian Tribe by *Harry L. Johnsen III* and *Judith K. Bush;* for the Saginaw Chippewa Indian Tribe of Michigan by *Frank R. Jozwiak* and *K. Allison*

JUSTICE THOMAS delivered the opinion of the Court.

We granted certiorari in this case to resolve whether state and local governments may tax reservation land that was made alienable by Congress and sold to non-Indians by the Federal Government, but was later repurchased by a tribe. We hold that ad valorem taxes may be imposed upon such land because, under the test established by our precedents, Congress has made "unmistakably clear" its intent to allow such taxation.

I

The Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe. The Leech Lake Reservation, which today encompasses 588,684 acres within the northern Minnesota counties of Cass, Itasca, and Beltrami, was established by federal treaty in 1855 and was augmented by subsequent treaties and Executive Orders.

During the late 19th century, the Federal Government changed its policy of setting aside reservation lands exclusively for Indian tribes under federal supervision. The new "allotment" policy removed significant portions of reservation land from tribal ownership and federal protection, allotting some parcels to individual Indians and providing for other parcels to be sold to non-Indians. See *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 253–254 (1992); F. Cohen, Handbook of Federal Indian Law 127–138 (1982). The purpose of the policy was to assimilate Indians into American society and to open reservation lands to ownership by non-Indians. *Id.*, at 128.

Most of the allotments made by the Federal Government were implemented pursuant to the General Allotment Act of

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McGaw; and for the National Congress of American Indians by *Tracy A. Labin* and *Kim Jerome Gottschalk*.

Briefs of *amici curiae* were filed for the Citizens Equal Rights Alliance by *Douglas Y. Freeman;* for the Oneida Indian Nation of New York by *William W. Taylor III* and *Michael R. Smith;* and for the Tribes of Forest County Potawatomi Community et al. by *Carol Brown Biermeier*.

1887 (GAA), 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.* Section 5 of the GAA provided that parcels of tribal land would be patented to individual Indians and held in trust by the United States for a 25-year period, after which the Federal Government would convey title to the individual allottees—

> "in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . ." 25 U. S. C. § 348.

Section 6 of the GAA, as originally enacted in 1887, provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 388. In 1905, this Court interpreted § 6 to mean that Indian allottees were subject to plenary state jurisdiction immediately upon issuance of the trust patent. See *In re Heff,* 197 U. S. 488.

The following year, Congress reversed the result of *In re Heff* by passing the Burke Act, 34 Stat. 182, 25 U. S. C. § 349, which amended § 6 of the GAA to provide that state jurisdiction did not attach until the end of the 25-year trust period, when the lands were conveyed to the Indians in fee. The Burke Act also contained a proviso to the effect that the Secretary of the Interior could, if "satisfied that any Indian allottee is competent and capable of managing his or her affairs," authorize issuance of a fee simple patent to the land before the end of the usual trust period, "and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ." *Ibid.*

For the Leech Lake Band and other Chippewa Tribes in Minnesota, the allotment policy was implemented through the Nelson Act of 1889. 25 Stat. 642. The Nelson Act provided for the "complete cession and relinquishment" of tribal title to all reservation land in the State of Minnesota, except for parts of two reservations, to the United States. After such "complete cession and relinquishment," which "operate[d] as a complete extinguishment of Indian title," the lands were to be disposed of in one of three ways: under § 3, the United States would allot parcels to individual tribe members as provided in the GAA; under §§ 4 and 5, so-called "pine lands" (surveyed 40-acre lots with standing or growing pine timber) were to be sold by the United States at public auction to the highest bidder; and under § 6, the remainder of the reservation land (called "agricultural lands") was to be sold by the United States to non-Indian settlers under the provisions of the Homestead Act of 1862, 12 Stat. 392.

In 1934, federal Indian policy shifted dramatically when Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which ended the practice of making federal allotments to individual Indians. Although the Reorganization Act did not repeal allotment statutes such as the Nelson Act, it extended the trust period for lands already allotted but not yet fee patented, provided that unallotted surplus lands would be restored to tribal ownership, and allowed additional lands "within or without existing reservations" to be acquired by the Federal Government for the tribes. See §§ 461, 462, 463, 465.

In 1977, the Leech Lake Band and individual Band members owned only about 27,000 acres—less than five percent—of Leech Lake Reservation land. See *State* v. *Forge,* 262 N. W. 2d 341, 343, and n. 1 (Minn. 1977). Since then, the Leech Lake Band has sought to reestablish its land base by purchasing back parcels of reservation land that were allotted to individual Indians or sold to non-Indians during the allotment period.

In 1992, we held in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, *supra*, that a county could assess ad valorem taxes on reservation land owned in fee by individual Indians or the tribe and originally made alienable when patented in fee simple under the GAA.

In 1993, Cass County began assessing ad valorem taxes on 21 parcels of reservation land that had been alienated from tribal control under the various provisions of the Nelson Act and later reacquired by the Leech Lake Band. Thirteen of the parcels had been allotted to individual Indians under § 3; seven had been sold to non-Indians as pine lands under §§ 4 and 5 for commercial timber harvest; and one parcel had been distributed to a non-Indian under § 6 as a homestead plot. Under protest and to avoid foreclosure, the Leech Lake Band paid more than $64,000 in taxes, interest, and penalties.

In 1995, the Band filed suit in federal court seeking a declaratory judgment that Cass County could not tax the 21 parcels.[1] The District Court granted summary judgment in favor of Cass County, holding that all of the land that had been alienated from tribal ownership under the Nelson Act was taxable. 908 F. Supp. 689 (Minn. 1995). The District Court interpreted our decision in *Yakima* to mean that "if Congress has made Indian land freely alienable, states may tax the land"—that is, "alienability equals taxability." 908 F. Supp., at 693.

A divided panel of the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. 108 F. 3d 820 (1997). Noting that *Yakima* reaffirmed prior statements by this Court indicating that Congress must make "unmistakably clear" its intent to subject reservation lands to state or local taxation, 108 F. 3d, at 826, the panel

[1] Also in 1995, the Band successfully applied, pursuant to § 465 of the Indian Reorganization Act, 25 U. S. C. § 465, to restore 11 of the parcels to federal trust status. See *infra*, at 114–115; App. to Pet. for Cert. 56; Tr. of Oral Arg. 9.

majority held that the 13 parcels allotted to individual Indians under § 3 of the Nelson Act could be taxed so long as the District Court confirmed on remand that they had been patented after passage of the Burke Act proviso, because the explicit mention of "taxation" in the proviso manifested the necessary "unmistakably clear" intent. *Id.*, at 827, 829–830. But the panel majority further held that the eight parcels sold as pine lands or homestead land under §§ 4–6 of the Nelson Act could not be taxed because those sections, "unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee." *Id.*, at 829.

Judge Magill concurred with the majority on the taxability of the 13 allotted parcels, but he dissented from the holding that the remaining 8 parcels were not also taxable. In his view, *Yakima* propounded "the clear rule . . . that alienability allows taxation." 108 F. 3d, at 831.

We granted certiorari, 522 U. S. 944 (1997), to decide whether Cass County may impose its ad valorem property tax on the seven parcels sold as pine lands and the one sold as a homestead to non-Indians.[2]

II

State and local governments may not tax Indian reservation land "'absent cession of jurisdiction or other federal statutes permitting it.'" *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S., at 258 (quoting *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973)). We have consistently declined to find that Congress has authorized such taxation unless it has "'made its intention to do so unmistakably clear.'" *Yakima*, *supra*, at 258 (quoting *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 765 (1985)). We have determined that Congress has manifested

[2] We denied the cross-petition for a writ of certiorari filed by the Band, which sought review of the holding by the courts below that the 13 parcels allotted to Indians under § 3 of the Nelson Act are taxable.

such an intent when it has authorized reservation lands to be allotted in fee to individual Indians, thus making the lands freely alienable and withdrawing them from federal protection. This was the case in both *Yakima* and *Goudy* v. *Meath*, 203 U. S. 146 (1906), in which this Court held that land, allotted and patented in fee to individual Indians and thus rendered freely alienable after the expiration of federal trust status, was subject to county ad valorem taxes even though it was within a reservation and held by either individual Indians or a tribe.

In *Goudy*, Congress had made reservation land alienable by authorizing the President to issue patents to individual members of the Puyallup Tribe. The President issued such a patent to the plaintiff shortly before Washington became a State. The treaty of March 16, 1854, between the United States and the Puyallup Tribe, 10 Stat. 1043, provided that such fee-patented land "shall be exempt from levy, sale, or forfeiture" until a state constitution was adopted and the state legislature removed the restrictions with Congress' consent. When Washington became a State, its legislature passed a law authorizing the sale of reservation lands; shortly thereafter, Congress authorized the appointment of a commission with the power to superintend the sale of those lands, with the proviso that "the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act." 27 Stat. 633 (1893).

When the 10-year period expired, the county levied an ad valorem tax on the land. This Court held that the tax was permissible because the land was freely alienable. *Goudy* v. *Meath*, 203 U. S., at 149–150. Although the Indian patent owner argued that there had been no express repeal of the exemption provided by the 1854 treaty, this Court stated that such an express repeal was unnecessary:

> "That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alien-

> ation may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested." *Id,* at 149.

The *Goudy* Court concluded that it would "seem strange [for Congress] to withdraw [federal] protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing [the lands] from taxation." *Ibid.* Indeed, because such congressional purpose would be unreasonable, Congress would have to "clearly manifest" such a contrary purpose in order to counteract the consequence of taxability that ordinarily flows from alienability. *Ibid.*

In *Yakima*, we considered whether the GAA manifested an unmistakably clear intent to allow state and local taxation of reservation lands allotted under the GAA and owned in fee by either the Yakima Indian Nation or individual Indians.[3] In holding that the lands could be taxed, we noted that the Burke Act proviso clearly manifested such an intent by expressly addressing the taxability of fee-patented land. 502 U. S., at 259. We also indicated that the alienability of allotted lands itself, as provided by § 5 of the GAA, similarly manifested an unmistakably clear intent to allow taxation.[4] We reasoned that *Goudy*, "without even mentioning the

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[3] We are concerned here only with *Yakima*'s holding with respect to ad valorem taxes such as those at issue in this case. *Yakima* also held that the GAA did not authorize the county to impose an excise tax on the *sale* of land held by individual Indians or by the tribe, because such a tax did not constitute the "taxation of land." See *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 268–269 (1992). That holding, however, is not relevant to this case, which involves only an ad valorem tax on land itself, rather than an excise tax on a transaction.

[4] The Burke Act proviso, as noted, see *supra*, at 107, did not itself authorize taxation of fee-patented land; it merely altered the result of *In re Heff*, 197 U. S. 488 (1905), as to when parcels allotted to the Indians could be alienated and taxed. *In re Heff* had held this occurred as soon as allotted lands were patented to the Indians in *trust* (during which the land would still be under the protection of the Federal Government); the Burke Act proviso stated that this did not occur until the lands were patented in *fee.*

Burke Act proviso," 502 U. S., at 259, had held that state tax laws applied to the Indian allottee at the expiration of the trust period: "[I]t was the alienability of the allotted lands . . . that the *[Goudy]* Court found of central significance." *Id.*, at 263 (emphasis deleted). And we reiterated *Goudy*'s point that, although it is *possible* for Congress to render reservation land alienable and still forbid States to tax it, this unlikely arrangement would not be presumed unless Congress "clearly manifested" such an intent. 502 U. S., at 263 (internal quotation marks and citation omitted).

The Court of Appeals thus erred in concluding that our holding in *Yakima* turned on the Burke Act proviso's express reference to taxability. *Yakima*, like *Goudy*, stands for the proposition that when Congress makes reservation lands freely alienable, it is "unmistakably clear" that Congress intends that land to be taxable by state and local governments, unless a contrary intent is "clearly manifested." 502 U. S., at 263.

The foregoing principle controls the disposition of this case. In §§ 5 and 6 of the Nelson Act, Congress provided for the public sale of pine lands and agricultural "homestead" lands by the Federal Government to non-Indians. Congress thereby removed that reservation land from federal protection and made it fully alienable. Under *Goudy* and *Yakima*, therefore, it is taxable. Indeed, this conclusion flows *a fortiori* from *Goudy* and *Yakima:* Those cases establish that Congress clearly intended reservation lands conveyed in fee to *Indians* to be subject to taxation; hence Congress surely intended reservation lands conveyed in fee to *non-Indians* also to be taxable. The Court of Appeals' contrary holding attributes to Congress the odd intent that parcels conveyed to *Indians* are to assume taxable status, while parcels sold to the *general public* are to remain tax exempt.

The Band essentially argues that, although its tax immunity lay dormant during the period when the eight parcels were held by non-Indians, its reacquisition of the lands in

fee rendered them nontaxable once again. We reject this contention. As explained, once Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it nontaxable. See *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S., at 263 (citing *Goudy* v. *Meath*, *supra*, at 149). The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority—particularly when Congress explicitly relinquished such protection many years before.

Further, if we were to accept the Leech Lake Band's argument, it would render partially superfluous § 465 of the Indian Reorganization Act. That section grants the Secretary of the Interior authority to place land in trust, to be held by the Federal Government for the benefit of the Indians and to be exempt from state and local taxation after assuming such status:

> "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, and interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians. . . .
>
> "Title to any lands . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands . . . shall be exempt from State and local taxation." 25 U. S. C. § 465.

In § 465, therefore, Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt. It would render this procedure unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land. The Leech Lake Band apparently realizes

this, because in 1995 it successfully applied to the Secretary of the Interior under § 465 to restore federal trust status to seven of the eight parcels at issue here. See Complaint ¶ 18 and Affidavit of Joseph F. Halloran in support of Plaintiff's Motion for Summary Judgment, in Civ. No. 5–95–99, ¶ V (DC Minn.); Tr. of Oral Arg. 9.[5]

* * *

When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. The repurchase of such land by an Indian tribe does not cause the land to reassume tax-exempt status. The eight parcels at issue here were therefore taxable unless and until they were restored to federal trust protection under § 465. The judgment of the Court of Appeals with respect to those lands is reversed.

It is so ordered.

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[5] The Leech Lake Band and the United States, as *amicus*, also argue that the parcels at issue here are not alienable—and therefore not taxable—under the terms of the Indian Nonintercourse Act, which provides: "No purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe . . . shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U. S. C. § 177.

This Court has never determined whether the Indian Nonintercourse Act, which was enacted in 1834, applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe. Because the parcels at issue here are not alienable—and therefore not taxable—under the terms of the Indian Nonintercourse Act, which provides: "No taxation if it remains freely alienable", and because it was not addressed by the Court of Appeals, we decline to consider it for the first time in this Court. See, *e. g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U. S. 367, 379, n. 5 (1996) (declining to address issue both because it was "outside the scope of the question presented in this Court" and because "we generally do not address arguments that were not the basis for the decision below").

Syllabus

DOOLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHUAPOCO, ET AL. *v.* KOREAN AIR LINES CO., LTD.

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

No. 97–704. Argued April 27, 1998—Decided June 8, 1998

The Death on the High Seas Act (DOHSA or Act) allows certain relatives of a decedent to sue for their own pecuniary losses, but does not authorize recovery for the decedent's pre-death pain and suffering. Petitioners, personal representatives of three passengers killed when Korean Air Lines Flight KE007 was shot down over the Sea of Japan, sued respondent airline (KAL) for, *inter alia*, damages for their decedents' pre-death pain and suffering. While their suit was pending, this Court decided in *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217—which arose out of the same disaster—that the Warsaw Convention permits compensation only for legally cognizable harm, but leaves the specification of what constitutes such harm to applicable domestic law, *id.*, at 231; that DOHSA supplies the applicable United States law where an airplane crashes on the high seas, *ibid.;* and that where DOHSA applies, neither state nor general maritime law can permit recovery of loss-of-society damages, *id.*, at 230. Subsequently, the District Court in this case granted KAL's motion to dismiss petitioners' nonpecuniary damages claims on the ground that DOHSA does not permit recovery for such damages, including damages for a decedent's pre-death pain and suffering. In affirming, the Court of Appeals rejected petitioners' argument that general maritime law provides a survival action for pain and suffering damages, holding that Congress has decided who may sue and for what in cases of death on the high seas.

Held: Because Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering in a case of death on the high seas, there can be no general maritime survival action for such damages. Before Congress enacted DOHSA, admiralty law did not permit an action to recover damages for a person's death. In DOHSA, Congress authorized such a cause of action for certain surviving relatives in cases of death on the high seas, 46 U. S. C. App. § 761, but limited recovery to the survivors' own pecuniary losses, § 762. DOHSA's limited survival provision also restricts recovery to the survivors' pecuniary losses. § 765. In *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, this Court

Syllabus

held that, in a case of death on the high seas, a decedent's survivors could not recover damages under general maritime law for their loss of society, reasoning that, since DOHSA announced Congress' considered judgment on, *inter alia*, beneficiaries, survival, and damages, *id.*, at 625, the Court had no authority to substitute its views for those expressed by Congress, *id.*, at 626. Because *Higginbotham* involved only the scope of the remedies available in a wrongful-death action, it did not address the availability of other causes of action. However, petitioners err in contending that DOHSA is a wrongful-death statute with no bearing on the availability of a survival action. By authorizing only certain surviving relatives to recover damages, and by limiting damages to those relatives' pecuniary losses, Congress provided the exclusive recovery for deaths on the high seas. Petitioners concede that their action would expand the class of beneficiaries entitled to recovery and the recoverable damages; but Congress has already decided these issues and, thus, has precluded the judiciary from expanding either category. DOHSA's survival provision confirms the Act's comprehensive scope by expressing Congress' considered judgment on the availability and contours of a survival action in cases of death on the high seas. Congress has simply chosen to adopt a more limited survival provision than that urged by petitioners. Indeed, Congress did so in the same year that it incorporated a survival action similar to the one petitioners seek into the Jones Act, permitting seamen to recover damages for their own injuries. In the exercise of its admiralty jurisdiction, the Court will not upset the balance Congress struck by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt. Pp. 121–124.

117 F. 3d 1477, affirmed.

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

Juanita M. Madole argued the cause and filed briefs for petitioners.

Andrew J. Harakas argued the cause for respondent. With him on the brief was *George N. Tompkins, Jr.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *David C. Frederick*, *Barbara B. O'Malley*, and *Bruce G. Forrest.*

JUSTICE THOMAS delivered the opinion of the Court.

In a case of death on the high seas, the Death on the High Seas Act, 46 U. S. C. App. § 761 *et seq.*, allows certain relatives of the decedent to sue for their pecuniary losses, but does not authorize recovery for the decedent's pre-death pain and suffering. This case presents the question whether those relatives may nevertheless recover such damages through a survival action under general maritime law. We hold that they may not.

I

On September 1, 1983, Korean Air Lines Flight KE007, en route from Anchorage, Alaska, to Seoul, South Korea, strayed into the airspace of the former Soviet Union and was shot down over the Sea of Japan. All 269 people on board were killed.

Petitioners, the personal representatives of three of the passengers, brought lawsuits against respondent Korean Air Lines Co., Ltd. (KAL), in the United States District Court for the District of Columbia. These cases were consolidated in that court, along with the other federal actions arising out of the crash. After trial, a jury found that KAL had committed "willful misconduct," thus removing the Warsaw Convention's $75,000 cap on damages, and in a subsequent verdict awarded $50 million in punitive damages. The Court of Appeals for the District of Columbia Circuit upheld the finding of willful misconduct, but vacated the punitive damages award on the ground that the Warsaw Convention does not permit the recovery of punitive damages. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F. 2d 1475, cert. denied, 502 U. S. 994 (1991).

The Judicial Panel on Multidistrict Litigation thereafter remanded, for damages trials, all of the individual cases to the District Courts in which they had been filed. In petitioners' cases, KAL moved for a pretrial determination that the Death on the High Seas Act (DOHSA or Act), 46 U. S. C.

App. § 761 *et seq.*, provides the exclusive source of recoverable damages. DOHSA provides, in relevant part:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative . . . ." § 761.
>
> "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." § 762.

KAL argued that, in a case of death on the high seas, DOHSA provides the exclusive cause of action and does not permit damages for loss of society, survivors' grief, and decedents' pre-death pain and suffering. The District Court for the District of Columbia disagreed, holding that because petitioners' claims were brought pursuant to the Warsaw Convention, DOHSA could not limit the recoverable damages. The court determined that Article 17 of the Warsaw Convention "allows for the recovery of all 'damages sustained,' " meaning any "actual harm" that any party "experienced" as a result of the crash. App. 59.

While petitioners' cases were awaiting damages trials, we reached a different conclusion in *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217 (1996), another case arising out of the downing of Flight KE007. In *Zicherman*, we held that the Warsaw Convention "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules," and that where "an

airplane crash occurs on the high seas, DOHSA supplies the substantive United States law." *Id.*, at 231. Accordingly, the petitioners could not recover damages for loss of society: "[W]here DOHSA applies, neither state law, see *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 232–233 (1986), nor general maritime law, see *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625–626 (1978), can provide a basis for recovery of loss-of-society damages." *Id.*, at 230. We did not decide, however, whether the petitioners in *Zicherman* could recover for their decedents' pre-death pain and suffering, as KAL had not raised this issue in its petition for certiorari. See *id.*, at 230, n. 4.

After the *Zicherman* decision, KAL again moved to dismiss all of petitioners' claims for nonpecuniary damages. The District Court granted this motion, holding that United States law (not South Korean law) governed these cases; that DOHSA provides the applicable United States law; and that DOHSA does not permit the recovery of nonpecuniary damages—including petitioners' claims for their decedents' pre-death pain and suffering. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12–15 (1996).

On appeal, petitioners argued that, although DOHSA does not itself permit recovery for a decedent's pre-death pain and suffering, general maritime law provides a survival action that allows a decedent's estate to recover for injuries (including pre-death pain and suffering) suffered by the decedent. The Court of Appeals rejected this argument and affirmed. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F. 3d 1477 (CADC 1997). Assuming, *arguendo*, that there is a survival cause of action under general maritime law, the court held that such an action is unavailable when the death is on the high seas:

> "For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Con-

gress made the law and it is up to Congress to change it." *Id.*, at 1481.

We granted certiorari, 522 U. S. 1038 (1998), to resolve a Circuit split concerning the availability of a general maritime survival action in cases of death on the high seas. Compare, *e. g.*, *In re Korean Air Lines Disaster*, 117 F. 3d, at 1481, with *Gray* v. *Lockheed Aeronautical Systems Co.*, 125 F. 3d 1371, 1385 (CA11 1997).

II

Before Congress enacted DOHSA in 1920, the general law of admiralty permitted a person injured by tortious conduct to sue for damages, but did not permit an action to be brought when the person was killed by that conduct. See generally R. Hughes, Handbook of Admiralty Law 222–223 (2d ed. 1920). This rule stemmed from the theory that a right of action was personal to the victim and thus expired when the victim died. Accordingly, in the absence of an Act of Congress or state statute providing a right of action, a suit in admiralty could not be maintained in the courts of the United States to recover damages for a person's death. See *The Harrisburg*, 119 U. S. 199, 213 (1886); *The Alaska*, 130 U. S. 201, 209 (1889).[1]

Congress passed such a statute, and thus authorized recovery for deaths on the high seas, with its enactment of DOHSA. DOHSA provides a cause of action for "the death of a person . . . caused by wrongful act, neglect, or default occurring on the high seas," § 761; this action must be brought by the decedent's personal representative "for the exclusive benefit of the decedent's wife, husband, parent,

[1] We later rejected this rule in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 408–409 (1970), by overruling *The Harrisburg*, 119 U. S. 199 (1886), and holding that a federal remedy for wrongful death exists under general maritime law. In *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 574 (1974), we further held that such wrongful-death awards could include compensation for loss of support and services and for loss of society.

child, or dependent relative," *ibid.* The Act limits recovery in such a suit to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is sought." § 762. DOHSA also includes a limited survival provision: In situations in which a person injured on the high seas sues for his injuries and then dies prior to completion of the suit, "the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762." § 765. Other sections establish a limitations period, § 763a, govern actions under foreign law, § 764, bar contributory negligence as a complete defense, § 766, exempt the Great Lakes, navigable waters in the Panama Canal Zone, and state territorial waters from the Act's coverage, § 767, and preserve certain state-law remedies and state-court jurisdiction, *ibid.* DOHSA does not authorize recovery for the decedent's own losses, nor does it allow damages for nonpecuniary losses.

In *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618 (1978), we considered whether, in a case of death on the high seas, a decedent's survivors could recover damages under general maritime law for their loss of society. We held that they could not, and thus limited to territorial waters those cases in which we had permitted loss of society damages under general maritime law. *Id.*, at 622–624; see n. 1, *supra.* For deaths on the high seas, DOHSA "announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." 436 U. S., at 625. We thus noted that while we could "fil[l] a gap left by Congress' silence," we were not free to "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Ibid.* Because "Congress ha[d] struck the balance for us" in DOHSA by limiting the available recovery to pecuniary losses suffered by surviving relatives, *id.*, at 623, we had "no authority to substitute our views for those expressed by Congress," *id.*, at 626. *Hig-*

ginbotham, however, involved only the scope of the remedies available in a wrongful-death action, and thus did not address the availability of other causes of action.

Conceding that DOHSA does not authorize recovery for a decedent's pre-death pain and suffering, petitioners seek to recover such damages through a general maritime survival action. Petitioners argue that general maritime law recognizes a survival action, which permits a decedent's estate to recover damages that the decedent would have been able to recover but for his death, including pre-death pain and suffering. And, they contend, because DOHSA is a wrongful-death statute—giving surviving relatives a cause of action for losses *they* suffered as a result of the decedent's death—it has no bearing on the availability of a survival action.

We disagree. DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas. Petitioners concede that their proposed survival action would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates (and their various beneficiaries) to recover compensation. They further concede that their cause of action would expand the recoverable damages for deaths on the high seas by permitting the recovery of nonpecuniary losses, such as pre-death pain and suffering. Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages. As we noted in *Higginbotham*, "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." *Id.*, at 625.

The comprehensive scope of DOHSA is confirmed by its survival provision, see *supra*, at 122, which limits the recovery in such cases to the pecuniary losses suffered by surviving relatives. The Act thus expresses Congress' "considered judgment," *Mobil Oil Corp.* v. *Higginbotham*, *supra*, at 625, on the availability and contours of a survival action in cases of death on the high seas. For this reason, it cannot be contended that DOHSA has no bearing on survival actions; rather, Congress has simply chosen to adopt a more limited survival provision. Indeed, Congress did so in the same year that it incorporated into the Jones Act, which permits seamen injured in the course of their employment to recover damages for their injuries, a survival action similar to the one petitioners seek here. See Act of June 5, 1920, § 33, 41 Stat. 1007 (incorporating survival action of the Federal Employers' Liability Act, 45 U. S. C. § 59). Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt.

In sum, Congress has spoken on the availability of a survival action, the losses to be recovered, and the beneficiaries, in cases of death on the high seas. Because Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages.[2] The judgment of the Court of Appeals is

Affirmed.

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[2] Accordingly, we need not decide whether general maritime law *ever* provides a survival action.

Syllabus

MUSCARELLO *v.* UNITED STATES

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

No. 96–1654. Argued March 23, 1998—Decided June 8, 1998*

A person who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime" is subject to a 5-year mandatory prison term. 18 U. S. C. § 924(c)(1). In the first case, police officers found a handgun locked in the glove compartment of petitioner Muscarello's truck, which he was using to transport marijuana for sale. In the second case, federal agents at a drug-sale point found drugs and guns in the trunk of petitioners' car. In both cases, the Courts of Appeals found that petitioners had carried firearms in violation of § 924(c)(1).

Held: The phrase "carries a firearm" applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies. Pp. 127–139.

(a) As a matter of ordinary English, one can "carry firearms" in a wagon, car, truck, or other vehicle which one accompanies. The word's first, or basic, meaning in dictionaries and the word's origin make clear that "carry" includes conveying in a vehicle. The greatest of writers have used "carry" with this meaning, as has the modern press. Contrary to the arguments of petitioners and the dissent, there is no linguistic reason to think that Congress intended to limit the word to its secondary meaning, which suggests support rather than movement or transportation, as when, for example, a column "carries" the weight of an arch. Given the word's ordinary meaning, it is not surprising that the Federal Courts of Appeals have unanimously concluded that "carry" is not limited to the carrying of weapons directly on the person but can include their carriage in a car. Pp. 127–132.

(b) Neither the statute's basic purpose—to combat the "dangerous combination" of "drugs and guns," *Smith* v. *United States,* 508 U. S. 223, 240—nor its legislative history supports circumscribing the scope of the word "carry" by applying an "on the person" limitation. Pp. 132–134.

(c) Petitioners' remaining arguments to the contrary—that the definition adopted here obliterates the statutory distinction between "carry" and "transport," a word used in other provisions of the "fire-

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*Together with No. 96–8837, *Cleveland et al.* v. *United States,* on certiorari to the United States Court of Appeals for the First Circuit.

arms" section of the United States Code; that it would be anomalous to construe "carry" broadly when the related phrase "uses . . . a firearm," 18 U. S. C. § 924(c)(1), has been construed narrowly to include only the "active employment" of a firearm, *Bailey* v. *United States*, 516 U. S. 137, 144; that this Court's reading of the statute would extend its coverage to passengers on buses, trains, or ships, who have placed a firearm, say, in checked luggage; and that the "rule of lenity" should apply because of statutory ambiguity—are unconvincing. Pp. 134–139.

No. 96–1654, 106 F. 3d 636, and No. 96–8837, 106 F. 3d 1056, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and SOUTER, JJ., joined, *post*, p. 139.

Robert H. Klonoff argued the cause for petitioner in No. 96–1654. With him on the briefs were *Gregory A. Castanias*, *Paul R. Reichert*, and *Ron S. Macaluso*. *Norman S. Zalkind*, by appointment of the Court, 522 U. S. 1074, argued the cause for petitioners in No. 96–8837. With him on the briefs were *Elizabeth A. Lunt*, *David Duncan*, and *John H. Cunha, Jr.*, by appointment of the Court, 522 U. S. 1074.

James A. Feldman argued the cause for the United States in both cases. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.†

JUSTICE BREYER delivered the opinion of the Court.

A provision in the firearms chapter of the federal criminal code imposes a 5-year mandatory prison term upon a person who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime." 18 U. S. C. § 924(c)(1). The question before us is whether the phrase "carries a firearm" is limited to the carrying of firearms on the person. We hold that it is not so limited. Rather, it also applies to a person

†*Daniel Kanstroom*, *David Porter*, and *Kyle O'Dowd* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies.

I

The question arises in two cases, which we have consolidated for argument. Petitioner in the first case, Frank J. Muscarello, unlawfully sold marijuana, which he carried in his truck to the place of sale. Police officers found a handgun locked in the truck's glove compartment. During plea proceedings, Muscarello admitted that he had "carried" the gun "for protection in relation" to the drug offense, App. in No. 96–1654, p. 12, though he later claimed to the contrary, and added that, in any event, his "carr[ying]" of the gun in the glove compartment did not fall within the scope of the statutory word "carries." App. to Pet. for Cert. in No. 96–1654, p. 10a.

Petitioners in the second case, Donald Cleveland and Enrique Gray-Santana, placed several guns in a bag, put the bag in the trunk of a car, and then traveled by car to a proposed drug-sale point, where they intended to steal drugs from the sellers. Federal agents at the scene stopped them, searched the cars, found the guns and drugs, and arrested them.

In both cases the Courts of Appeals found that petitioners had "carrie[d]" the guns during and in relation to a drug trafficking offense. 106 F. 3d 636, 639 (CA5 1997); 106 F. 3d 1056, 1068 (CA1 1997). We granted certiorari to determine whether the fact that the guns were found in the locked glove compartment, or the trunk, of a car precludes application of § 924(c)(1). We conclude that it does not.

II

A

We begin with the statute's language. The parties vigorously contest the ordinary English meaning of the phrase

"carries a firearm." Because they essentially agree that Congress intended the phrase to convey its ordinary, and not some special legal, meaning, and because they argue the linguistic point at length, we too have looked into the matter in more than usual depth. Although the word "carry" has many different meanings, only two are relevant here. When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, "carry firearms" in a wagon, car, truck, or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing" or (in slang) "packing" (as in "packing a gun"), the matter is less clear. But, for reasons we shall set out below, we believe Congress intended to use the word in its primary sense and not in this latter, special way.

Consider first the word's primary meaning. The Oxford English Dictionary gives as its *first* definition "convey, originally by cart or wagon, hence in any vehicle, by ship, on horseback, etc." 2 Oxford English Dictionary 919 (2d ed. 1989); see also Webster's Third New International Dictionary 343 (1986) (*first* definition: "move while supporting (*as in a vehicle* or in one's hands or arms)"); Random House Dictionary of the English Language Unabridged 319 (2d ed. 1987) (*first* definition: "to take or support from one place to another; convey; transport").

The origin of the word "carries" explains why the first, or basic, meaning of the word "carry" includes conveyance in a vehicle. See Barnhart Dictionary of Etymology 146 (1988) (tracing the word from Latin "carum," which means "car" or "cart"); 2 Oxford English Dictionary, *supra*, at 919 (tracing the word from Old French "carier" and the late Latin "carricare," which meant to "convey in a car"); Oxford Dictionary of English Etymology 148 (C. Onions ed. 1966) (same); Barnhart Dictionary of Etymology, *supra*, at 143 (explaining that the term "car" has been used to refer to the automobile since 1896).

The greatest of writers have used the word with this meaning. See, *e. g.*, The King James Bible, 2 Kings 9:28 ("[H]is servants carried him in a chariot to Jerusalem"); *id.*, Isaiah 30:6 ("[T]hey will carry their riches upon the shoulders of young asses"). Robinson Crusoe says, "[w]ith my boat, I carry'd away every Thing." D. Defoe, Robinson Crusoe 174 (J. Crowley ed. 1972). And the owners of Queequeg's ship, Melville writes, "had lent him a [wheelbarrow], in which to carry his heavy chest to his boarding-house." H. Melville, Moby Dick 43 (U. Chicago 1952). This Court, too, has spoken of the "carrying" of drugs in a car or in its "trunk." *California* v. *Acevedo*, 500 U. S. 565, 572–573 (1991); *Florida* v. *Jimeno*, 500 U. S. 248, 249 (1991).

These examples do not speak directly about carrying guns. But there is nothing linguistically special about the fact that weapons, rather than drugs, are being carried. Robinson Crusoe might have carried a gun in his boat; Queequeg might have borrowed a wheelbarrow in which to carry not a chest but a harpoon. And, to make certain that there is no special ordinary English restriction (unmentioned in dictionaries) upon the use of "carry" in respect to guns, we have surveyed modern press usage, albeit crudely, by searching computerized newspaper data bases—both the New York Times data base in Lexis/Nexis, and the "US News" data base in Westlaw. We looked for sentences in which the words "carry," "vehicle," and "weapon" (or variations thereof) all appear. We found thousands of such sentences, and random sampling suggests that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, *i. e.*, the carrying of guns in a car.

The New York Times, for example, writes about "an ex-con" who "arrives home driving a stolen car and carrying a load of handguns," Mar. 21, 1992, section 1, p. 18, col. 1, and an "official peace officer who carries a shotgun in his boat," June 19, 1988, section 12WC, p. 2, col. 1; cf. The New York

Times Manual of Style and Usage, a Desk Book of Guidelines for Writers and Editors, foreword (L. Jordan rev. ed. 1976) (restricting Times journalists and editors to the use of proper English). The Boston Globe refers to the arrest of a professional baseball player "for carrying a semiloaded automatic weapon in his car." Dec. 10, 1994, p. 75, col. 5. The Colorado Springs Gazette Telegraph speaks of one "Russell" who "carries a gun hidden in his car." May 2, 1993, p. B1, col. 2. The Arkansas Gazette refers to a "house" that was "searched" in an effort to find "items that could be carried in a car, such as . . . guns." Mar. 10, 1991, p. A1, col. 2. The San Diego Union-Tribune asks, "What, do they carry guns aboard these boats now?" Feb. 18, 1992, p. D2, col. 5.

Now consider a different, somewhat special meaning of the word "carry"—a meaning upon which the linguistic arguments of petitioners and the dissent must rest. The Oxford English Dictionary's *twenty-sixth* definition of "carry" is "bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one." 2 Oxford English Dictionary, at 921. Webster's defines "carry" as "to move while supporting," not just in a vehicle, but also "in one's hands or arms." Webster's Third New International Dictionary, *supra*, at 343. And Black's Law Dictionary defines the entire phrase "carry arms or weapons" as

> "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." Black's Law Dictionary 214 (6th ed. 1990).

These special definitions, however, do not purport to *limit* the "carrying of arms" to the circumstances they describe. No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may *also* "carry a weapon" tied to the saddle of a horse or placed in a bag in a car.

Nor is there any linguistic reason to think that Congress intended to limit the word "carries" in the statute to any of these special definitions. To the contrary, all these special definitions embody a form of an important, but secondary, meaning of "carry," a meaning that suggests support rather than movement or transportation, as when, for example, a column "carries" the weight of an arch. 2 Oxford English Dictionary, at 919, 921. In this sense a gangster might "carry" a gun (in colloquial language, he might "pack a gun") even though he does not move from his chair. It is difficult to believe, however, that Congress intended to limit the statutory word to this definition—imposing special punishment upon the comatose gangster while ignoring drug lords who drive to a sale carrying an arsenal of weapons in their van.

We recognize, as the dissent emphasizes, that the word "carry" has other meanings as well. But those other meanings (*e. g.*, "carry all he knew," "carries no colours"), see *post*, at 143–144, are not relevant here. And the fact that speakers often do *not* add to the phrase "carry a gun" the words "in a car" is of no greater relevance here than the fact that millions of Americans did *not* see Muscarello carry a gun in his truck. The relevant linguistic facts are that the word "carry" in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana.

Given the ordinary meaning of the word "carry," it is not surprising to find that the Federal Courts of Appeals have unanimously concluded that "carry" is not limited to the carrying of weapons directly on the person but can include their carriage in a car. *United States* v. *Toms*, 136 F. 3d 176, 181 (CADC 1998); *United States* v. *Foster*, 133 F. 3d 704, 708 (CA9 1998); *United States* v. *Eyer*, 113 F. 3d 470, 476 (CA3 1997); 106 F. 3d, at 1066 (case below); 106 F. 3d, at 639 (case below); *United States* v. *Malcuit*, 104 F. 3d 880, 885, rehearing en banc granted, 116 F. 3d 163 (CA6 1997); *United States* v. *Mitchell*, 104 F. 3d 649, 653–654 (CA4 1997); *United*

States v. *Molina*, 102 F. 3d 928, 932 (CA7 1996); *United States* v. *Willis*, 89 F. 3d 1371, 1379 (CA8 1996); *United States* v. *Miller*, 84 F. 3d 1244, 1259–1260 (1996), overruled on other grounds, *United States* v. *Holland*, 116 F. 3d 1353 (CA10 1997); *United States* v. *Giraldo*, 80 F. 3d 667, 676–677 (CA2 1996); *United States* v. *Farris*, 77 F. 3d 391, 395–396 (CA11 1996).

B

We now explore more deeply the purely legal question of whether Congress intended to use the word "carry" in its ordinary sense, or whether it intended to limit the scope of the phrase to instances in which a gun is carried "on the person." We conclude that neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word "carry" by applying an "on the person" limitation.

This Court has described the statute's basic purpose broadly, as an effort to combat the "dangerous combination" of "drugs and guns." *Smith* v. *United States*, 508 U. S. 223, 240 (1993). And the provision's chief legislative sponsor has said that the provision seeks "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968) (Rep. Poff); see *Busic* v. *United States*, 446 U. S. 398, 405 (1980) (describing Poff's comments as "crucial material" in interpreting the purpose of § 924(c)); *Simpson* v. *United States*, 435 U. S. 6, 13–14 (1978) (concluding that Poff's comments are "clearly probative" and "certainly entitled to weight"); see also 114 Cong. Rec. 22243–22244 (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt); *id.*, at 22244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home") (Rep. Randall); *id.*, at 22236 ("We are concerned . . . with having the criminal leave his gun at home") (Rep. Meskill).

From the perspective of any such purpose (persuading a criminal "to leave his gun at home"), what sense would it

make for this statute to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who, like defendant Gray-Santana, travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car? How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for use) actually takes it from the trunk (or unlocks the glove compartment) of his car? It is difficult to say that, considered as a class, those who prepare, say, to sell drugs by placing guns in their cars are less dangerous, or less deserving of punishment, than those who carry handguns on their person.

We have found no significant indication elsewhere in the legislative history of any more narrowly focused relevant purpose. We have found an instance in which a legislator referred to the statute as applicable when an individual "has a firearm on his person," *ibid.* (Rep. Meskill); an instance in which a legislator speaks of "a criminal who takes a gun in his hand," *id.*, at 22239 (Rep. Pucinski); and a reference in the Senate Report to a "gun carried in a pocket," S. Rep. No. 98–225, p. 314, n. 10 (1983); see also 114 Cong. Rec. 21788, 21789 (1968) (references to gun "carrying" without more). But in these instances no one purports to define the scope of the term "carries"; and the examples of guns carried on the person are not used to illustrate the reach of the term "carries" but to illustrate, or to criticize, a different aspect of the statute.

Regardless, in other instances, legislators suggest that the word "carries" has a broader scope. One legislator indicates that the statute responds in part to the concerns of law enforcement personnel, who had urged that "carrying short firearms in motor vehicles be classified as carrying such weapons concealed." *Id.*, at 22242 (Rep. May). Another criticizes a version of the proposed statute by suggesting it might apply to drunken driving, and gives as an example a

drunken driver who has a "gun in his car." *Id.*, at 21792 (Rep. Yates). Others describe the statute as criminalizing gun "possession"—a term that could stretch beyond both the "use" of a gun and the carrying of a gun on the person. See *id.*, at 21793 (Rep. Casey); *id.*, at 22236 (Rep. Meskill); *id.*, at 30584 (Rep. Collier); *id.*, at 30585 (Rep. Skubitz).

C

We are not convinced by petitioners' remaining arguments to the contrary. First, they say that our definition of "carry" makes it the equivalent of "transport." Yet, Congress elsewhere in related statutes used the word "transport" deliberately to signify a different, and broader, statutory coverage. The immediately preceding statutory subsection, for example, imposes a different set of penalties on one who, with an intent to commit a crime, "ships, transports, or receives a firearm" in interstate commerce. 18 U. S. C. § 924(b). Moreover, § 926A specifically "entitle[s]" a person "not otherwise prohibited . . . from transporting, shipping, or receiving a firearm" to "transport a firearm . . . from any place where he may lawfully possess and carry" it to "any other place" where he may do so. Why, petitioners ask, would Congress have used the word "transport," or used both "carry" and "transport" in the same provision, if it had intended to obliterate the distinction between the two?

The short answer is that our definition does not equate "carry" and "transport." "Carry" implies personal agency and some degree of possession, whereas "transport" does not have such a limited connotation and, in addition, implies the movement of goods in bulk over great distances. See Webster's Third New International Dictionary, at 343 (noting that "carry" means "moving to a location some distance away while supporting or maintaining off the ground" and "is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden," while "transport refers to carriage in bulk or number over an ap-

preciable distance and, typically, by a customary or usual carrier agency"); see also Webster's Dictionary of Synonyms 141 (1942). If Smith, for example, calls a parcel delivery service, which sends a truck to Smith's house to pick up Smith's package and take it to Los Angeles, one might say that Smith has shipped the package and the parcel delivery service has transported the package. But only the truck driver has "carried" the package in the sense of "carry" that we believe Congress intended. Therefore, "transport" is a broader category that includes "carry" but also encompasses other activity.

The dissent refers to § 926A and to another statute where Congress used the word "transport" rather than "carry" to describe the movement of firearms. 18 U. S. C. § 925(a)(2)(B); *post,* at 146–147. According to the dissent, had Congress intended "carry" to have the meaning we give it, Congress would not have needed to use a different word in these provisions. But as we have discussed above, we believe the word "transport" is broader than the word "carry."

And, if Congress intended "carry" to have the limited definition the dissent contends, it would have been quite unnecessary to add the proviso in § 926A requiring a person, to be exempt from penalties, to store her firearm in a locked container not immediately accessible. See § 926A (quoted in full, *post,* at 146) (exempting from criminal penalties one who transports a firearm from a place where "he may lawfully possess and carry such firearm" but not exempting the "transportation" of a firearm if it is "readily accessible or is directly accessible from the passenger compartment of such transporting vehicle"). The statute simply could have said that such a person may not "carry" a firearm. But, of course, Congress did not say this because that is not what "carry" means.

As we interpret the statutory scheme, it makes sense. Congress has imposed a variable penalty with no mandatory minimum sentence upon a person who "transports" (or

"ships" or "receives") a firearm knowing it will be used to commit any "offense punishable by imprisonment for [more than] one year," § 924(b), and it has imposed a 5-year mandatory minimum sentence upon one who "carries" a firearm "during and in relation to" a "drug trafficking crime," § 924(c). The first subsection imposes a less strict sentencing regime upon one who, say, ships firearms by mail for use in a crime elsewhere; the latter subsection imposes a mandatory sentence upon one who, say, brings a weapon with him (on his person or in his car) to the site of a drug sale.

Second, petitioners point out that, in *Bailey* v. *United States*, 516 U. S. 137 (1995), we considered the related phrase "uses . . . a firearm" found in the same statutory provision now before us. See 18 U. S. C. § 924(c)(1) ("uses or carries a firearm"). We construed the term "use" narrowly, limiting its application to the "active employment" of a firearm. *Bailey*, 516 U. S., at 144. Petitioners argue that it would be anomalous to construe broadly the word "carries," its statutory next-door neighbor.

In *Bailey*, however, we limited "use" of a firearm to "active employment" in part because we assumed "that Congress . . . intended each term to have a particular, nonsuperfluous meaning." *Id.*, at 146. A broader interpretation of "use," we said, would have swallowed up the term "carry." *Ibid.* But "carry" as we interpret that word does not swallow up the term "use." "Use" retains the same independent meaning we found for it in *Bailey*, where we provided examples involving the displaying or the bartering of a gun. *Ibid.* "Carry" also retains an independent meaning, for, under *Bailey*, carrying a gun in a car does not necessarily involve the gun's "active employment." More importantly, having construed "use" narrowly in *Bailey*, we cannot also construe "carry" narrowly without undercutting the statute's basic objective. For the narrow interpretation would remove the act of carrying a gun in a car entirely from the statute's

reach, leaving a gap in coverage that we do not believe Congress intended.

Third, petitioners say that our reading of the statute would extend its coverage to passengers on buses, trains, or ships, who have placed a firearm, say, in checked luggage. To extend this statute so far, they argue, is unfair, going well beyond what Congress likely would have thought possible. They add that some lower courts, thinking approximately the same, have limited the scope of "carries" to instances where a gun in a car is immediately accessible, thereby most likely excluding from coverage a gun carried in a car's trunk or locked glove compartment. See, *e. g.*, *Foster*, 133 F. 3d, at 708 (concluding that person "carries" a firearm in a car only if the firearm is immediately accessible); *Giraldo*, 80 F. 3d, at 676 (same).

In our view, this argument does not take adequate account of other limiting words in the statute—words that make the statute applicable only where a defendant "carries" a gun *both* "during *and* in relation to" a drug crime. § 924(c)(1) (emphasis added). Congress added these words in part to prevent prosecution where guns "played" no part in the crime. See S. Rep. No. 98–225, at 314, n. 10; cf. *United States* v. *Stewart*, 779 F. 2d 538, 539 (CA9 1985) (Kennedy, J.) (observing that "'in relation to'" was "added to allay explicitly the concern that a person could be prosecuted . . . for committing an entirely unrelated crime while in possession of a firearm"), overruled in part on other grounds, *United States* v. *Hernandez*, 80 F. 3d 1253, 1257 (CA9 1996).

Once one takes account of the words "during" and "in relation to," it no longer seems beyond Congress' likely intent, or otherwise unfair, to interpret the statute as we have done. If one carries a gun in a car "during" and "in relation to" a drug sale, for example, the fact that the gun is carried in the car's trunk or locked glove compartment seems not only logically difficult to distinguish from the immediately accessible gun, but also beside the point.

At the same time, the narrow interpretation creates its own anomalies. The statute, for example, defines "firearm" to include a "bomb," "grenade," "rocket having a propellant charge of more than four ounces," or "missile having an explosive or incendiary charge of more than one-quarter ounce," where such device is "explosive," "incendiary," or delivers "poison gas." 18 U. S. C. § 921(a)(4)(A). On petitioners' reading, the "carry" provision would not apply to instances where drug lords, engaged in a major transaction, took with them "firearms" such as these, which most likely could not be carried on the person.

Fourth, petitioners argue that we should construe the word "carry" to mean "immediately accessible." And, as we have said, they point out that several Courts of Appeals have limited the statute's scope in this way. See, *e. g.*, *Foster*, *supra*, at 708; *Giraldo*, *supra*, at 676. That interpretation, however, is difficult to square with the statute's language, for one "carries" a gun in the glove compartment whether or not that glove compartment is locked. Nothing in the statute's history suggests that Congress intended that limitation. And, for reasons pointed out above, see *supra*, at 137, we believe that the words "during" and "in relation to" will limit the statute's application to the harms that Congress foresaw.

Finally, petitioners and the dissent invoke the "rule of lenity." The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. Cf. *Smith*, 508 U. S., at 239 ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable"). "'The rule of lenity applies only if, "after seizing everything from which aid can be derived," . . . we can make "no more than a guess as to what Congress intended."'" *United States* v. *Wells*, 519 U. S. 482, 499 (1997) (quoting *Reno* v. *Koray*, 515 U. S. 50, 65 (1995), in turn quoting *Smith*, *supra*, at 239, and *Ladner* v. *United States*, 358 U. S. 169, 178 (1958)). To invoke the rule, we must con-

clude that there is a "'"grievous ambiguity or uncertainty"' in the statute." *Staples* v. *United States*, 511 U. S. 600, 619, n. 17 (1994) (quoting *Chapman* v. *United States*, 500 U. S. 453, 463 (1991)). Certainly, our decision today is based on much more than a "guess as to what Congress intended," and there is no "grievous ambiguity" here. The problem of statutory interpretation in these cases is indeed no different from that in many of the criminal cases that confront us. Yet, this Court has never held that the rule of lenity automatically permits a defendant to win.

In sum, the "generally accepted contemporary meaning" of the word "carry" includes the carrying of a firearm in a vehicle. The purpose of this statute warrants its application in such circumstances. The limiting phrase "during and in relation to" should prevent misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims.

For these reasons, we conclude that petitioners' conduct falls within the scope of the phrase "carries a firearm." The judgments of the Courts of Appeals are affirmed.

It is so ordered.

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

Section 924(c)(1) of Title 18, United States Code, is a punishment-enhancing provision; it imposes a mandatory five-year prison term when the defendant "during and in relation to any crime of violence or drug trafficking . . . uses or carries a firearm." In *Bailey* v. *United States*, 516 U. S. 137 (1995), this Court held that the term "uses," in the context of § 924(c)(1), means "active employment" of the firearm. In today's cases we confront a related question: What does the term "carries" mean in the context of § 924(c)(1), the enhanced punishment prescription again at issue.

It is uncontested that § 924(c)(1) applies when the defendant bears a firearm, *i. e.*, carries the weapon on or about his

person "for the purpose of being armed and ready for offensive or defensive action in case of a conflict." Black's Law Dictionary 214 (6th ed. 1990) (defining the phrase "carry arms or weapons"); see *ante*, at 130. The Court holds that, in addition, "carries a firearm," in the context of § 924(c)(1), means personally transporting, possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.

Without doubt, "carries" is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a ubiquitously necessary one. Nor, in my judgment, is it a proper construction of "carries" as the term appears in § 924(c)(1). In line with *Bailey* and the principle of lenity the Court has long followed, I would confine "carries a firearm," for § 924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon.

I

A

I note first what is at stake for petitioners. The question before the Court "is not *whether* possession of a gun [on the drug offender's premises or in his car, during and in relation to commission of the offense,] means a longer sentence for a convicted drug dealer. It most certainly does. . . . Rather, the question concerns *which sentencing statute* governs the precise length of the extra term of punishment," § 924(c)(1)'s "blunt 'mandatory minimum'" five-year sentence, or the more finely tuned "sentencing guideline statutes, under which extra punishment for drug-related gun possession varies with the seriousness of the drug crime." *United States* v. *McFadden*, 13 F. 3d 463, 466 (CA1 1994) (Breyer, C. J., dissenting).

Accordingly, there would be no "gap," see *ante*, at 137, no relevant conduct "ignore[d]," see *ante*, at 133, were the Court to reject the Government's broad reading of § 924(c)(1). To

be more specific, as cogently explained on another day by today's opinion writer:

> "The special 'mandatory minimum' sentencing statute says that anyone who '*uses or carries*' a gun 'during and in relation to any . . . drug trafficking crime' must receive a mandatory five-year prison term added on to his drug crime sentence. 18 U. S. C. § 924(c). At the same time, the Sentencing Guidelines, promulgated under the authority of a different statute, 28 U. S. C. § 994, provide for a two-level (i. e., a 30% to 40%) sentence enhancement where a 'firearm . . . was possessed' by a drug offender, U. S. S. G. § 2D1.1(b)(1), unless the possession clearly was not 'connected with the [drug] offense.'" *McFadden*, 13 F. 3d, at 467 (Breyer, C. J., dissenting).

In Muscarello's case, for example, the underlying drug crimes involved the distribution of 3.6 kilograms of marijuana, and therefore carried a base offense level of 12. See United States Sentencing Commission, Guidelines Manual § 2D1.1(a)(3) (Nov. 1995). After adjusting for Muscarello's acceptance of responsibility, see *id.*, § 3E1.1(a), his final offense level was 10, placing him in the 6-to-12 month sentencing range. See *id.*, ch. 5, pt. A. The two-level enhancement for possessing a firearm, *id.*, § 2D1.1(b)(1), would have increased his final offense level to 12 (a sentencing range of 10 to 16 months). In other words, the less rigid (tailored to "the seriousness of the drug crime," *McFadden*, 13 F. 3d, at 466) Guidelines regime would have added four months to Muscarello's prison time, in contrast to the five-year minimum addition the Court's reading of § 924(c)(1) mandates.[1]

[1] The Sentencing Guidelines carry out "a major congressional effort to create a fairly sophisticated . . . system that distinguishes among different kinds of criminal behavior and punishes accordingly." *United States* v. *McFadden*, 13 F. 3d, at 467–468 (Breyer, C. J., dissenting). A "mandatory minimum" statute deviates from the general regime Congress installed. "Given the importance (to Congress) of the Guidelines system, . . . courts should take care not to interpret [with unnecessary breadth] . . . deviations

In sum, drug traffickers will receive significantly longer sentences if they are caught traveling in vehicles in which they have placed firearms. The question that divides the Court concerns the proper reference for enhancement in the cases at hand, the Guidelines or § 924(c)(1).

B

Unlike the Court, I do not think dictionaries,[2] surveys of press reports,[3] or the Bible[4] tell us, dispositively, what "car-

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from the basic congressionally-directed effort to rationalize sentencing." *Id.*, at 468.

[2] I note, however, that the only legal dictionary the Court cites, Black's Law Dictionary, defines "carry arms or weapons" restrictively. See *ante*, at 130; *supra*, at 139–140.

[3] Many newspapers, the New York Times among them, have published stories using "transport," rather than "carry," to describe gun placements resembling petitioners'. See, *e. g.*, Atlanta Constitution, Feb. 27, 1998, p. 9D, col. 2 ("House members last week expanded gun laws by allowing weapons to be *carried into restaurants or transported anywhere in cars.*"); Chicago Tribune, June 12, 1997, sports section, p. 13 ("Disabled hunters with permission to hunt from a standing vehicle would be able to *transport a shotgun in an all-terrain vehicle* as long as the gun is unloaded and the breech is open."); Colorado Springs Gazette Telegraph, Aug. 4, 1996, p. C10 (British gun laws require "locked steel cases bolted onto a car for *transporting guns from home to shooting range.*"); Detroit News, Oct. 26, 1997, p. D14 ("It is unlawful to *carry afield or transport a rifle* . . . or shotgun if you have buckshot, slug, ball loads, or cut shells in possession except while traveling directly to deer camp or target range with firearm not readily available to vehicle occupants."); N. Y. Times, July 4, 1993, p. A21, col. 2 ("[T]he gun is supposed to be *transported unloaded*, in a locked box in the trunk."); Santa Rosa Press Democrat, Sept. 28, 1996, p. B1 ("Police and volunteers ask that participants . . . *transport [their guns] to the fairgrounds* in the trunks of their cars."); Worcester Telegram & Gazette, July 16, 1996, p. B3 ("Only one gun can be turned in per person. *Guns transported in a vehicle* should be locked in the trunk.") (emphasis added in all quotations).

[4] The translator of the Good Book, it appears, bore responsibility for determining whether the servants of Ahaziah "carried" his corpse to Jerusalem. Compare *ante*, at 129, with, *e. g.*, The New English Bible, 2 Kings 9:28 ("His servants *conveyed* his body to Jerusalem."); Saint Joseph Edi-

ries" means embedded in § 924(c)(1). On definitions, "carry" in legal formulations could mean, *inter alia*, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person.[5] At issue here is not "carries" at large but "carries a firearm." The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning "perhaps more than one-third" of the time. *Ante*, at 129. One is left to wonder what meaning showed up some two-thirds of the time. Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and *bear* Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

On lessons from literature, a scan of Bartlett's and other quotation collections shows how highly selective the Court's choices are. See *ante*, at 129. If "[t]he greatest of writers" have used "carry" to mean convey or transport in a vehicle, so have they used the hydra-headed word to mean, *inter alia*, carry in one's hand, arms, head, heart, or soul, sans vehicle. Consider, among countless examples:

> "[H]e shall gather the lambs with his arm, and carry them in his bosom." The King James Bible, Isaiah 40:11.
>
> "And still they gaz'd, and still the wonder grew,

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tion of the New American Bible ("His servants *brought* him in a chariot to Jerusalem."); Tanakh: The Holy Scriptures ("His servants *conveyed* him in a chariot to Jerusalem."); see also *id.*, Isaiah 30:6 ("They *convey* their wealth on the backs of asses."); The New Jerusalem Bible ("[T]hey *bear* their riches on donkeys' backs.") (emphasis added in all quotations).

[5] The dictionary to which this Court referred in *Bailey* v. *United States*, 516 U. S. 137, 145 (1995), contains 32 discrete definitions of "carry," including "[t]o make good or valid," "to bear the aspect of," and even "[t]o bear (a hawk) on the fist." See Webster's New International Dictionary 412 (2d ed. 1949).

> That one small head could carry all he knew."
> O. Goldsmith, The Deserted Village, ll. 215–216, in The Poetical Works of Oliver Goldsmith 30 (A. Dobson ed. 1949).
>
> "There's a Legion that never was 'listed,
> That carries no colours or crest."
> R. Kipling, The Lost Legion, st. 1, in Rudyard Kipling's Verse, 1885–1918, p. 222 (1920).
>
> "There is a homely adage which runs, 'Speak softly and carry a big stick; you will go far.'" T. Roosevelt, Speech at Minnesota State Fair, Sept. 2, 1901, in J. Bartlett, Familiar Quotations 575:16 (J. Kaplan ed. 1992).[6]

These and the Court's lexicological sources demonstrate vividly that "carry" is a word commonly used to convey various messages. Such references, given their variety, are not reliable indicators of what Congress meant, in § 924(c)(1), by "carries a firearm."

C

Noting the paradoxical statement, "'I *use* a gun to protect my house, but I've never had to *use* it,'" the Court in *Bailey*, 516 U. S., at 143, emphasized the importance of context—the statutory context. Just as "uses" was read to mean not simply "possession," but "active employment," so "carries," correspondingly, is properly read to signal the most danger-

[6] Popular films and television productions provide corroborative illustrations. In "The Magnificent Seven," for example, O'Reilly (played by Charles Bronson) says: "You think I am brave because I carry a gun; well, your fathers are much braver because they carry responsibility, for you, your brothers, your sisters, and your mothers." See http://us.imdb.com/M/search_quotes?for=carry. And in the television series "M*A*S*H," Hawkeye Pierce (played by Alan Alda) presciently proclaims: "I will not carry a gun. . . . I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even 'hari-kari' if you show me how, but I will not carry a gun!" See http://www.geocities.com/Hollywood/8915/mashquotes.html.

ous cases—the gun at hand, ready for use as a weapon.[7] It is reasonable to comprehend Congress as having provided mandatory minimums for the most life-jeopardizing gun-connection cases (guns in or at the defendant's hand when committing an offense), leaving other, less imminently threatening, situations for the more flexible Guidelines regime.[8] As the Ninth Circuit suggested, it is not apparent why possession of a gun in a drug dealer's moving vehicle would be thought more dangerous than gun possession on premises where drugs are sold: "A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence. A gun in a bag under a tarp in a truck bed [or in a bedroom closet] poses substantially less risk." *United States* v. *Foster*, 133 F. 3d 704, 707 (1998) (en banc).[9]

For indicators from Congress itself, it is appropriate to consider word usage in other provisions of Title 18's chapter on "Firearms." See *Bailey*, 516 U. S., at 143, 146 (interpreting § 924(c)(1) in light of 18 U. S. C. §§ 922(g), 922(j), 922(k), 922(*o*)(1), 924(d)(1), 930(a), 930(b)). The Court, however,

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[7] In my view, the Government would carry its burden by proving a firearm was kept so close to the person as to approximate placement in a pocket or holster, *e. g.*, guns carried at one's side in a briefcase or handbag, or strapped to the saddle of a horse. See *ante*, at 130.

[8] The Court reports that the Courts of Appeals "have unanimously concluded that 'carry' is not limited to the carrying of weapons directly on the person." *Ante*, at 131. In *Bailey*, however, the Government's argument based on a similar observation did not carry the day. See Brief for United States in *Bailey* v. *United States*, O. T. 1995, Nos. 94–7448 and 94–7492, p. 16, n. 4. No Court of Appeals had previously adopted an "active employment" construction of "uses . . . a firearm" in § 924(c)(1), yet this Court did exactly that. See 516 U. S., at 144.

[9] The "Firearms" statutes indicate that Congress, unlike the Court, *ante*, at 132–133, recognizes that a gun in the hand is indeed more dangerous than a gun in the trunk. See, *e. g.*, 18 U. S. C. § 926A (permitting the transportation of firearms in a vehicle, but only if "neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle"); see *infra*, at 146–147.

does not derive from the statutory complex at issue its thesis that "'[c]arry' implies personal agency and some degree of possession, whereas 'transport' does not have such a limited connotation and, in addition, implies the movement of goods in bulk over great distances." *Ante*, at 134. Looking to provisions Congress enacted, one finds that the Legislature did not acknowledge or routinely adhere to the distinction the Court advances today; instead, Congress sometimes employed "transports" when, according to the Court, "carries" was the right word to use.

Section 925(a)(2)(B), for example, provides that no criminal sanction shall attend "the transportation of [a] firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions." The full text of § 926A, rather than the truncated version the Court presents, see *ibid.*, is also telling:

> "Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console."

In describing when and how a person may travel in a vehicle that contains his firearm without violating the law,

§§ 925(a)(2)(B) and 926A use "transport," not "carry," to "impl[y] personal agency and some degree of possession." *Ibid.*[10]

Reading "carries" in § 924(c)(1) to mean "on or about [one's] person" is fully compatible with these and other "Firearms" statutes.[11] For example, under § 925(a)(2)(B), one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets. Under the conditions of § 926A, one could transport her gun in a car, but under no circumstances could the gun be readily accessible while she travels in the car. "[C]ourts normally try to read language in different, but related, statutes, so as best to reconcile

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[10] The Court asserts that " 'transport' is a broader category that includes 'carry' but also encompasses other activity." *Ante*, at 135. "Carry," however, is not merely a subset of "transport." A person seated at a desk with a gun in hand or pocket is carrying the gun, but is not transporting it. Yes, the words "carry" and "transport" often can be employed interchangeably, as can the words "carry" and "use." But in *Bailey*, this Court settled on constructions that gave "carry" and "use" independent meanings. See 516 U. S., at 145–146. Without doubt, Congress is alert to the discrete meanings of "transport" and "carry" in the context of vehicles, as the Legislature's placement of each word in § 926A illustrates. The narrower reading of "carry" preserves discrete meanings for the two words, while in the context of vehicles the Court's interpretation of "carry" is altogether synonymous with "transport." Tellingly, when referring to firearms traveling in vehicles, the "Firearms" statutes routinely use a form of "transport"; they never use a form of "carry."

[11] See *infra*, at 149, nn. 13, 14. The Government points to numerous federal statutes that authorize law enforcement officers to "carry firearms" and notes that, in those authorizing provisions, "carry" of course means "both on the person and in a vehicle." Brief for United States 31–32, and n. 18. Quite right. But as viewers of "Sesame Street" will quickly recognize, "one of these things [a statute *authorizing* conduct] is not like the other [a statute *criminalizing* conduct]." The authorizing statutes in question are properly accorded a construction compatible with the clear purpose of the legislation to aid federal law enforcers in the performance of their official duties. It is fundamental, however, that a penal statute is not to be construed generously in the Government's favor. See, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 348 (1971).

those statutes, in light of their purposes and of common sense." *McFadden,* 13 F. 3d, at 467 (Breyer, C. J., dissenting). So reading the "Firearms" statutes, I would not extend the word "carries" in § 924(c)(1) to mean transports out of hand's reach in a vehicle.[12]

II

Section 924(c)(1), as the foregoing discussion details, is not decisively clear one way or another. The sharp division in the Court on the proper reading of the measure confirms, "[a]t the very least, . . . that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 284–285 (1978) (citation omitted); see *United States* v. *Granderson,* 511 U. S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). "Carry" bears many mean-

[12] The Court places undue reliance on Representative Poff's statement that § 924(c)(1) seeks "'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" *Ante,* at 132 (quoting 114 Cong. Rec. 22231 (1968)). As the Government argued in its brief to this Court in *Bailey:*

"In making that statement, Representative Poff was not referring to the 'carries' prong of the original Section 924(c). As originally enacted, the 'carries' prong of the statute prohibited only the 'unlawful' carrying of a firearm while committing an offense. The statute would thus not have applied to an individual who, for instance, had a permit for carrying a gun and carried it with him when committing an offense, and it would have had no force in 'persuading' such an individual 'to leave his gun at home.' Instead, Representative Poff was referring to the 'uses' prong of the original Section 924(c)." Brief for United States in *Bailey* v. *United States,* O. T. 1995, Nos. 94–7448 and 94–7492, p. 28.

Representative Poff's next sentence confirms that he was speaking of "uses," not "carries": "Any person should understand that if he *uses* his gun and is caught and convicted, he is going to jail." 114 Cong. Rec., at 22231 (emphasis added).

ings, as the Court and the "Firearms" statutes demonstrate.[13] The narrower "on or about [one's] person" interpretation is hardly implausible nor at odds with an accepted meaning of "carries a firearm."

Overlooking that there will be an enhanced sentence for the gun-possessing drug dealer in any event, see *supra*, at 140–142, the Court asks rhetorically: "How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for use) actually takes it from the trunk (or unlocks the glove compartment) of his car?" *Ante*, at 133. Correspondingly, the Court defines "carries a firearm" to cover "a person who knowingly possesses and conveys firearms [anyplace] in a vehicle . . . which the person accompanies." *Ante*, at 126–127. Congress, however, hardly lacks competence to select the words "possesses" or "conveys" when that is what the Legislature means.[14] Notably in view of the Legislature's capacity to speak plainly, and of overriding concern, the Court's inquiry

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[13] Any doubt on that score is dispelled by examining the provisions in the "Firearms" chapter, in addition to § 924(c)(1), that include a form of the word "carry": 18 U. S. C. § 922(a)(5) ("*carry out* a bequest"); §§ 922(s)(6)(B)(ii), (iii) ("*carry out* this subsection"); § 922(u) ("*carry away* [a firearm]"); 18 U. S. C. § 924(a)(6)(B)(ii) (1994 ed., Supp. II) ("*carry* or otherwise possess or discharge or otherwise use [a] handgun"); 18 U. S. C. § 924(e)(2)(B) ("*carrying* of a firearm"); § 925(a)(2) ("*carried out* to enable a person"); § 926(a) ("*carry out* the provisions of this chapter"); § 926A ("lawfully possess and *carry* such firearm to any other place where he may lawfully possess and *carry* such firearm"); § 929(a)(1) ("uses or *carries* a firearm and is in possession of armor piercing ammunition"); § 930(d)(3) ("lawful *carrying* of firearms . . . in a Federal facility incident to hunting or other lawful purposes") (emphasis added in all quotations).

[14] See, *e. g.*, 18 U. S. C. § 924(a)(6)(B)(ii) (1994 ed., Supp. II) ("if the person sold . . . a handgun . . . to a juvenile knowing . . . that the juvenile intended to *carry or otherwise possess* . . . the handgun . . . in the commission of a crime of violence"); 18 U. S. C. § 926A ("may lawfully *possess and carry* such firearm to any other place where he may lawfully *possess and carry* such firearm"); § 929(a)(1) ("uses or *carries a firearm and is in possession* of armor piercing ammunition"); § 2277 ("brings, *carries, or possesses* any dangerous weapon") (emphasis added in all quotations).

pays scant attention to a core reason for the rule of lenity: "[B]ecause 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.'" *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

* * *

The narrower "on or about [one's] person" construction of "carries a firearm" is consistent with the Court's construction of "uses" in *Bailey* to entail an immediacy element. It respects the Guidelines system by resisting overbroad readings of statutes that deviate from that system. See *McFadden*, 13 F. 3d, at 468 (Breyer, C. J., dissenting). It fits plausibly with other provisions of the "Firearms" chapter, and it adheres to the principle that, given two readings of a penal provision, both consistent with the statutory text, we do not choose the harsher construction. The Court, in my view, should leave it to Congress to speak "'in language that is clear and definite'" if the Legislature wishes to impose the sterner penalty. *Bass*, 404 U. S., at 347 (quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952)). Accordingly, I would reverse the judgments of the First and Fifth Circuits.

NEW MEXICO ex rel. ORTIZ *v.* REED

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 97–1217. Decided June 8, 1998

After Ohio officials told respondent they planned to revoke his parole, he fled to New Mexico. That State's Governor issued an extradition warrant, and respondent was arrested. A New Mexico trial court granted him habeas relief on his claim that he was not a "fugitive" for extradition purposes because he fled under duress, believing that Ohio authorities intended to revoke his parole without due process and to cause him physical harm if he were returned to prison. The State Supreme Court affirmed.

Held: The Extradition Clause imposes a mandatory duty on the asylum State, affording no discretion to its executive officers or courts. Once a Governor has granted extradition, a court considering release on habeas can decide only whether (a) the documents on their face are in order; (b) the petitioner has been charged with a crime in the demanding State; (c) the petitioner is the person named in the extradition request; and (d) the petitioner is a fugitive. *Michigan* v. *Doran*, 439 U. S. 282, 289. Claims relating to what actually happened in the demanding State, the law of that State, and what may be expected to happen in that State when the fugitive returns are issues to be decided by the demanding State, not the asylum State. See *Pacileo* v. *Walker*, 449 U. S. 86, 88 *(per curiam)*.

Certiorari granted; 124 N. M. 129, 947 P. 2d 86, reversed and remanded.

PER CURIAM.

Respondent, sentenced to a term of 25 years upon conviction of armed robbery and theft of drugs, was paroled from the Ohio correctional system in 1992. In the following year Ohio prison officials told respondent they planned to revoke his parole status. Before the scheduled date of his meeting with his parole officer, respondent fled from Ohio to New Mexico.

Ohio sought extradition and the Governor of New Mexico issued a warrant directing the extradition of respondent. He was arrested in October 1994, and later that year sought

a writ of habeas corpus from the New Mexico State District Court. He claimed he was not a "fugitive" for purposes of extradition because he fled under duress, believing that Ohio authorities intended to revoke his parole without due process and to cause him physical harm if he were returned to an Ohio prison. In January 1995, the New Mexico trial court ruled in favor of respondent and directed his release from custody. The State appealed this order, and in September 1997 the Supreme Court of New Mexico affirmed the grant of habeas corpus. 124 N. M. 129, 947 P. 2d 86 (1997). The State has petitioned for certiorari from that decision.

Article IV of the United States Constitution provides that:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Art. IV, § 2, cl. 2.

The Extradition Act, 18 U. S. C. § 3182, provides the procedures by which this constitutional command is carried out.

In *Michigan* v. *Doran*, 439 U. S. 282 (1978), we said:

> "Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." *Id.*, at 289.

The Supreme Court of New Mexico agreed that the first three requirements had been met, but decided that respondent was not a "fugitive" from justice; in the words of the Supreme Court of New Mexico, he was a "refugee from injustice." 124 N. M, at 146, 947 P. 2d, at 103. That court held

that respondent fled Ohio because of fear that his parole would be revoked without due process, and that he would be thereafter returned to prison where he faced the threat of bodily injury. This "duress" negated his status as a fugitive under Article IV.

These are serious charges, unrebutted by any evidence at the hearing in the state trial court. It may be noted, however, that the State of Ohio was not a party at that hearing, and the State of New Mexico, which was defending the Governor's action, is at a considerable disadvantage in producing testimony, even in affidavit form, of occurrences in the State of Ohio. Very likely Ohio was aware of our statement in *Sweeney* v. *Woodall*, 344 U. S. 86, 89–90 (1952), that the "scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, . . . do[es] not contemplate an appearance by [the demanding State] in respondent's asylum to defend against the claimed abuses of its prison system" (footnotes omitted).

We accept, of course, the determination of the Supreme Court of New Mexico that respondent's testimony was credible, but this is simply not the kind of issue that may be tried in the asylum State. In case after case we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State. *Drew* v. *Thaw*, 235 U. S. 432 (1914); *Sweeney* v. *Woodall*, *supra*; *Michigan* v. *Doran*, *supra*; *Pacileo* v. *Walker*, 449 U. S. 86 (1980) *(per curiam)*. As we said in *Pacileo:*

> "Once the Governor of California issued the warrant for arrest and rendition in response to the request of the Governor of Arkansas, claims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California. 'To allow

> plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Article IV, § 2.' *Michigan* v. *Doran*, *supra*, at 290." *Id.*, at 88.

There are practical reasons as well as legal reasons which support this result. In a brief filed by 40 States as *amici curiae*, we are advised that in 1997, for example, Ohio made 218 extradition requests from its sister States, and returned 209 prisoners to other States. California in that same year had a total of 685 demands and returns, New York 490, Texas 700, and Pennsylvania 543.* The burden on a demanding State of producing witnesses and records in the asylum State to counter allegations such as those of respondent's in this case would be substantial, indeed.

The Supreme Court of New Mexico also held that the New Mexico Constitution's provision guaranteeing the right "of seeking and obtaining safety" prevailed over the State's duty under Article IV of the United States Constitution. But as long ago as *Kentucky* v. *Dennison*, 24 How. 66 (1861), we held that the duty imposed by the Extradition Clause on the asylum State was mandatory. In *Puerto Rico* v. *Branstad*, 483 U. S. 219, 227 (1987), we reaffirmed "the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or the courts of the asylum State." And in *California* v. *Superior Court of Cal., San Bernardino Cty.*, 482 U. S. 400, 405–406 (1987), we said:

> "The Federal Constitution places certain limits on the sovereign powers of the States, limits that are an essential part of the Framers' conception of national identity and Union. One such limit is found in Article IV, § 2, cl. 2, the Extradition Clause: [text of clause omitted].

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*The motion of National Association of Extradition Officials for leave to file a brief as *amicus curiae* is granted.

> "The obvious objective of the Extradition Clause is that no State should become a safe haven for the fugitives from a sister State's criminal justice system."

As is apparent from the length of time this proceeding has taken in the courts of New Mexico, it has been anything but the "summary" proceeding contemplated by the decisions cited above. This is because the Supreme Court of New Mexico went beyond the permissible inquiry in an extradition case, and permitted the litigation of issues not open in the asylum State. The State's petition for certiorari is granted, the judgment of the New Mexico Supreme Court is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

PHILLIPS ET AL. *v.* WASHINGTON LEGAL FOUNDATION ET AL.

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

No. 96–1578. Argued January 13, 1998—Decided June 15, 1998

Under Texas' Interest on Lawyers Trust Account (IOLTA) program, an attorney who receives client funds must place them in a separate, interest-bearing, federally authorized "NOW" account upon determining that the funds "could not reasonably be expected to earn interest for the client or [that] the interest which might be earned . . . is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest." IOLTA interest income is paid to the Texas Equal Access to Justice Foundation (TEAJF), which finances legal services for low-income persons. The Internal Revenue Service does not attribute such interest to the individual clients for federal income tax purposes if they have no control over the decision whether to place the funds in the IOLTA account and do not designate who will receive the interest. Respondents—a public-interest organization having Texas members opposed to the IOLTA program, a Texas attorney who regularly deposits client funds in an IOLTA account, and a Texas businessman whose attorney retainer has been so deposited—filed this suit against TEAJF and the other petitioners, alleging, *inter alia*, that the Texas IOLTA program violated their rights under the Fifth Amendment, which provides that "private property" shall not "be taken for public use, without just compensation." The District Court granted petitioners summary judgment, reasoning that respondents had no property interest in the IOLTA interest proceeds. The Fifth Circuit reversed, concluding that such interest belongs to the owner of the principal.

Held:

1. Interest earned on client funds held in IOLTA accounts is the "private property" of the client for Takings Clause purposes. The existence of a property interest is determined by reference to existing rules or understandings stemming from an independent source such as state law. *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577. All agree that under Texas law the principal held in IOLTA accounts is the client's "private property." Moreover, the general rule that "interest follows principal" applies in Texas. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 162. Petitioners' contention that

Syllabus

Webb's does not control because examples such as income-only trusts and marital community property rules demonstrate that Texas does not, in fact, adhere to the general rule is rejected. These examples miss the point of *Webb's.* Their exception by Texas from the "interest follows principal" rule has a firm basis in traditional property law principles, whereas petitioners point to no such principles allowing the owner of funds temporarily deposited in an attorney trust account to be deprived of the interest the funds generate. Petitioners' further contention that "interest follows principal" in Texas only if it is allowed by law does not assist their cause. They do not argue that Texas law prohibits the payment of interest on IOLTA funds, but, rather, that interest actually "earned" by such funds is not the private property of the principal's owner. Regardless of whether that owner has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal. Petitioners' final argument that the money transferred to the TEAJF is not "private property" because IOLTA funds cannot reasonably be expected to generate interest income on their own is plainly incorrect under Texas' requirement that client funds be deposited in an IOLTA account "if the interest which might be earned" is insufficient to offset account costs and service charges that would be incurred in obtaining it. It is not that the funds to be placed in IOLTA accounts cannot generate *interest,* but that they cannot generate *net interest.* This Court has indicated that a physical item does not lack "property" status simply because it does not have a positive economic or market value. See, *e. g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435, 437, n. 15. While IOLTA interest income may have no economically realizable value to its owner, its possession, control, and disposition are nonetheless valuable rights. See *Hodel* v. *Irving,* 481 U. S. 704, 715. The United States' argument that "private property" is not implicated here because IOLTA interest income is "government-created value" is factually erroneous: The State does nothing to create value; the value is created by respondents' funds. The Federal Government, through its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value." In any event, this Court rejected a similar argument in *Webb's*, *supra*, at 162. Pp. 163–171.

2. This Court leaves for consideration on remand the question whether IOLTA funds have been "taken" by the State, as well as the amount of "just compensation," if any, due respondents. P. 172.

94 F. 3d 996, affirmed.

Syllabus

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 172. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 179.

Darrell E. Jordan argued the cause for petitioners. With him on the briefs were *Brittan L. Buchanan*, *David J. Schenck*, and *Nancy Trease.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Acting Solicitor General Dellinger*, *Assistant Attorneys General Hunger* and *Schiffer*, *Patricia A. Millett*, *Robert Klarquist*, and *Timothy Dowling.*

Richard A. Samp argued the cause for respondents. With him on the brief were *Daniel J. Popeo*, *Donald B. Ayer*, *Thomas M. Fisher*, and *Michael J. Mazzone.**

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, and *Deborah Steenland*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *William U. Hill* of Wyoming; for the American Association of Retired Persons et al. by *John H. Pickering, Bruce Vignery, Michael R. Schuster,* and *J. Allen May;* for the American Bar Association by *Jerome J. Shestack*, *Jerold S. Solovy*, *Barry Levenstam*, *Paul M. Smith*, and *Nory Miller;* for the

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Texas, like 48 other States and the District of Columbia,[1] has adopted an Interest on Lawyers Trust Account

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Columbus Bar Association et al. by *Richard A. Cordray* and *Richard A. Frye;* for the Conference of Chief Justices by *Brian J. Serr* and *Charles Alan Wright;* for the Council of State Governments et al. by *Richard Ruda*, *David B. Isbell*, *Robert A. Long, Jr.*, and *Caroline M. Brown;* for the Massachusetts Bar Foundation by *Henry C. Dinger;* and for the Texas Equal Access to Justice Program et al. by *Peter M. Siegel*, *Randall C. Berg, Jr.*, *JoNel Newman*, and *Arthur J. England, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Association for Objective Law by *Stephen Plafker;* for the Attorneys' Bar Association of Florida by *Ronald D. Maines* and *Harvey M. Alper;* for Defenders of Property Rights et al. by *Nancie G. Marzulla;* for the National Right to Work Legal Defense Foundation, Inc., by *John C. Scully;* for the Pacific Legal Foundation by *James S. Burling*, *R. S. Radford*, and *Stephen E. Abraham;* for the Mountain States Legal Foundation by *William Perry Pendley;* for the Texas Justice Foundation by *David L. Wilkinson* and *Allan E. Parker, Jr.;* and for Robert E. Talton et al. by *Stephen R. McAllister* and *Mark W. Smith.*

[1] Ala. Rule Prof. Conduct 1.15(g) (1996); Alaska Rule Prof. Conduct 1.15(d) (1997); Ariz. Sup. Ct. Rule 44(c)(2) (1997); Ark. Rule Prof. Conduct 1.15(d)(2) (1997); Cal. Bus. & Prof. Code Ann. §6211(a) (West 1990 and Supp. 1998); Colo. Rule Prof. Conduct 1.15(e)(2) (1997); Conn. Rule Prof. Conduct 1.15(d) (1998); Del. Rule Prof. Conduct 1.15(h) (1998); D. C. Rule Prof. Conduct 1.15(e) (1997); Fla. Bar Rule 5–1.1 (1994 and Supp. 1998); Ga. Code Prof. Responsibility Rule 3–109, DR 9–102 (1998); Haw. Sup. Ct. Rule 11 (1997); Idaho Rule Prof. Conduct 1.15(d) (1997); Ill. Rule Prof. Conduct 1.15(d) (1997); Iowa Code Prof. Responsibility DR 9–102 (1997); Kan. Rule Prof. Conduct 1.15(d)(3) (1997); Ky. Sup. Ct. Rule 3.830 (1998); La. Rule Prof. Conduct 1.15(d) (1997); Me. Code Prof. Responsibility 3.6(e)(4) (1997); Md. Bus. Occ. & Prof. Code Ann. §10–303 (1995); Mass. Sup. Ct. Rule 3:07, DR 9–102 (1997); Mich. Rule Prof. Conduct 1.15(d) (1997); Minn. Rule Prof. Conduct 1.15(d) (1993); Miss. Rule Prof. Conduct 1.15(d) (1997); Mo. Rule Prof. Conduct 1.15(d) (1997); Mont. Rule Prof. Conduct 1.18(b) (1996); Neb. Sup. Ct. Trust Acct. Rules 1–8 (1997); Nev. Sup. Ct. Rule 217 (1998); *Petition of New Hampshire Bar Assn.*, 122 N. H. 971, 453 A. 2d 1258 (1982); N. J. Rules Gen. Application 1:28A–2 (1998); N. M. Rule Prof. Conduct 16–115(D) (1998); N. Y. Jud. Law §497 (McKinney Supp. 1997 and 1998); N. C. Rule Prof. Conduct 1.15–3 (1997); N. D. Rule

(IOLTA) program. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in bank accounts. The interest income generated by the funds is paid to foundations that finance legal services for low-income individuals. The question presented by this case is whether interest earned on client funds held in IOLTA accounts is "private property" of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment. We hold that it is the property of the client.

I

In the course of their legal practice, attorneys are frequently required to hold client funds for various lengths of time. Before 1980, an attorney generally held such funds in noninterest-bearing, federally insured checking accounts in which all client trust funds of an individual attorney were pooled. These accounts provided administrative convenience and ready access to funds. They were noninterest bearing because federal law prohibited federally insured banks and savings and loans from paying interest on checking accounts. See 12 U. S. C. §§ 371a, 1464(b)(1)(B), 1828(g). When a lawyer held a large sum in trust for his client, such funds were generally placed in an interest-bearing savings account because the interest generated

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Prof. Conduct 1.15(d)(1) (1997); Ohio Rev. Code Ann. § 4705.09(A)(1) (1997); Okla. Rule Prof. Conduct 1.15(d) (1997); Ore. Code Prof. Responsibility DR 9–101(D)(2) (1997); Pa. Rule Prof. Conduct 1.15(d) (1997) and Pa. Rule Disciplinary Enforcement 601(d) (1997); R. I. Rule Prof. Conduct 1.15(d) (1997); S. C. App. Ct. Rule 412 (1988); S. D. Rule Prof. Conduct 1.15(d)(4) (1995); Tenn. Code Prof. Responsibility DR 9–102(C)(2) (1997); *In re Interest on Lawyers' Trust Accounts*, 672 P. 2d 406 (Utah 1983); Va. Sup. Ct. Rules, Pt. 6, § 4, ¶ 20 (1997); Vt. Code Prof. Responsibility DR 9–103 (1996); Wash. Rule Prof. Conduct 1.14(c)(1) (1997); W. Va. Rule Prof. Conduct 1.15(d) (1997); Wis. Sup. Ct. Rules 13.04, 20:1.15 (1997); Wyo. Rule Prof. Conduct 1.15(II) (1997). Indiana is the only State that has not implemented an IOLTA program. See *In re Indiana State Bar Assn. Petition*, 550 N. E. 2d 311 (Ind. 1990).

outweighed the inconvenience caused by the lack of check-writing capabilities.

In 1980, Congress authorized the creation of Negotiable Order of Withdrawal (NOW) accounts, which for the first time permitted federally insured banks to pay interest on demand deposits. § 303, 94 Stat. 146, as amended, 12 U. S. C. § 1832. NOW accounts are permitted only for deposits that "consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit." § 1832(a)(2). For-profit corporations and partnerships are thus prohibited from earning interest on demand deposits. See *ibid.* However, interpreting § 1832(a), the Federal Reserve Board has concluded that corporate funds may be held in NOW accounts if the funds are held in trust pursuant to a program under which charitable organizations have "the exclusive right to the interest." Letter from Federal Reserve Board General Counsel Michael Bradfield to Donald Middlebrooks (Oct. 15, 1981), reprinted in Middlebrooks, The Interest on Trust Accounts Program: Mechanics of its Operation, 56 Fla. B. J. 115, 117 (Feb. 1982) (hereinafter Federal Reserve's IOLTA Letter).[2]

Beginning with Florida in 1981, a number of States moved quickly to capitalize on this change in the banking regulations by establishing IOLTA programs. Texas followed suit in 1984. Its Supreme Court issued an order, now codified as Article XI of the State Bar Rules, providing that an attorney who receives client funds that are "nominal in amount or are reasonably anticipated to be held for a short period of time" must place such funds in a separate, interest-bearing NOW account (an IOLTA account). Tex. State Bar Rule, Art. XI,

[2] We express no opinion as to the reasonableness of this interpretation of § 1832(a). See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

§5(A); Rules 4, 7 of the Texas Rules Governing the Operation of the Texas Equal Access to Justice Program. Client funds are considered "nominal in amount" or "held for a short period of time" if the attorney holding the funds determines that

> "such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client." Texas IOLTA Rule 6.

Interest earned by the funds deposited in an IOLTA account is to be paid to the Texas Equal Access to Justice Foundation (TEAJF), a nonprofit corporation established by the Supreme Court of Texas. Tex. State Bar Rule, Art. XI, §§3, 4; Texas IOLTA Rule 9(a). TEAJF distributes the funds to nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons." Texas IOLTA Rule 10. The Internal Revenue Service does not attribute the interest generated by an IOLTA account to the individual clients for federal income tax purposes so long as the client has no control over the decision whether to place the funds in the IOLTA account and does not designate who will receive the interest generated by the account. See Rev. Rul. 81–209, 1981–2 Cum. Bull. 16; Rev. Rul. 87–2, 1987–1 Cum. Bull. 18.

Respondents are the Washington Legal Foundation (WLF), Michael Mazzone, and William Summers. WLF is a public-interest law and policy center with members in the State of Texas who are opposed to the Texas IOLTA program. App. 26. Mazzone is an attorney admitted to practice in

Texas who maintains an IOLTA account into which he regularly deposits client funds. *Id.*, at 82. Summers is a Texas citizen and businessman whose work requires him to make regular use of the services of an attorney. In January 1994, Summers learned that a retainer he had deposited with his attorney was being held in an IOLTA account. *Id.*, at 85. In February 1994, respondents filed this suit against petitioners—TEAJF, W. Frank Newton, in his official capacity as chairman of TEAJF, and the nine Justices of the Supreme Court of Texas. Respondents alleged, *inter alia*, that the Texas IOLTA program violated their rights under the Fifth Amendment, by taking their property without just compensation.

The District Court granted summary judgment to petitioners, reasoning that respondents had no property interest in the interest proceeds generated by the funds held in IOLTA accounts. *Washington Legal Foundation* v. *Texas Equal Access to Justice Foundation*, 873 F. Supp. 1 (WD Tex. 1995). The Court of Appeals for the Fifth Circuit reversed, concluding that "any interest that accrues belongs to the owner of the principal." *Washington Legal Foundation* v. *Texas Equal Access to Justice Foundation*, 94 F. 3d 996, 1004 (1996). Because of a split over whether the interest income generated by funds held in IOLTA accounts is private property for purposes of the Fifth Amendment's Takings Clause,[3] we granted certiorari. 521 U. S. 1117 (1997).

II

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.*

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[3] *Cone* v. *State Bar of Fla.*, 819 F. 2d 1002 (CA11), cert. denied, 484 U. S. 917 (1987); *In re Interest on Lawyers' Trust Accounts*, 672 P. 2d 406 (Utah 1983); *Petition of New Hampshire Bar Assn.*, 122 N. H., at 975–976, 453 A. 2d, at 1260–1261; *In re Minnesota State Bar Assn.*, 332 N. W. 2d 151, 158 (Minn. 1982); *In re Interest on Trust Accounts*, 402 So. 2d 389, 395–396 (Fla. 1981).

v. *Chicago*, 166 U. S. 226, 239 (1897), provides that "private property" shall not "be taken for public use, without just compensation." Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972).

All agree that under Texas law the principal held in IOLTA trust accounts is the "private property" of the client. Texas IOLTA Rule 4 (discussing circumstances under which "client funds" must be deposited in an IOLTA account); Texas Bar Rule 1.14(a) (lawyers "shall hold funds . . . belonging in whole or in part to clients . . . separate from the lawyer's own property"); see also Brief for United States as *Amicus Curiae* 10 ("There can be no doubt that the client funds underlying the IOLTA program are the property of respondents"). When deposited in an IOLTA account, these funds remain in the control of a private attorney and are freely available to the client upon demand. As to the principal, then, the IOLTA rules at most "regulate the use of [the] property." *Yee* v. *Escondido*, 503 U. S. 519, 522 (1992). Respondents do not contend that the State's regulation of the manner in which attorneys hold and manage client funds amounts to a taking of private property. The question in this case is whether the interest on an IOLTA account is "private property" of the client for whom the principal is being held.[4]

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[4] We granted certiorari in this case to answer the question whether "interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer, cognizable under the . . . Fifth Amendmen[t] to the U. S. Constitution . . . ." Pet. for Cert. i. JUSTICE SOUTER contends that we should vacate the judgment of the Court of Appeals because it was improper for that court to have answered this question apart from the takings and just compensation questions. Petitioners, however, did not argue in their petition for certiorari that it was error for the Fifth Circuit to address the property question alone. Because, under this Court's Rule 14(1)(a), our practice is to consider "[o]nly

The rule that "interest follows principal" has been established under English common law since at least the mid-1700's. *Beckford* v. *Tobin*, 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749) ("[I]nterest shall follow the principal, as the shadow the body"). Not surprisingly, this rule has become firmly embedded in the common law of the various States.[5] The Court of Appeals in this case, two of the three

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the questions set forth in the petition, or fairly included therein," it would be improper for us *sua sponte* to raise and address the question answered by JUSTICE SOUTER.

[5] *E. g.*, *Freeman* v. *Young*, 507 So. 2d 109, 110 (Ala. Civ. App. 1987) ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property" (internal quotation marks omitted)); *Pomona City School Dist.* v. *Payne*, 9 Cal. App. 2d 510, 512, 50 P. 2d 822, 823 (1935) ("[O]bviously the interest accretions belong to such owner"); *Vidal Realtors of Westport, Inc.* v. *Harry Bennett & Assocs., Inc.*, 1 Conn. App. 291, 297–298, 471 A. 2d 658, 662 (1984) ("As long as the attached fund is used for profit, the profit . . . is impounded for the benefit of the attaching creditor and is subject to the same ultimate disposition as the principal of which it is the incident" (internal quotation marks omitted)); *Burnett* v. *Brito*, 478 So. 2d 845, 849 (Fla. App. 1985) ("[A]ny interest earned on interpleaded and deposited funds follows the principal and shall be allocated to whomever is found entitled to the principal"); *Morton Grove Park Dist.* v. *American Nat. Bank & Trust Co.*, 78 Ill. 2d 353, 362–363, 399 N. E. 2d 1295, 1299 (1980) ("The earnings on the funds deposited are a mere incident of ownership of the fund itself"); *B & M Coal Corp.* v. *United Mine Workers*, 501 N. E. 2d 401, 405 (Ind. 1986) ("[I]nterest earnings must follow the principal and be distributed to the ultimate owners of the fund"); *Unified School Dist. No. 490, Butler County* v. *Board of County Commissioners of Butler County*, 237 Kan. 6, 9, 697 P. 2d 64, 69 (1985) ("[I]nterest follows principal"); *Pontiac School Dist.* v. *City of Pontiac*, 294 Mich. 708, 715–716, 294 N. W. 141, 144 (1940) ("The generally understood and applied principles that interest is merely an incident of the principal and must be accounted for"); *State Highway Comm'n* v. *Spainhower*, 504 S. W. 2d 121, 126 (Mo. 1973) ("Interest earned by a deposit of special funds is an increment accruing thereto" (internal quotation marks omitted)); *Siroky* v. *Richland County*, 271 Mont. 67, 74, 894 P. 2d 309, 313 (1995) ("[I]nterest earned belongs to the owner of the funds that generated the interest"); *Bordy* v. *Smith*, 150 Neb. 272, 276, 34 N. W. 2d 331, 334 (1948) ("Once settled clearly and definitely whose money the principal sum was, the interest necessarily belongs to that person as an increment to the principal fund"); *State ex rel. Board of County Com-*

judges of which are Texans, held that Texas also follows this rule, citing *Sellers* v. *Harris County*, 483 S. W. 2d 242, 243 (Tex. 1972) ("The interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners"). Indeed, in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 162 (1980), we cited the *Sellers* opinion as demonstrative of the general rule that "any interest . . . follows the principal."

In *Webb's*, we addressed a Florida statute providing that interest accruing on an interpleader fund deposited in the registry of the court "'shall be deemed income of the office of the clerk of the circuit court.'" *Id.*, at 156, n. 1 (quoting Fla. Stat. § 28.33 (1977)) (emphasis deleted). The appellant in that case filed an interpleader action in Florida state court and tendered the sum at issue, nearly $2 million, into court. In addition to deducting $9,228.74 from the interpleader fund as a fee "for services rendered," the clerk of court also retained the more than $100,000 in interest income generated

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missioners v. *Montoya*, 91 N. M. 421, 423, 575 P. 2d 605, 607 (1978) ("[T]he general rule is that interest is an accretion or increment to the principal fund earning it"); *Stuarco, Inc.* v. *Slafbro Realty Corp.*, 30 App. Div. 2d 80, 82, 289 N. Y. S. 2d 883, 885 (1968) (plaintiff "is entitled to the interest actually accrued . . . despite the absence of any agreement to pay interest on the deposit, and this precisely and only because interest was in fact earned thereon"); *McMillan* v. *Robeson County*, 262 N. C. 413, 417, 137 S. E. 2d 105, 108 (1964) ("The earnings on the fund are a mere incident of ownership of the fund itself"); *Des Moines Mut. Hail & Cyclone Ins. Assn.* v. *Steen*, 43 N. D. 298, 301, 175 N. W. 195 (1919) ("[A]ccruing interest follows the principal"); *Board of Educ., Woodward Pub. Schools* v. *Hensely*, 665 P. 2d 327, 331 (Okla. App. 1983) ("The interest earned . . . becomes a part of the principal of the fund which generates it"); *University of S. C.* v. *Elliott*, 248 S. C. 218, 220, 149 S. E. 2d 433, 434 (1966) ("[I]nterest earned . . . is simply an increment of the principal fund, making the interest the property of the party who owned the principal fund"); *Board of County Commissioners of the County of Laramie* v. *Laramie County School Dist. No. One*, 884 P. 2d 946, 953 (Wyo. 1994) ("In general, interest is merely an incident of the principal fund, making it the property of the party owning the principal fund").

by the deposited funds. We held that the statute authorizing the clerk to confiscate the earned interest violated the Takings Clause. As we explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." 449 U. S., at 164. In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law. See *id.*, at 163–164; see also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1029 (1992).

Petitioners nevertheless contend that *Webb's* does not control because Texas does not, in fact, adhere to the "interest follows principal" rule, "at least if elevated to the level of an absolute legal rule." Brief for Petitioners 22. They point to several examples, such as income-only trusts and marital community property rules, where under Texas law interest does not follow principal. According to petitioners, the IOLTA program is simply another exception to the general rule.

We find these examples insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction. *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 204 (1956). Petitioners' examples miss the point of our decision in *Webb's*. Texas' exception of income-only trusts and certain marital property from the general rule that "interest follows principal" has a firm basis in traditional property law principles. Permitting the owner of a sum of money to distribute to a designated beneficiary the interest income generated by his principal is entirely consistent with the fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit. *United*

States v. *General Motors Corp.*, 323 U. S. 373, 377–378 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to . . . dispose of it"). Similarly, the Texas rules governing the distribution of marital assets have a historical pedigree tracing back to the marital property laws adopted by the Texas Congress only four years after Texas became an independent republic. W. McClanahan, Community Property Law in the United States § 3:23, pp. 123–124 (1982). But petitioners point to no "background principles" of property law, *Lucas*, *supra*, at 1030, that would lead one to the conclusion that the owner of a fund temporarily deposited in an attorney trust account may be deprived of the interest the fund generates.

Petitioners further contend that "interest follows principal" is an incomplete explication of the Texas rule. Reply Brief for Petitioners 11. Petitioners explain that interest follows principal in Texas only if the interest is "allowed by law or fixed by the parties." *Cavnar* v. *Quality Control Parking, Inc.*, 696 S. W. 2d 549, 552 (Tex. 1985). We fail to see how this assists petitioners' cause. We agree that the government has great latitude in regulating the circumstances under which interest may be earned. As we explained in *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979), "anticipated gains ha[ve] traditionally been viewed as less compelling than other property-related interests." But petitioners do not argue that the payment of interest on client funds deposited in an attorney trust account is not "allowed by law" in Texas. Rather, they argue that interest actually "earned" by funds held in IOLTA accounts, Texas IOLTA Rule 9, is not the private property of the owner of the principal. However, regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal.

Finally, petitioners argue that the interest income transferred to the TEAJF is not "private property" because the client funds held in IOLTA accounts "cannot reasonably be expected to generate interest income on their own." Brief for Petitioners 18. As an initial matter, petitioners' assertion that client funds held in IOLTA accounts cannot be expected to generate interest income is plainly incorrect under the express terms of the Texas IOLTA rules. Texas IOLTA Rule 6 requires that client funds held by an attorney be deposited in an IOLTA account "if the interest which might be earned" is insufficient to offset the "cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client." In other words, it is not that the client funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*.

Whether client funds held in IOLTA accounts could generate net interest is a matter of some dispute. As written, the Texas IOLTA program requires the calculation as to net interest to be made "without regard to funds of other clients which may be held by the attorney." Texas IOLTA Rule 6. This provision would deny to an attorney the traditional practice of pooling funds of several clients in one account, a practice which might produce net interest when opening an account for each client would not. But in the District Court, petitioners agreed that this portion of the rule was not to be enforced, and that an attorney could make the necessary calculation on the basis of pooled accounts. Petitioners made a similar concession during oral argument here. Tr. of Oral Arg. 13–16. We accept this concession but find that it does not avail petitioners.

We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto* v. *Teleprompter Manhattan CATV*

Corp., 458 U. S. 419 (1982), we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. *Id.*, at 437, n. 15. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value, see *id.*, at 435; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it," *General Motors, supra,* at 380. While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. See *Hodel* v. *Irving,* 481 U. S. 704, 715 (1987) (noting that "the right to pass on" property "is itself a valuable right"). The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected.

The United States, as *amicus curiae*, additionally argues that "private property" is not implicated by the IOLTA program because the interest income generated by funds held in IOLTA accounts is "government-created value." Brief for United States as *Amicus Curiae* 20. We disagree. As an initial matter, this argument is factually erroneous. The interest income transferred to the TEAJF is not the product of increased efficiency, economies of scale, or pooling of funds by the government. Indeed, as noted above, the State has conceded at oral argument that if an attorney could in any way (such as pooling of client funds) earn interest for a client, he is ethically obligated to do so rather than place the funds in an IOLTA account. Interest income is economically realizable by IOLTA primarily because: (1) the Federal Government imposes tax reporting costs only on those who attempt to exercise control over the interest their funds generate, see Rev. Rul. 81–209, 1981–2 Cum. Bull. 16; Rev. Rul. 87–2,

1987–1 Cum. Bull. 18; and (2) the Federal Government prohibits for-profit corporations from holding funds in NOW accounts if the interest is paid to the corporation, but permits corporate funds to be held in NOW accounts if the interest is paid to the TEAJF, see Federal Reserve's IOLTA Letter. In other words, the State does nothing to create value; the value is created by respondents' funds. The Federal Government, through the structuring of its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value."

In any event, we rejected a similar "government-created value" argument in *Webb's*. There, the State of Florida argued that since the clerk's authority to invest deposited funds was a statutorily created right, any interest income generated by the funds was not private property. 449 U. S., at 163. We rejected this argument, explaining that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Id.*, at 162.

This would be a different case if the interest income generated by IOLTA accounts was transferred to the State as payment "for services rendered" by the State. *Id.*, at 157. Our holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income. See *id.*, at 162; cf. *United States* v. *Sperry Corp.*, 493 U. S. 52, 60 (1989) (upholding the imposition of a "reasonable 'user fee'" on those utilizing the Iran-United States Claims Tribunal). But here the State does not, indeed cannot, argue that its confiscation of respondents' interest income amounts to a fee for services performed. Unlike in *Webb's*, where the State safeguarded and invested the deposited funds, funds held in IOLTA accounts are managed entirely by banks and private attorneys.

III

In sum, we hold that the interest income generated by funds held in IOLTA accounts is the "private property" of the owner of the principal. We express no view as to whether these funds have been "taken" by the State; nor do we express an opinion as to the amount of "just compensation," if any, due respondents. We leave these issues to be addressed on remand. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court holds that "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Ante* this page. I do not join in today's ruling because the Court's limited enquiry has led it to announce an essentially abstract proposition; even assuming that the proposition correctly states the law, it may ultimately turn out to have no significance in resolving the real issue raised in this case, which is whether the Interest on Lawyers Trust Account (IOLTA) scheme violates the Takings Clause of the Fifth Amendment. Since the sounder course would be to vacate the similarly limited judgment of the Court of Appeals for the Fifth Circuit and remand for the broader enquiry outlined below, I respectfully dissent.

The Court recognizes three distinct issues implicated by a takings claim: whether the interest asserted by the plaintiff is property, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking. *Ibid.* The Court is careful to address only the first of these questions, *ibid.*, which is the only one on which the Fifth Circuit ruled. See *Washington Legal Foundation* v. *Texas Equal Access to Justice Foundation*, 94 F. 3d 996, 1004 (1996).

The affirmative answer given by the Court and the Fifth Circuit to the question whether IOLTA interest attributable to a client's funds is the client's property states, in essence, a proposition of state law, which is one source of property interests entitled to federal constitutional protection, see *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972), and *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1030 (1992). In this instance the relevant state law is said to embrace the general principle that property in interest income follows ownership of the principal on which the interest is earned, *ante*, at 164–166, and n. 4, and the Court treats any income generated by a client's funds like income that the client could derive directly through a method of money management or investment that costs more than it produced, *ante*, at 169–171.

In addressing only the issue of the property interest, leaving the questions of taking and compensation for a later day in the litigation of respondents' action, the Court and the Court of Appeals have, however, postponed consideration of the most salient fact relied upon by petitioners in contesting respondents' Fifth Amendment claim: that the respondent client would effectively be barred from receiving any net interest on his funds subject to the state IOLTA rule by the combination of an unchallenged federal banking statute and regulation, 12 U. S. C. § 1832(a); 12 CFR § 204.130 (1997); a separate, unchallenged Texas rule of attorney discipline, Texas Bar Rules, Art. 10, § 9, Rule 1.14(b); and unchallenged Internal Revenue Service interpretations of the Tax Code, Rev. Rul. 81–209, 1981–2 Cum. Bull. 16; Rev. Rul. 87–2, 1987–1 Cum. Bull. 18. The argument for the view contrary to the one taken by the Court would emphasize that salient fact right now. The view that the client has no cognizable property right in the IOLTA interest is said to rest not only on a different understanding of the scope of the general prin-

ciple and its place in state law,[1] but also upon the very regulatory framework that would prevent a client from obtaining any net interest on funds now subject to IOLTA, even if IOLTA did not exist.[2] It is not, of course, that the federal and state regulatory combination includes some rule that is facially inconsistent with the general principle that interest follows principal; the components of the regulatory structure do not even directly address the question of who owns interest. Indeed, the most obvious relevance of the regulatory provisions and their effects is to the issues of whether IOLTA results in a taking of the client's property and whether any such taking requires compensation. And yet by this route the regulatory structure becomes relevant to the property issue as well, simply because the way we may ultimately resolve the taking and compensation issues bears on the way we ought to resolve the property issue. If it should turn out that within the meaning of the Fifth Amendment, the IOLTA scheme had not taken the property recognized today, or if it should turn out that the "just compensation" for any taking was zero, then there would be no practical consequence for purposes of the Fifth Amendment in recognizing a client's property right in the interest in the first place; any such recognition would be an inconsequential

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[1] The highest court of Texas has not understood the general principle that a property right in interest always follows property in principle in a way that supports respondents in this IOLTA challenge. See *Sellers* v. *Harris County*, 483 S. W. 2d 242, 243 (Tex. 1972) (owner of principal is entitled to interest, less administrative and accounting costs). *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), is not on point precisely because it dealt with interest actually in the hands of the fiduciary, net of any administrative expense.

[2] These unchallenged state and federal rules clearly fall within the general category of relevant law defining property subject to constitutional protection, see *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972) ("Property interests" are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law").

abstraction. Cf. *Hooker* v. *Burr*, 194 U. S. 415, 419 (1904) (If a contractual obligation is impaired, but the obligor is "not injured to the extent of a penny thereby, his abstract rights are unimportant"). The significance of the regulatory structure, and the issues of taking and compensation, should therefore be considered today.

Approaching the property issue in conjunction with the two others would, in fact, be entirely faithful to the Fifth Amendment, for as we have repeatedly said its Takings Clause does nothing to bar the government from taking property, but only from taking it without just compensation, see, *e. g.*, *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). It thus makes good sense to consider what is property only in connection with what is a compensable taking, an approach to Fifth Amendment analysis that not only would avoid spending time on what might turn out to be an entirely theoretical matter, but would also reduce the risk of placing such undue emphasis on the existence of a generalized property right as to distort the taking and compensation analyses that necessarily follow before the Fifth Amendment's significance can be known.[3]

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[3] For example, with respect to the determination whether government regulation "goes too far" in diminishing the value of a claimant's property, we have repeatedly instructed that a "parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 644 (1993); see also *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 130–131 (1978). With its narrow focus on a party's right to any interest generated by its principal, the Court's opinion might be read (albeit erroneously, in my view) to mean that the accrued interest is the only property right relevant to the question whether IOLTA effects a taking.

That is not to say, of course, that we should resolve either the taking or compensation issues here, for the Fifth Circuit did not address them. Rather, we should determine here whether either of the remaining issues might reasonably be resolved against respondents; if so, we should not abstract the property issue for resolution in their favor now, but should return the case to the Court of Appeals to consider all three issues before resolving the first. Suffice it to say that both the taking and compensation questions are serious ones for respondents.

First, as to a taking, we start with *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), and its guidance about certain sorts of facts that are of particular importance in what is supposed to be an "ad hoc, factual" enquiry, *id.*, at 124, into whether the government has "go[ne] too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). Attention should be paid to the nature of the government's action, its economic impact, and the degree of any interference with reasonable, investment-backed expectations. *Penn Central*, *supra*, at 124. Here it is enough to note the possible significance of the facts that there is no physical occupation or seizure of tangible property, cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426 (1982) (noting that physical intrusion is "unusually serious" in the takings context); that there is no apparent economic impact (since the client would have no net interest to go in his pocket, IOLTA or no IOLTA); and that the facts present neither anything resembling an investment nor (for the reason just given) any apparent basis for reasonably expecting to obtain net interest. While a court would certainly consider any proposal that respondents might make for a departure from the *Penn Central* approach to vindicating the Fifth Amendment in these circumstances, application of *Penn Central* would not bode well for claimants like respondents.

Second, as to the just compensation requirement, the client's inability to earn net interest outside IOLTA, due to

the unchallenged federal and state regulations, raises serious questions about entitlement to any compensation (which, if required, would convert any "taking" into a wash transaction from the client's standpoint). "Just compensation" generally means "the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970). In determining the amount of just compensation for a taking, a court seeks to place a claimant "'in as good a position pecuniarily as if his property had not been taken.'" *United States* v. *564.54 Acres of Monroe and Pike County Land*, 441 U. S. 506, 510 (1979) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934)), calculating any loss objectively and independently of the claimant's subjective valuation, see, *e. g.*, *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5 (1949).

Thus, in deciding what award would be needed to place the client respondent in as good a position as he would have enjoyed without a taking, a court presumably would look to the claimant's putative property interest as it was or would have been enjoyed in the absence of IOLTA, cf. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910), and consequently would measure any required compensation by the claimant's loss, not by the government's (or the public's) gain, *ibid.* This rule would not obviously produce much benefit to respondents. While it has been suggested in their favor that a cognizable taking may occur even when value has been enhanced, on the supposed authority of *Loretto*, *supra*, at 437, n. 15, that case dealt only with physical occupation, it rested on no finding that value had actually been enhanced, and it held nothing about the legal consequences of an actual finding that enhancement had occurred. The Court today makes a further suggestion of a way in which respondents might deflect the objection that they have lost nothing, when it observes that the notion of property is not limited by the concept of value, *ante*, at 170. But the Court makes the point by equating the government's seizure

of funds from the pocket of a failing business owner with IOLTA's disposition of funds the client never had or could have received. Neither the equation, nor its relevance to the Fifth Amendment's guarantee of just compensation, is immune to question.

But, however these issues of taking and compensation may someday be adjudicated, two things are clear now: the issues are serious and they might be resolved against respondents. If that should happen, today's holding would stand as an abstract proposition without significance for the application of the Fifth Amendment.

If abstraction were guaranteed to be harmless, of course, an abstract ruling now and again would not matter much, beyond the time spent reaching it. But our law has been wary of abstract legal propositions not only because the common-law tradition is a practical one, but because abstractions pose their own peculiar risks. As THE CHIEF JUSTICE noted in a different but related context, there is a danger in "cutting loose the notion of 'just compensation' from the notion of 'private property.'" *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 486 (1973) (REHNQUIST, J., dissenting); see also *id.*, at 482–483 ("While the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain").

One may wonder here not only whether the theoretical property analysis may skew the resolution of the taking and compensation issues that will follow, but also how far today's holding may unsettle accepted governmental practice elsewhere. By recognizing an abstract property right to interest "actually 'earned'" by a party's principal, *ante*, at 168, does the Court not raise the possibility of takings challenges whenever the government holds and makes use of the principal of private parties, as it frequently does? When, for

example, the National Government, or a State, has engaged in excessive tax withholding, it does not refund the interest earned between the time of withholding and the issuance of a refund. For any number of reasons unrelated to the recognition or nonrecognition of a generalized property right in interest, but tied to the questions of takings and compensation, it seems unlikely that such withholding practices would violate the Fifth Amendment. Nevertheless, the Court's abstract ruling may encourage claims of just this sort.

To avoid the dangers of abstraction, I would therefore vacate the judgment of the Court of Appeals and remand for plenary Fifth Amendment consideration. If, however, the property interest question is to be considered in the abstract, I would recast it and answer it as JUSTICE BREYER has done in his own dissenting opinion, which I join.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The question presented is whether "interest earned on client trust funds," which would "not earn interest" in the absence of a special "IOLTA program," amounts to a "property interest of the client or lawyer" for purposes of the Fifth Amendment's Takings Clause. Brief for Petitioners i; Brief for Respondents i; see U. S. Const., Amdt. 5 ("nor shall private property be taken for public use, without just compensation").

The question presented is premised on four assumptions: First, that lawyers sometimes hold small amounts of clients' funds for short periods of time; second, that because of federal tax and banking rules and regulations, such funds normally could not earn interest during that time; third, that state Interest on Lawyers Trust Account (IOLTA) rules require lawyers to place such funds in a special account where, mixed with other funds, they will earn interest; and fourth, that IOLTA rules require that interest earned on these funds

is distributed to groups that represent low-income individuals rather than to the lawyers or their clients who own the funds.

Insofar as factual circumstances such as these raise a Fifth Amendment question, I agree with JUSTICE SOUTER that the question is whether Texas, by requiring the placing of the funds in special IOLTA accounts and depriving the funds' owners of the subsequently earned interest has temporarily "taken" what is undoubtedly "private property," namely, the client's funds, *i. e.*, the principal, without "just compensation." To answer this (appropriately framed) question, the parties and the lower courts would have to consider whether the use of the principal in the fashion dictated by the IOLTA rules amounts to a deprivation of a property right, and, if so, whether the government's "taking" required compensating the owner of the funds, where it did not deprive the funds' owners of interest they might have otherwise received. But the Court of Appeals did not address this latter question. See *ante*, at 179 (SOUTER, J., dissenting).

Although I believe it wrong to separate Takings Clause analysis of the property rights at stake from analysis of the alleged deprivation, I have considered the question presented on its own terms. And, on the majority's assumptions, I believe that its answer is not the right one. The majority's answer rests upon the use of a legal truism, namely, "interest follows principal," and its application of a particular case, namely, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). See *ante*, at 166, 171. In my view, neither truism nor case can answer the hypothetical question the Court addresses.

The truism does not help because the question presented assumes circumstances that differ dramatically from those in which interest is ordinarily at issue. Ordinarily, principal is capable of generating interest for whoever holds it. Here, by the very terms of the question, we must assume

that (because of pre-existing federal law) the client's principal could not generate interest without IOLTA intervention. That is to say, the client could not have had an expectation of receiving interest without that intervention. Nor can one say that IOLTA rules excluded, or prevented, the client's use of his principal to generate interest that would otherwise be his. Under these circumstances, what is the property right of the client that IOLTA could have "confiscat[ed]"? *Ante*, at 167.

The most that Texas law here could have taken from the client is not a right to use his principal to create a benefit (for he had no such right), but the client's right to keep the client's principal sterile, a right to prevent the principal from being put to productive use by others. Cf. *National Bd. of YMCA* v. *United States*, 395 U. S. 85, 92–93 (1969) (noting that government deprivation of property requiring compensation normally takes from an owner *use* that the owner may otherwise make of the property). And whatever this Court's cases may have said about the constitutional status of such a right, they have *not* said that the Constitution forces a State to confer, upon the owner of property that cannot produce anything of value for him, ownership of the fruits of that property should that property be rendered fertile through the government's lawful intervention. Cf., *e. g.*, *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 276 (1943) (no need to pay for value that the "power of eminent domain" itself creates); *City of New York* v. *Sage*, 239 U. S. 57, 61 (1915) (city need not pay for value added by unifying parcels where unification impracticable absent eminent domain); *United States* v. *Twin City Power Co.*, 350 U. S. 222, 228 (1956) (to require payment for value created by government "would be to create private claims in the public domain"). Thus the question is whether "interest," *earned only as a result of IOLTA rules* and earned upon otherwise *barren* client principal, "follows principal." The slogan "interest follows principal" no more answers *that* question than

does King Diarmed's legendary slogan, "[T]o every cow her calf." A. Birrell, Seven Lectures on The Law and History of Copyright in Books 42 (1889) (internal quotation marks omitted). Cf. *Berkey* v. *Third Avenue Railway Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it").

Nor can *Webb's Fabulous Pharmacies* answer the question presented. But for state intervention the principal in that case could have, and would have, earned interest. See 449 U. S., at 156–157, and nn. 1, 2 (state law required party to deposit funds with court, authorized court to hold the funds in an interest-bearing account, and allowed the court to claim the interest as well as a fee). Here, federal law ensured that, in the absence of IOLTA intervention, the client's principal would earn nothing. *Webb's Fabulous Pharmacies* holds that a state law which places *that* ordinary kind of principal in an interest-bearing account (which interest the State unjustifiably keeps) takes "private property . . . for public use without just compensation." That holding says little about *this* kind of principal, principal that otherwise is barren. Nor do cases that find a private interest in property with virtually no economic value tell us to *whom* the fruits of that property belong when that property bears fruit through the intervention of another. *Ante*, at 169–170 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Hodel* v. *Irving*, 481 U. S. 704, 715 (1987)).

If necessary, I should find an answer to the question presented in other analogies that this Court's precedents provide. Land valuation cases, for example, make clear that the value of what is taken is bounded by that which is "lost," not that which the "taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910) (opinion of Holmes, J.); see also *United State*s v. *Miller*, 317 U. S. 369, 375 (1943) ("[S]pecial value to the condemnor . . . must be excluded as an element of market value"); *United States*

v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 75–76 (1913). This principle suggests that the government must pay the current value of condemned land, not the added value that a highway it builds on the property itself creates. It also suggests that condemnation of, say, riparian rights in order to build a dam must be followed by compensation for these rights, not for the value of the electricity that the dam would later produce. Cf. *id.*, at 76; *Twin City Power Co.*, *supra*, at 226–228; *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 423–424, 427 (1940). Indeed, no one would say that such electricity was, for Takings Clause purposes, the owner's "private property," where, as here, in the absence of the lawful government "taking," there would have been no such property.

These legal analogies more directly address the key assumption raised by the question presented, namely, that "absent the IOLTA program," no "interest" could have been earned. I consequently believe that the interest earned is *not* the client's "private property."

I respectfully dissent.

Syllabus

BRYAN *v.* UNITED STATES

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

No. 96–8422. Argued March 31, 1998—Decided June 15, 1998

The Firearms Owners' Protection Act (FOPA) added 18 U. S. C. § 924(a)(1)(D) to the Criminal Code to prohibit anyone from "willfully" violating, *inter alia*, § 922(a)(1)(A), which forbids dealing in firearms without a federal license. The evidence at petitioner's unlicensed dealing trial was adequate to prove that he was dealing in firearms and that he knew his conduct was unlawful, but there was no evidence that he was aware of the federal licensing requirement. The trial judge refused to instruct the jury that he could be convicted only if he knew of the federal licensing requirement, instructing, instead, that a person acts "willfully" if he acts with the bad purpose to disobey or disregard the law, but that he need not be aware of the specific law that his conduct may be violating. The jury found petitioner guilty. The Second Circuit affirmed, concluding that the instructions were proper and that the Government had elicited "ample proof" that petitioner had acted willfully.

Held: The term "willfully" in § 924(a)(1)(D) requires proof only that the defendant knew his conduct was unlawful, not that he also knew of the federal licensing requirement. Pp. 191–200.

(a) When used in the criminal context, a "willful" act is generally one undertaken with a "bad purpose." See, *e. g.*, *Heikkinen* v. *United States*, 355 U. S. 273, 279. In other words, to establish a "willful" violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. *Ratzlaf* v. *United States*, 510 U. S. 135, 137. The Court rejects petitioner's argument that, for two principal reasons, a more particularized showing is required here. His first contention—that the "knowingly" requirement in §§ 924(a)(1)(A)–(C) for three categories of acts made unlawful by § 922 demonstrates that the Government must prove knowledge of the law—is not persuasive because "knowingly" refers to knowledge of the facts constituting the offense, as distinguished from knowledge of the law, see, *e. g.*, *United States* v. *Bailey*, 444 U. S. 394, 408. With respect to the three § 924 "knowingly" categories, the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove an evil-meaning mind. As regards the "willfully" category here at issue, however, the jury must find that the defendant acted with such a mind, *i. e.*, with knowledge that his

Syllabus

conduct was unlawful. Also rejected is petitioner's second argument: that § 924(a)(1)(D) must be read to require knowledge of the law in light of this Court's adoption of a similar interpretation in cases concerned with willful violations of the tax laws, see, *e. g.*, *Cheek* v. *United States*, 498 U. S. 192, 201, and the willful structuring of cash transactions to avoid a bank reporting requirement, see *Ratzlaf*, 510 U. S., at 138, 149. Those cases are readily distinguishable because they involved highly technical statutes that threatened to ensnare individuals engaged in apparently innocent conduct. That danger is not present here because the jury found that this petitioner knew that his conduct was unlawful. Pp. 191–196.

(b) Petitioner's additional arguments based on his reading of congressional intent are rejected. FOPA's legislative history is too ambiguous to offer him much assistance, since his main support lies in statements made by opponents of the bill. See, *e. g.*, *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394. His next argument—that, at the time FOPA was passed, the "willfulness" requirements in §§ 923(d)(1)(C)–(D) had uniformly been interpreted to require knowledge of the law—is inaccurate because a number of courts had reached different conclusions. Moreover, the cases adopting petitioner's view support the notion that disregard of a known legal obligation is sufficient to establish a willful violation, but in no way make it necessary. Petitioner's final argument—that § 922(b)(3), which is governed by § 924(a)(1)(D), indicates that Congress intended "willfully" to include knowledge of the law—fails for a similar reason. Pp. 196–199.

(c) The trial court's misstatement of law in a jury instruction given after the correct instructions were given—specifically, a sentence asserting that "the government [need not] prove that [petitioner] had knowledge that he was breaking the law"—does not provide a basis for reversal because (1) petitioner did not effectively object to that sentence; (2) in the context of the entire instructions, it seems unlikely that the jury was misled; (3) petitioner failed to raise this argument in the Second Circuit; and (4) this Court's grant of certiorari was limited to the narrow legal question hereinbefore decided. Pp. 199–200.

122 F. 3d 90, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 200. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and GINSBURG, J., joined, *post*, p. 200.

Roger Bennet Adler argued the cause for petitioner. With him on the briefs was *Martin B. Adelman*.

Kent L. Jones argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *John F. De Pue.**

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner was convicted of "willfully" dealing in firearms without a federal license. The question presented is whether the term "willfully" in 18 U. S. C. § 924(a)(1)(D) requires proof that the defendant knew that his conduct was unlawful, or whether it also requires proof that he knew of the federal licensing requirement.

I

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act. 82 Stat. 197–239. In Title IV of that Act Congress made findings concerning the impact of the traffic in firearms on the prevalence of lawlessness and violent crime in the United States[1] and amended the Criminal Code

*Briefs of *amici curiae* urging reversal were filed for the Gun Owners Foundation by *James H. Jeffries III* and *James H. Wentzel;* and for the National Association of Criminal Defense Lawyers by *Barbara Bergman* and *Stephen P. Halbrook.*

[1] "Sec. 901. (a) The Congress hereby finds and declares—

"(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

"(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

"(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave

to include detailed provisions regulating the use and sale of firearms. As amended, 18 U. S. C. § 922 defined a number of "unlawful acts"; subsection (a)(1) made it unlawful for any person except a licensed dealer to engage in the business of dealing in firearms.[2] Section 923 established the federal licensing program and repeated the prohibition against dealing in firearms without a license, and § 924 specified the penalties for violating "any provision of this chapter." Read literally, § 924 authorized the imposition of a fine of up to $5,000 or a prison sentence of not more than five years, "or both," on any person who dealt in firearms without a license even if that person believed that he or she was acting lawfully.[3] As enacted in 1968, §§ 922(a)(1) and 924 omitted an express scienter requirement and therefore arguably imposed strict criminal liability on every unlicensed dealer in firearms. The 1968 Act also omitted any definition of the term "engaged in the business" even though that conduct was an element of the unlawful act prohibited by § 922(a)(1).

In 1986 Congress enacted the Firearms Owners' Protection Act (FOPA), in part, to cure these omissions. The findings in that statute explained that additional legislation was necessary to protect law-abiding citizens with respect to the acquisition, possession, or use of firearms for lawful pur-

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problem be properly dealt with, and effective State and local regulation of this traffic be made possible . . . ." 82 Stat. 225.

[2] 82 Stat. 228. The current version of this provision, which is substantially the same as the 1968 version, is codified at 18 U. S. C. § 922(a)(1)(A). It states:

"(a) It shall be unlawful—

"(1) for any person—

"(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce."

[3] "§ 924. Penalties

"(a) Whoever violates any provision of this chapter . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." 82 Stat. 233.

poses.[4] FOPA therefore amended § 921 to include a definition of the term "engaged in the business,"[5] and amended § 924 to add a scienter requirement as a condition to the imposition of penalties for most of the unlawful acts defined in § 922. For three categories of offenses the intent required is that the defendant acted "knowingly"; for the fourth category, which includes "any other provision of this chapter," the required intent is that the defendant acted "willfully."[6]

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[4] "The Congress finds that—

. . . . . .

"(b)(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" 100 Stat. 449.

[5] "Section 921 of title 18, United States Code, is amended—

. . . . . .

"(21) The term 'engaged in the business' means—

. . . . . .

"(C) as applied to a dealer in firearms, as defined in section 921 (a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms . . . ." 100 Stat. 449–450.

[6] Title 18 U. S. C. § 924(a)(1) currently provides:

"Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

"(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

"(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

The § 922(a)(1)(A)[7] offense at issue in this case is an "other provision" in the "willfully" category.

II

The jury having found petitioner guilty, we accept the Government's version of the evidence. That evidence proved that petitioner did not have a federal license to deal in firearms; that he used so-called "straw purchasers" in Ohio to acquire pistols that he could not have purchased himself; that the straw purchasers made false statements when purchasing the guns; that petitioner assured the straw purchasers that he would file the serial numbers off the guns; and that he resold the guns on Brooklyn street corners known for drug dealing. The evidence was unquestionably adequate to prove that petitioner was dealing in firearms, and that he knew that his conduct was unlawful.[8] There was, however, no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license.

Petitioner was charged with a conspiracy to violate 18 U. S. C. § 922(a)(1)(A), by willfully engaging in the business of dealing in firearms, and with a substantive violation of that provision.[9] After the close of evidence, petitioner requested that the trial judge instruct the jury that petitioner could be convicted only if he knew of the federal

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"(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

"(D) willfully violates any other provision of this chapter,

"shall be fined under this title, imprisoned not more than five years, or both."

[7] See n. 2, *supra*.

[8] Why else would he make use of straw purchasers and assure them that he would shave the serial numbers off the guns? Moreover, the street corner sales are not consistent with a good-faith belief in the legality of the enterprise.

[9] Although the prohibition against unlicensed dealing in firearms is set forth in § 922, see n. 2, *supra*, the criminal sanction is set forth in § 924(a)(1), see n. 6, *supra*.

licensing requirement,[10] but the judge rejected this request. Instead, the trial judge gave this explanation of the term "willfully":

> "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids."[11]

Petitioner was found guilty on both counts. On appeal he argued that the evidence was insufficient because there was no proof that he had knowledge of the federal licensing requirement, and that the trial judge had erred by failing to instruct the jury that such knowledge was an essential element of the offense. The Court of Appeals affirmed. 122 F. 3d 90 (CA2 1997). It concluded that the instructions were proper and that the Government had elicited "ample proof" that petitioner had acted willfully. App. 22.

Because the Eleventh Circuit has held that it is necessary for the Government to prove that the defendant acted with knowledge of the licensing requirement, *United States* v. *Sanchez-Corcino*, 85 F. 3d 549, 553–554 (1996), we granted certiorari to resolve the conflict. 522 U. S. 1024 (1997).

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[10] "KNOWLEDGE OF THE LAW

"The Federal Firearms Statute which the Defendant is charged with, conspiracy to violate and with allegedly violated *[sic]*, is a specific intent statute. You must accordingly find, beyond a reasonable doubt, that Defendant at all relevant times charged, acted with the knowledge that it was unlawful to engage in the business of firearms distribution lawfully purchased by a legally permissible transferee or gun purchaser.

. . . . . .

"[Y]ou must be persuaded that with the actual knowledge of the federal firearms licensing laws Defendant acted in knowing and intentional violation of them." App. 17 (citing *Ratzlaf* v. *United States*, 510 U. S. 135 (1994)).

[11] App. 18–19.

III

The word "willfully" is sometimes said to be "a word of many meanings" whose construction is often dependent on the context in which it appears. See, *e. g.*, *Spies* v. *United States*, 317 U. S. 492, 497 (1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States* v. *Murdock*, 290 U. S. 389 (1933), a variety of phrases have been used to describe that concept.[12] As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose."[13] In other words, in order to establish a

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[12] "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton* v. *United States*, 96 U. S. 699; *Potter* v. *United States*, 155 U. S. 438; *Spurr* v. *United States*, 174 U. S. 728); without justifiable excuse (*Felton* v. *United States*, *supra; Williams* v. *People*, 26 Colo. 272; 57 Pac. 701; *People* v. *Jewell*, 138 Mich 620; 101 N. W. 835; *St. Louis, I. M. & S. Ry. Co.* v. *Batesville & W. Tel. Co.*, 80 Ark. 499; 97 S. W. 660; *Clay* v. *State*, 52 Tex. Cr. 555; 107 S. W. 1129); stubbornly, obstinately, perversely, *Wales* v. *Miner*, 89 Ind. 118, 127; *Lynch* v. *Commonwealth*, 131 Va. 762; 109 S. E. 427; *Claus* v. *Chicago Gt. W. Ry. Co.*, 136 Iowa 7; 111 N. W. 15; *State* v. *Harwell*, 129 N. C. 550; 40 S. E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby* v. *Newton*, 121 Ga. 679; 49 S. E. 694), or conduct marked by careless disregard whether or not one has the right so to act, *United States* v. *Philadelphia & R. Ry. Co.*, 223 Fed. 207, 210; *State* v. *Savre*, 129 Iowa 122; 105 N. W. 387; *State* v. *Morgan*, 136 N. C. 628; 48 S. E. 670." 290 U. S., at 394–395.

[13] See, *e. g.*, *Heikkinen* v. *United States*, 355 U. S. 273, 279 (1958) ("There can be no *willful* failure by a deportee, in the sense of § 20(c), to apply to, and identify, a country willing to receive him in the absence of evidence . . . of a 'bad purpose' or '[non-]justifiable excuse,' or the like. . . . [I]t cannot be said that he acted 'willfully'—*i. e.*, with a 'bad purpose' or without 'justifiable excuse' "); *United States* v. *Murdock*, 290 U. S. 389, 394 (1933) ("[W]hen used in a criminal statute [willfully] generally means an act done with a bad purpose"); *Felton* v. *United States*, 96 U. S. 699, 702 (1878) ("Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad

"willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf* v. *United States*, 510 U. S. 135, 137 (1994).

Petitioner argues that a more particularized showing is required in this case for two principal reasons. First, he argues that the fact that Congress used the adverb "knowingly" to authorize punishment of three categories of acts made unlawful by § 922 and the word "willfully" when it referred to unlicensed dealing in firearms demonstrates that the Government must shoulder a special burden in cases like this. This argument is not persuasive because the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law."[14] Thus, in *United*

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intent to do it or to omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sect. 428"); 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions ¶ 3A.01, p. 3A–18 (1997) ("'Willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law").

[14] In his opinion dissenting from the Court's decision upholding the constitutionality of a statute authorizing punishment for the knowing violation of an Interstate Commerce regulation, Justice Jackson wrote:

"It is further suggested that a defendant is protected against indefiniteness because conviction is authorized only for knowing violations. The argument seems to be that the jury can find that defendant knowingly violated the regulation only if it finds that it knew the meaning of the regulation he was accused of violating. With the exception of *Screws* v. *United States*, 325 U. S. 91, which rests on a very particularized basis, the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence

States v. *Bailey*, 444 U. S. 394 (1980), we held that the prosecution fulfills its burden of proving a knowing violation of the escape statute "if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission." *Id.*, at 408. And in *Staples* v. *United States*, 511 U. S. 600 (1994), we held that a charge that the defendant's possession of an unregistered machinegun was unlawful required proof "that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id.*, at 602. It was not, however, necessary to prove that the defendant knew that his possession was unlawful. See *Rogers* v. *United States*, 522 U. S. 252, 254–255 (1998) (plurality opinion). Thus, unless the text of the statute dictates a different result,[15] the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.

With respect to the three categories of conduct that are made punishable by § 924 if performed "knowingly," the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that "an evil-meaning mind" directed the "evil-doing hand."[16] More is required, however, with respect to the conduct in the fourth category that is only criminal when done "willfully." The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.

Petitioner next argues that we must read § 924(a)(1)(D) to require knowledge of the law because of our inter-

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of such a regulation its ignorance would constitute a defense." *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 345 (1952).

[15] *Liparota* v. *United States*, 471 U. S. 419 (1985), was such a case. We there concluded that both the term "knowing" in 7 U. S. C. § 2024(c) and the term "knowingly" in § 2024(b)(1) literally referred to knowledge of the law as well as knowledge of the relevant facts. See *id.*, at 428–430.

[16] Justice Jackson's translation of the terms *mens rea* and *actus reus* is found in his opinion for the Court in *Morissette* v. *United States*, 342 U. S. 246, 251 (1952).

pretation of "willfully" in two other contexts. In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e. g., Cheek* v. *United States*, 498 U. S. 192, 201 (1991).[17] Similarly, in order to satisfy a willful violation in *Ratzlaf*, we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. See 510 U. S., at 138, 149. Those cases, however, are readily distinguishable. Both the tax cases[18] and *Ratzlaf*[19] involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.[20] As a result, we held that these statutes

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[17] Even in tax cases, we have not always required this heightened *mens rea*. In *United States* v. *Pomponio*, 429 U. S. 10 (1976) *(per curiam)*, for example, the jury was instructed that a willful act is one done "with [the] bad purpose either to disobey or to disregard the law." *Id.*, at 11. We approved of this instruction, concluding that "[t]he trial judge . . . adequately instructed the jury on willfulness." *Id.*, at 13.

[18] As we stated in *Cheek* v. *United States*, 498 U. S. 192, 199–200 (1991):

"The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend 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 [that every person is presumed to know the law]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."

[19] See *Bates* v. *United States*, 522 U. S. 23, 31, n. 6 (1997) (noting that *Ratzlaf*'s holding was based on the "particular statutory context of currency structuring"); *Ratzlaf*, 510 U. S., at 149 (Court's holding based on "particular contex[t]" of currency structuring statute).

[20] *Id.*, at 144–145 ("[C]urrency structuring is not inevitably nefarious. . . . Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark"; Government's construction of the statute would criminalize apparently innocent activity); *Cheek*, 498 U. S., at 205 ("[I]n 'our complex tax system, uncertainty

"carv[e] out an exception to the traditional rule" that ignorance of the law is no excuse[21] and require that the defendant have knowledge of the law.[22] The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in the tax cases and *Ratzlaf* is not present here because the jury found that this petitioner knew that his conduct was unlawful.[23]

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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))"); *Murdock*, 290 U. S., at 396 ("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").

[21] *Cheek*, 498 U. S., at 200; see also *Ratzlaf*, 510 U. S., at 149 (noting the "venerable principle that ignorance of the law generally is no defense to a criminal charge," but concluding that Congress intended otherwise in the "particular contex[t]" of the currency structuring statute).

[22] Even before *Ratzlaf* was decided, then-Chief Judge Breyer explained why there was a need for specificity under those statutes that is inapplicable when there is no danger of conviction of a defendant with an innocent state of mind. He wrote:

"I believe that criminal prosecutions for 'currency law' violations, of the sort at issue here, very much resemble criminal prosecutions for tax law violations. *Compare* 26 U. S. C. §§ 6050I, 7203 *with* 31 U. S. C. §§ 5322, 5324. Both sets of laws are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally. *Cheek* v. *United States*, 498 U. S. 192 . . . (1991), sets forth a legal standard that, by requiring proof that the defendant was subjectively aware of the duty at issue, would avoid such unfair results." *United States* v. *Aversa*, 984 F. 2d 493, 502 (CA1 1993) (concurring opinion).

He therefore concluded that the "same standards should apply in both" the tax cases and in cases such as *Ratzlaf*. 984 F. 2d, at 503.

[23] Moreover, requiring only knowledge that the conduct is unlawful is fully consistent with the purpose of FOPA, as FOPA was enacted to protect law-abiding citizens who might inadvertently violate the law. See

Thus, the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.

IV

Petitioner advances a number of additional arguments based on his reading of congressional intent. Petitioner first points to the legislative history of FOPA, but that history is too ambiguous to offer petitioner much assistance. Petitioner's main support lies in statements made by opponents of the bill.[24] As we have stated, however, "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394 (1951). "In their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964).[25]

Petitioner next argues that, at the time FOPA was passed, the "willfulness" requirements in other subsections of the statute—§§ 923(d)(1)(C)–(D)—had uniformly been interpreted by lower courts to require knowledge of the law; petitioner argues that Congress intended that "willfully" should have the same meaning in § 924(a)(1)(D). As an initial matter, the lower courts had come to no such agreement. While some courts had stated that willfulness in § 923(d)(1) is satis-

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n. 4, *supra;* see also *United States* v. *Andrade*, 135 F. 3d 104, 108–109 (CA1 1998).

[24] For example, Representative Hughes, a staunch opponent of the bill, stated that the willfulness requirement would "make it next to impossible to convict dealers, particularly those who engage in business without acquiring a license, because the prosecution would have to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law." 132 Cong. Rec. 6875 (1986). Even petitioner's *amicus* acknowledges that this statement was "undoubtedly an exaggeration." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 14.

[25] See also *Andrade*, 135 F. 3d, at 108–109.

fied by a disregard of a known legal obligation,[26] willful was also interpreted variously to refer to "purposeful, intentional conduct,"[27] "indifferen[ce] to the requirements of the law,"[28] or merely a "conscious, intentional, deliberate, voluntary decision."[29] Moreover, in each of the cases in which disregard of a known legal obligation was held to be sufficient to establish willfulness, it was perfectly clear from the record that the licensee had knowledge of the law;[30] thus, while these

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[26] See, *e. g.*, *Perri* v. *Department of the Treasury*, 637 F. 2d 1332, 1336 (CA9 1981); *Stein's Inc.* v. *Blumenthal*, 649 F. 2d 463, 467–468 (CA7 1980).

[27] *Rich* v. *United States*, 383 F. Supp. 797, 800 (SD Ohio 1974).

[28] *Lewin* v. *Blumenthal*, 590 F. 2d 268, 269 (CA8 1979); *Fin & Feather Sport Shop* v. *United States Treasury Department*, 481 F. Supp. 800, 807 (Neb. 1979).

[29] *Prino* v. *Simon*, 606 F. 2d 449, 451 (CA4 1979) (internal quotation marks omitted); see also *Stein's*, 649 F. 2d, at 467 ("[I]f a person 1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is willful" (internal quotation marks omitted)).

[30] *Perri*, 637 F. 2d, at 1336 ("The district court found Perri knew a straw-man transaction would violate the Act"); *Stein's*, 649 F. 2d, at 468 ("The record shows that the plaintiff's agents were instructed on the requirements of the law and acknowledged an understanding of the Secretary's regulations. Nevertheless, and despite repeated warnings from the Secretary, violations continued to occur" (footnote omitted)); *Powers* v. *Bureau of Alcohol, Tobacco and Firearms*, 505 F. Supp. 695, 698 (ND Fla. 1980) ("Bureau representatives inspected Powers August 31, 1976. They pointed out his many violations, gave him a copy of the regulations, thoroughly explained his obligations, and gave him a pamphlet explaining his obligations. As of that date Powers knew his obligations"); *Shyda* v. *Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F. Supp. 409, 415 (MD Pa. 1977) ("[A]t the formal administrative hearing petitioner admitted on the stand under oath that he was aware of the specific legal obligation at issue"); *Mayesh* v. *Schultz*, 58 F. R. D. 537, 540 (SD Ill. 1973) ("The uncontroverted evidence shows clearly that plaintiff was aware of the above holding period requirements. Mr. Mayesh had been previously advised on the requirements under Illinois law, and he clearly acknowledged that he was aware of them"); *McLemore* v. *United States Treasury Department*, 317 F. Supp. 1077, 1078 (ND Fla. 1970) (finding that both

cases support the notion that disregard of a known legal obligation is sufficient to establish a willful violation, they in no way stand for the proposition that it is required.[31]

Finally, petitioner argues that § 922(b)(3), which is governed by § 924(a)(1)(D)'s willfulness standard, indicates that Congress intended "willfully" to include knowledge of the law. Section 922(b)(3) prohibits licensees from selling firearms to any person who the licensee knows or has reasonable cause to believe does not reside in the licensee's State, except where, *inter alia*, the transaction fully complies with the laws of both the seller's and buyer's State. The subsection further states that the licensee "shall be presumed, . . . in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States."[32] Although petitioner argues that the presumption in § 922(b)(3) indicates that Congress intended willfulness to require knowledge of the law for all offenses covered by § 924(a)(1)(D), petitioner is mistaken. As noted above, while disregard of a known legal obligation is cer-

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the owner of the pawnshop, as well as his employees, had knowledge of the law).

[31] In *Mayesh*, for example, the court stated:

"The uncontroverted evidence shows clearly that plaintiff was aware of the above holding period requirements. Mr. Mayesh had been previously advised on the requirements under Illinois law, and he clearly acknowledged that he was aware of them. . . . Since the material facts are undisputed, as a matter of law the plaintiff clearly and knowingly violated the Illinois holding provisions . . . , and hence, 18 U. S. C. § 922(b)(2). This court can only consider such action to have been 'wilful' as a matter of law. There is no basis for trial of any disputed facts in this connection. This is sufficient to justify refusal of license renewal." 58 F. R. D., at 540. See also, *e. g.*, *Perri*, 637 F. 2d, at 1336 (stating that when a dealer understands the requirements of the law, but knowingly fails to follow them or is indifferent to them, willfulness "is established," *i. e.*, is satisfied); *Stein's*, 649 F. 2d, at 468 ("Evidence of repeated violations with knowledge of the law's requirements has been held *sufficient* to establish willfulness" (emphasis added)); *McLemore*, 317 F. Supp., at 1078–1079.

[32] 18 U. S. C. § 922(b)(3).

tainly sufficient to establish a willful violation, it is not necessary—and nothing in § 922(b)(3) contradicts this basic distinction.[33]

V

One sentence in the trial court's instructions to the jury, read by itself, contained a misstatement of the law. In a portion of the instructions that were given after the correct statement that we have already quoted, the judge stated: "In this case, the government is not required to prove that the defendant knew that a license was required, *nor is the government required to prove that he had knowledge that he was breaking the law.*" App. 19 (emphasis added). If the judge had added the words "that required a license," the sentence would have been accurate, but as given it was not.

Nevertheless, that error does not provide a basis for reversal for four reasons. First, petitioner did not object to that sentence, except insofar as he had argued that the jury should have been instructed that the Government had the burden of proving that he had knowledge of the federal licensing requirement. Second, in the context of the entire instructions, it seems unlikely that the jury was misled. See, *e. g.*, *United States* v. *Park*, 421 U. S. 658, 674–675 (1975). Third, petitioner failed to raise this argument in the Court of Appeals. Finally, our grant of certiorari was limited to

[33] Petitioner also argues that the statutory language—"willfully violates any other provision of this chapter"—indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the "provision[s] of [the] chapter." We rejected a similar argument in *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558 (1971). Although that case involved the word "knowingly" (in the phrase "knowingly violates any such regulation"), the response is the same:

"We . . . see no reason why the word 'regulations' [or the phrase 'any other provision of this chapter'] should not be construed as a shorthand designation for specific acts or omissions which violate the Act. The Act, so viewed, does not signal an exception to the rule that ignorance of the law is no excuse . . . ." *Id.*, at 562.

the narrow legal question whether knowledge of the licensing requirement is an essential element of the offense.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SOUTER, concurring.

I join in the Court's opinion with the caveat that if petitioner had raised and preserved a specific objection to the erroneous statement in the jury instructions, see Part V, *ante*, at 199 and this page, I would vote to vacate the conviction.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE GINSBURG join, dissenting.

Petitioner Sillasse Bryan was convicted of "willfully" violating the federal licensing requirement for firearms dealers. The jury apparently found, and the evidence clearly shows, that Bryan was aware in a general way that some aspect of his conduct was unlawful. See *ante*, at 189, and n. 8. The issue is whether that general knowledge of illegality is enough to sustain the conviction, or whether a "willful" violation of the licensing provision requires proof that the defendant knew that his conduct was unlawful specifically because he lacked the necessary license. On that point the statute is, in my view, genuinely ambiguous. Most of the Court's opinion is devoted to confirming half of that ambiguity by refuting Bryan's various arguments that the statute clearly requires specific knowledge of the licensing requirement. *Ante*, at 192–199. The Court offers no real justification for its implicit conclusion that either (1) the statute unambiguously requires only general knowledge of illegality, or (2) ambiguously requiring only general knowledge is enough. Instead, the Court curiously falls back on "the traditional rule that ignorance of the law is no excuse" to conclude that "knowledge that the conduct is unlawful is all that is required." *Ante*, at 196. In my view, this case calls for the application of a different canon—"the familiar rule that, 'where there is

ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 284–285 (1978), quoting *United States* v. *Bass*, 404 U. S. 336, 348 (1971).

Title 18 U. S. C. § 922(a)(1)(A) makes it unlawful for any person to engage in the business of dealing in firearms without a federal license. That provision is enforced criminally through § 924(a)(1)(D), which imposes criminal penalties on whoever "willfully violates any other provision of this chapter." The word "willfully" has a wide range of meanings, and "'its construction [is] often . . . influenced by its context.'" *Ratzlaf* v. *United States*, 510 U. S. 135, 141 (1994), quoting *Spies* v. *United States*, 317 U. S. 492, 497 (1943). In some contexts it connotes nothing more than "an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States* v. *Murdock*, 290 U. S. 389, 394 (1933). In the present context, however, inasmuch as the preceding three subparagraphs of § 924 specify a *mens rea* of "knowingly" for *other* firearms offenses, see §§ 924(a)(1)(A)–(C), a "willful" violation under § 924(a)(1)(D) must require some mental state more culpable than mere intent to perform the forbidden act. The United States concedes (and the Court apparently agrees) that the violation is not "willful" unless the defendant knows in a general way that his conduct is unlawful. Brief for United States 7–9; *ante*, at 193 ("The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful").

That concession takes this case beyond any useful application of the maxim that ignorance of the law is no excuse. Everyone agrees that § 924(a)(1)(D) requires some knowledge of the law; the only real question is *which* law? The Court's answer is that knowledge of *any* law is enough—or, put another way, that the defendant must be ignorant of *every* law violated by his course of conduct to be innocent of willfully violating the licensing requirement. The Court points to no

textual basis for that conclusion other than the notoriously malleable word "willfully" itself. Instead, it seems to fall back on a presumption (apparently derived from the rule that ignorance of the law is no excuse) that even where ignorance of the law *is* an excuse, that excuse should be construed as narrowly as the statutory language permits.

I do not believe that the Court's approach makes sense of the statute that Congress enacted. I have no quarrel with the Court's assertion that "willfully" in § 924(a)(1)(D) requires only "general" knowledge of illegality—in the sense that the defendant need not be able to recite chapter and verse from Title 18 of the United States Code. It is enough, in my view, if the defendant is generally aware that the *actus reus* punished by the statute—dealing in firearms without a license—is illegal. But the Court is willing to accept a *mens rea* so "general" that it is entirely divorced from the *actus reus* this statute was enacted to punish. That approach turns § 924(a)(1)(D) into a strange and unlikely creature. Bryan would be guilty of "willfully" dealing in firearms without a federal license even if, for example, he had never heard of the licensing requirement but was aware that he had violated the law by using straw purchasers or filing the serial numbers off the pistols. *Ante*, at 189, n. 8. The Court does not even limit (for there is no rational basis to limit) the universe of relevant laws to federal *firearms* statutes. Bryan would also be "act[ing] with an evil-meaning mind," and hence presumably be guilty of "willfully" dealing in firearms without a license, if he knew that his street-corner transactions violated New York City's business licensing or sales tax ordinances. (For that matter, it ought to suffice if Bryan knew that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania's speed limit on the drive back from the gun purchase in Ohio.) Once we stop focusing on the conduct the defendant is actually charged with (*i. e.*, selling guns without

a license), I see no principled way to determine *what* law the defendant must be conscious of violating. See, *e. g.*, *Lewis* v. *United States*, 523 U. S. 155, 174–175 (1998) (SCALIA, J., concurring in judgment) (pointing out a similar interpretive problem potentially raised by the Assimilative Crimes Act).

Congress is free, of course, to make criminal liability under one statute turn on knowledge of another, to use its firearms dealer statutes to encourage compliance with New York City's tax collection efforts, and to put judges and juries through the kind of mental gymnastics described above. But these are strange results, and I would not lightly assume that Congress intended to make liability under a federal criminal statute depend so heavily upon the vagaries of local law—particularly local law dealing with completely unrelated subjects. If we must have a presumption in cases like this one, I think it would be more reasonable to presume that, when Congress makes ignorance of the law a defense to a criminal prohibition, it ordinarily means ignorance of the unlawfulness of the specific conduct punished *by that criminal prohibition.*

That is the meaning we have given the word "willfully" in other contexts where we have concluded it requires knowledge of the law. See, *e. g.*, *Ratzlaf, supra*, at 149 ("To convict Ratzlaf of the crime with which he was charged, . . . the jury had to find he knew the structuring in which he engaged was unlawful"); *Cheek* v. *United States*, 498 U. S. 192, 201 (1991) ("[T]he standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' . . . [T]he issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating"). The Court explains these cases on the ground that they involved "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Ante*, at 194. That is no explanation at all. The complexity of the tax and currency laws may explain why the Court interpreted

"willful" to require some awareness of illegality, as opposed to merely "an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *Murdock*, 290 U. S., at 394. But it *in no way* justifies the distinction the Court seeks to draw today between knowledge of the law the defendant is actually charged with violating and knowledge of *any* law the defendant could conceivably be charged with violating. To protect the pure of heart, it is not necessary to forgive someone whose surreptitious laundering of drug money violates, unbeknownst to him, a technical currency statute. There, as here, regardless of how "complex" the violated statute may be, the defendant would have acted "with an evil-meaning mind."

It seems to me likely that Congress had a presumption of offense-specific knowledge of illegality in mind when it enacted the provision here at issue. Another section of the Firearms Owners' Protection Act, Pub. L. 99–308, 100 Stat. 449, prohibits licensed dealers from selling firearms to out-of-state residents unless they fully comply with the laws of both States. 18 U. S. C. § 922(b)(3). The provision goes on to state that all licensed dealers "shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States." *Ibid.* Like the dealer-licensing provision at issue here, a violation of § 922(b)(3) is a criminal offense only if committed "willfully" within the meaning of § 924(a)(1)(D). The Court is quite correct that this provision does not establish beyond doubt that "willfully" requires knowledge of the particular prohibitions violated: the fact that knowledge (attributed knowledge) of those prohibitions will be *sufficient* does not demonstrate conclusively that knowledge of *other* prohibitions will *not* be sufficient. *Ante*, at 198–199. But though it does not *demonstrate*, it certainly *suggests*. To say that only willful violation of a certain law is criminal, but that knowledge of the existence of that law is presumed, fairly reflects, I think, a

presumption that willful violation requires knowledge of the law violated.

If one had to choose, therefore, I think a presumption of statutory intent that is the opposite of the one the Court applies would be more reasonable. I would not, however, decide this case on the basis of any presumption at all. It is common ground that the statutory context here requires some awareness of the law for a § 924(a)(1)(D) conviction, but the statute is simply ambiguous, or silent, as to the precise contours of that *mens rea* requirement. In the face of that ambiguity, I would invoke the rule that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' " *United States* v. *Bass*, 404 U. S., at 347, quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820).

In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime, see, *e. g.*, *Bousley* v. *United States*, 523 U. S. 614 (1998).

I respectfully dissent.

Syllabus

PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. *v.* YESKEY

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

No. 97–634. Argued April 28, 1998—Decided June 15, 1998

Respondent Yeskey was sentenced to 18 to 36 months in a Pennsylvania correctional facility, but was recommended for placement in a Motivational Boot Camp for first-time offenders, the successful completion of which would have led to his parole in just six months. When he was refused admission because of his medical history of hypertension, he sued petitioners, Pennsylvania's Department of Corrections and several officials, alleging that the exclusion violated the Americans with Disabilities Act of 1990 (ADA), Title II of which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that disability, 42 U. S. C. § 12132. The District Court dismissed for failure to state a claim, holding the ADA inapplicable to state prison inmates, but the Third Circuit reversed.

Held: State prisons fall squarely within Title II's statutory definition of "public entity," which includes "any . . . instrumentality of a State . . . or local government." § 12131(1)(B). Unlike the situation that obtained in *Gregory* v. *Ashcroft*, 501 U. S. 452, there is no ambiguous exception that renders the coverage uncertain. For that reason the plain-statement requirement articulated in *Gregory*, if applicable to federal intrusion upon the administration of state prisons, has been met. Petitioners' attempts to derive an intent not to cover prisons from the statutory references to the "benefits" of programs and to "qualified individual" are rejected; some prison programs, such as this one, have benefits and are restricted to qualified inmates. The statute's lack of ambiguity also requires rejection of petitioners' appeal to the doctrine of constitutional doubt. The Court does not address the issue whether applying the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause or the Fourteenth Amendment because it was addressed by neither of the lower courts. Pp. 208–213.

118 F. 3d 168, affirmed.

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

Counsel

Paul A. Tufano argued the cause for petitioners. With him on the briefs was *Syndi L. Guido.*

Donald Specter argued the cause for respondent. With him on the brief were *Eve H. Cervantez* and *Arlene B. Mayerson.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Waxman, Acting Assistant Attorney General Lee, Deputy Solicitor General Underwood, Paul R. Q. Wolfson, Jessica Dunsay Silver, Linda F. Thome,* and *Seth M. Galanter.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Nevada et al. by *Frankie Sue Del Papa,* Attorney General of Nevada, and *Anne B. Cathcart,* Senior Deputy Attorney General, *Betty D. Montgomery,* Attorney General of Ohio, *Jeffrey S. Sutton,* State Solicitor, and *Elise Porter* and *Todd R. Marti,* Assistant Attorneys General, *John M. Ferren,* Corporation Counsel of the District of Columbia, and *Gus F. Diaz,* Acting Attorney General of Guam, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.,* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Philip T. McLaughlin* of New Hampshire, *Peter Verniero* of New Jersey, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Mark L. Earley* of Virginia, *Julio A. Brady* of the Virgin Islands, and *William U. Hill* of Wyoming; for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the Republican Caucus of the Pennsylvania House of Representatives by *John P. Krill, Jr.,* and *David R. Fine.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Protection and Advocacy Systems et al. by *Steven J. Schwartz, James R. Pingeon,* and *Stephen F. Hanlon;* and for the Na-

JUSTICE SCALIA delivered the opinion of the Court.

The question before us is whether Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U. S. C. § 12131 *et seq.*, which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that individual's disability, see § 12132, covers inmates in state prisons. Respondent Ronald Yeskey was such an inmate, sentenced in May 1994 to serve 18 to 36 months in a Pennsylvania correctional facility. The sentencing court recommended that he be placed in Pennsylvania's Motivational Boot Camp for first-time offenders, the successful completion of which would have led to his release on parole in just six months. See Pa. Stat. Ann., Tit. 61, § 1121 *et seq.* (Purdon Supp. 1998). Because of his medical history of hypertension, however, he was refused admission. He filed this suit against petitioners, the Commonwealth of Pennsylvania's Department of Corrections and several department officials, alleging that his exclusion from the Boot Camp violated the ADA. The District Court dismissed for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6), holding the ADA inapplicable to inmates in state prisons; the Third Circuit reversed, 118 F. 3d 168 (1997); we granted certiorari, 522 U. S. 1086 (1998).

Petitioners argue that state prisoners are not covered by the ADA for the same reason we held in *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), that state judges were not covered by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.* *Gregory* relied on the canon of construction that absent an "unmistakably clear" expression of intent to "alter the usual constitutional balance between the

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tional Prison Project of the ACLU Foundation et al. by *Steven R. Shapiro*, *David M. Porter*, *Marjorie Rifkin*, and *Elizabeth Alexander*.

Briefs of *amici curiae* were filed for Adapt et al. by *Stephen F. Gold;* and for the National Advisory Group for Justice et al. by *Michael Churchill*.

States and the Federal Government," we will interpret a statute to preserve rather than destroy the States' "substantial sovereign powers." 501 U. S., at 460–461 (citations and internal quotation marks omitted). It may well be that exercising ultimate control over the management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential state function subject to the plain-statement rule of *Gregory.* "One of the primary functions of government," we have said, "is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task." *Procunier* v. *Martinez,* 416 U. S. 396, 412 (1974), overruled on other grounds, *Thornburgh* v. *Abbott,* 490 U. S. 401, 414 (1989). "It is difficult to imagine an activity in which a State has a stronger interest," *Preiser* v. *Rodriguez,* 411 U. S. 475, 491 (1973).

Assuming, without deciding, that the plain-statement rule does govern application of the ADA to the administration of state prisons, we think the requirement of the rule is amply met: the statute's language unmistakably includes State prisons and prisoners within its coverage. The situation here is not comparable to that in *Gregory.* There, although the ADEA plainly covered state employees, it contained an exception for "'appointee[s] on the policymaking level'" which made it impossible for us to "conclude that the statute plainly cover[ed] appointed state judges." 501 U. S., at 467. Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt. Title II of the ADA provides:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. § 12132.

State prisons fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." § 12131(1)(B).

Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity," § 12132, creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which at least theoretically "benefit" the prisoners (and any of which disabled prisoners could be "excluded from participation in"). See *Block* v. *Rutherford*, 468 U. S. 576, 580 (1984) (referring to "contact visitation program"); *Hudson* v. *Palmer*, 468 U. S. 517, 552 (1984) (discussing "rehabilitative programs and services"); *Olim* v. *Wakinekona*, 461 U. S. 238, 246 (1983) (referring to "appropriate correctional programs for all offenders"). Indeed, the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a "program." Pa. Stat. Ann., Tit. 61, § 1123 (Purdon Supp. 1998). The text of the ADA provides no basis for distinguishing these programs, services, and activities from those provided by public entities that are not prisons.

We also disagree with petitioners' contention that the term "qualified individual with a disability" is ambiguous insofar as concerns its application to state prisoners. The statute defines the term to include anyone with a disability

> "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U. S. C. § 12131(2).

Petitioners argue that the words "eligibility" and "participation" imply voluntariness on the part of an applicant who seeks a benefit from the State, and thus do not connote prisoners who are being held against their will. This is wrong on two counts: First, because the words do not connote voluntariness. See, *e. g.*, Webster's New International Dictionary 831 (2d ed. 1949) ("eligible": "Fitted or qualified to be chosen or elected; legally or morally suitable; as, an *eligible* candidate"); *id.*, at 1782 ("participate": "To have a share in common with others; to partake; share, as in a debate"). While "eligible" individuals "participate" voluntarily in many programs, services, and activities, there are others for which they are "eligible" in which "participation" is mandatory. A drug addict convicted of drug possession, for example, might, as part of his sentence, be required to "participate" in a drug treatment program for which only addicts are "eligible." And secondly, even if the words did connote voluntariness, it would still not be true that all prison "services," "programs," and "activities" are excluded from the ADA because participation in them is not voluntary. The prison law library, for example, is a service (and the use of it an activity), which prisoners are free to take or leave. Cf. *Gabel* v. *Lynaugh*, 835 F. 2d 124, 125, n. 1 (CA5 1988) *(per curiam)* ("pro se civil rights litigation has become a recreational activity for state prisoners"). In the very case at hand, the governing law makes it clear that participation in the Boot Camp program is voluntary. See Pa. Stat. Ann., Tit. 61, § 1126(a) (Purdon Supp. 1998) ("An eligible inmate may make an application to the motivational boot camp selection committee for permission to participate in the motivational boot camp program"); § 1126(c) ("[c]onditio[n]" of "participa[tion]" is that applicant "agree to be bound by" certain "terms and conditions").

Finally, petitioners point out that the statute's statement of findings and purpose, 42 U. S. C. § 12101, does not mention prisons and prisoners. That is perhaps questionable, since the provision's reference to discrimination "in such critical

areas as . . . institutionalization," § 12101(a)(3), can be thought to include penal institutions. But assuming it to be true, and assuming further that it proves, as petitioners contend, that Congress did not "envisio[n] that the ADA would be applied to state prisoners," Brief for Petitioners 13–14, in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be "'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985) (citation omitted).

Our conclusion that the text of the ADA is not ambiguous causes us also to reject petitioners' appeal to the doctrine of constitutional doubt, which requires that we interpret statutes to avoid "grave and doubtful constitutional questions," *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909). That doctrine enters in only "where a statute is susceptible of two constructions," *ibid.* And for the same reason we disregard petitioners' invocation of the statute's title, "Public Services," 104 Stat. 337. "[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase." *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947).

We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause, compare *Printz* v. *United States*, 521 U. S. 898 (1997), with *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), or § 5 of the Fourteenth Amendment, see *City of Boerne* v. *Flores*, 521 U. S. 507 (1997). Petitioners raise this question in their brief, see Brief for Petitioners 22–23, but it was addressed by neither the District Court nor the Court of Appeals, where petitioners raised only the *Gregory* plain-statement issue. "Where

issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970) (citations omitted). See also *Dothard* v. *Rawlinson*, 433 U. S. 321, 323, n. 1 (1977); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927). We decline to do so here.

* * *

Because the plain text of Title II of the ADA unambiguously extends to state prison inmates, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

AMERICAN TELEPHONE & TELEGRAPH CO. *v.* CENTRAL OFFICE TELEPHONE, INC.

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

No. 97–679. Argued March 23, 1998—Decided June 15, 1998

Respondent purchases "bulk" communications services from long-distance providers, such as petitioner AT&T, and resells them to its customers. Petitioner, as a common carrier under the Communications Act of 1934, must file with the Federal Communications Commission (FCC) "tariffs" containing all its "charges" for interstate services and all "classifications, practices, and regulations affecting such charges," 47 U. S. C. § 203(a). A carrier may not "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such [tariff]." § 203(c). The FCC requires carriers to sell long-distance services to resellers under the same rates, terms, and conditions as apply to other customers. In 1989, petitioner agreed to sell respondent a long-distance service, which, under the parties' written subscription agreements, would be governed by the rates, terms, and conditions in the appropriate AT&T tariffs. Respondent soon experienced problems with the service it received, and withdrew from the contract before the expiration date. Meanwhile, it had sued petitioner in Federal District Court, asserting, *inter alia*, state-law claims for breach of contract and for tortious interference with contractual relations (viz., respondent's contracts with its customers), the latter claim derivative of the former. Respondent alleged that petitioner had promised and failed to deliver various service, provisioning, and billing options in addition to those set forth in the tariff, and that petitioner's conduct was willful, so that consequential damages were available under the tariff. The Magistrate Judge rejected petitioner's argument that the claims were pre-empted by § 203's filed-tariff requirements; he declined, however, to instruct on punitive damages for the tortious-interference claim. The jury found for respondent and awarded damages. The Ninth Circuit affirmed the judgment, but reversed the Magistrate Judge's failure to instruct on punitive damages and remanded for a trial on that aspect of the case.

Held: The Communications Act's filed-tariff requirements pre-empt respondent's state-law claims. Pp. 221–228.

Syllabus

(a) Sections 203(a) and (c) are modeled after similar provisions of the Interstate Commerce Act (ICA), and the "filed rate doctrine" associated with the ICA tariff provisions applies to the Communications Act as well. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 229–231. Under that doctrine, the rate a carrier duly files is the only lawful charge. *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97. Even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff. *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 653. That this case involves services and billing rather than rates or ratesetting does not make the filed rate doctrine inapplicable. Since rates have meaning only when one knows the services to which they are attached, any claim for excessive rates can be couched as a claim for inadequate services and vice versa. The Communications Act recognizes this in the §§ 203(a) and (c) requirements, and the cases decided under the ICA make it clear that discriminatory privileges are not limited to discounted rates, see, *e. g.*, *United States* v. *Wabash R. Co.*, 321 U. S. 403, 412–413. Pp. 221–224.

(b) This Court's filed-rate cases involving special services claims cannot be distinguished on the ground that the services they involved should have been included in the tariff. That is precisely the case here. Even provisioning and billing are "covered" by the applicable tariff. Nor does it make any difference that petitioner provided the same services, without charge, to other customers; that only tends to show that petitioner acted unlawfully with regard to the other customers as well. Pp. 224–226.

(c) The analysis used in evaluating respondent's contract claim applies with equal force to its wholly derivative tortious-interference claim. The Communications Act's saving clause does not dictate a different result. It copies the ICA's saving clause, which has long been held to preserve only those rights that are not inconsistent with the statutory filed-rate requirements. *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163. Finally, respondent's argument that petitioner's willful misconduct makes the relief awarded here consistent with the tariff is rejected. Pp. 226–228.

108 F. 3d 981, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 228. STEVENS, J., filed a dissenting opinion, *post*, p. 231. O'CONNOR, J., took no part in the consideration or decision of the case.

David W. Carpenter argued the cause for petitioner. With him on the briefs were *Carter G. Phillips*, *Thomas W. Merrill*, *Peter D. Keisler*, and *Marc E. Manly.*

Bruce M. Hall argued the cause and filed a brief for respondent.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondent Central Office Telephone, Inc. (COT), a reseller of long-distance communications services, sued petitioner AT&T, a provider of long-distance communications services, under state law for breach of contract and tortious interference with contract. Petitioner is regulated as a common carrier under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.* The issue before us is whether the federal filed-tariff requirements of the Communications Act pre-empt respondent's state-law claims.

I

Respondent purchases "bulk" long-distance services—volume-discounted services designed for large customers—from long-distance providers, and resells them to smaller customers. Like many other resellers in the telecommunications industry, respondent does not own or operate facilities of its own; it is known as a "switchless reseller," which is the industry nomenclature for arbitrageur. Of course respondent passes along only a portion of the bulk-purchase discount to its aggregated customers, and retains the remaining discount as profit.

Petitioner provides long-distance services and, as a common carrier under the Communications Act, § 153(h), must

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**Gary M. Epstein*, *Maureen E. Mahoney*, *Teresa D. Baer*, *Walter H. Alford*, *William B. Barfield*, *M. Robert Sutherland*, and *Michael J. Zpevak* filed a brief for the United States Telephone Association et al. as *amici curiae* urging reversal.

Henry D. Levine, *Ellen G. Block*, and *James S. Blaszak* filed a brief for the Ad Hoc Telecommunications Users Committee et al. as *amici curiae.*

observe certain substantive requirements imposed by that law. Section 203 of the Act requires that common carriers file "schedules" (also known as "tariffs") containing all their "charges" for interstate services and all "classifications, practices, and regulations affecting such charges." § 203(a). The Federal Communications Commission (FCC), which is the agency responsible for enforcing the Act, requires carriers to sell long-distance services to resellers such as respondent under the same rates, terms, and conditions as apply to other customers.

Prior to 1989, petitioner had developed a type of long-distance service known as Software Defined Network (SDN), designed to meet the needs of large companies with offices in multiple locations. SDN established a "virtual private network" that allowed employees in different locations to communicate easily. For example, an employee in Washington could call a co-worker in Denver simply by dialing a four-digit extension. SDN customers, in exchange for a commitment to purchase large volumes of long-distance communication time, received this service at a rate much below what it would otherwise cost.

Several changes to SDN in 1989 made the service extremely attractive to resellers, such as respondent, who aggregate smaller customers. Petitioner developed the capability to allow customers to use ordinary ("switched access") telephone lines to connect locations to their SDN networks. Previously, locations had to be connected over special "dedicated access" lines, which are direct lines from a location's telephone system to petitioner's long-distance network, bypassing the switches of the local exchange carrier. Dedicated access involves large fixed costs, so it is cost effective only when a location originates a large volume of calls. Switched access, in contrast, does not entail additional high fixed costs, so it is better suited to small users and hence to resellers. Petitioner also instituted two pricing promotions for SDN in 1989: additional discounts from the basic SDN

rates for customers making large usage and duration commitments, and waiver of installation charges for customers making multiyear commitments (subject to penalties for early termination). Petitioner also added a new billing option. In addition to network billing, whereby petitioner prepares a single bill that applies the tariffed rate to all usage at all locations, petitioner started to offer multilocation billing (MLB), which allows the SDN volume discounts to be apportioned between an SDN customer and individual locations on its network, with the proportion being chosen by the customer. Under this option, petitioner sends bills directly to the customer's individual locations (which, in the case of resellers, means to the reseller's customers) but the customer (or reseller) remains responsible for all payments. The tariff provides, however, that petitioner is not responsible for the allocation of charges. See AT&T Tariff FCC No. 1, § 6.2.4 (1986), App. to Brief for Petitioner 24a.

Attracted by these changes, in October 1989, respondent approached petitioner regarding its possible purchase of SDN. LaDonna Kisor, a sales representative in petitioner's Portland, Oregon, office, described the service and gave respondent literature on SDN. She predicted that petitioner could establish an initial SDN network for respondent in four to five months, and could thereafter add new locations within 30 days of receiving an order. Respondent subscribed to a tariffed switched-access SDN plan under which the up-front installation charges would be waived and respondent would receive a 17% to 20% discount off basic SDN rates in exchange for a 4-year commitment to purchase two million minutes of service annually. Respondent also requested MLB. Petitioner confirmed respondent's order, stating that respondent would obtain SDN "'pursuant to the rates, terms and conditions in AT&T's [FCC Tariff No. 1],'" and that the provisions of the tariff, "'including limitations on AT&T's liabilities, shall govern your and AT&T's obligations and liabilities with respect to the service and options you have

selected.'" Brief for Petitioner 14. Respondent accepted these terms in writing on October 30, 1989.

By February 1990, it had become apparent that the demand for SDN exceeded petitioner's expectations—largely because of the switchless resellers attracted to the service. Petitioner could not fill the volumes of switched-access orders as rapidly as dedicated access orders, or as quickly as petitioner's personnel had predicted. Accordingly, Ms. Kisor notified respondent that it would take up to 90 days to add new locations after the initial SDN was established. She suggested placing respondent's customers with another AT&T service, the Multilocation Calling Plan (MLCP), until they could be placed on SDN. Respondent agreed to this, and ordered MLCP. Again, respondent signed a letter confirming that MLCP "'is provided under the terms and conditions stated in AT&T's Tariff F. C. C. Nos. 1 and 2.'" Brief for Appellant in Nos. 94–36116, 94–36156 (CA9), p. 15.

Ms. Kisor informed respondent that its initial SDN network was functioning in April 1990. At that point, respondent elected to increase to a larger SDN volume commitment in order to qualify for a larger discount. In placing this order, respondent signed a form stating that the SDN service "'WILL BE GOVERNED BY THE RATES AND TERMS AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS.'" Brief for Petitioner 14–15. Respondent then began reselling SDN to its own customers and placing orders with petitioner that required petitioner to treat respondent's customers as if they were new locations on a corporate SDN.

Almost from the outset, respondent experienced problems with the network, including delays in provisioning (the filling of orders) and in billing. An additional billing problem was especially damaging to respondent: respondent's customers received bills reflecting 100% of the discount instead of the 50% respondent selected. These problems continued, and in October 1990, they led respondent to switch to network bill-

ing. Although respondent continued to resell SDN, it was ultimately unable to meet its usage commitment for the first period in which it was applicable. In September 1992, respondent notified petitioner that it was terminating its SDN service effective September 30, 1992, with 18 months remaining on its contract.

Meanwhile, on November 27, 1991, respondent had filed suit against petitioner in the United States District Court for the District of Oregon. The complaint contained a variety of claims, none of which arose under the Communications Act, and ultimately two state-law claims went to trial: (1) breach of contract (including breach of an implied covenant of good faith and fair dealing); and (2) tortious interference with contractual relations (viz., respondent's contracts with its customers). Respondent's state-law claims rested on the allegation that its contracts with petitioner were not limited by petitioner's tariff but also included certain understandings respondent's president derived from reading petitioner's brochures and talking with its representatives. According to respondent, petitioner promised various service, provisioning, and billing options in addition to those set forth in the tariff. Respondent also claimed that petitioner violated its state-law implied duty of good faith and fair dealing by taking actions that undermined the purpose of the contract for respondent, which was to purchase SDN services for resale at a profit. The tortious-interference claim was derivative of the contract claim. Respondent asserted that, because respondent promised certain benefits of SDN to its customers, and because petitioner provided competing services, any intentional violation of petitioner's contractual duties constituted tortious-interference with respondent's relationship with its customers. Respondent also asserted that, since petitioner's conduct was willful, consequential damages were available under the terms of the tariff. Petitioner filed a counterclaim to recover $200,000 in unpaid tariffed charges

from April to October 1990, and to obtain the termination charges that respondent did not pay in 1992.

Throughout the proceedings in District Court, petitioner argued that respondent's state-law contract and tort claims were pre-empted by the filed-tariff requirements of § 203 of the Act. The Magistrate Judge rejected this argument and instructed the jury to consider not only the written subscription agreements, but also any statements made or documents furnished before the parties signed the agreements " 'if you find that the parties intended that those statements or written materials form part of their agreements.' " Brief for Petitioner 18. The Magistrate Judge also instructed the jury that it could not find for respondent on its contract claims unless it found that petitioner engaged in willful misconduct. He declined to instruct on punitive damages for the tortious-interference claim. The jury found for respondent on its state-law claims, rejected petitioner's counterclaim, and awarded respondent $13 million in lost profits. The Magistrate Judge reduced the judgment to $1.154 million, which represented the lost profits respondent claimed during the period before it canceled SDN on September 30, 1992; he found that there was no competent evidence for lost profits after that date. The Court of Appeals, over a dissent by Judge Brunetti, affirmed the judgment but reversed the Magistrate Judge's failure to instruct on punitive damages and remanded for a trial on that aspect of the case. 108 F. 3d 981 (CA9 1997). We granted certiorari to determine whether the federal filed-rate requirements of § 203 pre-empt respondent's claims. 522 U. S. 1024 (1997).

II

Section 203(a) of the Communications Act requires every common carrier to file with the FCC "schedules," *i. e.*, tariffs, "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U. S. C. § 203(a). Section 203(c) makes it unlawful for a carrier to

"extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." These provisions are modeled after similar provisions of the Interstate Commerce Act (ICA) and share its goal of preventing unreasonable and discriminatory charges. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 229–230 (1994). Accordingly, the century-old "filed rate doctrine" associated with the ICA tariff provisions applies to the Communications Act as well. See *id.*, at 229–231; *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 577 (1981); cf. *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481 (1932). In *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915), we described the basic contours of the filed rate doctrine under the ICA:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff. *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 653 (1913).

While the filed rate doctrine may seem harsh in some circumstances, see, *e. g.*, *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 130–131 (1990), its strict application is necessary to "prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts," the very evil the filing requirement seeks to prevent. *Id.*, at 127. Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at "the heart of the common-carrier section of the Communications Act." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, *supra*, at 229.

The Ninth Circuit thought the filed rate doctrine inapplicable "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing." 108 F. 3d, at 990. Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." *Competitive Telecommunications Assn.* v. *FCC*, 998 F. 2d 1058, 1062 (CADC 1993). The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," 47 U. S. C. § 203(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communication, or employ or en-

force any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203(c).

Unsurprisingly, the cases decided under the ICA make it clear that discriminatory "privileges" come in many guises, and are not limited to discounted rates. "[A] preference or rebate is the necessary result of every violation of [the analog to § 203(c) in the ICA] where the carrier renders or pays for a service not covered by the prescribed tariffs." *United States* v. *Wabash R. Co.*, 321 U. S. 403, 412–413 (1944). In *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155 (1912), we rejected a shipper's breach-of-contract claim against a railroad for failure to ship a carload of race horses by a particularly fast train. We held that the contract was invalid as a matter of law because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train," and therefore the shipper received "an undue advantage . . . that is not one open to others in the same situation." *Id.*, at 163, 165. Similarly, in *Davis* v. *Cornwell*, 264 U. S. 560 (1924), we invalidated the carrier's agreement to provide the shipper with a number of railroad cars on a specified day; such a special advantage, we said, "is illegal, when not provided for in the tariff." *Id.*, at 562. See also *Kansas City Southern R. Co.* v. *Carl*, *supra*, at 653; *Wight* v. *United States*, 167 U. S. 512, 517–518 (1897); I. Lake, Discrimination by Railroads and Other Public Utilities 310–315 (1947).

III

The Ninth Circuit distinguished the Court's filed rate cases involving claims for special services on the ground that the services at issue there "should have been included in the tariff and made available to all" because "the customer would have been expected to pay a higher rate" for those services. 108 F. 3d, at 989, n. 9. But that is precisely the case here. Indeed, the additional services and guarantees that respondent claims it was entitled to by virtue of Ms. Kisor's representations and petitioner's sales brochures—

viz., faster provisioning, the allocation of charges through multilocation billing, and various matters relating to deposits, calling cards, and service support, see 108 F. 3d, at 987–988—all pertain to subjects that are *specifically addressed* by the filed tariff. See AT&T Tariff FCC No. 1, § 2.5.10 (provisioning of orders); § 6.2.4 (allocation of charges); § 2.5.6 (deposits); § 2.5.12.B (calling cards); § 6.2.5 (service supports).

The Ninth Circuit agreed that all of respondent's claims except those relating to provisioning and billing would be pre-empted if the filed rate doctrine applied. 108 F. 3d, at 990. But even provisioning and billing are, in the relevant sense, "covered" by the tariff. For example, whereas respondent asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to petitioner to "establis[h] and confir[m]" a due date for provisioning, requires that petitioner merely make "every reasonable effort" to meet that due date, and if it fails gives the customer no recourse except to "cancel the order without penalty or payment of nonrecurring charges." § 2.5.10(B). Faster, guaranteed provisioning of orders for the same rate is certainly a privilege within the meaning of 47 U. S. C. § 203(c) and the filed rate doctrine. Cf. *Chicago & Alton R. Co.* v. *Kirby*, *supra*, at 163 (refusing to enforce promise for faster, guaranteed service not included in the tariff). As for billing, whereas respondent claims that, pursuant to the MLB option, petitioner promised to allocate usage and charges accurately among respondent's customers, the tariff provides that petitioner "will not allocate . . . usage or charges" among the locations on the customer's network and "is not responsible for the way that the Customer may allocate usage or charges." AT&T Tariff FCC No. 1, § 6.2.4. Any assurance by petitioner that it would allocate usage and charges and take responsibility for the task would have been in flat contradiction of the tariff. See *Chesapeake & Ohio R. Co.* v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260, 266 (1926).

The Ninth Circuit distinguished respondent's claims from those in our filed-rate cases involving special services in one other respect: according to respondent, the "special services" that it sought were provided by petitioner, without charge, to other customers, 108 F. 3d, at 989, n. 9. Even if that were so, the claim for these services would still be pre-empted under the filed rate doctrine. To the extent respondent is asserting discriminatory treatment, its remedy is to bring suit under § 202 of the Communications Act.[1] To the extent petitioner is claiming that its own claims for special services are not really special because other companies get the same preferences, "that would only tend to show that the practice was unlawful [with regard to] the others as well." *United States* v. *Wabash R. Co.*, *supra*, at 413. Because respondent asks for privileges not included in the tariff, its state-law claims are barred in either case.

IV

Our analysis applies with equal force to respondent's tortious-interference claim because that is wholly derivative of the contract claim for additional and better services. Respondent contended that the tort claim was based on "AT&T's refusal to provide [respondent] with certain types of service" and the Magistrate Judge agreed, noting that "'the claims in this case, even the tort claim, . . . stem from the alleged failure of AT&T to comply with its contractual relationship.'"[2] Brief for Appellant in Nos. 94–36116, 94–

[1] Eight months after the close of discovery (and well after the 2-year statute of limitations in the Communications Act, § 415), respondent sought leave to file a second amended complaint to add a § 202 claim. The Magistrate Judge denied the request. Respondent did not appeal that ruling.

[2] The dissent argues that "the jury's verdict on respondent's tort claim is supported by evidence that went well beyond, and differed in nature from, the contract claim," *post*, at 231, which the dissent asserts requires us to remand this case rather than reverse the judgment. This issue of noncontract evidence neither was included within the question presented

36156 (CA9), p. 33. Respondent can no more obtain unlawful preferences under the cloak of a tort claim than it can by contract. "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922); see also *Maislin*, 497 U. S., at 126.

The saving clause of the Communications Act, § 414, contrary to respondent's reading of it, does not dictate a different result. Section 414 copies the saving clause of the ICA, and we have long held that the latter preserves only those rights that are not inconsistent with the statutory filed-tariff requirements. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 507 (1913). A claim for services that constitute unlawful preferences or that directly conflict with the tariff—the basis for both the tort and contract claims here—cannot be "saved" under § 414. "Th[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law

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for our review ("Whether . . . the Ninth Circuit improperly allowed state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff") nor was raised by respondent as an alternative ground in support of the judgment. Nor has respondent ever suggested the need for a remand, even though the petition for certiorari sought not merely reversal, but *summary* reversal. In its brief on the merits, respondent argued that the intentional tort claim was not pre-empted because AT&T's *willful* breach of its contractual commitments was not protected by the filed rate doctrine. There was no hint of an argument that, *even if* that willful breach could not form the basis for an action, *other* alleged intentional acts sufficed to support the judgment below. At no point has respondent disputed the Magistrate Judge's finding that the tort claim is derivative of the contract claim, or the Ninth Circuit's description of its tort claim as based on the fact that "because COT had promised certain benefits of SDN to its customers, and because AT&T provided competing services, any violation of AT&T's contractual duties constituted tortious interference with COT's relationship with its customers." 108 F. 3d 981, 988 (1997). Contrary to the dissent's assertion, we have no obligation to search the record for the existence of a nonjurisdictional point not presented, and to consider a disposition (remand instead of reversal) not suggested by either side.

right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446 (1907).

Finally, we reject respondent's argument that, even if the tariff exclusively governs the parties' relationship, the relief awarded is consistent with the tariff, since AT&T Tariff FCC No. 1, § 2.3.1 provides that petitioner's "liability, if any, for its willful misconduct is not limited by this tariff." Respondent reasons that, because the jury found that petitioner engaged in willful misconduct, the verdict does not conflict with the tariff. Section 2.3.1, however, cannot be construed to do what the parties have no power to do. It removes only those limitations upon liability imposed *by the tariff,* not those imposed by law. It is the Communications Act that renders the promise of preferences unenforceable. The tariff can no more exempt the broken promise of preference that is willful than it can the broken promise of preference that is unintentional. (In fact, perversely enough, the willful breach displays a greater, if belated, attempt to comply with the law.)

* * *

Because respondent's state-law claims are barred by the filed rate doctrine, we reverse the judgment of the Ninth Circuit.

It is so ordered.

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

CHIEF JUSTICE REHNQUIST, concurring.

The Court concludes that respondent's tortious interference claim is "wholly derivative of the contract claim" and therefore barred by the filed rate doctrine. The Court accepts the Magistrate Judge's finding to that effect, *ante,* at 226, and I agree: The acts of tortious interference asserted

against AT&T amount to no more than an intentional refusal to provide services to respondent in an amount or manner contrary to the filed tariff.

I write separately to note that this finding is necessary to the conclusion that respondent's state-law tort claim may not proceed. As the majority correctly states, the filed rate doctrine exists to protect the "antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'" *Ante*, at 223. Central to that antidiscriminatory policy is the notion that all purchasers of services covered by the tariff will pay the same rate. The filed rate doctrine furthers this policy by disallowing suits brought to enforce agreements to provide services on terms different from those listed in the tariff. This ensures that the tariff governs the terms by which the common carrier provides those services to its customers.

It is crucial to note, however, that this is all the tariff governs. In order for the filed rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff. This is how the doctrine has been applied in the past. In *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155 (1912), for example, respondent entered into a contract with petitioner to ship horses from Springfield, Illinois, to New York City via a special fast train. The tariff that the petitioner had filed "did not provide for an expedited service, nor for transportation by any particular train." *Id.*, at 163. The Court ruled that respondent's suit to enforce the special arrangement could not proceed:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advan-

> tage in that it is not one open to all others in the same situation." *Id.*, at 165.

In *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922), the question was not whether a separate contract could be enforced, but rather whether petitioner could bring an antitrust complaint challenging the rate that respondents had filed in their tariff. The Court ruled that he could not:

> "The legal rights of shipper as against carrier *in respect to a rate* are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. *The rights as defined by the tariff* cannot be varied or enlarged by either contract or tort of the carrier." *Ibid.* (emphasis added).

In this case respondent's contract claim seeks to enforce side arrangements that it made with petitioner. Respondent contends that petitioner promised to provide it with services on terms different from those listed in the tariff. As the above cases make clear, the filed rate doctrine bars such a claim. Respondent's tort claim is entirely derivative of its contractual claim, and the Court is therefore correct in concluding that the doctrine also bars the tort claim.

The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on petitioner to refrain from intentionally interfering with respondent's relationships with its customers by means other than failing to honor unenforceable side agreements, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all

actions based in state law. It is with this understanding that I join the Court's opinion.

JUSTICE STEVENS, dissenting.

Everyone agrees that respondent's tortious interference claim would be barred by the filed rate doctrine if it is "wholly derivative of the contract claim for additional and better services." *Ante*, at 226 (majority opinion); *ante*, at 228 (REHNQUIST, C. J., concurring). Moreover, it is true that when the Magistrate Judge ruled that respondent's case would not support a punitive damages award as a matter of state law, he characterized the tort claim as "stem[ming] from the alleged failure of AT&T to comply with its contractual relationship." Tr. 2207. In my opinion, however, the jury's verdict on respondent's tort claim is supported by evidence that went well beyond, and differed in nature from, the contract claim.

If petitioner, in an effort to appropriate respondent's customers, had included with each bill sent to a customer a statement expressly characterizing respondent as an unethical, profit-hungry middleman, I would think it clear that the filed rate doctrine would not constitute a defense to such tortious conduct. The evidence in the record indicates that a similar result was obtained by mailing bills to the customers that disclosed the markup that respondent obtained on their calls.

Respondent's tort claim was also premised in part on testimony that AT&T used a telemarketer to contact respondent's customers and, without their authorization, convert them to AT&T's own long-distance service. *Id.*, at 557–558. In rejecting AT&T's motion for a directed verdict on the tort claim, the Magistrate recognized that this practice of "slamming" customers could "easily be a case of intentional interference" that would not necessarily also constitute breach of contract. *Id.*, at 2166–2167. Slamming was clearly a part of the case presented in the District Court. There was an

allegation of slamming in respondent's amended complaint;[1] in the District Court, AT&T's trial counsel took issue with respondent's effort to make slamming "a big part of this case," *id.*, at 2170, and said in closing argument that slamming "is the basis for this intentional interference" claim, *id.*, at 2921; and nothing in the jury instructions remotely suggested that the tort claim required proof of broken promises by AT&T to provide additional services. Respondent's evidence easily fits within the definition of intentional interference set forth in the jury charge:

> "COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference." App. 71.

It may be the fact that the billing disclosures and slamming were the consequence of negligence rather than a deliberate plan to take over a network of customers that respondent had developed, but the jury concluded otherwise. It found that petitioner acted intentionally and willfully in interfering with respondent's business relations. See *ibid.*[2] That finding is doubly significant.

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[1] "[D]espite repeated requests by COT to AT&T, AT&T failed to rectify incidents of unauthorized changes made in the designated carriers ('slamming') of COT's customers." App. 28.

[2] The jury's $13 million damages award, reduced by the Magistrate Judge to $1.154 million, did not differentiate between the contract and tort claims.

First, as the Court acknowledges, *ante*, at 228, the jury's finding precludes a defense based on the provisions of the tariff that purport to limit petitioner's liability. Second, and of greater importance, it determines that the most egregious tortious conduct was not merely derivative of the contract violations. Enforcement of respondent's state-law right to be free from tortious interference with business relations does not somehow award respondent an unlawful preference that should have been specified in the tariff (presumably in return for an added fee or higher rate); it instead gives effect to a generally applicable right that petitioner is required, by state law, to respect in dealing with all others, customers and noncustomers alike. Thus, at least some of the tortious interference occurred independently of the customer-carrier relationship and would have been actionable even if respondent had never entered into a contract with AT&T.

The Court correctly states that the filed rate doctrine will pre-empt some tort claims, but we have never before applied that harsh doctrine to bar relief for tortious conduct with so little connection to, or effect upon, the relationship governed by the tariff. To the extent respondent's tort claim is based on petitioner's billing disclosures and slamming practices, it neither challenges the carrier's filed rates, as did the antitrust claim in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922), nor seeks a special service or privilege of the sort requested in cases such as *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155 (1912), and *Davis* v. *Cornwell*, 264 U. S. 560 (1924). More akin to this case is *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290, 300 (1976), in which we held that a common-law tort action for fraudulent misrepresentation against a federally regulated air carrier could "coexist" with the Federal Aviation Act. To a limited degree it may be said that here, as in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." *Ibid.* If the Communications Act's

saving clause[3] means anything, it preserves state-law remedies against carriers on facts such as these.

The District Court and the Court of Appeals never considered whether respondent's tort claim is wholly derivative of its contract claim for purposes of the filed rate doctrine, because those courts mistakenly believed that even the contract claim was not covered by the doctrine. On my own reading of the record, I think it clear that a portion of the tort claim is not pre-empted. The Court should therefore remand the case for a new trial rather than ordering judgment outright for AT&T.[4]

Although the Court holds broadly that respondent's tort claim is totally barred, it declines to consider whether a portion of the claim might survive on remand because this issue was not part of the question presented in the petition for certiorari and was not specifically raised by respondent. *Ante,* at 226–227, n. 2. The latter point is wholly irrelevant, precisely because of the scope of the question presented. The only question that we agreed to decide was whether the filed rate doctrine pre-empts "state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff." Pet. for Cert. i. The Court answers that legal question, and then decides an additional, factual one: whether respondent's tort claim is "based on" AT&T's "failure to honor an alleged side agreement," and thus is "wholly derivative" of the pre-empted contract claim. In resolving that issue, the Court cannot

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[3] "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414.

[4] Beyond the billing disclosures and slamming, respondent asserts that AT&T also misappropriated customer information from respondent's confidential data base. Brief for Respondent 4. That basis for a tort remedy, if supported by sufficient evidence, would also appear not to be pre-empted by the filed rate doctrine.

simply rely on AT&T's bald assertion, supported only by a statement of the Magistrate taken out of context, that the tort claim is "wholly derivative"; we have an obligation either to study the record or at least to remand and allow the lower courts to consider the proper application of the legal rule to the facts of this case.

I respectfully dissent.

Syllabus

HOHN *v.* UNITED STATES

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

No. 96–8986. Argued March 3, 1998—Decided June 15, 1998

Petitioner Hohn filed a motion under 28 U. S. C. § 2255 to vacate his conviction for "use" of a firearm during a drug trafficking offense, 18 U. S. C. § 924(c)(1), claiming the evidence was insufficient to prove such "use" under this Court's intervening decision in *Bailey* v. *United States*, 516 U. S. 137. While the motion was pending, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, § 102 of which amends the statutory provision which had required state prisoners to obtain a certificate of probable cause before appealing the denial of a habeas petition. The amended provision specifies, *inter alia*, that an appeal may not be taken to a court of appeals from the final order in a § 2255 proceeding, § 2253(c)(1)(B), unless a circuit justice or judge issues a certificate of appealability, § 2253(c)(1), upon a substantial showing of the denial of a constitutional right, § 2253(c)(2). The District Court denied Hohn's motion, and he filed a notice of appeal, which the Eighth Circuit treated as an application for a certificate of appealability. A three-judge panel declined to issue a certificate, ruling that Hohn did not satisfy § 2253(c)(2). In the panel's view, *Bailey* simply interpreted § 924(c)(1), and a district court's incorrect application of a statute does not violate the Constitution. Hohn then petitioned for review of the certificate denial under 28 U. S. C. § 1254(1), which provides in relevant part that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" "[b]y writ of certiorari." The Government now says that Hohn's claim was, in fact, constitutional in nature and asks the Court to vacate the judgment and remand so the Eighth Circuit can reconsider in light of this concession. Since both parties argue that this Court has jurisdiction, an *amicus curiae* was appointed to argue the contrary position.

Held: This Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel. Hohn's certificate application is a "case in" the Court of Appeals under § 1254(1) because the word "case," as used in a statute, means a court proceeding, suit, or action, *Blyew* v. *United States*, 13 Wall. 581, 595; the dispute here is a proceeding seeking relief for an immediate and redressable injury, *i. e.*, wrongful detention in violation of the Constitution; and there is adversity as well as the other requisite

qualities of a "case." That § 2253(c)(1) permits the certificate to be issued by a "circuit justice or judge" does not mean the judge's denial of a certificate is his or her own action, rather than the court's. The fact that Hohn's application moved through the Eighth Circuit in the same manner as cases in general do, yielding a decision that has been regarded in that court as precedential, suggests the application was as much a case in the Court of Appeals as any other matter. This conclusion is also confirmed by the adoption by every Court of Appeals but one of rules governing the disposition of certificate applications; by the issuance of the order denying Hohn's certificate in the name of the court and under its seal; by Federal Rule of Appellate Procedure 22(b), which specifically provides for consideration of certificate applications by the entire court of appeals; by Federal Rule 27(c), which authorizes the court of appeals to review decisions that individual judges are authorized to make on their own; by Eighth Circuit Rule 27B(b)(2), which lists grants of probable cause certificates by individual judges as reviewable decisions under Rule 27(c); and by the uniform practice of the courts of appeals, see *In re Burwell*, 350 U. S. 521, 522. Early cases acknowledging that this Court may not review a federal judge's actions performed in an administrative, as opposed to a judicial, capacity, see, *e. g.*, *United States* v. *Ferreira*, 13 How. 40, 51–52, are inapposite because certificate application decisions are judicial in nature. The contention of the dissent and the Court-appointed *amicus* that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from ever being "in" that court under § 1254(1) is foreclosed by precedent. See, *e. g.*, *Ex parte Quirin*, 317 U. S. 1, 24; *Nixon* v. *Fitzgerald*, 457 U. S. 731, 742–743, and n. 23; and *Automobile Workers* v. *Scofield*, 382 U. S. 205, 208–209. The argument is also refuted by the recent amendment to § 2244(b)(3)(E) barring certiorari review of court of appeals denials of motions to file second or successive habeas applications, which would have been superfluous were such a motion not a case in the court of appeals for § 1254(1) purposes, see, *e. g.*, *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62, and which contrasts tellingly with the absence of an analogous limitation on certiorari review of denials of appealability certificate applications, see, *e. g.*, *Bates* v. *United States*, 522 U. S. 23, 29–30. Today's holding conforms the Court's commonsense practice to the statutory scheme, making it unnecessary to invoke the Court's extraordinary jurisdiction in routine cases, which present important and meritorious claims such as Hohn's. Although the decision directly conflicts with the portion of *House* v. *Mayo*, 324 U. S. 42, 48 *(per curiam)*, holding this Court lacks statutory certiorari jurisdiction to review denials of certificates of probable cause, *stare decisis* does not require adherence to that erroneous conclusion,

which is hereby overruled. The Eight Circuit's decision is vacated in light of the Solicitor General's position in this Court. Pp. 241–253.

99 F. 3d 892, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, *post,* p. 253. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and THOMAS, JJ., joined, *post,* p. 254.

Eileen Penner argued the cause for petitioner. With her on the briefs was *Alan Untereiner.*

Matthew D. Roberts argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben.*

Jeffrey S. Sutton, by invitation of the Court, 522 U. S. 944, argued the cause and filed a brief as *amicus curiae.**

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to determine whether the Court has jurisdiction to review decisions of the courts of appeals deny-

*Briefs of *amici curiae* were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George H. Williamson*, Chief Assistant Attorney General, *Robert R. Anderson*, Senior Assistant Attorney General, and *Eric L. Christoffersen* and *Ward A. Campbell*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Richard P. Ieyoub* of Louisiana, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *Mark L. Earley* of Virginia, and *William U. Hill* of Wyoming; and for the National Association of Criminal Defense Lawyers by *Edward M. Chikofsky* and *Lisa Kemler.*

ing applications for certificates of appealability. The Court, we hold, does have jurisdiction.

I

In 1992, petitioner Arnold Hohn was charged with a number of drug-related offenses, including the use or carrying of a firearm during and in relation to a drug trafficking offense, 18 U. S. C. § 924(c)(1). Over defense counsel's objection, the District Court instructed the jury that "use" of a firearm meant having the firearm "available to aid in the commission of" the offense. App. 7, 32. The jury convicted Hohn on all counts. Hohn did not challenge the instruction in his direct appeal, and the Court of Appeals affirmed. *United States* v. *Hohn,* 8 F. 3d 1301 (CA8 1993).

Two years after Hohn's conviction became final, we held the term "use" in § 924(c)(1) required active employment of the firearm. Proximity and accessibility alone were not sufficient. *Bailey* v. *United States,* 516 U. S. 137 (1995). Hohn filed a *pro se* motion under 28 U. S. C. § 2255 to vacate his 18 U. S. C. § 924(c)(1) conviction in light of *Bailey* on the grounds the evidence presented at his trial was insufficient to prove use of a firearm. Although the Government conceded the jury instruction given at Hohn's trial did not comply with *Bailey,* the District Court denied relief because, in its view, Hohn had waived the claim by failing to challenge the instruction on direct appeal.

While Hohn's motion was pending before the District Court, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Section 102 of AEDPA amends the statutory provision which had required state prisoners to obtain a certificate of probable cause before appealing the denial of a habeas petition. The amended provision provides:

> "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> "(B) the final order in a proceeding under section 2255." 28 U. S. C. § 2253(c)(1) (1994 ed., Supp. II).

Certificates of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

Hohn filed a notice of appeal on July 29, 1996, three months after AEDPA's enactment. The Court of Appeals treated the notice of appeal as an application for a certificate of appealability and referred it to a three-judge panel. The panel decided Hohn's application did not meet the standard for a § 2253(c) certificate. In the panel's view, "*Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution." 99 F. 3d 892, 893 (CA8 1996). Given this determination, the panel declined to issue a certificate of appealability.

Judge McMillian dissented. In his view, *Bailey* cast doubt on whether Hohn's conduct in fact violated 18 U. S. C. § 924(c)(1). The Due Process Clause, he reasoned, does not "tolerat[e] convictions for conduct that was never criminal," so Hohn had made a sufficient showing of a constitutional deprivation. 99 F. 3d, at 895. When the Court of Appeals denied Hohn's rehearing petition and a suggestion for rehearing en banc, four judges noted they would have granted the suggestion.

Hohn petitioned this Court for a writ of certiorari to review the denial of the certificate, seeking to invoke our jurisdiction under 28 U. S. C. § 1254(1). The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature. It asked us to vacate the judgment and remand so the Court of Appeals could reconsider in light of this concession. We may not vacate and remand, of course, unless we first have jurisdiction over the

case; and since Hohn and the Government both argue in favor of our jurisdiction, we appointed an *amicus curiae* to argue the contrary position. 522 U. S. 944 (1997).

II

Title 28 U. S. C. § 1254 is the statute most often invoked for jurisdiction in this Court. It provides in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The first phrase of the quoted statute confines our jurisdiction to "[c]ases in" the courts of appeals. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 741–742 (1982). The question is whether an application for a certificate meets the description.

There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action." *Blyew* v. *United States*, 13 Wall. 581, 595 (1872). The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and redressable injury, *i. e.*, wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under consideration. This is significant, we think, for cases are addressed in the ordinary course of the judicial process, and, as a general rule, when the district court has denied relief and applicable requirements of finality have been satisfied, the next step is review in the court of appeals. That the statute permits the certificate to be issued by a "circuit justice or judge" does not mean the action of the circuit judge in denying the cer-

tificate is his or her own action, rather than the action of the court of appeals to whom the judge is appointed.

The course of events here illustrates the point. The application moved through the Eighth Circuit in the same manner as cases in general do. The matter was entered on the docket of the Court of Appeals, submitted to a panel, and decided in a published opinion, including a dissent. App. 4–5. The court entered judgment on it, issued a mandate, and entertained a petition for rehearing and suggestion for rehearing en banc. *Id.*, at 5–6. The Eighth Circuit has since acknowledged its rejection of Hohn's application made Circuit law. *United States* v. *Apker*, 101 F. 3d 75 (CA8 1996), cert. pending, No. 97–5460. One judge specifically indicated he was bound by the decision even though he believed it was wrongly decided. 101 F. 3d, at 75–76 (Henley, J., concurring in result). These factors suggest Hohn's certificate application was as much a case in the Court of Appeals as are the other matters decided by it.

We also draw guidance from the fact that every Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications. *E. g.*, Rules 22, 22.1 (CA1 1998); Rules 22, 27(b) and (f) (CA2 1998); Rules 3.4, 22.1, 111.3(b) and (c), 111.4(a) and (b)(vii) (CA3 1998); Rules 22(a) and (b)(3)(g), 34(b) (CA4 1998); Rules 8.1(g), 8.6, 8.10, 22, 27.2.3 (CA5 1998); Rules 28(f), (g), and (j) (CA6 1998); Rules 22(a)(2), (h)(2), and (h)(3)(i), 22.1 (CA7 1998); Rules 22A(d), 27B(b)(2) and (c)(2) (CA8 1998); Rules 3–1(b), 22–2, 22–3(a)(3) and (b)(4), 22–4(c), 22–5(c), (d)(1), (d)(3), and (e) (CA9 1998); Rules 11.2(b), 22.1, 22.2.3 (CA10 1998); Rules 22–1, 22–3(a)(3), (a)(4), (a)(6), and (a)(7), and (b), 27–1(d)(3) (CA11 1998). We also note the Internal Operating Procedures for the Court of Appeals for the Eighth Circuit require certificate applications to be heard as a general matter by three-judge administrative panels. Internal Operating Procedures, pt. I.D.3 (1998); see also Interim Processing Guidelines for Certifi-

cates of Appealability under 28 U. S. C. § 2253 and for Motions under 28 U. S. C. § 2244, pt. I (CA1), 28 U. S. C. A., p. 135 (1998 Pamphlet); Internal Operating Procedures 10.3.2, 15.1 (CA3 1998); Criminal Justice Act Implementation Plan, pt. I.2 (CA4), 28 U. S. C. A., p. 576 (1998 Pamphlet); Internal Operating Procedures 1(a)(1) and (c)(7) (CA7 1998); Rule 27–1, Advisory Committee Note (1) (CA9), 28 U. S. C. A., p. 290 (1998 Pamphlet); Emergency General Order in re Procedures Regarding the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act (CA10), 28 U. S. C. A., p. 487 (1998 Pamphlet); Internal Operating Procedure 11, following Rule 47–6 (CA11 1998). These directives would be meaningless if applications for certificates of appealability were not matters subject to the control and disposition of the courts of appeals.

It is true the President appoints "circuit judges for the several circuits," 28 U. S. C. § 44, but it is true as well the court of appeals "consist[s] of the circuit judges of the circuit in regular active service," § 43. In this instance, as in all other cases of which we are aware, the order denying the certificate was issued in the name of the court and under its seal. That is as it should be, for the order was judicial in character and had consequences with respect to the finality of the order of the District Court and the continuing jurisdiction of the Court of Appeals.

The Federal Rules of Appellate Procedure make specific provision for consideration of applications for certificates of appealability by the entire court. Rule 22(b) states:

> "In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. . . . If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit

> judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals."

On its face, the Rule applies only to state, and not federal, prisoners. It is nonetheless instructive on the proper construction of § 2253(c).

Rule 22(b) by no means prohibits application to an individual judge, nor could it, given the language of the statute. There would be incongruity, nevertheless, were the same ruling deemed in one instance the order of a judge acting *ex curia* and in a second the action of the court, depending upon the caption of the application or the style of the order.

Our conclusion is further confirmed by Federal Rule of Appellate Procedure 27(c). It states:

> "In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court."

As the Rule makes clear, even when individual judges are authorized under the Rules to entertain certain requests for relief, the court may review their decisions. The Eighth Circuit's Rules are even more explicit, specifically listing grants of certificates of probable cause by an individual judge as one of the decisions subject to revision by the court under Federal Rule 27(c). Rule 27B(b)(2) (CA8 1998). The recog-

nition that decisions made by individual circuit judges remain subject to correction by the entire court of appeals reinforces our determination that decisions with regard to an application for a certificate of appealability should be regarded as an action of the court itself and not of the individual judge. We must reject the suggestion contained in the Advisory Committee's Notes on Federal Rule of Appellate Procedure 22(b) that "28 U. S. C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause." 28 U. S. C. App., p. 609. It is more consistent with the Federal Rules and the uniform practice of the courts of appeals to construe § 2253(c)(1) as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal. See *In re Burwell*, 350 U. S. 521, 522 (1956).

Some early cases from this Court acknowledged a distinction between acting in an administrative and a judicial capacity. When judges perform administrative functions, their decisions are not subject to our review. *United States* v. *Ferreira*, 13 How. 40, 51–52 (1852); see also *Gordon* v. *United States*, 117 U. S. Appx. 697, 702, 704 (1864). Those opinions were careful to say it was the nonjudicial character of the judges' actions which deprived this Court of jurisdiction. *Ferreira*, *supra*, at 46–47 (tribunal not judicial when the proceedings were *ex parte* and did not involve the issuance of process, summoning of witnesses, or entry of a judgment); *Gordon*, *supra*, at 699, 702 (tribunal not judicial when it lacks power to enter and enforce judgments). Decisions regarding applications for certificates of appealability, in contrast, are judicial in nature. It is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings, as happened here. App. 4–6. Construing the issuance of a certificate of appealability as an administrative function, moreover, would suggest an entity not wielding judicial power might review the

decision of an Article III court. In light of the constitutional questions which would surround such an arrangement, see *Gordon*, *supra; Hayburn's Case*, 2 Dall. 409 (1792), we should avoid any such implication.

We further disagree with the contention, advanced by the dissent and by Court-appointed *amicus*, that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals. Precedent forecloses this argument. In *Ex parte Quirin*, 317 U. S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for a writ of habeas corpus was a case in a district court for the purposes of the then-extant statute governing court of appeals review of district court decisions. See 28 U. S. C. § 225(a) First (1940 ed.) (courts of appeals had jurisdiction to review final decisions "[i]n the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court"). We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. We reasoned, "[p]resentation of the petition for judicial action is the institution of a suit. Hence the denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals." 317 U. S., at 24.

We reached a similar conclusion in *Nixon* v. *Fitzgerald*. There President Nixon sought to appeal an interlocutory District Court order rejecting his claim of absolute immunity. The Court of Appeals summarily dismissed the appeal because, in its view, the order failed to present a "serious and unsettled question" of law sufficient to bring the case within the collateral order doctrine announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547 (1949). Because the Court of Appeals had dismissed for failure to

satisfy this threshold jurisdictional requirement, respondent Fitzgerald argued, "the District Court's order was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of § 1254." 457 U. S., at 742. Turning aside this argument, we ruled "petitioner did present a 'serious and unsettled' and therefore appealable question to the Court of Appeals. It follow[ed] that the case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction." *Id.*, at 743. We elaborated: "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction . . . . If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Id.*, at 743, n. 23; see also *United States* v. *Nixon*, 418 U. S. 683, 692 (1974) (holding appeal of District Court's denial of motion to quash *subpoena duces tecum* was in the Court of Appeals for purposes of § 1254(1)).

We have shown no doubts about our jurisdiction to review dismissals by the Courts of Appeals for failure to file a timely notice of appeal under § 1254(1). The filing of a proper notice of appeal is mandatory and jurisdictional. *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 315 (1988); *United States* v. *Robinson*, 361 U. S. 220, 224 (1960); Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U. S. C. App., p. 589. The failure to satisfy this jurisdictional prerequisite has not kept the case from entering the Court of Appeals, however. We have reviewed these dismissals often and without insisting the petitioner satisfy the requirements for an extraordinary writ and without suggesting our lack of jurisdiction to do so. *E. g.*, *Houston* v. *Lack*, 487 U. S. 266 (1988); *Torres*, *supra; Fallen* v. *United States*, 378 U. S. 139 (1964); *United States* v. *Robinson*, *supra; Leishman* v. *Associated Wholesale Elec. Co.*, 318 U. S. 203 (1943).

We have also held that § 1254(1) permits us to review denials of motions for leave to intervene in the Court of Appeals in proceedings to review the decision of an administra-

tive agency. *Automobile Workers* v. *Scofield*, 382 U. S. 205, 208–209 (1965); see also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. 27, 30 (1993) *(per curiam)*. Together these decisions foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of § 1254(1).

It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability. In *Scofield*, we held that § 1254(1) gave us jurisdiction to review the Court of Appeals' denial of a motion for leave to intervene despite the fact that neither the agency nor any of the other parties opposed intervention. 382 U. S., at 207. In the same manner, petitions for certiorari to this Court are often met with silence or even acquiescence; yet no one would suggest this deprives the petitions of the adversity needed to constitute a case. Assuming, of course, the underlying action satisfies the other requisites of a case, including injury in fact, the circumstance that the question before the court is a preliminary issue, such as the denial of a certificate of appealability or venue, does not oust appellate courts of the jurisdiction to review a ruling on the matter. For instance, a case does not lack adversity simply because the remedy sought from a particular court is dismissal for improper venue rather than resolution of the merits. Federal Rule of Civil Procedure 12(b)(3) specifically permits a party to move to dismiss for improper venue before joining issue on any substantive point through the filing of a responsive pleading, and we have long treated appeals of dismissals for improper venue as cases in the courts of appeals, see, *e. g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 151 (1976); *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 707 (1972); *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260, 261 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 223 (1957); *Mis-*

sissippi Publishing Corp. v. *Murphree,* 326 U. S. 438, 440 (1946). It is true we have held appellate jurisdiction improper when district courts have denied, rather than granted, motions to dismiss for improper venue. The jurisdictional problem in those cases, however, was the interlocutory nature of the appeal, not the absence of a proper case. *Lauro Lines s.r.l.* v. *Chasser,* 490 U. S. 495 (1989); *Van Cauwenberghe* v. *Biard,* 486 U. S. 517 (1988). In any event, concerns about adversity are misplaced in this case. Here the Government entered an appearance in response to the initial application and filed a response opposing Hohn's petition for rehearing and suggestion for rehearing en banc. App. 4, 5.

The argument that this Court lacks jurisdiction under § 1254(1) to review threshold jurisdictional inquiries is further refuted by the recent amendment to 28 U. S. C. § 2244(b)(3). The statute requires state prisoners filing second or successive habeas applications under § 2254 to first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U. S. C. § 2244(b)(3)(A) (1994 ed., Supp. II). The statute further provides "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." § 2244(b)(3)(E). It would have been unnecessary to include a provision barring certiorari review if a motion to file a second or successive application would not otherwise have constituted a case in the court of appeals for purposes of 28 U. S. C. § 1254(1). We are reluctant to adopt a construction making another statutory provision superfluous. See, *e. g., Kawaauhau* v. *Geiger,* 523 U. S. 57, 62 (1998); *United States* v. *Menasche,* 348 U. S. 528, 538–539 (1955).

Inclusion of a specific provision barring certiorari review of denials of motions to file second or successive applications is instructive for another reason. The requirements for cer-

tificates of appealability and motions for second or successive applications were enacted in the same statute. The clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability. True, the phrase concerning the grant or denial of second or successive applications refers to an action "by a court of appeals"; still, we think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention. See, *e. g.*, *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("'[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'") (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (other internal quotation marks omitted)). The dissent claims the absence of similar language in § 2253(c) can be explained by Congress' reliance on the rule holding certificate applications unreviewable under § 1254(1). *Post*, at 261–262. As we later discuss, any such reliance is lessened by the Court's consistent practice of treating denials of certificate applications as falling within its statutory certiorari jurisdiction. See *infra*, at 252.

Today's holding conforms our commonsense practice to the statutory scheme, making it unnecessary to invoke our extraordinary jurisdiction in routine cases, which present important and meritorious claims. The United States does not dispute that Hohn's claim has considerable merit and acknowledges that the trial court committed an error of constitutional magnitude. The only contested issue is whether the constitutional violation was a substantial one. Brief in Opposition 7–8. Were we to adopt the position advanced by the dissent, the only way we could consider his meritorious claim would be through the All Writs Act, 28 U. S. C.

§ 1651(a). Our rule permits us to carry out our normal function of reviewing possible misapplications of law by the courts of appeals without having to resort to extraordinary remedies.

Our decision, we must acknowledge, is in direct conflict with the portion of our decision in *House* v. *Mayo*, 324 U. S. 42, 44 (1945) *(per curiam)*, holding that we lack statutory certiorari jurisdiction to review refusals to issue certificates of probable cause. Given the number and frequency of the cases, and the difficulty of reconciling our practice with a requirement that only an extraordinary writ can be used to address them, we do not think *stare decisis* concerns require us to adhere to that decision. Its conclusion was erroneous, and it should not be followed.

Stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989).

We have recognized, however, that *stare decisis* is a "principle of policy" rather than "an inexorable command." *Payne*, *supra*, at 828. For example, we have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument. *Gray* v. *Mississippi*, 481 U. S. 648, 651, n. 1 (1987) (questioning the precedential value of *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*). The role of *stare decisis*, furthermore, is "somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior." *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995) (citing *Payne*, *supra*, at

828). Here we have a rule of procedure that does not alter primary conduct. And what is more, the rule of procedure announced in *House* v. *Mayo* has often been disregarded in our own practice. Both Hohn and the United States cite numerous instances in which we have granted writs of certiorari to review denials of certificate applications without requiring the petitioner to move for leave to file for an extraordinary writ, as previously required by our rules, and without requiring any extraordinary showing or exhibiting any doubts about our jurisdiction to do so. 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, pp. 15–16 (2d ed. 1988) (collecting cases). Included among these examples are several noteworthy decisions which resolved significant issues of federal law. See, *e. g.*, *Allen* v. *Hardy*, 478 U. S. 255, 257–258 (1986) *(per curiam)* (refusing to permit retroactive application of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), on collateral attack); *Lynce* v. *Mathis*, 519 U. S. 433, 436 (1997) (holding the cancellation of early release credits violated the *Ex Post Facto* Clause). These deviations have led litigants and the legal community to question the vitality of the rule announced in *House* v. *Mayo*. As commentators have observed: "More recent cases . . . have regularly granted certiorari following denial of leave to proceed in forma pauperis, or refusal to certify probable cause, without any indication that review was by common law writ rather than statutory certiorari. At least as to these two questions, statutory certiorari should be available." Wright, Miller, & Cooper, *supra*, at 15–16 (footnotes omitted). Our frequent disregard for the rule announced in *House* v. *Mayo* weakens the suggestion that Congress could have placed significant reliance on it, especially in light of the commentary on our practice in the legal literature.

This is not to say opinions passing on jurisdictional issues *sub silentio* may be said to have overruled an opinion addressing the issue directly. See, *e. g.*, *United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C. J.). Our decisions re-

main binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Once we have decided to reconsider a particular rule, however, we would be remiss if we did not consider the consistency with which it has been applied in practice. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); see also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962). This consideration, when combined with our analysis of the legal issue in question, convinces us the contrary holding of *House* v. *Mayo* cannot stand.

We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals. The portion of *House* v. *Mayo* holding this Court lacks statutory certiorari jurisdiction over denials of certificates of probable cause is overruled. In light of the position asserted by the Solicitor General in the brief for the United States filed August 18, 1997, the judgment of the Court of Appeals is vacated, and the case is remanded for further consideration consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, concurring.

I would be content to decide this case on the authority of *House* v. *Mayo*, 324 U. S. 42 (1945) *(per curiam)*, that common-law certiorari is available to review the denial of the certificate, leaving *House*'s precarious future for another day when its precedential value might have to be faced squarely. But that course would command no more than a minority of one, and there is good reason to deny it even that support. *House*'s holding on what may be "'in' the court of appeals," *id.*, at 44, was virtually unreasoned, and the Court correctly notes our subsequent practice of honoring this rule in the breach. Given the weakness of the precedent, the

advantage of having a clear majority for a rule governing our jurisdiction to reverse erroneous denials of certificates of appealability persuades me to join the others in overruling *House* insofar as it would bear on issuance of a statutory writ of certiorari under 28 U. S. C. § 1254(1).

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

Today's opinion permits review where Congress, with unmistakable clarity, has denied it. To reach this result, the Court ignores the obvious intent of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 110 Stat. 1214, distorts the meaning of our own jurisdictional statute, 28 U. S. C. § 1254(1), and overrules a 53-year-old precedent, *House* v. *Mayo*, 324 U. S. 42 (1945) *(per curiam)*. I respectfully dissent.

I

This Court's jurisdiction under 28 U. S. C. § 1254(1) is limited to "[c]ases in the courts of appeals." Section 102 of AEDPA provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding under section 2255," that is, a district court habeas proceeding challenging federal custody. Petitioner, who is challenging federal custody under 28 U. S. C. § 2255, did not obtain a certificate of appealability (COA). By the plain language of AEDPA, his appeal "from" the district court's "final order" "may not be taken to the court of appeals." Because it could not be taken *to* the Court of Appeals, it quite obviously was never *in* the Court of Appeals; and because it was never in the Court of Appeals, we lack jurisdiction under § 1254(1) to entertain it.

We have already squarely and explicitly endorsed this straightforward interpretation. In *House* v. *Mayo*, 324 U. S., at 44, involving the predecessors to §§ 1254(1) and

2253(c)(1), the statutorily required certificate was called a "certificate of probable cause" rather than a certificate of appealability, but the effect of failure to obtain it was precisely the same: The case could not proceed to the court of appeals. On an attempt to obtain review of denial of the certificate in this Court, we held that since petitioner's "case was never 'in' the court of appeals, for want of a certificate," we lacked jurisdiction under § 1254(1). *Ibid.*

The Court concedes that *House* is squarely on point but opts to overrule it because its "conclusion was erroneous," *ante,* at 251. The Court does not dispute that petitioner's § 2255 action was never in the Court of Appeals; its overruling of *House* is instead based on the proposition that petitioner's request for a COA is, in and of itself, a "case" within the meaning of § 1254(1), see *ante,* at 241–242, 246–249, and that *that* case was "in" the Court of Appeals and hence can be reviewed here, *ante,* at 241–246. Most of the Court's analysis is expended in the effort to establish that petitioner made his request for a COA to the Court of Appeals as such, rather than to the circuit judges in their individual capacity, *ibid.* Even that effort is unsuccessful, since it comes up against the pellucid language of AEDPA to the contrary. Section 102 does not permit application for a COA to a court of appeals; it states that the application must be made to a "circuit justice or judge." That this means precisely what it says is underscored by § 103 of AEDPA, which amends Rule 22 of the Federal Rules of Appellate Procedure: "If [a COA] request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate." As though drafted in anticipatory refutation of the Court's countertextual holding today, the Advisory Committee's Notes on Rule 22 explicitly state that "28 U. S. C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause." 28 U. S. C. App., p. 609.

Proclaiming the request for a COA to be "in" the Court of Appeals is the most obvious of the Court's statutory distortions, but not the one with the most serious collateral consequences. The latter award goes to the Court's virtually unanalyzed pronouncement (also essential to its holding) that the request for a COA was itself a "case" within the meaning of § 1254(1). The notion that a request pertaining to a case constitutes its own "case" for purposes of § 1254 is a jawdropper. To support that remarkable assertion, the Court relies upon circumstantial evidence—that the "application moved through the Eighth Circuit in the same manner as cases in general do." *Ante,* at 242. Does this mean that a request for a COA would *not* be a "case" in those Circuits that treated it differently—that permitted it to be disposed of by a single judge as Rule 22 specifically allows? Does it mean that a motion for recusal, or a request for televised coverage, or a motion to file under seal *would* be a "case" if the court of appeals chose to treat it in the manner the Eighth Circuit treated the request for a COA here? Surely not.

An application for a COA, standing alone, does not have the requisite qualities of a legal "case" under any known definition. It does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a "party" on the other side. It is nothing more than a request for permission to seek review. Petitioner's grievance is with respondent for unlawful custody, and the remedy he seeks is release from that custody pursuant to § 2255. The request for a COA is not some separate "case" that can subsist apart from that underlying suit; it is merely a procedural requirement that must be fulfilled before petitioner's § 2255 action—his "case" or "cause"—can advance to the appellate court. The adversity which the Court acknowledges is needed for a "case" under § 1254, see *ante,* at 241, is not satisfied by the dispute between petitioner and respondent as to whether the COA should be granted—

any more than a "case or controversy" for purposes of initial federal-court jurisdiction is created by a dispute over venue, between parties who agree on everything else.[1]

As is true with most erroneous theories, a logical and consistent application of the Court's reasoning yields strange results. If dispute over the propriety of granting a COA creates a "case," the denial of a COA request that has been unopposed (or, better yet, has been supported by the Government) will be unreviewable, whereas denial of a request that is vigorously opposed will be reviewed—surely an upside-down result. And the "case" concerning the COA will subsist even when the § 2255 suit has been mooted by the petitioner's release from prison. These bizarre consequences follow inevitably from the Court's "separate case" theory, which has been fabricated in order to achieve a result that is fundamentally at odds with the purpose of the statute. For the Court insists upon assuming, contrary to the plain import of the statute, that Congress wanted petitioner's § 2255 action to proceed "in the ordinary course of the judicial process" and to follow the "general rule" that permits an appeal from a final district court order, *ibid.* If this were Congress's wish, there would have been no need for § 102 of AEDPA. The *whole point* of that provision is to *diverge* from the ordinary course of the judicial process and to keep petitioner's case against respondent out of the Court of Appeals unless petitioner obtains a COA. "The certificate is a screening device, helping to conserve judicial (and prosecutorial) resources." *Young* v. *United States*, 124 F. 3d 794, 799

[1] The Court has no response to this. Its observation that a dispute over venue is not unreviewable simply because it is preliminary, *ante*, at 248–249, is accurate but irrelevant. The issue is not whether a venue dispute may be reviewed *at all*, but whether it may be reviewed in isolation from some case of which it is a part. It may not, because a venue dispute, standing alone—like a request for a COA, standing alone—lacks the requisite qualities of a case. If the entire § 2255 proceeding was not "in" the Court of Appeals, the COA request alone was not a "case" that § 1254 authorizes us to review.

(CA7 1997). It is this unique screening function that distinguishes a COA from the jurisdictional issues discussed by the Court: Section 102 of AEDPA prevents petitioner's case from entering the Court of Appeals *at all* in the absence of a COA, whereas other jurisdictional determinations are made after a case is in the Court of Appeals (even if the case is later dismissed because of jurisdictional defects), *ante*, at 246–249. See *Rosado* v. *Wyman*, 397 U. S. 397, 403, n. 3 (1970) (a court always has jurisdiction to determine its jurisdiction).

The Court's only response to these arguments is that they are foreclosed by our precedent, since we decided an analogous issue in *Ex parte Quirin*, 317 U. S. 1 (1942). *Ante*, at 246. (The Court displays no appreciation of the delicious irony involved in its insistence upon hewing to an allegedly analogous decision while overruling the case directly in point, *House*.) *Quirin* held that a petition for habeas corpus constituted the institution of a suit, and that it was not necessary for the writ to issue for the matter to be considered a case or controversy. 317 U. S., at 24. *Quirin* relied upon our decision in *Ex parte Milligan*, 4 Wall. 2, 110–113 (1866), which reasoned that a petition for habeas corpus is a suit because the petitioner seeks "'that remedy which the law affords him'" to recover his liberty. *Id.*, at 113 (quoting *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464 (1829)). Petitioner's request for § 2255 relief is analogous to a petition for habeas corpus, but his request for a COA is of a wholly different nature. That is no "remedy" for any harm, but a threshold procedural requirement that petitioner must meet in order to carry his § 2255 suit to the appellate stage. That is why the Court in *House*, decided less than three years after *Quirin*, did not treat the application for a certificate as a separate case but did recognize the petition for habeas corpus as a case even though it was decided without a hearing or a call for a return. 324 U. S., at 43.

I have described above why *House* was entirely correct, but a few words are in order concerning the inappropriate-

ness of overruling *House*, regardless of its virtue as an original matter. "[T]he burden borne by the party advocating abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989); see also *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). The Court acknowledges this principle, but invokes cases of ours that say that *stare decisis* concerns are "'somewhat reduced'" in the case of a procedural rule. *Ante*, at 251. The basis for that principle, of course, is that procedural rules do not *ordinarily* engender detrimental reliance—and in this case, as I shall discuss, detrimental reliance by the Congress of the United States is self-evident. In any event, even those cases cited by the Court as applying the "somewhat reduced" standard to procedural holdings still felt the need to set forth special factors justifying the overruling. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995), concluded that "the decision in question had been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court"; and *Payne* v. *Tennessee*, 501 U. S. 808, 828–830 (1991), noted that the overruled cases had been "decided by the narrowest of margins, over spirited dissents challenging [their] basic underpinnings," had been "questioned by Members of the Court in later decisions," and had "defied consistent application by the lower courts."

The Court's next excuse is that *House* was decided without full briefing or argument. The sole precedent it cites for the proposition that this makes a difference is *Gray* v. *Mississippi*, 481 U. S. 648, 651, n. 1 (1987). *Gray*, however, did not *deny stare decisis* effect to an opinion rendered without full briefing and argument—it *accorded stare decisis* effect. *Id.*, at 666–667. What the Court relies upon is the mere dictum, rendered in the course of this opinion (and dictum in a footnote, at that), that "summary action here does not have the

same precedential effect as does a case decided upon full briefing and argument." *Id.*, at 651, n. 1. But the sole authority cited for that dictum was *Edelman* v. *Jordan*, 415 U. S. 651 (1974), which declined to give *stare decisis* effect, *not* to opinions that had been issued without briefing and argument, but to *judgments that had been issued without opinion*—"summary affirmances" that did not "contain any substantive discussion" of the point at issue or any other point, *id.*, at 670–671. Such judgments, affirming without comment the disposition appealed from, were common in the days when this Court had an extensive mandatory jurisdiction; they carried little more weight than denials of certiorari. *House*, by contrast, was a six-page opinion with substantive discussion on the point at issue here. It reasoned: (1) "Our authority . . . extends only to cases 'in a circuit court of appeals . . . .' " (2) "Here the case was never 'in' the court of appeals," because of (3) "want of a certificate of probable cause." 324 U. S., at 44.[2] And it cited as authority *Ferguson* v. *District of Columbia*, 270 U. S. 633 (1926). The new rule that the Court today announces—that our opinions rendered without full briefing and argument (hitherto thought to be the strongest indication of certainty in the outcome) have a diminished *stare decisis* effect—may well turn out to be the principal point for which the present opinion will be remembered. It can be expected to affect the treatment of many significant *per curiam* opinions by the lower courts, and the willingness of Justices to undertake summary disposition in the future.

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[2] The concurrence asserts that this analysis was "virtually unreasoned." *Ante*, at 253 (opinion of SOUTER, J.). It seems to me, to the contrary, that there was virtually nothing more to be said. Not until today has anyone thought that a "case" could consist of a disembodied request to appeal. The concurrence joins the Court in relying upon a truly eccentric argument, and then blames the *House* Court for not discussing this eccentricity at length.

Of course even if one accepts that the two factors the Court alludes to (procedural ruling plus absence of full briefing or argument) reduce *House*'s *stare decisis* effect, one must still acknowledge that its *stare decisis* effect is *increased* by the fact that it was a statutory holding. The Court does not contend that *stare decisis* is utterly inapplicable, and so it must come up with *some* reason for ignoring it. Its reason is that we have "disregarded" *House* in practice. *Ante*, at 252. The opinions it cites for this proposition, however, not only fail to mention *House;* they fail to mention the jurisdictional issue to which *House* pertains. And "we have repeatedly held that the existence of unaddressed jurisdictional defects has *no precedential effect.*" *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996) (emphasis added). Surely it constitutes "precedential effect" to reduce the *stare decisis* effect of one of the Court's holdings. It is significant, moreover, that when Members of the Court *have* discussed *House* or the jurisdictional effect of a COA denial, they have agreed that jurisdiction is not available under § 1254. See *Davis* v. *Jacobs*, 454 U. S. 911, 912 (1981) (STEVENS, J., respecting denial of certiorari); *id.*, at 916–917 (REHNQUIST, J., joined by Burger, C. J., and Powell, J., dissenting); *Jeffries* v. *Barksdale*, 453 U. S. 914, 915–916 (1981) (REHNQUIST, J., joined by Burger, C. J., and Powell, J., dissenting). The Court's new approach to unaddressed jurisdictional defects is perhaps the second point for which the present opinion will be remembered.

While there is scant reason for denying *stare decisis* effect to *House*, there is special reason for according it: the reliance of Congress upon an unrepudiated decision central to the procedural scheme it was creating. Section 102 of AEDPA continues a long tradition of provisions enacted by Congress that limit appellate review of petitions. In 1908, Congress required a certificate of probable cause in habeas corpus cases involving state prisoners before an appeal would lie to

this Court, see Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. In 1925, this requirement was extended to intermediate appellate proceedings, see Act of Feb. 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942. Before 1925, this Court readily concluded it had no jurisdiction over appeals brought before it in the absence of a certificate, see, *e. g.*, *Bilik* v. *Strassheim*, 212 U. S. 551 (1908); *Ex parte Patrick*, 212 U. S. 555 (1908), and *House* interpreted the 1925 amendment to produce the same effect in the courts of appeals and, consequently, in this Court under the predecessor to § 1254(1). Quite obviously, with *House* on the books—neither overruled nor even *cited* in the later opinions that the Court claims "disregarded" it—Congress presumably anticipated that § 102 of AEDPA would be interpreted in the same manner.[3] In yet another striking departure from our ordinary practice, the Court qualifies the rule that statutes are deemed to adopt the extant holdings of this Court, see *Keene Corp.* v. *United States*, 508 U. S. 200, 212 (1993): They will *not* be deemed to adopt them, the Court says, when legal commentators "question

[3] The Court points to the fact that another provision of AEDPA, which requires court of appeals authorization before a state prisoner can file a second or successive habeas petition in district court, specifically states that the denial of the authorization "shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari." 28 U. S. C. § 2244(b)(3)(E) (1994 ed., Supp. II). This provision, the Court says, would be rendered "superfluous" if we followed *House*, *ante*, at 249. That is not so. Section 2244(b)(3) addresses whether there will be district-court consideration of a second or successive petition *at all*, not whether the district court's consideration may be reviewed by an appellate court. Only the latter is covered by the holding of *House*. It is true enough that the reasoning of *House*, if carried over to the other question, would produce the same result; but Congress's specification of that result when there is no Supreme Court holding precisely in point would more accurately be described as cautious than superfluous. Indeed, the greater relevance of § 2244(b)(3) to the question before us is this: It would be exceedingly strange to foreclose certiorari review of the denial of *all* federal intervention, as that provision does, while *according* certiorari review of the denial of appeal from the federal district court to the court of appeals.

the vitality" of the holdings. *Ante,* at 252. The confusion that will be introduced by this new approach is obvious.

At bottom, the only justification for the Court's holding—and the only one that prompts the concurrence to overrule *House*—is convenience: it "permits us to carry out our normal function" of appellate review. *Ante,* at 251. Our "normal" function of appellate review, however, is no more and no less than what Congress says it is. U. S. Const., Art. III, § 2. The Court's defiance of the scheme created by Congress in evident reliance on our precedent is a display not of "common sense," *ante,* at 250, but of judicial willfulness. And a doctrine of *stare decisis* that is suspended when five Justices find it inconvenient (or indeed, as the concurrence suggests, even four Justices in search of a fifth) is no doctrine at all, but simply an excuse for adhering to cases we like and abandoning those we do not.

II

Since I find no jurisdiction under § 1254(1), I must address the Government's further argument that we can issue a common-law writ of certiorari under the All Writs Act, 28 U. S. C. § 1651. The All Writs Act provides that "[t]he Supreme Court . . . may issue all writs necessary or appropriate in aid of [its] jurisdictio[n] and agreeable to the usages and principles of law." As expressly noted in this Court's Rule 20.1, issuance of a writ under § 1651 "is not a matter of right, but of discretion sparingly exercised," and "[t]o justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Petitioner (who filed a petition for a writ of certiorari under § 1254(1), not under the All Writs Act, Pet. for Cert. 1) has failed to establish that he meets these requirements. To begin with, he has not shown that adequate relief is unobtainable in any form or from any other court. AEDPA dif-

fers from the gatekeeping statute at issue in *House* in a crucial respect: when *House* was decided, claimants could seek certificates of probable cause only from "the United States court by which the final decision was rendered or a judge of the circuit court of appeals," 28 U. S. C. § 466 (1940 ed.), whereas § 102 of AEDPA permits claimants to seek COA's from a "circuit *justice* or judge." Because petitioner may obtain the relief he seeks from a circuit justice, relief under the All Writs Act is not "necessary."

Relief under the Act is also not "appropriate." The only circumstance alleged by petitioner to justify relief is that the Eighth Circuit erroneously concluded that he failed to present a substantial constitutional question. There is nothing "exceptional" about this claim; it is in fact the same claim available to *every* petitioner when a COA is denied, and entertaining it would render application for this "extraordinary" writ utterly routine. Issuance of the writ is not "appropriate" for another reason as well: It would frustrate the purpose of AEDPA, which is to prevent review unless a COA is granted. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985).[4]

* * *

The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of

[4] Because petitioner has not demonstrated that issuance of the writ is "necessary" or "appropriate" under § 1651, I need not discuss whether it fails the further requirement that it be "in aid of" our jurisdiction.

our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisprudence. And the purpose of the specific provision of AEDPA at issue here is also not obscure: It was designed, in intelligent reliance upon a holding of this Court, to end § 2255 litigation in the district court unless a court of appeals judge or the circuit justice finds reasonable basis to appeal. By giving literally unprecedented meaning to the words in two relevant statutes, and overruling the premise of Congress's enactment, the Court adds new, Byzantine detail to a habeas corpus scheme Congress meant to streamline and simplify. I respectfully dissent.

Syllabus

FORNEY *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY

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

No. 97–5737. Argued April 22, 1998—Decided June 15, 1998

Petitioner Forney sought judicial review of a Social Security Administration final determination denying her disability benefits. When the District Court found that determination inadequately supported by the evidence and remanded the case to the agency for further proceedings pursuant to sentence four of 42 U. S. C. § 405(g), Forney appealed, contending that the agency's denial of benefits should be reversed outright. The Ninth Circuit, however, decided that she did not have the legal right to appeal. Before this Court, both Forney and the Solicitor General agree that she had the right to appeal, so an *amicus* has been appointed to defend the Ninth Circuit's decision.

Held: A Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding the case to the agency for further proceedings pursuant to sentence four of 42 U. S. C. § 405(g). This Court has previously held that the language of the Social Security Act's "judicial review" provision—"district courts" (reviewing, for example, agency denials of disability claims) "have the power to enter . . . a *judgment* affirming, modifying or reversing [an agency] decision . . . with or without remanding the cause for a rehearing," and such "judgment . . . *shall be final* except that it *shall be subject to review* in the same manner as" other civil action judgments, 42 U. S. C. § 405(g) (emphases added)—means that a district court order remanding a Social Security disability claim to the agency for further proceedings is a "final judgment" appealable under 28 U. S. C. § 1291. *Sullivan* v. *Finkelstein*, 496 U. S. 617. *Finkelstein* differs from this case in that it involved an appeal by the Government. However, *Finkelstein*'s logic makes that feature irrelevant here. That case reasoned, primarily from § 405(g)'s language, that a district court judgment remanding a Social Security disability case fell within the "class of orders" that are appealable under § 1291. Neither the statute nor *Finkelstein* suggests that such an order could be final for purposes of an appeal by the Government, but not a claimant, or permits an inference that finality turns on the order's importance, or the availability of an avenue for appeal from the agency determination that might emerge after remand. The Ninth Circuit erred in concluding that For-

ney could not appeal because she was the prevailing party. A party is "aggrieved" and ordinarily can appeal a decision granting in part and denying in part the remedy requested, *United States* v. *Jose*, 519 U. S. 54, 56; Forney, who sought reversal of the administrative decision denying benefits and, in the alternative, a remand, received some, but not all, of the relief requested. The Solicitor General disputes the Ninth Circuit's assertion that a rule permitting appeals in these circumstances would impose additional, and unnecessary, burdens upon federal appeals courts. If the Solicitor General proves wrong in his prediction, the remedy must be legislative, for the statutes at issue do not give the courts the power to redefine or subdivide the classes of cases where appeals will (or will not) lie. Pp. 269–273.

108 F. 3d 228, reversed and remanded.

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

Ralph Wilborn argued the cause for petitioner. With him on the briefs were *Tim Wilborn* and *Eric Schnaufer*.

Lisa Schiavo Blatt argued the cause for respondent in support of petitioner. With her on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, and *William Kanter*.

Allen R. Snyder, by invitation of the Court, 522 U. S. 1088 (1998), argued the cause as *amicus curiae* in support of the judgment below.

JUSTICE BREYER delivered the opinion of the Court.

The question in this case is whether a Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding the case to the agency for further proceedings. We conclude that the law authorizes such an appeal.

I

Sandra K. Forney, the petitioner, applied for Social Security disability benefits under § 223 of the Social Security Act, as added, 70 Stat. 815, and as amended, 42 U. S. C. § 423. A Social Security Administration Administrative Law Judge (ALJ) determined (1) that Forney had not worked since the

onset of her medical problem, and (2) that she was more than minimally disabled, but (3) that she was not disabled enough to qualify for benefits automatically. Moreover, her disability, (4) while sufficiently serious to prevent her return to her former work (cook, kitchen manager, or baker), (5) was not serious enough to prevent her from holding other jobs available in the economy (such as order clerk or telephone answering service operator). App. 12–28. The ALJ consequently denied her disability claim, *id.*, at 28, and the Administration's Appeals Council denied Forney's request for review, App. to Pet. for Cert. 39–40; see generally *Bowen* v. *Yuckert*, 482 U. S. 137, 140–142 (1987) (setting forth five-part "disability" test); 20 CFR § 404.1520 (1997) (same).

Forney then sought judicial review in Federal District Court. The court found the agency's final determination—that Forney could hold other jobs—inadequately supported because those jobs "require frequent or constant reaching," but the record showed that Forney's "ability to reach is impaired." *Forney* v. *Secretary*, Civ. No. 94–6357 (D. Ore., May 1, 1995); App. 127–128. The District Court then entered a judgment, which remanded the case to the agency for further proceedings (pursuant to sentence four of 42 U. S. C. § 405(g)). *Id.*, at 128.

Forney sought to appeal the remand order. She contended that, because the agency had already had sufficient opportunity to prove the existence of other relevant employment (and for other reasons), its denial of benefits should be reversed outright. The Court of Appeals for the Ninth Circuit did not hear her claim, however, for it decided that Forney did not have the legal right to appeal. *Forney* v. *Chater*, 108 F. 3d 228, 234 (1997).

Forney sought certiorari. Both she and the Solicitor General agreed that Forney had the legal right to appeal from the District Court's judgment. The Solicitor General suggested that we reverse the Ninth Circuit and remand the case so that it could hear Forney's appeal. We granted cer-

tiorari to consider the merits of this position, and we appointed an *amicus* to defend the Ninth Circuit's decision. We now agree with Forney and the Solicitor General that the Court of Appeals should have heard Forney's appeal.

II

Section 1291 of Title 28 of the United States Code grants the "courts of appeals . . . jurisdiction of appeals from all *final decisions* of the district courts." (Emphasis added.) Forney's appeal falls within the scope of this jurisdictional grant. That is because the District Court entered its judgment under the authority of the special "judicial review" provision of the Social Security Act, which says, in its fourth sentence, that "district court[s]" (reviewing, for example, agency denials of Social Security disability claims)

> "shall have power to enter . . . a *judgment* affirming, modifying, or reversing the decision of the [agency] with or without remanding the cause for a rehearing," 42 U. S. C. § 405(g) (emphasis added),

and which adds, in its eighth sentence, that the

> "*judgment* of the court *shall be final* except that it *shall be subject to review* in the same manner as a judgment in other civil actions," *ibid.* (emphases added).

This Court has previously held that this statutory language means what it says, namely, that a district court order remanding a Social Security disability benefit claim to the agency for further proceedings is a "final judgment" for purposes of § 1291 and it is, therefore, appealable. *Sullivan* v. *Finkelstein*, 496 U. S. 617 (1990); see also *Shalala* v. *Schaefer*, 509 U. S. 292, 294 (1993) (statute that requires attorney's fees application to be filed within "thirty days of final judgment" requires filing within 30 days of entry of § 405(g) "sentence four" district court remand order, not within 30 days of final agency decision after remand).

Finkelstein is not identical to the case before us. It involved an appeal by the Government; this case involves an appeal by a disability benefits claimant. Moreover, the need for immediate appeal in *Finkelstein* was arguably greater than that here. The District Court there had invalidated a set of Health and Human Services regulations, and the Government might have found it difficult to obtain appellate review of this matter of general importance. Further, the Court, in *Finkelstein,* said specifically that it would "express no opinion about appealability" where a party seeks to "appeal on the ground that" the district court should have granted broader relief. 496 U. S., at 623, n. 3.

Finkelstein's logic, however, makes these features of that case irrelevant here. *Finkelstein* focused upon a "class of orders" that Congress had made "appealable under § 1291." *Id.,* at 628. It reasoned, primarily from the language of § 405(g), that a district court judgment remanding a Social Security disability benefit case fell within that class. Nothing in the language, either of the statute or the Court's opinion, suggests that such an order could be "final" for purposes of appeal only when the Government seeks to appeal but not when the claimant seeks to do so. Nor does the opinion's reasoning permit an inference that "finality" turns on the order's importance or the availability (or lack of availability) of an avenue for appeal from the different, later, agency determination that might emerge after remand.

The Ninth Circuit itself recognized that the District Court's judgment was "final" for purposes of appeal, for it said that any effort "to conclude" that a judgment remanding the case is "not final for the claimant" was "inconsistent" with *Finkelstein.* 108 F. 3d, at 232. The court added that it would be "error for the district court to attempt to retain jurisdiction" after remanding the case; and it wrote that the remand judgment, which ended the "civil action," must be " 'final' in a formalistic sense . . . for all parties to it." *Ibid.*

The Court of Appeals nonetheless reached a "no appeal" conclusion—but on a different ground. It pointed out that a "party normally may not appeal [a] decision in its favor." *Ibid.* (citing *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, 242 (1939)). And it said that Forney had obtained a decision in her favor here. Because Forney "may, on remand, secure all of the relief she seeks," the court wrote, she is a "prevailing" party and therefore cannot appeal. 108 F. 3d, at 232–233.

We do not agree. We concede that this Court has held that a "party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980). But this Court also has clearly stated that a party is "aggrieved" and ordinarily can appeal a decision "granting in part and denying in part the remedy requested." *United States* v. *Jose*, 519 U. S. 54, 56 (1996) *(per curiam)*. And this latter statement determines the outcome of this case.

Forney's complaint sought as relief:

> "1. That this court reverse and set aside the decision . . . denying [the] claim for disability benefits;
>
> "2. In the alternative, that this court remand the case back to the Secretary for proper evaluation of the evidence or a hearing *de novo*." App. 37.

The context makes clear that, from Forney's perspective, the second "alternative," which means further delay and risk, is only half a loaf. Thus, the District Court's order gives petitioner some, but not all, of the relief she requested; and she consequently can appeal the District Court's order insofar as it denies her the relief she has sought. Indeed, to hold to the contrary would deny a disability claimant the right to seek reversal (instead of remand) through a cross-appeal in cases where the Government itself appeals a re-

mand order, as the Government has every right to do. See *Finkelstein*, *supra*, at 619.

The Solicitor General points to many cases that find a right to appeal in roughly comparable circumstances. See Brief for Respondent 21, n. 12 (citing *Gargoyles, Inc.* v. *United States*, 113 F. 3d 1572 (CA Fed. 1997) (permitting appeal where prevailing party recovered reasonable royalty but was denied lost profits); *Castle* v. *Rubin*, 78 F. 3d 654 (CADC 1996) *(per curiam)* (permitting appeal where prevailing party awarded partial backpay but denied reinstatement and front pay); *La Plante* v. *American Honda Motor Co.*, 27 F. 3d 731 (CA1 1994) (permitting appeal where prevailing party awarded compensatory but not punitive damages); *Graziano* v. *Harrison*, 950 F. 2d 107 (CA3 1991) (permitting appeal where prevailing party awarded damages but denied attorney's fees); *Ragen Corp.* v. *Kearney & Trecker Corp.*, 912 F. 2d 619 (CA3 1990) (permitting appeal where prevailing party denied consequential damages); *Carrigan* v. *Exxon Co., U. S. A.*, 877 F. 2d 1237 (CA5 1989) (permitting appeal where prevailing party awarded damages but not injunctive relief)).

The contrary authority that *amicus*, through diligent efforts, has found arose in less closely analogous circumstances and consequently does not persuade us. Brief for *Amicus Curiae* in Support of the Judgment Below 17, and n. 13; see, *e. g.*, *Parr* v. *United States*, 351 U. S. 513, 518 (1956) (order granting Government's motion to dismiss indictment without prejudice as not appealable by defendant in part *because the dismissal would not be "final"* (emphasis added)); see also *CH2M Hill Central, Inc.* v. *Herman*, 131 F. 3d 1244, 1246–1247 (CA7 1997) (claimant cannot appeal *agency* appeals panel remand of case for further agency hearing, for appeals order is not type of final agency decision that is reviewable under relevant judicial review statute); *Director, Office of Workers' Compensation Programs* v. *Bath Iron Works Corp.*, 853 F. 2d 11, 16 (CA1 1988) (same); *Stripe-A-Zone* v.

Occupational Safety and Health Review Comm'rs, 643 F. 2d 230, 233 (CA5 1981) (same).

Finally, we recognize that the Ninth Circuit expressed concern that a rule of law permitting appeals in these circumstances would impose additional, and unnecessary, burdens upon federal appeals courts. The Solicitor General, while noting that the federal courts reviewed nearly 10,000 Social Security Administration decisions in 1996, says that the "[p]ractical [c]onsequences" of permitting appeals "[a]re limited." Brief for Respondent 26; Reply Brief for Respondent 17, n. 13. Except for unusual cases, he believes, a claimant obtaining a remand will prefer to return to the agency rather than to appeal immediately seeking outright agency reversal—because appeal means further delay, because the chance of obtaining reversal should be small, and because the appeal (if it provokes a Government cross-appeal) risks losing all. Brief for Respondent 26–29.

Regardless, as we noted in *Finkelstein*, congressional statutes governing appealability normally proceed by defining "classes" of cases where appeals will (or will not) lie. 496 U. S., at 628. The statutes at issue here do not give courts the power to redefine, or to subdivide, those classes, according to whether or not they believe, in a particular case, further agency proceedings might obviate the need for an immediate appeal. Thus, if the Solicitor General proves wrong in his prediction, the remedy must be legislative in nature.

For these reasons, the judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

GEBSER ET AL. *v.* LAGO VISTA INDEPENDENT SCHOOL DISTRICT

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

No. 96–1866. Argued March 25, 1998—Decided June 22, 1998

Petitioner Gebser, a high school student in respondent Lago Vista Independent School District, had a sexual relationship with one of her teachers. She did not report the relationship to school officials. After the couple was discovered having sex and the teacher was arrested, Lago Vista terminated his employment. During this time, the district had not distributed an official grievance procedure for lodging sexual harassment complaints or a formal antiharassment policy, as required by federal regulations. Gebser and her mother, also a petitioner here, filed suit raising, among other things, a claim for damages against Lago Vista under Title IX of the Education Amendments of 1972, which provides in pertinent part that a person cannot "be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U. S. C. § 1681(a). The Federal District Court granted Lago Vista summary judgment. In affirming, the Fifth Circuit held that school districts are not liable under Title IX for teacher-student sexual harassment unless an employee with supervisory power over the offending employee actually knew of the abuse, had the power to end it, and failed to do so, and ruled that petitioners could not satisfy that standard.

Held: Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct. Pp. 280–293.

(a) The express statutory means of enforcing Title IX is administrative, as the statute directs federal agencies who distribute education funding to establish requirements in furtherance of the nondiscrimination mandate and allows agencies to enforce those requirements, including ultimately by suspending or terminating federal funding. The Court held in *Cannon* v. *University of Chicago*, 441 U. S. 677, that Title IX is also enforceable through an implied private right of action. In *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, the Court established that monetary damages are available in such an action, but made no effort to delimit the circumstances in which that remedy

should lie. Petitioners, relying on standards developed in the context of Title VII, contend that damages are available in an implied action under Title IX based on principles of *respondeat superior* and constructive notice, *i. e.,* without actual notice to officials of discrimination in school programs. Whether an educational institution can be said to violate Title IX based on principles of *respondeat superior* and constructive notice has not been resolved by the Court's decisions. In this case, moreover, petitioners seek *damages* based on theories of *respondeat superior* and constructive notice. Unlike Title IX, Title VII contains an express cause of action for a damages remedy. Title IX's private action is judicially implied, however, and so contains no legislative expression of the scope of available remedies. Pp. 280–284.

(b) Because the private right of action is judicially implied, this Court must infer how Congress would have addressed the issue of monetary damages had the action been expressly included in Title IX. It does not appear that Congress contemplated unlimited damages against a funding recipient that is unaware of discrimination in its programs. When Title IX was enacted, the principal civil rights statutes containing an express right of action did not allow monetary damages, and when Title VII was amended to allow such damages, Congress limited the amount recoverable in any individual case. Title IX was modeled after Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in programs receiving federal funds. Both statutes condition federal funding on a recipient's promise not to discriminate, in what amounts essentially to a contract between the Government and the recipient. In contrast, Title VII is framed as an outright prohibition. Title IX's contractual nature has implications for the construction of the scope of available remedies. When Congress conditions the award of federal funds under its spending power, the Court closely examines the propriety of private actions holding recipients liable in damages for violating the condition. It is sensible to assume that Congress did not envision a recipient's liability in damages where the recipient was unaware of the discrimination.

Title IX contains important clues that this was Congress' intent. Title IX's express means of enforcement requires actual notice to officials of the funding recipient and an opportunity for voluntary compliance before administrative enforcement proceedings can commence. The presumable purpose is to avoid diverting education funding from beneficial uses where a recipient who is unaware of discrimination in its programs is willing to institute prompt corrective measures. Allowing recovery of damages based on principles of *respondeat superior* or constructive notice in cases of teacher-student sexual harassment would be at odds with that basic objective, as liability would attach

Syllabus

even though the district had no actual knowledge of the teacher's conduct and no opportunity to take action to end the harassment. It would be unsound for a statute's *express* enforcement system to require notice and an opportunity to comply while a judicially *implied* system permits substantial liability—including potentially an award exceeding a recipient's federal funding level—without regard to either requirement. Pp. 284–290.

(c) Absent further direction from Congress, the implied damages remedy should be fashioned along the same lines as the express remedial scheme. Thus, a damages remedy will not lie unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination and fails adequately to respond. Moreover, the response must amount to deliberate indifference to discrimination, in line with the premise of the statute's administrative enforcement scheme of an official decision by the recipient not to remedy the violation. Applying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard. Lago Vista's alleged failure to comply with federal regulations requiring it to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims does not establish the requisite actual notice and deliberate indifference, and the failure to promulgate a grievance procedure does not itself constitute discrimination in violation of Title IX. Pp. 290–292.

106 F. 3d 1223, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 293. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post,* p. 306.

Terry L. Weldon argued the cause for petitioners. With him on the briefs were *Cynthia L. Estlund* and *Samuel Issacharoff.*

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Lee, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Pinzler, Dennis J. Dimsey,* and *Rebecca K. Troth.*

Wallace B. Jefferson argued the cause for respondent. With him on the brief were *Ellen B. Mitchell* and *N. Mark Ralls.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* (Title IX), for the sexual harassment of a student by one of the district's teachers. We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

I

In the spring of 1991, when petitioner Alida Star Gebser was an eighth-grade student at a middle school in respondent Lago Vista Independent School District (Lago Vista), she joined a high school book discussion group led by Frank Waldrop, a teacher at Lago Vista's high school. Lago Vista received federal funds at all pertinent times. During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters. Waldrop continued to make inappropriate

*Briefs of *amici curiae* urging reversal were filed for the National Education Association by *Michael D. Simpson* and *Laurence Gold;* and for the National Women's Law Center et al. by *Jacqueline R. Denning, Nancy L. Perkins,* and *Marcia D. Greenberger.*

Briefs of *amici curiae* urging affirmance were filed for the American Insurance Association by *William J. Kilberg, Craig A. Berrington,* and *Phillip L. Schwartz;* for the Kentucky School Boards Association by *Michael A. Owsley* and *Regina Abrams;* for the National School Boards Association et al. by *Lisa A. Brown, Gwendolyn H. Gregory,* and *Cynthia Jahn;* and for the TASB Legal Assistance Fund by *Carolyn M. Hanahan.*

remarks to the students, and he began to direct more of his suggestive comments toward Gebser, including during the substantial amount of time that the two were alone in his classroom. He initiated sexual contact with Gebser in the spring, when, while visiting her home ostensibly to give her a book, he kissed and fondled her. The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.

Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher. In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class. The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator. A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista terminated his employment, and subsequently, the Texas Education Agency revoked his teaching license. During this time, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal antiharassment policy.

Gebser and her mother filed suit against Lago Vista and Waldrop in state court in November 1993, raising claims against the school district under Title IX, Rev. Stat. § 1979,

42 U. S. C. § 1983, and state negligence law, and claims against Waldrop primarily under state law. They sought compensatory and punitive damages from both defendants. After the case was removed, the United States District Court for the Western District of Texas granted summary judgment in favor of Lago Vista on all claims, and remanded the allegations against Waldrop to state court. In rejecting the Title IX claim against the school district, the court reasoned that the statute "was enacted to counter *policies* of discrimination . . . in federally funded education programs," and that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district." App. to Pet. for Cert. 6a–7a. Here, the court determined, the parents' complaint to the principal concerning Waldrop's comments in class was the only one Lago Vista had received about Waldrop, and that evidence was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student.

Petitioners appealed only on the Title IX claim. The Court of Appeals for the Fifth Circuit affirmed, *Doe* v. *Lago Vista Independent School Dist.*, 106 F. 3d 1223 (1997), relying in large part on two of its recent decisions, *Rosa H.* v. *San Elizario Independent School Dist.*, 106 F. 3d 648 (1997), and *Canutillo Independent School Dist.* v. *Leija*, 101 F. 3d 393 (1996), cert. denied, 520 U. S. 1265 (1997). The court first declined to impose strict liability on school districts for a teacher's sexual harassment of a student, reiterating its conclusion in *Leija* that strict liability is inconsistent with "the Title IX contract." 106 F. 3d, at 1225 (internal quotation marks omitted). The court then determined that Lago Vista could not be liable on the basis of constructive notice, finding that there was insufficient evidence to suggest that a school official should have known about Waldrop's relationship with Gebser. *Ibid.* Finally, the court refused to in-

voke the common law principle that holds an employer vicariously liable when an employee is "aided in accomplishing [a] tort by the existence of the agency relation," Restatement (Second) of Agency § 219(2)(d) (1957) (hereinafter Restatement), explaining that application of that principle would result in school district liability in essentially every case of teacher-student harassment. 106 F. 3d, at 1225–1226.

The court concluded its analysis by reaffirming its holding in *Rosa H.* that "school districts are not liable in tort for teacher-student [sexual] harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so," 106 F. 3d, at 1226, and ruling that petitioners could not satisfy that standard. The Fifth Circuit's analysis represents one of the varying approaches adopted by the Courts of Appeals in assessing a school district's liability under Title IX for a teacher's sexual harassment of a student. See *Smith* v. *Metropolitan School Dist. Perry Twp.*, 128 F. 3d 1014 (CA7 1997); *Kracunas* v. *Iona College*, 119 F. 3d 80 (CA2 1997); *Doe* v. *Claiborne County*, 103 F. 3d 495, 513–515 (CA6 1996); *Kinman* v. *Omaha Public School Dist.*, 94 F. 3d 463, 469 (CA8 1996). We granted certiorari to address the issue, 522 U. S. 1011 (1997), and we now affirm.

II

Title IX provides in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a). The express statutory means of enforcement is administrative: The statute directs federal agencies that distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through "any . . . means authorized by law," including

ultimately the termination of federal funding. § 1682. The Court held in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), that Title IX is also enforceable through an implied private right of action, a conclusion we do not revisit here. We subsequently established in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), that monetary damages are available in the implied private action.

In *Franklin*, a high school student alleged that a teacher had sexually abused her on repeated occasions and that teachers and school administrators knew about the harassment but took no action, even to the point of dissuading her from initiating charges. See *id.*, at 63–64. The lower courts dismissed Franklin's complaint against the school district on the ground that the implied right of action under Title IX, as a categorical matter, does not encompass recovery in damages. We reversed the lower courts' blanket rule, concluding that Title IX supports a private action for damages, at least "in a case such as this, in which intentional discrimination is alleged." See *id.*, at 74–75. *Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student; the decision, however, does not purport to define the contours of that liability.

We face that issue squarely in this case. Petitioners, joined by the United States as *amicus curiae*, would invoke standards used by the Courts of Appeals in Title VII cases involving a supervisor's sexual harassment of an employee in the workplace. In support of that approach, they point to a passage in *Franklin* in which we stated: "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student." *Id.*, at 75.

Meritor Savings Bank, FSB v. *Vinson*, 477 U. S. 57 (1986), directs courts to look to common law agency principles when assessing an employer's liability under Title VII for sexual harassment of an employee by a supervisor. See *id.*, at 72. Petitioners and the United States submit that, in light of *Franklin*'s comparison of teacher-student harassment with supervisor-employee harassment, agency principles should likewise apply in Title IX actions.

Specifically, they advance two possible standards under which Lago Vista would be liable for Waldrop's conduct. First, relying on a 1997 "Policy Guidance" issued by the Department of Education, they would hold a school district liable in damages under Title IX where a teacher is "'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,'" irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware. Brief for Petitioners 36 (quoting Dept. of Education, Office for Civil Rights, Sexual Harassment Policy Guidance: Harrassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997) (1997 Policy Guidance)); Brief for United States as *Amicus Curiae* 14. That rule is an expression of *respondeat superior* liability, *i. e.*, vicarious or imputed liability, see Restatement § 219(2)(d), under which recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates the harassment. Second, petitioners and the United States submit that a school district should at a minimum be liable for damages based on a theory of constructive notice, *i. e.*, where the district knew or "should have known" about harassment but failed to uncover and eliminate it. Brief for Petitioners 28; Brief for United States as *Amicus Curiae* 15–16; see Restatement § 219(2)(b). Both standards would allow a damages recovery in a broader range of situations than the rule adopted by the

Court of Appeals, which hinges on actual knowledge by a school official with authority to end the harassment.

Whether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*'s citation of *Meritor*. That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, see *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80–81 (1998), an issue not in dispute here. In fact, the school district's liability in *Franklin* did not necessarily turn on principles of imputed liability or constructive notice, as there was evidence that school officials knew about the harassment but took no action to stop it. See 503 U. S., at 63–64. Moreover, *Meritor*'s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against "an employer," 42 U. S. C. § 2000e–2(a), explicitly defines "employer" to include "any agent," § 2000e(b). See *Meritor*, *supra*, at 72. Title IX contains no comparable reference to an educational institution's "agents," and so does not expressly call for application of agency principles.

In this case, moreover, petitioners seek not just to establish a Title IX violation but to recover *damages* based on theories of *respondeat superior* and constructive notice. It is that aspect of their action, in our view, that is most critical to resolving the case. Unlike Title IX, Title VII contains an express cause of action, § 2000e–5(f), and specifically provides for relief in the form of monetary damages, § 1981a. Congress therefore has directly addressed the subject of damages relief under Title VII and has set out the particular situations in which damages are available as well as the maximum amounts recoverable. § 1981a(b). With respect to Title IX, however, the private right of action is judicially

implied, see *Cannon*, 441 U. S., at 717, and there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages. In addition, although the general presumption that courts can award any appropriate relief in an established cause of action, *e. g.*, *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), coupled with Congress' abrogation of the States' Eleventh Amendment immunity under Title IX, see 42 U. S. C. § 2000d–7, led us to conclude in *Franklin* that Title IX recognizes a damages remedy, 503 U. S., at 68–73; see *id.*, at 78 (SCALIA, J., concurring in judgment), we did so in response to lower court decisions holding that Title IX does not support damages relief at all. We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie.

III

Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute. See, *e. g.*, *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 292–293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1104 (1991). That endeavor inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken. See, *e. g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 359 (1991). To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose. See *Musick, Peeler*, 508 U. S., at 294–297; *id.*, at 300 (THOMAS, J., dissenting); *Virginia Bankshares, supra*, at 1102.

Those considerations, we think, are pertinent not only to the scope of the implied right, but also to the scope of the available remedies. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979); see also *Franklin, supra*,

at 77–78 (SCALIA, J., concurring in judgment). We suggested as much in *Franklin*, where we recognized "the general rule that all appropriate relief is available in an action brought to vindicate a federal right," but indicated that the rule must be reconciled with congressional purpose. 503 U. S., at 68. The "general rule," that is, "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 595 (1983) (opinion of White, J.); cf., *Cannon*, 441 U. S, at 703 ("[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme").

Applying those principles here, we conclude that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i. e.*, without actual notice to a school district official. Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies. *Franklin*, 503 U. S., at 71; *id.*, at 76 (SCALIA, J., concurring in judgment). Instead, "we attempt to infer how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the" statute. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 178 (1994) (internal quotation marks omitted); see *Musick, Peeler, supra*, at 294–295; *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 529 (1982).

As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs. When Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief. See 42

U. S. C. § 2000a–3(a) (1970 ed.); §§ 2000e–5(e), (g) (1970 ed., Supp. II). It was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer. See 42 U. S. C. § 1981a(b)(3). Adopting petitioners' position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available.

Congress enacted Title IX in 1972 with two principal objectives in mind: "[T]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Cannon*, *supra*, at 704. The statute was modeled after Title VI of the Civil Rights Act of 1964, see 441 U. S., at 694–696; *Grove City College* v. *Bell*, 465 U. S. 555, 566 (1984), which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs. See 42 U. S. C. § 2000d *et seq.* The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. See *Guardians*, 463 U. S., at 599 (opinion of White, J.); *id.*, at 609 (Powell, J., concurring in judgment); cf. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981).

That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to "eradicat[e] discrimination throughout the economy." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 254 (1994) (internal quo-

tation marks omitted). Title VII, moreover, seeks to "make persons whole for injuries suffered through past discrimination." *Ibid.* (internal quotation marks omitted). Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on "protecting" individuals from discriminatory practices carried out by recipients of federal funds. *Cannon*, *supra*, at 704. That might explain why, when the Court first recognized the implied right under Title IX in *Cannon*, the opinion referred to injunctive or equitable relief in a private action, see 441 U. S., at 705, and n. 38, 710, n. 44, 711, but not to a damages remedy.

Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, U. S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. See *Franklin*, *supra*, at 74–75; *Guardians*, *supra*, at 596–603 (White, J.); see generally *Pennhurst*, *supra*, at 28–29. Our central concern in that regard is with ensuring that "the receiving entity of federal funds [has] notice that it will be liable for a monetary award." *Franklin*, *supra*, at 74. Justice White's opinion announcing the Court's judgment in *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, for instance, concluded that the relief in an action under Title VI alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, "it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition]." 463 U. S., at 598. We confront similar concerns here. If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*, it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible to as-

sume that Congress did not envision a recipient's liability in damages in that situation. See *Rosa H.*, 106 F. 3d, at 654 ("When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex").

Most significantly, Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice. Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient. The statute entitles agencies who disburse education funding to enforce their rules implementing the nondiscrimination mandate through proceedings to suspend or terminate funding or through "other means authorized by law." 20 U. S. C. § 1682. Significantly, however, an agency may not initiate enforcement proceedings until it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." *Ibid.* The administrative regulations implement that obligation, requiring resolution of compliance issues "by informal means whenever possible," 34 CFR § 100.7(d) (1997), and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and "the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance," § 100.8(d); see § 100.8(c).

In the event of a violation, a funding recipient may be required to take "such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination." § 106.3. While agencies have conditioned continued funding on providing equitable relief to the victim, see, *e. g.*, *North Haven,* 456 U. S., at 518 (reinstatement of employee), the regulations do not appear to contemplate a condition order-

ing payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute. See Brief for United States as *Amicus Curiae* in *Franklin* v. *Gwinnett County School District*, O. T. 1991, No. 90–918, p. 24. In *Franklin*, for instance, the Department of Education found a violation of Title IX but determined that the school district came into compliance by virtue of the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints. 503 U. S., at 64, n. 3.

Presumably, a central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures. The scope of private damages relief proposed by petitioners is at odds with that basic objective. When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have "constructively" known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct. Nor, of course, did the district have an opportunity to take action to end the harassment or to limit further harassment.

It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice. Cf. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S., at 180 ("[I]t would be 'anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for

comparable express causes of action'"), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 736 (1975). Moreover, an award of damages in a particular case might well exceed a recipient's level of federal funding. See Tr. of Oral Arg. 35 (Lago Vista's federal funding for 1992–1993 was roughly $120,000). Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.

IV

Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, 20 U. S. C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An "appropriate person" under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in dam-

ages not for its own official decision but instead for its employees' independent actions. Comparable considerations led to our adoption of a deliberate indifference standard for claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation. See *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397 (1997); *Canton* v. *Harris*, 489 U. S. 378, 388–392 (1989); see also *Collins* v. *Harker Heights*, 503 U. S. 115, 123–124 (1992).

Applying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard. The only official alleged to have had information about Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student. Lago Vista, moreover, terminated Waldrop's employment upon learning of his relationship with Gebser. JUSTICE STEVENS points out in his dissenting opinion that Waldrop of course had knowledge of his own actions. See *post*, at 299, n. 8. Where a school district's liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis. See Restatement § 280.

Petitioners focus primarily on Lago Vista's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims. They point to Department of Education regulations requiring each funding recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints, 34 CFR § 106.8(b) (1997), and to notify students and others that "it does not discriminate on the basis of sex in the educational programs or activities which it operates," § 106.9(a). Lago Vista's alleged failure to comply with the

regulations, however, does not establish the requisite actual notice and deliberate indifference. And in any event, the failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U. S. C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. *E. g., Grove City*, 465 U. S., at 574–575 (permitting administrative enforcement of regulation requiring college to execute an "Assurance of Compliance" with Title IX). We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

V

The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U. S. C. § 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and de-

liberate indifference. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question that the petition for certiorari asks us to address is whether the Lago Vista Independent School District (respondent) is liable in damages for a violation of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.* (Title IX). The Court provides us with a negative answer to that question because respondent did not have actual notice of, and was not deliberately indifferent to, the odious misconduct of one of its teachers. As a basis for its decision, the majority relies heavily on the notion that because the private cause of action under Title IX is "judicially implied," the Court has "a measure of latitude" to use its own judgment in shaping a remedial scheme. See *ante*, at 284. This assertion of lawmaking authority is not faithful either to our precedents or to our duty to interpret, rather than to revise, congressional commands. Moreover, the majority's policy judgment about the appropriate remedy in this case thwarts the purposes of Title IX.

I

It is important to emphasize that in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), the Court confronted a question of statutory construction. The decision represented our considered judgment about the intent of the Congress that enacted Title IX in 1972. After noting that Title IX had been patterned after Title VI of the Civil Rights Act of 1964, which had been interpreted to include a private right of action, we concluded that Congress intended to authorize the same private enforcement of Title IX. 441 U. S., at 694–698; see also *id.*, at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as

authorizing an implied private cause of action for victims of the prohibited discrimination").[1] As long as the intent of Congress is clear, an implicit command has the same legal force as one that is explicit. The fact that a statute does not authorize a particular remedy "in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under [the statute]." *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 288 (1940).[2]

In *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), we unanimously concluded that Title IX authorized

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[1] We explained: "In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy . . . . It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." 441 U. S., at 696–698. We also observed that "during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies—often in cases much less clear than this. It was *after* 1972 that this Court decided *Cort* v. *Ash*[, 422 U. S. 66 (1975),] and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal contest. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Id.*, at 698–699 (footnotes omitted).

[2] In *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984), we unanimously concluded that comparable language in the statute prohibiting discrimination against the handicapped by federal grant recipients authorized a private right of action for the recovery of backpay. That decision, like *Cannon*, relied on the fact that the comparable language in Title VI had authorized a private remedy. See 465 U. S., at 626, 635.

a high school student who had been sexually harassed by a sports coach/teacher to recover damages from the school district. That conclusion was supported by two considerations. In his opinion for the Court, Justice White first relied on the presumption that Congress intends to authorize "all appropriate remedies" unless it expressly indicates otherwise. *Id.*, at 66.[3] He then noted that two amendments[4] to Title IX enacted after the decision in *Cannon* had validated *Cannon*'s holding and supported the conclusion that "Congress did not intend to limit the remedies available in a suit brought under Title IX." 503 U. S., at 72. JUSTICE SCALIA, concurring in the judgment, agreed that Congress' amendment of Title IX to eliminate the States' Eleventh Amendment immunity, see 42 U. S. C. § 2000d–7(a)(1), must be read "not only 'as a validation of *Cannon*'s holding,' *ante*, at 72, but also as an implicit acknowledgment that damages are available." 503 U. S., at 78.

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[3] "In *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), for example, Chief Justice Marshall observed that our Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.' This principle originated in the English common law, and Blackstone described it as 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.' 3 W. Blackstone, Commentaries 23 (1783). See also *Ashby* v. *White*, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q. B. 1702) ('If a statute gives a right, the common law will give a remedy to maintain that right . . .')." *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 66–67; see also *id.*, at 67 ("'A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law'") (quoting *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916)).

[4] See Rehabilitation Act Amendments of 1986, 42 U. S. C. § 2000d–7 (abrogating the States' Eleventh Amendment immunity); Civil Rights Restoration Act of 1987, 20 U. S. C. § 1687 (defining "program or activity" broadly).

Because these constructions of the statute have been accepted by Congress and are unchallenged here, they have the same legal effect as if the private cause of action seeking damages had been explicitly, rather than implicitly, authorized by Congress. We should therefore seek guidance from the text of the statute and settled legal principles rather than from our views about sound policy.

II

We have already noted that the text of Title IX should be accorded "'a sweep as broad as its language.'" *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 521 (1982) (quoting *United States* v. *Price*, 383 U. S. 787 (1966)). That sweep is broad indeed. "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U. S. C. § 1681(a). As Judge Rovner has correctly observed, the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII. See *Smith* v. *Metropolitan School Dist. Perry Twp.*, 128 F. 3d 1014, 1047 (CA7 1997) (dissenting opinion).[5]

[5] "Unlike Title VII . . . , which focuses on the discriminator, making it unlawful for an employer to engage in certain prohibited practices (*see* 42 U. S. C. § 2000e–2(a)), Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the discrimination occurred. In effect, the statute asks but a single question—whether an individual was subjected to discrimination *under* a covered program or activity. . . . And because Title IX as drafted includes no actor at all, it necessarily follows that the statute also would not reference 'agents' of that non-existent actor." *Smith* v. *Metropolitan School Dist. Perry Twp.*, 128 F. 3d, at 1047; see also *Cannon* v. *University of Chicago*, 441 U. S. 677, 691–693 (1979) (recognizing that Congress drafted Title IX "with an unmistakable focus on the benefited class," and did not "writ[e] it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition

Moreover, because respondent assumed the statutory duty set out in Title IX as part of its consideration for the receipt of federal funds, that duty constitutes an affirmative undertaking that is more significant than a mere promise to obey the law.

Both of these considerations are reflected in our decision in *Franklin*. Explaining why Title IX is violated when a teacher sexually abuses a student, we wrote:

> "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. *Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.*" 503 U. S., at 75 (emphasis added).

Franklin therefore stands for the proposition that sexual harassment of a student by a teacher violates the duty—assumed by the school district in exchange for federal funds—not to discriminate on the basis of sex, and that a student may recover damages from a school district for such a violation.

Although the opinion the Court announces today is not entirely clear, it does not purport to overrule *Franklin*. See *ante*, at 281 ("*Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student"). Moreover, I do not understand the Court to question the conclusion that an intentional violation of Title IX, of the type we recognized in

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against the disbursement of public funds to educational institutions engaged in discriminatory practices").

Franklin,[6] has been alleged in this case.[7] During her freshman and sophomore years of high school, petitioner Alida Star Gebser was repeatedly subjected to sexual abuse by her teacher, Frank Waldrop, whom she had met in the eighth grade when she joined his high school book discussion group. Waldrop's conduct was surely intentional, and it occurred during, and as a part of, a curriculum activity in which he wielded authority over Gebser that had been delegated to him by respondent. Moreover, it is undisputed that the activity was subsidized, in part, with federal moneys.

The Court nevertheless holds that the law does not provide a damages remedy for the Title IX violation alleged in this case because no official of the school district with "authority to institute corrective measures on the district's behalf" had actual notice of Waldrop's misconduct. *Ante*, at 277. That holding is at odds with settled principles of

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[6] As the Court notes, the student in *Franklin*—unlike the student in this case—alleged that school administrators knew about the harassment but failed to act. See *ante*, at 281; *Franklin* v. *Gwinnett County Schools*, 503 U. S., at 64. The *Franklin* opinion does not suggest, however, that that allegation was relevant to its holding that the school district could be liable in damages for an intentional violation of Title IX as a result of teacher-student harassment.

[7] Cf. Brief for Respondent 9 ("It is important to bear in mind that the question in this case is not whether school districts are somehow 'responsible' for violations of Title IX and for failure to comply with administrative procedures. The issue is in what circumstances a school district may be compelled to answer *in damages* for a violation of Title IX or its implementing regulations"); *id.*, at 13 ("In sum, the manner in which Title IX is phrased simply determines that a violation of the statute may occur whenever a person is discriminated against on the basis of sex, regardless of the school district's knowledge of the discrimination. But nothing in the language of the statute indicates that a school district must respond in damages for every such violation, regardless of its own knowledge or culpability"). But see *id.*, at 19 ("[T]here is no evidence that Lago Vista committed an intentional violation of Title IX").

agency law,[8] under which the district is responsible for Waldrop's misconduct because "he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2)(d) (1957).[9] This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust.[10]

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[8] The Court's holding is also questionable as a factual matter. Waldrop himself surely had ample authority to maintain order in the classes that he conducted. Indeed, that is a routine part of every teacher's responsibilities. If Gebser had been the victim of sexually harassing conduct by other students during those classes, surely the teacher would have had ample authority to take corrective measures. The fact that he did not prevent his own harassment of Gebser is the consequence of his lack of will, not his lack of authority.

[9] The Court suggests that agency principles are inapplicable to this case because Title IX does not expressly refer to an "agent," as Title VII does. See *ante*, at 283 (citing 42 U. S. C. § 2000e(b)). Title IX's focus on the protected class rather than the fund recipient fully explains the statute's failure to mention "agents" of the recipient, however. See n. 5, *supra*. Moreover, in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), we viewed Title VII's reference to an "agent" as a *limitation* on the liability of the employer: "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*, at 72.

[10] For example, Waldrop first sexually abused Gebser when he visited her house on the pretense of giving her a book that she needed for a school project. See App. 54a (deposition of Alida Star Gebser). Gebser, then a high school freshman, stated that she "was terrified": "He was the main teacher at the school with whom I had discussions, and I didn't know what

Reliance on the principle set out in § 219(2)(b) of the Restatement comports with the relevant agency's interpretation of Title IX. The United States Department of Education, through its Office for Civil Rights, recently issued a policy "Guidance" stating that a school district is liable under Title IX if one of its teachers "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Sexual Harassment Policy Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997). As the agency charged with administering and enforcing Title IX, see 20 U. S. C. § 1682, the Department of Education has a special interest in ensuring that federal funds are not used in contravention of Title IX's mandate. It is therefore significant that the Department's interpretation of the statute wholly supports the conclusion that respondent is liable in damages for Waldrop's sexual abuse of his student, which was made possible only by Waldrop's affirmative misuse of his authority as her teacher.

The reason why the common law imposes liability on the principal in such circumstances is the same as the reason why Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they

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to do." *Id.*, at 56a. Gebser was the only student to attend Waldrop's summer advanced placement course, and the two often had sexual intercourse during the time allotted for the class. See *id.*, at 60a. Gebser stated that she declined to report the sexual relationship because "if I was to blow the whistle on that, then I wouldn't be able to have this person as a teacher anymore." *Id.*, at 62a. She also stated that Waldrop "was the person in Lago administration . . . who I most trusted, and he was the one that I would have been making the complaint against." *Id.*, at 63a.

can claim immunity from damages liability.[11] Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have "authority to institute corrective measures on the district's behalf." *Ante*, at 277. It is not my function to determine whether this newly fashioned rule is wiser than the established common-law rule. It is proper, however, to suggest that the Court bears the burden of justifying its rather dramatic departure from settled law, and to explain why its opinion fails to shoulder that burden.

III

The Court advances several reasons why it would "frustrate the purposes" of Title IX to allow recovery against a school district that does not have actual notice of a teacher's sexual harassment of a student. *Ante*, at 285 (internal quotation marks omitted). As the Court acknowledges, however, the two principal purposes that motivated the enactment of Title IX were: (1) "'to avoid the use of federal resources to support discriminatory practices'"; and (2) "'to provide individual citizens effective protection against those practices.'" *Ante*, at 286 (quoting *Cannon*, 441 U. S., at 704). It seems quite obvious that both of those purposes would be served—not frustrated—by providing a damages remedy in a case of this kind. To the extent that the Court's reasons for its policy choice have any merit, they suggest that no damages should ever be awarded in a Title IX case—in other words, that our unanimous holding in *Franklin* should be repudiated.

[11] The Court concludes that its holding "does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U. S. C. § 1983." *Ante*, at 292. In this case, of course, the District Court denied petitioners' § 1983 claim on summary judgment, and it is undisputed that the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (1997), immunizes school districts from tort liability in cases like this one.

First, the Court observes that at the time Title IX was enacted, "the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all." *Ante*, at 285. *Franklin*, however, forecloses this reevaluation of legislative intent; in that case, we "evaluate[d] the state of the law when the Legislature passed Title IX," 503 U. S., at 71, and concluded that "the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies," *id.*, at 72. The Court also suggests that the fact that Congress has imposed a ceiling on the amount of damages that may be recovered in Title VII cases, see 42 U. S. C. §1981a, is somehow relevant to the question whether any damages at all may be awarded in a Title IX case. *Ante*, at 286. The short answer to this creative argument is that the Title VII ceiling does not have any bearing on when damages may be recovered from a defendant in a Title IX case. Moreover, this case does not present any issue concerning the amount of any possible damages award.[12]

Second, the Court suggests that the school district did not have fair notice when it accepted federal funding that it might be held liable "'for a monetary award'" under Title IX. *Ante*, at 287 (quoting *Franklin*, 503 U. S., at 74). The Court cannot mean, however, that respondent was not

[12] The lower courts are not powerless to control the size of damages verdicts. See n. 18, *infra*. Courts retain the power to order a remittitur, for example. In addition, the size of a jury verdict presumably would depend on several factors, at least some of which a school district could control. For example, one important factor might be whether the district had adopted and disseminated an effective policy on sexual harassment. See also Dept. of Education, Office for Civil Rights, Sexual Harrassment Policy Guidance: Harrassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12048, n. 35 (1997) ("[A] school's immediate and appropriate remedial actions are relevant in determining the nature and extent of the damages suffered by a plaintiff").

on notice that sexual harassment of a student by a teacher constitutes an "intentional" violation of Title IX for which damages are available, because we so held shortly before Waldrop began abusing Gebser. See *id.*, at 74–75. Given the fact that our holding in *Franklin* was unanimous, it is not unreasonable to assume that it could have been foreseen by counsel for the recipients of Title IX funds. Moreover, the nondiscrimination requirement set out in Title IX is clear, and this Court held that sexual harassment constitutes intentional sex discrimination long before the sexual abuse in this case began. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). Normally, of course, we presume that the citizen has knowledge of the law.

The majority nevertheless takes the position that a school district that accepts federal funds under Title IX should not be held liable in damages for an intentional violation of that statute if the district itself "was unaware of the discrimination." *Ante*, at 287. The Court reasons that because administrative proceedings to terminate funding cannot be commenced until after the grant recipient has received notice of its noncompliance and the agency determines that voluntary compliance is not possible, see 20 U. S. C. § 1682, there should be no damages liability unless the grant recipient has actual notice of the violation (and thus an opportunity to end the harassment). See *ante*, at 288–290.

The fact that Congress has specified a particular administrative procedure to be followed when a subsidy is to be terminated, however, does not illuminate the question of what the victim of discrimination on the basis of sex must prove in order to recover damages in an implied private right of action. Indeed, in *Franklin*, 503 U. S., at 64, n. 3, we noted that the Department of Education's Office of Civil Rights had declined to terminate federal funding of the school district at issue—despite its finding that a Title IX violation had occurred—because the "district [had come] into compliance" with Title IX after the harassment at issue. See *ante*, at

289. That fact did not affect the Court's analysis, much less persuade the Court that a damages remedy was unavailable. Cf. *Cannon,* 441 U. S., at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section").

The majority's inappropriate reliance on Title IX's administrative enforcement scheme to limit the availability of a damages remedy leads the Court to require not only actual knowledge on the part of "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf," but also that official's "refus[al] to take action," or "deliberate indifference" toward the harassment. *Ante,* at 290.[13] Presumably, few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard. The Court fails to recognize that its holding will virtually "render inutile causes of action authorized by Congress through a decision that *no* remedy is available." *Franklin,* 503 U. S., at 74.

IV

We are not presented with any question concerning the affirmative defenses that might eliminate or mitigate the recovery of damages for a Title IX violation. It has been argued, for example, that a school district that has adopted and vigorously enforced a policy that is designed to prevent sexual harassment and redress the harms that such conduct may produce should be exonerated from damages liability.[14]

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[13] The only decisions the Court cites to support its adoption of such a stringent standard are cases arising under a quite different statute, 42 U. S. C. § 1983. See *ante,* at 291.

[14] See Brief for National Education Association as *Amicus Curiae* 15 (proposing affirmative defense that "the entity had adopted and has implemented an effective prevention and compliance program").

The Secretary of Education has promulgated regulations directing grant recipients to adopt such policies and disseminate them to students.[15] A rule providing an affirmative defense for districts that adopt and publish such policies pursuant to the regulations would not likely be helpful to respondent, however, because it is not at all clear whether respondent adopted any such policy,[16] and there is no evidence that such a policy was made available to students, as required by regulation.[17]

A theme that seems to underlie the Court's opinion is a concern that holding a school district liable in damages might deprive it of the benefit of the federal subsidy—that the damages remedy is somehow more onerous than a possible termination of the federal grant. See, *e. g.*, *ante*, at 290 (stating that "an award of damages in a particular case might well exceed a recipient's level of federal funding"). It is possible, of course, that in some cases the recoverable damages, in either a Title IX action or a state-law tort action, would

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[15] The school district must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of discrimination. 34 CFR § 106.8(b) (1997). The district also must inform students and their parents of Title IX's antidiscrimination requirement. § 106.9.

[16] Factual questions remain with respect to whether respondent had an adequate antidiscrimination policy. Compare App. 44a–45a (affidavit of superintendent/Title IX coordinator Virginia Collier) (stating that the district had a policy) with Plaintiffs' Motion for Partial Summary Judgment, Record 332; *id.*, Exh. 2 (Collier deposition), at 42, 44 (stating that the district had no formal policy).

[17] The district's superintendent stated that she did not remember if any handbook alerting students to grievance procedures was disseminated to students. App. 72a–73a (Collier deposition). Moreover, Gebser herself stated: "If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified and I had no idea where to go from where I was." *Id.*, at 64a–65a.

exceed the amount of a federal grant.[18] That is surely not relevant to the question whether the school district or the injured student should bear the risk of harm—a risk against which the district, but not the student, can insure. It is not clear to me why the well-settled rules of law that impose responsibility on the principal for the misconduct of its agents should not apply in this case. As a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students that those rules would provide. Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government.

I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

JUSTICE STEVENS' opinion focuses on the standard of school district liability for teacher-on-student harassment in secondary schools. I join that opinion, which reserves the question whether a district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment. *Ante*, at 304–305. I think it appropriate to answer that question for these reasons: (1) the dimensions of a claim are determined not only by the plaintiff's

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[18] *Amici curiae* National School Boards Association and the New Jersey School Boards Association point to a $1.4 million verdict in a recent Title IX case. See Brief for National School Boards Association et al. as *Amici Curiae* 5, and n. 4 (citing *Canutillo Independent School Dist.* v. *Leija*, 101 F. 3d 393 (CA5 1996), cert. denied, 520 U. S. 1265 (1997)); see also Brief for TASB Legal Assistance Fund et al. as *Amici Curiae* 23 (same). Significantly, however, the District Judge in that case refused to enter a judgment on that verdict; the judge instead ordered a new trial on damages, limited to medical and mental health treatment and special education expenses. See 887 F. Supp. 947, 957 (WD Tex. 1995), rev'd, 101 F. 3d 393 (CA5 1996).

allegations, but by the allowable defenses; (2) this Court's pathmarkers are needed to afford guidance to lower courts and school officials responsible for the implementation of Title IX.

In line with the tort law doctrine of avoidable consequences, see generally C. McCormick, Law of Damages 127–159 (1935), I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct. School districts subject to Title IX's governance have been instructed by the Secretary of Education to install procedures for "prompt and equitable resolution" of complaints, 34 CFR § 106.8(b) (1997), and the Department of Education's Office of Civil Rights has detailed elements of an effective grievance process, with specific reference to sexual harassment, 62 Fed. Reg. 12034, 12044–12045 (1997).

The burden would be the school district's to show that its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense. Under such a regime, to the extent that a plaintiff unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suffered avoidable harm, she would not qualify for Title IX relief.

Syllabus

CARON *v.* UNITED STATES

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

No. 97–6270. Argued April 21, 1998—Decided June 22, 1998

Federal law forbids a person convicted of a serious offense to possess any firearm, 18 U. S. C. § 922(g)(1), and requires that a three-time violent felon who violates § 922(g) receive an enhanced sentence, § 924(e). However, a previous conviction is not a predicate for the substantive offense or the enhanced sentence if the offender's civil rights have been restored, "unless such . . . restoration . . . expressly provides that the person may not . . . possess . . . firearms." § 921(a)(20). Petitioner, who has an extensive criminal record, was convicted of possessing, *inter alia*, six rifles and shotguns in violation of § 922(g). The District Court enhanced his sentence based on one California conviction and three Massachusetts convictions, but the First Circuit vacated the sentence, concluding that his civil rights had been restored by operation of a Massachusetts law that permitted him to possess rifles but restricted his right to carry handguns. On remand, the District Court disregarded the Massachusetts convictions, finding that, because Massachusetts law allowed petitioner to possess rifles, § 921(a)(20)'s "unless clause" was not activated, and that the handgun restriction was irrelevant because the case involved rifles and shotguns. The First Circuit reversed, counting the convictions because petitioner remained subject to significant firearms restrictions.

Held: The handgun restriction activates the unless clause, making the Massachusetts convictions count under federal law. The phrase "may not . . . possess . . . firearms" must be interpreted under either of two "all-or-nothing" approaches: either it applies when the State forbids one or more types of firearms, as the Government contends; or it does not apply if the State permits one or more types of firearms, regardless of the one possessed in the particular case. This Court agrees with the Government's approach, under which a state weapons limitation activates the uniform federal ban on possessing any firearms at all. Even if a State permitted an offender to have the guns he possessed, federal law uses the State's determination that the offender is more dangerous than law-abiding citizens to impose its own broader stricture. Under petitioner's approach, if he had possessed a handgun in violation of state law, the unless clause would not apply because he could have possessed a rifle. This approach contradicts a likely, and rational,

congressional intent. Congress, believing that existing state laws provided less than positive assurance that a repeat violent offender no longer poses an unacceptable risk of dangerousness, intended to keep guns away from all offenders who might cause harm, even if they were not deemed dangerous by the States. *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 119, 120. To provide the missing assurance, federal law must reach primary conduct not covered by state law. The fact that state law determines the restoration of civil rights does not mean that state law also controls the unless clause: As to weapons possession, the Federal Government has an interest in a single, national, protective policy, broader than required by state law. The rule of lenity does not apply here, since petitioner relies on an implausible reading of the congressional purpose. See *United States* v. *Shabani*, 513 U. S. 10, 17. Pp. 312–317.

Affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and SOUTER, JJ., joined, *post,* p. 317.

Owen S. Walker argued the cause for petitioner. With him on the briefs was *Bjorn R. Lange.*

Jonathan E. Nuechterlein argued the cause for the United States. On the brief were *Solicitor General Waxman, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben, Edward C. DuMont,* and *Nina Goodman.*

JUSTICE KENNEDY delivered the opinion of the Court.

Under federal law, a person convicted of a crime punishable by more than one year in prison may not possess any firearm. 18 U. S. C. § 922(g)(1). If he has three violent felony convictions and violates the statute, he must receive an enhanced sentence. § 924(e). A previous conviction is a predicate for neither the substantive offense nor the sentence enhancement if the offender has had his civil rights restored, "unless such . . . restoration of civil rights expressly provides that the person may not . . . possess . . . firearms." § 921(a)(20). This is the so-called "unless clause" we now must interpret. As the ellipses suggest, the statute is more

complex, but the phrase as quoted presents the issue for our decision.

The parties, reflecting a similar division among various Courts of Appeals, disagree over the interpretation of the unless clause in the following circumstance. What if the State restoring the offender's rights forbids possession of some firearms, say pistols, but not others, say rifles? In one sense, he "may not . . . possess . . . firearms" under the unless clause because the ban on specified weapons is a ban on "firearms." In another sense, he can possess firearms under the unless clause because the state ban is not absolute. Compare, *e. g.*, *United States* v. *Estrella*, 104 F. 3d 3, 8 (CA1) (adopting former reading), cert. denied, 521 U. S. 1110 (1997), and *United States* v. *Driscoll*, 970 F. 2d 1472, 1480–1481 (CA6 1992) (same), cert. denied, 506 U. S. 1083 (1993), with *United States* v. *Qualls*, 140 F. 3d 824, 826 (CA9 1998) (en banc) (intermediate position), and *United States* v. *Shoemaker*, 2 F. 3d 53, 55–56 (CA4 1993) (same), cert. denied, 510 U. S. 1047 (1994).

The Government contends the class of criminals who "may not . . . possess . . . firearms" includes those forbidden to have some guns but not others. On this reading, the restoration of rights is of no effect here, the previous offenses are chargeable, and petitioner's sentence must be enhanced. On appeal, the Government's position prevailed in the Court of Appeals for the First Circuit, and we now affirm its judgment.

I

Petitioner Gerald Caron has an extensive criminal record, including felonies. In Massachusetts state court, he was convicted in 1958 of attempted breaking and entering at night and, in 1959 and 1963, of breaking and entering at night. In California state court, he was convicted in 1970 of assault with intent to commit murder and attempted murder.

In July 1993, petitioner walked into the home of Walter Miller, carrying a semiautomatic rifle. He threatened Miller,

brandished the rifle in his face, and pointed it at his wife, his daughters, and his 3-year-old grandson. Police officers disarmed and arrested petitioner.

In September 1993, a federal agent called on petitioner at home to determine if he had other unlawful firearms. Petitioner said he had only flintlock or other antique weapons (not forbidden by law) and owned no conventional firearms. Federal law, the agent told him, forbade his possession of firearms and was not superseded by state law. In December 1993, agents executed a search warrant at petitioner's house, seizing six rifles and shotguns and 6,823 rounds of ammunition.

A federal jury convicted petitioner of four counts of possessing a firearm or ammunition after having been convicted of a serious offense. See 18 U. S. C. § 922(g)(1). The District Court enhanced his sentence because he was at least a three-time violent felon, based on his one California and three Massachusetts convictions. See § 924(e). Petitioner claimed the court should not have counted his Massachusetts convictions because his civil rights had been restored by operation of Massachusetts law. Massachusetts law allowed petitioner to possess rifles or shotguns, as he had the necessary firearm permit and his felony convictions were more than five years old. Mass. Gen. Laws §§ 140:123, 140:129B, 140:129C (1996). The law forbade him to possess handguns outside his home or business. See §§ 140:121, 140:131, 269:10.

At first, the District Court rejected the claim that Massachusetts had restored petitioner's civil rights. It held civil rights had to be restored by an offender-specific action rather than by operation of law. The First Circuit disagreed, vacating the sentence and remanding the case. *United States* v. *Caron*, 77 F. 3d 1, 2, 6 (1996) (en banc). We denied certiorari. 518 U. S. 1027 (1996). On remand, the District Court, interpreting the unless clause of the federal statute, disregarded the Massachusetts convictions.

It ruled Massachusetts law did not forbid petitioner's possession of firearms because he could possess rifles. 941 F. Supp. 238, 251–254 (Mass. 1996). Though Massachusetts restricted petitioner's right to carry a handgun, the District Court considered the restriction irrelevant because his case involved rifles and shotguns. See *ibid.* The First Circuit reversed, counting the convictions because petitioner remained subject to significant firearms restrictions. We granted certiorari. 522 U. S. 1038 (1998).

II

A federal statute forbids possession of firearms by those convicted of serious offenses. An abbreviated version of the statute is as follows:

> "It shall be unlawful for any person—
>
> "(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . . . .
>
> "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U. S. C. § 922(g).

Three-time violent felons who violate § 922(g) face enhanced sentences of at least 15 years' imprisonment. § 924(e)(1). "Violent felony" is defined to include burglary and other crimes creating a serious risk of physical injury. § 924(e)(2)(B)(ii). This term includes petitioner's previous offenses discussed above.

Not all violent felony convictions, however, count for purposes of § 922(g) or § 924(e). Until 1986, federal law alone determined whether a state conviction counted, regardless of whether the State had expunged the conviction.

Dickerson v. *New Banner Institute, Inc.*, 460 U. S. 103, 119–122 (1983). Congress modified this aspect of *Dickerson* by adopting the following language:

> "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." § 921(a)(20).

The first sentence and the first clause of the second sentence define convictions, pardons, expungements, and restorations of civil rights by reference to the law of the convicting jurisdiction. See *Beecham* v. *United States*, 511 U. S. 368, 371 (1994).

Aside from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights. As for the unless clause, state law permits him to possess rifles and shotguns but forbids him to possess handguns outside his home or business. The question presented is whether the handgun restriction activates the unless clause, making the convictions count under federal law.

We note these preliminary points. First, Massachusetts restored petitioner's civil rights by operation of law rather than by pardon or the like. This fact makes no difference. Nothing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights to this particular offender. While the term "pardon" connotes a case-by-case determination, "restoration of civil rights" does not. Massachusetts has chosen a broad rule to govern this situation, and federal law gives effect to its rule. All Courts of Appeals to ad-

dress the point agree. See *Caron*, 77 F. 3d, at 2; *McGrath* v. *United States*, 60 F. 3d 1005, 1008 (CA2 1995), cert. denied, 516 U. S. 1121 (1996); *United States* v. *Hall*, 20 F. 3d 1066, 1068–1069 (CA10 1994); *United States* v. *Glaser*, 14 F. 3d 1213, 1218 (CA7 1994); *United States* v. *Thomas*, 991 F. 2d 206, 212–213 (CA5), cert. denied, 510 U. S. 1014 (1993); *United States* v. *Dahms*, 938 F. 2d 131, 133–134 (CA9 1991); *United States* v. *Essick*, 935 F. 2d 28, 30–31 (CA4 1991); *United States* v. *Cassidy*, 899 F. 2d 543, 550, and n. 14 (CA6 1990).

Second, the District Court ruled, and petitioner urges here, that the unless clause allows an offender to possess what state law permits him to possess, and nothing more. Here, petitioner's shotguns and rifles were permitted by state law, so, under their theory, the weapons would not be covered by the unless clause. While we do not dispute the common sense of this approach, the words of the statute do not permit it. The unless clause is activated if a restoration of civil rights "expressly provides that the person may not . . . possess . . . firearms." 18 U. S. C. § 921(a)(20). Either the restorations forbade possession of "firearms" and the convictions count for all purposes, or they did not and the convictions count not at all. The unless clause looks to the terms of the past restorations alone and does not refer to the weapons at issue in the present case. So if the Massachusetts convictions count for some purposes, they count for all and bar possession of all guns.

III

The phrase "may not . . . possess . . . firearms," then, must be interpreted under either of what the parties call the two "all-or-nothing" approaches. Either it applies when the State forbids one or more types of firearms, as the Government contends; or it does not apply if state law permits one or more types of firearms, regardless of the one possessed in the particular case.

Under the Government's approach, a state weapons limitation on an offender activates the uniform federal ban on possessing any firearms at all. This is so even if the guns the offender possessed were ones the State permitted him to have. The State has singled out the offender as more dangerous than law-abiding citizens, and federal law uses this determination to impose its own broader stricture.

Although either reading creates incongruities, petitioner's approach yields results contrary to a likely, and rational, congressional policy. If permission to possess one firearm entailed permission to possess all, then state permission to have a pistol would allow possession of an assault weapon as well. Under this view, if petitioner, in violation of state law, had possessed a handgun, the unless clause would still not apply because he could have possessed a rifle. Not only would this strange result be inconsistent with any conceivable federal policy, but it also would arise often enough to impair the working of the federal statute. Massachusetts, in this case, and some 15 other States choose to restore civil rights while restricting firearm rights in part. The permissive reading would make these partial restrictions a nullity under federal law, indeed in the egregious cases with the most dangerous weapons. Congress cannot have intended this bizarre result.

Under petitioner's all-or-nothing argument, federal law would forbid only a subset of activities already criminal under state law. This limitation would contradict the intent of Congress. In Congress' view, existing state laws "provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." *Dickerson,* 460 U. S., at 120. Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by States. See *id.*, at 119. If federal law is to provide the missing "positive assurance," it must reach primary conduct not covered by state law. The need

for this caution is borne out by petitioner's rifle attack on the Miller family, in which petitioner used a gun permitted by state law. Any other result would reduce federal law to a sentence enhancement for some state-law violations, a result inconsistent with the congressional intent we recognized in *Dickerson*. Permission to possess one gun cannot mean permission to possess all.

Congress responded to our ruling in *Dickerson* by providing that the law of the State of conviction, not federal law, determines the restoration of civil rights as a rule. While state law is the source of law for restorations of other civil rights, however, it does not follow that state law also controls the unless clause. Under the Government's approach, with which we agree, the federal policy still governs the interpretation of the unless clause. We see nothing contradictory in this analysis. Restoration of the right to vote, the right to hold office, and the right to sit on a jury turns on so many complexities and nuances that state law is the most convenient source for definition. As to the possession of weapons, however, the Federal Government has an interest in a single, national, protective policy, broader than required by state law. Petitioner's approach would undermine this protective purpose.

As a final matter, petitioner says his reading is required by the rule of lenity, but his argument is unavailing. The rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose. See *United States* v. *Shabani*, 513 U. S. 10, 17 (1994) (requiring use of traditional tools of statutory construction to resolve ambiguities before resorting to the rule of lenity). For the reasons we have explained, petitioner's reading is not plausible enough to satisfy this condition.

In sum, Massachusetts treats petitioner as too dangerous to trust with handguns, though it accords this right to

law-abiding citizens. Federal law uses this state finding of dangerousness in forbidding petitioner to have any guns. The judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE SOUTER join, dissenting.

The only limitation that Massachusetts law imposed on petitioner's possession of firearms was that he could not carry handguns outside his home or business. See *ante*, at 311. In my view, Massachusetts law did not "expressly provid[e]" that petitioner "may not . . . possess . . . firearms," 18 U. S. C. § 921(a)(20), and thus petitioner cannot be sentenced as an armed career criminal under § 924(e). Because the Court holds to the contrary, I respectfully dissent.

Petitioner's prior Massachusetts convictions qualify as violent felonies for purposes of § 924(e) only if the "restoration of [his] civil rights" by operation of Massachusetts law "expressly provide[d] that [petitioner] may not . . . possess . . . firearms." § 921(a)(20). In 1994, Massachusetts law did not expressly provide that petitioner could not possess firearms. To the contrary: Petitioner was permitted by Massachusetts law to possess shotguns, rifles, and handguns. See *ante*, at 311; Mass. Gen. Laws §§ 140:123, 140:129B, 140:129C (1996). Indeed, Massachusetts provided petitioner with a firearm identification card that enabled him to possess such firearms.* The only restriction Massachusetts law placed on petitioner's possession of firearms was that he could not carry handguns outside his home or business. See § 269:10(A). By prohibiting petitioner from pos-

*Petitioner was "entitled to" a firearm identification card five years after his release from prison. See Mass. Gen. Laws § 140:129B (1996); see also *Commonwealth* v. *Landry*, 6 Mass. App. 404, 406, 376 N. E. 2d 1243, 1245 (1978) (firearm identification card can be obtained as a "matter of right").

sessing only certain firearms (handguns) in only certain places (outside his home or office), Massachusetts law did not expressly provide that petitioner could not possess firearms.

The plain meaning of § 921(a)(20) thus resolves this case. The Court, however, rejects this plain meaning on the basis of "a likely, and rational, congressional policy" of prohibiting firearms possession by all ex-felons whose ability to possess certain firearms is in any way restricted by state law. *Ante*, at 315. According to the Court, Congress could not have intended the "bizarre result" that a conviction would not count as a violent felony if a State only partially restricts the possession of firearms by the ex-felon. But this would not be a bizarre result at all. Under § 921(a)(20), state-law limitations on firearms possession are only relevant once it has been established that an ex-felon's other civil rights, such as the right to vote, the right to seek and to hold public office, and the right to serve on a jury, have been restored. See 77 F. 3d 1, 2 (CA1 1996). In restoring those rights, the State has presumably deemed such ex-felons worthy of participating in civic life. Once a State makes such a decision, it is entirely rational (and certainly not bizarre) for Congress to authorize the increased sentences in § 924(e) only when the State additionally prohibits those ex-felons from possessing firearms altogether.

Moreover, as the Court concedes, its own interpretation creates "incongruities." *Ante*, at 315. Under the statute, whether a prior state conviction qualifies as a violent felony conviction under § 924(e) turns entirely on state law. Given the primacy of state law in the statutory scheme, it is bizarre to hold that the *legal* possession of firearms under state law subjects a person to a sentence enhancement under federal law. That, however, is precisely the conclusion the Court reaches in this case. It is simply not true, as the Court reasons, that federal law "must reach primary conduct not covered by state law." *Ibid.* It is entirely plausible that Congress simply intended to create stiffer penalties for

weapons possessions that are already illegal under state law. And such a purpose is consistent with the statutory direction that state law controls what constitutes a conviction for a violent felony.

I believe that the plain meaning of the statute is that Massachusetts did not "expressly provid[e]" that petitioner "may not . . . possess . . . firearms." At the very least, this interpretation is a plausible one. Indeed, both the Government and the Court concede as much. See Brief for United States 16 ("grammatically possible" to read statute to say that its condition is not satisfied if the State does permit its felons to possess some firearms); *ante*, at 316 (this "reading is not plausible enough"). Accordingly, it is far from clear under the statute that a prior state conviction counts as a violent felony conviction for purposes of § 924(e) just because the State imposes some restriction, no matter how slight, on firearms possession by ex-felons. The rule of lenity must therefore apply: "[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U. S. 169, 178 (1958). Ex-felons cannot be expected to realize that a federal statute that explicitly relies on state law prohibits behavior that state law allows.

The Court rejects the rule of lenity in this case because it thinks the purported statutory ambiguity rests on a "grammatical possibility" and "an implausible reading of the congressional purpose." *Ante*, at 316. But the alleged ambiguity does not result from a mere grammatical possibility; it exists because of an interpretation that, for the reasons I have described, both accords with a natural reading of the statutory language and is consistent with the statutory purpose.

The plain meaning of § 921(a)(20) is that Massachusetts law did not "expressly provid[e] that [petitioner] may not . . .

possess . . . firearms." This interpretation is, at the very least, a plausible one, and the rule of lenity must apply. I would therefore reverse the judgment below.

Syllabus

UNITED STATES *v.* BAJAKAJIAN

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

No. 96–1487. Argued November 4, 1997—Decided June 22, 1998

After customs inspectors found respondent and his family preparing to board an international flight carrying $357,144, he was charged with, *inter alia*, attempting to leave the United States without reporting, as required by 31 U. S. C. § 5316(a)(1)(A), that he was transporting more than $10,000 in currency. The Government also sought forfeiture of the $357,144 under 18 U. S. C. § 982(a)(1), which provides that a person convicted of willfully violating § 5316 shall forfeit "any property . . . involved in such an offense." Respondent pleaded guilty to the failure to report and elected to have a bench trial on the forfeiture. The District Court found, among other things, that the entire $357,144 was subject to forfeiture because it was "involved in" the offense, that the funds were not connected to any other crime, and that respondent was transporting the money to repay a lawful debt. Concluding that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of $15,000, in addition to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines. The Ninth Circuit affirmed, holding that a forfeiture must fulfill two conditions to satisfy the Clause: The property forfeited must be an "instrumentality" of the crime committed, and the property's value must be proportional to its owner's culpability. The court determined that respondent's currency was not an "instrumentality" of the crime of failure to report, which involves the withholding of information rather than the possession or transportation of money; that, therefore, § 982(a)(1) could never satisfy the Clause in a currency forfeiture case; that it was unnecessary to apply the "proportionality" prong of the test; and that the Clause did not permit forfeiture of *any* of the unreported currency, but that the court lacked jurisdiction to set the $15,000 forfeiture aside because respondent had not cross-appealed to challenge it.

Held: Full forfeiture of respondent's $357,144 would violate the Excessive Fines Clause. Pp. 327–344.

(a) The forfeiture at issue is a "fine" within the meaning of the Clause, which provides that "excessive fines [shall not be] imposed." The Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense. *Austin* v. *United*

Syllabus

States, 509 U. S. 602, 609–610. Forfeitures—payments in kind—are thus "fines" if they constitute punishment for an offense. Section 982(a)(1) currency forfeitures do so. The statute directs a court to order forfeiture as an additional sanction when "imposing sentence on a person convicted of" a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency. Cf. *id.*, at 619. The Court rejects the Government's argument that such forfeitures serve important remedial purposes—by deterring illicit movements of cash and giving the Government valuable information to investigate and detect criminal activities associated with that cash—because the asserted loss of information here would not be remedied by confiscation of respondent's $357,144. The Government's argument that the § 982(a)(1) forfeiture is constitutional because it falls within a class of historic forfeitures of property tainted by crime is also rejected. In so arguing, the Government relies upon a series of cases involving traditional civil *in rem* forfeitures that are inapposite because such forfeitures were historically considered nonpunitive. See, *e. g.*, *The Palmyra*, 12 Wheat. 1, 14–15. Section 982(a)(1) descends from a different historical tradition: that of *in personam* criminal forfeitures. Similarly, the Court declines to accept the Government's contention that the forfeiture here is constitutional because it involves an "instrumentality" of respondent's crime. Because instrumentalities historically have been treated as a form of "guilty property" forfeitable in civil *in rem* proceedings, it is irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for its excessiveness involves solely a proportionality determination. Pp. 327–334.

(b) A punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish. Although the proportionality principle has always been the touchstone of the inquiry, see, *e. g.*, *Austin*, *supra*, at 622–623, the Clause's text and history provide little guidance as to how disproportional a forfeiture must be to be "excessive." Until today, the Court has not articulated a governing standard. In deriving the standard, the Court finds two considerations particularly relevant. The first, previously emphasized in cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment belong in the first instance to the legislature. See, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277, 290. The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Because both considerations counsel against requiring strict

proportionality, the Court adopts the gross disproportionality standard articulated in, *e. g., id.,* at 288. Pp. 334–337.

(c) The forfeiture of respondent's entire $357,144 would be grossly disproportional to the gravity of his offense. His crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it. And because § 982(a)(1) orders currency forfeited for a "willful" reporting violation, the essence of the crime is a willful failure to report. Furthermore, the District Court found his violation to be unrelated to any other illegal activities. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: money launderers, drug traffickers, and tax evaders. And the maximum penalties that could have been imposed under the Sentencing Guidelines, a 6-month sentence and a $5,000 fine, confirm a minimal level of culpability and are dwarfed by the $357,144 forfeiture sought by the Government. The harm that respondent caused was also minimal. The failure to report affected only the Government, and in a relatively minor way. There was no fraud on the Government and no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country. Thus, there is no articulable correlation between the $357,144 and any Government injury. Pp. 337–340.

(d) The Court rejects the contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress, at roughly the same time the Eighth Amendment was ratified, enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. The early customs statutes do not support the Government's assertion because, unlike § 982(a)(1), the type of forfeiture they imposed was not considered punishment for a criminal offense, but rather was civil *in rem* forfeiture, in which the Government proceeded against the "guilty" property itself. See, *e. g., Harford* v. *United States,* 8 Cranch 109. Similarly, the early statutes imposing monetary "forfeitures" proportioned to the value of the goods involved were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from evasion of customs duties. See, *e. g., Stockwell* v. *United States,* 13 Wall. 531, 546–547. Pp. 340–344.

84 F. 3d 334, affirmed.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting

opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post,* p. 344.

Irving L. Gornstein argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger, Acting Solicitor General Waxman, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *Kathleen A. Felton.*

James E. Blatt argued the cause and filed a brief for respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

Respondent Hosep Bajakajian attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Federal law also provides that a person convicted of willfully violating this reporting requirement shall forfeit to the Government "any property . . . involved in such offense." 18 U. S. C. § 982(a)(1). The question in this case is whether forfeiture of the entire $357,144 that respondent failed to declare would violate the Excessive Fines Clause of the Eighth Amendment. We hold that it would, because full forfeiture of respondent's currency would be grossly disproportional to the gravity of his offense.

I

On June 9, 1994, respondent, his wife, and his two daughters were waiting at Los Angeles International Airport to board a flight to Italy; their final destination was Cyprus. Using dogs trained to detect currency by its smell, customs inspectors discovered some $230,000 in cash in the Bajakajians' checked baggage. A customs inspector approached respondent and his wife and told them that they were required to report all money in excess of $10,000 in their possession or in their baggage. Respondent said that he had $8,000 and

**Ronald D. Maines* filed a brief for the Clarendon Foundation as *amicus curiae* urging affirmance.

that his wife had another $7,000, but that the family had no additional currency to declare. A search of their carry-on bags, purse, and wallet revealed more cash; in all, customs inspectors found $357,144. The currency was seized and respondent was taken into custody.

A federal grand jury indicted respondent on three counts. Count One charged him with failing to report, as required by 31 U. S. C. § 5316(a)(1)(A),[1] that he was transporting more than $10,000 outside the United States, and with doing so "willfully," in violation of § 5322(a).[2] Count Two charged him with making a false material statement to the United States Customs Service, in violation of 18 U. S. C. § 1001. Count Three sought forfeiture of the $357,144 pursuant to 18 U. S. C. § 982(a)(1), which provides:

> "The court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316, . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U. S. C. § 982(a)(1).

Respondent pleaded guilty to the failure to report in Count One; the Government agreed to dismiss the false statement charge in Count Two; and respondent elected to have a bench trial on the forfeiture in Count Three. After the bench trial, the District Court found that the entire $357,144 was subject to forfeiture because it was "involved

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[1] The statutory reporting requirement provides:

"[A] person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly—

"(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

"(A) from a place in the United States to or through a place outside the United States . . . ." 31 U. S. C. § 5316(a).

[2] Section 5322(a) provides: "A person willfully violating this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both."

in" the offense. *Ibid.* The court also found that the funds were not connected to any other crime and that respondent was transporting the money to repay a lawful debt. Tr. 61–62 (Jan. 19, 1995). The District Court further found that respondent had failed to report that he was taking the currency out of the United States because of fear stemming from "cultural differences": Respondent, who had grown up as a member of the Armenian minority in Syria, had a "distrust for the Government." *Id.*, at 63; see Tr. of Oral Arg. 30.

Although § 982(a)(1) directs sentencing courts to impose full forfeiture, the District Court concluded that such forfeiture would be "extraordinarily harsh" and "grossly disproportionate to the offense in question," and that it would therefore violate the Excessive Fines Clause. Tr. 63. The court instead ordered forfeiture of $15,000, in addition to a sentence of three years of probation and a fine of $5,000—the maximum fine under the Sentencing Guidelines—because the court believed that the maximum Guidelines fine was "too little" and that a $15,000 forfeiture would "make up for what I think a reasonable fine should be." *Ibid.*

The United States appealed, seeking full forfeiture of respondent's currency as provided in § 982(a)(1). The Court of Appeals for the Ninth Circuit affirmed. 84 F. 3d 334 (1996). Applying Circuit precedent, the court held that, to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: The property forfeited must be an "instrumentality" of the crime committed, and the value of the property must be proportional to the culpability of the owner. *Id.*, at 336 (citing *United States* v. *Real Property Located in El Dorado County*, 59 F. 3d 974, 982 (CA9 1995)). A majority of the panel determined that the currency was not an "instrumentality" of the crime of failure to report because "'[t]he crime [in a currency reporting offense] is the withholding of information, . . . not the possession or the transportation of the money.'" 84 F. 3d, at 337 (quoting *United States* v. *$69,292*

in United States Currency, 62 F. 3d 1161, 1167 (CA9 1995)). The majority therefore held that § 982(a)(1) could never satisfy the Excessive Fines Clause in cases involving forfeitures of currency and that it was unnecessary to apply the "proportionality" prong of the test. Although the panel majority concluded that the Excessive Fines Clause did not permit forfeiture of *any* of the unreported currency, it held that it lacked jurisdiction to set the $15,000 forfeiture aside because respondent had not cross-appealed to challenge that forfeiture. 84 F. 3d, at 338.

Judge Wallace concurred in the result. He viewed respondent's currency as an instrumentality of the crime because "without the currency, there can be no offense," *id.*, at 339, and he criticized the majority for "strik[ing] down a portion of" the statute, *id.*, at 338. He nonetheless agreed that full forfeiture would violate the Excessive Fines Clause in respondent's case, based upon the "proportionality" prong of the Ninth Circuit test. Finding no clear error in the District Court's factual findings, he concluded that the reduced forfeiture of $15,000 was proportional to respondent's culpability. *Id.*, at 339–340.

Because the Court of Appeals' holding—that the forfeiture ordered by § 982(a)(1) was *per se* unconstitutional in cases of currency forfeiture—invalidated a portion of an Act of Congress, we granted certiorari. 520 U. S. 1239 (1997).

II

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amdt. 8. This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal*,

Inc., 492 U. S. 257, 265 (1989). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " *Austin* v. *United States*, 509 U. S. 602, 609–610 (1993) (emphasis deleted). Forfeitures—payments in kind—are thus "fines" if they constitute punishment for an offense.

We have little trouble concluding that the forfeiture of currency ordered by § 982(a)(1) constitutes punishment. The statute directs a court to order forfeiture as an additional sanction when "imposing sentence on a person convicted of" a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation.[3] Cf. *id.*, at 619 (holding forfeiture to be a "fine" in part because the forfeiture statute "expressly provide[d] an 'innocent owner' defense" and thus "look[ed] . . . like punishment").

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[3] Although the currency reporting statute provides that "a person or an agent or bailee of the person shall file a report," 31 U. S. C. § 5316(a), the statute ordering the criminal forfeiture of unreported currency provides that "[t]he court, in imposing sentence on a person convicted of" failure to file the required report, "shall order that the person forfeit to the United States" any property "involved in" or "traceable to" the offense, 18 U. S. C. § 982(a)(1). The combined effect of these two statutes is that an owner of unreported currency is not subject to criminal forfeiture if his agent or bailee is the one who fails to file the required report, because such an owner could not be convicted of the reporting offense. The United States endorsed this interpretation at oral argument in this case. See Tr. of Oral Arg. 24–25.

For this reason, the dissent's speculation about the effect of today's holding on "kingpins" and "cash couriers" is misplaced. See *post*, at 352, 354. Section 982(a)(1)'s criminal *in personam* forfeiture reaches only currency owned by someone who himself commits a reporting crime. It is unlikely that the Government, in the course of criminally indicting and prosecuting a cash courier, would not bother to investigate the source and true ownership of unreported funds.

The United States argues, however, that the forfeiture of currency under § 982(a)(1) "also serves important remedial purposes." Brief for United States 20. The Government asserts that it has "an overriding sovereign interest in controlling what property leaves and enters the country." *Ibid.* It claims that full forfeiture of unreported currency supports that interest by serving to "dete[r] illicit movements of cash" and aiding in providing the Government with "valuable information to investigate and detect criminal activities associated with that cash." *Id.*, at 21. Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. See Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity"); *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232 (1972) *(per curiam)* (monetary penalty provides "a reasonable form of liquidated damages," *id.*, at 237, to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144.[4]

The United States also argues that the forfeiture mandated by § 982(a)(1) is constitutional because it falls within a class of historic forfeitures of property tainted by crime. See Brief for United States 16 (citing, *inter alia*, *The Pal-*

[4] We do not suggest that merely because the forfeiture of respondent's currency in this case would not serve a remedial purpose, other forfeitures may be classified as nonpunitive (and thus not "fines") if they serve some remedial purpose as well as being punishment for an offense. Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part. (The Government concedes as much.) This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause. See *Austin* v. *United States,* 509 U. S. 602, 621–622 (1993).

myra, 12 Wheat. 1, 13 (1827) (forfeiture of ship); *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 400–401 (1878) (forfeiture of distillery)). In so doing, the Government relies upon a series of cases involving traditional civil *in rem* forfeitures that are inapposite because such forfeitures were historically considered nonpunitive.

The theory behind such forfeitures was the fiction that the action was directed against "guilty property," rather than against the offender himself.[5] See, *e. g.*, *Various Items of Personal Property* v. *United States*, 282 U. S. 577, 581 (1931) ("[I]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"); see also R. Waples, Proceedings In Rem 13, 205–209 (1882). Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See, *e. g.*, *Origet* v. *United States*, 125 U. S. 240, 246 (1888) ("[T]he merchandise is to be forfeited irrespective of any criminal prosecution. . . . The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). As Justice Story explained:

> "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or

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[5] The "guilty property" theory behind *in rem* forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense. See Exodus 21:28. In medieval Europe and at common law, this concept evolved into the law of deodand, in which offending property was condemned and confiscated by the church or the Crown in remediation for the harm it had caused. See 1 M. Hale, Pleas of the Crown 420–424 (1st Am. ed. 1847); 1 W. Blackstone, Commentaries on the Laws of England 290–292 (1765); O. Holmes, The Common Law 10–13, 23–27 (M. Howe ed. 1963).

> *malum in se*. . . . [T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 12 Wheat., at 14–15.

Traditional *in rem* forfeitures were thus not considered punishment against the individual for an offense. See *id.*, at 14; *Dobbins's Distillery* v. *United States*, *supra*, at 401; *Van Oster* v. *Kansas*, 272 U. S. 465, 467–468 (1926); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 683–684 (1974); *Taylor* v. *United States*, 3 How. 197, 210 (1845) (opinion of Story, J.) (laws providing for *in rem* forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called, remedial"); see also *United States* v. *Ursery*, 518 U. S. 267, 293 (1996) (KENNEDY, J., concurring) ("[C]ivil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense"). Because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause. Recognizing the nonpunitive character of such proceedings, we have held that the Double Jeopardy Clause does not bar the institution of a civil, *in rem* forfeiture action after the criminal conviction of the defendant. See *id.*, at 278.[6]

The forfeiture in this case does not bear any of the hallmarks of traditional civil *in rem* forfeitures. The Govern-

[6] It does not follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause. Because some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture is a "fine" for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*. See *Austin* v. *United States*, *supra*, at 621–622 (although labeled *in rem*, civil forfeiture of real property used "to facilitate" the commission of drug crimes was punitive in part and thus subject to review under the Excessive Fines Clause).

ment has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners.

Section 982(a)(1) thus descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. See W. McKechnie, Magna Carta 337–339 (2d ed. 1958); 2 F. Pollock & F. Maitland, The History of English Law 460–466 (2d ed. 1909). Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were rejected altogether in the laws of this country until very recently.[7]

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[7] The First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes, see Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate"), and Congress reenacted this ban several times over the course of two centuries. See Rev. Stat. § 5326 (1875); Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1159; Act of June 25, 1948, ch. 645, § 3563, 62 Stat. 837, codified at 18 U. S. C. § 3563 (1982 ed.); repealed effective Nov. 1, 1987, Pub. L. 98–473, 98 Stat. 1987.

It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking. See Organized Crime Control Act of 1970, 18 U. S. C. § 1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848(a). In providing for this mode of punishment, which had long been unused in this country, the Senate Judiciary Committee acknowledged that "criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 91–617, p. 79 (1969). Indeed, it was not until 1992 that Congress provided for the criminal forfeiture of currency at issue here. See 18 U. S. C. § 982(a).

The Government specifically contends that the forfeiture of respondent's currency is constitutional because it involves an "instrumentality" of respondent's crime.[8] According to the Government, the unreported cash is an instrumentality because it "does not merely facilitate a violation of law," but is "'the very *sine qua non* of the crime.'" Brief for United States 20 (quoting *United States* v. *United States Currency in the Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars*, 18 F. 3d 73, 75 (CA2), cert. denied *sub nom. Etim* v. *United States*, 513 U. S. 815 (1994)). The Government reasons that "there would be no violation at all without the exportation (or attempted exportation) of the cash." Brief for United States 20.

Acceptance of the Government's argument would require us to expand the traditional understanding of instrumentality forfeitures. This we decline to do. Instrumentalities historically have been treated as a form of "guilty property" that can be forfeited in civil *in rem* proceedings. In this case, however, the Government has sought to punish respondent by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for

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[8] Although the term "instrumentality" is of recent vintage, see *Austin* v. *United States*, 509 U. S., at 627–628 (SCALIA, J., concurring in part and concurring in judgment), it fairly characterizes property that historically was subject to forfeiture because it was the actual means by which an offense was committed. See *infra* this page; see, *e. g., J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505, 508–510 (1921). "Instrumentality" forfeitures have historically been limited to the property actually used to commit an offense and no more. See *Austin* v. *United States*, *supra*, at 627–628 (SCALIA, J., concurring in part and concurring in judgment). A forfeiture that reaches beyond this strict historical limitation is *ipso facto* punitive and therefore subject to review under the Excessive Fines Clause.

the excessiveness of a punitive forfeiture involves solely a proportionality determination. See *infra* this page and 335–337.[9]

III

Because the forfeiture of respondent's currency constitutes punishment and is thus a "fine" within the meaning of the Excessive Fines Clause, we now turn to the question whether it is "excessive."

A

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. See *Austin* v. *United States*, 509 U. S., at 622–623 (noting Court of Appeals' statement that "'the government is exacting too high a penalty in relation to the offense committed'"); *Alexander* v. *United States*, 509 U. S. 544, 559 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was 'excessive' must be considered"). Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.

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[9] The currency in question is not an instrumentality in any event. The Court of Appeals reasoned that the existence of the currency as a "precondition" to the reporting requirement did not make it an "instrumentality" of the offense. See 84 F. 3d 334, 337 (CA9 1996). We agree; the currency is merely the subject of the crime of failure to report. Cash in a suitcase does not facilitate the commission of that crime as, for example, an automobile facilitates the transportation of goods concealed to avoid taxes. See, *e. g., J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, *supra*, at 508. In the latter instance, the property is the actual means by which the criminal act is committed. See Black's Law Dictionary 801 (6th ed. 1990) ("Instrumentality" is "[s]omething by which an end is achieved; a means, medium, agency").

The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive." Excessive means surpassing the usual, the proper, or a normal measure of proportion. See 1 N. Webster, American Dictionary of the English Language (1828) (defining excessive as "beyond the common measure or proportion"); S. Johnson, A Dictionary of the English Language 680 (4th ed. 1773) ("[b]eyond the common proportion"). The constitutional question that we address, however, is just how proportional to a criminal offense a fine must be, and the text of the Excessive Fines Clause does not answer it.

Nor does its history. The Clause was little discussed in the First Congress and the debates over the ratification of the Bill of Rights. As we have previously noted, the Clause was taken verbatim from the English Bill of Rights of 1689. See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S., at 266–267. That document's prohibition against excessive fines was a reaction to the abuses of the King's judges during the reigns of the Stuarts, *id.*, at 267, but the fines that those judges imposed were described contemporaneously only in the most general terms. See *Earl of Devonshire's Case*, 11 State Tr. 1367, 1372 (H. L. 1689) (fine of £30,000 "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land"). Similarly, Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:

> "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his

> merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage." Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6–7 (1762 ed.).

None of these sources suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive.

We must therefore rely on other considerations in deriving a constitutional excessiveness standard, and there are two that we find particularly relevant. The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature. See, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"); see also *Gore* v. *United States*, 357 U. S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy"). The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents. See, *e. g.*, *Solem* v. *Helm*, *supra*, at 288; *Rummel* v. *Estelle*, 445 U. S. 263, 271 (1980).

In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*,[10] must compare the amount

[10] At oral argument, respondent urged that a district court's determination of excessiveness should be reviewed by an appellate court for abuse of discretion. See Tr. of Oral Arg. 32. We cannot accept this submission. The factual findings made by the district courts in conducting the exces-

of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

B

Under this standard, the forfeiture of respondent's entire $357,144 would violate the Excessive Fines Clause.[11] Respondent's crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it. Section 982(a)(1) orders currency to be forfeited for a "willful" violation of the reporting requirement. Thus, the essence of respondent's crime is a willful failure to report the removal of currency from the United States.[12] Furthermore, as the District Court found, re-

siveness inquiry, of course, must be accepted unless clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–575 (1985). But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate. See *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996).

[11] The only question before this Court is whether the full forfeiture of respondent's $357,144 as directed by § 982(a)(1) is constitutional under the Excessive Fines Clause. We hold that it is not. The Government petitioned for certiorari seeking full forfeiture, and we reject that request. Our holding that full forfeiture would be excessive reflects no judgment that "a forfeiture of even $15,001 would have suffered from a gross disproportion," nor does it "affir[m] the reduced $15,000 forfeiture on *de novo* review." *Post*, at 349. Those issues are simply not before us. Nor, indeed, do we address in *any* respect the validity of the forfeiture ordered by the District Court, including whether a court may disregard the terms of a statute that commands full forfeiture: As noted, *supra*, at 327, respondent did not cross-appeal the $15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the $15,000 forfeiture, and that question is not properly presented here either.

[12] Contrary to the dissent's contention, the nature of the nonreporting offense in this case was not altered by respondent's "lies" or by the "suspicious circumstances" surrounding his transportation of his currency. See *post*, at 352–353. A single willful failure to declare the currency constitutes the crime, the gravity of which is not exacerbated or mitigated by

spondent's violation was unrelated to any other illegal activities. The money was the proceeds of legal activity and was to be used to repay a lawful debt. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader.[13] See Brief for United States 2–3. And under the Sentencing Guidelines, the maximum sentence that could have been imposed on respondent was six months, while the maximum fine was $5,000. App. to Pet. for Cert. 17a (transcript of District Court sentencing hearing); United States Sentencing Commission, Guidelines Manual § 5(e)1.2, Sentencing Table

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"fable[s]" that respondent told one month, or six months, later. See *post*, at 352. The Government indicted respondent under 18 U. S. C. § 1001 for "lying," but that separate count did not form the basis of the nonreporting offense for which § 982(a)(1) orders forfeiture.

Further, the District Court's finding that respondent's lies stemmed from a fear of the Government because of "cultural differences," *supra*, at 326, does not mitigate the gravity of his offense. We reject the dissent's contention that this finding was a "patronizing excuse" that "demeans millions of law-abiding American immigrants by suggesting they cannot be expected to be as truthful as every other citizen." *Post*, at 353. We are confident that the District Court concurred in the dissent's incontrovertible proposition that "[e]ach American, regardless of culture or ethnicity, is equal before the law." *Ibid.* The District Court did nothing whatsoever to imply that "cultural differences" excuse lying, but rather made this finding in the context of establishing that respondent's willful failure to report the currency was unrelated to any other crime—a finding highly relevant to the determination of the gravity of respondent's offense. The dissent's charge of ethnic paternalism on the part of the District Court finds no support in the record, nor is there any indication that the District Court's factual finding that respondent "distrust[ed] . . . the Government," see *supra*, at 326, was clearly erroneous.

[13] Nor, contrary to the dissent's repeated assertion, see *post*, at 344, 346–351, 354, 356, is respondent a "smuggl[er]." Respondent owed no customs duties to the Government, and it was perfectly legal for him to possess the $357,144 in cash and to remove it from the United States. His crime was simply failing to report the wholly legal act of transporting his currency.

(Nov. 1994). Such penalties confirm a minimal level of culpability.[14]

The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country. The Government and the dissent contend that there is a correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected. See Brief for United States 30 (forfeiture is "perfectly calibrated"); *post*, at 344 ("a fine calibrated with this accuracy"). We disagree. There is no inherent proportionality in such a forfeiture. It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs.

Comparing the gravity of respondent's crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the

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[14] In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence. Here, as the Government and the dissent stress, Congress authorized a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement, and this suggests that it did not view the reporting offense as a trivial one. That the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized, however, undercuts any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed. This disproportion is telling notwithstanding the fact that a separate Guideline provision permits forfeiture if mandated by statute, see *post*, at 350–351. That Guideline, moreover, cannot override the constitutional requirement of proportionality review.

gravity of his offense.[15] It is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government.

C

Finally, we must reject the contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. It is argued that the enactment of these statutes at roughly the same time that the Eighth Amendment was ratified suggests that full forfeiture, in the customs context at least, is a proportional punishment. The early customs statutes, however, do not support such a conclusion because, unlike § 982(a)(1), the type of forfeiture that they imposed was not considered punishment for a criminal offense.

Certain of the early customs statutes required the forfeiture of goods imported in violation of the customs laws, and, in some instances, the vessels carrying them as well. See, *e. g.*, Act of Aug. 4, 1790, § 27, 1 Stat. 163 (goods unladen without a permit from the collector). These forfeitures, however, were civil *in rem* forfeitures, in which the Government proceeded against the property itself on the theory that it was guilty, not against a criminal defendant. See, *e. g.*, *Harford* v. *United States*, 8 Cranch 109 (1814) (goods unladen without a permit); *Locke* v. *United States*, 7 Cranch 339, 340 (1813) (same). Such forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional *in rem* forfeitures, they were not considered at the founding to be punishment for an offense. See *supra*, at 330–331. They therefore indicate

[15] Respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood, see *supra*, at 335–336, and the District Court made no factual findings in this respect.

nothing about the proportionality of the punitive forfeiture at issue here. See *supra*, at 330–332.[16]

Other statutes, however, imposed monetary "forfeitures" proportioned to the value of the goods involved. See, *e. g.*, Act of July 31, 1789, § 22, 1 Stat. 42 (if an importer, "with design to defraud the revenue," did not invoice his goods at their actual cost at the place of export, "all such goods, wares or merchandise, or the value thereof . . . shall be forfeited"); § 25, *id.*, at 43 (any person concealing or purchasing goods, knowing they were liable to seizure for violation of the customs laws, was liable to "forfeit and pay a sum double the value of the goods so concealed or purchased"); see also Act of Aug. 4, 1790, §§ 10, 14, 22, *id.*, at 156, 158, 161. Similar statutes were passed in later Congresses. See, *e. g.*, Act of Mar. 2, 1799, §§ 24, 28, 45, 46, 66, 69, 79, 84, *id.*, at 646, 648, 661, 662, 677, 678, 687, 694; Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781.

These "forfeitures" were similarly not considered punishments for criminal offenses. This Court so recognized in *Stockwell* v. *United States*, 13 Wall. 531 (1871), a case interpreting a statute that, like the Act of July 31, 1789, provided that a person who had concealed goods liable to seizure for customs violations should "forfeit and pay a sum double the amount or value of the goods." Act of Mar. 3, 1823, ch. 58, § 2, 3 Stat. 781–782. The *Stockwell* Court rejected the de-

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[16] The nonpunitive nature of these early forfeitures was not lost on the Department of Justice, in commenting on the punitive forfeiture provisions of the Organized Crime Control Act of 1970:

"'The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, *and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics, and revenue laws.*'" S. Rep. No. 91–617, p. 79 (1969) (emphasis added).

fendant's contention that this provision was "penal," stating instead that it was "fully as remedial in its character, designed as plainly to secure [the] rights [of the Government], as are the statutes rendering importers liable to duties." 13 Wall., at 546. The Court reasoned:

> "When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes on the importer the obligation to pay the legal charges. Besides this the goods themselves, if the duties be not paid, are subject to seizure . . . . Every act, therefore, which interferes with the right of the government to seize and appropriate the property which has been forfeited to it . . . is a wrong to property rights, and is a fit subject for indemnity." *Ibid.*

Significantly, the fact that the forfeiture was a multiple of the value of the goods did not alter the Court's conclusion:

> "The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value . . . . Double the value may not be more than complete indemnity." *Id.*, at 546–547.

The early monetary forfeitures, therefore, were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties.[17] They

[17] In each of the statutes from the early Congresses cited by the dissent, the activities giving rise to the monetary forfeitures, if undetected, were likely to cause the Government losses in customs revenue. The forfeiture imposed by the Acts of Aug. 4, 1790, and Mar. 2, 1799, was not simply for "transferring goods from one ship to another," *post,* at 346, but rather for doing so "before such ship . . . shall come to the proper place for the discharge of her cargo . . . and be there duly authorized by the proper officer or officers of the customs to unlade" the goods, see 1 Stat. 157,

were thus no different in purpose and effect than the *in rem* forfeitures of the goods to whose value they were proportioned.[18] Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U. S., at 237 (customs statute requiring the forfeiture of undeclared goods concealed in baggage and imposing a monetary penalty equal to the value of the goods imposed a "remedial, rather than [a] punitive sanctio[n]").[19] By contrast,

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158, 648, whereupon duties would be assessed. Similarly, the forfeiture imposed by the Act of Mar. 3, 1823, was for failing to deliver the ship's manifest of cargo—which was to list "merchandise subject to duty"—to the collector of customs. See Act of Mar. 2, 1821, § 1, 3 Stat. 616; Act of Mar. 3, 1823, § 1, *id.*, at 781. And the "invoices" that if "false" gave rise to the forfeiture imposed by the Act of Mar. 3, 1863, were to include the value or quantity of any dutiable goods. § 1, 12 Stat. 737–738.

[18] The nonpunitive nature of the monetary forfeitures was also reflected in their procedure: like traditional *in rem* forfeitures, they were brought as civil actions, and as such are distinguishable from the punitive criminal fine at issue here. Instead of instituting an information of libel *in rem* against the goods, see, *e. g.*, *Locke* v. *United States*, 7 Cranch 339 (1813), the Government filed "a civil action of debt" against the person from whom it sought payment. See, *e. g.*, *Stockwell* v. *United States*, 13 Wall. 531, 541–542 (1871). In both England and the United States, an action of debt was used to recover import duties owed the Government, being "the general remedy for the recovery of all sums certain, whether the legal liability arise from contract, or be created by a statute. And the remedy as well lies for the government itself, as for a citizen." *United States* v. *Lyman*, 26 F. Cas. 1024, 1030 (No. 15,647) (CC Mass. 1818) (Story, C. J.). Thus suits for the payment of monetary forfeitures were viewed no differently than suits for the customs duties themselves.

[19] *One Lot Emerald Cut Stones* differs from this case in the most fundamental respect. We concluded that the forfeiture provision in *Emerald Cut Stones* was entirely remedial and thus nonpunitive, primarily because it "provide[d] a reasonable form of liquidated damages" to the Government. 409 U. S., at 237. The additional fact that such a remedial forfeiture also "serves to reimburse the Government for investigation and enforcement expenses," *ibid.;* see *post*, at 346, is essentially meaningless, because even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation. Contrary to the dissent's assertion, this certainly does not mean that the forfeiture in this case—which, as the dissent acknowledges, see *post*, at 344 (respondent's forfeiture is a "fine"); *post*, at 353 (§ 982(a)(1) imposes a

the full forfeiture mandated by § 982(a)(1) in this case serves no remedial purpose; it is clearly punishment. The customs statutes enacted by the First Congress, therefore, in no way suggest that § 982(a)(1)'s currency forfeiture is constitutionally proportional.

* * *

For the foregoing reasons, the full forfeiture of respondent's currency would violate the Excessive Fines Clause. The judgment of the Court of Appeals is

Affirmed.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court's test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful of the separation of powers. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all. This, too, is unsound; and with all respect, I dissent.

I

A

In striking down this forfeiture, the majority treats many fines as "remedial" penalties even though they far exceed the

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"punishment"), is clearly punitive—"would have to [be treated] as nonpunitive," *post,* at 346.

harm suffered. Remedial penalties, the Court holds, are not subject to the Excessive Fines Clause at all. See, *e. g.*, *ante*, at 342. Proceeding from this premise, the majority holds customs fines are remedial and not at all punitive, even if they amount to many times the duties due on the goods. See *ante*, at 341–344. In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment.

This novel, mistaken approach requires reordering a tradition existing long before the Republic and confirmed in its early years. The Court creates its category to reconcile its unprecedented holding with a six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue. *E. g.*, *Cross* v. *United States*, 6 F. Cas. 892 (No. 3,434) (CC Mass. 1812) (Story, J., Cir. J.); *United States* v. *Riley*, 88 F. 480 (SDNY 1898); *United States* v. *Jordan*, 26 F. Cas. 661 (No. 15,498) (Mass. 1876); *In re Vetterlein*, 28 F. Cas. 1172 (No. 16,929) (CC SDNY 1875); *United States* v. *Hughes*, 26 F. Cas. 417 (No. 15,417) (CC SDNY 1875); *McGlinchy* v. *United States*, 16 F. Cas. 118 (No. 8,803) (CC Me. 1875); *United States* v. *Hutchinson*, 26 F. Cas. 446 (No. 15,431) (Me. 1868); Tariff Act of 1930, § 497, 46 Stat. 728, as amended, 19 U. S. C. § 1497(a) (failing to declare goods); Act of Mar. 3, 1863, § 1, 12 Stat. 738 (same); Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781 (importing without a manifest); Act of Mar. 2, 1799, §§ 46, 79, 84, 1 Stat. 662, 687, 694 (failing to declare goods; failing to reexport goods; making false entries on forms); Act of Aug. 4, 1790, §§ 10, 14, 22, 1 Stat. 156, 158, 161 (submitting incomplete manifests; unloading before customs; unloading duty-free goods); Act of July 31, 1789, §§ 22, 25, 1 Stat. 42, 43 (using false invoices; buying uncustomed goods); *King* v. *Manning*, 2 Comyns 616, 92 Eng. Rep. 1236 (K. B. 1738) (assisting smugglers); 1 Eliz. 1, ch. 11, § 5 (1558–1559) (Eng.) (declaring goods under wrong person's name); 1 & 2 Phil. &

M., ch. 5, §§ 1, 3 (1554–1555) (Eng.) (exporting food without a license; exporting more food than the license allowed); 5 Rich. 2, Stat. 1, chs. 2, 3 (1381) (Eng.) (exporting gold or silver without a license; using ships other than those of the King's allegiance).

In order to sweep all these precedents aside, the majority's remedial analysis assumes the settled tradition was limited to "reimbursing the Government for" unpaid duties. *Ante,* at 342. The assumption is wrong. Many offenses did not require a failure to pay a duty at all. See, *e. g.,* Act of Mar. 3, 1863, § 1, 12 Stat. 738 (importing under false invoices); Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781 (failing to deliver ship's manifest); Act of Mar. 2, 1799, § 28, 1 Stat. 648 (transferring goods from one ship to another); Act of Aug. 4, 1790, § 14, 1 Stat. 158 (same); 5 Rich. II, st. 1, ch. 2 (1381) (Eng.) (exporting gold or silver without a license). None of these *in personam* penalties depended on a compensable monetary loss to the Government. True, these offenses risked causing harm, *ante,* at 342–343, n. 17, but so does smuggling or not reporting cash. A sanction proportioned to potential rather than actual harm is punitive, though the potential harm may make the punishment a reasonable one. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 460–462 (1993) (opinion of STEVENS, J.). The majority nonetheless treats the historic penalties as nonpunitive and thus not subject to the Excessive Fines Clause, though they are indistinguishable from the fine in this case. (It is a mark of the Court's doctrinal difficulty that we must speak of nonpunitive penalties, which is a contradiction in terms.)

Even if the majority's typology were correct, it would have to treat the instant penalty as nonpunitive. In this respect, the Court cannot distinguish the case on which it twice relies, *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232 (1972) *(per curiam). Ante,* at 329, 343. *Emerald Stones* held forfeiture of smuggled goods plus a fine equal to their value was remedial and not punitive, for purposes of

double jeopardy, because the fine "serves to reimburse the Government for investigation and enforcement expenses." 409 U. S., at 237. The logic, however, applies with equal force here. Forfeiture of the money involved in the offense would compensate for the investigative and enforcement expenses of the Customs Service. There is no reason to treat the cases differently, just because a small duty was at stake in one and a disclosure form in the other. See *Bollinger's Champagne*, 3 Wall. 560, 564 (1866) (holding falsehoods on customs forms justify forfeiture even if the lies do not affect the duties due and paid). The majority, in short, is not even faithful to its own artificial category of remedial penalties.

B

The majority's novel holding creates another anomaly as well. The majority suggests *in rem* forfeitures of the instrumentalities of crimes are not fines at all. See *ante*, at 333–334, and nn. 8, 9. The point of the instrumentality theory is to distinguish goods having a "close enough relationship to the offense" from those incidentally related to it. *Austin* v. *United States*, 509 U. S. 602, 628 (1993) (SCALIA, J., concurring in part and concurring in judgment). From this, the Court concludes the money in a cash-smuggling or nonreporting offense cannot be an instrumentality, unlike, say, a car used to transport goods concealed from taxes. *Ante*, at 334, n. 9. There is little logic in this rationale. The car plays an important role in the offense but is not essential; one could also transport goods by jet or by foot. The link between the cash and the cash-smuggling offense is closer, as the offender must fail to report while smuggling more than $10,000. See 31 U. S. C. §§ 5316(a), 5322(a). The cash is not just incidentally related to the offense of cash smuggling. It is essential, whereas the car is not. Yet the car plays an important enough role to justify forfeiture, as the majority concedes. *A fortiori*, the cash does as well. Even if there were a clear distinction between instrumentalities

and incidental objects, when the Court invokes the distinction it gets the results backwards.

II

Turning to the question of excessiveness, the majority states the test: A defendant must prove a gross disproportion before a court will strike down a fine as excessive. See *ante,* at 334. This test would be a proper way to apply the Clause, if only the majority were faithful in applying it. The Court does not, however, explain why in this case forfeiture of all of the cash would have suffered from a gross disproportion. The offense is a serious one, and respondent's smuggling and failing to report were willful. The cash was lawful to own, but this fact shows only that the forfeiture was a fine; it cannot also prove that the fine was excessive.

The majority illuminates its test with a principle of deference. Courts "'should grant substantial deference to the broad authority that legislatures necessarily possess'" in setting punishments. *Ante,* at 336 (quoting *Solem* v. *Helm,* 463 U. S. 277, 290 (1983)). Again, the principle is sound but the implementation is not. The majority's assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress. Congress deems the crime serious, but the Court does not. Under the congressional statute, the crime is punishable by a prison sentence, a heavy fine, and the forfeiture here at issue. As the statute makes clear, the Government needs the information to investigate other serious crimes, and it needs the penalties to ensure compliance.

A

By affirming, the majority in effect approves a meager $15,000 forfeiture. The majority's holding purports to be narrower, saying only that forfeiture of the entire $357,144 would be excessive. *Ante,* at 337, and n. 11. This narrow holding is artificial in constricting the question presented for this Court's review. The statute mandates forfeiture of

the entire $357,144. See 18 U. S. C. § 982(a)(1). The only ground for reducing the forfeiture, then, is that any higher amount would be unconstitutional. The majority affirms the reduced $15,000 forfeiture on *de novo* review, see *ante*, at 336–337, and n. 11, which it can do only if a forfeiture of even $15,001 would have suffered from a gross disproportion. Indeed, the majority leaves open whether the $15,000 forfeiture itself was too great. See *ante*, at 337, n. 11. Money launderers, among the principal targets of this statute, may get an even greater return from their crime.

The majority does not explain why respondent's knowing, willful, serious crime deserves no higher penalty than $15,000. It gives only a cursory explanation of why forfeiture of all of the money would have suffered from a gross disproportion. The majority justifies its evisceration of the fine because the money was legal to have and came from a legal source. See *ante*, at 337–338. This fact, however, shows only that the forfeiture was a fine, not that it was excessive. As the majority puts it, respondent's money was lawful to possess, was acquired in a lawful manner, and was lawful to export. *Ibid.* It was not, however, lawful to possess the money while concealing and smuggling it. Even if one overlooks this problem, the apparent lawfulness of the money adds nothing to the argument. If the items possessed had been dangerous or unlawful to own, for instance, narcotics, the forfeiture would have been remedial and would not have been a fine at all. See *Austin*, *supra*, at 621; *e. g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364 (1984) (unlicensed guns); *Commonwealth* v. *Dana*, 43 Mass. 329, 337 (1841) (forbidden lottery tickets). If respondent had acquired the money in an unlawful manner, it would have been forfeitable as proceeds of the crime. As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership. See *United States* v. *Ursery*, 518 U. S. 267, 284

(1996). Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines. Hence, the lawfulness of the money shows at most that the forfeiture was a fine; it cannot at the same time prove that the fine was excessive.

B

1

In assessing whether there is a gross disproportion, the majority concedes, we must grant "'substantial deference'" to Congress' choice of penalties. *Ante,* at 336 (quoting *Solem, supra,* at 290). Yet, ignoring its own command, the Court sweeps aside Congress' reasoned judgment and substitutes arguments that are little more than speculation.

Congress considered currency smuggling and nonreporting a serious crime and imposed commensurate penalties. It authorized punishments of five years' imprisonment, a $250,000 fine, plus forfeiture of all the undeclared cash. 31 U. S. C. § 5322(a); 18 U. S. C. § 982(a)(1). Congress found the offense standing alone is a serious crime, for the same statute doubles the fines and imprisonment for failures to report cash "while violating another law of the United States." 31 U. S. C. § 5322(b). Congress experimented with lower penalties on the order of one year in prison plus a $1,000 fine, but it found the punishments inadequate to deter lucrative money laundering. See President's Commission on Organized Crime, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 27, 60 (Oct. 1984). The Court today rejects this judgment.

The Court rejects the congressional judgment because, it says, the Sentencing Guidelines cap the appropriate fine at $5,000. See *ante,* at 338–339, and n. 14. The purpose of the Guidelines, however, is to select punishments with precise proportion, not to opine on what is a gross disproportion. In addition, there is no authority for elevating the Commission's judgment of what is prudent over the congressional judg-

ment of what is constitutional. The majority, then, departs from its promise of deference in the very case announcing the standard.

The Court's argument is flawed, moreover, by a serious misinterpretation of the Guidelines on their face. The Guidelines do not stop at the $5,000 fine the majority cites. They augment it with this vital point: "Forfeiture is to be imposed upon a convicted defendant as provided by statute." United States Sentencing Commission, Guidelines Manual §5E1.4 (Nov. 1995). The fine thus supplements the forfeiture; it does not replace it. Far from contradicting congressional judgment on the offense, the Guidelines implement and mandate it.

2

The crime of smuggling or failing to report cash is more serious than the Court is willing to acknowledge. The drug trade, money laundering, and tax evasion all depend in part on smuggled and unreported cash. Congress enacted the reporting requirement because secret exports of money were being used in organized crime, drug trafficking, money laundering, and other crimes. See H. R. Rep. No. 91–975, pp. 12–13 (1970). Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government. See *ibid.*

The Court does not deny the importance of these interests but claims they are not implicated here because respondent managed to disprove any link to other crimes. Here, to be sure, the Government had no affirmative proof that the money was from an illegal source or for an illegal purpose. This will often be the case, however. By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean. The point of the statute, which provides for even heavier penalties if a second crime can be proved, is to mandate forfeiture regardless. See 31 U. S. C. §5322(b); 18 U. S. C.

§ 982(a)(1). It is common practice, of course, for a cash courier not to confess a tainted source but to stick to a well-rehearsed story. The kingpin, the real owner, need not come forward to make a legal claim to the funds. He has his own effective enforcement measures to ensure delivery at destination or return at origin if the scheme is thwarted. He is, of course, not above punishing the courier who deviates from the story and informs. The majority is wrong, then, to assume *in personam* forfeitures cannot affect kingpins, as their couriers will claim to own the money and pay the penalty out of their masters' funds. See *ante*, at 328, n. 3. Even if the courier confessed, the kingpin could face an *in personam* forfeiture for his agent's authorized acts, for the kingpin would be a co-principal in the commission of the crime. See 18 U. S. C. § 2.

In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proved. The facts of this case exemplify how hard it can be to prove ownership and other crimes, and they also show respondent is far from an innocent victim. For one thing, he was guilty of repeated lies to Government agents and suborning lies by others. Customs inspectors told respondent of his duty to report cash. He and his wife claimed they had only $15,000 with them, not the $357,144 they in fact had concealed. He then told customs inspectors a friend named Abe Ajemian had lent him about $200,000. Ajemian denied this. A month later, respondent said Saeed Faroutan had lent him $170,000. Faroutan, however, said he had not made the loan and respondent had asked him to lie. Six months later, respondent resurrected the fable of the alleged loan from Ajemian, though Ajemian had already contradicted the story. As the District Court found, respondent "has lied, and has had his friends lie." Tr. 54 (Jan. 19, 1995). He had proffered a "suspicious and confused story, documented in the poorest way, and replete with past misrepresentation." *Id.*, at 61–62.

Respondent told these lies, moreover, in most suspicious circumstances. His luggage was stuffed with more than a third of a million dollars. All of it was in cash, and much of it was hidden in a case with a false bottom.

The majority ratifies the District Court's see-no-evil approach. The District Court ignored respondent's lies in assessing a sentence. It gave him a two-level downward adjustment for acceptance of responsibility, instead of an increase for obstruction of justice. See *id.*, at 62. It dismissed the lies as stemming from "distrust for the Government" arising out of "cultural differences." *Id.*, at 63. While the majority is sincere in not endorsing this excuse, *ante*, at 337–338, n. 12, it nonetheless affirms the fine tainted by it. This patronizing excuse demeans millions of law-abiding American immigrants by suggesting they cannot be expected to be as truthful as every other citizen. Each American, regardless of culture or ethnicity, is equal before the law. Each has the same obligation to refrain from perjury and false statements to the Government.

In short, respondent was unable to give a single truthful explanation of the source of the cash. The multitude of lies and suspicious circumstances points to some form of crime. Yet, though the Government rebutted each and every fable respondent proffered, it was unable to adduce affirmative proof of another crime in this particular case.

Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment. See S. Rep. No. 99–130, p. 21 (1985); see also Drug Money Laundering Control Efforts, Hearing before the Subcommittee on Consumer and Regulatory Affairs of the Senate Banking, Housing, and Urban Affairs Committee, 101st Cong., 1st Sess., 84 (1989) (former Internal Revenue Service agent found it "'unbelievably difficult'" to discern which money flows were legitimate and which were tied to crime). One of the few reliable warning signs of some serious crimes is the use of large sums of cash. See *id.*, at 83. So Congress

punished all cash smuggling or nonreporting, authorizing single penalties for the offense alone and double penalties for the offense coupled with proof of other crimes. See 31 U. S. C. §§ 5322(a), (b). The requirement of willfulness, it judged, would be enough to protect the innocent. See *ibid.* The majority second-guesses this judgment without explaining why Congress' blanket approach was unreasonable.

Money launderers will rejoice to know they face forfeitures of less than 5% of the money transported, provided they hire accomplished liars to carry their money for them. Five percent, of course, is not much of a deterrent or punishment; it is comparable to the fee one might pay for a mortgage lender or broker. Cf. 15 U. S. C. § 1602(aa)(1)(B) (high-cost mortgages cost more than 8% in points and fees). It is far less than the 20%–26% commissions some drug dealers pay money launderers. See Hearing on Money Laundering and the Drug Trade before the Subcommittee on Crime of the House Judiciary Committee, 105th Cong., 1st Sess., 62 (1997) (testimony of M. Zeldin); Andelman, The Drug Money Maze, 73 Foreign Affairs 108 (July/Aug. 1994). Since many couriers evade detection, moreover, the average forfeiture per dollar smuggled could amount, courtesy of today's decision, to far less than 5%. In any event, the fine permitted by the majority would be a modest cost of doing business in the world of drugs and crime. See US/Mexico Bi-National Drug Threat Assessment 84 (Feb. 1997) (to drug dealers, transaction costs of 13%–15% are insignificant compared to their enormous profit margins).

Given the severity of respondent's crime, the Constitution does not forbid forfeiture of all of the smuggled or unreported cash. Congress made a considered judgment in setting the penalty, and the Court is in serious error to set it aside.

III

The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause. One of the main

purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison. See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 267 (1989); 4 W. Blackstone, Commentaries on the Laws of England 373 (1769) ("[C]orporal punishment, or a stated imprisonment, . . . is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms . . ."). Concern with imprisonment may explain why the Excessive Fines Clause is coupled with, and follows right after, the Excessive Bail Clause. While the concern is not implicated here—for of necessity the money is there to satisfy the forfeiture—the Court's restrictive approach could subvert this purpose. Under the Court's holding, legislators may rely on mandatory prison sentences in lieu of fines. Drug lords will be heartened by this, knowing the prison terms will fall upon their couriers while leaving their own wallets untouched.

At the very least, today's decision will encourage legislatures to take advantage of another avenue the majority leaves open. The majority subjects this forfeiture to scrutiny because it is *in personam*, but it then suggests most *in rem* forfeitures (and perhaps most civil forfeitures) may not be fines at all. *Ante*, at 331, 340–341, and n. 16; but see *ante*, at 331, n. 6. The suggestion, one might note, is inconsistent or at least in tension with *Austin* v. *United States*, 509 U. S. 602 (1993). In any event, these remarks may encourage a legislative shift from *in personam* to *in rem* forfeitures, avoiding *mens rea* as a predicate and giving owners fewer procedural protections. By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it.

IV

The majority's holding may not only jeopardize a vast range of fines but also leave countless others unchecked by

the Constitution. Nonremedial fines may be subject to deference in theory but overbearing scrutiny in fact. So-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines may not be subject to scrutiny at all. I would not create these exemptions from the Excessive Fines Clause. I would also accord genuine deference to Congress' judgments about the gravity of the offenses it creates. I would further follow the long tradition of fines calibrated to the value of the goods smuggled. In these circumstances, the Constitution does not forbid forfeiture of all of the $357,144 transported by respondent. I dissent.

Syllabus

PENNSYLVANIA BOARD OF PROBATION AND PAROLE *v.* SCOTT

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 97–581. Argued March 30, 1998—Decided June 22, 1998

A condition of respondent's Pennsylvania parole was that he refrain from owning or possessing weapons. Based on evidence that he had violated this and other such conditions, parole officers entered his home and found firearms, a bow, and arrows. At his parole violation hearing, respondent objected to the introduction of this evidence on the ground that the search was unreasonable under the Fourth Amendment. The hearing examiner rejected the challenge and admitted the evidence. As a result, petitioner parole board found sufficient evidence to support the charges and recommitted respondent. The Commonwealth Court of Pennsylvania reversed, and the Pennsylvania Supreme Court affirmed the reversal, holding, *inter alia*, that although the federal exclusionary rule, which prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights, does not generally apply in parole revocation hearings, it applied in this case because the officers who conducted the search were aware of respondent's parole status. The court reasoned that, otherwise, illegal searches would be undeterred when officers know that their subjects are parolees and that illegally obtained evidence can be introduced at parole hearings.

Held: The federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. The State's use of such evidence does not itself violate the Constitution. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897, 906. Rather, a violation is "fully accomplished" by the illegal search or seizure, and no exclusion of evidence can cure the invasion of rights the defendant has already suffered. *E. g.*, *id.*, at 906. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. *United States* v. *Calandra*, 414 U. S. 338, 348. As such, it does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons, *Stone* v. *Powell*, 428 U. S. 465, 486, but applies only in contexts where its remedial objectives are thought most efficaciously served, *e. g.*, *Calandra*, *supra*, at 348. Moreover, because the rule is prudential rather than constitutionally mandated, it applies only where its deterrence benefits outweigh the substantial social costs inherent in precluding consideration of reliable,

probative evidence. *Leon*, 468 U. S., at 907. Recognizing these costs, the Court has repeatedly declined to extend the rule to proceedings other than criminal trials. *E. g., id.*, at 909. It again declines to do so here. The social costs of allowing convicted criminals who violate their parole to remain at large are particularly high, see *Morrissey* v. *Brewer*, 408 U. S. 471, 477, 483, and are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future crimes than are average citizens, see *Griffin* v. *Wisconsin*, 483 U. S. 868, 880. Application of the exclusionary rule, moreover, would be incompatible with the traditionally flexible, nonadversarial, administrative procedures of parole revocation, see *Morrissey*, *supra*, at 480, 489, in that it would require extensive litigation to determine whether particular evidence must be excluded, cf., *e. g.*, *Calandra*, *supra*, at 349. The rule would provide only minimal deterrence benefits in this context, because its application in criminal trials already provides significant deterrence of unconstitutional searches. Cf. *United States* v. *Janis*, 428 U. S. 433, 448, 454. The Pennsylvania Supreme Court's special rule for situations in which the searching officer knows his subject is a parolee is rejected because this Court has never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence, *e. g.*, *Calandra*, *supra*, at 350; because such a piecemeal approach would add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status; and because, in any event, any additional deterrence would be minimal, whether the person conducting the search was a police officer or a parole officer. Pp. 362–369.

548 Pa. 418, 698 A. 2d 32, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 369. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 370.

D. Michael Fisher, Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs were *John G. Knorr III*, Chief Deputy Attorney General, and *Gregory R. Neuhauser* and *Calvin R. Koons*, Senior Deputy Attorneys General.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Acting Assistant At-*

torney General Keeney, *Deputy Solicitor General Dreeben*, and *Vicki Marani*.

Leonard N. Sosnov argued the cause for respondent. With him on the brief was *David Rudovsky*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether the exclusionary rule, which generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights, applies in parole revocation hearings. We hold that it does not.

I

Respondent Keith M. Scott pleaded *nolo contendere* to a charge of third-degree murder and was sentenced to a prison

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, and *Todd R. Marti*, Assistant Attorney General, by *John M. Ferren*, Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *M. Jane Brady* of Delaware, *Robert Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jeff Modisett* of Indiana, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Jeffrey B. Pine* of Rhode Island, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *Wallace J. Malley* of Vermont, and *William U. Hill* of Wyoming; for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt*, *James P. Manak*, *Richard M. Weintraub*, and *Bernard J. Farber;* for the Center for the Community Interest by *Andrew N. Vollmer* and *Roger L. Conner;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Tracey Maclin, *Steven R. Shapiro*, *Stefan Presser*, and *Lisa B. Kemler* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

term of 10 to 20 years, beginning on March 31, 1983. On September 1, 1993, just months after completing the minimum sentence, respondent was released on parole. One of the conditions of respondent's parole was that he would refrain from "owning or possessing any firearms or other weapons." App. 5a. The parole agreement, which respondent signed, further provided:

> "I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in *[sic]* the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process." *Id.*, at 7a.

About five months later, after obtaining an arrest warrant based on evidence that respondent had violated several conditions of his parole by possessing firearms, consuming alcohol, and assaulting a co-worker, three parole officers arrested respondent at a local diner. Before being transferred to a correctional facility, respondent gave the officers the keys to his residence. The officers entered the home, which was owned by his mother, but did not perform a search for parole violations until respondent's mother arrived. The officers neither requested nor obtained consent to perform the search, but respondent's mother did direct them to his bedroom. After finding no relevant evidence there, the officers searched an adjacent sitting room in which they found five firearms, a compound bow, and three arrows.

At his parole violation hearing, respondent objected to the introduction of the evidence obtained during the search of his home on the ground that the search was unreasonable under the Fourth Amendment. The hearing examiner, however, rejected the challenge and admitted the evidence. As a result, the Pennsylvania Board of Probation and Parole found sufficient evidence in the record to support the weap-

ons and alcohol charges and recommitted respondent to serve 36 months' backtime.

The Commonwealth Court of Pennsylvania reversed and remanded, holding, *inter alia*, that the hearing examiner had erred in admitting the evidence obtained during the search of respondent's residence.[1] The court ruled that the search violated respondent's Fourth Amendment rights because it was conducted without the owner's consent and was not authorized by any state statutory or regulatory framework ensuring the reasonableness of searches by parole officers. 668 A. 2d 590, 596 (1995). The court further held that the exclusionary rule should apply because, in the circumstances of respondent's case, the deterrence benefits of the rule outweighed its costs. *Id.*, at 600.[2]

The Pennsylvania Supreme Court affirmed. 548 Pa. 418, 698 A. 2d 32 (1997). The court stated that respondent's Fourth Amendment right against unreasonable searches and seizures was "unaffected" by his signing of the parole agreement giving parole officers permission to conduct warrantless searches. *Id.*, at 427, 698 A. 2d, at 36. It then held that the search in question was unreasonable because it was supported only by "mere speculation" rather than a "reasonable suspicion" of a parole violation. *Ibid.* Carving out an exception to its *per se* bar against application of the exclusionary rule in parole revocation hearings, see *Commonwealth* v. *Kates*, 452 Pa. 102, 120, 305 A. 2d 701, 710 (1973), the court further ruled that the federal exclusionary rule applied to this case because the officers who conducted the

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[1] The court also held that the Board of Probation and Parole erred by admitting hearsay evidence regarding alcohol consumption and a separate incident of weapons possession.

[2] While this case was pending in the Pennsylvania Supreme Court, the Commonwealth Court filed an en banc opinion in another case that overruled its decision in respondent's case and held that the exclusionary rule does not apply in parole revocation hearings. *Kyte* v. *Pennsylvania Bd. of Probation and Parole*, 680 A. 2d 14, 18, n. 8 (1996).

search were aware of respondent's parole status, 548 Pa., at 428–432, 698 A. 2d, at 37–38. The court reasoned that, in the absence of the rule, illegal searches would be undeterred when officers know that the subjects of their searches are parolees and that illegally obtained evidence can be introduced at parole hearings. *Ibid.*

We granted certiorari to determine whether the Fourth Amendment exclusionary rule applies to parole revocation proceedings. 522 U. S. 992 (1997).[3]

II

We have emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897, 906 (1984); *Stone* v. *Powell*, 428 U. S. 465, 482, 486 (1976). Rather, a Fourth Amendment violation is "'fully accomplished'" by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can "'cure the invasion of the defendant's rights which he has already suffered.'" *United States* v. *Leon*, *supra*, at 906 (quoting *Stone* v. *Powell*, *supra*, at 540

[3] We also invited the parties to brief the question whether a search of a parolee's residence must be based on reasonable suspicion where the parolee has consented to searches as a condition of parole. Respondent argues that we lack jurisdiction to decide this question in this case because the Pennsylvania Supreme Court held, as a matter of Pennsylvania law, that respondent's consent to warrantless searches as a condition of his state parole did not constitute consent to searches that are unreasonable under the Fourth Amendment. Petitioner and its *amici* contend that the Pennsylvania Supreme Court's opinion was at least ambiguous as to whether it relied on state or federal law to determine the extent of respondent's consent, and that we therefore have jurisdiction under *Michigan* v. *Long*, 463 U. S. 1032 (1983). We need not parse the Pennsylvania Supreme Court's decision in an attempt to discern its intent, however, because it is clear that we have jurisdiction to determine whether the exclusionary rule applies to state parole revocation proceedings, and our decision on that issue is sufficient to decide the case. We therefore express no opinion regarding the constitutionality of the search.

(White, J., dissenting)). The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," *Stone* v. *Powell*, *supra*, at 486, but applies only in contexts "where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra*, *supra*, at 348; see also *United States* v. *Janis*, 428 U. S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted"). Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs." *United States* v. *Leon*, 468 U. S., at 907.

Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. *Id.*, at 909; *United States* v. *Janis*, *supra*, at 447. For example, in *United States* v. *Calandra*, we held that the exclusionary rule does not apply to grand jury proceedings; in so doing, we emphasized that such proceedings play a special role in the law enforcement process and that the traditionally flexible, nonadversarial nature of those proceedings would be jeopardized by application of the rule. 414 U. S., at 343–346, 349–350. Likewise, in *United States* v. *Janis*, we held that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which, we noted, would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches. 428 U. S., at 448, 454. Finally, in *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984), we refused to extend the exclusionary rule to civil deportation proceedings, citing the high social costs of allowing an immigrant to remain illegally

in this country and noting the incompatibility of the rule with the civil, administrative nature of those proceedings. *Id.*, at 1050.

As in *Calandra*, *Janis*, and *Lopez-Mendoza*, we are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so. Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches. We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights.

Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions. See *Stone* v. *Powell*, *supra*, at 490. Although we have held these costs to be worth bearing in certain circumstances,[4] our cases have repeatedly emphasized that the rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those

[4] As discussed above, we have generally held the exclusionary rule to apply only in criminal trials. We have, moreover, significantly limited its application even in that context. For example, we have held that the rule does not apply when the officer reasonably relied on a search warrant that was later deemed invalid, *United States* v. *Leon*, 468 U. S. 897, 920–922 (1984); when the officer reasonably relied on a statute later deemed unconstitutional, *Illinois* v. *Krull*, 480 U. S. 340, 349–350 (1987); when the defendant seeks to assert another person's Fourth Amendment rights, *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969); and when the illegally obtained evidence is used to impeach a defendant's testimony, *United States* v. *Havens*, 446 U. S. 620, 627–628 (1980); *Walder* v. *United States*, 347 U. S. 62, 65 (1954).

urging application of the rule. *United States* v. *Payner*, 447 U. S. 727, 734 (1980).

The costs of excluding reliable, probative evidence are particularly high in the context of parole revocation proceedings. Parole is a "variation on imprisonment of convicted criminals," *Morrissey* v. *Brewer*, 408 U. S. 471, 477 (1972), in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an "overwhelming interest" in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so. *Id.*, at 483. The exclusion of evidence establishing a parole violation, however, hampers the State's ability to ensure compliance with these conditions by permitting the parolee to avoid the consequences of his noncompliance. The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future criminal offenses than are average citizens. See *Griffin* v. *Wisconsin*, 483 U. S. 868, 880 (1987). Indeed, this is the very premise behind the system of close parole supervision. *Ibid.*

The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation. Because parole revocation deprives the parolee not "of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions," *Morrissey* v. *Brewer*, *supra*, at 480, States have wide latitude under the Constitution to structure parole revocation proceedings.[5] Most

[5] We thus have held that a parolee is not entitled to "the full panoply" of due process rights to which a criminal defendant is entitled, *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), and that the right to counsel generally

States, including Pennsylvania, see 548 Pa., at 427–428, 698 A. 2d, at 36; *Rivenbark* v. *Pennsylvania Bd. of Probation and Parole*, 509 Pa. 248, 501 A. 2d 1110 (1985), have adopted informal, administrative parole revocation procedures in order to accommodate the large number of parole proceedings. These proceedings generally are not conducted by judges, but instead by parole boards, "members of which need not be judicial officers or lawyers." *Morrissey* v. *Brewer*, 408 U. S., at 489. And traditional rules of evidence generally do not apply. *Ibid.* ("[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"). Nor are these proceedings entirely adversarial, as they are designed to be "'predictive and discretionary' as well as factfinding." *Gagnon* v. *Scarpelli*, 411 U. S. 778, 787 (1973) (quoting *Morrissey* v. *Brewer*, *supra*, at 480).

Application of the exclusionary rule would significantly alter this process. The exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded. Cf. *United States* v. *Calandra*, 414 U. S., at 349 (noting that application of the exclusionary rule "would delay and disrupt grand jury proceedings" because "[s]uppression hearings would halt the orderly process of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective"); *INS* v. *Lopez-Mendoza*, 468 U. S., at 1048 (noting that "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of" the deportation system). Such litigation is inconsistent with the nonadversarial, administrative processes established by the States. Although States could adapt their parole revocation proceedings to accommodate

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does not attach to such proceedings because the introduction of counsel would "alter significantly the nature of the proceeding," *Gagnon* v. *Scarpelli*, 411 U. S. 778, 787 (1973).

such litigation, such a change would transform those proceedings from a "predictive and discretionary" effort to promote the best interests of both parolees and society into trial-like proceedings "less attuned" to the interests of the parolee. *Gagnon* v. *Scarpelli*, *supra*, at 787–788 (quoting *Morrissey* v. *Brewer*, *supra*, at 480). We are simply unwilling so to intrude into the States' correctional schemes. See *Morrissey* v. *Brewer*, *supra*, at 483 (recognizing that States have an "overwhelming interest" in maintaining informal, administrative parole revocation procedures). Such a transformation ultimately might disadvantage parolees because in an adversarial proceeding, "the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation." *Gagnon* v. *Scarpelli*, *supra*, at 788. And the financial costs of such a system could reduce the State's incentive to extend parole in the first place, as one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee.

The deterrence benefits of the exclusionary rule would not outweigh these costs. As the Supreme Court of Pennsylvania recognized, application of the exclusionary rule to parole revocation proceedings would have little deterrent effect upon an officer who is unaware that the subject of his search is a parolee. 548 Pa., at 431, 698 A. 2d, at 38. In that situation, the officer will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial. The likelihood that illegally obtained evidence will be excluded from trial provides deterrence against Fourth Amendment violations, and the remote possibility that the subject is a parolee and that the evidence may be admitted at a parole revocation proceeding surely has little, if any, effect on the officer's incentives. Cf. *United States* v. *Janis*, 428 U. S., at 448.

The Pennsylvania Supreme Court thus fashioned a special rule for those situations in which the officer performing the

search knows that the subject of his search is a parolee. We decline to adopt such an approach. We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. *United States* v. *Calandra*, *supra*, at 350; *Alderman* v. *United States*, 394 U. S. 165, 174 (1969). Furthermore, such a piecemeal approach to the exclusionary rule would add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status.

In any event, any additional deterrence from the Pennsylvania Supreme Court's rule would be minimal. Where the person conducting the search is a police officer, the officer's focus is not upon ensuring compliance with parole conditions or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes. The noncriminal parole proceeding "falls outside the offending officer's zone of primary interest." *Janis*, *supra*, at 458. Thus, even when the officer knows that the subject of his search is a parolee, the officer will be deterred from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials.

Even when the officer performing the search is a parole officer, the deterrence benefits of the exclusionary rule remain limited. Parole agents, in contrast to police officers, are not "engaged in the often competitive enterprise of ferreting out crime," *United States* v. *Leon*, 468 U. S., at 914; instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial. *Griffin* v. *Wisconsin*, 483 U. S. 868, 879 (1987). It is thus "unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer." *Morrissey* v. *Brewer*, *supra*, at 485–486. Although this relationship does not prevent parole officers from *ever* violating the Fourth Amendment rights of their parolees, it does mean

that the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of damages actions. Moreover, although in some instances parole officers may act like police officers and seek to uncover evidence of illegal activity, they (like police officers) are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial. In this case, assuming that the search violated respondent's Fourth Amendment rights, the evidence could have been inadmissible at trial if respondent had been criminally prosecuted.

* * *

We have long been averse to imposing federal requirements upon the parole systems of the States. A federal requirement that parole boards apply the exclusionary rule, which is itself a "'grud[g]ingly taken, medicament,'" *United States* v. *Janis*, *supra*, at 455, n. 29, would severely disrupt the traditionally informal, administrative process of parole revocation. The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion. We therefore hold that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment. Accordingly, the judgment below is reversed, and the case is remanded to the Pennsylvania Supreme Court.

It is so ordered.

JUSTICE STEVENS, dissenting.

JUSTICE SOUTER has explained why the deterrent function of the exclusionary rule is implicated as much by a parole revocation proceeding as by a conventional criminal trial. I agree with that explanation. I add this comment merely to endorse Justice Stewart's conclusion that the "rule *is* constitutionally required, not as a 'right' explicitly incorporated in the fourth amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact."

Stewart, The Road to *Mapp* v. *Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1389 (1983). See also *Arizona* v. *Evans*, 514 U. S. 1, 18–19, and n. 1 (1995) (STEVENS, J., dissenting); *Segura* v. *United States*, 468 U. S. 796, 828, and n. 22 (1984) (STEVENS, J., dissenting); *United States* v. *Leon*, 468 U. S. 897, 978, and n. 37 (1984) (STEVENS, J., dissenting).

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court's holding that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), has no application to parole revocation proceedings rests upon mistaken conceptions of the actual function of revocation, of the objectives of those who gather evidence in support of petitions to revoke, and, consequently, of the need to deter violations of the Fourth Amendment that would tend to occur in administering the parole laws. In reality a revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the State will seek to use evidence of a parole violation, even when that evidence would support an independent criminal charge. The deterrent function of the exclusionary rule is therefore implicated as much by a revocation proceeding as by a conventional trial, and the exclusionary rule should be applied accordingly. From the Court's conclusion to the contrary, I respectfully dissent.

This Court has said that the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). Because the exclusionary rule thus "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitu-

tional right of the party aggrieved," *United States* v. *Leon*, 468 U. S. 897, 906 (1984) (internal quotation marks omitted), "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Ibid.* (quoting *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983)). The exclusionary rule does not, therefore, mandate the exclusion of illegally acquired evidence from all proceedings or against all persons, *United States* v. *Calandra*, *supra*, at 348, and we have made clear that the rule applies only in "those instances where its remedial objectives are thought most efficaciously served," *Arizona* v. *Evans*, 514 U. S. 1, 11 (1995). Only then can the deterrent value of applying the rule to a given class of proceedings be seen to outweigh its price, including "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1041 (1984); see also *United States* v. *Janis*, 428 U. S. 433, 454 (1976); *United States* v. *Calandra*, *supra*, at 349–350.

Because we have found the requisite efficacy when the rule is applied in criminal trials, see *Elkins* v. *United States*, 364 U. S. 206 (1960); *Mapp* v. *Ohio*, *supra; Weeks* v. *United States*, 232 U. S. 383 (1914), the deterrent effect of the evidentiary limitation upon prosecution is a baseline for evaluating the degree (or incremental degree) of deterrence that could be expected from extending the exclusionary rule to other sorts of cases, see *INS* v. *Lopez-Mendoza*, *supra.* Thus, we have thought that any additional deterrent value obtainable from applying the rule in civil tax proceedings, see *United States* v. *Janis*, *supra*, habeas proceedings, see *Stone* v. *Powell*, 428 U. S. 465 (1976), and grand jury proceedings, see *United States* v. *Calandra*, *supra*, would be so marginal as to be outweighed by the incremental costs.

In *Janis,* for example, we performed incremental benefit analysis by focusing on the two classes of law enforcement officers affected. We reasoned that when the offending official was a state police officer, his "zone of primary interest" would be state criminal prosecution, not federal civil proceedings; accordingly, we said, "common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." 428 U. S., at 457–458. *Stone* v. *Powell* was another variant on the same theme, where we looked to the collateral nature of the habeas proceedings in which the rule might be applied: "The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal." 428 U. S., at 493. And in *United States* v. *Calandra* we observed that excluding such evidence from grand jury proceedings "would deter only police investigation[s] consciously directed toward the discovery of evidence solely for use in a grand jury investigation," 414 U. S., at 351; an investigation so unambitious would be a rare one, we said, since prosecutors are unlikely to seek indictments in the face of dim prospects of conviction after trial, *ibid.*

In a formal sense, such is the reasoning of the Court's majority in deciding today that application of the exclusionary rule in parole revocation proceedings would have only an insignificant marginal deterrent value, "because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches." *Ante,* at 364. In substance, however, the Court's conclusion will not jibe with the examples just cited, for it rests on erroneous views of the roles of regular police and parole officers in relation to revocation proceedings, and of the practical significance of the proceedings themselves.

As to the police, the majority says that regular officers investigating crimes almost always act with the prospect of a criminal prosecution before them. Their fear of evidentiary suppression in the criminal trial will have as much deterrent effect as can be expected, therefore, while any risk of suppression in parole administration is too unlikely to be on their minds to influence their conduct.

The majority's assumption will only sometimes be true, however, and in many, or even most cases, it will quite likely be false. To be sure, if a police officer acts on the spur of the moment to seize evidence or thwart crime, he may have no idea of a perpetrator's parole status. But the contrary will almost certainly be the case when he has first identified the person he has his eye on: the local police know the local felons, criminal history information is instantly available nationally, and police and parole officers routinely cooperate. See, *e. g., United States ex rel. Santos* v. *New York State Bd. of Parole*, 441 F. 2d 1216, 1217 (CA2 1971) (police officer, who had obtained "reasonable grounds" to believe that the parolee was dealing in stolen goods, informed the parole officer; the parole officer and police officer together searched parolee's apartment), cert. denied, 404 U. S. 1025 (1972); *Grimsley* v. *Dodson*, 696 F. 2d 303, 304 (CA4 1982) (upon receipt of information about probationer, probation officer contacted a sheriff, sheriff obtained search warrant, and together they searched probationer's house), cert. denied, 462 U. S. 1134 (1983); *State ex rel. Wright* v. *Ohio Adult Parole Auth.*, 75 Ohio St. 3d 82, 83–84, 661 N. E. 2d 728, 730 (1996) (police officers suspected parolee had committed burglary and asked his parole officer to search his residence; parolee was then reincarcerated for violating his parole conditions); *People* v. *Stewart*, 242 Ill. App. 3d 599, 611–612, 610 N. E. 2d 197, 206 (1993) (police conducting illegal traffic stop and subsequent search and seizure knew or had reason to know that defendant was on probation); *People* v. *Montenegro*, 173 Cal. App. 3d 983, 986, 219 Cal. Rptr. 331, 332 (4th Dist. 1985) (police contacted parole agent so that they could conduct search of

parolee's apartment); see also Pennsylvania Board of Probation and Parole, Police Procedures in the Handling of Parolees 16 (rev. 1974) (parole agent has a responsibility to inform police in the area where parolee will be living and to provide "full cooperation to the police").

As these cases show, the police very likely do know a parolee's status when they go after him, and (contrary to the majority's assumption) this fact is significant for three reasons. First, and most obviously, the police have reason for concern with the outcome of a parole revocation proceeding, which is just as foreseeable as the criminal trial and at least as likely to be held. Police officers, especially those employed by the same sovereign that runs the parole system, therefore have every incentive not to jeopardize a recommitment by rendering evidence inadmissible. See *INS* v. *Lopez-Mendoza*, 468 U. S., at 1043 (deterrence especially effective when law enforcement and prosecution are under one government). Second, as I will explain below, the actual likelihood of trial is often far less than the probability of a petition for parole revocation, with the consequence that the revocation hearing will be the only forum in which the evidence will ever be offered. Often, therefore, there will be nothing incremental about the significance of evidence offered in the administrative tribunal, and nothing "marginal" about the deterrence provided by an exclusionary rule operating there. *Ante*, at 368. Finally, the cooperation between parole and police officers, as in the instances shown in the cases cited above, casts serious doubt upon the aptness of treating police officers differently from parole officers, doubt that is confirmed by the following attention to the Court's characterization of the position of the parole officer.

The Court recalls our description of the police as "engaged in the often competitive enterprise of ferreting out crime," which raises the temptation to cut constitutional corners (which in turn requires the countervailing influence of the exclusionary rule). *United States* v. *Leon*, 468 U. S., at 914.

As against this picture of the police, the Court paints the parole officer as a figure more nearly immune to such competitive zeal. As the Court describes him, the parole officer is interested less in catching a parole violator than in making sure that the parolee continues to go straight, since "'realistically the failure of the parolee is in a sense a failure for his supervising officer.'" *Ante*, at 368 (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 485–486 (1972)). This view of the parole officer suffers, however, from its selectiveness. Parole officers wear several hats; while they are indeed the parolees' counselors and social workers, they also "often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees." N. Cohen & J. Gobert, Law of Probation and Parole § 11.04, p. 533 (1983); see also *Minnesota* v. *Murphy*, 465 U. S. 420, 432 (1984) (probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers" (internal quotation marks omitted)); T. Wile, Pennsylvania Law of Probation and Parole § 5.12, p. 88 (1993) (parole officers "act in various capacities, supervisor, social worker, advocate, police officer, investigator and advisor, to the offenders under their supervision"). Indeed, a parole officer's obligation to petition for revocation when a parolee goes bad, see Cohen & Gobert, *supra*, § 11.04, at 533, is presumably the basis for the legal rule in Pennsylvania that "state parole agents are considered police officers with respect to the offenders under their jurisdiction," Wile, *supra*, § 5.12, at 89.

Once, in fact, the officer has turned from counselor to adversary, there is every reason to expect at least as much competitive zeal from him as from a regular police officer. See *Gagnon* v. *Scarpelli*, 411 U. S. 778, 785 (1973) ("[A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation"). If he fails to respond to his parolee's further crimi-

nality he will be neglecting the public safety, and if he brings a revocation petition without enough evidence to sustain it he can hardly look forward to professional advancement. R. Prus & J. Stratton, Parole Revocation Decisionmaking: Private Typings and Official Designations, 40 Federal Probation 51 (Mar. 1976). And as for competitiveness, one need only ask whether a parole officer would rather leave the credit to state or local police when a parolee has to be brought to book.

The Court, of course, does not mean to deny that parole officers are subject to some temptation to skirt the limits on search and seizure, but it believes that deterrents other than the evidentiary exclusion will suffice. The Court contends that parole agents will be kept within bounds by "departmental training and discipline and the threat of damages actions." *Ante,* at 369. The same, of course, might be said of the police, and yet as to them such arguments are not heard, perhaps for the same reason that the Court's suggestion sounds hollow as to parole officers. The Court points to no specific departmental training regulation; it cites no instance of discipline imposed on a Pennsylvania parole officer for conducting an illegal search of a parolee's residence; and, least surprisingly of all, the majority mentions not a single lawsuit brought by a parolee against a parole officer seeking damages for an illegal search. In sum, if the police need the deterrence of an exclusionary rule to offset the temptations to forget the Fourth Amendment, parole officers need it quite as much.[1]

[1] While it is true that the Court found in *INS* v. *Lopez-Mendoza,* 468 U. S. 1032 (1984), that the deterrence value of applying the exclusionary rule in deportation proceedings was diminished because the INS "has its own comprehensive scheme for deterring Fourth Amendment violations by its officers," *id.,* at 1044, and "alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights" were available, *id.,* at 1045, these two factors reflected what was at least on the agency's books and, in any event, did not stand alone. The Court in that case found that as a practical matter "it is highly unlikely that any particu-

Just as the Court has underestimated the competitive influences tending to induce police and parole officers to stint on Fourth Amendment obligations, so I think it has misunderstood the significance of admitting illegally seized evidence at the revocation hearing. On the one hand, the majority magnifies the cost of an exclusionary rule for parole cases by overemphasizing the differences between a revocation hearing and a trial, and on the other hand it has minimized the benefits by failing to recognize the significant likelihood that the revocation hearing will be the principal, not the secondary, forum, in which evidence of a parolee's criminal conduct will be offered.

The Court is, of course, correct that the revocation hearing has not only an adversarial side in factfinding, but a predictive and discretionary aspect in addressing the proper disposition when a violation has been found. See *ante*, at 366 (citing *Gagnon* v. *Scarpelli*, *supra*, at 787 (quoting *Morrissey* v. *Brewer*, *supra*, at 480)). And I agree that open-mindedness at the discretionary, dispositional stage is promoted by the relative informality of the proceeding even at its factfinding stage. *Gagnon* v. *Scarpelli*, *supra*, at 786. That informality is fostered by limiting issues so that lawyers are not always necessary, 411 U. S., at 787–788, and by appointing lay members to parole boards, *Morrissey* v. *Brewer*, *supra*, at 489. There is no question, either, that application of an exclusionary rule, if there is no waiver of Fourth Amendment rights, will tend to underscore the adversary character of the factfinding process. This cannot, however, be a dispositive objection to an exclusionary rule. Any revocation hearing is adversary to a degree: counsel must now be provided whenever the complexity of fact issues so warrant, *Gagnon* v. *Scarpelli*, *supra*, at 787, and lay board members are just as capable of passing upon Fourth Amend-

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lar arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding." *Id.*, at 1044. As the instant case may suggest, there is no reason to expect parolees to be so reticent.

ment issues as the police, who are necessarily charged with responsibility for the legality of warrantless arrests, investigatory stops, and searches.[2]

As to the benefit of an exclusionary rule in revocation proceedings, the majority does not see that in the investigation of criminal conduct by someone known to be on parole, Fourth Amendment standards will have very little deterrent sanction unless evidence offered for parole revocation is subject to suppression for unconstitutional conduct. It is not merely that parole revocation is the government's consolation prize when, for whatever reason, it cannot obtain a further criminal conviction, though that will sometimes be true. See, *e. g.*, *State ex rel. Wright* v. *Ohio Adult Parole Auth.*, 75 Ohio St. 3d, at 83–89, 661 N. E. 2d, at 730 (State sought revocation of parole when criminal prosecution was dismissed for insufficient evidence after defendant's motion to suppress was successful); *Anderson* v. *Virginia*, 20 Va. App. 361, 363–364, 457 S. E. 2d 396, 397 (1995) (same); *Chase* v. *Maryland*, 309 Md. 224, 228, 522 A. 2d 1348, 1350 (1987) (same); *Gronski* v. *Wyoming*, 700 P. 2d 777, 778 (Wyo. 1985) (same). What is at least equally telling is that parole revocation will frequently be pursued instead of prosecution as the course of choice, a fact recognized a quarter of a century

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[2] On the subject of cost, the majority also argues that the cost of applying the exclusionary rule to revocation proceedings would be high because States have an "'overwhelming interest'" in ensuring that its parolees comply with the conditions of their parole, given the fact that parolees are more likely to commit future crimes than average citizens. *Ante*, at 365. I certainly do not contest the fact, but merely point out that it does not differentiate suppression at parole hearings from suppression at trials, where suppression of illegally obtained evidence in the prosecution's case in chief certainly takes some toll on the State's interest in convicting criminals in the first place. The majority's argument suggests not that the exclusionary rule is necessarily out of place in parole revocation proceedings, but that States should be permitted to condition parole on an agreement to submit to warrantless, suspicionless searches, on the possibility of which this case has no bearing. See *infra*, at 379–380.

ago when we observed in *Morrissey* v. *Brewer* that a parole revocation proceeding "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." 408 U. S., at 479; see also Cohen & Gobert, § 8.06, at 386 ("Favoring the [exclusionary] rule's applicability is the fact that the revocation proceeding, often based on the items discovered in the search, is used in lieu of a criminal trial").

The reasons for this tendency to skip any new prosecution are obvious. If the conduct in question is a crime in its own right, the odds of revocation are very high. Since time on the street before revocation is not subtracted from the balance of the sentence to be served on revocation, *Morrissey* v. *Brewer*, 408 U. S., at 480, the balance may well be long enough to render recommitment the practical equivalent of a new sentence for a separate crime. And all of this may be accomplished without shouldering the burden of proof beyond a reasonable doubt; hence the obvious popularity of revocation in place of new prosecution.

The upshot is that without a suppression remedy in revocation proceedings, there will often be no influence capable of deterring Fourth Amendment violations when parole revocation is a possible response to new crime. Suppression in the revocation proceeding cannot be looked upon, then, as furnishing merely incremental or marginal deterrence over and above the effect of exclusion in criminal prosecution. Instead, it will commonly provide the only deterrence to unconstitutional conduct when the incarceration of parolees is sought, and the reasons that support the suppression remedy in prosecution therefore support it in parole revocation.

Because I would apply the exclusionary rule to evidence offered in revocation hearings, I would affirm the judgment in this case. Scott gave written consent to warrantless searches; the form he signed provided that he consented "to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation

and Parole." App. 7a. The Supreme Court of Pennsylvania held the consent insufficient to waive any requirement that searches be supported by reasonable suspicion,[3] and in the absence of any such waiver, the State was bound to justify its search by what the Court has described as information indicating the likelihood of facts justifying the search. *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987) (dealing with the analogous context of probation revocation). The State makes no claim here to have satisfied this standard. It describes the parole agent's knowledge as rising no further than "the possibility of the presence of weapons in Scott's home," Brief for Petitioner 7, and rests on the argument that not even reasonable suspicion was required.

Because the search violated the Fourth Amendment, and because I conclude that the exclusionary rule ought to apply to parole revocation proceedings, I would affirm the decision of the Supreme Court of Pennsylvania.

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[3] See 548 Pa. 418, 426, 698 A. 2d 32, 35–36 (1997) ("'[T]he parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant'") (quoting *Commonwealth* v. *Williams*, 547 Pa. 577, 588, 692 A. 2d 1031, 1036 (1997)). Since Pennsylvania has not sought review of this conclusion, I do not look behind it, or offer any opinion on whether the terms and sufficiency of such a waiver are to be scrutinized under state or federal law.

Syllabus

WISCONSIN DEPARTMENT OF CORRECTIONS ET AL. *v.* SCHACHT

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

No. 97–461. Argued April 20, 1998—Decided June 22, 1998

Respondent Schacht filed a state-court suit against the defendants (petitioners here), the Wisconsin Department of Corrections and several of its employees, both in their "personal" and in their "official" capacities, alleging that his dismissal from his prison guard position violated the Federal Constitution and federal civil rights laws. The defendants removed the case to federal court and then filed an answer raising the "defense" that the Eleventh Amendment doctrine of sovereign immunity barred the claims against the Department and its employees in their official capacity. The District Court granted the individual defendants summary judgment on the "personal capacity" claims and dismissed the claims against the Department and the individual defendants in their "official capacity." On appeal, Schacht challenged only the disposition of the "personal capacity" claims, but the Seventh Circuit determined that the removal had been improper because the presence of even one claim subject to an Eleventh Amendment bar deprives the federal courts of removal jurisdiction over the entire case.

Held: The presence in an otherwise removable case of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction that would otherwise exist. A federal court can proceed to hear the remaining claims, and the District Court did not err in doing so in this case. Pp. 386–393.

(a) Title 28 U. S. C. § 1441(a), which allows a defendant to remove "any civil action brought in a State court of which the [federal] district courts . . . have original jurisdiction," obviously permits the removal of a case containing only claims that "arise under" federal law, since federal courts have original jurisdiction over such claims, see § 1331. There are several parts to respondent's argument that removal jurisdiction is destroyed if one of those federal claims is subject to an Eleventh Amendment bar. First, the argument distinguishes cases with both federal-law and state-law claims from cases with federal-law claims that include one or more Eleventh Amendment claims. In the former cases the state-law claims fall within the federal courts' supplemental jurisdiction. In the latter cases the comparable claims are ones that the Eleventh Amendment prohibits the federal courts from deciding.

Syllabus

Second, the argument emphasizes the "jurisdictional" nature of the difference, since neither the law permitting supplemental jurisdiction, nor any other law, gives the federal court the power to decide a claim barred by the Eleventh Amendment. Third, the argument looks to removal based upon "diversity jurisdiction" for analogical authority leading to its conclusion that the "jurisdictional" problem is so serious that the presence of even one Eleventh Amendment barred claim destroys removal jurisdiction with respect to all claims, *i. e.*, the "case." The analogy is unconvincing, for this case differs significantly from diversity cases with respect to original jurisdiction. The presence of a nondiverse party automatically destroys such jurisdiction: No party need assert the defect. No party can waive the defect, or consent to jurisdiction. No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. In contrast, the Eleventh Amendment does not automatically destroy original jurisdiction. It grants the State a legal power to assert a sovereign immunity defense. The State can waive the defense, and a court may ignore the defect unless it is raised by the State. Since a federal court would have original jurisdiction to hear this case had Schacht originally filed it there, the defendants may remove the case from state to federal courts. Other conditions—*e. g.*, the fact that removal jurisdiction is determined as of the time a case was filed in state court, which was before the defendants filed their answer in federal court—further undermine the analogy. Pp. 386–391.

(b) Schacht's one further argument—that, after the State asserted its Eleventh Amendment defense, the federal court lacked subject-matter jurisdiction over the entire case and thus had to remand it to state court under § 1447(c)—is rejected. An ordinary reading of § 1447(c) indicates that it refers to an instance in which a federal court "lacks subject matter jurisdiction" over a "case," not simply over one claim within the case. Moreover, § 1447(c)'s objective—to specify the procedures that a federal court must follow in remanding a case after removal—is irrelevant to the question presented here. Pp. 391–393.

116 F. 3d 1151, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 393.

Richard Briles Moriarty, Assistant Attorney General of Wisconsin, argued the cause for petitioners. With him on the briefs was *James E. Doyle*, Attorney General.

David E. Lasker argued the cause and filed a brief for respondent.*

JUSTICE BREYER delivered the opinion of the Court.

The question before us is whether defendants in a case filed in a state court, with claims "arising under" federal law, can remove that case to federal court—where some claims, made against a State, are subject to an Eleventh Amendment bar. We conclude that the defendants can remove the case to a federal court and that the court can decide the nonbarred claims.

I

In 1993, the Wisconsin Department of Corrections dismissed Keith Schacht, a prison guard, for stealing items from the Oakhill Correctional Institution, a state prison. In January 1996, Schacht filed a complaint in state court against the Department and several of its employees, both in their "personal" and in their "official" capacities. The complaint, in several different claims, alleged that the Department and its employees had deprived Schacht of "liberty" and "property" without "due process of law," thereby violating the Federal Constitution and civil rights laws. U. S. Const.,

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*A brief of *amici curiae* urging reversal was filed for the State of Indiana et al. by *Jeffrey A. Modisett*, Attorney General of Indiana, and *Jon Laramore*, *Geoffrey Slaughter*, and *Anthony Scott Chinn*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Grant Woods* of Arizona, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *James E. Ryan* of Illinois, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Philip T. McLaughlin* of New Hampshire, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *William U. Hill* of Wyoming.

Amdt. 14, § 1; Rev. Stat. § 1979, 42 U. S. C. § 1983. The defendants immediately removed the case to federal court.

The defendants' answer, filed in federal court, in part raised as a "defense" that the "eleventh amendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U. S. C. § 1983 against" the State itself, namely, the "defendant Wisconsin Department of Corrections [and] against any of the named defendants in their official capacities." Answer and Defenses, App. 14–15. See *Kentucky* v. *Graham*, 473 U. S. 159, 165–167, and n. 14 (1985) (suit for damages against state officer in official capacity is barred by the Eleventh Amendment); *Alabama* v. *Pugh*, 438 U. S. 781, 782 (1978) *(per curiam)* (suit against state agency is barred by the Eleventh Amendment).

After further proceedings, the Federal District Court considered those claims that were not against the State, that is, the claims against the individual defendants in their "personal capacit[ies]." It concluded as to those claims that, even if Schacht's factual allegations were true, Schacht had received the process that was his "due," and his dismissal did not violate the Fourteenth Amendment. No. 96–C–122–S (WD Wis., Sept. 13, 1996), App. 31–34. It therefore granted the defendants' motion for summary judgment with respect to those claims. *Id.*, at 34.

The federal court also considered the defendants' motion to dismiss those claims filed against the State, *i. e.*, the claims against the Department of Corrections and its employees in their "official capacities." The District Court granted the motion, stating:

> "Plaintiff agrees his claims for money damages are barred [by the Eleventh Amendment] but pursues his claims for injunctive relief. Plaintiff does not, however, request injunctive relief in his complaint . . . . Defendants' motion to dismiss plaintiff's claims against the Wisconsin Department of Corrections and the individual

defendants in their official capacities will be granted." *Id.*, at 30.

Schacht appealed. He did not assert that the District Court was wrong to have dismissed the claims against the State. He argued only that the court's disposition of the "personal capacity" claims, *i. e.*, the grant of summary judgment, was legally erroneous. During the appeal, the Court of Appeals for the Seventh Circuit itself raised the question whether the removal from state to federal court had been legally permissible. See 116 F. 3d 1151, 1153 (1997). After supplemental briefing, the Court of Appeals concluded that removal had been improper and the federal courts lacked jurisdiction over Schacht's case. *Ibid.*

The Court of Appeals pointed out that Schacht's original state-court complaint, while presenting only claims arising under federal law, asserted some of those claims against the State. *Id.*, at 1152. The court added that the Eleventh Amendment, as interpreted by this Court, prohibited the assertion of those claims in federal court. *Ibid.* (citing U. S. Const., Amdt. 11; *Hans* v. *Louisiana*, 134 U. S 1, 10 (1890)). The Court of Appeals concluded that the presence of even one such claim in an otherwise removable case deprived the federal courts of removal jurisdiction over the entire case. 116 F. 3d, at 1152–1153 (relying on *Frances J.* v. *Wright*, 19 F. 3d 337, 341 (CA7 1994)). Hence, it held, the District Court's judgment must be vacated and the entire case returned to the state court for the litigation to begin all over again. 116 F. 3d, at 1153–1154.

We granted certiorari to review the Seventh Circuit's view of the matter, and the similar views taken in several earlier cases upon which that court relied, see, *e. g.*, *Frances J.*, *supra; McKay* v. *Boyd Constr. Co.*, 769 F. 2d 1084 (CA5 1985). Those decisions conflict with the decisions of other Courts of Appeals. See, *e. g.*, *Kruse* v. *Hawai'i*, 68 F. 3d 331 (CA9 1995); *Henry* v. *Metropolitan Sewer Dist.*, 922 F. 2d 332 (CA6 1990); see also *Silver* v. *Baggiano*, 804 F. 2d 1211 (CA11

1986). We now conclude, contrary to the Seventh Circuit, that the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist.

II

The governing provision of the federal removal statute authorizes a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U. S. C. § 1441(a). See also Judiciary Act of 1789, § 12, 1 Stat. 79–80 (original removal statute); Act of Mar. 3, 1887, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433 (setting forth removal power in terms roughly similar to present law). The language of this section obviously permits the removal of a case that contains only claims that "arise under" federal law. That is because a federal statute explicitly grants the federal courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U. S. C. § 1331. This case, however, requires us to consider what happens if one, or more, of those claims is subject to an Eleventh Amendment bar. Does that circumstance destroy removal jurisdiction that would otherwise exist?

The primary argument that it does destroy removal jurisdiction has several parts. First, the argument distinguishes a case with federal-law claims that include one or more Eleventh Amendment claims from a case with both federal-law claims and state-law claims. See 116 F. 3d, at 1152. We have suggested that the presence of even one claim "arising under" federal law is sufficient to satisfy the requirement that the case be within the original jurisdiction of the district court for removal. See *Chicago* v. *International College of Surgeons*, 522 U. S. 156, 163–166 (1997). In *Chicago*, for example, we wrote:

> "[The] federal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the district

> courts for purposes of removal. . . . Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that [the] complaints, by virtue of their federal claims, were 'civil actions' within the federal courts' 'original jurisdiction.'" *Id.*, at 166 (citation omitted).

See also *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58 (1987); *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 7–12 (1983).

This statement, however, and others like it, appear in the context of cases involving both federal-law and state-law claims. And the Seventh Circuit found a significant difference between such cases and cases in which the Eleventh Amendment applies to some of the federal-law claims. See 116 F. 3d, at 1152. In the former cases the state-law claims fall within the supplemental jurisdiction of the federal courts. Supplemental jurisdiction allows federal courts to hear and decide state-law claims along with federal-law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U. S. C. § 1367(a); see *Chicago*, *supra*, at 164–166. Cf. § 1441(c) (explicitly providing discretionary removal jurisdiction over entire case where federal claim is accompanied by a "separate and independent" state-law claim). In the latter cases, the comparable claims do not fall within the federal courts' "pendent" jurisdiction, but rather, it is argued, are claims that the Eleventh Amendment prohibits the federal courts from deciding.

Second, the argument emphasizes the "jurisdictional" nature of this difference. The Seventh Circuit, for example, said: "Claims barred by sovereign immunity stand on different footing than other claims that are not independently removable, because of the affirmative limitation on jurisdiction imposed by the sovereign immunity doctrines." 116 F. 3d, at 1152 (citing *Frances J.*, *supra*, at 340–341, and n. 4). That is to say, according to the Court of Appeals, neither the law

permitting supplemental jurisdiction, nor any other law, see, *e. g.*, § 1441(c), gives the federal court the power to decide a claim barred by the Eleventh Amendment. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 121 (1984); *Frances J.*, 19 F. 3d, at 341.

Third, the argument looks to removal based upon "diversity jurisdiction," 28 U. S. C. § 1332, for analogical authority that leads to its conclusion, namely, that this "jurisdictional" problem is so serious that the presence of even one Eleventh-Amendment-barred claim destroys removal jurisdiction with respect to *all* claims (*i. e.*, the entire "case"). See, *e. g.*, 116 F. 3d, at 1152 (citing *Frances J.*, *supra*, at 341); *McKay* v. *Boyd Constr. Co.*, 769 F. 2d, at 1086–1087 (discussing analogy to removal based on diversity jurisdiction). A case falls within the federal district court's "original" diversity "jurisdiction" only if diversity of citizenship among the parties is complete, *i. e.*, only if there is no plaintiff and no defendant who are citizens of the same State. See *Carden* v. *Arkoma Associates*, 494 U. S. 185, 187 (1990); *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). But cf. Fed. Rule Civ. Proc. 21; *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 832–838 (1989) (Rule 21 authorizes courts to dismiss nondiverse defendants in order to cure jurisdictional defects, instead of the entire case). Consequently, this Court has indicated that a defendant cannot remove a case that contains some claims against "diverse" defendants as long as there is one claim brought against a "nondiverse" defendant. See *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 68–69 (1996). If the analogy is appropriate, then, an Eleventh Amendment bar with respect to one claim would prevent removal of a case that contains some "arising under" claims, which, had they stood alone, would have permitted removal. *Frances J.*, *supra*, at 341; *McKay*, *supra*, at 1087.

We find the analogy unconvincing. This case differs significantly from a diversity case with respect to a federal dis-

trict court's *original* jurisdiction. The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982); *People's Bank* v. *Calhoun*, 102 U. S. 256, 260–261 (1880). No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. *Insurance Corp. of Ireland*, *supra*, at 702; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241 (1985); *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883). Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 515, n. 19 (1982).

These differences help to explain why governing authority has treated the defects differently for purposes of original jurisdiction. Where original jurisdiction rests upon Congress' statutory grant of "diversity jurisdiction," this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction. See, *e. g.*, *Newman-Green, Inc.*, *supra*, at 829 ("When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal"). But, where original jurisdiction rests upon the Statute's grant of "arising under" jurisdiction, the Court has assumed that the presence of a potential Eleventh Amendment bar with respect to one claim, has not destroyed original jurisdiction over the case. *E. g.*, *Pugh*, 438 U. S., at 782; *Papasan* v. *Allain*, 478 U. S. 265 (1986). See also

Henry, 922 F. 2d, at 338–339; *Roberts* v. *College of the Desert*, 870 F. 2d 1411, 1415 (CA9 1988). Cf. *Pennhurst*, *supra*, at 121 (suggesting that courts must analyze the applicability of the Eleventh Amendment to each claim rather than case as whole). Since a federal court would have original jurisdiction to hear this case had Schacht originally filed it there, the defendants may remove the case from state to federal courts. See § 1441(a).

Other considerations further undermine the analogy. For example, for purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court—prior to the time the defendants filed their answer in federal court. See, *e. g.*, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 291 (1938) ("[T]he status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove"). As of that time, a case that involved "incomplete diversity" automatically would have fallen outside the federal courts' "original jurisdiction." By contrast, as of that time, the State's participation as a defendant would not automatically have placed the case outside the federal courts' jurisdictional authority. That is because the underlying relevant condition (the federal courts' effort to assert jurisdiction over an objecting State) could not have existed prior to removal, see, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1, 9, n. 7 (1980), and because the State might not have asserted the defense in federal court, but could have decided instead to defend on the merits. (Here, for example, the State, while not waiving its Eleventh Amendment defense, has asserted in the alternative that Schacht could not state a § 1983 claim against the State. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 64 (1989).)

These differences between "diversity" and "Eleventh Amendment" cases with respect to original and removal jurisdiction are sufficient to destroy the analogy upon which

the lower court opinions rest. A case such as this one is more closely analogous to cases in which a *later* event, say, the change in the citizenship of a party or a subsequent reduction of the amount at issue below jurisdictional levels, destroys previously existing jurisdiction. In such cases, a federal court will *keep* a removed case. See *St. Paul Mercury Indemnity Co.*, *supra*, at 293–295; *Phelps* v. *Oaks*, 117 U. S. 236, 240–241 (1886); *Kanouse* v. *Martin*, 15 How. 198, 207–210 (1854). See also *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343, 350, and n. 7 (1988) (federal court may exercise jurisdiction over remaining state-law claims under supplemental jurisdiction, if all federal-law claims are eliminated before trial). Here, too, at the time of removal, this case fell within the "original jurisdiction" of the federal courts. The State's later invocation of the Eleventh Amendment placed the particular *claim* beyond the power of the federal courts to decide, but it did not destroy removal jurisdiction over the entire case.

III

We must consider one further argument that respondent has made. That argument is not based upon an analogy but upon the specific language of a particular statutory provision, 28 U. S. C. § 1447(c). The provision says: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Ibid.* Respondent argues that, at least after the State asserted its Eleventh Amendment defense, the federal court "lacked subject matter jurisdiction." Brief for Respondent 19. He points out that the statute says that the entire "*case* shall be remanded" to the state court. That is to say, he contends that, if the "district court lacks subject matter jurisdiction" over *any* claim, then *every* claim, *i. e.*, the entire "case," must be "remanded" to the state court.

Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided—we reject respondent's argument

because we do not read the statute in this way. An ordinary reading of the language indicates that the statute refers to an instance in which a federal court "lacks subject matter jurisdiction" over a "case," and not simply over one claim within a case. Cf. § 1441(c) (permitting "the entire case" to be removed or remanded, when one or more "non-removable claims or causes of action" is joined with a federal question "claim or cause of action"). Conceivably, one might also read the statute's reference to "case" to include a claim within a case as well as the entire case. But neither reading helps Schacht. The former reading would make the provision inapplicable here; the latter would make it applicable, but requires remand only of the relevant claims, and not the entire case as Schacht contends.

Nor does the statute's purpose favor Schacht's interpretation. The statutory section that contains the provision deals, not with the question of what is removable, but with the procedures that a federal court is to follow after removal occurs. It is entitled: "Procedure after removal generally." § 1447. In substance, the section differentiates between removals that are defective because of lack of subject-matter jurisdiction and removals that are defective for some other reason, *e. g.*, because the removal took place after relevant time limits had expired. For the latter kind of case, there must be a motion to remand filed no later than 30 days after the filing of the removal notice. § 1447(c). For the former kind of case, remand may take place without such a motion and at any time. *Ibid.* The provision, then, helps to specify a procedural difference that flows from a difference in the kinds of reasons that could lead to a remand. That objective is irrelevant to the kind of problem presented in this case.

We repeat our conclusion: A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can

proceed to hear those other claims, and the District Court did not err in doing so.

For these reasons, 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 KENNEDY, concurring.

In joining the opinion of the Court, I write to observe we have neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its Eleventh Amendment immunity. Insofar as the record shows, this issue was not raised in the proceedings below; and it was not part of the briefs filed here or the arguments made to the Court. The question should be considered, however, in some later case.

Removal requires the consent of all of the defendants. See, *e. g.*, *Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245, 248 (1900); 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3731, p. 504 (2d ed. 1985). Here the State consented to removal but then registered a prompt objection to the jurisdiction of the United States District Court over the claim against it. By electing to remove, the State created the difficult problem confronted in the Court of Appeals and now here. This is the situation in which law usually says a party must accept the consequences of its own acts. It would seem simple enough to rule that once a State consents to removal, it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court. Consent to removal, it can be argued, is a waiver of the Eleventh Amendment immunity.

Given the latitude accorded the States in raising the immunity at a late stage, however, a rule of waiver may not be all that obvious. The Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the mer-

its. See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 683, n. 18 (1982) (plurality opinion); see also *Calderon* v. *Ashmus*, 523 U. S. 740, 745, n. 2 (1998); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99, n. 8 (1984); *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, 467 (1945).

I have my doubts about the propriety of this rule. In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

This departure from the usual rules of waiver stems from the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment. In certain respects, the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 516, n. 19 (1982). Permitting the immunity to be raised at any stage of the proceedings, in contrast, is more consistent with regarding the Eleventh Amendment as a limit on the federal courts' subject-matter jurisdiction. See *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702–704 (1982) (comparing personal jurisdiction with subject-matter jurisdiction). We have noted the inconsistency. Although the text is framed in terms of the extent of the "Judicial power of the United States," U. S. Const., Amdt. 11, our precedents have treated the Eleventh Amendment as "enact[ing] a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 267 (1997); see also E. Chemerinsky, Federal Jurisdiction § 7.6, p. 405 (2d ed. 1994) (noting that allowing waiver of the immunity "seems

inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction").

The Court could eliminate the unfairness by modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction. Under a rule inferring waiver from the failure to raise the objection at the outset of the proceedings, States would be prevented from gaining an unfair advantage. See Fed. Rule Civ. Proc. 12(h)(1).

We would not need to make this substantial revision to find waiver in the circumstances here, however. Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction. As the Court recognized in *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906), "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

An early decision of this Court applied this principle in holding that a State's voluntary intervention in a federal-court action to assert its own claim constituted a waiver of the Eleventh Amendment. *Clark* v. *Barnard*, 108 U. S. 436, 447–448 (1883); see also *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 294, n. 10 (1973) (Marshall, J., concurring in result) (citing *Clark* v. *Barnard* with approval); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276 (1959) (same); *Missouri* v. *Fiske*, 290 U. S. 18, 24–25 (1933) (same). The Court also found a waiver of the Eleventh Amendment when a State voluntarily appeared in bankruptcy court to file a claim against a common fund. *Gardner* v. *New Jersey*, 329 U. S. 565, 574 (1947). Since a State which is made a defendant to a state-court action is under no com-

pulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.

Some Courts of Appeals, following this reasoning, have recognized that consent to removal may constitute a waiver. *Newfield House, Inc.* v. *Massachusetts Dept. of Pub. Welfare*, 651 F. 2d 32, 36, n. 3 (CA1), cert. denied, 454 U. S. 1114 (1981); see also *Estate of Porter* v. *Illinois*, 36 F. 3d 684, 691 (CA7 1994); *Silver* v. *Baggiano*, 804 F. 2d 1211, 1214 (CA11 1986); *Gwinn Area Community Schools* v. *Michigan*, 741 F. 2d 840, 847 (CA6 1984). These cases have first inquired, however, whether state law authorized the attorneys representing the State to waive the Eleventh Amendment on its behalf. Petitioners cited this qualification when we raised the issue at oral argument in the instant case. This was also the Court's apparent concern in *Ford Motor Co.*, in which it held:

> "It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so. As this issue has not been determined by state courts, this Court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions. Article 4, § 24 of the Indiana Constitution provides:
>
> " 'Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.'
>
> "We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in

> the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases. . . . It would seem, therefore, that no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts." 323 U. S., at 467–469 (footnotes omitted).

See also *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975).

Notwithstanding the quoted language from *Ford Motor Co.*, the absence of specific authorization, it seems to me, is not an insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court. If the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

It is true as well that the Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit be unequivocal. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 246–247 (1985); *Edelman* v. *Jordan*, 415 U. S., at 673. The conduct which may give rise to the waiver in the instance of removal is far less equivocal than the conduct at issue in those cases, however. Here the State's consent amounted to a direct invocation of the jurisdiction of the federal courts, an act considerably more specific than the general participation in a federal program found insufficient in *Atascadero* and *Edelman*.

These questions should be explored. If it were demonstrated that a federal rule finding waiver of the Eleventh

Amendment when the State consents to removal would put States at some unfair tactical disadvantage, perhaps the waiver rule ought not to be embraced. I tend to doubt such consequences, however. Since the issue was not addressed either by the parties or the Court of Appeals, the proper course is for us to defer addressing the question until it is presented for our consideration, supported by full briefing and argument, in some later case.

Syllabus

SWIDLER & BERLIN ET AL. *v.* UNITED STATES

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

No. 97–1192. Argued June 8, 1998—Decided June 25, 1998

When various investigations of the 1993 dismissal of White House Travel Office employees were beginning, Deputy White House Counsel Vincent W. Foster, Jr., met with petitioner Hamilton, an attorney at petitioner law firm, to seek legal representation. Hamilton took handwritten notes at their meeting. Nine days later, Foster committed suicide. Subsequently, a federal grand jury, at the Independent Counsel's request, issued subpoenas for, *inter alia*, the handwritten notes as part of an investigation into whether crimes were committed during the prior investigations into the firings. Petitioners moved to quash, arguing, among other things, that the notes were protected by the attorney-client privilege. The District Court agreed and denied enforcement of the subpoenas. In reversing, the Court of Appeals recognized that most courts assume the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. The court declared that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. Concluding that the privilege is not absolute in such circumstances, and that instead, a balancing test should apply, the court held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial.

Held: Hamilton's notes are protected by the attorney-client privilege. This Court's inquiry must be guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." Fed. Rule Evid. 501. The relevant case law demonstrates that it has been overwhelmingly, if not universally, accepted, for well over a century, that the privilege survives the client's death in a case such as this. While the Independent Counsel's arguments against the privilege's posthumous survival are not frivolous, he has simply not satisfied his burden of showing that "reason and experience" require a departure from the common-law rule. His interpretation—that the testamentary exception supports the privilege's posthumous termination because in practice most cases have refused to apply the privilege posthumously;

Syllabus

that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality; and that, by analogy, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the estate's financial interests are not at stake—does not square with the case law's implicit acceptance of the privilege's survival and with its treatment of testamentary disclosure as an "exception" or an implied "waiver." And his analogy's premise is incorrect, since cases have consistently recognized that the testamentary exception furthers the client's intent, whereas there is no reason to suppose the same is true with respect to grand jury testimony about confidential communications. Knowing that communications will remain confidential even after death serves a weighty interest in encouraging a client to communicate fully and frankly with counsel; posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. The Independent Counsel's suggestion that a posthumous disclosure rule will chill only clients intent on perjury, not truthful clients or those asserting the Fifth Amendment, incorrectly equates the privilege against self-incrimination with the privilege here at issue, which serves much broader purposes. Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crime, but nonetheless are matters the clients would not wish divulged. The suggestion that the proposed exception would have minimal impact if confined to criminal cases, or to information of substantial importance in particular criminal cases, is unavailing because there is no case law holding that the privilege applies differently in criminal and civil cases, and because a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application and therefore must be rejected. The argument that the existence of, *e. g.*, the crime-fraud and testamentary exceptions to the privilege makes the impact of one more exception marginal fails because there is little empirical evidence to support it, and because the established exceptions, unlike the proposed exception, are consistent with the privilege's purposes. Indications in *United States* v. *Nixon*, 418 U. S. 683, 710, and *Branzburg* v. *Hayes*, 408 U. S. 665, that privileges must be strictly construed as inconsistent with truth seeking are inapposite here, since those cases dealt with the creation of privileges not recognized by the common law, whereas here, the Independent Counsel seeks to narrow a well-established privilege. Pp. 403–411.

124 F. 3d 230, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 411.

James Hamilton, *pro se*, argued the cause for petitioners. With him on the briefs was *Robert V. Zener*.

Brett M. Kavanaugh argued the cause for the United States. With him on the brief were *Kenneth W. Starr* and *Craig S. Lerner*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Hamilton, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July 1993, Foster met with petitioner Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2-hour meeting, Hamilton took three pages of

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Jerome J. Shestack*, *William H. Jeffress, Jr.*, and *Scott L. Nelson, Jr.;* for the American College of Trial Lawyers by *Edward Brodsky* and *Alan J. Davis;* and for the National Association of Criminal Defense Lawyers et al. by *Mark I. Levy*, *Timothy K. Armstrong*, *Lisa B. Kemler*, *Steven Alan Bennett*, *Arthur H. Bryant*, and *Richard G. Taranto*.

handwritten notes. One of the first entries in the notes is the word "Privileged." Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton's handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and by the work-product privilege. The District Court, after examining the notes *in camera*, concluded they were protected from disclosure by both doctrines and denied enforcement of the subpoenas.

The Court of Appeals for the District of Columbia Circuit reversed. *In re Sealed Case*, 124 F. 3d 230 (1997). While recognizing that most courts assume the privilege survives death, the Court of Appeals noted that holdings actually manifesting the posthumous force of the privilege are rare. Instead, most judicial references to the privilege's posthumous application occur in the context of a well-recognized exception allowing disclosure for disputes among the client's heirs. *Id.*, at 231–232. It further noted that most commentators support some measure of posthumous curtailment of the privilege. *Id.*, at 232. The Court of Appeals thought that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. It therefore concluded that the privilege was not absolute in such circumstances, and that instead, a balancing test should apply. *Id.*, at 233–234. It thus held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial. *Id.*, at 235. While acknowledging that uncertain privileges are disfavored, *Jaffee* v. *Redmond*, 518 U. S. 1, 17–18 (1996), the Court of Appeals determined that the uncertainty introduced by its balancing test was insignificant in light of existing excep-

tions to the privilege. 124 F. 3d, at 235. The Court of Appeals also held that the notes were not protected by the work-product privilege.

The dissenting judge would have affirmed the District Court's judgment that the attorney-client privilege protected the notes. *Id.*, at 237. He concluded that the common-law rule was that the privilege survived death. He found no persuasive reason to depart from this accepted rule, particularly given the importance of the privilege to full and frank client communication. *Id.*, at 237.

Petitioners sought review in this Court on both the attorney-client privilege and the work-product privilege.[1] We granted certiorari, 523 U. S. 1045 (1998), and we now reverse.

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981); *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn*, *supra*, at 389. The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. Rule Evid. 501; *Funk* v. *United States*, 290 U. S. 371 (1933).

The Independent Counsel argues that the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A. 2d 689 (1976),

[1] Because we sustain the claim of attorney-client privilege, we do not reach the claim of work-product privilege.

and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant. *Id.*, at 462–464, 357 A. 2d, at 692–693.

But other than these two decisions, cases addressing the existence of the privilege after death—most involving the testamentary exception—uniformly presume the privilege survives, even if they do not so hold. See, *e. g.*, *Mayberry* v. *Indiana*, 670 N. E. 2d 1262 (Ind. 1996); *Morris* v. *Cain*, 39 La. Ann. 712, 1 So. 797 (1887); *People* v. *Modzelewski*, 611 N. Y. S. 2d 22, 203 A. 2d 594 (App. Div. 1994). Several State Supreme Court decisions expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context. See *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 481–483, 562 N. E. 2d 69, 70 (1990); *State* v. *Doster*, 276 S. C. 647, 650–651, 284 S. E. 2d 218, 219 (1981); *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976). In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Judicial Court concluded that survival of the privilege was "the clear implication" of its early pronouncements that communications subject to the privilege could not be disclosed at any time. 408 Mass., at 483, 562 N. E. 2d, at 70. The court further noted that survival of the privilege was "necessarily implied" by cases allowing waiver of the privilege in testamentary disputes. *Ibid.*

Such testamentary exception cases consistently presume the privilege survives. See, *e. g.*, *United States* v. *Osborn*, 561 F. 2d 1334, 1340 (CA9 1977); *DeLoach* v. *Myers*, 215 Ga. 255, 259–260, 109 S. E. 2d 777, 780–781 (1959); *Doyle* v. *Reeves*, 112 Conn. 521, 152 A. 882 (1931); *Russell* v. *Jackson*, 9 Hare 387, 68 Eng. Rep. 558 (V. C. 1851). They view testa-

mentary disclosure of communications as an exception to the privilege: "[T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs." *Osborn*, 561 F. 2d, at 1340. The rationale for such disclosure is that it furthers the client's intent. *Id.*, at 1340, n. 11.[2]

Indeed, in *Glover* v. *Patten*, 165 U. S. 394, 406–408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent. *Id.*, at 407–408 (quoting *Blackburn* v. *Crawfords*, 3 Wall. 175 (1866), and *Russell* v. *Jackson*, *supra*).

The great body of this case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independ-

[2] About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). See, *e. g.*, Ala. Rule Evid. 502 (1996); Ark. Code Ann. § 16–41–101, Rule 502 (Supp. 1997); Neb. Rev. Stat. § 27–503, Rule 503 (1995). These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. See, *e. g.*, Ark. Code Ann. § 16–41–101, Rule 502(c) (Supp. 1997). They thus do not refute or affirm the general presumption in the case law that the privilege survives. California's statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. See Cal. Code Evid. Ann. §§ 954, 957 (West 1995). But no other State has followed California's lead in this regard.

ent Counsel to show that "reason and experience" require a departure from this rule.

The Independent Counsel contends that the testamentary exception supports the posthumous termination of the privilege because in practice most cases have refused to apply the privilege posthumously. He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.

But the Independent Counsel's interpretation simply does not square with the case law's implicit acceptance of the privilege's survival and with the treatment of testamentary disclosure as an "exception" or an implied "waiver." And the premise of his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent, see, *e. g.*, *Glover*, *supra*. There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent.

Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. See, *e. g.*, 8 Wigmore, Evidence § 2323 (McNaughton rev. 1961); Frankel, The Attorney-Client Privilege After the Death of the Client, 6 Geo. J. Legal Ethics 45, 78–79 (1992); 1 J. Strong, McCormick on Evidence § 94, p. 348 (4th ed. 1992). Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should be abrogated after the client's death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. See, *e. g.*, C. Mueller & L. Kirkpatrick, 2 Federal Evidence § 199, pp. 380–381 (2d ed. 1994); Restatement (Third) of the Law Governing Lawyers § 127, Comment

d (Proposed Final Draft No. 1, Mar. 29, 1996). But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law. See, *e. g.*, Mueller & Kirkpatrick, *supra*, at 379; Restatement of the Law Governing Lawyers, *supra*, § 127, Comment *c;* 24 C. Wright & K. Graham, Federal Practice and Procedure § 5498, p. 483 (1986).

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys

act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffee*, 518 U. S., at 12; *Fisher* v. *United States*, 425 U. S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case.[3] However, there is no case authority for the proposition that the privilege applies differently in crimi-

[3] Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

nal and civil cases, and only one commentator ventures such a suggestion, see Mueller & Kirkpatrick, *supra*, at 380–381. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege. See *Upjohn*, 449 U. S., at 393; *Jaffee*, *supra*, at 17–18.

In a similar vein, the Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, these exceptions do not demonstrate that the impact of a posthumous exception would be insignificant, and there is little empirical evidence on this point.[4] The established exceptions are con-

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[4] Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. Alexander, The Corporate Attorney Client Privilege: A Study of the Participants, 63 St. John's L. Rev. 191 (1989); Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 352 (1989); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L. J. 1226 (1962). These articles note that clients are often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244–246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 Yale L. J., *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege's application after death. This may reflect the general assumption that the privilege sur-

sistent with the purposes of the privilege, see *Glover*, 165 U. S., at 407–408; *United States* v. *Zolin*, 491 U. S. 554, 562–563 (1989), while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege, without reference to common-law principles or "reason and experience."

Finally, the Independent Counsel, relying on cases such as *United States* v. *Nixon*, 418 U. S. 683, 710 (1974), and *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of case law.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Rule 501's direction to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" does not mandate that a rule, once established, should endure for all time. *Funk* v. *United States*, 290 U. S. 371, 381 (1933). But

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vives—if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist.

here the Independent Counsel has simply not made a sufficient showing to overturn the common-law rule embodied in the prevailing case law. Interpreted in the light of reason and experience, that body of law requires that the attorney-client privilege prevent disclosure of the notes at issue in this case. The judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.

We have long recognized that "[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States*, 290 U. S. 371, 381 (1933). In light of the heavy burden that they place on the search for truth, see *United States* v. *Nixon*, 418 U. S. 683, 708–710 (1974), "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances," *Herbert* v. *Lando*, 441 U. S. 153, 175 (1979). Consequently, we construe the scope of privileges narrowly. See *Jaffee* v. *Redmond*, 518 U. S. 1, 19 (1996) (SCALIA, J., dissenting); see also *University of Pennsylvania* v. *EEOC*, 493 U. S. 182, 189 (1990). We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United*

States, 445 U. S. 40, 50 (1980) (internal quotation marks omitted).

The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. See *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981). The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," see *Fisher* v. *United States*, 425 U. S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise," *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A. 2d 689, 693–694 (1976).

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. See *ante*, at 407. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." 1 J. Strong, McCormick on Evidence § 94, p. 350 (4th ed. 1992); see also Restatement (Third) of the Law Governing Lawyers § 127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect disclosure of the underlying facts by those who communicated with the attorney," *Upjohn*, *supra*, at 395, and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete

"loss of crucial information" will often result, see 24 C. Wright & K. Graham, Federal Practice and Procedure § 5498, p. 484 (1986).

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. See *In re Sealed Case*, 124 F. 3d 230, 233–234 (CADC 1997). Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. See *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976); cf. *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 486, 562 N. E. 2d 69, 72 (1990) (Nolan, J., dissenting). In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. See, *e. g.*, *Schlup* v. *Delo*, 513 U. S. 298, 324–325 (1995); *In re Winship*, 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Indeed, even petitioners acknowledge that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. "[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon*, *supra*, at 709 (internal quotation marks omitted); see also *Herrera* v. *Collins*, 506 U. S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts

should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

A number of exceptions to the privilege already qualify its protections, and an attorney "who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit." 124 F. 3d, at 235. In the situation where the posthumous privilege most frequently arises—a dispute between heirs over the decedent's will—the privilege is widely recognized to give way to the interest in settling the estate. See *Glover* v. *Patten*, 165 U. S. 394, 406–408 (1897). This testamentary exception, moreover, may be invoked in some cases where the decedent would not have chosen to waive the privilege. For example, "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." 124 F. 3d, at 234. Among the Court's rationales for a broad construction of the posthumous privilege is its assertion that "[m]any attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed . . . which the client would not wish divulged." *Ante*, at 407–408. That reasoning, however, would apply in the testamentary context with equal force. Nor are other existing exceptions to the privilege—for example, the crime-fraud exception or the exceptions for claims relating to attorney competence or compensation—necessarily consistent with "encouraging full and frank communication" or "protecting the client's interests." *Ante*, at 410. Rather, those exceptions reflect the understanding that, in certain circumstances, the privilege "'ceases to operate'" as a safeguard on "the proper functioning of our adversary system." See *United States* v. *Zolin*, 491 U. S. 554, 562–563 (1989).

Finally, the common law authority for the proposition that the privilege remains absolute after the client's death is not a monolithic body of precedent. Indeed, the Court acknowl-

edges that most cases merely "presume the privilege survives," see *ante*, at 404, and it relies on the case law's "implicit acceptance" of a continuous privilege, see *ante*, at 406. Opinions squarely addressing the posthumous force of the privilege "are relatively rare." See 124 F. 3d, at 232. And even in those decisions expressly holding that the privilege continues after the death of the client, courts do not typically engage in detailed reasoning, but rather conclude that the cases construing the testamentary exception imply survival of the privilege. See, *e. g.*, *Glover*, *supra*, at 406–408; see also Wright & Graham, *supra*, § 5498, at 484 ("Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy").

Moreover, as the Court concedes, see *ante*, at 403–404, 406–407, there is some authority for the proposition that a deceased client's communications may be revealed, even in circumstances outside of the testamentary context. California's Evidence Code, for example, provides that the attorney-client privilege continues only until the deceased client's estate is finally distributed, noting that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." Cal. Evid. Code Ann. § 954, and comment, p. 232, § 952 (West 1995). And a state appellate court has admitted an attorney's testimony concerning a deceased client's communications after "balanc[ing] the necessity for revealing the substance of the [attorney-client conversation] against the unlikelihood of any cognizable injury to the rights, interests, estate or memory of [the client]." See *Cohen*, *supra*, at 464, 357 A. 2d, at 693. The American Law Institute, moreover, has recently recommended withholding the privilege when the communication "bears on a litigated issue of pivotal significance" and has suggested that courts "balance the interest in confidentiality against any exceptional need for the communication." Restatement (Third) of the Law Governing Lawyers § 127, at 431, Com-

ment *d;* see also 2 C. Mueller & L. Kirkpatrick, Federal Evidence, § 199, p. 380 (2d ed. 1994) ("[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences").

Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client. Moreover, although I disagree with the Court of Appeals' notion that the context of an initial client interview affects the applicability of the work product doctrine, I do not believe that the doctrine applies where the material concerns a client who is no longer a potential party to adversarial litigation.

Accordingly, I would affirm the judgment of the Court of Appeals. Although the District Court examined the documents *in camera,* it has not had an opportunity to balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case. Thus, I agree with the Court of Appeals' decision to remand for a determination whether any portion of the notes must be disclosed.

With respect, I dissent.

Syllabus

CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 97–1374. Argued April 27, 1998—Decided June 25, 1998

Last Term, this Court determined on expedited review that Members of Congress did not have standing to maintain a constitutional challenge to the Line Item Veto Act (Act), 2 U. S. C. § 691 *et seq.*, because they had not alleged a sufficiently concrete injury. *Raines* v. *Byrd*, 521 U. S. 811. Within two months, the President exercised his authority under the Act by canceling § 4722(c) of the Balanced Budget Act of 1997, which waived the Federal Government's statutory right to recoupment of as much as $2.6 billion in taxes that the State of New York had levied against Medicaid providers, and § 968 of the Taxpayer Relief Act of 1997, which permitted the owners of certain food refiners and processors to defer recognition of capital gains if they sold their stock to eligible farmers' cooperatives. Appellees, claiming they had been injured, filed separate actions against the President and other officials challenging the cancellations. The plaintiffs in the first case are the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The plaintiffs in the second are the Snake River farmers' cooperative and one of its individual members. The District Court consolidated the cases, determined that at least one of the plaintiffs in each had standing under Article III, and ruled, *inter alia*, that the Act's cancellation procedures violate the Presentment Clause, Art. I, § 7, cl. 2. This Court again expedited its review.

Held:

1. The appellees have standing to challenge the Act's constitutionality. They invoked the District Court's jurisdiction under a section entitled "Expedited review," which, among other things, expressly authorizes "any individual adversely affected" to bring a constitutional challenge. § 692(a)(1). The Government's argument that none of them except the individual Snake River member is an "individual" within § 692(a)(1)'s meaning is rejected because, in the context of the entire section, it is clear that Congress meant that word to be construed broadly to include corporations and other entities. The Court is also unpersuaded by the Government's argument that appellees' challenge is nonjusticiable. These cases differ from *Raines*, not only because the President's exercise of his cancellation authority has removed any con-

cern about the dispute's ripeness, but more importantly because the parties have alleged a "personal stake" in having an actual injury redressed, rather than an "institutional injury" that is "abstract and widely dispersed." 521 U. S., at 829. There is no merit to the Government's contention that, in both cases, the appellees have not suffered actual injury because their claims are too speculative and, in any event, are advanced by the wrong parties. Because New York State now has a multibillion dollar contingent liability that had been eliminated by § 4722(c), the State, and the appellees, suffered an immediate, concrete injury the moment the President canceled the section and deprived them of its benefits. The argument that New York's claim belongs to the State, not appellees, fails in light of New York statutes demonstrating that both New York City and the appellee providers will be assessed for substantial portions of any recoupment payments the State has to make. Similarly, the President's cancellation of § 968 inflicted a sufficient likelihood of economic injury on the Snake River appellees to establish standing under this Court's precedents, cf. *Bryant* v. *Yellen*, 447 U. S. 352, 368. The assertion that, because processing facility sellers would have received the tax benefits, only they have standing to challenge the § 968 cancellation not only ignores the fact that the cooperatives were the intended beneficiaries of § 968, but also overlooks the fact that more than one party may be harmed by a defendant and therefore have standing. Pp. 428–436.

2. The Act's cancellation procedures violate the Presentment Clause. Pp. 436–449.

(a) The Act empowers the President to cancel an "item of new direct spending" such as § 4722(c) of the Balanced Budget Act and a "limited tax benefit" such as § 968 of the Taxpayer Relief Act, § 691(a), specifying that such cancellation prevents a provision "from having legal force or effect," §§ 691e(4)(B)–(C). Thus, in both legal and practical effect, the Presidential actions at issue have amended two Acts of Congress by repealing a portion of each. Statutory repeals must conform with Art. I, *INS* v. *Chadha*, 462 U. S. 919, 954, but there is no constitutional authorization for the President to amend or repeal. Under the Presentment Clause, after a bill has passed both Houses, but "before it become[s] a Law," it must be presented to the President, who "shall sign it" if he approves it, but "return it," *i. e.*, "veto" it, if he does not. There are important differences between such a "return" and cancellation under the Act: The constitutional return is of the entire bill and takes place *before* it becomes law, whereas the statutory cancellation occurs *after* the bill becomes law and affects it only in part. There are powerful reasons for construing the constitutional silence on the profoundly important subject of Presidential repeals as equivalent to an express

prohibition. The Article I procedures governing statutory enactment were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U. S., at 951. What has emerged in the present cases, however, are not the product of the "finely wrought" procedure that the Framers designed, but truncated versions of two bills that passed both Houses. Pp. 436–441.

(b) The Court rejects two related Government arguments. First, the contention that the cancellations were merely exercises of the President's discretionary authority under the Balanced Budget Act and the Taxpayer Relief Act, read in light of the previously enacted Line Item Veto Act, is unpersuasive. *Field* v. *Clark*, 143 U. S. 649, 693, on which the Government relies, suggests critical differences between this cancellation power and the President's statutory power to suspend import duty exemptions that was there upheld: such suspension was contingent on a condition that did not predate its statute, the duty to suspend was absolute once the President determined the contingency had arisen, and the suspension executed congressional policy. In contrast, the Act at issue authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing Article I, § 7, procedures. Second, the contention that the cancellation authority is no greater than the President's traditional statutory authority to decline to spend appropriated funds or to implement specified tax measures fails because this Act, unlike the earlier laws, gives the President the unilateral power to change the text of duly enacted statutes. Pp. 442–447.

(c) The profound importance of these cases makes it appropriate to emphasize three points. First, the Court expresses no opinion about the wisdom of the Act's procedures and does not lightly conclude that the actions of the Congress that passed it, and the President who signed it into law, were unconstitutional. The Court has, however, twice had full argument and briefing on the question and has concluded that its duty is clear. Second, having concluded that the Act's cancellation provisions violate Article I, § 7, the Court finds it unnecessary to consider the District Court's alternative holding that the Act impermissibly disrupts the balance of powers among the three branches of Government. Third, this decision rests on the narrow ground that the Act's procedures are not authorized by the Constitution. If this Act were valid, it would authorize the President to create a law whose text was not voted on by either House or presented to the President for signature. That may or may not be desirable, but it is surely not a document that may "become a law" pursuant to Article I, § 7. If there is to be a new proce-

dure in which the President will play a different role, such change must come through the Article V amendment procedures. Pp. 447–449.

985 F. Supp. 168, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 449. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, and in which BREYER, J., joined as to Part III, *post*, p. 453. BREYER, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined as to Part III, *post*, p. 469.

Solicitor General Waxman argued the cause for the appellants. With him on the briefs were *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Malcolm L. Stewart*, and *Douglas N. Letter*.

Louis R. Cohen argued the cause for appellees Snake River Potato Growers, Inc., et al. With him on the brief were *Lloyd N. Cutler*, *Lawrence A. Kasten*, *Donald B. Holbrook*, *Randon W. Wilson*, and *William H. Orton*. *Charles J. Cooper* argued the cause for appellees City of New York et al. With him on the briefs were *M. Sean Laane*, *Leonard J. Koerner*, *Alan G. Krams*, *David B. Goldin*, and *Peter F. Nadel*.*

JUSTICE STEVENS delivered the opinion of the Court.

The Line Item Veto Act (Act), 110 Stat. 1200, 2 U. S. C. § 691 *et seq.* (1994 ed., Supp. II), was enacted in April 1996

*Briefs of *amici curiae* urging reversal were filed for the United States Senate by *Thomas B. Griffith*, *Morgan J. Frankel*, and *Steven F. Huefner;* for *Marci Hamilton*, *pro se*, and *David Schoenbrod*, *pro se;* for Congressman Dan Burton et al. by *James M. Spears;* and for *John S. Baker, Jr.*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Bar of the City of New York by *Louis A. Craco, Jr.*, *James F. Parver*, and *David P. Felsher;* for Senator Robert C. Byrd et al. by *Michael Davidson* and *Mark A. Patterson;* and for Representative Henry W. Waxman et al. by *Alan B. Morrison*.

and became effective on January 1, 1997. The following day, six Members of Congress who had voted against the Act brought suit in the District Court for the District of Columbia challenging its constitutionality. On April 10, 1997, the District Court entered an order holding that the Act is unconstitutional. *Byrd* v. *Raines*, 956 F. Supp. 25. In obedience to the statutory direction to allow a direct, expedited appeal to this Court, see §§ 692(b)–(c), we promptly noted probable jurisdiction and expedited review, 520 U. S. 1194 (1997). We determined, however, that the Members of Congress did not have standing to sue because they had not "alleged a sufficiently concrete injury to have established Article III standing," *Raines* v. *Byrd*, 521 U. S. 811, 830 (1997); thus, "[i]n . . . light of [the] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," *id.*, at 820, we remanded the case to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

Less than two months after our decision in that case, the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251, 515, and two provisions in the Taxpayer Relief Act of 1997, Pub. L. 105–34, 111 Stat. 788, 895–896, 990–993. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid, 985 F. Supp. 168, 177–182 (1998), and we again expedited our review, 522 U. S. 1144 (1998). We now hold that these appellees have standing to challenge the constitutionality of the Act and, reaching the merits, we agree that the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution.

I

We begin by reviewing the canceled items that are at issue in these cases.

Section 4722(c) of the Balanced Budget Act

Title XIX of the Social Security Act, 79 Stat. 343, as amended, authorizes the Federal Government to transfer huge sums of money to the States to help finance medical care for the indigent. See 42 U. S. C. § 1396d(b). In 1991, Congress directed that those federal subsidies be reduced by the amount of certain taxes levied by the States on health care providers.[1] In 1994, the Department of Health and Human Services (HHS) notified the State of New York that 15 of its taxes were covered by the 1991 Act, and that as of June 30, 1994, the statute therefore required New York to return $955 million to the United States. The notice advised the State that it could apply for a waiver on certain statutory grounds. New York did request a waiver for those tax programs, as well as for a number of others, but HHS has not formally acted on any of those waiver requests. New York has estimated that the amount at issue for the period from October 1992 through March 1997 is as high as $2.6 billion.

Because HHS had not taken any action on the waiver requests, New York turned to Congress for relief. On August 5, 1997, Congress enacted a law that resolved the issue in New York's favor. Section 4722(c) of the Balanced Budget Act of 1997 identifies the disputed taxes and provides that they "are deemed to be permissible health care related taxes and in compliance with the requirements" of the relevant provisions of the 1991 statute.[2]

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[1] Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. 102–234, 105 Stat. 1793, 42 U. S. C. § 1396b(w).

[2] Section 4722(c) provides:

"(c) WAIVER OF CERTAIN PROVIDER TAX PROVISIONS.—Notwithstanding any other provision of law, taxes, fees, or assessments, as defined in section 1903(w)(3)(A) of the Social Security Act (42 U. S. C. 1396b(w)(3)(A)), that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions of subparagraph (B) or (C) of section 1903(w)(3) of such Act has been applied for, or that would, but for this subsection require that such

On August 11, 1997, the President sent identical notices to the Senate and to the House of Representatives canceling "one item of new direct spending," specifying § 4722(c) as that item, and stating that he had determined that "this cancellation will reduce the Federal budget deficit." He explained that § 4722(c) would have permitted New York "to continue relying upon impermissible provider taxes to finance its Medicaid program" and that "[t]his preferential treatment would have increased Medicaid costs, would have treated New York differently from all other States, and would have established a costly precedent for other States to request comparable treatment."[3]

Section 968 of the Taxpayer Relief Act of 1997

A person who realizes a profit from the sale of securities is generally subject to a capital gains tax. Under existing law, however, an ordinary business corporation can acquire a corporation, including a food processing or refining company, in a merger or stock-for-stock transaction in which no gain is recognized to the seller, see 26 U. S. C. §§ 354(a), 368(a); the seller's tax payment, therefore, is deferred. If, however, the purchaser is a farmers' cooperative, the parties cannot structure such a transaction because the stock of the cooperative may be held only by its members, see § 521(b)(2); thus, a seller dealing with a farmers' cooperative cannot obtain the benefits of tax deferral.

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a waiver be applied for, in accordance with subparagraph (E) of such section, and, (if so applied for) upon which action by the Secretary of Health and Human Services (including any judicial review of any such proceeding) has not been completed as of July 23, 1997, are deemed to be permissible health care related taxes and in compliance with the requirements of subparagraphs (B) and (C) of section 1903(w)(3) of such Act." 111 Stat. 515.

[3] App. to Juris. Statement 63a–64a (Cancellation No. 97–3). The quoted text is an excerpt from the statement of reasons for the cancellation, which is required by the Line Item Veto Act. See 2 U. S. C. § 691a (1994 ed., Supp. II).

In § 968 of the Taxpayer Relief Act of 1997, Congress amended § 1042 of the Internal Revenue Code to permit owners of certain food refiners and processors to defer the recognition of gain if they sell their stock to eligible farmers' cooperatives.[4] The purpose of the amendment, as repeatedly explained by its sponsors, was "to facilitate the transfer of refiners and processors to farmers' cooperatives."[5] The

[4] Section 968(a) of the Taxpayer Relief Act of 1997 amended 26 U. S. C. § 1042 by adding a new subsection (g), which defined the sellers eligible for the exemption as follows:

"(2) QUALIFIED REFINER OR PROCESSOR.—For purposes of this subsection, the term 'qualified refiner or processor' means a domestic corporation—

"(A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and

"(B) which, during the 1-year period ending on the date of the sale, purchases more than one-half of such products to be refined or processed from—

"(i) farmers who make up the eligible farmers' cooperative which is purchasing stock in the corporation in a transaction to which this subsection is to apply, or

"(ii) such cooperative." 111 Stat. 896.

[5] H. R. Rep. No. 105–148, p. 420 (1997); see also 141 Cong. Rec. S18739 (Dec. 15, 1995) (Senator Hatch, introducing a previous version of the bill, stating that it "would provide farmers who form farmers cooperatives the opportunity for an ownership interest in the processing and marketing of their products"); *ibid.* (Senator Craig, cosponsor of a previous bill, stating that "[c]urrently, farmers cannot compete with other business entities . . . in buying such [processing] businesses because of the advantages inherent in the tax deferrals available in transactions with these other purchases"; bill "would be helpful to farmers cooperatives"); App. 116–117 (Letter from Congresspersons Roberts and Stenholm (Dec. 1, 1995)) (congressional sponsors stating that a previous version of the bill was intended to "provide American farmers a more firm economic footing and more control over their economic destiny. We believe this proposal will help farmers, through their cooperatives, purchase facilities to refine and process their raw commodities into value-added products. . . . It will encourage farmers to help themselves in a more market-oriented environment by vertically integrating. If this legislation is passed, we are confident that, 10 years from now, we will look on this bill as one of the most beneficial actions Congress took for U. S. farmers").

amendment to § 1042 was one of the 79 "limited tax benefits" authorized by the Taxpayer Relief Act of 1997 and specifically identified in Title XVII of that Act as "subject to [the] line item veto."[6]

On the same date that he canceled the "item of new direct spending" involving New York's health care programs, the President also canceled this limited tax benefit. In his explanation of that action, the President endorsed the objective of encouraging "value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods,"[7] but concluded that the provision lacked safeguards and also "failed to target its benefits to small-and-medium-size cooperatives."[8]

II

Appellees filed two separate actions against the President[9] and other federal officials challenging these two cancellations. The plaintiffs in the first case are the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The plaintiffs in the second are a farmers' cooperative consisting of about 30 potato growers in Idaho and an individual farmer who is a member and officer of the cooperative. The District Court consolidated the two cases and determined that at least one

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[6] § 1701(30), 111 Stat. 1101.

[7] App. to Juris. Statement 71a (Cancellation No. 97–2). On the day the President canceled § 968, he stated: "Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me." App. 125. He added that creating incentives so that farmers' cooperatives can obtain processing facilities is a "very worthy goal." *Id.*, at 130.

[8] App. to Juris. Statement 71a (Cancellation No. 97–2). Section 968 was one of the two limited tax benefits in the Taxpayer Relief Act of 1997 that the President canceled.

[9] In both actions, the plaintiffs sought a declaratory judgment that the Line Item Veto Act is unconstitutional and that the particular cancellation was invalid; neither set of plaintiffs sought injunctive relief against the President.

of the plaintiffs in each had standing under Article III of the Constitution.

Appellee New York City Health and Hospitals Corporation (NYCHHC) is responsible for the operation of public health care facilities throughout the City of New York. If HHS ultimately denies the State's waiver requests, New York law will automatically require[10] NYCHHC to make retroactive tax payments to the State of about $4 million for each of the years at issue. 985 F. Supp., at 172. This contingent liability for NYCHHC, and comparable potential liabilities for the other appellee health care providers, were eliminated by § 4722(c) of the Balanced Budget Act of 1997 and revived by the President's cancellation of that provision. The District Court held that the cancellation of the statutory protection against these liabilities constituted sufficient injury to give these providers Article III standing.

Appellee Snake River Potato Growers, Inc. (Snake River) was formed in May 1997 to assist Idaho potato farmers in marketing their crops and stabilizing prices, in part through a strategy of acquiring potato processing facilities that will allow the members of the cooperative to retain revenues otherwise payable to third-party processors. At that time, Congress was considering the amendment to the capital gains tax that was expressly intended to aid farmers' cooperatives in the purchase of processing facilities, and Snake River had concrete plans to take advantage of the amendment if passed. Indeed, appellee Mike Cranney, acting on behalf of Snake River, was engaged in negotiations with the

[10] See, *e. g.*, N. Y. Pub. Health Law § 2807–c(18)(e) (McKinney Supp. 1997–1998) ("In the event the secretary of the department of health and human services determines that the assessments do not . . . qualify based on any such exclusion, then the exclusion shall be deemed to have been null and void . . . and the commissioner shall collect any retroactive amount due as a result . . . . Interest and penalties shall be measured from the due date of ninety days following notice from the commissioner"); § 2807–d(12) (1993) (same); § 2807–j(11) (Supp. 1997–1998) (same); § 2807–s(8) (same).

owner of an Idaho potato processor that would have qualified for the tax benefit under the pending legislation, but these negotiations terminated when the President canceled § 968. Snake River is currently considering the possible purchase of other processing facilities in Idaho if the President's cancellation is reversed. Based on these facts, the District Court concluded that the Snake River plaintiffs were injured by the President's cancellation of § 968, as they "lost the benefit of being on equal footing with their competitors and will likely have to pay more to purchase processing facilities now that the sellers will not [be] able to take advantage of section 968's tax breaks." *Id.*, at 177.

On the merits, the District Court held that the cancellations did not conform to the constitutionally mandated procedures for the enactment or repeal of laws in two respects. First, the laws that resulted after the cancellations "were different from those consented to by both Houses of Congress." *Id.*, at 178.[11] Moreover, the President violated Article I "when he unilaterally canceled provisions of duly enacted statutes." *Id.*, at 179.[12] As a separate basis for

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[11] As the District Court explained: "These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid." 985 F. Supp., at 178–179.

[12] "Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent. Once a bill becomes law, it can only be repealed or amended through another, independent legislative enactment, which itself must conform with the requirements of Article I. Any rescissions must be agreed upon by a majority of both Houses of Congress. The President cannot single-handedly revise the work of the other two participants in the lawmaking process, as he did here when he vetoed certain provisions of these statutes." *Ibid.*

its decision, the District Court also held that the Act "impermissibly disrupts the balance of powers among the three branches of government." *Ibid.*

III

As in the prior challenge to the Line Item Veto Act, we initially confront jurisdictional questions. The appellees invoked the jurisdiction of the District Court under the section of the Act entitled "Expedited review." That section, 2 U. S. C. § 692(a)(1) (1994 ed., Supp. II), expressly authorizes "[a]ny Member of Congress or any individual adversely affected" by the Act to bring an action for declaratory judgment or injunctive relief on the ground that any provision of the Act is unconstitutional. Although the Government did not question the applicability of that section in the District Court, it now argues that, with the exception of Mike Cranney, the appellees are not "individuals" within the meaning of § 692(a)(1). Because the argument poses a jurisdictional question (although not one of constitutional magnitude), it is not waived by the failure to raise it in the District Court. The fact that the argument did not previously occur to the able lawyers for the Government does, however, confirm our view that in the context of the entire section Congress undoubtedly intended the word "individual" to be construed as synonymous with the word "person."[13]

The special section authorizing expedited review evidences an unmistakable congressional interest in a prompt and authoritative judicial determination of the constitution-

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[13] Although in ordinary usage both "individual" and "person" often refer to an individual human being, see, *e. g.*, Webster's Third New International Dictionary 1152, 1686 (1986) ("individual" defined as a "single human being"; "person" defined as "an individual human being"), "person" often has a broader meaning in the law, see, *e. g.*, 1 U. S. C. § 1 ("person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

ality of the Act. Subsection (a)(2) requires that copies of any complaint filed under subsection (a)(1) "shall be promptly delivered" to both Houses of Congress, and that each House shall have a right to intervene. Subsection (b) authorizes a direct appeal to this Court from any order of the District Court, and requires that the appeal be filed within 10 days. Subsection (c) imposes a duty on both the District Court and this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a)." There is no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons. Acceptance of the Government's new-found reading of § 692 "would produce an absurd and unjust result which Congress could not have intended." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 574 (1982).[14]

We are also unpersuaded by the Government's argument that appellees' challenge to the constitutionality of the Act is nonjusticiable. We agree, of course, that Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and that "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whit-*

[14] JUSTICE SCALIA objects to our conclusion that the Government's reading of the statute would produce an absurd result. *Post*, at 454–455. Nonetheless, he states that "'the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.'" *Post*, at 455 (quoting this Court's Rule 11). Unlike JUSTICE SCALIA, however, we need not rely on our *own* sense of the importance of the issue involved; instead, the structure of § 692 makes it clear that *Congress* believed the issue warranted expedited review and, therefore, that Congress did not intend the result that the word "individual" would dictate in other contexts.

more v. *Arkansas*, 495 U. S. 149, 155 (1990).[15] Our disposition of the first challenge to the constitutionality of this Act demonstrates our recognition of the importance of respecting the constitutional limits on our jurisdiction, even when Congress has manifested an interest in obtaining our views as promptly as possible. But these cases differ from *Raines*, not only because the President's exercise of his cancellation authority has removed any concern about the ripeness of the dispute, but more importantly because the parties have alleged a "personal stake" in having an actual injury redressed rather than an "institutional injury" that is "abstract and widely dispersed." 521 U. S., at 829.

In both the New York and the Snake River cases, the Government argues that the appellees are not actually injured because the claims are too speculative and, in any event, the claims are advanced by the wrong parties. We find no merit in the suggestion that New York's injury is merely speculative because HHS has not yet acted on the State's waiver requests. The State now has a multibillion dollar contingent liability that had been eliminated by § 4722(c) of the Balanced Budget Act of 1997. The District Court correctly concluded that the State, and the appellees, "suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law." 985 F. Supp., at 174. The self-evident significance of the contingent liability is confirmed by the fact that New York lobbied Congress for this relief, that Congress decided that it warranted statutory attention, and that the President selected for cancellation only this one provision in an Act that occupies 536 pages of the Statutes at Large. His action was comparable to the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial of a multibillion

[15] To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

dollar damages claim. Even if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a favorable final judgment. The revival of a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor.[16]

We also reject the Government's argument that New York's claim is advanced by the wrong parties because the claim belongs to the State of New York, and not appellees. Under New York statutes that are already in place, it is clear that both the City of New York[17] and the appellee health care providers[18] will be assessed by the State for substantial portions of any recoupment payments that the State may have to make to the Federal Government. To the extent of such assessments, they have the same potential liability as the State does.[19]

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[16] Because the cancellation of the legislative equivalent of a favorable final judgment causes immediate injury, the Government's reliance on *Anderson* v. *Green*, 513 U. S. 557 (1995) *(per curiam)*, is misplaced. That case involved a challenge to a California statute that would have imposed limits on welfare payments to new residents during their first year of residence in California. The statute could not become effective without a waiver from HHS. Although such a waiver had been in effect when the action was filed, it had been vacated in a separate proceeding and HHS had not sought review of that judgment. Accordingly, at the time the *Anderson* case reached this Court, the plaintiffs were receiving the same benefits as long-term residents; they had suffered no injury. We held that the case was not ripe because, unless and until HHS issued a new waiver, any future injury was purely conjectural. *Id.*, at 559 ("The parties [*i. e.*, the plaintiffs and California, but not HHS] have no live dispute now, and whether one will arise in the future is conjectural"). Unlike New York in this case, they were not contingently liable for anything.

[17] App. 106–107.

[18] See n. 10, *supra*.

[19] The Government relies on *Warth* v. *Seldin*, 422 U. S. 490 (1975), to support its argument that the State, and not appellees, should be bringing this claim. In *Warth* we held, *inter alia*, that citizens of Rochester did not have standing to challenge the exclusionary zoning practices of another community because their claimed injury of increased taxation turned

The Snake River farmers' cooperative also suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants. Three critical facts identify the specificity and the importance of that injury. First, Congress enacted § 968 for the specific purpose of providing a benefit to a defined category of potential purchasers of a defined category of assets.[20] The members of that statutorily defined class received the equivalent of a statutory "bargaining chip" to use in carrying out the congressional plan to facilitate their purchase of such assets. Second, the President selected § 968 as one of only two tax benefits in the Taxpayer Relief Act of 1997 that should be canceled. The cancellation rested on his determination that the use of those bargaining chips would have a significant impact on the federal budget deficit. Third, the Snake River cooperative was organized for the very purpose of acquiring processing facilities, it had concrete plans to utilize the benefits of § 968, and it was engaged in ongoing negotiations with the owner of a processing plant who had expressed an interest in structuring a tax-deferred sale when the President canceled § 968. Moreover, it is actively searching for other processing facilities for possible future purchase if the President's cancellation is reversed; and there are ample processing facilities in the State that Snake River may be able to purchase.[21] By depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents. See, *e. g.*, *Investment*

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on the prospective actions of Rochester officials. *Id.*, at 509. Appellees' injury in this case, however, does not turn on the independent actions of third parties, as existing New York law will automatically require that appellees reimburse the State.

Because both the City of New York and the health care appellees have standing, we need not consider whether the appellee unions also have standing to sue. See, *e. g., Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986).

[20] See n. 5, *supra.*

[21] App. 111–115 (Declaration of Mike Cranney).

Company Institute v. *Camp*, 401 U. S. 617, 620 (1971); 3 K. Davis & R. Pierce, Administrative Law Treatise 13–14 (3d ed. 1994) ("The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]. . . . It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test").

Appellees' injury in this regard is at least as concrete as the injury suffered by the respondents in *Bryant* v. *Yellen*, 447 U. S. 352 (1980). In that case, we considered whether a rule that generally limited water deliveries from reclamation projects to 160 acres applied to the much larger tracts of the Imperial Irrigation District in southeastern California; application of that limitation would have given large landowners an incentive to sell excess lands at prices below the prevailing market price for irrigated land. The District Court had held that the 160-acre limitation did not apply, and farmers who had hoped to purchase the excess land sought to appeal. We acknowledged that the farmers had not presented "detailed information about [their] financial resources," and noted that "the prospect of windfall profits could attract a large number of potential purchasers" besides the farmers. *Id.*, at 367, n. 17. Nonetheless, "even though they could not with certainty establish that they would be able to purchase excess lands" if the judgment were reversed, *id.*, at 367, we found standing because it was "likely that excess lands would become available at less than market prices," *id.*, at 368. The Snake River appellees have alleged an injury that is as specific and immediate as that in *Yellen*. See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72–78 (1978).[22]

[22] The Government argues that there can be an Article III injury only if Snake River would have actually obtained a facility on favorable terms. We have held, however, that a denial of a benefit in the bargaining process

As with the New York case, the Government argues that the wrong parties are before the Court—that because the sellers of the processing facilities would have received the tax benefits, only they have standing to challenge the cancellation of § 968. This argument not only ignores the fact that the cooperatives were the intended beneficiaries of § 968, but also overlooks the self-evident proposition that more than one party may have standing to challenge a particular action or inaction.[23] Once it is determined that a particular plain-

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can itself create an Article III injury, irrespective of the end result. See *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993). In that case an association of contractors challenged a city ordinance that accorded preferential treatment to certain minority-owned businesses in the award of city contracts. The Court of Appeals had held that the association lacked standing "because it failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance." *Id.*, at 664. We rejected the Court of Appeals' position, stating that it "cannot be reconciled with our precedents." *Ibid.* Even though the preference applied to only a small percentage of the city's business, and even though there was no showing that any party would have received a contract absent the ordinance, we held that the prospective bidders had standing; the "injury in fact" was the harm to the contractors in the negotiation process, "not the ultimate inability to obtain the benefit." *Id.*, at 666.

Having found that both the New York and Snake River appellees are actually injured, traceability and redressability are easily satisfied—each injury is traceable to the President's cancellation of § 4722(c) or § 968, and would be redressed by a declaratory judgment that the cancellations are invalid.

[23] *Allen* v. *Wright*, 468 U. S. 737 (1984), and *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26 (1976), are distinguishable, as each of those cases involved a speculative chain of causation quite different from the situation here. In *Allen*, parents of black public school children alleged that, even though it was the policy of the Internal Revenue Service (IRS) to deny tax-exempt status to racially discriminatory schools, the IRS had "not adopted sufficient standards and procedures" to enforce this policy. 468 U. S., at 739. The parents alleged that the lax enforcement caused white students to attend discriminatory *private* schools and, therefore, interfered with their children's opportunity to attend desegre-

tiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would

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gated *public* schools. We held that the chain of causation between the challenged action and the alleged injury was too attenuated to confer standing:

"It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. . . . It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." *Id.*, at 758 (footnote omitted).

Similarly, in *Simon*, the respondents challenged an IRS Revenue Ruling that granted favorable tax treatment to nonprofit hospitals that offered only emergency-room services to the poor. The respondents argued that the Revenue Ruling "'encouraged' hospitals to deny services to indigents." 426 U. S., at 42. As in *Allen*, we held that the chain of causation was too attenuated:

"It is purely speculative whether the denials of service . . . fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications.

"It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." 426 U. S., at 42–43.

See also *id.*, at 45 ("Speculative inferences are necessary to connect [respondents'] injury to the challenged actions of petitioners").

The injury in the present case is comparable to the repeal of a law granting a subsidy to sellers of processing plants if, and only if, they sell to farmers' cooperatives. Every farmers' cooperative seeking to buy a processing plant is harmed by that repeal.

also have standing to sue. Thus, we are satisfied that both of these actions are Article III "Cases" that we have a duty to decide.

IV

The Line Item Veto Act gives the President the power to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." 2 U. S. C. § 691(a) (1994 ed., Supp. II). It is undisputed that the New York case involves an "item of new direct spending" and that the Snake River case involves a "limited tax benefit" as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. See 2 U. S. C. § 691(b) (1994 ed., Supp. II). He must determine, with respect to each cancellation, that it will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." § 691(a)(A). Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. See § 691(a)(B). It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. See § 691b(a). If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." *Ibid.* The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill," see § 691d, but no such bill was passed for

either of the cancellations involved in these cases.[24] A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, see § 691(c), but he does, of course, retain his constitutional authority to veto such a bill.[25]

The effect of a cancellation is plainly stated in § 691e, which defines the principal terms used in the Act. With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevents the item "from having legal force or effect." §§ 691e(4)(B)–(C).[26] Thus, under the

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[24] Congress failed to act upon proposed legislation to disapprove these cancellations. See S. 1157, H. R. 2444, S. 1144, and H. R. 2436, 105th Cong., 1st Sess. (1997). Indeed, despite the fact that the President has canceled at least 82 items since the Act was passed, see Statement of June E. O'Neill, Director, Congressional Budget Office, Line Item Veto Act After One Year, The Process and Its Implementation, before the Subcommittee on Legislative and Budget Process of the House Committee on Rules, 105th Cong., 2d Sess. (Mar. 11–12, 1998), Congress has enacted only one law, over a Presidential veto, disapproving *any* cancellation, see Pub. L. 105–159, 112 Stat. 19 (1998) (disapproving the cancellation of 38 military construction spending items).

[25] See n. 29, *infra*.

[26] The term "cancel," used in connection with any dollar amount of discretionary budget authority, means "to rescind." 2 U. S. C. § 691e(4)(A). The entire definition reads as follows:

"The term 'cancel' or 'cancellation' means—

"(A) with respect to any dollar amount of discretionary budget authority, to rescind;

"(B) with respect to any item of new direct spending—

"(i) that is budget authority provided by law (other than an appropriation law), to prevent such budget authority from having legal force or effect;

"(ii) that is entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect; or

"(iii) through the food stamp program, to prevent the specific provision of law that results in an increase in budget authority or outlays for that program from having legal force or effect; and

"(C) with respect to a limited tax benefit, to prevent the specific provision of law that provides such benefit from having legal force or effect." 2 U. S. C. § 691e(4) (1994 ed., Supp. II).

plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 "from having legal force or effect." The remaining provisions of those statutes, with the exception of the second canceled item in the latter, continue to have the same force and effect as they had when signed into law.

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "[R]epeal of statutes, no less than enactment, must conform with Art. I." *INS* v. *Chadha*, 462 U. S. 919, 954 (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President "shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ." Art. II, § 3. Thus, he may initiate and influence legislative proposals.[27] Moreover, after a bill has passed both Houses of Congress, but "before it become[s] a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2.[28] His

[27] See 3 J. Story, Commentaries on the Constitution of the United States § 1555, p. 413 (1833) (Art. II, § 3, enables the President "to point out the evil, and to suggest the remedy").

[28] The full text of the relevant paragraph of § 7 provides:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and pro-

"return" of a bill, which is usually described as a "veto,"[29] is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered,

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ceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

[29] "In constitutional terms, 'veto' is used to describe the President's power under Art. I, § 7, of the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 925, n. 2 (1983) (citing Black's Law Dictionary 1403 (5th ed. 1979)).

procedure." *Chadha,* 462 U. S., at 951. Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto."[30] What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

At oral argument, the Government suggested that the cancellations at issue in these cases do not effect a "repeal" of the canceled items because under the special "lockbox" provisions of the Act,[31] a canceled item "retain[s] real, legal

[30] 33 Writings of George Washington 96 (J. Fitzpatrick ed., 1940); see also W. Taft, The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations 11 (1916) (stating that the President "has no power to veto part of a bill and let the rest become a law"); cf. 1 W. Blackstone, Commentaries *154 ("The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses").

[31] The lockbox procedure ensures that savings resulting from cancellations are used to reduce the deficit, rather than to offset deficit increases arising from other laws. See 2 U. S. C. §§ 691c(a)–(b) (1994 ed., Supp. II); see also H. R. Conf. Rep. No. 104–491, pp. 23–24 (1996). The Office of Management and Budget (OMB) estimates the deficit reduction resulting from each cancellation of new direct spending or limited tax benefit items and presents its estimate as a separate entry in the "pay-as-you-go" report submitted to Congress pursuant to § 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 (or Gramm-Rudman-Hollings Act), 2 U. S. C. § 902(d). See § 691c(a)(2)(A) (1994 ed., Supp. II); see also H. R. Conf. Rep. No. 104–491, at 23. The "pay-as-you-go" requirement acts as a self-imposed limitation on Congress' ability to increase spending and/or reduce revenue: If spending increases are not offset by revenue increases (or if revenue reductions are not offset by spending reductions), then a "sequester" of the excess budgeted funds is required. See 2 U. S. C. §§ 900(b), 901(a)(1), 902(b), 906(*l*). OMB does not include the estimated savings resulting from a cancellation in the report it must submit under §§ 252(b) and 254 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U. S. C. §§ 902(b), 904. See § 691c(a)(2)(B). By providing in this way that such savings "shall not be included in the pay-as-you-go balances," Congress ensures that "savings from the cancellation of new

budgetary effect" insofar as it prevents Congress and the President from spending the savings that result from the cancellation. Tr. of Oral Arg. 10.[32] The text of the Act expressly provides, however, that a cancellation prevents a direct spending or tax benefit provision "from having legal force or effect." 2 U. S. C. §§ 691e(4)(B)–(C). That a canceled item may have "real, legal budgetary effect" as a result of the lockbox procedure does not change the fact that by canceling the items at issue in these cases, the President made them entirely inoperative as to appellees. Section 968 of the Taxpayer Relief Act no longer provides a tax benefit, and § 4722(c) of the Balanced Budget Act of 1997 no longer relieves New York of its contingent liability.[33] Such significant changes do not lose their character simply because the canceled provisions may have some continuing financial effect on the Government.[34] The cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled.

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direct spending or limited tax benefits are devoted to deficit reduction and are not available to offset a deficit increase in another law." H. R. Conf. Rep. No. 104–491, at 23. Thus, the "pay-as-you-go" cap does not change upon cancellation because the canceled item is not treated as canceled. Moreover, if Congress enacts a disapproval bill, "OMB will not score this legislation as increasing the deficit under pay as you go." *Ibid.*

[32] The Snake River appellees have argued that the lockbox provisions have no such effect with respect to the canceled tax benefits at issue. Because we reject the Government's suggestion that the lockbox provisions alter our constitutional analysis, however, we find it unnecessary to resolve the dispute over the details of the lockbox procedure's applicability.

[33] Thus, although "Congress's use of infelicitous terminology cannot transform the cancellation into an unconstitutional amendment or repeal of an enacted law," Brief for Appellants 40–41 (citations omitted), the actual effect of a cancellation is entirely consistent with the language of the Act.

[34] Moreover, Congress always retains the option of statutorily amending or repealing the lockbox provisions and/or the Gramm-Rudman-Hollings Act, so as to eliminate any lingering financial effect of canceled items.

V

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on *Field* v. *Clark*, 143 U. S. 649 (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items "is, in practical effect, no more and no less than the power to 'decline to spend' specified sums of money, or to 'decline to implement' specified tax measures." Brief for Appellants 40. Neither argument is persuasive.

In *Field* v. *Clark*, the Court upheld the constitutionality of the Tariff Act of 1890. Act of Oct. 1, 1890, 26 Stat. 567. That statute contained a "free list" of almost 300 specific articles that were exempted from import duties "unless otherwise specially provided for in this act." *Id.*, at 602. Section 3 was a special provision that directed the President to suspend that exemption for sugar, molasses, coffee, tea, and hides "whenever, and so often" as he should be satisfied that any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be "reciprocally unequal and unreasonable. . . ." *Id.*, at 612, quoted in *Field*, 143 U. S., at 680. The section then specified the duties to be imposed on those products during any such suspension. The Court provided this explanation for its conclusion that § 3 had not delegated legislative power to the President:

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . [W]hen he ascertained the fact that duties

> and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. . . . It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed." *Id.*, at 693.

This passage identifies three critical differences between the power to suspend the exemption from import duties and the power to cancel portions of a duly enacted statute. First, the exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed: the imposition of "reciprocally unequal and unreasonable" import duties by other countries. In contrast, the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes. Second, under the Tariff Act, when the President determined that the contingency had arisen, he had a duty to suspend; in contrast, while it is true that the President was required by the Act to make three determinations before he canceled a provision, see 2

U. S. C. § 691(a)(A) (1994 ed., Supp. II), those determinations did not qualify his discretion to cancel or not to cancel. Finally, whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment.[35] Thus, the conclusion in *Field* v. *Clark* that the suspensions mandated by the Tariff Act were not exercises of legislative power does not undermine our opinion that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7.

The Government's reliance upon other tariff and import statutes, discussed in *Field*, that contain provisions similar to the one challenged in *Field* is unavailing for the same reasons.[36] Some of those statutes authorized the President to "suspen[d] and discontinu[e]" statutory duties upon his determination that discriminatory duties imposed by other nations had been abolished. See 143 U. S., at 686–687 (discussing Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 3, and Act of May 24, 1828, ch. 111, 4 Stat. 308).[37] A slightly different statute,

[35] For example, one reason that the President gave for canceling § 968 of the Taxpayer Relief Act was his conclusion that "this provision failed to target its benefits to small-and-medium size cooperatives." App. to Juris. Statement 71a (Cancellation No. 97–2); see n. 8, *supra.* Because the Line Item Veto Act requires the President to act within five days, *every* exercise of the cancellation power will necessarily be based on the same facts and circumstances that Congress considered, and therefore constitute a rejection of the policy choice made by Congress.

[36] The Court did not, of course, expressly consider in *Field* whether those statutes comported with the requirements of the Presentment Clause.

[37] Cf. 143 U. S., at 688 (discussing Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 4, which permitted the President to "declare the provisions of this act to be inoperative" and lift import restrictions on foreign cattle and hides upon a showing that such importation would not endanger U. S. cattle).

Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, provided that certain statutory provisions imposing duties on foreign ships "shall be repealed" upon the same no-discrimination determination by the President. See 143 U. S., at 687; see also *id.*, at 686 (discussing similar tariff statute, Act of Mar. 3, 1815, ch. 77, 3 Stat. 224, which provided that duties "are hereby repealed," "[s]uch repeal to take effect . . . whenever the President" makes the required determination).

The cited statutes all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). "Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries." *Ibid.*[38] More important, when enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President.[39] The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no

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[38] Indeed, the Court in *Field* v. *Clark*, 143 U. S. 649 (1892), so limited its reasoning: "[I]n the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Id.*, at 691.

[39] See also *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 407 (1928) ("Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive").

moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.[40]

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. The Government has reviewed in some detail the series of statutes in which Congress has given the Executive broad discretion over the expenditure of appropriated funds. For example, the First Congress appropriated "sum[s] not exceeding" specified amounts to be spent on various Government operations. See, *e. g.*, Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. In those statutes, as in later years, the President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical

[40] The Government argues that the Rules Enabling Act, 28 U. S. C. § 2072(b), permits this Court to "repeal" prior laws without violating Article I, § 7. Section 2072(b) provides that this Court may promulgate rules of procedure for the lower federal courts and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10 (1941) (stating that the procedural rules that this Court promulgates, "if they are within the authority granted by Congress, repeal" a prior inconsistent procedural statute); see also *Henderson* v. *United States*, 517 U. S. 654, 664 (1996) (citing § 2072(b)). In enacting § 2072(b), however, Congress expressly provided that laws inconsistent with the procedural rules promulgated by this Court would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts. As in the tariff statutes, Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court.

difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

VI

Although they are implicit in what we have already written, the profound importance of these cases makes it appropriate to emphasize three points.

First, we express no opinion about the wisdom of the procedures authorized by the Line Item Veto Act. Many members of both major political parties who have served in the Legislative and the Executive Branches have long advocated the enactment of such procedures for the purpose of "ensur-[ing] greater fiscal accountability in Washington." H. R. Conf. Rep. 104–491, p. 15 (1996).[41] The text of the Act was itself the product of much debate and deliberation in both Houses of Congress and that precise text was signed into law by the President. We do not lightly conclude that their action was unauthorized by the Constitution.[42] We have, however, twice had full argument and briefing on the question and have concluded that our duty is clear.

Second, although appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the "finely wrought" procedure commanded by the Constitution. *Chadha*, 462 U. S., at 951. We have been

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[41] Cf. Taft, The Presidency, *supra* n. 30, at 21 ("A President with the power to veto items in appropriation bills might exercise a good restraining influence in cutting down the total annual expenses of the government. But this is not the right way").

[42] See *Bowsher*, 478 U. S., at 736 (STEVENS, J., concurring in judgment) ("When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons").

favored with extensive debate about the scope of Congress' power to delegate lawmaking authority, or its functional equivalent, to the President. The excellent briefs filed by the parties and their *amici curiae* have provided us with valuable historical information that illuminates the delegation issue but does not really bear on the narrow issue that is dispositive of these cases. Thus, because we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act "impermissibly disrupts the balance of powers among the three branches of government." 985 F. Supp., at 179.[43]

Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105–33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105–33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105–33 as modified by the President" may or

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[43] We also find it unnecessary to consider whether the provisions of the Act relating to discretionary budget authority are severable from the Act's tax benefit and direct spending provisions. We note, however, that the Act contains no severability clause; a severability provision that had appeared in the Senate bill was dropped in conference without explanation. H. R. Conf. Rep. No. 104–491, at 17, 41.

may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. Cf. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 837 (1995).

The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

A Nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statute before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending. Nevertheless, for the reasons given by JUSTICE STEVENS in the opinion for the Court, the statute must be found invalid. Failure of political will does not justify unconstitutional remedies.

I write to respond to my colleague JUSTICE BREYER, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree. See *post*, at 496–497. The argument is related to his earlier suggestion that our role is lessened here because the two political branches are adjusting their own powers between themselves. *Post*, at 472, 482–483. To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. See *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276–277 (1991); *Bowsher* v. *Synar*,

478 U. S. 714, 736 (1986); *INS* v. *Chadha,* 462 U. S. 919, 944–945, 958–959 (1983); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U. S. 50, 73–74 (1982). The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. The Federalist No. 84, pp. 513, 515; G. Wood, The Creation of the American Republic 1776–1787, pp. 536–543 (1969). It was at Madison's insistence that the First Congress enacted the Bill of Rights. R. Goldwin, From Parchment to Power 75–153 (1997). It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1132 (1991).

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one

branch to influence basic political decisions. Quoting Montesquieu, the Federalist Papers made the point in the following manner:

> "'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*'" The Federalist No. 47, *supra,* at 303.

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

The principal object of the statute, it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers would have endorsed.

It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or

enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. See *Freytag* v. *Commissioner*, 501 U. S. 868, 880 (1991); cf. *Chadha*, *supra*, at 942, n. 13. Abdication of responsibility is not part of the constitutional design.

Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has a vital interest in the regularity of the exercise of governmental power. If this point was not clear before *Chadha*, it should have been so afterwards. Though *Chadha* involved the deportation of a person, while the case before us involves the expenditure of money or the grant of a tax exemption, this circumstance does not mean that the vertical operation of the separation of powers is irrelevant here. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

The Constitution is not bereft of controls over improvident spending. Federalism is one safeguard, for political accountability is easier to enforce within the States than nationwide. The other principal mechanism, of course, is control of the political branches by an informed and responsible electorate. Whether or not federalism and control by the electorate are adequate for the problem at hand, they are two of the structures the Framers designed for the problem the statute strives to confront. The Framers of the Consti-

tution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device. With these observations, I join the opinion of the Court.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, and with whom JUSTICE BREYER joins as to Part III, concurring in part and dissenting in part.

Today the Court acknowledges the "'overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere.'" *Ante*, at 421, quoting *Raines* v. *Byrd*, 521 U. S. 811, 820 (1997). It proceeds, however, to ignore the prescribed statutory limits of our jurisdiction by permitting the expedited-review provisions of the Line Item Veto Act to be invoked by persons who are not "individual[s]," 2 U. S. C. § 692 (1994 ed., Supp. II); and to ignore the constitutional limits of our jurisdiction by permitting one party to challenge the Government's denial *to another party* of favorable tax treatment from which the first party might, but just as likely might not, gain a concrete benefit. In my view, the Snake River appellees lack standing to challenge the President's cancellation of the "limited tax benefit," and the constitutionality of that action should not be addressed. I think the New York appellees have standing to challenge the President's cancellation of an "item of new direct spending"; I believe we have statutory authority (other than the expedited-review provision) to address that challenge; but unlike the Court I find the President's cancellation of spending items to be entirely in accord with the Constitution.

I

The Court's unrestrained zeal to reach the merits of this case is evident in its disregard of the statute's expedited-

review provision, which extends that special procedure to "[a]ny Member of Congress or any individual adversely affected by [the Act]." § 692. With the exception of Mike Cranney, a natural person, the appellees—corporations, cooperatives, and governmental entities—are not "individuals" under any accepted usage of that term. Worse still, the first provision of the United States Code confirms that insofar as this word is concerned, Congress speaks English like the rest of us: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals.*" 1 U. S. C. § 1 (emphasis added). And doubly worse, one of the definitional provisions of this very Act expressly distinguishes "individuals" from "persons." A tax law does not create a "limited tax benefit," it says, so long as

> "any difference in the treatment of *persons* is based solely on—
>
> "(I) in the case of *businesses and associations*, the size or form of the business or association involved;
>
> "(II) in the case of *individuals*, general demographic conditions, such as income, marital status, number of dependents, or tax return filing status . . . ." 2 U. S. C. § 691e(9)(B)(iii) (1994 ed., Supp. II) (emphasis added).

The Court majestically sweeps the plain language of the statute aside, declaring that "[t]here is no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons." *Ante*, at 429. Indeed, the Court says, it would be "absurd" for Congress to have done so. *Ibid.* But Congress treats individuals more favorably than corporations and other associations *all the time.* There is nothing whatever extraordinary—and surely nothing so

bizarre as to permit this Court to declare a "scrivener's error"—in believing that individuals will suffer more seriously from delay in the receipt of "vetoed" benefits or tax savings than corporations will, and therefore according individuals (but not corporations) expedited review. It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law.

The only individual who has sued, and thus the only appellee who qualifies for expedited review under § 692, is Mike Cranney. Since § 692 does not confer jurisdiction over the claims of the other appellees, we must dismiss them, unless we have jurisdiction under another statute. In their complaints, appellees sought declaratory relief not only under § 692(a), but also under the Declaratory Judgment Act, 28 U. S. C. § 2201, invoking the District Court's jurisdiction under 28 U. S. C. § 1331. After the District Court ruled, the Government appealed directly to this Court, but it also filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit. In light of the Government's representation that it desires "[t]o eliminate any possibility that the district court's decision might escape review," Reply Brief for Appellants 2, n. 1, I would deem its appeal to this Court a petition for writ of certiorari before judgment, see 28 U. S. C. § 2101(e), and grant it. Under this Court's Rule 11, "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." In light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals, the entire case, in my view, qualifies for certiorari review before judgment.

II

Not only must we be satisfied that we have statutory jurisdiction to hear this case; we must be satisfied that we have jurisdiction under Article III. "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines*, 521 U. S., at 818, quoting *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

In the first action before us, appellees Snake River Potato Growers, Inc. (Snake River) and Mike Cranney, Snake River's Director and Vice-Chairman, challenge the constitutionality of the President's cancellation of § 968 of the Taxpayer Relief Act of 1997. The Snake River appellees have standing, in the Court's view, because § 968 gave them "the equivalent of a statutory 'bargaining chip,'" and "[b]y depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents." *Ante*, at 432. It is unclear whether the Court means that deprivation of a "bargaining chip" itself suffices for standing, or that such deprivation suffices in the present case because it creates a likelihood of economic injury. The former is wrong as a matter of law, and the latter is wrong as a matter of fact, on the facts alleged.

For the proposition that "a denial of a benefit in the bargaining process" can suffice for standing the Court relies in a footnote, see *ante*, at 433, n. 22, on *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993). There, an association of contractors alleged that a city ordinance according racial preferences in the award of city contracts denied its members equal protection of the laws. *Id.*, at 658–659. The association's members had regularly bid on and performed city contracts, and would have bid on designated set-aside contracts but for the ordinance. *Id.*, at 659. We held that the association had

standing even without proof that its members would have been awarded contracts absent the challenged discrimination. The reason, we explained, is that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*, at 666, citing two earlier equal protection cases, *Turner* v. *Fouche*, 396 U. S. 346, 362 (1970), and *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989). In other words, *Northeastern Florida* did not hold, as the Court suggests, that harm to one's bargaining position is an "injury in fact," but rather that, in an equal protection case, the denial of equal treatment is. Inasmuch as Snake River does not challenge the Line Item Veto Act on equal protection grounds, *Northeastern Florida* is inapposite. And I know of no case outside the equal protection field in which the mere detriment to one's "bargaining position," as opposed to a demonstrated loss of some bargain, has been held to confer standing. The proposition that standing is established by the mere reduction in one's chances of receiving a financial benefit is contradicted by *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26 (1976), which held that low-income persons who had been denied treatment at local hospitals lacked standing to challenge an Internal Revenue Service (IRS) ruling that reduced the amount of charitable care necessary for the hospitals to qualify for tax-exempt status. The situation in that case was strikingly similar to the one before us here: The denial of a tax benefit to a third party was alleged to reduce the chances of a financial benefit to the plaintiffs. And standing was denied.

But even if harm to one's bargaining position *were* a legally cognizable injury, Snake River has not alleged, as it must, facts sufficient to demonstrate that *it personally* has suffered that injury. See *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). In *Eastern Ky. Welfare Rights*, *supra*, the plaintiffs at least had *applied* for the financial benefit which had alleg-

edly been rendered less likely of receipt; the present suit, by contrast, resembles a complaint asserting that the plaintiff's chances of winning the lottery were reduced, filed by a plaintiff who never bought a lottery ticket, or who tore it up before the winner was announced. Snake River has presented no evidence to show that it was engaged in bargaining, and that that bargaining was impaired by the President's cancellation of § 968. The Court says that Snake River "was engaged in ongoing negotiations with the owner of a processing plant who had expressed an interest in structuring a tax-deferred sale when the President canceled § 968," *ante*, at 432. There is, however, no evidence of "negotiations," only of two "discussions." According to the affidavit of Mike Cranney:

> "On or about May 1997, I spoke with Howard Phillips, the principal owner of Idaho Potato Packers, concerning the possibility that, if the Cooperative Tax Act were passed, Snake River Potato Growers might purchase a Blackfoot, Idaho processing facility in a transaction that would allow the deferral of gain. Mr. Phillips expressed an interest in such a transaction if the Cooperative Tax Act were to pass. Mr. Phillips also acknowledged to me that Jim Chapman, our General Manager, had engaged him in a previous discussion concerning this matter." App. 112.

This affidavit would have set forth something of significance if it had said that Phillips had expressed an interest in the transaction "if *and only if* the Cooperative Tax Act were to pass." But of course it is most unlikely he said that; Idaho Potato Packers (IPP) could get just as much from the sale without the Act as with the Act, so long as the price was right. The affidavit would also have set forth something of significance if it had said that Phillips had expressed an interest in the sale "at a particular price if the Cooperative Tax Act were to pass." But it does not say that either.

Nor does it even say that the President's action caused IPP to reconsider. Moreover, it was Snake River, not IPP, that terminated the discussions. According to Cranney, "[t]he President's cancellation of the Cooperative Tax Act caused me to terminate discussions with Phillips about the possibility of Snake River Potato Growers buying the Idaho Potato Packers facility." *Id.*, at 114. So all we know from the record is that Snake River had two discussions with IPP concerning the sale of its processing facility on the tax deferred basis the Act would allow; that IPP was interested; and that Snake River ended the discussions after the President's action. We do not know that Snake River was prepared to offer a price—tax deferral or no—that would cross IPP's laugh threshold. We do not even know for certain that the tax deferral was a significant attraction to IPP; we know only that Cranney thought it was. On these facts—which never even bring things to the *point* of bargaining—it is pure conjecture to say that Snake River suffered an impaired bargaining position. As we have said many times, conjectural or hypothetical injuries do not suffice for Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

Nor has Snake River demonstrated, as the Court finds, that "the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents." *Ante*, at 432. Presumably the economic injury the Court has in mind is Snake River's loss of a bargain purchase of a processing plant. But there is no evidence, and indeed not even an allegation, that before the President's action such a purchase was *likely*. The most that Snake River alleges is that the President's action rendered it "more difficult for plaintiffs to purchase qualified processors," App. 12. And even if that abstract "increased difficulty" sufficed for injury in fact (which it does not), the existence of *even that* is pure speculation. For all that appears, *no* owner of a processing plant would have been willing to sell to Snake

River at *any* price that Snake River could afford—and the impossible cannot be made "more difficult." All we know is that a potential seller was "interested" in talking about the subject before the President's action, and that after the President's action Snake River itself decided to proceed no further. If this establishes a "likelihood" that Snake River would have made a bargain purchase but for the President's action, or even a "likelihood" that the President's action rendered "more difficult" a purchase that was realistically within Snake River's grasp, then we must adopt for our standing jurisprudence a new definition of likely: "plausible."

Twice before have we addressed whether plaintiffs had standing to challenge the Government's tax treatment of a third party, and twice before have we held that the speculative nature of a third party's response to changes in federal tax laws defeats standing. In *Simon* v. *Eastern Ky. Welfare Rights*, 426 U. S. 26 (1976), we found it "purely speculative whether the denials of service . . . fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.*, at 42–43. We found it "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services." *Id.*, at 43. In *Allen* v. *Wright*, 468 U. S. 737 (1984), we held that parents of black children attending public schools lacked standing to challenge IRS policies concerning tax exemptions for private schools. The parents alleged, *inter alia*, that "federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated." *Id.*, at 752–753. We concluded that "the injury alleged is not fairly traceable to the Government conduct . . . challenge[d] as unlawful," *id.*, at 757, and that "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies," *id.*, at 758. Likewise, here, it is purely speculative whether a tax

deferral would have prompted any sale, let alone one that reflected the tax benefit in the sale price.

The closest case the Court can appeal to as precedent for its finding of standing is *Bryant* v. *Yellen*, 447 U. S. 352 (1980). Even on its own terms, *Bryant* is distinguishable. As that case came to us, it involved a dispute between a class of some 800 landowners in the Imperial Valley, each of whom owned more than 160 acres, and a group of Imperial Valley residents who wished to purchase lands owned by that class. The point at issue was the application to those lands of a statutory provision that forbade delivery of water from a federal reclamation project to irrigable land held by a single owner in excess of 160 acres, and that limited the sale price of any lands so held in excess of 160 acres to a maximum amount, fixed by the Secretary of the Interior, based on fair market value in 1929, before the valley was irrigated by water from the Boulder Canyon Project. *Id.*, at 366–367. That price would of course be "far below [the lands'] current market values." *Id.*, at 367, n. 17. The Court concluded that the would-be purchasers "had a sufficient stake in the outcome of the controversy to afford them standing." *Id.*, at 368. It is true, as the Court today emphasizes, that the purchasers had not presented "detailed information about [their] financial resources," but the Court thought that unnecessary only because "purchasers of such land would stand to reap significant gains on resale." *Id.*, at 367, n. 17. Financing, in other words, would be easy to come by. Here, by contrast, not only do we have no notion whether Snake River has the cash in hand to afford IPP's bottom-line price, but we also have no reason to believe that financing of the purchase will be readily available. Potato processing plants, unlike agricultural land in the Imperial Valley, do not have a readily available resale market. On the other side of the equation, it was also much clearer in *Bryant* that if the suit came out in the would-be purchasers' favor, many of the landowners would be willing to sell. The alternative would be

withdrawing the land from agricultural production, whereas sale—even at bargain-basement prices for the land—would at least enable recoupment of the cost of improvements, such as drainage systems. *Ibid.* In the present case, by contrast, we have no reason to believe that IPP is not operating its processing plant at a profit, and will not continue to do so in the future; Snake River has proffered no evidence that IPP or any other processor *would surely have sold* if only the President had not canceled the tax deferral. The only uncertainty in *Bryant* was whether any of the respondents would wind up as buyers of any of the excess land; that seemed probable enough, since "respondents are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming." *Ibid.* We have no basis to say that it is "likely" that Snake River would have purchased a processing facility if § 968 had not been canceled.

More fundamentally, however, the reasoning of *Bryant* should not govern the present case because it represents a crabbed view of the standing doctrine that has been superseded. *Bryant* was decided at the tail-end of "an era in which it was thought that the only function of the constitutional requirement of standing was 'to assure that concrete adverseness which sharpens the presentation of issues,'" *Spencer* v. *Kemna*, 523 U. S. 1, 11 (1998), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Thus, the *Bryant* Court ultimately afforded the respondents standing simply because they "had a sufficient stake in the outcome of the controversy," 447 U. S., at 368, not because they had demonstrated injury in fact, causation, and redressability. "That parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a 'means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power," ' and 'a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States,'" *Spencer*, *supra*, at 11–12, quoting *Valley Forge*

Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474, 476 (1982). While Snake River in the present case may indeed have enough of a "stake" to assure adverseness, the matter it brings before us is inappropriate for our resolution because its allegations do not establish an injury in fact, attributable to the Presidential action it challenges, and remediable by this Court's invalidation of that Presidential action.

Because, in my view, Snake River has no standing to bring this suit, we have no jurisdiction to resolve its challenge to the President's authority to cancel a "limited tax benefit."

III

I agree with the Court that the New York appellees have standing to challenge the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an "item of new direct spending." See *ante*, at 430–431. The tax liability they will incur under New York law is a concrete and particularized injury, fairly traceable to the President's action, and avoided if that action is undone. Unlike the Court, however, I do not believe that Executive cancellation of this item of direct spending violates the Presentment Clause.

The Presentment Clause requires, in relevant part, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." U. S. Const., Art. I, § 7, cl. 2. There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only *after* the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes

him to "cancel"—prevent from "having legal force or effect"—certain parts of duly enacted statutes.

Article I, § 7, of the Constitution obviously prevents the President from canceling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law, and if it is legislative action, as the Court observes, "'repeal of statutes, no less than enactment, must conform with Art. I.'" *Ante,* at 438, quoting from *INS* v. *Chadha,* 462 U. S. 919, 954 (1983). But that is not this case. It was certainly arguable, as an original matter, that Art. I, § 7, also prevents the President from canceling a law which itself *authorizes* the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected. In 1809, Congress passed a law authorizing the President to cancel trade restrictions against Great Britain and France if either revoked edicts directed at the United States. Act of Mar. 1, 1809, § 11, 2 Stat. 528. Joseph Story regarded the conferral of that authority as entirely unremarkable in *The Orono,* 18 F. Cas. 830 (No. 10,585) (CCD Mass. 1812). The Tariff Act of 1890 authorized the President to "suspend, by proclamation to that effect" certain of its provisions if he determined that other countries were imposing "reciprocally unequal and unreasonable" duties. Act of Oct. 1, 1890, § 3, 26 Stat. 612. This Court upheld the constitutionality of that Act in *Field* v. *Clark,* 143 U. S. 649 (1892), reciting the history since 1798 of statutes conferring upon the President the power to, *inter alia,* "discontinue the prohibitions and restraints hereby enacted and declared," *id.,* at 684, "suspend the operation of the aforesaid act," *id.,* at 685, and "declare the provisions of this act to be inoperative," *id.,* at 688.

As much as the Court goes on about Art. I, § 7, therefore, that provision does not demand the result the Court reaches. It no more categorically prohibits the Executive *reduction* of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically

prohibits the Executive *augmentation* of congressional dispositions in the course of implementing statutes that authorize such augmentation—generally known as substantive rulemaking. There are, to be sure, limits upon the former just as there are limits upon the latter—and I am prepared to acknowledge that the limits upon the former may be much more severe. Those limits are established, however, not by some categorical prohibition of Art. I, § 7, which our cases conclusively disprove, but by what has come to be known as the doctrine of unconstitutional delegation of legislative authority: When authorized Executive reduction or augmentation is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers.

It is this doctrine, and not the Presentment Clause, that was discussed in the *Field* opinion, and it is this doctrine, and not the Presentment Clause, that is the issue presented by the statute before us here. That is why the Court is correct to distinguish prior authorizations of Executive cancellation, such as the one involved in *Field*, on the ground that they were contingent upon an Executive finding of fact, and on the ground that they related to the field of foreign affairs, an area where the President has a special "'degree of discretion and freedom,'" *ante*, at 445 (citation omitted). These distinctions have nothing to do with whether the details of Art. I, § 7, have been complied with, but everything to do with whether the authorizations went too far by transferring to the Executive a degree of political, lawmaking power that our traditions demand be retained by the Legislative Branch.

I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch. I may note, to begin with, that the Line Item Veto Act is not the first statute to authorize the President to "cancel" spending items. In *Bowsher* v. *Synar*, 478 U. S. 714 (1986), we addressed the

constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U. S. C. § 901 *et seq.* (1982 ed., Supp. III), which required the President, if the federal budget deficit exceeded a certain amount, to issue a "sequestration" order mandating spending reductions specified by the Comptroller General, § 902. The effect of sequestration was that "amounts sequestered . . . shall be *permanently cancelled.*" § 902(a)(4) (emphasis added). We held that the Act was unconstitutional, not because it impermissibly gave the Executive legislative power, but because it gave the Comptroller General, an officer of the Legislative Branch over whom Congress retained removal power, "the ultimate authority to determine the budget cuts to be made," 478 U. S., at 733, "functions . . . *plainly entailing execution of the law in constitutional terms,*" *id.*, at 732–733 (emphasis added). The President's discretion under the Line Item Veto Act is certainly broader than the Comptroller General's discretion was under the 1985 Act, but it is no broader than the discretion traditionally granted the President in his execution of spending laws.

Insofar as the degree of political, "lawmaking" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the Nation. From 1789–1791, the First Congress made lump-sum appropriations for the entire Government—"sum[s] not exceeding" specified amounts for broad purposes. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. In 1803, it appropriated $50,000 for the President to build "not exceeding fifteen gun boats, to be armed,

manned and fitted out, and employed for such purposes as in his opinion the public service may require," Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206. President Jefferson reported that "[t]he sum of fifty thousand dollars appropriated by Congress for providing gun boats remains unexpended. The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary," 13 Annals of Cong. 14 (1803). Examples of appropriations committed to the discretion of the President abound in our history. During the Civil War, an Act appropriated over $76 million to be divided among various items "as the exigencies of the service may require," Act of Feb. 25, 1862, ch. 32, 12 Stat. 344–345. During the Great Depression, Congress appropriated $950 million "for such projects and/or purposes and under such rules and regulations as the President in his discretion may prescribe," Act of Feb. 15, 1934, ch. 13, 48 Stat. 351, and $4 billion for general classes of projects, the money to be spent "in the discretion and under the direction of the President," Emergency Relief Appropriation Act of 1935, 49 Stat. 115. The constitutionality of such appropriations has never seriously been questioned. Rather, "[t]hat Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321–322 (1937).

Certain Presidents have claimed Executive authority to withhold appropriated funds even *absent* an express conferral of discretion to do so. In 1876, for example, President Grant reported to Congress that he would not spend money appropriated for certain harbor and river improvements, see Act of Aug. 14, 1876, ch. 267, 19 Stat. 132, because "[u]nder no circumstances [would he] allow expenditures upon works not clearly national," and in his view, the appropriations

were for "works of purely private or local interest, in no sense national," 4 Cong. Rec. 5628. President Franklin D. Roosevelt impounded funds appropriated for a flood control reservoir and levee in Oklahoma. See Act of Aug. 18, 1941, ch. 377, 55 Stat. 638, 645; Hearings on S. 373 before the Ad Hoc Subcommittee on Impoundment of Funds of the Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 848–849 (1973). President Truman ordered the impoundment of hundreds of millions of dollars that had been appropriated for military aircraft. See Act of Oct. 29, 1949, ch. 787, 63 Stat. 987, 1013; Public Papers of the Presidents of the United States, Harry S. Truman, 1949, pp. 538–539 (W. Reid ed. 1964). President Nixon, the Mahatma Gandhi of all impounders, asserted at a press conference in 1973 that his "constitutional right" to impound appropriated funds was "absolutely clear." The President's News Conference of Jan. 31, 1973, 9 Weekly Comp. of Pres. Doc. 109–110 (1973). Our decision two years later in *Train* v. *City of New York*, 420 U. S. 35 (1975), proved him wrong, but it implicitly confirmed that Congress may confer discretion upon the Executive to withhold appropriated funds, even funds appropriated for a specific purpose. The statute at issue in *Train* authorized spending "not to exceed" specified sums for certain projects, and directed that such "[s]ums authorized to be appropriated . . . shall be allotted" by the Administrator of the Environmental Protection Agency, 33 U. S. C. §§ 1285, 1287 (1970 ed., Supp. III). Upon enactment of this statute, the President directed the Administrator to allot no more than a certain part of the amount authorized. 420 U. S., at 40. This Court held, as a matter of statutory interpretation, that the statute *did not grant* the Executive discretion to withhold the funds, but required allotment of the full amount authorized. *Id.*, at 44–47.

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item

of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead—authorizing the President to "cancel" an item of spending—is technically different. But the technical difference does *not* relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which *is* at issue here, is preeminently *not* a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

IV

I would hold that the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an item of direct spending does not violate the Constitution. Because I find no party before us who has standing to challenge the President's cancellation of § 968 of the Taxpayer Relief Act of 1997, I do not reach the question whether that violates the Constitution.

For the foregoing reasons, I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join as to Part III, dissenting.

I

I agree with the Court that the parties have standing, but I do not agree with its ultimate conclusion. In my view the Line Item Veto Act (Act) does not violate any specific textual constitutional command, nor does it violate any implicit

separation-of-powers principle. Consequently, I believe that the Act is constitutional.

II

I approach the constitutional question before us with three general considerations in mind. *First*, the Act represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power. In that time period, our population was less than 4 million, see U. S. Dept. of Commerce, Census Bureau, Historical Statistics of the United States: Colonial Times to 1970, pt. 1, p. 8 (1975), federal employees numbered fewer than 5,000, see *id.*, pt. 2, at 1103, annual federal budget outlays totaled approximately $4 million, see *id.*, pt. 2, at 1104, and the entire operative text of Congress' first general appropriations law read as follows:

> "Be it enacted . . . [t]hat there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on import and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95.

At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million, see U. S. Dept. of Commerce, Census Bureau, 1990 Census, the Federal Government employs more than 4 million people, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Analytical Perspectives 207 (1997) (hereinafter Analytical Perspectives), the annual federal budget is $1.5 trillion, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Budget 303 (1997) (hereinafter Budget), and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. See, *e. g.*, Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. Thus, the question is whether the Constitution permits Congress to choose a particular novel *means* to achieve this same, constitutionally legitimate, *end*.

Second, the case in part requires us to focus upon the Constitution's generally phrased structural provisions, provisions that delegate all "legislative" power to Congress and vest all "executive" power in the President. See Part IV, *infra*. The Court, when applying these provisions, has interpreted them generously in terms of the institutional arrangements that they permit. See, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 412 (1989) (upholding delegation of authority to Sentencing Commission to promulgate Sentencing Guidelines); *Crowell* v. *Benson*, 285 U. S. 22, 53–54 (1932) (permitting non-Article III commission to adjudicate factual

disputes arising under federal dock workers' compensation statute). See generally, *e. g.*, *OPP Cotton Mills, Inc.* v. *Administrator of Wage and Hour Div., Dept. of Labor*, 312 U. S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions" without delegating details of regulatory scheme to executive agency); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (Constitution permits "interdependence" and flexible relations between branches in order to secure "workable government"); *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 406 (1928) (Taft, C. J.) ("[T]he extent and character of . . . assistance [between the different branches] must be fixed according to common sense and the inherent necessities of the governmental coordination"); *Crowell* v. *Benson*, *supra*, at 53 ("[R]egard must be had" in cases "where constitutional limits are invoked, not to mere matters of form but to the substance of what is required").

Indeed, Chief Justice Marshall, in a well-known passage, explained,

> "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819).

This passage, like the cases I have just mentioned, calls attention to the genius of the Framers' pragmatic vision, which this Court has long recognized in cases that find constitutional room for necessary institutional innovation.

Third, we need not here referee a dispute among the other two branches. And, as the majority points out:

> " 'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.' " *Ante*, at 447, n. 42 (quoting *Bowsher* v. *Synar*, 478 U. S. 714, 736 (1986) (STEVENS, J., concurring in judgment)).

Cf. *Youngstown Sheet and Tube Co.*, *supra*, at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress . . . [and when] the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum").

These three background circumstances mean that, when one measures the *literal* words of the Act against the Constitution's *literal* commands, the fact that the Act may closely resemble a different, literally unconstitutional, arrangement is beside the point. To drive exactly 65 miles per hour on an interstate highway closely resembles an act that violates the speed limit. But it does not violate that limit, for small differences matter when the question is one of literal violation of law. No more does this Act literally violate the Constitution's words. See Part III, *infra.*

The background circumstances also mean that we are to interpret nonliteral separation-of-powers principles in light of the need for "workable government." *Youngstown Sheet and Tube Co.*, *supra*, at 635 (Jackson, J., concurring). If we apply those principles in light of that objective, as this Court has applied them in the past, the Act is constitutional. See Part IV, *infra.*

III

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

> Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws. See *ante,* at 438–440.
>
> Minor Premise: The Act authorizes the President to "repea[l] or amen[d]" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law. See *ante,* at 436–438.
>
> Conclusion: The Act is inconsistent with the Constitution. See *ante,* at 448–449.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled" the two appropriation measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply *followed* the law, leaving the statutes, as they are literally written, intact.

To understand why one cannot say, *literally speaking*, that the President has repealed or amended any law, imagine how the provisions of law before us might have been, but were not, written. Imagine that the canceled New York health care tax provision at issue here, Pub. L. 105–33, § 4722(c), 111 Stat. 515 (quoted in full *ante*, at 422–423, n. 2), had instead said the following:

> "Section One. Taxes . . . that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions [requiring payment] have been sought . . . are deemed to be permissible health care related taxes . . . *provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y, and z*" (Assume x, y, and z to be the same determinations required by the Line Item Veto Act).

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who "prevent[s]" the deeming language

from "having legal force or effect," see 2 U. S. C. § 691e(4)(B) (1994 ed., Supp. II), has either *repealed* or *amended* this particular hypothetical statute. Rather, the President has *followed* that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say, referenced by an asterisk, with a statement that it applies to every spending provision in the Act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula. See, *e. g.*, Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), Pub. L. 99–177, 99 Stat. 1063, 2 U. S. C. § 901 *et seq.* (enforcing strict spending and deficit-neutrality limits on future appropriations statutes); see also 1 U. S. C. § 1 (in "*any* Act of Congress" singular words include plural, and vice versa) (emphasis added).

But, of course, this last mentioned possibility is this very case. The earlier law, namely, the Line Item Veto Act, says that "the President may . . . prevent such [future] budget authority from having legal force or effect." 2 U. S. C. §§ 691(a), 691e(4)(B) (1994 ed., Supp. II). Its definitional sections make clear that it applies to the 1997 New York health care provision, see § 691e(8), just as they give a special legal meaning to the word "cancel," § 691e(4). For that reason, one cannot dispose of this case through a purely literal analysis as the majority does. Literally speaking, the President has not "repealed" or "amended" anything. He has simply *executed* a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution. See *Field* v. *Clark*, 143 U. S. 649, 693 (1892) (President's

power to raise tariff rates "*was a part of the law itself, as it left the hands of Congress*" (emphasis added)).

Nor can one dismiss this literal compliance as some kind of formal quibble, as if it were somehow "obvious" that what the President has done "amounts to," "comes close to," or is "analogous to" the repeal or amendment of a previously enacted law. That is because the power the Act grants the President (to render designated appropriations items without "legal force or effect") also "amounts to," "comes close to," or is "analogous to" a different legal animal, the delegation of a power to choose one legal path as opposed to another, such as a power to appoint.

To take a simple example, a legal document, say, a will or a trust instrument, might grant a beneficiary the power (a) to appoint property "to Jones for his life, remainder to Smith for 10 years so long as Smith . . . etc., and then to Brown," or (b) to appoint the same property "to Black and the heirs of his body," or (c) not to exercise the power of appointment at all. See, *e. g.*, 5 W. Bowe & D. Parker, Page on Law of Wills § 45.8 (rev. 3d ed. 1962) (describing power of appointment). To choose the second or third of these alternatives prevents from taking effect the legal consequences that flow from the first alternative, which the legal instrument describes in detail. Any such choice, made in the exercise of a delegated power, renders that first alternative language without "legal force or effect." But such a choice does not "repeal" or "amend" either that language or the document itself. The will or trust instrument, in delegating the power of appointment, has not delegated a power to amend or to repeal the instrument; to the contrary, it requires the delegated power to be exercised in accordance with the instrument's terms. *Id.*, § 45.9, pp. 516–518.

The trust example is useful not merely because of its simplicity, but also because it illustrates the logic that must apply when a power to execute is conferred, not by a private trust document, but by a federal statute. This is not the

first time that Congress has delegated to the President or to others this kind of power—a contingent power to deny effect to certain statutory language. See, *e. g.*, Pub. L. 95–384, § 13(a), 92 Stat. 737 ("Section 620(x) of the Foreign Assistance Act of 1961 *shall be of no further force and effect* upon the President's determination and certification to the Congress that the resumption of full military cooperation with Turkey is in the national interest of the United States and [other criteria]") (emphasis added); 28 U. S. C. § 2072 (Supreme Court is authorized to promulgate rules of practice and procedure in federal courts, and "[a]ll laws in conflict with such rules *shall be of no further force and effect*") (emphasis added); 41 U. S. C. § 405b (subsection (a) requires the Office of Federal Procurement Policy to issue "[g]overnment-wide regulations" setting forth a variety of conflict of interest standards, but subsection (e) says that "if the President determine[s]" that the regulations "would have a significantly adverse effect on the accomplishment of the mission" of Government agencies, "the requirement [to promulgate] the regulations . . . *shall be null and void*") (emphasis added); Gramm-Rudman-Hollings Act, § 252(a)(4), 99 Stat. 1074 (authorizing the President to issue a "final order" that has the effect of "*permanently cancell[ing]*" sequestered amounts in spending statutes in order to achieve budget compliance) (emphasis added); Pub. L. 104–208, 110 Stat. 3009-695 ("Public Law 89–732 [dealing with immigration from Cuba] *is repealed* . . . upon a determination by the President . . . that a democratically elected government in Cuba is in power") (emphasis added); Pub. L. 99–498, § 701, 100 Stat. 1532 (amending § 758 of the Higher Education Act of 1965) (Secretary of Education "may" sell common stock in an educational loan corporation; if the Secretary decides to sell stock, and "if the Student Loan Marketing Association acquires from the Secretary" over 50 percent of the voting stock, "section 754 [governing composition of the Board of Directors] *shall be of no further force or effect*") (emphasis

added); Pub. L. 104–134, § 2901(c), 110 Stat. 1321–160 (President is "authorized to suspend the provisions of the [preceding] proviso" which suspension may last for *entire* effective period of proviso, if he determines suspension is "appropriate based upon the public interest in sound environmental management . . . [or] the protection of national or locally-affected interests, or protection of any cultural, biological or historic resources").

All of these examples, like the Act, delegate a power to take action that will render statutory provisions "without force or effect." Every one of these examples, like the present Act, delegates the power to choose between alternatives, each of which the statute spells out in some detail. None of these examples delegates a power to "repeal" or "amend" a statute, or to "make" a new law. Nor does the Act. Rather, the delegated power to nullify statutory language was *itself* created and defined by Congress, and included in the statute books on an equal footing with (indeed, as a component part of) the sections that are potentially subject to nullification. As a Pennsylvania court put the matter more than a century ago: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power." *Locke's Appeal*, 72 Pa. 491, 498 (1873).

In fact, a power to appoint property offers a closer analogy to the power delegated here than one might at first suspect. That is because the Act contains a "lockbox" feature, which gives legal significance to the enactment of a particular appropriations item even if, and even after, the President has rendered it without "force or effect." See 2 U. S. C. § 691c (1994 ed., Supp. II); see also *ante*, at 440–441, n. 31 (describing "lockbox"); but cf. Letter from Counsel for Snake River Cooperative, dated Apr. 29, 1998 (available in Clerk of Court's case file) (arguing "lockbox" feature inapplicable here due to special provision in Balanced Budget Act of 1997, the constitutionality and severability of which have not been argued). In essence, the "lockbox" feature: (1) points to a

Gramm-Rudman-Hollings Act requirement that, when Congress enacts a "budget busting" appropriation bill, automatically reduces authorized spending for a host of federal programs in a pro rata way; (2) notes that cancellation of an item (say, a $2 billion item) would, absent the "lockbox" provision, neutralize (by up to $2 billion) the potential "budget busting" effects of other bills (and therefore potentially the President could cancel items in order to "save" the other programs from the mandatory cuts, resulting in no net deficit reduction); and (3) says that this "neutralization" will not occur (*i. e.*, the pro rata reductions will take place just as if the $2 billion item had not been canceled), so that the canceled items truly provide *additional* budget savings over and above the Gramm-Rudman-Hollings regime. See generally H. R. Conf. Rep. No. 104–491, pp. 23–24 (1996) ("lockbox" provision included "to ensure that the savings from the cancellation of [items] are devoted to deficit reduction and are not available to offset a deficit increase in another law"). That is why the Government says that the Act provides a "lockbox," and why it seems fair to say that, despite the Act's use of the word "cancel," the Act does not delegate to the President the power truly to *cancel* a line item expenditure (returning the legal status quo to one in which the item had never been enacted). Rather, it delegates to the President the power to decide *how* to spend the money to which the line item refers—either for the specific purpose mentioned in the item, or for general deficit reduction via the "lockbox" feature.

These features of the law do not mean that the delegated power is, or is just like, a power to appoint property. But they do mean that it is not, and it is not just like, the repeal or amendment of a law, or, for that matter, a true line item veto (despite the Act's title). Because one cannot say that the President's exercise of the power the Act grants is, literally speaking, a "repeal" or "amendment," the fact that the Act's procedures differ from the Constitution's exclusive pro-

cedures for enacting (or repealing) legislation is beside the point. The Act *itself* was enacted in accordance with these procedures, and its failure to require the President to satisfy those procedures does not make the Act unconstitutional.

IV

Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates separation-of-powers principles—principles that arise out of the Constitution's vesting of the "executive Power" in "a President," U. S. Const., Art. II, § 1, and "[a]ll legislative Powers" in "a Congress," Art. I, § 1. There are three relevant separation-of-powers questions here: (1) Has Congress given the President the wrong kind of power, *i. e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the citizen's Representatives in Congress," upon which JUSTICE KENNEDY properly insists. See *ante*, at 451 (concurring opinion). And with respect to *this* Act, the answer to all these questions is "no."

A

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority—to spend or not to spend appropriations, to change or not to change tariff rates—that Congress has frequently granted the President, any differences being differences in degree, not kind. See Part IV–C, *infra*.

The fact that one could also characterize this kind of power as "legislative," say, if Congress itself (by amending the appropriations bill) prevented a provision from taking effect, is beside the point. This Court has frequently found that the

exercise of a particular power, such as the power to make rules of broad applicability, *American Trucking Assns., Inc.* v. *United States*, 344 U. S. 298, 310–313 (1953), or to adjudicate claims, *Crowell* v. *Benson*, 285 U. S., at 50–51, 54; *Wiener* v. *United States*, 357 U. S. 349, 354–356 (1958), can fall within the constitutional purview of more than one branch of Government. See *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825) (Marshall, C. J.) ("Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself"). The Court does not "carry out the distinction between legislative and executive action with mathematical precision" or "divide the branches into watertight compartments," *Springer* v. *Philippine Islands*, 277 U. S. 189, 211 (1928) (Holmes, J., dissenting), for, as others have said, the Constitution "blend[s]" as well as "separat[es]" powers in order to create a workable government. 1 K. Davis, Administrative Law § 1.09, p. 68 (1958).

The Court has upheld congressional delegation of rulemaking power and adjudicatory power to federal agencies, *American Trucking Assns.* v. *United States*, *supra*, at 310–313; *Wiener* v. *United States*, *supra*, at 354–356, guideline-writing power to a Sentencing Commission, *Mistretta* v. *United States*, 488 U. S., at 412, and prosecutor-appointment power to judges, *Morrison* v. *Olson*, 487 U. S. 654, 696–697 (1988). It is far easier *conceptually* to reconcile the power at issue here with the relevant constitutional description ("executive") than in many of these cases. And cases in which the Court may have found a delegated power and the basic constitutional function of another branch conceptually irreconcilable are yet more distant. See, *e. g.*, *Federal Radio Comm'n* v. *General Elec. Co.*, 281 U. S. 464 (1930) (power to award radio licenses not a "judicial" power).

If there is a separation-of-powers violation, then, it must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant separation-of-powers objective.

B

The Act does not undermine what this Court has often described as the principal function of the separation of powers, which is to maintain the tripartite structure of the Federal Government—and thereby protect individual liberty—by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam); Mistretta* v. *United States*, *supra*, at 380–382. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); 1 Davis, *supra*, § 1.09, at 68 ("The danger is not blended power[;] [t]he danger is unchecked power"); see also, *e. g.*, *Bowsher* v. *Synar*, 478 U. S. 714 (1986) (invalidating congressional intrusion on Executive Branch); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge); *Myers* v. *United States*, 272 U. S. 52 (1926) (Congress cannot limit President's power to remove Executive Branch official).

In contrast to these cases, one cannot say that the Act "encroaches" upon Congress' power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. See 2 U. S. C. § 691f(c)(1) (1994 ed., Supp. II); *Raines* v. *Byrd*, 521 U. S. 811, 824 (1997) (Congress can "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act"). Congress also retained the power to "disapprov[e]," and thereby reinstate, any of the President's cancellations. See 2 U. S. C. § 691b(a). And it is Congress that drafts and enacts the appropriations statutes that are subject to the Act in the first place—and thereby defines the outer limits of the President's cancellation authority. Thus *this* Act is not the sort of delegation "without . . . sufficient check" that concerns JUSTICE KEN-

NEDY. See *ante,* at 450 (concurring opinion). Indeed, the President acts only in response to, and on the terms set by, the Congress.

Nor can one say that the Act's basic substantive objective is constitutionally improper, for the earliest Congresses could, see Part II, *supra,* and often did, confer on the President this sort of discretionary authority over spending, see *ante,* at 466–467 (SCALIA, J., concurring in part and dissenting in part). Cf. *J. W. Hampton,* 276 U. S., at 412 (Taft, C. J.) ("[C]ontemporaneous legislative exposition of the Constitution when the founders of our Government and the framers of our Constitution were actively participating in public affairs . . . fixes the construction to be given to its provisions"). And, if an individual Member of Congress, who, say, favors aid to Country A but not to Country B, objects to the Act on the ground that the President may "rewrite" an appropriations law to do the opposite, one can respond: "But a majority of Congress voted that he have that power; you may vote to exempt the relevant appropriations provision from the Act; and if you command a majority, your appropriation is safe." Where the burden of overcoming legislative inertia lies is within the power of Congress to determine by rule. Where is the encroachment?

Nor can one say the Act's grant of power "aggrandizes" the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from generally applicable tax law from taking effect. These powers, as I will explain in detail, resemble those the President has exercised in the past on other occasions. See Part IV–C, *infra.* The delegation of those powers to the President may strengthen the Presidency, but any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld. See, *e. g., American*

Trucking Assns., Inc. v. *United States*, 344 U. S. 298 (1953) (delegation of rulemaking authority); *Lichter* v. *United States*, 334 U. S. 742 (1948) (delegation to determine and regulate "excessive" profits); *Crowell* v. *Benson*, 285 U. S. 22 (1932) (delegation of adjudicatory authority); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986) (same).

C

The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. The Constitution permits Congress to "see[k] assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." *J. W. Hampton*, *supra*, at 406. But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 324 (1931). Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform." *J. W. Hampton*, *supra*, at 409 (emphasis added).

The Act before us seeks to create such a principle in three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts [or] . . . items. . . for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things,

> "the legislative history, construction, and purposes of the law which contains [those amounts or items, and] . . . any specific sources of information referenced in

such law or . . . the best available information . . . ." 2 U. S. C. § 691(b) (1994 ed., Supp. II).

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and . . . special tax breaks." H. R. Conf. Rep. No. 104–491, p. 15 (1996).

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest." 2 U. S. C. § 691(a)(A) (1994 ed., Supp. II).

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. See, *e. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require) (internal quotation marks omitted); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600–603 (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 577 (1939) (if milk prices were "unreasonable," Secretary of Agriculture could "fi[x]" prices to a level that was "in the public interest"). See also *Lichter* v. *United States*, 334 U. S. 742, 785–786 (1948) (delegation of authority to determine "excessive" profits); *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946) (delegation of authority to Securities and Exchange Commission to prevent "unfairly or inequitably" distributing voting power among security holders); *Yakus* v. *United States*, 321 U. S. 414, 427 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be "fair" and "equitable").

Indeed, the Court has only twice in its history found that a congressional delegation of power violated the "nondele-

gation" doctrine. One such case, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), was in a sense a special case, for it was discovered in the midst of the case that the particular exercise of the power at issue, the promulgation of a Petroleum Code under the National Industrial Recovery Act, did not contain any legally operative sentence. *Id.*, at 412–413. The other case, *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), involved a delegation through the National Industrial Recovery Act, 48 Stat. 195, that contained not simply a broad standard ("fair competition"), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry, *id.*, at 521–525. As Justice Cardozo put it, the legislation exemplified "delegation running riot," which created a "roving commission to inquire into evils and upon discovery correct them." *Id.*, at 553, 551 (concurring opinion).

The case before us does not involve any such "roving commission," nor does it involve delegation to private parties, nor does it bring all of American industry within its scope. It is limited to one area of Government, the budget, and it seeks to give the President the power, in one portion of that budget, to tailor spending and special tax relief to what he concludes are the demands of fiscal responsibility. Nor is the standard that governs his judgment, though broad, any broader than the standard that currently governs the award of television licenses, namely, "public convenience, interest, *or* necessity." 47 U. S. C. § 303 (emphasis added). To the contrary, (a) the broadly phrased limitations in the Act, together with (b) its evident deficit reduction purpose, and (c) a procedure that guarantees Presidential awareness of the reasons for including a particular provision in a budget bill, taken together, guide the President's exercise of his discretionary powers.

1

The relevant similarities and differences among and between this case and other "nondelegation" cases can be listed

more systematically as follows: First, as I have just said, like statutes delegating power to award broadcast television licenses, or to regulate the securities industry, or to develop and enforce workplace safety rules, the Act is aimed at a discrete problem: namely, a particular set of expenditures within the federal budget. The Act concerns, not the entire economy, cf. *Schecter Poultry Corp.*, *supra*, but the annual federal budget. Within the budget it applies only to *discretionary* budget authority and *new* direct spending items, that together amount to approximately a third of the current annual budget outlays, see Tr. of Oral Arg. 18; see also Budget 303, and to "limited tax benefits" that (because each can affect no more than 100 people, see 2 U. S. C. § 691e(9)(A) (1994 ed., Supp. II)), amount to a tiny fraction of federal revenues and appropriations. Compare Analytical Perspectives 73–75 (listing over *$500 billion* in overall "tax expenditures" that OMB estimated were contained in federal law in 1997) and Budget 303 (federal outlays and receipts in 1997 were both over *$1.5 trillion*) with App. to Juris. Statement 71a (President's cancellation message for Snake River appellees' limited tax benefit, estimating annual "value" of benefit, in terms of revenue loss, at about *$20 million*).

Second, like the award of television licenses, the particular problem involved—determining whether or not a particular amount of money should be spent or whether a particular dispensation from tax law should be granted a few individuals—does not readily lend itself to a significantly more specific standard. The Act makes clear that the President should consider the reasons for the expenditure, measure those reasons against the desirability of avoiding a deficit (or building a surplus), and make up his mind about the comparative weight of these conflicting goals. Congress might have expressed this matter in other language, but could it have done so in a *significantly* more specific way? See *National Broadcasting Co.* v. *United States*, *supra*, at 216 ("[P]ublic interest, convenience, or necessity" standard is

" 'as concrete as the complicated factors for judgment in such a field of delegated authority permit' ") (quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940)). The statute's language, I believe, is sufficient to provide the President, and the public, with a fairly clear idea as to what Congress had in mind. And the public can judge the merits of the President's choices accordingly. Cf. *Yakus* v. *United States*, 321 U. S., at 426 (standards were "sufficiently definite and precise to enable . . . the public to ascertain . . . conform[ity]").

Third, insofar as monetary expenditure (but not "tax expenditure") is at issue, the President acts in an area where history helps to justify the discretionary power that Congress has delegated, and where history may inform his exercise of the Act's delegated authority. Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money. See, *e. g.*, Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190; Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (appropriating over $4 billion to be spent "in the discretion and under the direction of the President" for economic relief measures); see also *ante*, at 466–467 (SCALIA, J., concurring in part and dissenting in part) (listing numerous examples).

Fourth, the Constitution permits Congress to rely upon context and history as providing the necessary standard for the exercise of the delegated power. See, *e. g.*, *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co. (Station WIBO)*, 289 U. S. 266, 285 (1933) ("public interest, convenience, or necessity [standard] . . . is to be interpreted by its context"); *Fahey* v. *Mallonee*, 332 U. S. 245, 253 (1947) (otherwise vague delegation to regulate banks was "sufficiently explicit, against the background of custom, to be adequate"). Relying upon context, Congress has sometimes granted the President broad discretionary authority over

spending in laws that mention no standard at all. See, *e. g.*, Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535–536 (granting the President recess authority to transfer money "appropriated for a particular branch of expenditure in [a] department" to be "applied [instead] to another branch of expenditure in the same department"); Revenue and Expenditure Control Act of 1968, §§ 202(b), 203(b), 82 Stat. 271–272; (authorizing the President annually to reserve up to $6 billion in outlays and $10 billion in new obligation authority); Second Supplemental Appropriations Act, 1969, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, §§ 401, 501, 84 Stat. 405–407. In this case, too, context and purpose can give meaning to highly general language. See *Federal Radio Comm'n* v. *Nelson Bros.*, *supra*, at 285; *Fahey* v. *Malonee*, *supra*, at 250–253; cf. *Lichter* v. *United States*, 334 U. S., at 777 (Congress has "at least expressed . . . satisfaction with the existing specificity of the Act"); *Train* v. *City of New York*, 420 U. S. 35, 44–47 (1975) (disallowing President Nixon's efforts to impound funds because Court found Congress did not *intend* him to exercise the power in that instance).

On the other hand, I must recognize that there are important differences between the delegation before us and other broad, constitutionally acceptable delegations to Executive Branch agencies—differences that argue against my conclusion. In particular, a broad delegation of authority to an administrative agency differs from the delegation at issue here in that agencies often develop subsidiary rules under the statute, rules that explain the general "public interest" language. Doing so diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation. See 1 K. Davis, Administrative Law § 3:15, pp. 207–208 (2d ed. 1978). Moreover, agencies are typically subject to judicial review, which review provides an additional check against arbitrary implementation. See, *e. g.*, *Motor Vehicle Mfrs. Assn. of United*

States, Inc. v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 40–42 (1983). The President has not so narrowed his discretionary power through rule, nor is his implementation subject to judicial review under the terms of the Administrative Procedure Act. See, *e. g.*, *Franklin* v. *Massachusetts*, 505 U. S. 788, 801 (1992) (APA does not apply to President absent express statement by Congress).

While I believe that these last mentioned considerations are important, they are not determinative. The President, unlike most agency decisionmakers, is an elected official. He is responsible to the voters, who, in principle, will judge the manner in which he exercises his delegated authority. Whether the President's expenditure decisions, for example, are arbitrary is a matter that in the past has been left primarily to those voters to consider. And this Court has made clear that judicial review is less appropriate when the President's own discretion, rather than that of an agency, is at stake. See *Dalton* v. *Specter*, 511 U. S. 462, 476 (1994) (Presidential decision on military base closure recommendations not reviewable; President could "approv[e] or disapprov[e] the recommendations for whatever reason he sees fit"); *Franklin*, 505 U. S., at 801 (President's decision whether or not to transmit census report to Congress was unreviewable by courts for abuse of discretion); cf. *id.*, at 799–800 (it was "important to the integrity of the process" that the decision was made by the President, a "constitutional officer" as opposed to the unelected Secretary of Commerce). These matters reflect in part the Constitution's own delegation of "executive Power" to "a President," Art. II, § 1; cf. *Clinton* v. *Jones*, 520 U. S. 681, 710–711 (1997) (BREYER, J., concurring in judgment) (discussing unitary Executive), and we must take this into account when applying the Constitution's nondelegation doctrine to questions of Presidential authority.

Consequently I believe that the power the Act grants the President to prevent spending items from taking effect does not violate the "nondelegation" doctrine.

2

Most, but not all, of the considerations mentioned in the previous subsection apply to the Act's delegation to the President of the authority to prevent "from having legal force or effect" a "limited tax benefit," which term the Act defines in terms of special tax relief for fewer than 100 (or in some instances 10) beneficiaries, which tax relief is not available to others who are somewhat similarly situated. 2 U. S. C. § 691e(9) (1994 ed., Supp. II). There are, however, two related significant differences between the "limited tax benefit" and the spending items considered above, which make the "limited tax benefit" question more difficult. First, the history is different. The history of Presidential authority to pick and to choose is less voluminous. Second, the subject matter (increasing or decreasing an individual's taxes) makes the considerations discussed at the end of the last section (*i. e.*, the danger of an arbitrary exercise of delegated power) of greater concern. But these differences, in my view, are not sufficient to change the "nondelegation" result.

For one thing, this Court has made clear that the standard we must use to judge whether a law violates the "nondelegation" doctrine is the same in the tax area as in any other. In *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S. 212 (1989), the Court considered whether Congress, in the exercise of its taxing power, could delegate to the Secretary of Transportation the authority to establish a system of pipeline user fees. In rejecting the argument that the "fees" were actually a "tax," and that the law amounted to an unconstitutional delegation of Congress' own power to tax, the unanimous Court said that:

> "From its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive . . . .
>
> . . . . .

> "We find no support . . . for [the] contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power. . . . Even if the user fees are a form of taxation, we hold that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges. Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution." *Id.*, at 221–223.

For another thing, this Court has upheld tax statutes that delegate to the President the power to change taxes under very broad standards. In 1890, for example, Congress authorized the President to "suspend" the provisions of the tariff statute, thereby raising tariff rates, if the President determined that other nations were imposing "reciprocally unequal and unreasonable" tariff rates on specialized commodities. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612. And the Court upheld the statute against constitutional attack. *Field* v. *Clark*, 143 U. S., at 693–694 ("[N]o valid objection can be made" to such statutes "conferring authority or discretion" on the President) (internal quotation marks omitted); see also Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (President "authorized" to "suspend the operation of" a customs law "if in his judgment the public interest should require it"); Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372 (empowering President to lay an embargo on ships in ports "whenever, in his opinion, the public safety shall so require" and to revoke related regulations "whenever he shall think proper"). In 1922 Congress gave the President the authority to adjust tariff rates to "equalize" the differences in costs of production at home and abroad, see Tariff Act of 1922, ch. 356,

§ 315(a), 42 Stat. 941–942. The Court also upheld this delegation against constitutional attack. See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928).

These statutory delegations resemble today's Act more closely than one might at first suspect. They involve a duty on imports, which is a tax. That tax in the last century was as important then as the income tax is now, for it provided most of the Federal Government's revenues. See U. S. Dept. of Commerce, Census Bureau, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, at 1106 (in 1890, when Congress passed the statute at issue in *Field*, tariff revenues were 57% of the total receipts of the Federal Government). And the delegation then thus affected a far higher percentage of federal revenues than the tax-related delegation over extremely "limited" tax benefits here. See *supra*, at 487.

The standards at issue in these earlier laws, such as "unreasonable," were frequently vague and without precise meaning. See, *e. g.*, Act of Oct. 1, 1890, § 3, 26 Stat. 612. Indeed, the word "equalize" in the 1922 statute, 42 Stat. 942, could not have been administered as if it offered the precision it seems to promise, for a tariff that literally "equalized" domestic and foreign production costs would, because of transport costs, have virtually ended foreign trade.

Nor can I accept the majority's effort to distinguish these examples. The majority says that these statutes imposed a specific "duty" upon the President to act upon the occurrence of a specified event. See *ante*, at 443. But, in fact, some of the statutes imposed no duty upon the President at all. See, *e. g.*, Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (President "authorized" to "suspend the operation of" a customs law "if in his judgment the public interest should require it"). Others imposed a "duty" in terms so vague as to leave substantial discretion in the President's hands. See Act of Oct. 1, 1890, 26 Stat. 612 (President's "duty" to suspend tariff law was triggered "whenever" and "so often as" he was "satisfied"

that "unequal and unreasonable" rates were imposed); see also *Field* v. *Clark*, *supra*, at 691 (historically in the flexible tariff statutes Congress has "invest[ed] the President with large discretion").

The majority also tries to distinguish these examples on the ground that the President there executed congressional policy while here he rejects that policy. See *ante*, at 444. The President here, however, in exercising his delegated authority does not *reject* congressional policy. Rather, he *executes* a law in which Congress has specified its desire that the President have the very authority he has exercised. See Part III, *supra*.

The majority further points out that these cases concern imports, an area that, it says, implicates foreign policy and therefore justifies an unusual degree of discretion by the President. See *ante*, at 445. Congress, however, has not limited its delegations of taxation authority to the "foreign policy" arena. The first Congress gave the Secretary of the Treasury the "power to mitigate or remit" statutory penalties for nonpayment of liquor taxes "upon such terms and conditions as shall appear to him reasonable." Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209. A few years later, the Secretary was authorized, in lieu of collecting the stamp duty enacted by Congress, "to agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of the annual dividend made by such banks." Act of July 6, 1797, ch. 11, § 2, 1 Stat. 528. More recently, Congress has given to the Executive Branch the authority to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U. S. C. § 7805(a). And the Court has held that such rules and regulations, "which undoubtedly affect individual taxpayer liability, are . . . without doubt the result of entirely appropriate delegations of discretionary authority

by Congress." *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S., at 222. I do not believe the Court would hold the same delegations at issue in *J. W. Hampton* and *Field* unconstitutional were they to arise in a more obviously domestic area.

Finally, the tax-related delegation is limited in ways that tend to diminish any widespread risk of arbitrary Presidential decisionmaking:

(1) The Act does not give the President authority to change general tax policy. That is because the limited tax benefits are defined in terms of deviations from tax policy, *i. e.*, special benefits to fewer than 100 individuals. See 2 U. S. C. § 691e(9)(A)(i) (1994 ed., Supp. II); see also Analytical Perpectives 84 (defining "tax expenditure" as "a preferential exception to the baseline provisions of the tax structure").

(2) The Act requires the President to make the same kind of policy judgment with respect to these special benefits as with respect to items of spending. He is to consider the budget as a whole, he is to consider the particular history of the tax benefit provision, and he is to consider whether the provision is worth the loss of revenue it causes in the same way that he must decide whether a particular expenditure item is worth the added revenue that it requires. See *supra*, at 484–485.

(3) The delegated authority does not destroy any individual's expectation of receiving a particular benefit, for the Act is written to say to the small group of taxpayers who may receive the benefit, "Taxpayers, you will receive an exemption from ordinary tax laws, but only if the President decides the budgetary loss is not too great."

(4) The "limited tax benefit" provisions involve only a small part of the federal budget, probably less than one percent of total annual outlays and revenues. Compare Budget 303 (federal outlays and receipts in 1997 were both over *$1.5 trillion*) with App. to Juris. Statement 71a (President's cancellation message for Snake River appellees' limited tax ben-

efit, estimating annual "value" of benefit, in terms of revenue loss, at about *$20 million*) and Taxpayer Relief Act of 1997, § 1701, 111 Stat. 1099 (identifying only 79 "limited tax benefits" subject to cancellation in the entire tax statute).

(5) Because the "tax benefit" provisions are part and parcel of the budget provisions, and because the Act in defining them, focuses upon "revenue-losing" tax provisions, 2 U. S. C. § 691e(9)(A)(i) (1994 ed., Supp. II), it regards "tax benefits" as if they were a special kind of *spending*, namely spending that puts back into the pockets of a small group of taxpayers, money that "baseline" tax policy would otherwise take from them. There is, therefore, no need to consider this provision as if it represented a delegation of authority to the President, outside the budget expenditure context, to set major policy under the federal tax laws. But cf. *Skinner* v. *Mid-America Pipeline*, *supra*, at 222–223 (no "different and stricter" nondelegation doctrine in the taxation context). Still less does approval of the delegation in this case, given the long history of Presidential discretion in the budgetary context, automatically justify the delegation to the President of the authority to alter the effect of other laws outside that context.

The upshot is that, in my view, the "limited tax benefit" provisions do not differ enough from the "spending" provisions to warrant a different "nondelegation" result.

V

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic separation-of-powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since

they comply with separation-of-powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.

Syllabus

EASTERN ENTERPRISES *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.

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

No. 97–42. Argued March 4, 1998—Decided June 25, 1998

In 1946, a historic labor agreement between coal operators and the United Mine Workers of America (UMWA) led to the creation of benefit funds that provided for the medical expenses of miners and their dependents, with the precise benefits determined by UMWA-appointed trustees. Those trusts served as the model for the United Mine Workers of America Welfare and Retirement Fund (1947 W&R Fund), which was established by the National Bituminous Coal Wage Agreement of 1947 (1947 NBCWA). The Fund used proceeds of a royalty on coal production to provide benefits to miners and their families, and trustees determined benefit levels and other matters. The 1950 NBCWA created a new fund (1950 W&R Fund), which used a fixed amount of royalties for benefits, gave trustees the authority to establish and adjust benefit levels so as to remain within the budgetary restraints, and did not guarantee lifetime health benefits for retirees and their dependents. The 1950 W&R Fund continued to operate with benefit levels subject to revision until the Employee Retirement Income Security Act of 1974 (ERISA) introduced specific funding and vesting requirements for pension plans. To comply with ERISA, the UMWA and the Bituminous Coal Operators' Association entered into the 1974 NBCWA, which created four new trusts. It was the first agreement to expressly reference health benefits for retirees, but it did not alter the employers' obligation to contribute a fixed amount of royalties. The new agreement did not extend the employers' liability beyond the term of the agreement. Miners who retired before 1976 were covered by the 1950 Benefit Plan and Trust (1950 Benefit Plan), and those retiring after 1975 were covered by the 1974 Benefit Plan and Trust (1974 Benefit Plan). The increase in benefits and other factors—the decline in coal production, the retirement of a generation of miners, and rapid acceleration in health care costs—quickly caused financial problems for the 1950 and 1974 Benefit Plans. To ensure the Plans' solvency, the 1978 NBCWA obligated signatories to make sufficient contributions to maintain benefits as long as they were in the coal business. As the Plans continued to suffer financially, employers began to withdraw, leaving the remaining signatories to absorb the increasing cost of covering retirees left behind.

Syllabus

Ultimately, Congress passed the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) to stabilize funding and provide for benefits to retirees by merging the 1950 and 1974 Benefit Plans into a new fund (Combined Fund) that provides substantially the same benefits as provided by the 1950 and 1974 Plans and is funded by premiums assessed against coal operators that signed any NBCWA or other agreement requiring contributions to the 1950 or 1974 Benefit Plans. Respondent, Commissioner of Social Security, assigns retirees to signatory coal operators according to the following allocation formula: First, to the most recent signatory to the 1978 or a subsequent NBCWA to employ the retiree in the coal industry for at least two years, 26 U. S. C. § 9706(a)(1); second, to the most recent signatory to the 1978 or a subsequent NBCWA to employ the retiree in the coal industry, § 9706(a)(2); and third, to the signatory operator that employed the retiree in the coal industry for the longest period of time prior to the effective date of the 1978 NBCWA, § 9706(a)(3).

Petitioner Eastern Enterprises (Eastern) was a signatory to every NBCWA executed between 1947 and 1964. It is "in business" within the Coal Act's meaning, although it left the coal industry in 1965, after transferring its coal operations to a subsidiary (EACC) and ultimately selling its interest in EACC to respondent Peabody Holding Company, Inc. (Peabody). Under the Coal Act, the Commissioner assigned Eastern the obligation for Combined Fund premiums respecting over 1,000 retired miners who had worked for the company before 1966. Eastern sued the Commissioner and other respondents, claiming that the Coal Act violates substantive due process and constitutes a taking in violation of the Fifth Amendment. The District Court granted respondents summary judgment, and the First Circuit affirmed.

Held: The judgment is reversed, and the case is remanded.

110 F. 3d 150, reversed and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded:

1. The declaratory judgment and injunction petitioner seeks are an appropriate remedy for the taking alleged in this case, and it is within the district courts' power to award such equitable relief. The Tucker Act may require that a just compensation claim under the Takings Clause be filed in the Court of Federal Claims, but petitioner does not seek compensation from the Government. In situations analogous to the one here, this Court has assumed the lack of a compensatory remedy and has granted equitable relief for Takings Clause violations without discussing the Tucker Act's applicability. See, *e. g.*, *Babbitt* v. *Youpee*, 519 U. S. 234, 234–235. Pp. 519–522.

Syllabus

2. The Coal Act's allocation of liability to Eastern violates the Takings Clause. Pp. 522–537.

(a) Economic regulation such as the Coal Act may effect a taking. *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78. The party challenging the government action bears a substantial burden, for not every destruction or injury to property by such action is a constitutional taking. A regulation's constitutionality is evaluated by examining the governmental action's "justice and fairness." See *Andrus* v. *Allard*, 444 U. S. 51, 65. Although that inquiry does not lend itself to any set formula, three factors traditionally have informed this Court's regulatory takings analysis: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175. Pp. 522–524.

(b) The analysis in this case is informed by previous decisions considering the constitutionality of somewhat similar legislative schemes: *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (Black Lung Benefits Act of 1972); *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (Multiemployer Pension Plan Amendments Act of 1980); and *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602 (same). Those opinions make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties; and that it may impose retroactive liability to some degree, particularly where it is "'confined to short and limited periods required by the practicalities of producing national legislation,'" *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 731. The decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience. Pp. 524–529.

(c) The Coal Act's allocation scheme, as applied to Eastern, presents such a case, when the three traditional factors are considered. As to the economic impact, Eastern's Coal Act liability is substantial, and the company is clearly deprived of the $50 to $100 million it must pay to the Combined Fund. An employer's statutory liability for multiemployer plan benefits should reflect some proportionality to its experience with the plan. *Concrete Pipe*, *supra*, at 645. Eastern contributed to the 1947 and 1950 W&R Funds, but ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans established under the 1974, 1978, or subsequent NBCWA's. It is the latter agreements, however, that first suggest an industry commitment to funding lifetime health

benefits for retirees and their dependents. During the years that Eastern employed miners, such benefits were far less extensive than under the 1974 NBCWA, were unvested, and were fully subject to alteration or termination. To the extent that Eastern may be able to seek indemnification from EACC or Peabody under contractual arrangements that might insure Eastern against liabilities arising out of its former coal operations, that indemnity is neither enhanced nor supplanted by the Coal Act and does not affect the availability of the declaratory relief sought here. Respondents' argument that the Coal Act moderates and mitigates the economic impact by allocating some of Eastern's former employees to signatories of the 1978 NBCWA is unavailing. That Eastern is not forced to bear the burden of lifetime benefits for all of its former employees does not mean that its liability is not a significant economic burden.

For similar reasons, the Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. It operates retroactively, reaching back 30 to 50 years to impose liability based on Eastern's activities between 1946 and 1965. Retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. *General Motors Corp.* v. *Romein*, 503 U. S. 181, 191. The distance into the past that the Coal Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial fairness questions. The pre-1974 NBCWA's do not demonstrate that there was an implicit industrywide agreement to fund lifetime health benefits at the time that Eastern was involved in the coal industry. The 1947 and 1950 W&R Funds, in which Eastern participated, operated on a pay-as-you-go basis and the classes of beneficiaries were subject to the trustees' discretion. Not until 1974, when ERISA forced revisions to the 1950 W&R Fund and when Eastern was no longer in the industry, could lifetime medical benefits have been viewed as promised. Thus, the Coal Act's scheme for allocating Combined Fund premiums is not calibrated either to Eastern's past actions or to any agreement by the company. Nor would the Federal Government's pattern of involvement in the coal industry have given Eastern sufficient notice that lifetime health benefits might be guaranteed to retirees several decades later. Eastern's liability for such benefits also differs from coal operators' responsibility under the Black Lung Benefits Act of 1972, which spread the cost of employment-related disabilities to those who profited from the fruits of the employees' labor, *Turner Elkhorn*, *supra*, at 18. Finally, the nature of the governmental action in this case is quite unusual in that Congress' solution to the grave funding problem that it identified singles out certain employers to bear a substantial burden, based on the employers' conduct

far in the past, and unrelated to any commitment that the employers made or to any injury they caused. Pp. 529–537.

JUSTICE KENNEDY concluded that application of the Coal Act to Eastern would violate the proper bounds of settled due process principles. Although the Court has been hesitant to subject economic legislation to due process scrutiny as a general matter, this country's law has harbored a singular distrust of retroactive statutes, and that distrust is reflected in this Court's due process jurisprudence. For example, in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15, the Court held that due process requires an inquiry into whether a legislature acted in an arbitrary and irrational way when enacting a retroactive law. This formulation has been repeated in numerous recent cases, *e. g.*, *United States* v. *Carlton*, 512 U. S. 26, 31, which reflect the recognition that retroactive lawmaking is a particular concern because of the legislative temptation to use it as a means of retribution against unpopular groups or individuals, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 266. Because change in the legal consequences of transactions long closed can destroy the reasonable certainty and security which are the very objects of property ownership, due process protection for property must be understood to incorporate the settled tradition against retroactive laws of great severity. The instant case presents one of those rare instances where the legislature has exceeded the limits imposed by due process. The Coal Act's remedy bears no legitimate relation to the interest which the Government asserts supports the statute. The degree of retroactive effect, which is a significant determinant in a statute's constitutionality, *e. g.*, *United States* v. *Carlton*, *supra*, at 32, is of unprecedented scope here, since the Coal Act created liability for events occurring 35 years ago. While the Court has upheld the imposition of liability on former employers based on past employment relationships when the remedial statutes were designed to impose an actual, measurable business cost which the employer had been able to avoid in the past, *e. g.*, *Turner Elkhorn*, *supra*, at 19, the Coal Act does not serve this purpose. The beneficiaries' expectation of lifetime benefits was created by promises and agreements made long after Eastern left the coal business, and Eastern was not responsible for the perilous condition of the 1950 and 1974 Plans which jeopardized the benefits. Pp. 547–550.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 538. KENNEDY, J., filed an opinion concurring in the judgment and dissenting in part, *post*, p. 539. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 550. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 553.

John T. Montgomery argued the cause for petitioner. With him on the briefs were *John H. Mason* and *L. William Law.*

Deputy Solicitor General Kneedler argued the cause for the federal respondent. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Paul R. Q. Wolfson*, *Douglas N. Letter*, and *Sushma Soni.*

Peter Buscemi argued the cause for respondents UMWA Combined Benefit Fund et al. With him on the brief were *Stanley F. Lechner*, *David Lubitz*, *John R. Mooney*, *Paul A. Green*, and *David W. Allen.* *Kenneth A. Sweder* filed a brief for respondents Peabody Holding Co., Inc., et al.*

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Scalia, and Justice Thomas join.

In this case, the Court considers a challenge under the Due Process and Takings Clauses of the Constitution to the Coal

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*Briefs of *amici curiae* urging reversal were filed for AlliedSignal Inc. et al. by *Donald B. Ayer*, *Jonathan C. Rose*, *James E. Gauch*, and *Gregory G. Katsas;* for Davon, Inc., by *John W. Fischer II;* for Pardee & Curtin Lumber Co. et al. by *Arthur Newbold*, *Ethan D. Fogel*, and *Andrew S. Miller;* for Unity Real Estate Co. et al. by *Robert H. Bork*, *David J. Laurent*, *Patrick M. McSweeney*, *William B. Ellis*, and *John L. Marshall;* and for the Washington Legal Foundation by *Timothy S. Bishop*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the Bituminous Coal Operators' Association, Inc., by *Clifford M. Sloan* and *Paul L. Joffe;* for California Cities and Counties et al. by *John R. Calhoun*, *John D. Echeverria*, *James K. Hahn*, *Anthony Saul Alperin*, *Samuel L. Jackson*, *Joan R. Gallo*, *George Rios*, *Louise H. Renne*, *Gary T. Ragghianti*, and *S. Shane Stark;* for Cedar Coal Co. et al. by *David M. Cohen;* for Freeman United Coal Mining Co. by *Kathryn S. Matkov;* for Ohio Valley Coal Co. et al. by *John G. Roberts, Jr.;* and for the United Mine Workers of America by *Grant Crandall.*

Briefs of *amici curiae* were filed for Midwest Motor Express, Inc., by *Hervey H. Aitken, Jr.*, and *Roy A. Sheetz;* and for Pittston Co. by *A. E. Dick Howard*, *Stephen M. Hodges*, *Wade W. Massie*, and *Gregory B. Robertson.*

Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U. S. C. §§ 9701–9722 (1994 ed. and Supp. II), which establishes a mechanism for funding health care benefits for retirees from the coal industry and their dependents. We conclude that the Coal Act, as applied to petitioner Eastern Enterprises, effects an unconstitutional taking.

I

A

For a good part of this century, employers in the coal industry have been involved in negotiations with the United Mine Workers of America (UMWA or Union) regarding the provision of employee benefits to coal miners. When petitioner Eastern Enterprises (Eastern) was formed in 1929, coal operators provided health care to their employees through a prepayment system funded by payroll deductions. Because of the rural location of most mines, medical facilities were frequently substandard, and many of the medical professionals willing to work in mining areas were "company doctors," often selected by the coal operators for reasons other than their skills or training. The health care available to coal miners and their families was deficient in many respects. In addition, the cost of company-provided services, such as housing and medical care, often consumed the bulk of miners' compensation. See generally U. S. Dept. of Interior, Report of the Coal Mines Administration, A Medical Survey of the Bituminous-Coal Industry (1947) (Boone Report); Report of United States Coal Commission, S. Doc. No. 195, 68th Cong., 2d Sess. (1925).

In the late 1930's, the UMWA began to demand changes in the manner in which essential services were provided to miners, and by 1946, the subject of miners' health care had become a critical issue in collective bargaining negotiations between the Union and bituminous coal companies. When a breakdown in those negotiations resulted in a nationwide

strike, President Truman issued an Executive order directing Secretary of the Interior Julius Krug to take possession of all bituminous coal mines and to negotiate "appropriate changes in the terms and conditions of employment" of miners with the UMWA. 11 Fed. Reg. 5593 (1946). A week of negotiations between Secretary Krug and UMWA President John L. Lewis produced the historic Krug-Lewis Agreement that ended the strike. See App. in No. 96–1947 (CA1), p. 610 (hereinafter App. (CA1)).

That agreement, described as "an almost complete victory for the miners," M. Fox, United We Stand 405 (1990), led to the creation of benefit funds, financed by royalties on coal produced and payroll deductions. The funds compensated miners and their dependents and survivors for wages lost due to disability, death, or retirement. The funds also provided for the medical expenses of miners and their dependents, with the precise benefits determined by UMWA-appointed trustees. In addition, the Krug-Lewis Agreement committed the Government to undertake a comprehensive survey of the living conditions in coal mining areas in order to assess the improvements necessary to bring those communities up to "recognized American standards." Krug-Lewis Agreement § 5, App. (CA1) 613. That study concluded that the medical needs of miners and their dependents would be more effectively served through "a broad prepayment system, based on sound actuarial principles." Boone Report 226–227.

Shortly after the study was issued, the mines returned to private control and the UMWA and several coal operators entered into the National Bituminous Coal Wage Agreement of 1947 (1947 NBCWA), App. (CA1) 615, which established the United Mine Workers of America Welfare and Retirement Fund (1947 W&R Fund), modeled after the Krug-Lewis benefit trusts. The Fund was to use the proceeds of a royalty on coal production to provide pension and medical

benefits to miners and their families. The 1947 NBCWA did not specify the benefits to which miners and their dependents were entitled. Instead, three trustees appointed by the parties were given authority to determine "coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters." 1947 NBCWA 146, App. (CA1) 619.

Disagreement over benefits continued, however, leading to the execution of another NBCWA in 1950, which created a new multiemployer trust, the United Mine Workers of America Welfare and Retirement Fund of 1950 (1950 W&R Fund). The 1950 W&R Fund established a 30-cents-per-ton royalty on coal produced, payable by signatory operators on a "several and not joint" basis for the duration of the 1950 Agreement. 1950 NBCWA 63, App. (CA1) 640. As with the 1947 W&R Fund, the 1950 W&R Fund was governed by three trustees chosen by the parties and vested with responsibility to determine the level of benefits. *Id.*, at 59–61, App. (CA1) 638–639. Between 1950 and 1974, the 1950 NBCWA was amended on occasion, and new NBCWA's were adopted in 1968 and 1971. Except for increases in the amount of royalty payments, however, the terms and structure of the 1950 W&R Fund remained essentially unchanged. A 1951 amendment recognized the creation of the Bituminous Coal Operators' Association (BCOA), a multiemployer bargaining association, which became the primary representative of coal operators in negotiations with the Union. See App. (CA1) 647–648.

Under the 1950 W&R Fund, miners and their dependents were not promised specific benefits. As the 1950 W&R Fund's Annual Report for the fiscal year ending June 30, 1955, explained:

> "Under the legal and financial obligations . . . imposed [by the Trust Agreement], the Fund is operated on a pay-as-you-go basis, maintaining a sound relation-

> ship between revenues and expenditures. Resolutions adopted by the Trustees governing Fund Benefits—Pensions, Hospital and Medical Care, and Widows and Survivors Benefits—specifically provide that all these Benefits are subject to termination, revision, or amendment, by the Trustees in their discretion at any time. No vested interest in the Fund extends to any beneficiary." *Id.*, at 3–4, App. (CA1) 869–870.

See also *Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 565, and n. 2 (1982). Thus, the Fund operated using a fixed amount of royalties, with the trustees having the authority to establish and adjust the level of benefits provided so as to remain within the budgetary constraints.

Subsequent annual reports of the 1950 W&R Fund reiterated that benefits were subject to change. See, *e. g.*, 1950 W&R Fund Annual Report for the Year Ending June 30, 1956 (1956 Annual Report), p. 30, App. (CA1) 929 ("Resolutions adopted by the Trustees governing Fund Benefits—Pensions, Hospital and Medical Care, and Widows and Survivors Benefits—specifically provide that all these Benefits are subject to termination, revision, or amendment, by the Trustees in their discretion at any time"); 1950 W&R Fund Annual Report for the Year Ending June 30, 1958, pp. 20–21, App. (CA1) 955–956 ("Trustee regulations governing Benefits specifically provide that all Benefits which have been authorized are subject to termination, suspension, revision, or amendment by the Trustees in their discretion at any time. Each beneficiary is officially notified of this governing provision at the time his Benefit is authorized").[1] Thus, although

[1] See also 1950 W&R Fund Annual Report for the Year Ending June 30, 1959, pp. 27–28, App. (CA1) 995–996; 1950 W&R Fund Annual Report for the Year Ending June 30, 1960 (1960 Annual Report), pp. 19–20, App. (CA1) 1028–1029; 1950 W&R Fund Annual Report for the Year Ending June 30, 1961 (1961 Annual Report), p. 5, App. (CA1) 1047; 1950 W&R Fund Annual Report for the Year Ending June 30, 1962, p. 5, App. (CA1)

persons involved in the coal industry may have made occasional statements intimating that the 1950 W&R Fund promised lifetime health benefits, see App. (CA1) 1899, 1971–1972, it is clear that the 1950 W&R Fund did not, by its terms, guarantee lifetime health benefits for retirees and their dependents. In fact, as to widows of miners, the 1950 W&R Fund expressly limited health benefits to the time period during which widows would also receive death benefits. See, *e. g.*, *Robinson*, *supra*, at 565–566; 1956 Annual Report 14, App. (CA1) 913.

Between 1950 and 1974, the trustees often exercised their prerogative to alter the level of benefits according to the Fund's budget. In 1960, for instance, "[t]he Trustees of the Fund, recognizing their legal and fiscal obligation to soundly administer the Trust Fund, took action prior to the close of the fiscal year, to curtail the excess of expenditures over income," by "limit[ing] or terminat[ing] eligibility for [certain] Trust Fund Benefits." 1960 Annual Report 2, App. (CA1) 1011. Similar concerns prompted the trustees to reduce monthly pension benefits by 25% at one point, and to limit the range of medical and pension benefits available to miners employed by operators who did not pay the required royalties. See 1961 Annual Report 2, 11–12, App. (CA1) 1044, 1053–1054; 1963 Annual Report 13, 16, App. (CA1) 1121, 1124.

Reductions in benefits were not always acceptable to the miners, and some wildcat strikes erupted in the 1960's. See Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report 22–23 (1990) (Coal Comm'n Report), App. (CA1)

1080; 1950 W&R Fund Annual Report for the Year Ending June 30, 1963 (1963 Annual Report), p. 5, App. (CA1) 1113; 1950 W&R Fund Annual Report for the Year Ending June 30, 1964, p. 8, App. (CA1) 1146; 1950 W&R Fund Annual Report for the Year Ending June 30, 1965, p. 18, App. (CA1) 1191; 1950 W&R Fund Annual Report for the Year Ending June 30, 1966 (1966 Annual Report), p. 19, App. (CA1) 1223.

1352–1353. Nonetheless, the 1950 W&R Fund continued to provide benefits on a "pay-as-you-go" basis, with the level of benefits fully subject to revision, until the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.*, introduced specific funding and vesting requirements for pension plans. To comply with ERISA, the UMWA and the BCOA entered into a new agreement, the 1974 NBCWA, which created four trusts, funded by royalties on coal production and premiums based on hours worked by miners, to replace the 1950 W&R Fund. See *Robinson*, *supra*, at 566. Two of the new trusts, the UMWA 1950 Benefit Plan and Trust (1950 Benefit Plan) and the UMWA 1974 Benefit Plan and Trust (1974 Benefit Plan), provided nonpension benefits, including medical benefits. Miners who retired before January 1, 1976, and their dependents were covered by the 1950 Benefit Plan, while active miners and those who retired after 1975 were covered by the 1974 Benefit Plan.

The 1974 NBCWA thus was the first agreement between the UMWA and the BCOA to expressly reference health benefits for retirees; prior agreements did not specifically mention retirees, and the scope of their benefits was left to the discretion of fund trustees. The 1974 NBCWA explained that it was amending previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage. 1974 NBCWA 99, 105 (Summary of Principal Provisions, UMWA Health and Retirement Benefits), App. (CA1) 755, 758. Despite the expanded benefits, the 1974 NBCWA did not alter the employers' obligation to contribute only a fixed amount of royalties, nor did it extend employers' liability beyond the life of the agreement. See *id.*, Art. XX, § (d), App. (CA1) 749.

As a result of the broadened coverage under the 1974 NBCWA, the number of eligible benefit recipients jumped dramatically. See 1977 Annual Report of the UMWA Wel-

fare and Retirement Funds 3, App. (CA1) 1253. A 1993 Report of the House Committee on Ways and Means explained:

> "The 1974 agreement was the first NBCWA to mention retiree health benefits. As part of a substantial liberalization of benefits and eligibility under both the pension and health plans, the 1974 contract provided lifetime health benefits for retirees, disabled mine workers, and spouses, and extended the benefits to surviving spouses . . . ." House Committee on Ways and Means, Financing UMWA Coal Miner "Orphan Retiree" Health Benefits, 103d Cong., 1st Sess., 4 (Comm. Print 1993) (House Report).

The increase in benefits, combined with various other circumstances—such as a decline in the amount of coal produced, the retirement of a generation of miners, and rapid escalation of health care costs—quickly resulted in financial problems for the 1950 and 1974 Benefit Plans. In response, the next NBCWA, executed in 1978, assigned responsibility to signatory employers for the health care of their own active and retired employees. See 1978 NBCWA, Art. XX, § (c)(3), App. (CA1) 778. The 1974 Benefit Plan remained in effect, but only to cover retirees whose former employers were no longer in business.

To ensure the Benefit Plans' solvency, the 1978 NBCWA included a "guarantee" clause obligating signatories to make sufficient contributions to maintain benefits during that agreement, and "evergreen" clauses were incorporated into the Benefit Plans so that signatories would be required to contribute as long as they remained in the coal business, regardless of whether they signed a subsequent agreement. See *id.*, § (h), App. (CA1) 787–788; House Report 5. As a result, the coal operators' liability to the Benefit Plans shifted from a defined contribution obligation, under which employers were responsible only for a predetermined

amount of royalties, to a form of defined benefit obligation, under which employers were to fund specific benefits.

Despite the 1978 changes, the Benefit Plans continued to suffer financially as costs increased and employers who had signed the 1978 NBCWA withdrew from the agreement, either to continue in business with nonunion employees or to exit the coal business altogether. As more and more coal operators abandoned the Benefit Plans, the remaining signatories were forced to absorb the increasing cost of covering retirees left behind by exiting employers. A spiral soon developed, with the rising cost of participation leading more employers to withdraw from the Benefit Plans, resulting in more onerous obligations for those that remained. In 1988, the UMWA and BCOA attempted to relieve the situation by imposing withdrawal liability on NBCWA signatories who seceded from the Benefit Plans. See 1988 NBCWA, Art. XX, §§(i) and (j), App. (CA1) 805, 828–829. Even so, by 1990, the 1950 and 1974 Benefit Plans had incurred a deficit of about $110 million, and obligations to beneficiaries were continuing to surpass revenues. See House Report 9; Coal Comm'n Report 43–44, App. (CA1) 1373–1374.

B

In response to unrest among miners, such as the lengthy strike that followed Pittston Coal Company's refusal to sign the 1988 NBCWA, Secretary of Labor Elizabeth Dole announced the creation of the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission or Commission). The Coal Commission was charged with "recommend[ing] a solution for ensuring that orphan retirees in the 1950 and 1974 Benefit Trusts will continue to receive promised medical care." Coal Comm'n Report 2, App. (CA1) 1333. The Commission explained that "[h]ealth care benefits are an emotional subject in the coal industry, not only because coal miners have been promised

and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits." Coal Comm'n Report, Executive Summary vii, App. (CA1) 1324. The Commission agreed that "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWA]," but disagreed about "whether the entire [coal] industry should contribute to the resolution of the problem of orphan retirees." *Id.*, at vii–viii, App. (CA1) 1324–1325. Therefore, the Commission proposed two alternative funding plans for Congress' consideration.

First, the Commission recommended that Congress establish a fund financed by an industrywide fee to provide health care to orphan retirees at the level of benefits they were entitled to receive at that fund's inception. To cover the cost of medical benefits for retirees from signatories to the 1978 or subsequent NBCWA's who remained in the coal business, the Commission proposed the creation of another fund financed by the retirees' most recent employers. *Id.*, at 61, App. (CA1) 1390. The Commission also recommended that Congress codify the "evergreen" obligation of the 1978 and subsequent NBCWA's. *Id.*, at 63, App. (CA1) 1392.

As an alternative to imposing industrywide liability, the Commission suggested that Congress spread the cost of retirees' health benefits across "a broadened base of current and past signatories to the contracts," apparently referring to the 1978 and subsequent NBCWA's. See *id.*, at 58, 65, App. (CA1) 1387, 1394. Not all Commission members agreed, however, that it would be fair to assign such a burden to signatories of the 1978 agreement. Four Commissioners explained that "[i]ssues of elemental fairness are involved" in imposing obligations on "respectable operators who made decisions in the past to move to different locales, invest in different technology, or pursue their business with or without respect to union presence." *Id.*, at 85, App. (CA1) 1414 (statement of Commissioners Michael J. Mahoney,

Carl J. Schramm, Arlene Holen, Richard M. Holsten); see also *id.*, at 81–82, App. (CA1) 1410–1411 (statement of Commissioner Richard M. Holsten).

After the Coal Commission issued its report, Congress considered several proposals to fund health benefits for UMWA retirees. At a 1991 hearing, a Senate subcommittee was advised that more than 120,000 retirees might not receive "the benefits they were promised." Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance, 102d Cong., 1st Sess., 45 (1991) (statement of BCOA Chairman Michael K. Reilly). The Coal Commission's Chairman submitted a statement urging that Congress' assistance was needed "to fulfill the promises that began in the collective bargaining process nearly 50 years ago . . . ." *Id.*, at 306 (prepared statement of W. J. Usery, Jr.). Some Senators expressed similar concerns that retired miners might not receive the benefits promised to them. See *id.*, at 16 (statement of Sen. Dave Durenberger) (describing issue as involving "a whole bunch of promises made to a whole lot of people back in the 1940s and 1950s when the cost consequences of those problems were totally unknown"); *id.*, at 59 (prepared statement of Sen. Orrin G. Hatch) (stating that "miners and their families . . . were led to believe by their own union leaders and the companies for which they worked that they were guaranteed lifetime [health] benefits").

In 1992, as part of a larger bill, both Houses passed legislation based on the Coal Commission's first proposal, which required signatories to the 1978 or any subsequent NBCWA to fund their own retirees' health care costs and provided for orphan retirees' benefits through a tax on future coal production. See H. R. Conf. Rep. No. 102–461, pp. 268–295 (1992). President Bush, however, vetoed the entire bill. See H. R. Doc. No. 102–206, p. 1 (1992).

Congress responded by passing the Coal Act, a modified version of the Coal Commission's alternative funding plan. In the Act, Congress purported "to identify persons most responsible for [1950 and 1974 Benefit Plan] liabilities in order to stabilize plan funding and allow for the provision of health care benefits to . . . retirees." § 19142(a)(2), 106 Stat. 3037, note following 26 U. S. C. § 9701; see also 138 Cong. Rec. 34001 (1992) (Conference Report on Coal Act) (explaining that, under the Coal Act, "those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements").

The Coal Act merged the 1950 and 1974 Benefit Plans into a new multiemployer plan called the United Mine Workers of America Combined Benefit Fund (Combined Fund). See 26 U. S. C. §§ 9702(a)(1), (2).[2] The Combined Fund provides "substantially the same" health benefits to retirees and their dependents that they were receiving under the 1950 and 1974 Benefit Plans. See §§ 9703(b)(1), (f). It is financed by annual premiums assessed against "signatory coal operators," *i. e.*, coal operators that signed any NBCWA or any other agreement requiring contributions to the 1950 or 1974 Benefit Plans. See §§ 9701(b)(1), (3); § 9701(c)(1). Any signatory operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be liable for those premiums. §§ 9706(a), 9701(c)(7). Where a signatory is no longer involved in any business activity, premiums may be levied against "related person[s]," including successors in interest and businesses or corporations under common control. §§ 9706(a), 9701(c)(2)(A).

The Commissioner of Social Security (Commissioner) calculates the premiums due from any signatory operator based

[2] The Coal Act also established another fund, the 1992 UMWA Benefit Plan, which is not at issue here. See 26 U. S. C. § 9712.

on the following formula, by which retirees are assigned to particular operators:

> "For purposes of this chapter, the Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> "(1) First, to the signatory operator which—
>
> "(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> "(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> "(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> "(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> "(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> "(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." § 9706(a).

It is the application of the third prong of the allocation formula, § 9706(a)(3), to Eastern that we review in this case.[3]

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[3] The Coal Act also provides for an allocation of liability for unassigned beneficiaries. See 26 U. S. C. § 9704(d). That liability, however, has thus far been covered through the transfer of funds from other sources. See § 9705; 30 U. S. C. § 1232(h). This case presents no question regarding the assignment to Eastern of liability for any retirees other than its own former employees.

II

A

Eastern was organized as a Massachusetts business trust in 1929, under the name Eastern Gas and Fuel Associates. Its current holdings include Boston Gas Company and a barge operator. Therefore, although Eastern is no longer involved in the coal industry, it is "in business" within the meaning of the Coal Act. Until 1965, Eastern conducted extensive coal mining operations centered in West Virginia and Pennsylvania. As a signatory to each NBCWA executed between 1947 and 1964, Eastern made contributions of over $60 million to the 1947 and 1950 W&R Funds. Brief for Petitioner 6.

In 1963, Eastern decided to transfer its coal-related operations to a subsidiary, Eastern Associated Coal Corp. (EACC). The transfer was completed by the end of 1965, and was described in Eastern's federal income tax return as an agreement by EACC to assume all of Eastern's liabilities arising out of coal mining and marketing operations in exchange for Eastern's receipt of EACC's stock. EACC made similar representations in Security and Exchange Commission filings, describing itself as the successor to Eastern's coal business. See App. (CA1) 117–118. At that time, the 1950 W&R Fund had a positive balance of over $145 million. 1966 Annual Report 3, App. (CA1) 1207.

Eastern retained its stock interest in EACC through a subsidiary corporation, Coal Properties Corp. (CPC), until 1987, and it received dividends of more than $100 million from EACC during that period. See Brief for Petitioner 6, n. 13. In 1987, Eastern sold its interest in CPC to respondent Peabody Holding Company, Inc. (Peabody). Under the terms of the agreement effecting the transfer, Peabody, CPC, and EACC assumed responsibility for payments to certain benefit plans, including the "Benefit Plan for UMWA Represented Employees of EACC and Subs." App. 206a, 210a.

As of June 30, 1987, the 1950 and 1974 Benefit Plans reported surplus assets, totaling over $33 million. House Report 9.

B

Following enactment of the Coal Act, the Commissioner assigned to Eastern the obligation for Combined Fund premiums respecting over 1,000 retired miners who had worked for the company before 1966, based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. See 26 U. S. C. § 9706(a). Eastern's premium for a 12-month period exceeded $5 million. See Brief for Petitioner 16.

Eastern responded by suing the Commissioner, as well as the Combined Fund and its trustees, in the United States District Court for the District of Massachusetts. Eastern asserted that the Coal Act, either on its face or as applied, violates substantive due process and constitutes a taking of its property in violation of the Fifth Amendment. Eastern also challenged the Commissioner's interpretation of the Coal Act. The District Court granted summary judgment for respondents on all claims, upholding both the Commissioner's interpretation of the Coal Act and the Act's constitutionality. *Eastern Enterprises* v. *Shalala*, 942 F. Supp. 684 (Mass. 1996).

The Court of Appeals for the First Circuit affirmed. *Eastern Enterprises* v. *Chater*, 110 F. 3d 150 (1997). The court rejected Eastern's challenge to the Commissioner's interpretation of the Coal Act. Addressing Eastern's substantive due process claim, the court described the Coal Act as "entitled to the most deferential level of judicial scrutiny," explaining that, "[w]here, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted in an arbitrary and irrational way." *Id.*, at 155–156 (internal quotation marks omitted). In the court's view, the retroactive liability imposed by the Act was permissible "[a]s long as the

retroactive application . . . is supported by a legitimate legislative purpose furthered by rational means," for "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.*, at 156 (internal quotation marks omitted). The court concluded that Congress' purpose in enacting the Coal Act was legitimate and that Eastern's obligations under the Act are rationally related to those objectives, because Eastern's execution of pre-1974 NBCWA's contributed to miners' expectations of lifetime health benefits. *Id.*, at 157. The court rejected Eastern's argument that costs of retiree health benefits should be borne by post-1974 coal operators, reasoning that Eastern's proposal would require coal operators to fund health benefits for miners whom the operators had never employed. *Id.*, at 158, n. 5. The court also noted the substantial dividends that Eastern had received from EACC. *Id.*, at 158.

The court analyzed Eastern's claim that the Coal Act effects an uncompensated taking under the three factors set out in *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986): "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action." 110 F. 3d, at 160. With respect to the Act's economic impact on Eastern, the court observed that the Act "does not involve the total deprivation of an asset." *Ibid.* The Act's terms, the court found, "reflec[t] a sufficient degree of proportionality" because Eastern is assigned liability only for miners "whom it employed for a relevant (and relatively long) period of time," and then only if no post-1977 NBCWA signatory (or related person) can be found. *Ibid.* The court also rejected Eastern's contention that the Act unreasonably interferes with its investment-backed expectations, explaining that the pattern of federal intervention in the coal industry and Eastern's role in fostering an expectation of

lifetime health benefits meant that Eastern "had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." *Id.*, at 161. Finally, in assessing the nature of the challenged governmental action, the court determined that the Coal Act does not result in the physical invasion or permanent appropriation of Eastern's property, but merely "adjusts the benefits and burdens of economic life to promote the common good." *Ibid.* (internal quotation marks omitted). The court also noted that the premiums are disbursed to the privately operated Combined Fund, not to a government entity. For those reasons, the court concluded, "there is no basis whatever for [Eastern's] claim that the [Coal Act] transgresses the Takings Clause." *Ibid.*

Other Courts of Appeals have also upheld the Coal Act against constitutional challenges.[4] In view of the importance of the issues raised in this case, we granted certiorari. 522 U. S. 931 (1997).

III

We begin with a threshold jurisdictional question, raised in the federal respondent's answer to Eastern's complaint: Whether petitioner's takings claim was properly filed in Federal District Court rather than the United States Court of Federal Claims. See App. (CA1) 40. Although the Commissioner no longer challenges the Court's adjudication of this action, see Brief for Federal Respondent 38–39, n. 30, it is appropriate that we clarify the basis of our jurisdiction over petitioner's claims.

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[4] See, *e. g.*, *Holland* v. *Keenan Trucking Co.*, 102 F. 3d 736, 739–742 (CA4 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F. 3d 688, 693–695 (CA3 1996); *In re Blue Diamond Coal Co.*, 79 F. 3d 516, 521–526 (CA6 1996), cert. denied, 519 U. S. 1055 (1997); *Davon, Inc.* v. *Shalala*, 75 F. 3d 1114, 1121–1130 (CA7), cert. denied, 519 U. S. 808 (1996); *In re Chateaugay Corp.*, 53 F. 3d 478, 486–496 (CA2), cert. denied *sub nom. LTV Steel Co.* v. *Shalala*, 516 U. S. 913 (1995).

Under the Tucker Act, 28 U. S. C. § 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Accordingly, a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute. See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016–1019 (1984).

In this case, however, Eastern does not seek compensation from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against the Commissioner's enforcement of the Act as to Eastern. Such equitable relief is arguably not within the jurisdiction of the Court of Federal Claims under the Tucker Act. See *United States* v. *Mitchell*, 463 U. S. 206, 216 (1983) (explaining that, in order for a claim to be "cognizable under the Tucker Act," it "must be one for money damages against the United States"); see also, *e. g.*, *Bowen* v. *Massachusetts*, 487 U. S. 879, 905 (1988).

Some Courts of Appeals have accepted the view that the Tucker Act does not apply to suits seeking only equitable relief, see *In re Chateaugay Corp.*, 53 F. 3d 478, 493 (CA2), cert. denied *sub nom. LTV Steel Co.* v. *Shalala*, 516 U. S. 913 (1995); *Southeast Kansas Community Action Program, Inc.* v. *Secretary of Agriculture*, 967 F. 2d 1452, 1455–1456 (CA10 1992), while others have concluded that a claim for equitable relief under the Takings Clause is hypothetical, and therefore not within the district courts' jurisdiction, until compensation has been sought and refused in the Court of Federal Claims, see *Bay View, Inc.* v. *Ahtna, Inc.*, 105 F. 3d 1281,

1286 (CA9 1997); *Rose Acre Farms, Inc.* v. *Madigan*, 956 F. 2d 670, 673–674 (CA7), cert. denied, 506 U. S. 820 (1992).

On the one hand, this Court's precedent can be read to support the latter conclusion that regardless of the nature of relief sought, the availability of a Tucker Act remedy renders premature any takings claim in federal district court. See *Preseault* v. *ICC*, 494 U. S. 1, 11 (1990); see also *Monsanto*, *supra*, at 1016. On the other hand, in a case such as this one, it cannot be said that monetary relief against the Government is an available remedy. See Brief for Federal Respondent 38–39, n. 30. The payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund. Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for "[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *In re Chateaugay Corp.*, 53 F. 3d, at 493. Accordingly, the "presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds" mandated by the Government. *Ibid.* In that situation, a claim for compensation "would entail an utterly pointless set of activities." *Student Loan Marketing Assn.* v. *Riley*, 104 F. 3d 397, 401 (CADC), cert. denied, 522 U. S. 913 (1997). Instead, as we explained in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 71, n. 15 (1978), the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained."

Moreover, in situations analogous to this case, we have assumed the lack of a compensatory remedy and have granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act. See, *e. g.*, *Babbitt* v. *Youpee*, 519 U. S. 234, 243–245 (1997); *Hodel* v. *Ir-*

ving, 481 U. S. 704, 716–718 (1987). Without addressing the basis of this Court's jurisdiction, we have also upheld similar statutory schemes against Takings Clause challenges. See *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 641–647 (1993); *Connolly*, 475 U. S., at 221–228. "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper" in previous cases. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962) (citations omitted). Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

IV

A

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." The aim of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

This case does not present the "classi[c] taking" in which the government directly appropriates private property for its own use. See *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982). Although takings problems are more commonly presented when "the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (citation omitted),

economic regulation such as the Coal Act may nonetheless effect a taking, see *Security Industrial Bank*, *supra*, at 78. See also *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.) ("It is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes *property* from A. and gives it to B"). By operation of the Act, Eastern is "permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to [the Combined Fund]," *Connolly*, *supra*, at 222, and "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922).

Of course, a party challenging governmental action as an unconstitutional taking bears a substantial burden. See *United States* v. *Sperry Corp.*, 493 U. S. 52, 60 (1989). Government regulation often "curtails some potential for the use or economic exploitation of private property," *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979), and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong*, *supra*, at 48. In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. See *Andrus*, 444 U. S., at 65. That inquiry, by its nature, does not lend itself to any set formula, see *ibid.*, and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive, *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) (internal quotation marks omitted). We have identified several factors, however, that have particular significance: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and

the character of the governmental action." *Ibid.;* see also *Connolly, supra,* at 224–225.

B

Our analysis in this case is informed by previous decisions considering the constitutionality of somewhat similar legislative schemes. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976), we had occasion to review provisions of the Black Lung Benefits Act of 1972, 30 U. S. C. § 901 *et seq.*, which required coal operators to compensate certain miners and their survivors for death or disability due to black lung disease caused by employment in coal mines. Coal operators challenged the provisions of the Act relating to miners who were no longer employed in the industry, arguing that those provisions violated substantive due process by imposing "an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." 428 U. S., at 15.

In rejecting the operators' challenge, we explained that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Ibid.* We observed that stricter limits may apply to Congress' authority when legislation operates in a retroactive manner, *id.*, at 16–17, but concluded that the assignment of liability for black lung benefits was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor," *id.*, at 18.

Several years later, we confronted a due process challenge to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 94 Stat. 1208. See *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). The MPPAA was enacted to supplement ERISA, 29 U. S. C. § 1001 *et seq.*, which established the Pension Benefit Guar-

anty Corporation (PBGC) to administer an insurance program for vested pension benefits. For a temporary period, the PBGC had discretionary authority to pay benefits upon the termination of multiemployer pension plans, after which insurance coverage would become mandatory. If the PBGC exercised that authority, employers who had contributed to the plan during the five years before its termination faced liability for an amount proportional to their share of contributions to the plan during that period. See 467 U. S., at 720–721.

Despite Congress' effort to insure multiemployer plan benefits through ERISA, many multiemployer plans were in a precarious financial position as the date for mandatory coverage approached. After a series of hearings and debates, Congress passed the MPPAA, which imposed a payment obligation upon any employer withdrawing from a multiemployer pension plan, the amount of which depended on the employer's share of the plan's unfunded vested benefits. The MPPAA applied retroactively to withdrawals within the five months preceding the statute's enactment. *Id.*, at 721–725.

In *Gray,* an employer that had participated in a multiemployer pension plan brought a due process challenge to the statutory liability stemming from its withdrawal from the plan four months before the MPPAA was enacted. Relying on our decision in *Turner Elkhorn,* we rejected the employer's claim. It was rational, we determined, for Congress to impose retroactive liability "to prevent employers from taking advantage of a lengthy legislative process [by] withdrawing while Congress debated necessary revisions in the statute." 467 U. S., at 731. In addition, we explained, "as the [MPPAA] progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period that Congress believed would be necessary to accomplish its purposes." *Ibid.* Accordingly, we concluded that the MPPAA exem-

plified the "customary congressional practice" of enacting "retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation." *Ibid.* (internal quotation marks omitted).

This Court again considered the constitutionality of the MPPAA in *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986), which presented the question whether the MPPAA's withdrawal liability provisions effected an unconstitutional taking. The action was brought by trustees of a multiemployer pension plan that, under collective bargaining agreements, received contributions from employers on the basis of the hours worked by their employees. We agreed that the liability imposed by the MPPAA constituted a permanent deprivation of assets, but we rejected the notion that "such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment." *Id.*, at 222. "In the course of regulating commercial and other human affairs," we explained, "Congress routinely creates burdens for some that directly benefit others." *Id.*, at 223. Consistent with our decisions in *Gray* and *Turner Elkhorn*, we reasoned that legislation is not unlawful solely because it upsets otherwise settled expectations.

Moreover, given our holding in *Gray* that the MPPAA did not violate due process, we concluded that "it would be surprising indeed to discover" that the statute effected a taking. 475 U. S., at 223. Although the employers in *Connolly* had contractual agreements expressly limiting their contributions to the multiemployer plan, we observed that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress" and "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Id.*, at 223–224 (internal quotation marks omitted). Focusing on the three factors of "particular significance"—the economic impact of the regulation, the extent to which the regulation

interferes with investment-backed expectations, and the character of the governmental action—we determined that the MPPAA did not violate the Takings Clause. *Id.*, at 225.

The governmental action at issue in *Connolly* was not a physical invasion of employers' assets; rather, it "safeguard[ed] the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." *Ibid.* In addition, although the amounts assessed under the MPPAA were substantial, we found it important that "[t]he assessment of withdrawal liability [was] not made in a vacuum, . . . but directly depend[ed] on the relationship between the employer and the plan to which it had made contributions." *Ibid.* Further, "a significant number of provisions in the Act . . . moderate[d] and mitigate[d] the economic impact of an individual employer's liability." *Id.*, at 225–226. Accordingly, we found "nothing to show that the withdrawal liability actually imposed on an employer w[ould] always be out of proportion to its experience with the plan." *Id.*, at 226. Nor did the MPPAA interfere with employers' reasonable investment-backed expectations, for, by the time of the MPPAA's enactment, "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations." *Id.*, at 227. For those reasons, we determined that "fairness and justice" did not require anyone other than the withdrawing employers and the remaining parties to the pension agreements to bear the burden of funding employees' vested benefits. *Ibid.*

We once more faced challenges to the MPPAA under the Due Process and Takings Clauses in *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602 (1993). In that case, the employer focused on the fact that its contractual commitment to the multiemployer plan did not impose withdrawal liabil-

ity. We first rejected the employer's substantive due process challenge based on our decisions in *Gray* and *Turner Elkhorn*, notwithstanding the employer's argument that the MPPAA imposed upon it a higher liability than its contract contemplated. 508 U. S., at 636–641. The claim under the Takings Clause, meanwhile, was resolved by *Connolly*. We explained that, as in that case, the Government had not occupied or destroyed the employer's property. 508 U. S., at 643–644. As to the severity of the MPPAA's impact, we concluded that the employer had not shown that its withdrawal liability was "'out of proportion to its experience with the plan'" *Id.*, at 645 (quoting *Connolly*, *supra*, at 226). Turning to the employer's reasonable investment-backed expectations, we repeated our observation in *Connolly* that "pension plans had long been subject to federal regulation." 508 U. S., at 645. Moreover, although the employer's liability under the MPPAA exceeded ERISA's original cap on withdrawal liability, we found that there was "no reasonable basis to expect that [ERISA's] legislative ceiling would never be lifted." *Id.*, at 646. In sum, as in *Connolly*, the employer "voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA," making the burden the MPPAA imposed upon it neither unfair nor unjust. 508 U. S., at 646–647 (internal quotation marks omitted).

Our opinions in *Turner Elkhorn*, *Connolly*, and *Concrete Pipe* make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." *Gray*, 467 U. S., at 731 (internal quotation marks omitted). Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties

that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

C

We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case. We reach that conclusion by applying the three factors that traditionally have informed our regulatory takings analysis. Although Justice Kennedy and Justice Breyer would pursue a different course in evaluating the constitutionality of the Coal Act, they acknowledge that this Court's opinions in *Connolly* and *Concrete Pipe* indicate that the regulatory takings framework is germane to legislation of this sort. See *post*, at 545–546 (Kennedy, J., concurring in judgment and dissenting in part); *post*, at 555–556 (Breyer, J., dissenting).

As to the first factor relevant in assessing whether a regulatory taking has occurred, economic impact, there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern. The parties estimate that Eastern's cumulative payments under the Act will be on the order of $50 to $100 million. See Brief for Petitioner 2 ($100 million); Brief for Respondents UMWA Combined Benefit Fund et al. 46 ($51 million). Eastern's liability is thus substantial, and the company is clearly deprived of the amounts it must pay the Combined Fund. See *Connolly*, 475 U. S., at 222. The fact that the Federal Government has not specified the assets that Eastern must use to satisfy its obligation does not negate that impact. It is clear that the Act requires Eastern to turn over a dollar amount established by the Commissioner under a timetable set by the Act, with the threat of severe penalty if Eastern fails to comply. See 26 U. S. C. §§ 9704(a) and (b) (directing liable operators to pay annual premiums as computed by the Commissioner); § 9707 (imposing, with limited exceptions, a penalty of $100 per day per eligible beneficiary if payment is not made in accordance with § 9704).

That liability is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 441 (1982). But our decisions upholding the MPPAA suggest that an employer's statutory liability for multiemployer plan benefits should reflect some "proportion[ality] to its experience with the plan." *Concrete Pipe*, 508 U. S., at 645 (internal quotation marks omitted); see also *Connolly*, *supra*, at 225 (noting that employer's liability under the MPPAA "directly depend[ed] on the relationship between the employer and the plan to which it had made contributions"). In *Concrete Pipe* and *Connolly*, the employers had "voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA," *Concrete Pipe*, *supra*, at 646 (internal quotation marks omitted); *Connolly*, *supra*, at 227, and consequently, the statutory liability was linked to the employers' conduct.

Here, however, while Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members. Although EACC continued mining coal until 1987 as a subsidiary of Eastern, Eastern's liability under the Act bears no relationship to its ownership of EACC; the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed. See 26 U. S. C. § 9706(a). Thus, the Act does not purport, as JUSTICE BREYER suggests, *post*, at 566, to assign liability to Eastern based on the "'last man out' problem" that developed after benefits were significantly expanded in 1974. During the years in which

Eastern employed miners, retirement and health benefits were far less extensive than under the 1974 NBCWA, were unvested, and were fully subject to alteration or termination. Before 1974, as Justice Breyer notes, Eastern could not have contemplated liability for the provision of lifetime benefits to the widows of deceased miners, see *post*, at 562–563, a beneficiary class that is likely to be substantial. See General Accounting Office, Human Resources Division Report, Retired Coal Miners' Health Benefits 7 (July 1992) (reporting to Congress that widows composed 45% of beneficiaries in Jan. 1992); see also Brief for Petitioner 45, n. 54 (citing affidavit that 75% of the beneficiaries assigned to Eastern are spouses or dependent children of miners). Although Eastern at one time employed the Combined Fund beneficiaries that it has been assigned under the Coal Act, the correlation between Eastern and its liability to the Combined Fund is tenuous, and the amount assessed against Eastern resembles a calculation "made in a vacuum." See *Connolly*, *supra*, at 225. The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted.

It is true that Eastern may be able to seek indemnification from EACC or Peabody. But although the Act preserves Eastern's right to pursue indemnification, see 26 U. S. C. § 9706(f)(6), it does not confer any right of reimbursement. See also Conference Report on Coal Act, 138 Cong. Rec., at 34004 (explaining that the Coal Act allows parties to "enter into private litigation to enforce . . . contracts for indemnification," but "does not create new private rights of action"). Moreover, the possibility of indemnification does not alter the fact that Eastern has been assessed over $5 million in Combined Fund premiums and that its liability under the Coal Act will continue for many years. To the extent that Eastern may have entered into contractual arrangements to

insure itself against liabilities arising out of its former coal operations, that indemnity is neither enhanced nor supplanted by the Coal Act and does not affect the availability of the declaratory relief Eastern seeks.

We are also not persuaded by respondents' argument that the Coal Act "moderate[s] and mitigate[s] the economic impact" upon Eastern. See *Connolly*, 475 U. S., at 225–226. Although Eastern is not assigned the premiums for former employees who later worked for companies that signed the 1978 NBCWA, see 26 U. S. C. §§ 9706(a)(1), (2), Eastern had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965. By contrast, the provisions of the MPPAA that we identified as potentially moderating the employer's liability in *Connolly* were generally within the employer's control. See 475 U. S., at 226, n. 8. The mere fact that Eastern is not forced to bear the burden of lifetime benefits respecting *all* of its former employees does not mean that the company's liability for some of those employees is not a significant economic burden.

For similar reasons, the Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only the payment of future health benefits, it nonetheless "attaches new legal consequences to [an employment relationship] completed before its enactment." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 270 (1994).

Retroactivity is generally disfavored in the law, *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988), in accordance with "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 855 (1990) (SCALIA, J., concurring). See also, *e. g.*, *Dash* v. *Van Kleeck*, 7 Johns. *477, *503 (NY 1811) ("It is a principle in the *Eng-*

lish common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect"); H. Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law"). In his Commentaries on the Constitution, Justice Story reasoned: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891). A similar principle abounds in the laws of other nations. See, *e. g., Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, 66 D. L. R. 3d 449, 462 (Can. 1975) (discussing rule that statutes should not be construed in a manner that would impair existing property rights); The French Civil Code, Preliminary Title, Art. 2, p. 2 ("Legislation only provides for the future; it has no retroactive effect") (J. Crabb transl., rev. ed. 1995); Aarnio, Statutory Interpretation in Finland 151, in Interpreting Statutes: A Comparative Study (D. MacCormick & R. Summers eds. 1991) (discussing prohibition against retroactive legislation). "Retroactive legislation," we have explained, "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp.* v. *Romein*, 503 U. S. 181, 191 (1992).

Our Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses. *Landgraf*, *supra*, at 266. In *Calder* v. *Bull*, 3 Dall. 386 (1798), this Court held that the *Ex Post Facto* Clause is directed at the retroactivity of penal legislation, while suggesting that the Takings Clause provides

a similar safeguard against retrospective legislation concerning property rights. See *id.*, at 394 (opinion of Chase, J.) ("The restraint against making any *ex post facto laws* was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property;* or the provision, 'that *private* property should not be taken for public use, without just compensation,' was unnecessary"). In *Security Industrial Bank*, we considered a Takings Clause challenge to a Bankruptcy Code provision permitting debtors to avoid certain liens, possibly including those predating the statute's enactment. We expressed "substantial doubt whether the retroactive destruction of the appellees' liens . . . comport[ed] with the Fifth Amendment," and therefore construed the statute as applying only to lien interests vesting after the legislation took effect. 459 U. S., at 78–79. Similar concerns led this Court to strike down a bankruptcy provision as an unconstitutional taking where it affected substantive rights acquired before the provision was adopted. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 601–602 (1935).

Like those provisions, the Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W&R Fund to have been settled. And the extent of Eastern's retroactive liability is substantial and particularly far reaching. Even in areas in which retroactivity is generally tolerated, such as tax legislation, some limits have been suggested. See, *e. g., United States* v. *Darusmont*, 449 U. S. 292, 296–297 (1981) *(per curiam)* (noting Congress' practice of confining retroactive application of tax provisions to "short and limited periods"). The distance into the past that the Act reaches back to impose a liability on Eastern and the magnitude of that liability raise substantial questions of fairness. See *Connolly*, *supra*, at 229 (O'CONNOR, J., concurring) (questioning constitutionality of imposing liability on "employers for unfunded benefits that accrued in the past under a pension plan

whether or not the employers had agreed to ensure that benefits would be fully funded"); see also *Landgraf,* 511 U. S., at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

Respondents and their *amici curiae* assert that the extent of retroactive liability is justified because there was an implicit, industrywide agreement during the time that Eastern was involved in the coal industry to fund lifetime health benefits for qualifying miners and their dependents. That contention, however, is not supported by the pre-1974 NBCWA's. No contrary conclusion can be drawn from the few isolated statements of individuals involved in the coal industry, see, *e. g.,* Brief for Respondents Peabody Holding Company, Inc., et al. 8–10, or from statements of Members of Congress while considering legislative responses to the issue of funding retiree benefits. Moreover, even though retirees received medical benefits before 1974, and perhaps developed a corresponding expectation that those benefits would continue, the Coal Act imposes liability respecting a much broader range of beneficiaries. In any event, the question is not whether miners had an expectation of lifetime benefits, but whether Eastern should bear the cost of those benefits as to miners it employed before 1966.

Eastern only participated in the 1947 and 1950 W&R Funds, which operated on a pay-as-you-go basis, and under which the degree of benefits and the classes of beneficiaries were subject to the trustees' discretion. Not until 1974, when ERISA forced revisions to the 1950 W&R Fund, could lifetime medical benefits under the multiemployer agreement have been viewed as promised. Eastern was no longer in the industry when the evergreen and guarantee clauses of the 1978 and subsequent NBCWA's shifted the 1950 and 1974 Benefit Plans from a defined contribution framework to a guarantee of defined benefits, at least for the life of the

agreements. See *Connolly*, 475 U. S., at 230–231 (O'CONNOR, J., concurring) (imposition of liability "without regard to the extent of a particular employer's actual responsibility for [a benefit] plan's promise of fixed benefits to employees" could raise serious concerns under the Takings Clause). Thus, unlike the pension withdrawal liability upheld in *Concrete Pipe* and *Connolly*, the Coal Act's scheme for allocation of Combined Fund premiums is not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company. Nor would the pattern of the Federal Government's involvement in the coal industry have given Eastern "sufficient notice" that lifetime health benefits might be guaranteed to retirees several decades later. See *Connolly*, *supra*, at 227.

Eastern's liability also differs from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed "liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Turner Elkhorn*, 428 U. S., at 18. Likewise, Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment, see *id.*, at 16, but there is no such connection here. There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's. Nor do we, as JUSTICE STEVENS suggests, *post*, at 553, question Congress' policy decision that the miners are entitled to relief. But the Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern.

Finally, the nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.

D

Eastern also claims that the manner in which the Coal Act imposes liability upon it violates substantive due process. To succeed, Eastern would be required to establish that its liability under the Act is "arbitrary and irrational." *Turner Elkhorn*, *supra*, at 15. Our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent, see *Connolly*, *supra*, at 223, and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact. At the same time, this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731 (1963) (noting "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believ[e] to be economically unwise" (footnote omitted)); see also *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business

and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"). Because we have determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim. Nor do we consider the first two tiers of the Act's allocation scheme, 26 U. S. C. §§ 9706(a)(1) and (2), as the liability that has been imposed on Eastern arises only under the third tier. Cf. *Printz* v. *United States,* 521 U. S. 898, 934–935 (1997).

V

In enacting the Coal Act, Congress was responding to a serious problem with the funding of health benefits for retired coal miners. While we do not question Congress' power to address that problem, the solution it crafted improperly places a severe, disproportionate, and extremely retroactive burden on Eastern. Accordingly, we conclude that the Coal Act's allocation of liability to Eastern violates the Takings Clause, and that 26 U. S. C. § 9706(a)(3) should be enjoined as applied to Eastern. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE THOMAS, concurring.

JUSTICE O'CONNOR's opinion correctly concludes that the Coal Act's imposition of retroactive liability on petitioner violates the Takings Clause. I write separately to emphasize that the *Ex Post Facto* Clause of the Constitution, Art. I, § 9, cl. 3, even more clearly reflects the principle that "[r]etrospective laws are, indeed, generally unjust." 2 J. Story, Commentaries on the Constitution § 1398, p. 272 (5th ed. 1891). Since *Calder* v. *Bull,* 3 Dall. 386 (1798), however, this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context. I have never been convinced of the soundness of this limitation, which in *Calder* was

principally justified because a contrary interpretation would render the Takings Clause unnecessary. See *id.*, at 394 (opinion of Chase, J.). In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause. Today's case, however, does present an unconstitutional taking, and I join JUSTICE O'CONNOR's well-reasoned opinion in full.

JUSTICE KENNEDY, concurring in the judgment and dissenting in part.

The plurality's careful assessment of the history and purpose of the statute in question demonstrates the necessity to hold it arbitrary and beyond the legitimate authority of the Government to enact. In my view, which is in full accord with many of the plurality's conclusions, the relevant portions of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U. S. C. § 9701 *et seq.* (1994 ed. and Supp. II), must be invalidated as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment. I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect and quite unnecessary for decision of the case. I must record my respectful dissent on this issue.

I

The final Clause of the Fifth Amendment states:

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

The provision is known as the Takings Clause. The concept of a taking under the Clause has become a term of art, and my discussion begins here.

Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e. g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e. g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.

As the role of Government expanded, our experience taught that a strict line between a taking and a regulation is difficult to discern or to maintain. This led the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), to try to span the two concepts when specific property was subjected to what the owner alleged to be excessive regulation. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, at 415. The quoted sentence is, of course, the genesis of the so-called regulatory takings doctrine. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession' " (citations omitted)). Without denigrating the importance the

regulatory takings concept has assumed in our law, it is fair to say it has proved difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) (the regulatory taking question requires an "essentially ad hoc, factual inquir[y]").

Until today, however, one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake. After the decision in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, we confronted cases where specific and identified properties or property rights were alleged to come within the regulatory takings prohibition: air rights for high-rise buildings, *Penn Central*, *supra;* zoning on parcels of real property, *e. g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340 (1986); *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); trade secrets, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984); right of access to property, *e. g.*, *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Kaiser Aetna*, *supra;* right to affix on structures, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); right to transfer property by devise or intestacy, *e. g.*, *Hodel* v. *Irving*, 481 U. S. 704 (1987); creation of an easement, *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987); right to build or improve, *Lucas*, *supra;* liens on real property, *Armstrong* v. *United States*, 364 U. S. 40 (1960); right to mine coal, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987); right to sell personal property, *Andrus* v. *Allard*, 444 U. S. 51 (1979); and the right to extract mineral deposits, *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *United States*

v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958). The regulations in the cited cases were challenged as being so excessive as to destroy, or take, a specific property interest. The plurality's opinion disregards this requirement and, by removing this constant characteristic from takings analysis, would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause.

The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity. The existence of at least this outer boundary for application of the regulatory takings rule provides some necessary predictability for governmental entities. Our definition of a taking, after all, is binding on all of the States as well as the Federal Government. The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts. The existing category of cases involving specific property interests ought not to be obliterated by extending regulatory takings analysis to the amorphous class of cases embraced by the plurality's opinion today.

True, the burden imposed by the Coal Act may be just as great if the Government had appropriated one of Eastern's plants, but the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking, even as that concept has been expanded by the regulatory takings principle. In the terminology of our regulatory takings analysis, the character of the governmental action renders the Coal Act not a taking of property. While the usual taking occurs when the government physically acquires property for itself, *e. g.*, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897), our regulatory takings analysis recognizes a taking may occur when property is not appropriated by the government

or is transferred to other private parties. See, *e. g.*, *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982) ("[O]ur cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself"); *Loretto*, *supra* (transfer of physical space from landlords to cable companies).

As the range of governmental conduct subjected to takings analysis has expanded, however, we have been careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation, with the attendant potential for money damages. We have asked how the challenged governmental action is implemented with particular emphasis on the extent to which a specific property right is affected. See *id.*, at 432 (physical invasion "is a government action of such a unique character that it is a taking without regard to other factors"); *Hodel*, *supra*, at 715–716 (declaring a law, which otherwise would not be a taking because of its insignificant economic impact, a taking because the character of the governmental action destroyed the right to pass property to one's heirs, a right which "has been part of the Anglo-American legal system since feudal times"); *Penn Central*, *supra*, at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (citation omitted)). The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms. The liability imposed on Eastern no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect.

The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking.

While there are instances where the Government's self-enrichment may make it all the more evident a taking has occurred, *e. g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980); *United States* v. *Causby*, 328 U. S. 256 (1946), the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another. Cf. *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984). At the same time, the Government's imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause. For example, in *United States* v. *Security Industrial Bank*, we confronted a statute which was alleged to destroy an existing creditor's lien in certain chattels to the benefit of the debtor. We acknowledged that, given the nature of the property interest at stake, which resembled a contractual obligation, the takings challenge "fits but awkwardly into the analytic framework" of our regulatory takings analysis. 459 U. S., at 75. We decided the analysis could apply because the property interest was a "traditional property interes[t]," though in the end the statute was found inapplicable to the lien at issue. In so holding, we relied on *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935), which invalidated the Frazier-Lemke Farm-Mortgage Act, because it interfered with mortgages on farms and thus worked a "'taking of substantive rights in specific property acquired by the Bank prior to'" the Act. 459 U. S., at 77 (quoting *Radford*, *supra*, at 590, 601). Unlike the statutes at issue in *Security Industrial Bank* and *Radford*, the Coal Act does not affect an obligation relating to a specific property interest.

If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events. See, *e. g.*, *ante*, at 537 ("[T]he governmental action implicates fundamental princi-

ples of fairness"). The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S., at 260 (zoning constitutes a taking if it does not "substantially advance legitimate state interests"). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional:

> "As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314–315 (1987) (emphasis and citations omitted).

Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, see *ante*, at 521 ("[I]n a case such as this one, it cannot be said that monetary relief against the Government is an available remedy"), the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.

It should be acknowledged that there are passages in some of our cases on the imposition of retroactive liability for an employer's withdrawal from a pension plan which might give some support to the plurality's discussion of the Takings Clause. See *Connolly* v. *Pension Benefit Guaranty Corpo-*

ration, 475 U. S. 211, 223 (1986); *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 641 (1993). In *Connolly*, the Court said the definition of a taking was not controlled by "any set formula," but was dependent "on ad hoc, factual inquiries into the circumstances of each particular case." 475 U. S., at 224. The Court then applied the three-factor regulatory takings analysis set forth in *Penn Central*, which examines the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 475 U. S., at 225. This analysis did not result in a finding of a taking. The Court, moreover, prefaced the entire takings discussion with the admonition it would be surprising to discover that there had been a taking in the instance where a due process attack had been rejected. See *id.*, at 223; see also *Concrete Pipe*, *supra*, at 641 ("Given that [the] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause") (quoting *Connolly*, *supra*, at 223). At best, *Connolly* is equivocal on the question whether we should apply the regulatory takings analysis to instances like the one now before us. My reading of *Connolly*, and *Concrete Pipe*, is that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible. See *Connolly*, *supra*, at 224 ("[H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose"); see also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 94, n. 39 (1978) (upholding on due process grounds the Price-Anderson Act, 42 U. S. C. § 2210 (1970 ed., Supp. V), which placed a cap on civil liability for nuclear accidents, but declining to address petitioner's request that the Act be declared a taking because compensation would be available under the Tucker Act, 28 U. S. C. § 1491(a)(1) (1976

ed.)). These authorities confirm my view that the case is controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws.

Given my view that the takings analysis is inapplicable in this case, it is unnecessary to comment upon the plurality's effort to resolve a jurisdictional question despite little briefing by the parties on a point which has divided the Courts of Appeals.

II

When the constitutionality of the Coal Act is tested under the Due Process Clause, it must be invalidated. Accepted principles forbidding retroactive legislation of this type are sufficient to dispose of the case.

Although we have been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects. As today's plurality opinion notes, for centuries our law has harbored a singular distrust of retroactive statutes. *Ante*, at 532–533. In the words of Chancellor Kent: "A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law . . . ; and in every other case relating to contracts or property, it would be against every sound principle." 1 J. Kent, Commentaries on American Law *455; see also *ibid.* (rule against retroactive application of statutes to be "founded not only in English law, but on the principles of general jurisprudence"). Justice Story reached a similar conclusion: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891).

The Court's due process jurisprudence reflects this distrust. For example, in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976), the Court held due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way. Even though prospective economic legislation carries with it

the presumption of constitutionality, "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.*, at 16–17. We have repeated this formulation in numerous recent decisions and given serious consideration to retroactivity-based due process challenges, all without questioning the validity of the underlying due process principle. *United States* v. *Carlton*, 512 U. S. 26, 31 (1994); *Concrete Pipe*, *supra*, at 636–641; *General Motors Corp.* v. *Romein*, 503 U. S. 181, 191 (1992); *United States* v. *Sperry Corp.*, 493 U. S. 52, 64 (1989); *United States* v. *Hemme*, 476 U. S. 558, 567–572 (1986); *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 729–730 (1984). These decisions treat due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation. Indeed, it is no accident that the primary retroactivity precedents upon which today's plurality opinion relies in its takings analysis were grounded in due process. *Ante*, at 524–528 (citing *Turner Elkhorn*, *R. A. Gray*, and *Concrete Pipe*).

These cases reflect our recognition that retroactive lawmaking is a particular concern for the courts because of the legislative "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 266 (1994); see also Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (a retroactive law "may be passed with an exact knowledge of who will benefit from it"). If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership.

As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process. The plurality opinion demonstrates in convincing fashion that the remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute. *Ante*, at 529–537. In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute. *United States* v. *Carlton*, *supra*, at 32; *United States* v. *Darusmont*, 449 U. S. 292, 296–297 (1981) *(per curiam);* see also *Dunbar* v. *Boston & P. R. Corp.*, 181 Mass. 383, 386, 63 N. E. 916, 917 (1902) (Holmes, C. J.). As the plurality explains today, in creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope. *Ante*, at 532.

While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an "actual, measurable cost of [the employer's] business" which the employer had been able to avoid in the past. *Turner Elkhorn*, *supra*, at 19; accord, *Concrete Pipe*, 508 U. S., at 638; *Romein*, *supra*, at 191–192; *R. A. Gray*, *supra*, at 733–734. As Chancellor Kent noted: "Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights." 1 Kent, Commentaries on American Law, at *455–*456. The Coal Act, however, does not serve

this purpose. Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy. As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the National Bituminous Coal Wage Agreement. *Ante*, at 535–536. This case is far outside the bounds of retroactivity permissible under our law.

Finding a due process violation in this case is consistent with the principle that "under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe*, *supra*, at 639 (citing *Turner Elkhorn*, 428 U. S., at 19). Statutes may be invalidated on due process grounds only under the most egregious of circumstances. This case represents one of the rare instances in which even such a permissive standard has been violated.

Application of the Coal Act to Eastern would violate the proper bounds of settled due process principles, and I concur in the plurality's conclusion that the judgment of the Court of Appeals must be reversed.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Some appellate judges are better historians than others. With respect to the central issue resolved by the Coal Act of 1992, I am persuaded that the consensus among the Circuit Judges who have appraised the issue is more accurate than the views of this Court's majority.[1] The uneasy truce

[1] See *ante*, at 535–536 (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and SCALIA and THOMAS, JJ.); *ante*, at 539, 549 and this page (KENNEDY, J., concurring in judgment and dissenting in part).

between the coal operators and the miners that enabled coal production to continue during the 1950's and 1960's depended more on the value of a handshake than the fine print in written documents. During that period there was an implicit understanding on both sides of the bargaining table that the operators would provide the miners with lifetime health benefits. It was this understanding that kept the mines in operation and enabled Eastern to earn handsome profits before it transferred its coal business to a wholly owned subsidiary in 1965.

My understanding of this critical fact is shared by the judges of the Seventh Circuit,[2] the Sixth Circuit,[3] and the

[2] "[E]very [National Bituminous Coal Wage Agreement (NBCWA)] signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits. Imposing liability on companies that have profited from the retirees' labor was found rational in [*Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 18 (1976)] . . . . Every signatory company, including plaintiffs, participated in the creation and development of a multi-employer health benefit program that provided lifetime health benefits for retirees for almost fifty years. Congress could rationally have concluded that such participation led to a legitimate expectation of lifetime health benefits that should be honored under the Coal Act. Again, in this light, it would have been arbitrary to draw the line anywhere other than at all NBCWA signatories. Plaintiffs respond that it was not until the 1974 NBCWA and the 'guarantee' and 'evergreen' clauses of the 1978 NBCWA that miners were promised lifetime health benefits—promises that plaintiffs never made. Therefore, they argue, it was irrational for Congress to require contributions from pre-1974 signatories. But the fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits. The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s, even though it is not explicit in any NBCWA until 1974." *Davon, Inc.* v. *Shalala*, 75 F. 3d 1114, 1124–1125 (1996) (footnote omitted).

[3] "Blue Diamond further argues that it was irrational for Congress to impose Coal Act liability upon Blue Diamond because Blue Diamond did not promise its employees that they would receive lifetime health benefits. It is undisputed that the NBCWAs did not contain an explicit promise of lifetime benefits until the 1974 NBCWA agreement. However, several federal courts have found that [United Mine Workers of America (UMWA)] members had a legitimate expectation of lifetime benefits be-

First Circuit.[4] It is the same understanding that motivated the members of the Coal Commission to conclude that the operators who had employed the "orphaned miners" should share responsibility for their health benefits.[5] And it is

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fore the 1974 NBCWA, based on the various funds' more than 30-year history of continuous payment of benefits and the statements of coal industry officials. *Davon*, 75 F. 3d at 1124–25 ('Congress could rationally have concluded that such participation [in the NBCWA benefit funds] led to a legitimate expectation of lifetime benefits.'). *See also Templeton Coal* [*Co., Inc.* v. *Shalala*, 882 F. Supp. 799, 825 (SD Ind. 1995)] (describing basis for lifetime benefits expectation). Congress certainly had a rational basis for concluding that all NBCWA signatories and 'me-too' operators who agreed to be bound by the NBCWAs, including Blue Diamond, contributed toward the legitimate expectations of the UMWA members." *In re Blue Diamond Coal Co.*, 79 F. 3d 516, 522 (1996).

[4] "[I]t is not accurate to claim that only those [signatory operators] which executed NBCWAs in or after 1974 created a legitimate expectation of lifetime health benefits for miners. Congress and the Coal Commission both reviewed the historical evidence and concluded that pre-1974 signatories had made an *implicit* commitment to furnish such benefits. . . .

"Of course, the appellant is correct in insisting that the commitment distilled by Congress from the historical data was not made explicit in the text of those NBCWAs which were written before 1974. But Eastern reads too much into that omission. To be sure, such an implied commitment might not be enforceable in a civil suit *ex contractu*—but this is a constitutional challenge, not a breach of contract case. For purposes of due process review, Congress' determination that a commitment was made need not rest upon a legally enforceable promise; it is enough that Congress' conclusions as to the existence and effects of such a commitment are rational." *Eastern Enterprises* v. *Chater*, 110 F. 3d 150, 157 (1997).

[5] "The Commission firmly believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored. . . .

. . . . . .

"Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy." Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report (1990), quoted in App. 237a, 245a–246a.

the same understanding that led legislators in both political parties to conclude that the Coal Act of 1992 represented a fair solution to a difficult problem.

Given the critical importance of the reasonable expectations of both the miners and the operators during the period before their implicit agreement was made explicit in 1974, I am unable to agree with the plurality's conclusion that the retroactive application of the 1992 Act is an unconstitutional "taking" of Eastern's property. Rather, it seems to me that the plurality and JUSTICE KENNEDY have substituted their judgment about what is fair for the better informed judgment of the members of the Coal Commission and Congress.[6]

Accordingly, I conclude that, whether the provision in question is analyzed under the Takings Clause or the Due Process Clause, Eastern has not carried its burden of overcoming the presumption of constitutionality accorded to an Act of Congress, by demonstrating that the provision is unsupported by the reasonable expectations of the parties in interest.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

We must decide whether it is fundamentally unfair for Congress to require Eastern Enterprises to pay the health care costs of retired miners who worked for Eastern before 1965, when Eastern stopped mining coal. For many years Eastern benefited from the labor of those miners. Eastern helped to create conditions that led the miners to expect continued health care benefits for themselves and their families

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[6] It may well be true that the majority might have been able to fashion a wiser solution to a difficult problem. Nevertheless, as Chief Justice Hughes observed in a dissent joined by Justices Brandeis, Stone, and Cardozo: "The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect." *Railroad Retirement Bd.* v. *Alton R. Co.,* 295 U. S. 330, 391–392 (1935).

after they retired. And Eastern, until 1987, continued to draw sizable profits from the coal industry through a wholly owned subsidiary. For these reasons, I believe that Congress did not act unreasonably or otherwise unjustly in imposing these health care costs upon Eastern. Consequently, in my view, the statute before us is constitutional.

I

As a preliminary matter, I agree with JUSTICE KENNEDY, *ante*, at 539–547 (opinion concurring in judgment and dissenting in part), that the plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property . . . for public use, without just compensation." U. S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes "private property" to serve the "public" good.

The "private property" upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. See, *e. g.*, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). It requires compensation when the government takes that property for a public purpose. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994) (Clause requires payment so that government cannot "'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960))). This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.

This Court has not directly held that the Takings Clause applies to the creation of this kind of liability. The Court has made clear that not only seizures through eminent do-

main but also certain "takings" through regulation can require "compensation" under the Clause. See, *e. g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992) (land-use regulation that deprives owner of all economically beneficial use of property constitutes taking); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) (public easement across property may constitute taking). But these precedents concern the taking of interests in *physical* property.

The Court has also made clear that the Clause can apply to monetary interest generated from a fund into which a private individual has paid money. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). But the monetary interest at issue there arose out of the operation of a specific, separately identifiable fund of money. And the government took that interest for itself. Here there is no specific fund of money; there is only a general liability; and that liability runs not to the Government, but to third parties. Cf., *e. g.*, *Armstrong*, *supra*, at 48 (Government destroyed liens "for its own advantage"); *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986) (no taking where "the Government does not physically invade or permanently appropriate any . . . assets *for its own use*" (emphasis added)).

The Court in two cases has arguably acted *as if* the Takings Clause might apply to the creation of a general liability. *Connolly*, *supra*; *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602 (1993). But in the first of those cases, the Court said that the Takings Clause had *not* been violated, in part because "the Government does not physically invade or permanently appropriate any . . . assets for its own use." *Connolly*, 475 U. S., at 225. It also rejected the position that a

taking occurs "whenever legislation requires one person to use his or her assets for the benefit of another." *Id.*, at 223. The second case basically followed the analysis of the first case. *Concrete Pipe*, 508 U. S., at 641–647. And both cases *rejected* the claim of a Takings Clause violation. *Id.*, at 646–647; *Connolly*, *supra*, at 227–228.

The dearth of Takings Clause authority is not surprising, for application of the Takings Clause here bristles with conceptual difficulties. If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i. e.*, when it assesses a tax? Cf. *In re Leckie Smokeless Coal Co.*, 99 F. 3d 573, 583 (CA4 1996) (characterizing "reachback" liability payments as a "tax"), cert. denied, 520 U. S. 1118 (1997); *In re Chateaugay Corp.*, 53 F. 3d 478, 498 (CA2 1995) (same), cert. denied *sub nom. LTV Steel Co., Inc.* v. *Shalala*, 516 U. S. 913 (1995). Would that Clause apply to some or to all statutes and rules that "routinely creat[e] burdens for some that directly benefit others"? *Connolly*, *supra*, at 223. Regardless, could a court apply the same kind of Takings Clause analysis when violation means the law's invalidation, rather than simply the payment of "compensation?" See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987) ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking").

We need not face these difficulties, however, for there is no need to torture the Takings Clause to fit this case. The question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor. That Clause says that no person shall be "deprive[d] . . . of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, § 1. It safeguards citizens from arbitrary or irrational legislation.

And the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary. See, *e. g.*, *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 728–730 (1984); *id.*, at 730 ("[R]etroactive aspects of legislation [imposing withdrawal liability on employers participating in pension plan] must meet the test of due process"); *id.*, at 733 ("[R]etrospective civil legislation may offend due process if it is particularly harsh and oppressive" (internal quotation marks omitted)); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 17 (1976). Cf. *United States* v. *Carlton*, 512 U. S. 26, 30 (1994) (retroactive tax provision); *Welch* v. *Henry*, 305 U. S. 134, 147 (1938) (same); *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149, 151 (CA9 1952) (invalidating administrative order as "arbitrary, capricious, an abuse of discretion," see 5 U. S. C. § 706(2)(A), because "[t]he inequity of . . . retroactive policy making . . . is the sort of thing our system of law abhors").

Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word "property" appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted. Compare, *e. g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977) ("person" includes corporations for purposes of Fifth Amendment Double Jeopardy Clause), with *Doe* v. *United States*, 487 U. S. 201, 206 (1988) ("person" does not include a corporation for purposes of Fifth Amendment Self-Incrimination Clause).

Insofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting *Lochner* v. *New York*, 198 U. S. 45 (1905), and related doctrines of "substantive due process," that fear is misplaced. Cf. *id.*, at 75–76 (Holmes, J., dissenting); *Lincoln Fed. Union* v. *Northwestern*

Iron & Metal Co., 335 U. S. 525, 535 (1949) (repudiating the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine"). As the plurality points out, *ante*, at 533, an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself. See, *e. g.*, 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) (criticizing retrospective laws as failing to "accord with . . . the fundamental principles of the social compact"); *ibid.* (retroactive legislation invalid "upon principles derived from the general nature of free governments, and the necessary limitations created thereby"); *General Motors Corp.* v. *Romein*, 503 U. S. 181, 191 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations"); *Fletcher* v. *Peck*, 6 Cranch 87, 143 (1810) (Johnson, J., concurring) (suggesting that retroactive legislation is invalid because it offends principles of natural law).

To find that the Due Process Clause protects against this kind of fundamental unfairness—that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means—is to read the Clause in light of a basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta. It is not to resurrect long-discredited substantive notions of "freedom of contract." See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726, 729–732 (1963).

Thus, like the plurality I would inquire if the law before us is fundamentally unfair or unjust. *Ante*, at 534–537. But I would ask this question because, like JUSTICE KENNEDY, I believe that, *if so*, the Coal Act would "deprive" Eastern of "property, without due process of law." U. S. Const., Amdt. 14, § 1.

II

The substantive question before us is whether or not it is fundamentally unfair to require Eastern to make *future* payments for health care costs of retired miners and their families, on the basis of Eastern's *past* association with these

miners. Congress might have assessed all those who now use coal, or the taxpayer, in order to pay for those retired coal miners' health benefits. But Congress, instead, imposed this liability on Eastern. Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U. S. C. §§ 9701–9722 (1994 ed. and Supp. II). The "fairness" question is, why Eastern?

The answer cannot lie in a contractual promise to pay, for Eastern made no such contractual promise. Nor did Eastern participate in any benefit plan that made such a contractual promise, prior to its departure from the coal industry in 1965. But, as JUSTICE STEVENS points out, this case is not a civil law suit for breach of contract. It is a constitutional challenge to Congress' decision to assess a new future liability on the basis of an old employment relationship. *Ante*, at 551–552, n. 3 (dissenting opinion). Unless it is fundamentally unfair and unjust, in terms of Eastern's reasonable reliance and settled expectations, to impose that liability, the Coal Act's "reachback" provision meets that challenge. See *Connolly*, 475 U. S., at 227; *Concrete Pipe*, 508 U. S., at 645–646.

I believe several features of this case demonstrate that the relationship between Eastern and the payments demanded by the Coal Act is special enough to pass the Constitution's fundamental fairness test. That is, even though Eastern left the coal industry in 1965, the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's "reachback" liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability. Cf. *Penn Central*, 438 U. S., at 127–128.

For one thing, the liability that the statute imposes upon Eastern extends only to miners whom Eastern itself employed. See 26 U. S. C. § 9706(a) (imposing "reachback" liability only where no presently operating coal firm which ratified 1978 or subsequent bargaining agreement ever employed the retiree, and Eastern employed the retiree longer than

any other "reachback" firm). They are miners whose labor benefited Eastern when they were younger and healthier. Insofar as working conditions created a risk of future health problems for those miners, Eastern created those conditions. And these factors help to distinguish Eastern from others with respect to a later obligation to pay the health care costs that inevitably arise in old age. See, *e. g.*, 138 Cong. Rec. 34001 (1992) (Conference Report on Coal Act) (Coal Act assigns liability to "those companies which employed the retirees . . . and thereby benefitted from their services"); Hearings on Provisions Relating to the Health Benefits of Retired Coal Miners before the House Committee on Ways and Means, 103d Cong., 1st Sess., 8–9, 32 (1993) (hereinafter Hearings on Health Benefits); House Committee on Ways and Means, Financing UMWA Coal Miner "Orphan Retiree" Health Benefits, 103d Cong., 1st Sess., 50–51 (Comm. Print 1993) (hereinafter House Report).

Congress has sometimes imposed liability, even "retroactive" liability, designed to prevent degradation of a natural resource, upon those who have used and benefited from it. See, *e. g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9601 *et seq.* (1994 ed. and Supp. I). That analogy, while imperfect, calls attention to the special tie between a firm and its former employee, a human resource, that helps to explain the special retroactive liability. That connection, while not by itself justifying retroactive liability here, helps to distinguish a firm like Eastern, which employed a miner but no longer makes coal, from other funding sources, say, current coal producers or coal consumers, who now make or use coal but who have never employed that miner or benefited from his work.

More importantly, the record demonstrates that Eastern, before 1965, contributed to the making of an important "promise" to the miners. That "promise," even if not contractually enforceable, led the miners to "develo[p]" a reasonable "expectation" that they would continue to receive

"[retiree] medical benefits." *Ante,* at 535. The relevant history, outlined below, shows that industry action (including action by Eastern), combined with Federal Government action and the miners' own forbearance, produced circumstances that made it natural for the miners to believe that either industry or Government (or both) would make every effort to see that they received health benefits after they retired—regardless of what terms were explicitly included in previously signed bargaining agreements.

(1) Before the 1940's, health care for miners, insofar as it existed, was provided by "company doctors" in company towns. See, *e. g.,* U. S. Dept. of Interior, Report of the Coal Mines Administration, A Medical Survey of the Bituminous-Coal Industry 121, 144 (1947) (hereinafter Boone Report); *id.*, at 131, 191, 193 (describing care as substandard and criticizing the "noticeable deficiency" in the number of doctors); Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report 19 (1990) (hereinafter Coal Comm'n Report), App. in No. 96–1947 (CA1), p. 1350 (hereinafter App. (CA1)). By the late 1940's, health care and pension rights had become *the* issue for miners, a central demand in collective bargaining, and a rallying cry for those who urged a nationwide coal strike. M. Fox, United We Stand 404, 416 (1990); I. Krajcinovic, From Company Doctors to Managed Care 17, 43 (1997) (hereinafter Krajcinovic); C. Seltzer, Fire in the Hole 57 (1985); R. Zieger, John L. Lewis: Labor Leader 151 (1988); see also *ante,* at 504–505. John L. Lewis, head of the United Mine Workers of America (hereinafter UMWA or Union), urged the mine owners to "'remove that fear'" of sudden death from "'their minds so that they will know if that occurs . . . their families will be provided with proper insurance.'" Zieger, *supra,* at 153. In 1946, the workers struck. The Government seized the mines. And the Government, together with the Union, effectively imposed a managed health care agreement on the coal operators. Seltzer, *supra,* at 58.

(2) The resulting 1946 "Krug-Lewis Agreement" created a Medical and Hospital Fund designed to "provide, or to arrange for the availability of, medical, hospital, and related services for the miners and their dependents." Krug-Lewis Agreement § 4(b), App. (CA1) 612–613. One year later, this fund was consolidated with a "Welfare and Retirement Fund" also established in 1946 (hereinafter W&R Fund). 1947 National Bituminous Coal Wage Agreement (hereinafter NBCWA) 150, App. (CA1) 621. Under the 1947 and successive agreements, the W&R Fund's three trustees (union, management, and "neutral") determined the specific benefits provided under the plan. 1947 NBCWA 144, App. (CA1) 618.

(3) Between 1947 and 1965, the benefits that the W&R Fund provided included retiree benefits quite similar to those at issue here. The bargaining agreements between the coal operators and miners (NBCWA's) and the W&R Fund's Annual Reports make clear that the W&R Fund provided benefits to all "employees . . . , their families and dependents for medical or hospital care." 1947 NBCWA 146, App. (CA1) 619; 1950 NBCWA 60–61, App. (CA1) 639 (continuing coverage); 1951 NBCWA 50–51, App. (CA1) 648 (same); 1952 NBCWA 40–42, App. (CA1) 650–651 (same); 1955 NBCWA 34–35, App. (CA1) 655 (same); 1956 NBCWA 28–29, App. (CA1) 658 (same); 1958 NBCWA 16–17, App. (CA1) 661 (same); 1964 NBCWA 4–5, App. (CA1) 668–669 (same); 1966 NBCWA 4–5, App. (CA1) 688–689 (same). The Fund's Annual Reports specified that eligible family members included miners' spouses, children, dependent parents, and (at least after 1955) *retired miners and their dependents*, and widows and orphans (for a 12-month period). 1955 W&R Fund Annual Report 15, 28, App. (CA1) 881, 894; 1956 W&R Fund Annual Report 13–14, App. (CA1) 912–913 (also noting the "unprecedented magnitude and liberality of the Fund's Hospital and Medical Care Program"); 1958 W&R Fund Annual Report 7, App. (CA1) 943; 1959 W&R Fund Annual Report

7–8, App. (CA1) 975–976; 1960 W&R Fund Annual Report 9, App. (CA1) 1018; 1961 W&R Fund Annual Report 16–17, App. (CA1) 1058–1059; 1962 W&R Fund Annual Report 15–16, App. (CA1) 1090–1091; 1963 W&R Fund Annual Report 15–16, App. (CA1) 1123–1124; 1964 W&R Fund Annual Report 22–23, App. (CA1) 1160–1161; 1965 W&R Fund Annual Report 14, App. (CA1) 1187. See also Hearings on Health Benefits, at 36 (suggesting retirees eligible " 'from the inception of bargained benefits' ").

The only significant difference between the coverage provided before 1974 and after 1974 consists of greater generosity after 1974 with respect to widows, for the earlier 12-month limitation was repealed and health benefits extended to widows' remarriage or death. See 1974 NBCWA 105, App. (CA1) 758.

(4) In return for what the miners thought was an assurance (though not a contractual obligation) from management of continued pension and health care benefits, the Union agreed to accept mechanization of mining, a concession that meant significant layoffs and a smaller future work force. Coal Comm'n Report 11–14, App. (CA1) 1342–1345 (75% decline in employment from 1950 to 1969); Krajcinovic 4, 43–44; Seltzer, *supra*, at 36; see also C. Perry, Collective Bargaining and the Decline of the United Mine Workers 43 (1984) (detailing benefits of mechanization for coal operators). The president of the Southern Coal Operators' Association said in 1953 that the miners "have been promised and grown accustomed to" health benefits. App. (CA1) 2000. Those benefits, the management's W&R Fund trustee said in 1951, covered "mine worker[s], including pensioners, and dependents . . . without limit as to duration." *Id.*, at 1972. This Court, too, has said that the UMWA "agreed not to oppose the rapid mechanization of the mines" in exchange for "increased wages" and "payments into the welfare fund." *Mine Workers* v. *Pennington*, 381 U. S. 657, 660 (1965); see also *id.*, at 698 (Goldberg, J., concurring in judgment) (improved wages,

benefits, and working conditions were a "*quid pro quo*" for automation).

Others have reached similar conclusions. The Coal Commission more recently said:

> "Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored." Coal Comm'n Report 1, App. (CA1) 1332.

And numerous supporters of the present law read the history as showing, for example, that the "miners went to work each day under the assumption that their health benefits would be there when they retired." 138 Cong. Rec. 20121 (1992) (Sen. Wofford); see also *id.*, at 20118 (Sen. Rockefeller) (Coal Act "will see to it that the promise of health care is kept to tens of thousands of retired coal miners and their families"); *id.*, at 20119 (Sen. Byrd) (Coal Act will "assure . . . retired coal miners . . . that promises made to them during their working years are not now . . . reneged upon"); *id.*, at 20120 (Sen. Ford) (Coal Act assures that "promise made to [retirees] can be kept"); *id.*, at 34001 (Conference Report on Coal Act) ("Under [NBCWA's], retirees and their dependents have been promised lifetime health care benefits").

Further, the Federal Government played a significant role in developing the expectations that these "promises" created. In 1946, as mentioned above, during a strike related to health and pension benefits, the Government seized the mines and imposed the "Krug-Lewis Agreement," which established the basic health benefits framework. *Supra*, at 561; see also 11 Fed. Reg. 5593 (1946) (President Truman's seizure order). In 1948, during a strike related to pension benefits, the Government again intervened to ensure continued availability of these benefits. 13 Fed. Reg. 1579 (1948) (Executive Order creating board to inquire into strike); Kraj-

cinovic 37–38. In later years, but before 1965, Congress provided the W&R Fund with special tax benefits, helped the Fund to build hospitals, and established health and safety standards. Brief for Respondents UMWA Combined Benefit Fund et al. 11–12 (citing relevant statutes and record materials). This kind of Government intervention explains why the president of the Southern Coal Producers' Association said, in the 1950's, that if benefits were reduced, it was

> "entirely conceivable that Congress [would] step in and take over the mines, assuming responsibility for the welfare collections and payment." App. (CA1) 2000.

I repeat that the Federal Government's words and deeds, along with those of the pre-1965 industry, did not necessarily create contractually binding promises (which, had they existed, might have eliminated the need for this legislation). But in labor relations, as in human relations, one can create promises and understandings which, even in the absence of a legally enforceable contract, others reasonably expect will be honored. Indeed, in labor relations such industrywide understandings may spell the difference between labor war and labor peace, for the parties may look to a strike, not to a court, for enforcement. It is that kind of important, mutual understanding that is at issue here. For the record shows that pre-1965 statements and other conduct led management to understand, and labor legitimately to expect, that health care benefits for retirees and their dependents would continue to be provided.

Finally, Eastern continued to obtain profits from the coal mining industry long after 1965, for it operated a wholly owned coal-mining subsidiary, Eastern Associated Coal Corp. (hereinafter EACC), until the late 1980's. Between 1966 and 1987, Eastern effectively ran EACC, sharing officers, supervising management, and receiving 100% of EACC's approximately $100 million in dividends. Brief for Petitioner 6, n. 13; App. (CA1) 2172 (affidavit of T. Gallagher,

EACC General Counsel); *id.*, at 2182 (Eastern Corporate Cash Manual); see also *id.*, at 2170–2173 (noting Eastern's profits from, and control over, EACC); *id.*, at 2178–2181; *id.*, at 2192–2205. Eastern officials, in their role as EACC directors, ratified the post-1965 bargaining agreements, Brief for Bituminous Coal Operators' Association, Inc., as *Amicus Curiae* 28, and n. 20; Brief for Respondent Peabody Holding Co., Inc., et al. 14–15, and must have remained aware of the W&R Fund's deepening financial crisis.

Taken together, these circumstances explain why it is not fundamentally unfair for Congress to impose upon Eastern liability for the future health care costs of miners whom it long ago employed—rather than imposing that liability, for example, upon the present industry, coal consumers, or taxpayers. Each diminishes the reasonableness of Eastern's expectation that, by leaving the industry, it could fall within the Constitution's protection against unfairly retroactive liability.

These circumstances, as elaborated by the record, mean that Eastern knew of the potential funding problems that arise in any multiemployer benefit plan, see *Concrete Pipe*, 508 U. S., at 637–639, before it left the industry. Eastern knew or should have known that, in light of the structure of the benefit plan and the frequency with which coal operators went out of business, a "last man out" problem could exacerbate the health plan's funding difficulties. See, *e. g.*, Boone Report xvi; House Report 34; Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance, 102d Cong., 1st Sess., 15, 21 (1991) (statement of Coal Commission Vice Chairman Henry Perritt, Jr.). Eastern also knew or should have known that because of prior federal involvement, future federal intervention to solve any such problem was a serious possibility. *Supra*, at 564–565; see also *Concrete Pipe*, *supra*, at 645–646; *Connolly*, 475 U. S., at 226–227; *Usery*, 428 U. S., at 15–16.

Eastern knew, by the very nature of the problem, that any legislative effort to solve such a problem could well occur many years into the future. And, most importantly, Eastern played a significant role in creating the miners' expectations that led to this legislation. Add to these circumstances the two others I have mentioned—that Eastern had benefited from the labor of the miners for whose future health care it must provide, and that Eastern remained in the industry, drawing from it substantial profits (though doing business through a subsidiary, which usually, *but not always,* insulates an owner from liability).

The upshot, if I follow the form of analysis this Court used in *Connolly,* is that I cannot say the Government's regulation has unfairly interfered with Eastern's "distinct investment-backed expectations." See *Connolly, supra,* at 225–227 (analyzing "taking" in terms of three factors: (1) "economic impact"; (2) interference "'with distinct investment-backed expectations'"; and (3) "'character of the governmental action'" (citations omitted)). Within that framework, I could find additional support for the constitutionality of the "reach-back" liability provision by adding that the "character of the governmental action" here amounts to the creation of a liability to a third party, and not a direct "taking" of an interest in physical property. And the fact that the statute here narrows Eastern's liability to those whom it employed, while explicitly preserving Eastern's rights to indemnification from others (thereby helping Eastern spread the risk of this liability), 26 U. S. C. § 9706(f)(6), helps to diminish the Coal Act's "economic impact" upon Eastern as well.

I would put the matter more directly, however. The law imposes upon Eastern the burden of showing that the statute, because of its retroactive effect, is fundamentally unfair or unjust. The circumstances I have mentioned convince me that Eastern cannot show a sufficiently reasonable expectation that it would remain free of future health care cost liability for the workers whom it employed. Eastern has

therefore failed to show that the law unfairly upset its legitimately settled expectations. Because, in my view, Eastern has not met its burden, I would uphold the "reachback" provision of the Coal Act as constitutional.

Syllabus

NATIONAL ENDOWMENT FOR THE ARTS ET AL. *v.* FINLEY ET AL.

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

No. 97–371. Argued March 31, 1998—Decided June 25, 1998

The National Foundation on the Arts and the Humanities Act of 1965 vests the National Endowment for the Arts (NEA) with substantial discretion to award financial grants to support the arts; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to . . . creativity and cultural diversity," "professional excellence," and the encouragement of "public . . . education . . . and appreciation of the arts." See 20 U. S. C. §§ 954(c)(1)–(10). Applications for NEA funding are initially reviewed by advisory panels of experts in the relevant artistic field. The panels report to the National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. In 1989, controversial photographs that appeared in two NEA-funded exhibits prompted public outcry over the agency's grant-making procedures. Congress reacted to the controversy by inserting an amendment into the NEA's 1990 reauthorization bill. The amendment became § 954(d)(1), which directs the Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The NEA has not promulgated an official interpretation of the provision, but the Council adopted a resolution to implement § 954(d)(1) by ensuring that advisory panel members represent geographic, ethnic, and esthetic diversity. The four individual respondents are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of each of their projects, but the Council subsequently recommended disapproval, and funding was denied. They filed suit for restoration of the recommended grants or reconsideration of their applications, asserting First Amendment and statutory claims. When Congress enacted § 954(d)(1), respondents, now joined by the National Association of Artists' Organizations, amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. The District Court granted summary judgment in favor of respondents on their facial constitutional challenge to § 954(d)(1).

Syllabus

The Ninth Circuit affirmed, holding that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments.

Held: Section 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles. Pp. 580–590.

(a) Respondents confront a heavy burden in advancing their facial constitutional challenge, and they have not demonstrated a substantial risk that application of § 954(d)(1) will lead to the suppression of free expression, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615. The premise of respondents' claim is that § 954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The provision, however, simply adds "considerations" to the grant-making process; it does not preclude awards to projects that might be deemed "indecent" or "disrespectful," nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application. Regardless of whether the NEA's view that the formulation of diverse advisory panels is sufficient to comply with Congress' command is in fact a reasonable reading, § 954(d)(1)'s plain text clearly does not impose a categorical requirement. Furthermore, the political context surrounding the "decency and respect" clause's adoption is inconsistent with respondents' assertion. The legislation was a bipartisan proposal introduced as a counterweight to amendments that would have eliminated the NEA's funding or substantially constrained its grant-making authority. Section 954(d)(1) merely admonishes the NEA to take "decency and respect" into consideration, and the Court does not perceive a realistic danger that it will be utilized to preclude or punish the expression of particular views. The Court typically strikes down legislation as facially unconstitutional when the dangers are both more evident and more substantial. See, *e. g., R. A. V.* v. *St. Paul*, 505 U. S. 377. Given the varied interpretations of the "decency and respect" criteria urged by the parties, and the provision's vague exhortation to "take them into consideration," it seems unlikely that § 954(d)(1) will significantly compromise First Amendment values.

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" and the "respect" prongs of § 954(d)(1). It is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. See, *e. g., Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 871. And the statute already provides that the agency must take "cultural diversity" into account. References to permissible applications would not alone be sufficient to sustain the statute,

but neither is the Court persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account are a consequence of the nature of arts funding; the NEA has limited resources to allocate among many "artistically excellent" projects, and it does so on the basis of a wide variety of subjective criteria. Respondent's reliance on *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 837—in which the Court overturned a public university's objective decision denying funding to all student publications having religious editorial viewpoints—is therefore misplaced. The NEA's mandate is to make esthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*. Moreover, although the First Amendment applies in the subsidy context, Congress has wide latitude to set spending priorities. See, *e. g.*, *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 549. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, the Court will uphold it. Pp. 580–588.

(b) The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. The First and Fifth Amendments protect speakers from arbitrary and discriminatory enforcement of vague standards. See *NAACP* v. *Button*, 371 U. S. 415, 432–433. Section 954(d)(1)'s terms are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any forbidden area in the context of NEA grants. As a practical matter, artists may conform their speech to what they believe to be the NEA decisionmaking criteria in order to acquire funding. But when the Government is acting as patron rather than sovereign, the consequences of imprecision are not constitutionally severe. In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, to accept respondents' vagueness argument would be to call into question the constitutionality of the many valuable Government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." Pp. 588–590.

100 F. 3d 671, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, and Breyer, JJ., joined, and in all but Part II–B of which Ginsburg, J., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined, *post*, p. 590. Souter, J., filed a dissenting opinion, *post*, p. 600.

Solicitor General Waxman argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Preston*, *Jeffrey P. Minear*, *William Kanter*, *Alfred Mollin*, and *Karen Christensen.*

David Cole argued the cause for respondents. With him on the briefs were *Ellen Yaroshefsky*, *Marjorie Heins*, *Steven R. Shapiro*, *Mary D. Dorman*, and *Carol Sobel.**

JUSTICE O'CONNOR delivered the opinion of the Court.†

The National Foundation on the Arts and the Humanities Act of 1965, as amended in 1990, 104 Stat. 1963, requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U. S. C. § 954(d)(1). In this case, we review the Court of Ap-

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Briefs of *amici curiae* urging affirmance were filed for the American Association of University Professors et al. by *John Joshua Wheeler*, *Jonathan R. Alger*, and *Jeffrey P. Cunard;* for Americans United for Separation of Church and State by *Steven K. Green*, *Julie A. Segal*, and *Edward Tabash;* for the Family Research Institute of Wisconsin by *Daniel Kelly;* for the New School for Social Research et al. by *Floyd Abrams*, *Burt Neuborne*, *Kathleen M. Sullivan*, *Jonathan Sherman*, *Elai Katz*, and *Deborah Goldberg;* for the Rockefeller Foundation by *Donald B. Verrilli, Jr.;* for Twenty-Six Arts, Broadcast, Library, Museum and Publishing *Amici Curiae* by *James F. Fitzpatrick*, *James A. Dobkin*, *Matthew T. Heartney*, *Mark R. Drozdowski*, *Elliot M. Mincberg*, and *Lawrence S. Ottinger;* for Volunteer Lawyers for the Arts et al. by *Marci A. Hamilton;* and for Claes Oldenburg et al. by *Gloria C. Phares.*

Paul J. McGeady and *Robert W. Peters* filed a brief for Morality in Media, Inc., as *amicus curiae.*

†JUSTICE GINSBURG joins all but Part II–B of this opinion.

peals' determination that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. We conclude that § 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

I

A

With the establishment of the NEA in 1965, Congress embarked on a "broadly conceived national policy of support for the . . . arts in the United States," see § 953(b), pledging federal funds to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of . . . creative talent." § 951(7). The enabling statute vests the NEA with substantial discretion to award grants; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts." See §§ 954(c)(1)–(10).

Applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts. Under the 1990 amendments to the enabling statute, those panels must reflect "diverse artistic and cultural points of view" and include "wide geographic, ethnic, and minority representation," as well as "lay individuals who are knowledgeable about the arts." §§ 959(c)(1)–(2). The panels report to the 26-member National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. The Chairperson has the ultimate authority to award grants but may not approve an application as to which the Council has made a negative recommendation. § 955(f).

Since 1965, the NEA has distributed over $3 billion in grants to individuals and organizations, funding that has served as a catalyst for increased state, corporate, and foundation support for the arts. Congress has recently restricted the availability of federal funding for individual artists, confining grants primarily to qualifying organizations and state arts agencies, and constraining subgranting. See Department of the Interior and Related Agencies Appropriations Act, 1998, § 329, 111 Stat. 1600. By far the largest portion of the grants distributed in fiscal year 1998 were awarded directly to state arts agencies. In the remaining categories, the most substantial grants were allocated to symphony orchestras, fine arts museums, dance theater foundations, and opera associations. See National Endowment for the Arts, FY 1998 Grants, Creation & Presentation 5–8, 21, 20, 27.

Throughout the NEA's history, only a handful of the agency's roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public's trust. Two provocative works, however, prompted public controversy in 1989 and led to congressional revaluation of the NEA's funding priorities and efforts to increase oversight of its grant-making procedures. The Institute of Contemporary Art at the University of Pennsylvania had used $30,000 of a visual arts grant it received from the NEA to fund a 1989 retrospective of photographer Robert Mapplethorpe's work. The exhibit, entitled The Perfect Moment, included homoerotic photographs that several Members of Congress condemned as pornographic. See, *e. g.*, 135 Cong. Rec. 22372 (1989). Members also denounced artist Andres Serrano's work Piss Christ, a photograph of a crucifix immersed in urine. See, *e. g.*, *id.*, at 9789. Serrano had been awarded a $15,000 grant from the Southeast Center for Contemporary Art, an organization that received NEA support.

When considering the NEA's appropriations for fiscal year 1990, Congress reacted to the controversy surrounding the

Mapplethorpe and Serrano photographs by eliminating $45,000 from the agency's budget, the precise amount contributed to the two exhibits by NEA grant recipients. Congress also enacted an amendment providing that no NEA funds "may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 738–742. The NEA implemented Congress' mandate by instituting a requirement that all grantees certify in writing that they would not utilize federal funding to engage in projects inconsistent with the criteria in the 1990 appropriations bill. That certification requirement was subsequently invalidated as unconstitutionally vague by a Federal District Court, see *Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774 (CD Cal. 1991), and the NEA did not appeal the decision.

In the 1990 appropriations bill, Congress also agreed to create an Independent Commission of constitutional law scholars to review the NEA's grant-making procedures and assess the possibility of more focused standards for public arts funding. The Commission's report, issued in September 1990, concluded that there is no constitutional obligation to provide arts funding, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of "the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us." See Independent Commission, Report to Congress on the Na-

tional Endowment for the Arts 83–91 (Sept. 1990), 3 Record, Doc. No. 51, Exh. K (hereinafter Report to Congress).

Informed by the Commission's recommendations, and cognizant of pending judicial challenges to the funding limitations in the 1990 appropriations bill, Congress debated several proposals to reform the NEA's grant-making process when it considered the agency's reauthorization in the fall of 1990. The House rejected the Crane Amendment, which would have virtually eliminated the NEA, see 136 Cong. Rec. 28656–28657 (1990), and the Rohrabacher Amendment, which would have introduced a prohibition on awarding any grants that could be used to "promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion" or "of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin," *id.*, at 28657–28664. Ultimately, Congress adopted the Williams/Coleman Amendment, a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency. In relevant part, the Amendment became § 954(d)(1), which directs the Chairperson, in establishing procedures to judge the artistic merit of grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."*

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*Title 20 U. S. C. § 954(d) provides in full that:

"No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

"(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

"(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded."

The NEA has not promulgated any official interpretation of the provision, but in December 1990, the Council unanimously adopted a resolution to implement § 954(d)(1) merely by ensuring that the members of the advisory panels that conduct the initial review of grant applications represent geographic, ethnic, and esthetic diversity. See Minutes of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in App. 12–13; Transcript of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in *id.*, at 32–33. John Frohnmayer, then Chairperson of the NEA, also declared that he would "count on [the] procedures" ensuring diverse membership on the peer review panels to fulfill Congress' mandate. See *id.*, at 40.

B

The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of respondents' projects, both initially and after receiving Frohnmayer's request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding. Respondents filed suit, alleging that the NEA had violated their First Amendment rights by rejecting the applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA's enabling statute, and had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974, 5 U. S. C. § 552(a). Respondents sought restoration of the recommended grants or reconsideration of their applications, as well as damages for the alleged Privacy Act violations. When Congress enacted § 954(d)(1), respondents, now joined by the National Association of Artists' Organizations (NAAO), amended

their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. First Amended Complaint ¶ 1.

The District Court denied the NEA's motion for judgment on the pleadings, 795 F. Supp. 1457, 1463–1468 (CD Cal. 1992), and, after discovery, the NEA agreed to settle the individual respondents' statutory and as-applied constitutional claims by paying the artists the amount of the vetoed grants, damages, and attorney's fees. See Stipulation and Settlement Agreement, 6 Record, Doc. No. 128, pp. 3–5.

The District Court then granted summary judgment in favor of respondents on their facial constitutional challenge to § 954(d)(1) and enjoined enforcement of the provision. See 795 F. Supp., at 1476. The court rejected the argument that the NEA could comply with § 954(d)(1) by structuring the grant selection process to provide for diverse advisory panels. *Id.*, at 1471. The provision, the court stated, "fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.*, at 1472. Reasoning that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency,'" the court concluded that § 954(d)(1) "cannot be given effect consistent with the Fifth Amendment's due process requirement." *Id.*, at 1471–1472 (citing *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972)). Drawing an analogy between arts funding and public universities, the court further ruled that the First Amendment constrains the NEA's grant-making process, and that because § 954(d)(1) "clearly reaches a substantial amount of protected speech," it is impermissibly overbroad on its face. 795 F. Supp., at 1476. The Government did not seek a stay of the District Court's injunction, and consequently the NEA has not applied § 954(d)(1) since June 1992.

A divided panel of the Court of Appeals affirmed the District Court's ruling. 100 F. 3d 671 (CA9 1996). The major-

ity agreed with the District Court that the NEA was compelled by the adoption of § 954(d)(1) to alter its grant-making procedures to ensure that applications are judged according to the "decency and respect" criteria. The Chairperson, the court reasoned, "has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction." *Id.*, at 680. Concluding that the "decency and respect" criteria are not "susceptible to objective definition," the court held that § 954(d)(1) "gives rise to the danger of arbitrary and discriminatory application" and is void for vagueness under the First and Fifth Amendments. *Id.*, at 680–681. In the alternative, the court ruled that § 954(d)(1) violates the First Amendment's prohibition on viewpoint-based restrictions on protected speech. Government funding of the arts, the court explained, is both a "traditional sphere of free expression," *Rust* v. *Sullivan*, 500 U. S. 173, 200 (1991), and an area in which the Government has stated its intention to "encourage a diversity of views from private speakers," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834 (1995). 100 F. 3d, at 681–682. Accordingly, finding that § 954(d)(1) "has a speech-based restriction as its sole rationale and operative principle," *Rosenberger*, *supra*, at 834, and noting the NEA's failure to articulate a compelling interest for the provision, the court declared it facially invalid. 100 F. 3d, at 683.

The dissent asserted that the First Amendment protects artists' rights to express themselves as indecently and disrespectfully as they like, but does not compel the Government to fund that speech. *Id.*, at 684 (opinion of Kleinfeld, J.). The challenged provision, the dissent contended, did not prohibit the NEA from funding indecent or offensive art, but merely required the agency to consider the "decency and respect" criteria in the grant selection process. *Id.*, at 689–690. Moreover, according to the dissent's reasoning, the vagueness principles applicable to the direct regulation of speech have no bearing on the selective award of prizes, and

the Government may draw distinctions based on content and viewpoint in making its funding decisions. *Id.*, at 684–688. Three judges dissented from the denial of rehearing en banc, maintaining that the panel's decision gave the statute an "implausible construction," applied the "'void for vagueness' doctrine where it does not belong," and extended "First Amendment principles to a situation that the First Amendment doesn't cover." 112 F. 3d 1015, 1016–1017 (CA9 1997).

We granted certiorari, 522 U. S. 991 (1997), and now reverse the judgment of the Court of Appeals.

II

A

Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront "a heavy burden" in advancing their claim. *Rust*, *supra*, at 183. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick*, *supra*, at 615.

Respondents argue that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency. The premise of respondents' claim is that § 954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The NEA, however, reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction. Section 954(d)(1) adds "considerations" to the grant-making process; it does not preclude awards to projects that might be deemed "indecent" or "disrespectful," nor place conditions on grants, or even specify that those factors must be given

any particular weight in reviewing an application. Indeed, the agency asserts that it has adequately implemented § 954(d)(1) merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications. See Declaration of Randolph McAusland, Deputy Chairman for Programs at the NEA, reprinted in App. 79 (stating that the NEA implements the provision "by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups, and gender, and include a lay person"). We do not decide whether the NEA's view—that the formulation of diverse advisory panels is sufficient to comply with Congress' command—is in fact a reasonable reading of the statute. It is clear, however, that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms. See § 954(d)(2) ("[O]bscenity is without artistic merit, is not protected speech, and shall not be funded").

Furthermore, like the plain language of § 954(d), the political context surrounding the adoption of the "decency and respect" clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria. The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority. See, *e. g.*, 136 Cong. Rec. 28626, 28632, 28634 (1990). The Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding, and the Commission's report suggests that "additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of 'artistic excel-

lence'), rather than isolated and treated as exogenous considerations." Report to Congress 89. In keeping with that recommendation, the criteria in § 954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints. As the sponsors of § 954(d)(1) noted in urging rejection of the Rohrabacher Amendment: "[I]f we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin." 136 Cong. Rec. 28624 (statement of Rep. Coleman); see also *id.*, at 28663 (statement of Rep. Williams) (arguing that the Rohrabacher Amendment would prevent the funding of Jasper Johns' flag series, The Merchant of Venice, Chorus Line, Birth of a Nation, and the Grapes of Wrath). In contrast, before the vote on § 954(d)(1), one of its sponsors stated: "If we have done one important thing in this amendment, it is this. We have maintained the integrity of freedom of expression in the United States." *Id.*, at 28674.

That § 954(d)(1) admonishes the NEA merely to take "decency and respect" into consideration and that the legislation was aimed at reforming procedures rather than precluding speech undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination. In cases where we have struck down legislation as facially unconstitutional, the dangers were both more evident and more substantial. In *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), for example, we invalidated on its face a municipal ordinance that defined as a criminal offense the placement of a symbol on public or private property "'which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" See *id.*, at 380. That provision set forth a clear penalty, proscribed views on particular "disfavored subjects," *id.*, at 391, and suppressed "distinctive idea[s], conveyed by a distinctive message," *id.*, at 393.

In contrast, the "decency and respect" criteria do not silence speakers by expressly "threaten[ing] censorship of ideas." See *ibid.* Thus, we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values. As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that "[o]ne would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them"; and they claim that "'[d]ecency' is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas." Brief for Respondents 41. The NEA likewise views the considerations enumerated in § 954(d)(1) as susceptible to multiple interpretations. See Department of the Interior and Related Agencies Appropriations for 1992, Hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess., 234 (1991) (testimony of John Frohnmayer) ("[N]o one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions"). Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views. Indeed, one could hardly anticipate how "decency" or "respect" would bear on grant applications in categories such as funding for symphony orchestras.

Respondents' claim that the provision is facially unconstitutional may be reduced to the argument that the criteria in § 954(d)(1) are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague ex-

hortation to "take them into consideration," it seems unlikely that this provision will introduce any greater element of selectivity than the determination of "artistic excellence" itself. And we are reluctant, in any event, to invalidate legislation "on the basis of its hypothetical application to situations not before the Court." *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 743 (1978).

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" prong of § 954(d)(1) and its reference to "respect for the diverse beliefs and values of the American public." Educational programs are central to the NEA's mission. See § 951(9) ("Americans should receive in school, background and preparation in the arts and humanities"); § 954(c)(5) (listing "projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts" among the NEA's funding priorities); National Endowment for the Arts, FY 1999 Application Guidelines 18–19 (describing "Education & Access" category); Brief for Twenty-six Arts, Broadcast, Library, Museum and Publishing *Amici Curiae* 5, n. 2 (citing NEA Strategic Plan FY 1997–FY 2002, which identifies children's festivals and museums, art education, at-risk youth projects, and artists in schools as examples of the NEA's activities). And it is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 871 (1982); see also *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 683 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

Permissible applications of the mandate to consider "respect for the diverse beliefs and values of the American public" are also apparent. In setting forth the purposes of the NEA, Congress explained that "[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage."

§ 951(10). The agency expressly takes diversity into account, giving special consideration to "projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community," § 954(c)(4), as well as projects that generally emphasize "cultural diversity," § 954(c)(1). Respondents do not contend that the criteria in § 954(d)(1) are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience.

We recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge. But neither are we persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose "artistically excellent" projects. The agency may decide to fund particular projects for a wide variety of reasons, "such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form." Brief for Petitioners 32. As the dissent below noted, it would be "impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression." 100 F. 3d, at 685 (opinion of Kleinfeld, J.). The "very assumption" of the NEA is that grants will be awarded according to the "artistic worth of competing applicants," and absolute neutrality is simply "inconceivable." *Advo-*

cates for the Arts v. *Thomson*, 532 F. 2d 792, 795–796 (CA1), cert. denied, 429 U. S. 894 (1976).

Respondents' reliance on our decision in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), is therefore misplaced. In *Rosenberger*, a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints. *Id.*, at 837. Although the scarcity of NEA funding does not distinguish this case from *Rosenberger*, see *id.*, at 835, the competitive process according to which the grants are allocated does. In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers," *id.*, at 834. The NEA's mandate is to make esthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were "'related to the educational purpose of the University,'" *id.*, at 824—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, see *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 386 (1993); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975), or the second class mailing privileges available to "'all newspapers and other periodical publications,'" see *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 148, n. 1 (1946).

Respondents do not allege discrimination in any particular funding decision. (In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants. See 4 Record, Doc. No. 57, Exh. 35 (Sept. 30, 1991, letters from the NEA informing respondents Hughes and Miller that they had been awarded Solo Performance The-

ater Artist Fellowships).) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas," *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 550 (1983) (internal quotation marks omitted), and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 237 (1987) (SCALIA, J., dissenting); see also *Leathers* v. *Medlock*, 499 U. S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"). In addition, as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive "certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991); see Brief for Petitioners 38, n. 12. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 396 (1969) ("[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise" (citation omitted)).

B

Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria

that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. See *Regan, supra,* at 549. In the 1990 amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling Act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "[p]ublic funds . . . must ultimately serve public purposes the Congress defines." § 951(5). And as we held in *Rust,* Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U. S., at 193. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.;* see also *Maher* v. *Roe,* 432 U. S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy").

III

The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. See *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963). The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any "forbidden area" in the context of grants of this nature. Cf. *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.,* 482 U. S. 569, 574 (1987) (facially invalidating a flat ban

on any "First Amendment" activities in an airport); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982) ("prohibitory and stigmatizing effect" of a "quasi-criminal" ordinance relevant to the vagueness analysis); *Grayned* v. *City of Rockford*, 408 U. S., at 108 (requiring clear lines between "lawful and unlawful" conduct). We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. See Statement of Charlotte Murphy, Executive Director of NAAO, reprinted in App. 21–22. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." See, *e. g.*, 2 U. S. C. § 802 (establishing the Congressional Award Program to "promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness"); 20 U. S. C. § 956(c)(1) (providing funding to the National Endowment for the Humanities to promote "progress and scholarship in the humanities"); § 1134h(a) (authorizing the Secretary of Education to award fellowships to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise"); 22 U. S. C. § 2452(a) (authorizing the award of Fulbright grants to "strengthen international cooperative relations"); 42 U. S. C. § 7382c (authorizing the Secretary of Energy to recognize teachers for "excellence in mathematics or science education"). To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable Government programs and countless others like them.

Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process. It does not, on its face, impermissibly infringe on First or Fifth Amendment rights. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

"The operation was a success, but the patient died." What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U. S. C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. I write separately because, unlike the Court, I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

I

THE STATUTE MEANS WHAT IT SAYS

Section 954(d)(1) provides:

> "No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> "(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press "Chairperson" into service). Even so, it is clear enough that the phrase is meant to apply to those who do the judging. The application reviewers must take into account "general standards of decency" and "respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and merit. One can regard this as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit. But either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications.

This is so apparent that I am at a loss to understand what the Court has in mind (other than the gutting of the statute) when it speculates that the statute is merely "advisory." *Ante*, at 581. General standards of decency and respect for Americans' beliefs and values *must* (for the statute says that the Chairperson "shall ensure" this result) be taken into account, see, *e. g.*, American Heritage Dictionary 402 (3d ed. 1992) ("consider . . . [t]o take into account; bear in mind"), in evaluating all applications. This does not mean that those factors must always be dispositive, but it *does* mean that they must always be considered. The method of compliance proposed by the National Endowment for the Arts (NEA)—selecting diverse review panels of artists and nonartists that reflect a wide range of geographic and cultural perspectives—is so obviously inadequate that it insults the intelligence. A diverse panel membership increases the odds that, *if and when* the panel takes the factors into account, it will reach an accurate assessment of what they demand. But it

in no way increases the odds that the panel *will* take the factors into consideration—much less *ensures* that the panel will do so, which is the Chairperson's duty under the statute. Moreover, the NEA's fanciful reading of § 954(d)(1) would make it wholly superfluous. Section 959(c) already requires the Chairperson to "issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting . . . diverse artistic and cultural points of view."

The statute requires the decency and respect factors to be considered in evaluating *all* applications—not, for example, just those applications relating to educational programs, *ante,* at 584, or intended for a particular audience, *ante,* at 585. Just as it would violate the statute to apply the artistic excellence and merit requirements to only select categories of applications, it would violate the statute to apply the decency and respect factors less than universally. A reviewer may, of course, give varying weight to the factors depending on the context, and in some categories of cases (such as the Court's example of funding for symphony orchestras, *ante,* at 583) the factors may rarely if ever affect the outcome; but § 954(d)(1) requires the factors to be considered in every case.

I agree with the Court that § 954(d)(1) "imposes no categorical requirement," *ante,* at 581, in the sense that it does not require the denial of all applications that violate general standards of decency or exhibit disrespect for the diverse beliefs and values of Americans. Cf. § 954(d)(2) ("[O]bscenity . . . shall not be funded"). But the factors need not be conclusive to be discriminatory. To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes. In other words, the presence of the "tak[e] into consideration" clause "cannot be regarded as mere surplusage; it means something," *Potter* v. *United*

States, 155 U. S. 438, 446 (1894). And the "something" is that the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not.

This unquestionably constitutes viewpoint discrimination.[1] That conclusion is not altered by the fact that the statute does not "compe[l]" the denial of funding, *ante*, at 581, any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of black applicants. If viewpoint discrimination in this context is unconstitutional (a point I shall address anon), the law is invalid unless there are some situations in which the decency and respect factors *do not constitute viewpoint discrimination.* And there is none. The applicant who displays "decency," that is, "[c]onformity to prevailing standards of propriety or modesty," American Heritage Dictionary, at 483 (def. 2), and the applicant who displays "respect," that is, "deferential regard," for the diverse beliefs and values of the American people, *id.*, at 1536 (def. 1), will *always* have an edge over an applicant who displays the opposite. And finally, the conclusion of viewpoint discrimination is not affected by the fact that what constitutes "'decency'" or "'the diverse values and beliefs of the American people'" is difficult to pin down, *ante*, at 583—any more than a civil service preference in favor of those who display "Republican-Party values" would be rendered nondiscriminatory by the fact that there is plenty of room for argument as to what Republican-Party values might be.

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[1] If there is any uncertainty on the point, it relates only to the adjective, which is not at issue in the current discussion. That is, one might argue that the decency and respect factors constitute *content* discrimination rather than *viewpoint* discrimination, which would render them easier to uphold. Since I believe this statute must be upheld in either event, I pass over this conundrum and assume the worst.

The "political context surrounding the adoption of the 'decency and respect' clause," which the Court discusses at some length, *ante*, at 581, does not change its meaning or affect its constitutionality. All that is proved by the various statements that the Court quotes from the Report of the Independent Commission and the floor debates is (1) that the provision was not meant categorically to exclude any particular viewpoint (which I have conceded, and which is plain from the text), and (2) that the language was not meant to do anything that is unconstitutional. That in no way propels the Court's leap to the countertextual conclusion that the provision was merely "aimed at reforming procedures," and cannot be "utilized as a tool for invidious viewpoint discrimination," *ante*, at 582. It is evident in the legislative history that § 954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano's "Piss Christ," the portrayal of a crucifix immersed in urine, and Mapplethorpe's show of lurid homoerotic photographs. Thus, even if one strays beyond the plain text it is perfectly clear that the statute was meant to disfavor—that is, to discriminate against—such productions. Not to ban their funding absolutely, to be sure (though as I shall discuss, that also would not have been unconstitutional), but to make their funding more difficult.

More fundamentally, of course, all this legislative history has no valid claim upon our attention at all. It is a virtual certainty that very few of the Members of Congress who voted for this language both (1) knew of, and (2) agreed with, the various statements that the Court has culled from the Report of the Independent Commission and the floor debate (probably conducted on an almost empty floor). And it is wholly irrelevant that the statute was a "bipartisan proposal introduced as a counterweight" to an alternative proposal that would directly restrict funding on the basis of viewpoint. See *ante*, at 581–582. We do not judge statutes as

if we are surveying the scene of an accident; each one is reviewed, not on the basis of how much worse it could have been, but on the basis of what it says. See *United States* v. *Estate of Romani*, 523 U. S. 519, 535 (1998) (SCALIA, J., concurring in part and concurring in judgment). It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, "The more we get together, the happier we'll be." It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). The law at issue in this case is to be found in the text of § 954(d)(1), which passed both Houses and was signed by the President, U. S. Const., Art. I, § 7. And that law unquestionably disfavors—discriminates against—indecency and disrespect for the diverse beliefs and values of the American people. I turn, then, to whether such viewpoint discrimination violates the Constitution.

II

WHAT THE STATUTE SAYS IS CONSTITUTIONAL

The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis. The First Amendment reads: "Congress shall make no law . . . *abridging* the freedom of speech." U. S. Const., Amdt. 1 (emphasis added). To abridge is "to contract, to diminish; to deprive of." T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). With the enactment of § 954(d)(1), Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as respondents remain

entirely free to *épater les bourgeois;*[2] they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures "'"aimed at the *suppression* of dangerous ideas."'" *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 550 (1983) (emphasis added) (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959), in turn quoting *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958)). "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 237 (1987) (SCALIA, J., dissenting).

One might contend, I suppose, that a threat of rejection by the only available source of free money would constitute coercion and hence "abridgment" within the meaning of the First Amendment. Cf. *Norwood* v. *Harrison*, 413 U. S. 455, 465 (1973). I would not agree with such a contention, which would make the NEA the mandatory patron of all art too

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[2] Which they do quite well. The *oeuvres d'art* for which the four individual plaintiffs in this case sought funding have been described as follows:

"Finley's controversial show, 'We Keep Our Victims Ready,' contains three segments. In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly Hughes' monologue 'World Without End' is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. John Fleck, in his stage performance 'Blessed Are All the Little Fishes,' confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance 'Some Golden States' from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols." Note, 48 Wash. & Lee L. Rev. 1545, 1546, n. 2 (1991) (citations omitted).

indecent, too disrespectful, or even too *kitsch* to attract private support. But even if one accepts the contention, it would have no application here. The NEA is far from the sole source of funding for art—even indecent, disrespectful, or just plain bad art. Accordingly, the Government may earmark NEA funds for projects it deems to be in the public interest without thereby abridging speech. *Regan* v. *Taxation with Representation of Wash.*, *supra*, at 549.

Section 954(d)(1) is no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program . . . ." *Rust* v. *Sullivan*, 500 U. S. 173, 193 (1991). As we noted in *Rust*, when Congress chose to establish the National Endowment for Democracy it was not constitutionally required to fund programs encouraging competing philosophies of government—an example of funding discrimination that cuts much closer than this one to the core of *political* speech which is the primary concern of the First Amendment. See *id.*, at 194. It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates—and is required by law to discriminate—in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, "Adams denounced all Frenchmen, but most especially 'schoolmasters, painters, poets, &C.' He warned Marshall that the fine arts were like germs that infected healthy constitutions." J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979). Surely the NEA itself is nothing less than an institutionalized discrimination against that point of view. Nonetheless, it is consti-

tutional, as is the congressional determination to favor decency and respect for beliefs and values over the opposite because such favoritism does not "abridge" anyone's freedom of speech.

Respondents, relying on *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995), argue that viewpoint-based discrimination is impermissible unless the government is the speaker or the government is "disburs-[ing] public funds to private entities to convey a governmental message." *Ibid.* It is impossible to imagine why that should be so; one would think that directly involving the government itself in the viewpoint discrimination (if it is unconstitutional) would make the situation even worse. Respondents are mistaken. It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).[3] None of this has anything to do with abridging anyone's speech. *Rosenberger*, as the Court explains, *ante*, at 586, found the view-

[3] I suppose it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party—but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party, and I do not think that that unconstitutionality has anything to do with the First Amendment.

point discrimination unconstitutional, not because funding of "private" speech was involved, but because the government had established a limited public forum—to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance.

The nub of the difference between me and the Court is that I regard the distinction between "abridging" speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. The Court, by contrast, seems to believe that the First Amendment, despite its words, has some ineffable effect upon funding, imposing constraints of an indeterminate nature which it announces (without troubling to enunciate any particular test) are not violated by the statute here—or, more accurately, are not violated by the quite different, emasculated statute that it imagines. "[T]he Government," it says, "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake," *ante*, at 587–588. The Government, *I* think, may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned.

Finally, what is true of the First Amendment is also true of the constitutional rule against vague legislation: it has no application to funding. Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government *regulation* of expressive conduct, see *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972), not government grant programs. In the former context, vagueness produces an abridgment of lawful speech; in the latter it produces, at worst, a waste of money. I cannot refrain from observing, however, that if the vagueness doctrine *were* applicable, the agency charged with making grants under a statutory standard of "artistic excellence"—and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of

a crucifix immersed in urine—would be of more dubious constitutional validity than the "decency" and "respect" limitations that respondents (who demand to be judged on the same strict standard of "artistic excellence") have the humorlessness to call too vague.

* * *

In its laudatory description of the accomplishments of the NEA, *ante,* at 574, the Court notes with satisfaction that "only a handful of the agency's roughly 100,000 awards have generated formal complaints," *ibid.* The Congress that felt it necessary to enact § 954(d)(1) evidently thought it much *more* noteworthy that *any* money exacted from American taxpayers had been used to produce a crucifix immersed in urine or a display of homoerotic photographs. It is no secret that the provision was prompted by, and directed at, the funding of such offensive productions. Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications. The Court's opinion today renders even that lesser step a nullity. For that reason, I concur only in the judgment.

JUSTICE SOUTER, dissenting.

The question here is whether the italicized segment of this statute is unconstitutional on its face: "[A]rtistic excellence and artistic merit are the criteria by which applications [for grants from the National Endowment for the Arts (NEA)] are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.*" 20 U. S. C. § 954(d) (emphasis added). It is.

The decency and respect proviso mandates viewpoint-based decisions in the disbursement of Government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the funda-

mental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. The Court's conclusions that the proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken. Nor may the question raised be answered in the Government's favor on the assumption that some constitutional applications of the statute are enough to satisfy the demand of facial constitutionality, leaving claims of the proviso's obvious invalidity to be dealt with later in response to challenges of specific applications of the discriminatory standards. This assumption is irreconcilable with our longstanding and sensible doctrine of facial overbreadth, applicable to claims brought under the First Amendment's speech clause. I respectfully dissent.

I

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas," *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972), which is to say that "[t]he principle of viewpoint neutrality . . . underlies the First Amendment," *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 505 (1984). Because this principle applies not only to affirmative suppression of speech, but also to disqualification for government favors, Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses. See, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (public university's student activities funds may not be disbursed on viewpoint-based terms); *Lamb's Chapel* v. *Center Moriches*

Union Free School Dist., 508 U. S. 384 (1993) (after-hours access to public school property may not be withheld on the basis of viewpoint); *Leathers* v. *Medlock*, 499 U. S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986) (government-mandated access to public utility's billing envelopes must not be viewpoint based); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

It goes without saying that artistic expression lies within this First Amendment protection. See, *e. g.*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded"); *Ward* v. *Rock Against Racism*, 491 U. S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *Kaplan* v. *California*, 413 U. S. 115, 119–120 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection"). The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political,[1] but simply on their expressive character, which

[1] Art "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501 (1952).

falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal" of governmental viewpoint neutrality. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994).

When called upon to vindicate this ideal, we characteristically begin by asking "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." *Ward* v. *Rock Against Racism*, *supra*, at 791 (citation omitted). The answer in this case is damning. One need do nothing more than read the text of the statute to conclude that Congress's purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. In the words of a cosponsor of the bill that enacted the proviso, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. 28624 (1990).[2] Another supporter of the bill observed that "the Endowment's support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens," behooving "Congress . . . to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again." *Id.*, at 28642. Indeed, if there were any question at all about what Congress had in

[2] There is, of course, nothing whatsoever unconstitutional about this view as a general matter. Congress has no obligation to support artistic enterprises that many people detest. The First Amendment speaks up only when Congress decides to participate in the Nation's artistic life by legal regulation, as it does through a subsidy scheme like the NEA. If Congress does choose to spend public funds in this manner, it may not discriminate by viewpoint in deciding who gets the money.

mind, a definitive answer comes in the succinctly accurate remark of the proviso's author, that the bill "add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account." *Id.*, at 28631.[3]

II

In the face of such clear legislative purpose, so plainly expressed, the Court has its work cut out for it in seeking a

[3] On the subject of legislative history and purpose, it is disturbing that the Court upholds § 954(d) in part because the statute was drafted in hope of avoiding constitutional objections, with some Members of Congress proclaiming its constitutionality on the congressional floor. See *ante*, at 581–582. Like the Court, I assume that many Members of Congress believed the bill to be constitutional. Indeed, Members of Congress must take an oath or affirmation to support the Constitution, see U. S. Const., Art. VI, cl. 3, and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands, see, *e. g.*, *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution"); *Yates* v. *United States*, 354 U. S. 298, 319 (1957). But courts cannot allow a legislature's conclusory belief in constitutionality, however sincere, to trump incontrovertible unconstitutionality, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

I recognize, as the court explains, *ante*, at 581, that the amendment adding the decency and respect proviso was a bipartisan counterweight to more severe alternatives, and that some Members of Congress may have voted for it simply because it seemed the least among various evils. See, *e. g.*, 136 Cong. Rec. 28670 (1990) ("I am not happy with all aspects of the Williams-Coleman substitute . . . . It . . . contains language concerning standards of decency that I find very troubling. But I applaud Mr. WILLIAMS for his efforts in achieving this compromise under very difficult circumstances . . . . I support the Williams-Coleman substitute"). Perhaps the proviso was the mildest alternative available, but that simply proves that the bipartisan push to reauthorize the NEA could succeed only by including at least some viewpoint-based limitations. An appreciation of alternatives does not alter the fact that Congress passed decency and respect restrictions, and it did so knowing and intending that those restrictions would prevent future controversies stemming from the NEA's funding of inflammatory art projects, by declaring the inflammatory to be disfavored for funding.

constitutional reading of the statute. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).

A

The Court says, first, that because the phrase "general standards of decency and respect for the diverse beliefs and values of the American public" is imprecise and capable of multiple interpretations, "the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Ante*, at 583. Unquestioned case law, however, is clearly to the contrary.

"Sexual expression which is indecent but not obscene is protected by the First Amendment," *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989), and except when protecting children from exposure to indecent material, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), the First Amendment has never been read to allow the government to rove around imposing general standards of decency, see, *e. g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997) (striking down on its face a statute that regulated "indecency" on the Internet). Because "the normal definition of 'indecent' . . . refers to nonconformance with accepted standards of morality," *FCC* v. *Pacifica Foundation*, *supra*, at 740, restrictions turning on decency, especially those couched in terms of "general standards of decency," are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores. The Government's contrary suggestion that the NEA's decency standards restrict only the "form, mode, or style" of artistic expression, not the underlying viewpoint or message, Brief for Petitioners 39–41, may be a tempting abstraction (and one not lacking in support, cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 83–84 (1983) (STEVENS, J., concurring in judgment)). But here it suffices to realize that "form, mode, or style" are not subject to ab-

straction from artistic viewpoint, and to quote from an opinion just two years old: "In artistic . . . settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 805 (1996) (KENNEDY, J., joined by GINSBURG, J., concurring) (citation and internal quotation marks omitted); see also *Cohen* v. *California*, 403 U. S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"). "[T]he inextricability of indecency from expression," *Denver Area Ed. Telecommunications Consortium*, *supra*, at 805, is beyond dispute in a certain amount of entirely lawful artistic enterprise. Starve the mode, starve the message.

Just as self-evidently, a statute disfavoring speech that fails to respect America's "diverse beliefs and values" is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace. Boiled down to its practical essence, the limitation obviously means that art that disrespects the ideology, opinions, or convictions of a significant segment of the American public is to be disfavored, whereas art that reinforces those values is not. After all, the whole point of the proviso was to make sure that works like Serrano's ostensibly blasphemous portrayal of Jesus would not be funded, see *supra*, at 603, while a reverent treatment, conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that. Cf. *Rosenberger*, 515 U. S., at 831 (a statute targeting a "prohibited perspective, not the general subject matter" of religion is viewpoint based); *United States* v. *Eichman*, 496 U. S. 310, 317 (1990) (striking down anti-flag-

burning statute because it impermissibly prohibited speech that was "disrespectful" of the flag). The fact that the statute disfavors art insufficiently respectful of America's "diverse" beliefs and values alters this conclusion not one whit: the First Amendment does not validate the ambition to disqualify many disrespectful viewpoints instead of merely one. See *Rosenberger*, *supra*, at 831–832.

B

Another alternative for avoiding unconstitutionality that the Court appears to regard with some favor is the Government's argument that the NEA may comply with § 954(d) merely by populating the advisory panels that analyze grant applications with members of diverse backgrounds. See *ante*, at 577, 581. Would that it were so easy; this asserted implementation of the law fails even to "reflec[t] a plausible construction of the plain language of the statute." *Rust* v. *Sullivan*, 500 U. S. 173, 184 (1991).

The Government notes that § 954(d) actually provides that "[i]n establishing . . . regulations and procedures, the Chairperson [of the NEA] shall ensure that (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." According to the Government, this language requires decency and respect to be considered not in judging applications, but in making regulations. If, then, the Chairperson takes decency and respect into consideration through regulations ensuring diverse panels, the statute is satisfied. But it would take a great act of will to find any plausibility in this reading. The reference to considering decency and respect occurs in the subparagraph speaking to the "criteria by which applications are judged," not in the preamble directing the Chairperson to adopt regulations; it is in judging applications that decency and respect are most obviously to be considered. It is no surprise, then, that the

Government's reading is directly contradicted by the legislative history. According to the provision's author, the decency and respect proviso "mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. 28672 (1990). Or, as the cosponsor of the bill put it, "the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.*, at 28624.

The Government offers a variant of this argument in suggesting that even if the NEA must take decency and respect into account in the active review of applications, it may satisfy the statute by doing so in an indirect way through the natural behavior of diversely constituted panels. This, indeed, has apparently been the position of the Chairperson of the NEA since shortly after the legislation was first passed. But the problems with this position are obvious. First, it defies the statute's plain language to suggest that the NEA complies with the law merely by allowing decency and respect to have their way through the subconscious inclinations of panel members. "[T]aking into consideration" is a conscious activity. See Webster's New International Dictionary 2570 (2d ed. 1949) (defining "take into consideration" as "[t]o make allowance in judging for"); *id.*, at 569 (defining "consideration" as the "[a]ct or process of considering; continuous and careful thought; examination; deliberation; attention"); *id.*, at 568 (defining "consider" as "to think on with care . . . to bear in mind"). Second, even assuming that diverse panel composition would produce a sufficient response to the proviso, that would merely mean that selection for decency and respect would occur derivatively through the inclinations of the panel members, instead of directly through the intentional application of the criteria; at the end of the day, the proviso would still serve its purpose to screen out offending artistic works, and it would still be unconstitutional. Finally, a less obvious but equally dispositive re-

sponse is that reading the statute as a mandate that may be satisfied merely by selecting diverse panels renders § 954(d)(1) essentially redundant of § 959(c), which provides that the review panels must comprise "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored. *Freytag* v. *Commissioner*, 501 U. S. 868, 877 (1991) (internal quotation marks omitted).

C

A third try at avoiding constitutional problems is the Court's disclaimer of any constitutional issue here because "[§] 954(d)(1) adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Ante*, at 580–581. Since "§ 954(d)(1) admonishes the NEA merely to take 'decency and respect' into consideration," *ante*, at 582, not to make funding decisions specifically on those grounds, the Court sees no constitutional difficulty.

That is not a fair reading. Just as the statute cannot be read as anything but viewpoint based, or as requiring nothing more than diverse review panels, it cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel, the National Council on the Arts, and the Chairperson have given some thought to the offending qualities and decided to underwrite them anyway. That, after all, is presumably just what prompted the congressional outrage in the first place, and there was nothing naive about the Representative who said he voted for the bill because it does "not tolerate wasting Federal funds for sexually explicit photographs [or] sacrilegious works." 136 Cong. Rec. 28676 (1990).

But even if I found the Court's view of "consideration" plausible, that would make no difference at all on the question of constitutionality. What if the statute required a panel to apply criteria "taking into consideration the centrality of Christianity to the American cultural experience," or "taking into consideration whether the artist is a communist," or "taking into consideration the political message conveyed by the art," or even "taking into consideration the superiority of the white race"? Would the Court hold these considerations facially constitutional, merely because the statute had no requirement to give them any particular, much less controlling, weight? I assume not. In such instances, the Court would hold that the First Amendment bars the government from considering viewpoint when it decides whether to subsidize private speech, and a statute that mandates the consideration of viewpoint is quite obviously unconstitutional. Cf. *Dawson* v. *Delaware*, 503 U. S. 159, 167 (1992) (holding that the First Amendment forbids reliance on a defendant's abstract beliefs at sentencing, even if they are considered as one factor among many); *Ozonoff* v. *Berzak*, 744 F. 2d 224, 233 (CA1 1984) (Breyer, J.) (holding that an Executive Order which provided that a person's political associations "*may* be considered" in determining security clearance violated the First Amendment). Section 954(d)(1) is just such a statute.

III

A second basic strand in the Court's treatment of today's question, see *ante*, at 585–587, and the heart of JUSTICE SCALIA's, see *ante*, at 595–599, in effect assume that whether or not the statute mandates viewpoint discrimination, there is no constitutional issue here because government art subsidies fall within a zone of activity free from First Amendment restraints. The Government calls attention to the roles of government-as-speaker and government-as-buyer, in which the government is of course entitled to engage in view-

point discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page;[4] and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third.[5]

The Government freely admits, however, that it neither speaks through the expression subsidized by the NEA,[6] nor buys anything for itself with its NEA grants. On the contrary, believing that "[t]he arts . . . reflect the high place accorded by the American people to the nation's rich cultural heritage," § 951(6), and that "[i]t is vital to a democracy . . . to provide financial assistance to its artists and the organizations that support their work," § 951(10), the Government acts as a patron, financially underwriting the production of art by private artists and impresarios for independent consumption. Accordingly, the Government would have us liberate government-as-patron from First Amendment strictures not by placing it squarely within the categories of government-as-buyer or government-as-speaker,

[4] See *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U. S. C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

[5] On proposing the Public Works Art Project (PWAP), the New Deal program that hired artists to decorate public buildings, President Roosevelt allegedly remarked: "I can't have a lot of young enthusiasts painting Lenin's head on the Justice Building." Quoted in Mankin, Federal Arts Patronage in the New Deal, in America's Commitment to Culture: Government and the Arts 77 (K. Mulcahy & M. Wyszomirski eds. 1995). He was buying, and was free to take his choice.

[6] Here, the "communicative element inherent in the very act of funding itself," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 892–893, n. 11 (1995) (SOUTER, J., dissenting), is an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art.

but by recognizing a new category by analogy to those accepted ones. The analogy is, however, a very poor fit, and this patronage falls embarrassingly on the wrong side of the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.

The division is reflected quite clearly in our precedents. Drawing on the notion of government-as-speaker, we held in *Rust* v. *Sullivan*, 500 U. S., at 194, that the Government was entitled to appropriate public funds for the promotion of particular choices among alternatives offered by health and social service providers (*e. g.*, family planning with, and without, resort to abortion). When the government promotes a particular governmental program, "it is entitled to define the limits of that program," and to dictate the viewpoint expressed by speakers who are paid to participate in it. *Ibid.*[7] But we added the important qualifying language that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.*, at 199. Indeed, outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas." *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 548 (1983) (internal quotation marks and brackets omitted); see also *Lamb's Chapel*, 508 U. S., at 394 (when the government subsidizes private speech, it may not "favor some viewpoints or ideas at the expense of others"); *Hannegan* v. *Esquire, Inc.*, 327

[7] In *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, *supra*, at 833 (citing *Rust*, *supra*, at 194).

U. S. 146, 149 (1946) (the Postmaster General may not deny subsidies to certain periodicals on the ground that they are "'morally improper and not for the public welfare and the public good'").

Our most thorough statement of these principles is found in the recent case of *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), which held that the University of Virginia could not discriminate on viewpoint in underwriting the speech of student-run publications. We recognized that the government may act on the basis of viewpoint "when the State is the speaker" or when the State "disburses public funds to private entities to convey a governmental message." *Id.*, at 833. But we explained that the government may not act on viewpoint when it "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.*, at 834. When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.

Rosenberger controls here. The NEA, like the student activities fund in *Rosenberger*, is a subsidy scheme created to encourage expression of a diversity of views from private speakers. Congress brought the NEA into being to help all Americans "achieve a better understanding of the past, a better analysis of the present, and a better view of the future." § 951(3). The NEA's purpose is to "support new ideas" and "to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry." §§ 951(10), (7); see also S. Rep. No. 300, 89th Cong., 1st Sess., 4 (1965) ("[T]he intent of this act should be the encouragement of free inquiry and expression"); H. R. Rep. No. 99–274, p. 13 (1985) (Committee Report accompanying bill to reauthorize and amend the NEA's governing statute) ("As the Preamble of the act directs, the Endowment['s] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free"). Given this

congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their "freedom of thought, imagination, and inquiry" to defying our tastes, our beliefs, or our values. It may not use the NEA's purse to "suppres[s] . . . dangerous ideas." *Regan* v. *Taxation with Representation of Wash.*, *supra*, at 548 (internal quotation marks omitted).

The Court says otherwise, claiming to distinguish *Rosenberger* on the ground that the student activities funds in that case were generally available to most applicants, whereas NEA funds are disbursed selectively and competitively to a choice few. *Ante*, at 586. But the Court in *Rosenberger* anticipated and specifically rejected just this distinction when it held in no uncertain terms that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 515 U. S., at 835.[8] Scarce money demands choices, of course, but choices "on some acceptable [viewpoint] neutral principle," like artistic excellence and artistic merit;[9] "nothing in our decision[s] in-

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[8] The Court's attempt to avoid *Rosenberger* by describing NEA funding in terms of competition, not scarcity, will not work. Competition implies scarcity, without which there is no exclusive prize to compete for; the Court's "competition" is merely a surrogate for "scarcity."

[9] While criteria of "artistic excellence and artistic merit" may raise intractable issues about the identification of artistic worth, and could no doubt be used covertly to filter out unwanted ideas, there is nothing inherently viewpoint discriminatory about such merit-based criteria. We have noted before that an esthetic government goal is perfectly legitimate. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508 (1981) (plurality opinion). Decency and respect, on the other hand, are inherently and facially viewpoint based, and serve no legitimate and permissible end. The Court's assertion that the mere fact that grants must be awarded according to artistic merit precludes "absolute neutrality" on the part of the

dicate[s] that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Ibid.;* see also *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 676 (1998) (scarcity of air time does not justify viewpoint-based exclusion of candidates from a debate on public television; neutral selection criteria must be employed). If the student activities fund at issue in *Rosenberger* had awarded competitive, merit-based grants to only 50%, or even 5%, of the applicants, on the basis of "journalistic merit taking into consideration the message of the newspaper," it is obvious beyond peradventure that the Court would not have come out differently, leaving the University free to refuse funding after considering a publication's Christian perspective.[10]

A word should be said, finally, about a proposed alternative to this failed analogy. As the Solicitor General put it

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NEA, *ante,* at 585, is therefore misdirected. It is not to the point that the Government necessarily makes choices among competing applications, or even that its judgments about artistic quality may be branded as subjective to some greater or lesser degree; the question here is whether the Government may apply patently viewpoint-based criteria in making those choices.

[10] JUSTICE SCALIA suggests that *Rosenberger* turned not on the distinction between government-as-speaker and government-as-facilitator-of-private-speech, but rather on the fact that "the government had established a limited public forum." *Ante,* at 599. Leaving aside the proper application of forum analysis to the NEA and its projects, I cannot agree that the holding of *Rosenberger* turned on characterizing its metaphorical forum as public in some degree. Like this case, *Rosenberger* involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even nonpublic ones, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.,* 473 U. S. 788, 806 (1985), where, by definition, the government has not made public property generally available to facilitate private speech, *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 46 (1983) (defining a nonpublic forum as "[p]ublic property which is not by tradition or designation a forum for public communication"). Accordingly, *Rosenberger*'s brief allusion to forum analysis was in no way determinative of the Court's holding.

at oral argument, "there is something unique . . . about the Government funding of the arts for First Amendment purposes." Tr. of Oral Arg. 27. However different the governmental patron may be from the governmental speaker or buyer, the argument goes, patronage is also singularly different from traditional regulation of speech, and the limitations placed on the latter would be out of place when applied to viewpoint discrimination in distributing patronage. To this, there are two answers. The first, again, is *Rosenberger*, which forecloses any claim that the NEA and the First Amendment issues that arise under it are somehow unique. But even if we had no *Rosenberger*, and even if I thought the NEA's program of patronage was truly singular, I would not hesitate to reject the Government's plea to recognize a new, categorical patronage exemption from the requirement of viewpoint neutrality. I would reject it for the simple reason that the Government has offered nothing to justify recognition of a new exempt category.

The question of who has the burden to justify a categorical exemption has never been explicitly addressed by this Court, despite our recognition of the speaker and buyer categories in the past. The answer is nonetheless obvious in a recent statement by the Court synthesizing a host of cases on viewpoint discrimination. "The First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991). Because it takes something to defeat a presumption, the burden is necessarily on the Government to justify a new exception to the fundamental rules that give life to the First Amendment. It is up to the Government to explain why a sphere of governmental participation in the arts (unique or not) should be treated as outside traditional First Amendment limits. The Government has not carried this burden here, or even squarely faced it.

IV

Although I, like the Court, recognize that "facial challenges to legislation are generally disfavored," *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 223 (1990), the proviso is the type of statute that most obviously lends itself to such an attack. The NEA does not offer a list of reasons when it denies a grant application, and an artist or exhibitor whose subject raises a hint of controversy can never know for sure whether the decency and respect criteria played a part in any decision by the NEA to deny funding. Hence, the most that we could hope for in waiting for an as-applied challenge would be (a) a plaintiff whose rejected proposal raised some risk of offense and was not aimed at exhibition in a forum in which decency and respect might serve as permissible selection criteria, or (b) a plaintiff who sought funding for a project that had been sanitized to avoid rejection. But no one has denied here that the institutional plaintiff, the National Association of Artists' Organizations (NAAO), has representative standing on behalf of some such potential plaintiffs. See App. 21–25 (declaration of NAAO's Executive Director, listing examples of the potentially objectionable works produced by several member organizations). We would therefore gain nothing at all by dismissing this case and requiring those individuals or groups to bring essentially the same suit, restyled as an as-applied challenge raising one of the possibilities just mentioned.

In entertaining this challenge, the Court finds § 954(d)(1) constitutional on its face in part because there are "a number of indisputably constitutional applications" for both the "decency" and the "respect" criteria, *ante*, at 584, and it is hard to imagine "how 'decency' or 'respect' would bear on grant applications in categories such as funding for symphony orchestras," *ante*, at 583. There are circumstances in which we have rejected facial challenges for similar reasons. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger

must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). But quite apart from any question that might be raised about that statement as a general rule,[11] it is beyond question, as the Court freely concedes, that it can have no application here, it being well settled that the general rule does not limit challenges brought under the First Amendment's speech clause.

There is an "exception to th[e] [capable-of-constitutional-application] rule recognized in our jurisprudence [for] facial challenge[s] based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (*i. e.*, facially invalid) if it is invalid in any of them." *Ada* v. *Guam Society of Obstetricians & Gynecologists*, 506 U. S. 1011, 1012 (1992) (SCALIA, J., dissenting from denial of certiorari);[12] see, *e. g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997) (striking down decency provision of Communications Decency Act as facially overbroad); *id.*, at 893–894 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (declining to apply the rule of *Salerno* because the plaintiffs' claim arose under the First Amendment); *Schad* v. *Mount Ephraim*, 452 U. S., at 66 ("Because appellants' claims are rooted in the First Amendment, they are entitled to . . . raise an overbreadth challenge") (internal quotation marks omitted); *Gooding* v. *Wilson*, 405 U. S. 518, 521–522 (1972).[13] Thus,

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[11] Cf., *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 895 (1992) (statute restricting abortion will be struck down if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion").

[12] We have, however, recognized that "the overbreadth doctrine does not apply to commercial speech." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 497 (1982).

[13] Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since

we have routinely understood the overbreadth doctrine to apply where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech. See, *e. g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 759 (1988) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers"); *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992) (applying overbreadth doctrine to invalidate on its face an ordinance allowing for content-based discrimination in the awarding of parade permits).

To be sure, such a "facial challenge will not succeed unless the statute is 'substantially' overbroad," *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11 (1988), by which we mean that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications," *New York* v. *Ferber*, 458 U. S. 747, 771 (1982). But that is no impediment to invalidation here. The Court speculates that the "decency" criterion might permissibly be applied to applications seeking to create or display art in schools[14] or children's museums, whereas the "respect" criterion might permissibly be applied to applications

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we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment").

[14] In placing such emphasis on the potential applicability of the decency criterion to educational programs, the Court neglects to point out the existence of § 954a, entitled "[a]ccess to the arts through support of education," which is concerned specifically with funding for arts education, especially in elementary and secondary schools. It seems that the NEA's "mission" to promote arts education, *ante*, at 584, is carried out primarily through § 954a, not § 954. While the decency standard might be constitutionally permissible when applied to applications for grants under § 954a, that standard does not appear to be relevant to such applications at all; the decency and respect provision appears in § 954(d), which governs grant applications under § 954, not under § 954a.

seeking to create art that celebrates a minority, tribal, rural, or inner-city culture. But even so, this is certainly a case in which the challenged statute "reaches a substantial number of impermissible applications," not one in which the statute's "legitimate reach dwarfs its arguably impermissible applications." *Id.*, at 771, 773. On the contrary, nothing in the record suggests that the grant scheme administered under the broad authorization of the NEA's governing statute, see §§ 951, 954(c), devotes an overwhelming proportion of its resources to schools and ethnic commemoration. Since the decency and respect criteria may not be employed in the very many instances in which the art seeking a subsidy is neither aimed at children nor meant to celebrate a particular culture, the statute is facially overbroad. Cf. *City of Lakewood*, *supra*, at 766 ("[I]n a host of . . . First Amendment cases we have . . . considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue"). Accordingly, the Court's observation that there are a handful of permissible applications of the decency and respect proviso, even if true, is irrelevant.[15]

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[15] The Court seemingly concedes that these isolated constitutional applications are in fact of little matter. For after speaking of specific applications that may be valid, the Court goes on to admit that these "would not alone be sufficient to sustain the statute." *Ante*, at 585. The Court nonetheless upholds the statute because it is not "persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression." *Ibid.* This conclusion appears to rest on some combination of (a) the Court's competition rationale as distinguishing *Rosenberger* and justifying the discrimination, (b) the Court's reading of the decency and respect proviso as something other than viewpoint based, and (c) the Court's treatment of "taking into consideration" as establishing no firm mandate subject to constitutional scrutiny. As already explained,

The Government takes a different tack, arguing that overbreadth analysis is out of place in this case because the "prospect for 'chilling' expressive conduct," which forms the basis for the overbreadth doctrine, see, *e. g.*, *Massachusetts* v. *Oakes*, 491 U. S. 576, 584 (1989) (plurality opinion of O'CONNOR, J.), "is not present here." Brief for Petitioners 20–21, n. 5. But that is simply wrong. We have explained before that the prospect of a denial of government funding necessarily carries with it the potential to "chil[l] . . . individual thought and expression." *Rosenberger*, 515 U. S., at 835. In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether. Either way, to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic. And either way, the proviso's viewpoint discrimination will "chill the expressive activity of [persons] not before the court." *Forsyth County*, *supra*, at 129. See App. 22–24 (declaration of Charlotte Murphy, Executive Director of respondent NAAO) (recounting how some NAAO members have not applied for NEA grants for fear that their work would be found indecent or disrespectful, while others have applied but were "chilled in their applications and in the scope of their projects" by the decency and respect provision). Indeed, because NEA grants are often matched by funds from private donors, the constraining impact of § 954(d)(1) is significantly magnified:

> "[T]he chilling effect caused by [the NEA's viewpoint-based selection criteria] is exacerbated by the practical realities of funding in the artistic community. Plainly stated, the NEA occupies a dominant and influential role in the financial affairs of the art world in the United

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however, fair reading of the text and attention to case law foreclose reliance on any, let alone all, of these arguments.

> States. Because the NEA provides much of its support with conditions that require matching or co-funding from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors. . . . [In addition,] most non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources. Grant applicants rely on the NEA well beyond the dollar value of any particular grant." *Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774, 783 (CD Cal. 1991) (footnote and internal quotation marks omitted).[16]

Since the decency and respect proviso of § 954(d)(1) is substantially overbroad and carries with it a significant power to chill artistic production and display, it should be struck down on its face.[17]

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[16] See also, *e. g.*, 131 Cong. Rec. 24808 (1985) ("[S]upport from the Endowmen[t] has always represented a 'Good Housekeeping Seal' of approval which has helped grantees generate non-Federal dollars for projects and productions").

[17] I agree with the Court that § 954(d) is not unconstitutionally vague. Any chilling that results from imprecision in the drafting of standards (such as "artistic excellence and artistic merit") by which the Government awards scarce grants and scholarships is an inevitable and permissible consequence of distributing prizes on the basis of criteria dealing with a subject that defies exactness. The necessary imprecision of artistic-merit-based criteria justifies tolerating a degree of vagueness that might be intolerable when applying the First Amendment to attempts to regulate political discussion. Cf. *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 694–695 (1998) (STEVENS, J., dissenting). My problem is not with the chilling that may naturally result from necessarily open standards; it is with the unacceptable chilling of "dangerous ideas," *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958), that naturally results from explicitly viewpoint-based standards.

V

The Court does not strike down the proviso, however. Instead, it preserves the irony of a statutory mandate to deny recognition to virtually any expression capable of causing offense in any quarter as the most recent manifestation of a scheme enacted to "create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry." § 951(7).

Syllabus

BRAGDON *v.* ABBOTT ET AL.

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

No. 97–156. Argued March 30, 1998—Decided June 25, 1998

Respondent Abbott is infected with the human immunodeficiency virus (HIV), but had not manifested its most serious symptoms when the incidents in question occurred. At that time, she went to petitioner's office for a dental examination and disclosed her HIV infection. Petitioner discovered a cavity and informed respondent of his policy against filling cavities of HIV-infected patients in his office. He offered to perform the work at a hospital at no extra charge, though respondent would have to pay for use of the hospital's facilities. She declined and filed suit under, *inter alia*, the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against any individual "on the basis of disability in the . . . enjoyment of the . . . services . . . of any place of public accommodation by any person who . . . operates [such] a place," 42 U. S. C. § 12182(a), but qualifies the prohibition by providing: "Nothing [herein] shall require an entity to permit an individual to participate in or benefit from the . . . accommodations of such entity where such individual poses a direct threat to the health or safety of others," § 12182(b)(3). The District Court granted respondent summary judgment. The First Circuit affirmed, agreeing with the lower court that respondent's HIV was a disability under the ADA even though her infection had not yet progressed to the symptomatic stage, and that treating her in petitioner's office would not have posed a direct threat to the health and safety of others. In making the latter ruling, the court relied on the 1993 Dentistry Guidelines of the Centers for Disease Control and Prevention (CDC) and on the 1991 American Dental Association Policy on HIV.

Held:

1. Even though respondent's HIV infection had not progressed to the so-called symptomatic phase, it was a "disability" under § 12102(2)(A), that is, "a physical . . . impairment that substantially limits one or more of [an individual's] major life activities." Pp. 630–647.

(a) The ADA definition is drawn almost verbatim from definitions applicable to § 504 of the Rehabilitation Act of 1973 and another federal statute. Because the ADA expressly provides that "nothing [herein] shall be construed to apply a lesser standard than . . . under . . . the Rehabilitation Act . . . or the regulations issued . . . pursuant to [it],"

§ 12201(a), this Court must construe the ADA to grant at least as much protection as the regulations implementing the Rehabilitation Act. Pp. 631–632.

(b) From the moment of infection and throughout every stage of the disease, HIV infection satisfies the statutory and regulatory definition of a "physical impairment." Applicable Rehabilitation Act regulations define "physical or mental impairment" to mean "any physiological disorder or condition . . . affecting . . . the . . . body['s] . . . hemic and lymphatic [systems]." HIV infection falls well within that definition. The medical literature reveals that the disease follows a predictable and unalterable course from infection to inevitable death. It causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even during the intermediate stage when its attack is concentrated in the lymph nodes. Thus, HIV infection must be regarded as a physiological disorder with an immediate, constant, and detrimental effect on the hemic and lymphatic systems. Pp. 632–637.

(c) The life activity upon which respondent relies, her ability to reproduce and to bear children, constitutes a "major life activity" under the ADA. The plain meaning of the word "major" denotes comparative importance and suggests that the touchstone is an activity's significance. Reproduction and the sexual dynamics surrounding it are central to the life process itself. Petitioner's claim that Congress intended the ADA only to cover those aspects of a person's life that have a public, economic, or daily character founders on the statutory language. Nothing in the definition suggests that activities without such a dimension may somehow be regarded as so unimportant or insignificant as not to be "major." This interpretation is confirmed by the Rehabilitation Act regulations, which provide an illustrative, nonexhaustive list of major life activities. Inclusion on that list of activities such as caring for one's self, performing manual tasks, working, and learning belies the suggestion that a task must have a public or economic character. On the contrary, the regulations support the inclusion of reproduction, which could not be regarded as any less important than working and learning. Pp. 637–639.

(d) Respondent's HIV infection "substantially limits" her major life activity within the ADA's meaning. Although the Rehabilitation Act regulations provide little guidance in this regard, the Court's evaluation of the medical evidence demonstrates that an HIV-infected woman's ability to reproduce is substantially limited in two independent ways: If she tries to conceive a child, (1) she imposes on her male partner a statistically significant risk of becoming infected; and (2) she risks infecting her child during gestation and childbirth, *i. e.*, perinatal trans-

mission. Evidence suggesting that antiretroviral therapy can lower the risk of perinatal transmission to about 8%, even if relevant, does not avail petitioner because it cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and treated. Some state laws, moreover, forbid HIV-infected persons to have sex with others, regardless of consent. In the context of reviewing summary judgment, the Court must take as true respondent's unchallenged testimony that her HIV infection controlled her decision not to have a child. Pp. 639–642.

(e) The uniform body of administrative and judicial precedent interpreting similar language in the Rehabilitation Act confirms the Court's holding. Every agency and court to consider the issue under the Rehabilitation Act has found statutory coverage for persons with asymptomatic HIV. The uniformity of that precedent is significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress' intent to incorporate such interpretations as well. See, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 580–581. Pp. 642–645.

(f) The Court's holding is further reinforced by the guidance issued by the Justice Department and other agencies authorized to administer the ADA, which supports the conclusion that persons with asymptomatic HIV fall within the ADA's definition of disability. The views of agencies charged with implementing a statute are entitled to deference. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844. Pp. 646–647.

2. In affirming the summary judgment, the First Circuit did not cite sufficient material in the record to determine, as a matter of law, that respondent's HIV infection posed no direct threat to the health and safety of others. The ADA's direct threat provision, § 12182(b)(3), stems from *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 287, in which this Court reconciled competing interests in prohibiting discrimination and preventing the spread of disease by construing the Rehabilitation Act not to require the hiring of a person who posed "a significant risk of communicating an infectious disease to others," *id.*, at 287, and n. 16. The existence of a significant risk is determined from the standpoint of the health care professional who refuses treatment or accommodation, and the risk assessment is based on the medical or other objec-

Syllabus

tive, scientific evidence available to him and his profession, not simply on his good-faith belief that a significant risk existed. See *id.*, at 288; *id.*, at 288, n. 18, distinguished. For the most part, the First Circuit followed the proper standard and conducted a thorough review of the evidence. However, it might have mistakenly relied on the 1993 CDC Dentistry Guidelines, which recommend certain universal precautions to combat the risk of HIV transmission in the dental environment, but do not actually assess the level of such risk, and on the 1991 American Dental Association Policy on HIV, which is the work of a professional organization, not a public health authority, and which does not reveal the extent to which it was based on the Association's assessment of dentists' ethical and professional duties, rather than scientific assessments. Other evidence in the record might support affirmance of the trial court's ruling, and there are reasons to doubt whether petitioner advanced evidence sufficient to raise a triable issue of fact on the significance of the risk, but this Court's evaluation is constrained by the fact that it has not had briefs and arguments directed to the entire record. A remand will permit a full exploration of the issues through the adversary process. Pp. 648–655.

107 F. 3d 934, affirmed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined, *post,* p. 655. GINSBURG, J., filed a concurring opinion, *post,* p. 656. REHNQUIST, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, and in Part II of which O'CONNOR, J., joined, *post,* p. 657. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 664.

John W. McCarthy argued the cause for petitioner. With him on the briefs was *Brent A. Singer.*

Bennett H. Klein argued the cause for respondents. With him on the brief for respondent Abbott was *Wendy E. Parmet. John E. Carnes* filed a brief for respondent Maine Human Rights Commission.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman, Act-*

ing Assistant Attorney General Lee, James A. Feldman, Jessica Dunsay Silver, and *Thomas E. Chandler.**

JUSTICE KENNEDY delivered the opinion of the Court.

We address in this case the application of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. § 12101 *et seq.*, to persons infected with the human immunodeficiency virus (HIV). We granted certiorari to review, first, whether HIV infection is a disability under the ADA when the infection has not yet progressed to the so-called symptomatic phase; and, second, whether the Court of Appeals, in affirming a grant of summary judgment, cited sufficient material in the record to determine, as a matter of law, that respondent's infection with HIV posed no direct threat to the health and safety of her treating dentist. 522 U. S. 991 (1997).

I

Respondent Sidney Abbott (hereinafter respondent) has been infected with HIV since 1986. When the incidents we recite occurred, her infection had not manifested its most serious symptoms. On September 16, 1994, she went to the office of petitioner Randon Bragdon in Bangor, Maine, for a dental appointment. She disclosed her HIV infection on the

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**Ann Elizabeth Reesman* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of Los Angeles by *James K. Hahn* and *David I. Schulman;* for the AIDS Action Council et al. by *Chai R. Feldblum, Steven R. Shapiro, Matthew Coles,* and *Robert A. Long, Jr.;* for the American Medical Association by *Carter G. Phillips, Mark E. Haddad, Jack R. Bierig, Michael L. Ile,* and *Leonard A. Nelson;* for the Elizabeth Glaser Pediatric AIDS Foundation by *Lynn E. Cunningham;* for the Infectious Diseases Society of America et al. by *Catherine A. Hanssens, Heather C. Sawyer, Beatrice Dohrn, Daniel Bruner, Elizabeth A. Seaton,* and *Laura M. Flegel;* and for Senator Harkin et al. by *Arlene Mayerson.*

Peter M. Sfikas filed a brief for the American Dental Association as *amicus curiae.*

patient registration form. Petitioner completed a dental examination, discovered a cavity, and informed respondent of his policy against filling cavities of HIV-infected patients. He offered to perform the work at a hospital with no added fee for his services, though respondent would be responsible for the cost of using the hospital's facilities. Respondent declined.

Respondent sued petitioner under state law and § 302 of the ADA, 104 Stat. 355, 42 U. S. C. § 12182, alleging discrimination on the basis of her disability. The state-law claims are not before us. Section 302 of the ADA provides:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." § 12182(a).

The term "public accommodation" is defined to include the "professional office of a health care provider." § 12181(7)(F).

A later subsection qualifies the mandate not to discriminate. It provides:

> "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." § 12182(b)(3).

The United States and the Maine Human Rights Commission intervened as plaintiffs. After discovery, the parties filed cross-motions for summary judgment. The District Court ruled in favor of the plaintiffs, holding that respondent's HIV infection satisfied the ADA's definition of disability. 912 F. Supp. 580, 585–587 (Me. 1995). The court held further that petitioner raised no genuine issue of material fact as to whether respondent's HIV infection would have

posed a direct threat to the health or safety of others during the course of a dental treatment. *Id.*, at 587–591. The court relied on affidavits submitted by Dr. Donald Wayne Marianos, Director of the Division of Oral Health of the Centers for Disease Control and Prevention (CDC). The Marianos affidavits asserted it is safe for dentists to treat patients infected with HIV in dental offices if the dentist follows the so-called universal precautions described in the Recommended Infection-Control Practices for Dentistry issued by CDC in 1993 (1993 CDC Dentistry Guidelines). 912 F. Supp., at 589.

The Court of Appeals affirmed. It held respondent's HIV infection was a disability under the ADA, even though her infection had not yet progressed to the symptomatic stage. 107 F. 3d 934, 939–943 (CA1 1997). The Court of Appeals also agreed that treating the respondent in petitioner's office would not have posed a direct threat to the health and safety of others. *Id.*, at 943–948. Unlike the District Court, however, the Court of Appeals declined to rely on the Marianos affidavits. *Id.*, at 946, n. 7. Instead the court relied on the 1993 CDC Dentistry Guidelines, as well as the Policy on AIDS, HIV Infection and the Practice of Dentistry, promulgated by the American Dental Association in 1991 (1991 American Dental Association Policy on HIV). 107 F. 3d, at 945–946.

II

We first review the ruling that respondent's HIV infection constituted a disability under the ADA. The statute defines disability as:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." § 12102(2).

We hold respondent's HIV infection was a disability under subsection (A) of the definitional section of the statute. In light of this conclusion, we need not consider the applicability of subsections (B) or (C).

Our consideration of subsection (A) of the definition proceeds in three steps. First, we consider whether respondent's HIV infection was a physical impairment. Second, we identify the life activity upon which respondent relies (reproduction and childbearing) and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. In construing the statute, we are informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question.

A

The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 29 U. S. C. § 706(8)(B) (1988 ed.), and the definition of "handicap" contained in the Fair Housing Amendments Act of 1988, 102 Stat. 1619, 42 U. S. C. § 3602(h)(1) (1988 ed.). Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. See *FDIC* v. *Philadelphia Gear Corp.*, 476 U. S. 426, 437–438 (1986); *Commissioner* v. *Estate of Noel*, 380 U. S. 678, 681–682 (1965); *ICC* v. *Parker*, 326 U. S. 60, 65 (1945). In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:

> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the

> Rehabilitation Act of 1973 (29 U. S. C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U. S. C. § 12201(a).

The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

1

The first step in the inquiry under subsection (A) requires us to determine whether respondent's condition constituted a physical impairment. The Department of Health, Education and Welfare (HEW) issued the first regulations interpreting the Rehabilitation Act in 1977. The regulations are of particular significance because, at the time, HEW was the agency responsible for coordinating the implementation and enforcement of § 504 of that statute. *Consolidated Rail Corporation* v. *Darrone,* 465 U. S. 624, 634 (1984) (citing Exec. Order No. 11914, 3 CFR 117 (1976–1980 Comp.)). Section 504 prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. 29 U. S. C. § 794. The HEW regulations, which appear without change in the current regulations issued by the Department of Health and Human Services, define "physical or mental impairment" to mean:

> "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> "(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 CFR § 84.3(j)(2)(i) (1997).

In issuing these regulations, HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive. 42 Fed. Reg. 22685 (1977), reprinted in 45 CFR pt. 84, App. A, p. 334 (1997). The commentary accompanying the regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." *Ibid.*

In 1980, the President transferred responsibility for the implementation and enforcement of § 504 to the Attorney General. See, *e. g.*, Exec. Order No. 12250, 3 CFR 298 (1981). The regulations issued by the Justice Department, which remain in force to this day, adopted verbatim the HEW definition of physical impairment quoted above. 28 CFR § 41.31(b)(1) (1997). In addition, the representative list of diseases and conditions originally relegated to the commentary accompanying the HEW regulations were incorporated into the text of the regulations. *Ibid.*

HIV infection is not included in the list of specific disorders constituting physical impairments, in part because HIV was not identified as the cause of AIDS until 1983. See Barré-Sinoussi et al., Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS), 220 Science 868 (1983); Gallo et al., Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV–III) from Patients with AIDS and at Risk for AIDS, 224 Science 500 (1984); Levy et al., Isolation of Lymphocytopathic Retroviruses from San Francisco Patients with AIDS, 225 Science 840 (1984). HIV infection does fall well within the general definition set forth by the regulations, however.

The disease follows a predictable and, as of today, an unalterable course. Once a person is infected with HIV, the

virus invades different cells in the blood and in body tissues. Certain white blood cells, known as helper T-lymphocytes or CD4+ cells, are particularly vulnerable to HIV. The virus attaches to the CD4 receptor site of the target cell and fuses its membrane to the cell's membrane. HIV is a retrovirus, which means it uses an enzyme to convert its own genetic material into a form indistinguishable from the genetic material of the target cell. The virus' genetic material migrates to the cell's nucleus and becomes integrated with the cell's chromosomes. Once integrated, the virus can use the cell's own genetic machinery to replicate itself. Additional copies of the virus are released into the body and infect other cells in turn. Young, The Replication Cycle of HIV–1, in The AIDS Knowledge Base, pp. 3.1–2 to 3.1–7 (P. Cohen, M. Sande, & P. Volberding eds., 2d ed. 1994) (hereinafter AIDS Knowledge Base); Folks & Hart, The Life Cycle of Human Immunodeficiency Virus Type 1, in AIDS: Etiology, Diagnosis, Treatment and Prevention 29–39 (V. DeVita et al. eds., 4th ed. 1997) (hereinafter AIDS: Etiology); Greene, Molecular Insights into HIV–1 Infection, in The Medical Management of AIDS 18–24 (M. Sande & P. Volberding eds., 5th ed. 1997) (hereinafter Medical Management of AIDS). Although the body does produce antibodies to combat HIV infection, the antibodies are not effective in eliminating the virus. Pantaleo et al., Immunopathogenesis of Human Immunodeficiency Virus Infection, in AIDS: Etiology 79; Gardner, HIV Vaccine Development, in AIDS Knowledge Base 3.6–5; Haynes, Immune Responses to Human Immunodeficiency Virus Infection, in AIDS: Etiology 91.

The virus eventually kills the infected host cell. CD4+ cells play a critical role in coordinating the body's immune response system, and the decline in their number causes corresponding deterioration of the body's ability to fight infections from many sources. Tracking the infected individual's CD4+ cell count is one of the most accurate measures of the course of the disease. Greene, Medical Management of

AIDS 19, 24. Osmond, Classification and Staging of HIV Disease, in AIDS Knowledge Base 1.1–8; Saag, Clinical Spectrum of Human Immunodeficiency Virus Diseases, in AIDS: Etiology 204.

The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks; circulating HIV can be detected within 10 weeks. Carr & Cooper, Primary HIV Infection, in Medical Management of AIDS 89–91; Cohen & Volberding, Clinical Spectrum of HIV Disease, in AIDS Knowledge Base 4.1–7; Crowe & McGrath, Acute HIV Infection, in AIDS Knowledge Base 4.2–1 to 4.2–4; Saag, AIDS: Etiology 204–205.

After the symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections. Although it varies with each individual, in most instances this stage lasts from 7 to 11 years. The virus now tends to concentrate in the lymph nodes, though low levels of the virus continue to appear in the blood. Cohen & Volberding, AIDS Knowledge Base 4.1–4, 4.1–8; Saag, AIDS: Etiology 205–206; Staprans & Feinberg, Natural History and Immunopathogenesis of HIV–1 Disease, in Medical Management of AIDS 29, 38. It was once

thought the virus became inactive during this period, but it is now known that the relative lack of symptoms is attributable to the virus' migration from the circulatory system into the lymph nodes. Cohen & Volberding, AIDS Knowledge Base 4.1–4. The migration reduces the viral presence in other parts of the body, with a corresponding diminution in physical manifestations of the disease. The virus, however, thrives in the lymph nodes, which, as a vital point of the body's immune response system, represents an ideal environment for the infection of other CD4+ cells. Staprans & Feinberg, Medical Management of AIDS 33–34. Studies have shown that viral production continues at a high rate. Cohen & Volberding, AIDS Knowledge Base 4.1–4; Staprans & Feinberg, Medical Management of AIDS 38. CD4+ cells continue to decline an average of 5% to 10% (40 to 80 cells/mm3) per year throughout this phase. Saag, AIDS: Etiology 207.

A person is regarded as having AIDS when his or her CD4+ count drops below 200 cells/mm3 of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes. U. S. Dept. of Health and Human Services, Public Health Service, CDC, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 Morbidity and Mortality Weekly Rep., No. RR–17 (Dec. 18, 1992); Osmond, AIDS Knowledge Base 1.1–2; Saag, AIDS: Etiology 207; Ward, Petersen, & Jaffe, Current Trends in the Epidemiology of HIV/AIDS, in Medical Management of AIDS 3. During this stage, the clinical conditions most often associated with HIV, such as *pneumocystis carninii* pneumonia, Kaposi's sarcoma, and non-Hodgkins lymphoma, tend to appear. In addition, the general systemic disorders present during all stages of the disease, such as fever, weight loss, fatigue, lesions, nausea, and diarrhea, tend to worsen. In most cases, once the patient's CD4+ count drops below 10

cells/mm3, death soon follows. Cohen & Volberding, AIDS Knowledge Base 4.1–9; Saag, AIDS: Etiology 207–209.

In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.

2

The statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity. Respondent's claim throughout this case has been that the HIV infection placed a substantial limitation on her ability to reproduce and to bear children. App. 14; 912 F. Supp., at 586; 107 F. 3d, at 939. Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of *amici* make arguments about HIV's profound impact on almost every phase of the infected person's life. See Brief for Respondent Abbott 24–27; Brief for American Medical Association as *Amicus Curiae* 20; Brief for Infectious Diseases Society of America et al. as *Amici Curiae* 7–11. In light of these submissions, it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.

From the outset, however, the case has been treated as one in which reproduction was the major life activity limited by the impairment. It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari. See, *e. g.*, *Blessing* v. *Freestone*, 520 U. S. 329, 340, n. 3 (1997) (citing this Court's Rule 14.1(a)); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 760 (1995). We ask, then, whether reproduction is a major life activity.

We have little difficulty concluding that it is. As the Court of Appeals held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 107 F. 3d, at 939, 940. Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

While petitioner concedes the importance of reproduction, he claims that Congress intended the ADA only to cover those aspects of a person's life which have a public, economic, or daily character. Brief for Petitioner 14, 28, 30, 31; see also *id.*, at 36–37 (citing *Krauel* v. *Iowa Methodist Medical Center*, 95 F. 3d 674, 677 (CA8 1996)). The argument founders on the statutory language. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word "major." The breadth of the term confounds the attempt to limit its construction in this manner.

As we have noted, the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act. See 42 U. S. C. § 12201(a). Rather than enunciating a general principle for determining what is and is not a major life activity, the Rehabilitation Act regulations instead provide a representative list, defining the term to include "functions such as caring for one's self, performing manual

tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 CFR §84.3(j)(2)(ii) (1997); 28 CFR §41.31(b)(2) (1997). As the use of the term "such as" confirms, the list is illustrative, not exhaustive.

These regulations are contrary to petitioner's attempt to limit the meaning of the term "major" to public activities. The inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA. On the contrary, the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning. Petitioner advances no credible basis for confining major life activities to those with a public, economic, or daily aspect. In the absence of any reason to reach a contrary conclusion, we agree with the Court of Appeals' determination that reproduction is a major life activity for the purposes of the ADA.

3

The final element of the disability definition in subsection (A) is whether respondent's physical impairment was a substantial limit on the major life activity she asserts. The Rehabilitation Act regulations provide no additional guidance. 45 CFR pt. 84, App. A, p. 334 (1997).

Our evaluation of the medical evidence leads us to conclude that respondent's infection substantially limited her ability to reproduce in two independent ways. First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected. The cumulative results of 13 studies collected in a 1994 textbook on AIDS indicates that 20% of male partners of women with HIV became HIV-positive themselves, with a majority of the studies finding a statistically significant risk of infection. Osmond & Padian, Sexual Transmission of HIV, in AIDS

Knowledge Base 1.9–8, and tbl. 2; see also Haverkos & Battjes, Female-to-Male Transmission of HIV, 268 JAMA 1855, 1856, tbl. (1992) (cumulative results of 16 studies indicated 25% risk of female-to-male transmission). (Studies report a similar, if not more severe, risk of male-to-female transmission. See, *e. g.*, Osmond & Padian, AIDS Knowledge Base 1.9–3, tbl. 1, 1.9–6 to 1.9–7.)

Second, an infected woman risks infecting her child during gestation and childbirth, *i. e.*, perinatal transmission. Petitioner concedes that women infected with HIV face about a 25% risk of transmitting the virus to their children. 107 F. 3d, at 942; 912 F. Supp., at 587, n. 6. Published reports available in 1994 confirm the accuracy of this statistic. Report of a Consensus Workshop, Maternal Factors Involved in Mother-to-Child Transmission of HIV–1, 5 J. Acquired Immune Deficiency Syndromes 1019, 1020 (1992) (collecting 13 studies placing risk between 14% and 40%, with most studies falling within the 25% to 30% range); Connor et al., Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment, 331 New England J. Med. 1173, 1176 (1994) (placing risk at 25.5%); see also Staprans & Feinberg, Medical Management of AIDS 32 (studies report 13% to 45% risk of infection, with average of approximately 25%).

Petitioner points to evidence in the record suggesting that antiretroviral therapy can lower the risk of perinatal transmission to about 8%. App. 53; see also Connor, *supra*, at 1176 (8.3%); Sperling et al., Maternal Viral Load, Zidovudine Treatment, and the Risk of Transmission of Human Immunodeficiency Virus Type 1 from Mother to Infant, 335 New England J. Med. 1621, 1622 (1996) (7.6%). The United States questions the relevance of the 8% figure, pointing to regulatory language requiring the substantiality of a limitation to be assessed without regard to available mitigating measures. Brief for United States as *Amicus Curiae* 18, n. 10 (citing 28 CFR pt. 36, App. B, p. 611 (1997); 29 CFR pt.

1630, App., p. 351 (1997)). We need not resolve this dispute in order to decide this case, however. It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction.

The Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection. The laws of some States, moreover, forbid persons infected with HIV to have sex with others, regardless of consent. Iowa Code §§ 139.1, 139.31 (1997); Md. Health Code Ann. § 18–601.1(a) (1994); Mont. Code Ann. §§ 50–18–101, 50–18–112 (1997); Utah Code Ann. § 26–6–3.5(3) (Supp. 1997); *id.*, § 26–6–5 (1995); Wash. Rev. Code § 9A.36.011(1)(b) (Supp. 1998); see also N. D. Cent. Code § 12.1–20–17 (1997).

In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable. For the statistical and other reasons we have cited, of course, the limitations on reproduction may be insurmountable here. Testimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged. App. 14; 912 F. Supp., at 587; 107 F. 3d, at 942. In the context of reviewing summary judgment, we must take it to be true. Fed. Rule Civ. Proc. 56(e). We agree with the District Court and the Court of Appeals that no triable issue of fact impedes a ruling on the question of statutory coverage. Respondent's HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it. In view of our holding, we

need not address the second question presented, *i. e.*, whether HIV infection is a *per se* disability under the ADA.

B

Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. Every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV. Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944).

One comprehensive and significant administrative precedent is a 1988 opinion issued by the Office of Legal Counsel of the Department of Justice (OLC) concluding that the Rehabilitation Act "protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program." Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264–265 (Sept. 27, 1988) (preliminary print) (footnote omitted). Relying on a letter from Surgeon General C. Everett Koop stating that, "from a purely scientific perspective, persons with HIV are clearly impaired" even during the asymptomatic phase, OLC determined asymptomatic HIV was a physical impairment under the Rehabilitation Act because it constituted a "physiological disorder or condition affecting the hemic and lymphatic systems." *Id.*, at 271 (internal quotation marks omitted). OLC determined further that asymptomatic HIV imposed a substantial limit on the major life activity of reproduction. The opinion said:

> "Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation . . . is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child." *Id.*, at 273.

In addition, OLC indicated that "[t]he life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus." *Id.*, at 274. Either consideration was sufficient to render asymptomatic HIV infection a handicap for purposes of the Rehabilitation Act. In the course of its opinion, OLC considered, and rejected, the contention that the limitation could be discounted as a voluntary response to the infection. The limitation, it reasoned, was the infection's manifest physical effect. *Id.*, at 274, and n. 13. Without exception, the other agencies to address the problem before enactment of the ADA reached the same result. Federal Contract Compliance Manual App. 6D, 8 FEP Manual 405:352 (Dec. 23, 1988); *In re Ritter*, No. 03890089, 1989 WL 609697, *10 (EEOC, Dec. 8, 1989); see also Comptroller General's Task Force on AIDS in the Workplace, Coping with AIDS in the GAO Workplace: Task Force Report 29 (Dec. 1987); Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 113–114, 122–123 (June 1988). Agencies have adhered to this conclusion since the enactment of the ADA as well. See 5 CFR § 1636.103 (1997); 7 CFR § 15e.103 (1998); 22 CFR § 1701.103 (1997); 24 CFR § 9.103 (1997); 34 CFR § 1200.103 (1997); 45 CFR §§ 2301.103, 2490.103 (1997); *In re Westchester County Medical Center*, [1991–1994 Transfer Binder] CCH Employment Practices Guide ¶ 5340, pp. 6110–6112 (Apr. 20, 1992), aff'd, *id.*, ¶ 5362, pp. 6249–6250 (Dept. of Health & Human Servs. Departmental Appeals Bd., Sept. 25, 1992);

In re Rosebud Sioux Tribe, No. 93–504–1, 1994 WL 603015 (Dept. of Health & Human Servs. Departmental Appeals Bd., July 14, 1994); *In re Martin*, No. 01954089, 1997 WL 151524, *4 (EEOC, Mar. 27, 1997).

Every court which addressed the issue before the ADA was enacted in July 1990, moreover, concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap. See *Doe* v. *Garrett*, 903 F. 2d 1455, 1457 (CA11 1990), cert. denied, 499 U. S. 904 (1991); *Ray* v. *School Dist. of DeSoto County*, 666 F. Supp. 1524, 1536 (MD Fla. 1987); *Thomas* v. *Atascadero Unified School Dist.*, 662 F. Supp. 376, 381 (CD Cal. 1987); *District 27 Community School Bd.* v. *Board of Ed. of New York*, 130 Misc. 2d 398, 413–415, 502 N. Y. S. 2d 325, 335–337 (Sup. Ct., Queens Cty. 1986); cf. *Baxter* v. *Belleville*, 720 F. Supp. 720, 729 (SD Ill. 1989) (Fair Housing Amendments Act); *Cain* v. *Hyatt*, 734 F. Supp. 671, 679 (ED Pa. 1990) (Pennsylvania Human Relations Act). (For cases finding infection with HIV to be a handicap without distinguishing between symptomatic and asymptomatic HIV, see *Martinez ex rel. Martinez* v. *School Bd. of Hillsborough Cty.*, 861 F. 2d 1502, 1506 (CA11 1988); *Chalk* v. *United States Dist. Ct.*, 840 F. 2d 701, 706 (CA9 1988); *Doe* v. *Dolton Elementary School Dist. No. 148*, 694 F. Supp. 440, 444–445 (ND Ill. 1988); *Robertson* v. *Granite City Community Unit School Dist. No. 9*, 684 F. Supp. 1002, 1006–1007 (SD Ill. 1988); *Local 1812, AFGE* v. *United States Dept. of State*, 662 F. Supp. 50, 54 (DC 1987); cf. *Association of Relatives and Friends of AIDS Patients* v. *Regulations and Permits Admin.*, 740 F. Supp. 95, 103 (PR 1990) (Fair Housing Amendments Act).) We are aware of no instance prior to the enactment of the ADA in which a court or agency ruled that HIV infection was not a handicap under the Rehabilitation Act.

Had Congress done nothing more than copy the Rehabilitation Act definition into the ADA, its action would indicate

the new statute should be construed in light of this unwavering line of administrative and judicial interpretation. All indications are that Congress was well aware of the position taken by OLC when enacting the ADA and intended to give that position its active endorsement. H. R. Rep. No. 101–485, pt. 2, p. 52 (1990) (endorsing the analysis and conclusion of the OLC opinion); *id.*, pt. 3, at 28, n. 18 (same); S. Rep. No. 101–116, pp. 21, 22 (1989) (same). As noted earlier, Congress also incorporated the same definition into the Fair Housing Amendments Act of 1988. See 42 U. S. C. § 3602(h)(1). We find it significant that the implementing regulations issued by the Department of Housing and Urban Development (HUD) construed the definition to include infection with HIV. 54 Fed. Reg. 3232, 3245 (1989) (codified at 24 CFR § 100.201 (1997)); see also *In re Williams*, 2A P–H Fair Housing-Fair Lending ¶ 25,007, pp. 25,111–25,113 (HUD Off. Admin. Law Judges, Mar. 22, 1991) (adhering to this interpretation); *In re Elroy R. and Dorothy Burns Trust*, 2A P–H Fair Housing-Fair Lending ¶ 25,073, p. 25,678 (HUD Off. Admin. Law Judges, June 17, 1994) (same). Again the legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA. H. R. Rep. No. 101–485, pt. 2, at 50; *id.*, pt. 3, at 27; *id.*, pt. 4, at 36; S. Rep. No. 101–116, at 21.

We find the uniformity of the administrative and judicial precedent construing the definition significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. See, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.

C

Our conclusion is further reinforced by the administrative guidance issued by the Justice Department to implement the public accommodation provisions of Title III of the ADA. As the agency directed by Congress to issue implementing regulations, see 42 U. S. C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference. See *Chevron*, 467 U. S., at 844.

The Justice Department's interpretation of the definition of disability is consistent with our analysis. The regulations acknowledge that Congress intended the ADA's definition of disability to be given the same construction as the definition of handicap in the Rehabilitation Act. 28 CFR § 36.103(a) (1997); *id.*, pt. 36, App. B, pp. 608, 609. The regulatory definition developed by HEW to implement the Rehabilitation Act is incorporated verbatim in the ADA regulations. § 36.104. The Justice Department went further, however. It added "HIV infection (symptomatic and asymptomatic)" to the list of disorders constituting a physical impairment. § 36.104(1)(iii). The technical assistance the Department has issued pursuant to 42 U. S. C. § 12206 similarly concludes that persons with asymptomatic HIV infection fall within the ADA's definition of disability. See, *e. g.*, U. S. Dept. of Justice, Civil Rights Division, The Americans with Disabilities Act: Title III Technical Assistance Manual 9 (Nov. 1993); Response to Congressman Sonny Callahan, 5 Nat. Disability L. Rep. (LRP) ¶ 360, p. 1167 (Feb. 9, 1994); Response to A. Laurence Field, 5 Nat. Disability L. Rep. (LRP) ¶ 21, p. 80 (Sept. 10, 1993). Any other conclusion, the Department reasoned, would contradict Congress' affirmative ratification of the administrative interpretations given previous versions of the same definition. 28 CFR pt. 36, App. B, pp. 609, 610 (1997) (citing the OLC opinion and HUD regulations); 56 Fed. Reg. 7455, 7456 (1991) (same) (notice of proposed rulemaking).

We also draw guidance from the views of the agencies authorized to administer other sections of the ADA. See 42 U. S. C. § 12116 (authorizing EEOC to issue regulations implementing Title I); § 12134(a) (authorizing the Attorney General to issue regulations implementing the public services provisions of Title II, subtitle A); §§ 12149, 12164, 12186 (authorizing the Secretary of Transportation to issue regulations implementing the transportation-related provisions of Titles II and III); § 12206(c) (authorizing the same agencies to offer technical assistance for the provisions they administer). These agencies, too, concluded that HIV infection is a physical impairment under the ADA. 28 CFR § 35.104(1)(iii) (1997); 49 CFR §§ 37.3, 38.3 (1997); 56 Fed. Reg. 13858 (1991); U. S. Dept. of Justice, Civil Rights Division, The Americans with Disabilities Act: Title II Technical Assistance Manual 4 (Nov. 1993); EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act II–3 (Jan. 1992) (hereinafter EEOC Technical Assistance Manual); EEOC Interpretive Manual § 902.2(d), pp. 902–13 to 902–14 (reissued Mar. 14, 1995) (hereinafter EEOC Interpretive Manual), reprinted in 2 BNA EEOC Compliance Manual 902:0013 (1998). Most categorical of all is EEOC's conclusion that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability." EEOC Interpretive Manual § 902.4(c)(1), p. 902–21; accord, *id.*, § 902.2(d), p. 902–14, n. 18. In the EEOC's view, "impairments . . . such as HIV infection, are inherently substantially limiting." 29 CFR pt. 1630, App., p. 350 (1997); EEOC Technical Assistance Manual II–4; EEOC Interpretive Manual § 902.4(c)(1), p. 902–21.

The regulatory authorities we cite are consistent with our holding that HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction.

III

The petition for certiorari presented three other questions for review. The questions stated:

> "3. When deciding under title III of the ADA whether a private health care provider must perform invasive procedures on an infectious patient in his office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?
>
> "4. What is the proper standard of judicial review under title III of the ADA of a private health care provider's judgment that the performance of certain invasive procedures in his office would pose a direct threat to the health or safety of others?
>
> "5. Did petitioner, Randon Bragdon, D. M. D., raise a genuine issue of fact for trial as to whether he was warranted in his judgment that the performance of certain invasive procedures on a patient in his office would have posed a direct threat to the health or safety of others?" Pet. for Cert. i.

Of these, we granted certiorari only on question three. The question is phrased in an awkward way, for it conflates two separate inquiries. In asking whether it is appropriate to defer to petitioner's judgment, it assumes that petitioner's assessment of the objective facts was reasonable. The central premise of the question and the assumption on which it is based merit separate consideration.

Again, we begin with the statute. Notwithstanding the protection given respondent by the ADA's definition of disability, petitioner could have refused to treat her if her infectious condition "pose[d] a direct threat to the health or safety of others." 42 U. S. C. § 12182(b)(3). The ADA defines a direct threat to be "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids

or services." *Ibid.* Parallel provisions appear in the employment provisions of Title I. §§ 12111(3), 12113(b).

The ADA's direct threat provision stems from the recognition in *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 287 (1987), of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks, resulting, for instance, from a contagious disease. In *Arline*, the Court reconciled these objectives by construing the Rehabilitation Act not to require the hiring of a person who posed "a significant risk of communicating an infectious disease to others." *Id.*, at 287, n. 16. Congress amended the Rehabilitation Act and the Fair Housing Act to incorporate the language. See 29 U. S. C. § 706(8)(D) (excluding individuals who "would constitute a direct threat to the health or safety of other individuals"); 42 U. S. C. § 3604(f)(9) (same). It later relied on the same language in enacting the ADA. See 28 CFR pt. 36, App. B, p. 626 (1997) (ADA's direct threat provision codifies *Arline*). Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant. *Arline*, *supra*, at 287, and n. 16; 42 U. S. C. § 12182(b)(3).

The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence. *Arline*, *supra*, at 288; 28 CFR § 36.208(c) (1997); *id.*, pt. 36, App. B, p. 626. As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability. To use the words of the question presented, petitioner receives no special deference simply because he is a health care professional. It is true that *Arline* reserved "the question whether courts should also defer to the reasonable medical

judgments of private physicians on which an employer has relied." 480 U. S., at 288, n. 18. At most, this statement reserved the possibility that employers could consult with individual physicians as objective third-party experts. It did not suggest that an individual physician's state of mind could excuse discrimination without regard to the objective reasonableness of his actions.

Our conclusion that courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments does not answer the implicit assumption in the question presented, whether petitioner's actions were reasonable in light of the available medical evidence. In assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U. S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority. *Arline*, *supra*, at 288; 28 CFR pt. 36, App. B, p. 626 (1997). The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, p. 187 (5th ed. 1984).

We have reviewed so much of the record as necessary to illustrate the application of the rule to the facts of this case. For the most part, the Court of Appeals followed the proper standard in evaluating petitioner's position and conducted a thorough review of the evidence. Its rejection of the District Court's reliance on the Marianos affidavits was a correct application of the principle that petitioner's actions must be evaluated in light of the available, objective evidence. The record did not show that CDC had published the conclusion set out in the affidavits at the time petitioner refused to treat respondent. 107 F. 3d, at 946, n. 7.

A further illustration of a correct application of the objective standard is the Court of Appeals' refusal to give weight

to petitioner's offer to treat respondent in a hospital. *Id.*, at 943, n. 4. Petitioner testified that he believed hospitals had safety measures, such as air filtration, ultraviolet lights, and respirators, which would reduce the risk of HIV transmission. App. 151. Petitioner made no showing, however, that any area hospital had these safeguards or even that he had hospital privileges. *Id.*, at 31. His expert also admitted the lack of any scientific basis for the conclusion that these measures would lower the risk of transmission. *Id.*, at 209. Petitioner failed to present any objective, medical evidence showing that treating respondent in a hospital would be safer or more efficient in preventing HIV transmission than treatment in a well-equipped dental office.

We are concerned, however, that the Court of Appeals might have placed mistaken reliance upon two other sources. In ruling no triable issue of fact existed on this point, the Court of Appeals relied on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV. 107 F. 3d, at 945–946. This evidence is not definitive. As noted earlier, the CDC Guidelines recommended certain universal precautions which, in CDC's view, "should reduce the risk of disease transmission in the dental environment." U. S. Dept. of Health and Human Services, Public Health Service, CDC, Recommended Infection-Control Practices for Dentistry, 41 Morbidity and Mortality Weekly Rep. No. RR–8, p. 1 (May 28, 1993). The Court of Appeals determined that, "[w]hile the guidelines do not state explicitly that no further risk-reduction measures are desirable or that routine dental care for HIV-positive individuals is safe, those two conclusions seem to be implicit in the guidelines' detailed delineation of procedures for office treatment of HIV-positive patients." 107 F. 3d, at 946. In our view, the Guidelines do not necessarily contain implicit assumptions conclusive of the point to be decided. The Guidelines set out CDC's recommendation that the universal precautions are the best way

to combat the risk of HIV transmission. They do not assess the level of risk.

Nor can we be certain, on this record, whether the 1991 American Dental Association Policy on HIV carries the weight the Court of Appeals attributed to it. The Policy does provide some evidence of the medical community's objective assessment of the risks posed by treating people infected with HIV in dental offices. It indicates:

> "Current scientific and epidemiologic evidence indicates that there is little risk of transmission of infectious diseases through dental treatment if recommended infection control procedures are routinely followed. Patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed. Such infection control procedures provide protection both for patients and dental personnel." App. 225.

We note, however, that the Association is a professional organization, which, although a respected source of information on the dental profession, is not a public health authority. It is not clear the extent to which the Policy was based on the Association's assessment of dentists' ethical and professional duties in addition to its scientific assessment of the risk to which the ADA refers. Efforts to clarify dentists' ethical obligations and to encourage dentists to treat patients with HIV infection with compassion may be commendable, but the question under the statute is one of statistical likelihood, not professional responsibility. Without more information on the manner in which the American Dental Association formulated this Policy, we are unable to determine the Policy's value in evaluating whether petitioner's assessment of the risks was reasonable as a matter of law.

The court considered materials submitted by both parties on the cross-motions for summary judgment. The petitioner was required to establish that there existed a genuine

issue of material fact. Evidence which was merely colorable or not significantly probative would not have been sufficient. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 249–250 (1986).

We acknowledge the presence of other evidence in the record before the Court of Appeals which, subject to further arguments and examination, might support affirmance of the trial court's ruling. For instance, the record contains substantial testimony from numerous health experts indicating that it is safe to treat patients infected with HIV in dental offices. App. 66–68, 88–90, 264–266, 268. We are unable to determine the import of this evidence, however. The record does not disclose whether the expert testimony submitted by respondent turned on evidence available in September 1994. See *id.*, at 69–70 (expert testimony relied in part on materials published after September 1994).

There are reasons to doubt whether petitioner advanced evidence sufficient to raise a triable issue of fact on the significance of the risk. Petitioner relied on two principal points: First, he asserted that the use of high-speed drills and surface cooling with water created a risk of airborne HIV transmission. The study on which petitioner relied was inconclusive, however, determining only that "[f]urther work is required to determine whether such a risk exists." Johnson & Robinson, Human Immunodeficiency Virus-1 (HIV–1) in the Vapors of Surgical Power Instruments, 33 J. of Medical Virology 47 (1991). Petitioner's expert witness conceded, moreover, that no evidence suggested the spray could transmit HIV. His opinion on airborne risk was based on the absence of contrary evidence, not on positive data. App. 166. Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment. See *General Electric Co.* v. *Joiner*, 522 U. S. 136, 144–145, 146 (1997).

Second, petitioner argues that, as of September 1994, CDC had identified seven dental workers with possible occupa-

tional transmission of HIV. See U. S. Dept. of Health and Human Services, Public Health Service, CDC, HIV/AIDS Surveillance Report, vol. 6, no. 1, p. 15, tbl. 11 (Mid-year ed. June 1994). These dental workers were exposed to HIV in the course of their employment, but CDC could not determine whether HIV infection had resulted from this exposure. *Id.*, at 15, n. 3. It is now known that CDC could not ascertain how the seven dental workers contracted the disease because they did not present themselves for HIV testing at an appropriate time after this occupational exposure. Gooch et al., Percutaneous Exposures to HIV-Infected Blood Among Dental Workers Enrolled in the CDC Needlestick Study, 126 J. American Dental Assn. 1237, 1239 (1995). It is not clear on this record, however, whether this information was available to petitioner in September 1994. If not, the seven cases might have provided some, albeit not necessarily sufficient, support for petitioner's position. Standing alone, we doubt it would meet the objective, scientific basis for finding a significant risk to the petitioner.

Our evaluation of the evidence is constrained by the fact that on these and other points we have not had briefs and arguments directed to the entire record. In accepting the case for review, we declined to grant certiorari on question five, which asked whether petitioner raised a genuine issue of fact for trial. Pet. for Cert. i. As a result, the briefs and arguments presented to us did not concentrate on the question of sufficiency in light all of the submissions in the summary judgment proceeding. "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge* v. *Williams,* 397 U. S. 471, 476, n. 6 (1970). This consideration carries particular force where, as here, full briefing directed at the issue would help place a complex factual record in proper perspective. Resolution of the issue will be of im-

portance to health care workers not just for the result but also for the precision and comprehensiveness of the reasons given for the decision.

We conclude the proper course is to give the Court of Appeals the opportunity to determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk. In remanding the case, we do not foreclose the possibility that the Court of Appeals may reach the same conclusion it did earlier. A remand will permit a full exploration of the issue through the adversary process.

The determination of the Court of Appeals that respondent's HIV infection was a disability under the ADA is affirmed. The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

The Court's opinion demonstrates that respondent's HIV infection easily falls within the statute's definition of "disability." Moreover, the Court's discussion in Part III of the relevant evidence has persuaded me that the judgment of the Court of Appeals should be affirmed. I do not believe petitioner has sustained his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed by treating respondent in his office. The Court of Appeals reached that conclusion after a careful and extensive study of the record; its analysis on this question was perfectly consistent with the legal reasoning in JUSTICE KENNEDY's opinion for the Court; and the latter opinion itself explains that petitioner relied on data that were inconclusive and speculative at best, see *ante,* at 653–654. Cf. *General Electric Co.* v. *Joiner*, 522 U. S. 136 (1997).

There are not, however, five Justices who agree that the judgment should be affirmed. Nor does it appear that there are five Justices who favor a remand for further proceedings consistent with the views expressed in either JUSTICE KENNEDY's opinion for the Court or the opinion of THE CHIEF JUSTICE. Because I am in agreement with the legal analysis in JUSTICE KENNEDY's opinion, in order to provide a judgment supported by a majority, I join that opinion even though I would prefer an outright affirmance. Cf. *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

JUSTICE GINSBURG, concurring.

Human Immunodeficiency Virus (HIV) infection, as the description set out in the Court's opinion documents, *ante*, at 635–637, has been regarded as a disease limiting life itself. See Brief for American Medical Association as *Amicus Curiae* 20. The disease inevitably pervades life's choices: education, employment, family and financial undertakings. It affects the need for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment. No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible. I am therefore satisfied that the statutory and regulatory definitions are well met. HIV infection is "a physical . . . impairment that substantially limits . . . major life activities," or is so perceived, 42 U. S. C. §§ 12102(2)(A), (C), including the afflicted individual's family relations, employment potential, and ability to care for herself, see 45 CFR § 84.3(j)(2)(ii) (1997); 28 CFR § 41.31(b)(2) (1997).

I further agree, in view of the "importance [of the issue] to health care workers," *ante*, at 654–655, that it is wise to remand, erring, if at all, on the side of caution. By taking this course, the Court ensures a fully informed determina-

tion whether respondent Abbott's disease posed "a significant risk to the health or safety of [petitioner Bragdon] that [could not] be eliminated by a modification of policies, practices, or procedures . . . ." 42 U. S. C. § 12182(b)(3).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, and with whom JUSTICE O'CONNOR joins as to Part II, concurring in the judgment in part and dissenting in part.

I

Is respondent Abbott (hereinafter respondent)—who has tested positive for the human immunodeficiency virus (HIV) but was asymptomatic at the time she suffered discriminatory treatment—a person with a "disability" as that term is defined in the Americans with Disabilities Act of 1990 (ADA)? The term "disability" is defined in the ADA to include:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U. S. C. § 12102(2).

It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made "with respect to an individual." Were this not sufficiently clear, the Act goes on to provide that the "major life activities" allegedly limited by an impairment must be those "of such individual." § 12102(2)(A).

The individualized nature of the inquiry is particularly important in this case because the District Court disposed of it on summary judgment. Thus all disputed issues of material fact must be resolved against respondent. She contends

that her asymptomatic HIV status brings her within the first definition of a "disability."[1] She must therefore demonstrate, *inter alia*, that she was (1) physically or mentally impaired and that such impairment (2) substantially limited (3) one or more of her major life activities.

Petitioner does not dispute that asymptomatic HIV-positive status is a physical impairment. I therefore assume this to be the case, and proceed to the second and third statutory requirements for "disability."

According to the Court, the next question is "whether reproduction is a major life activity." *Ante*, at 638. That, however, is only half of the relevant question. As mentioned above, the ADA's definition of a "disability" requires that the major life activity at issue be one "of such individual." § 12102(2)(A). The Court truncates the question, perhaps because there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction[2] (assuming

[1] Respondent alternatively urges us to find that she is disabled in that she is "regarded as" such. 42 U. S. C. § 12102(2)(C). We did not, however, grant certiorari on that question. While respondent can advance arguments not within the question presented in support of the judgment below, *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 119, n. 14 (1985); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970), we have rarely addressed arguments not asserted below. It was the United States, not respondent, that asserted the "regarded as" argument below. The Court of Appeals declined to address it, as should we.

In any event, the "regarded as" prong requires a plaintiff to demonstrate that the defendant regarded him as having "*such* an impairment" (*i. e.*, one that substantially limits a major life activity). 42 U. S. C. § 12102(2)(C) (emphasis added). Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired.

[2] Calling reproduction a major life activity is somewhat inartful. Reproduction is not an activity at all, but a process. One could be described as breathing, walking, or performing manual tasks, but a human being (as opposed to a copier machine or a gremlin) would never be described as reproducing. I assume that in using the term reproduction, respondent and the Court are referring to the numerous discrete activities that com-

for the moment that reproduction is a major life activity at all). At most, the record indicates that after learning of her HIV status, respondent, whatever her previous inclination, conclusively decided that she would not have children. App. 14. There is absolutely no evidence that, absent the HIV, respondent would have had or was even considering having children. Indeed, when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of *her* life functions, respondent answered "No." *Ibid.* It is further telling that in the course of her entire brief to this Court, respondent studiously avoids asserting even once that reproduction is a major life activity *to her.* To the contrary, she argues that the "major life activity" inquiry should not turn on a particularized assessment of the circumstances of this or any other case. Brief for Respondent Abbott 30–31.

But even aside from the facts of this particular case, the Court is simply wrong in concluding as a general matter that reproduction is a "major life activity." Unfortunately, the ADA does not define the phrase "major life activities." But the Act does incorporate by reference a list of such activities contained in regulations issued under the Rehabilitation Act. 42 U. S. C. § 12201(a); 45 CFR § 84.3(j)(2)(ii) (1997). The Court correctly recognizes that this list of major life activities "is illustrative, not exhaustive," *ante,* at 639, but then makes no attempt to demonstrate that reproduction is a major life activity in the same sense that "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" are. *Ante,* at 638–639.

Instead, the Court argues that reproduction is a "major" life activity in that it is "central to the life process itself." *Ante,* at 638. In support of this reading, the Court focuses on the fact that "'major'" indicates "'comparative impor-

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prise the reproductive process, and that is the sense in which I have used the term.

tance,'" *ibid.;* see also Webster's Collegiate Dictionary 702 (10th ed. 1994) ("greater in dignity, rank, importance, or interest"), ignoring the alternative definition of "major" as "greater in quantity, number, or extent," *ibid.* It is the latter definition that is most consistent with the ADA's illustrative list of major life activities.

No one can deny that reproductive decisions are important in a person's life. But so are decisions as to who to marry, where to live, and how to earn one's living. Fundamental importance of this sort is not the common thread linking the statute's listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child.

Both respondent, Brief for Respondent Abbott 20, n. 24, and the Government, Brief for United States as *Amicus Curiae* 13, argue that reproduction must be a major life activity because regulations issued under the ADA define the term "physical impairment" to include physiological disorders affecting the reproductive system. 28 CFR § 36.104 (1997). If reproduction were not a major life activity, they argue, then it would have made little sense to include the reproductive disorders in the roster of physical impairments. This argument is simply wrong. There are numerous disorders of the reproductive system, such as dysmenorrhea and endometriosis, which are so painful that they limit a woman's ability to engage in major life activities such as walking and working. And, obviously, cancer of the various reproductive organs limits one's ability to engage in numerous activities other than reproduction.

But even if I were to assume that reproduction *is* a major life activity of respondent, I do not agree that an asymptomatic HIV infection "substantially limits" that activity. The record before us leaves no doubt that those so infected are still entirely able to engage in sexual intercourse, give birth

to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity. See App. 53–54. While individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a "limit" on one's own life activities.

The Court responds that the ADA "addresses substantial limitations on major life activities, not utter inabilities." *Ante*, at 641. I agree, but fail to see how this assists the Court's cause. Apart from being unable to demonstrate that she is utterly unable to engage in the various activities that comprise the reproductive process, respondent has not even explained how she is less able to engage in those activities.

Respondent contends that her ability to reproduce is limited because "the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood." Brief for Respondent Abbott 22. But the ADA's definition of a disability is met only if the alleged impairment substantially "limits" (present tense) a major life activity. 42 U. S. C. § 12102(2)(A). Asymptomatic HIV does not presently limit respondent's ability to perform any of the tasks necessary to bear or raise a child. Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease "disabled" here and now because of some possible future effects.

In my view, therefore, respondent has failed to demonstrate that any of her major life activities were substantially limited by her HIV infection.

II

While the Court concludes to the contrary as to the "disability" issue, it then quite correctly recognizes that petitioner could nonetheless have refused to treat respondent if her condition posed a "direct threat." The Court of Appeals

affirmed the judgment of the District Court granting summary judgment to respondent on this issue. The Court vacates this portion of the Court of Appeals' decision, and remands the case to the lower court, presumably so that it may "determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk." *Ante,* at 655. I agree that the judgment should be vacated, although I am not sure I understand the Court's cryptic direction to the lower court.

"[D]irect threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." § 12182(b)(3). This statutory definition of a direct threat consists of two parts. First, a court must ask whether treating the infected patient *without precautionary techniques* would pose a "significant risk to the health or safety of others." *Ibid.* Whether a particular risk is significant depends on:

> "'(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.'" *School Bd. of Nassau Cty.* v. *Arline,* 480 U. S. 273, 288 (1987).

Even if a significant risk exists, a health practitioner will still be required to treat the infected patient if "a modification of policies, practices, or procedures" (in this case, universal precautions) will "eliminat[e]" the risk. § 12182(b)(3).

I agree with the Court that "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation," as of the time that the decision refusing treatment is made. *Ante,* at 649. I disagree with the Court, however,

that "[i]n assessing the reasonableness of petitioner's actions, the views of public health authorities . . . are of special weight and authority." *Ante*, at 650. Those views are, of course, entitled to a presumption of validity when the actions of those authorities themselves are challenged in court, and even in disputes between private parties where Congress has committed that dispute to adjudication by a public health authority. But in litigation between private parties originating in the federal courts, I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General). In litigation of this latter sort, which is what we face here, the credentials of the scientists employed by the public health authority, and the soundness of their studies, must stand on their own. The Court cites no authority for its limitation upon the courts' truth-finding function, except the statement in *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S., at 288, that in making findings regarding the risk of contagion under the Rehabilitation Act, "courts normally should defer to the reasonable medical judgments of public health officials." But there is appended to that dictum the following footnote, which makes it very clear that the Court was urging respect for *medical* judgment, and not necessarily respect for "official" medical judgment over "private" medical judgment: "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Id.*, at 288, n. 18.

Applying these principles here, it is clear to me that petitioner has presented more than enough evidence to avoid summary judgment on the "direct threat" question. In June 1994, the Centers for Disease Control and Prevention published a study identifying seven instances of possible transmission of HIV from patients to dental workers. See *ante*,

at 654. While it is not entirely certain whether these dental workers contracted HIV during the course of providing dental treatment, the potential that the disease was transmitted during the course of dental treatment is relevant evidence. One need only demonstrate "risk," not certainty of infection. See *Arline*, *supra*, at 288 ("'[T]he probabilities the disease will be transmitted'" is a factor in assessing risk). Given the "severity of the risk" involved here, *i. e.*, near certain death, and the fact that no public health authority had outlined a protocol for *eliminating* this risk in the context of routine dental treatment, it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a "direct threat" to his safety.

In addition, petitioner offered evidence of 42 documented incidents of occupational transmission of HIV to health care workers other than dental professionals. App. 106. The Court of Appeals dismissed this evidence as irrelevant because these health professionals were not dentists. 107 F. 3d 934, 947 (CA1 1997). But the fact that the health care workers were not dentists is no more valid a basis for distinguishing these transmissions of HIV than the fact that the health care workers did not practice in Maine. At a minimum, petitioner's evidence was sufficient to create a triable issue on this question, and summary judgment was accordingly not appropriate.

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

I agree with THE CHIEF JUSTICE that respondent's claim of disability should be evaluated on an individualized basis and that she has not proved that her asymptomatic HIV status substantially limited one or more of her major life activities. In my view, the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of

all persons—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"—listed in regulations relevant to the Americans with Disabilities Act of 1990. See 45 CFR §84.3(j)(2)(ii) (1997); 28 CFR §41.31(b)(2) (1997). Based on that conclusion, there is no need to address whether other aspects of intimate or family relationships not raised in this case could constitute major life activities; nor is there reason to consider whether HIV status would impose a substantial limitation on one's ability to reproduce if reproduction were a major life activity.

I join in Part II of The Chief Justice's opinion concurring in the judgment in part and dissenting in part, which concludes that the Court of Appeals failed to properly determine whether respondent's condition posed a direct threat. Accordingly, I agree that a remand is necessary on that issue.

Syllabus

UNITED STATES *v.* BALSYS

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

No. 97–873. Argued April 20, 1998—Decided June 25, 1998

When the Office of Special Investigations of the Department of Justice's Criminal Division (OSI) subpoenaed respondent Balsys, a resident alien, to testify about his wartime activities between 1940 and 1944 and his immigration to the United States, he claimed the Fifth Amendment privilege against self-incrimination, based on his fear of prosecution by a foreign nation. The Federal District Court granted OSI's petition to enforce the subpoena, but the Second Circuit vacated the order, holding that a witness with a real and substantial fear of prosecution by a foreign country may assert the privilege to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of a criminal prosecution in this country.

Held: Concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause. Pp. 671–700.

(a) As a resident alien, Balsys is a "person" who, under that Clause, cannot "be compelled in any criminal case to be a witness against himself." See *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596. However, the question here is whether a criminal prosecution by a foreign government not subject to this country's constitutional guarantees presents a "criminal case" for purposes of the privilege. Pp. 671–672.

(b) Balsys initially relies on the textual contrast between the Sixth Amendment, which clearly applies only to domestic criminal proceedings, and the Fifth, with its broader reference to "any criminal case," to argue that "any criminal case" means exactly that, regardless of the prosecuting authority. But the argument overlooks the cardinal rule to construe provisions in context. See *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221. Because none of the other provisions of the Fifth Amendment is implicated except by action of the government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view. Further, a more modest understanding, that "any criminal case" distinguishes the Fifth Amendment's Self-Incrimination Clause from its Clause limiting grand jury indictments to "capital, or otherwise infamous crime[s]," provides an explanation for the text of the privilege. Indeed, there is no known clear common-law precedent or practice, contemporaneous with the framing, for looking to

the possibility of foreign prosecution as a premise for claiming the privilege. Pp. 672–674.

(c) In the precursors of this case, the Court concluded that prosecution in a state jurisdiction not bound by the Self-Incrimination Clause is beyond the purview of the privilege. *United States* v. *Murdock*, 284 U. S. 141. *United States* v. *Saline Bank of Va.*, 1 Pet. 100, and *Ballmann* v. *Fagin*, 200 U. S. 186, distinguished. The Court's precedent turned away from this proposition once, in *Malloy* v. *Hogan*, 378 U. S. 1, 3, where it applied the Fourteenth Amendment due process incorporation to the Self-Incrimination Clause, so as to bind the States as well as the National Government by its terms. It immediately said, in *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52, 57, that *Malloy* necessitated a reconsideration of *Murdock*'s rule. After *Malloy*, the Fifth Amendment limitation was no longer framed for one jurisdiction alone, each jurisdiction having instead become subject to the same privilege claim flowing from the same source. Since fear of prosecution in the one jurisdiction now implicated the very privilege binding upon the other, the *Murphy* opinion sensibly recognized that if a witness could not assert the privilege in such circumstances, the witness could be "whipsawed" into incriminating himself under both state and federal law, even though the privilege was applicable to each. Such whipsawing is possible because the privilege against self-incrimination can be exchanged by the government for an immunity to prosecutorial use of any compelled inculpatory testimony. *Kastigar* v. *United States*, 406 U. S. 441, 448–449. Such an exchange by the government is permissible only when it provides immunity as broad as the privilege. After *Malloy* had held the privilege binding on the state jurisdictions as well as the National Government, it would have been intolerable to allow a prosecutor in one or the other jurisdiction to eliminate the privilege by offering immunity less complete than the privilege's dual jurisdictional reach. To the extent that the *Murphy* Court undercut *Murdock*'s rationale on historical grounds, its reasoning that English cases supported a more expansive reading of the Clause is flawed and cannot be accepted now. Pp. 674–690.

(d) *Murphy* discusses a catalog of "Policies of the Privilege," which could suggest a concern broad enough to encompass foreign prosecutions. However, the adoption of such a revised theory would rest on *Murphy*'s treatment of English cases, which has been rejected as an indication of the Clause's meaning. Moreover, although *Murphy* catalogs aspirations furthered by the Clause, its discussion does not weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope. Contrary to Balsys's

Syllabus

contention, general personal testimonial integrity or privacy is not a reliable guide to the Clause's scope of protection. Fifth Amendment tradition offers, in practice, a conditional protection of testimonial privacy. Since the judiciary could not recognize fear of foreign prosecution and at the same time preserve the Government's existing rights to seek testimony in exchange for immunity (because domestic courts could not enforce the immunity abroad), extending the privilege would change the balance of private and governmental interests that has been accepted for as long as there has been Fifth Amendment doctrine. Balsys also argues that *Murphy*'s policy catalog supports application of the privilege in order to prevent the Government from overreaching to facilitate foreign criminal prosecutions in a spirit of "cooperative internationalism." *Murphy* recognized "cooperative federalism"—the teamwork of state and national officials to fight interstate crime—but only to underscore the significance of the Court's holding that a federal court could no longer ignore fear of state prosecution when ruling on a privilege claim. Since in this case there is no counterpart to *Malloy*, imposing the Fifth Amendment beyond the National Government, there is no premise in *Murphy* for appealing to "cooperative internationalism" by analogy to "cooperative federalism." The analogy must, instead, be to the pre-*Murphy* era when the States were not bound by the privilege. Even if "cooperative federalism" and "cooperative internationalism" did support expanding the privilege's scope, Balsys has not shown that the likely costs and benefits justify such expansion. Cooperative conduct between the United States and foreign nations may one day develop to a point at which fear of foreign prosecution could be recognized under the Clause as traditionally understood, but Balsys has presented no interest rising to such a level of cooperative prosecution. Pp. 690–700.

119 F. 3d 122, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Parts I, II, and III. STEVENS, J., filed a concurring opinion, *post*, p. 700. GINSBURG, J., filed a dissenting opinion, *post*, p. 701. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 702.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, *Barbara McDowell*, and *Joseph C. Wyderko*.

Ivars Berzins argued the cause and filed a brief for respondent.*

JUSTICE SOUTER delivered the opinion of the Court.†

By administrative subpoena, the Office of Special Investigations of the Criminal Division of the United States Department of Justice (OSI) sought testimony from the respondent, Aloyzas Balsys, about his wartime activities between 1940 and 1944 and his immigration to the United States in 1961. Balsys declined to answer such questions, claiming the Fifth Amendment privilege against self-incrimination, based on his fear of prosecution by a foreign nation. We hold that concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.

I

Respondent Aloyzas Balsys is a resident alien living in Woodhaven, New York, having obtained admission to this country in 1961 under the Immigration and Nationality Act, 8 U. S. C. § 1201, on an immigrant visa and alien registration issued at the American Consulate in Liverpool. In his application, he said that he had served in the Lithuanian army between 1934 and 1940, and had lived in hiding in Plateliai, Lithuania, between 1940 and 1944. Balsys swore that the information was true, and signed a statement of understanding that if his application contained any false information or materially misleading statements, or concealed any material fact, he would be subject to criminal prosecution and deportation.

**Elizabeth Holtzman* and *Sanford Hausler* filed a brief for the World Jewish Congress et al. as *amici curiae* urging reversal.

John D. Cline, *Barbara E. Bergman*, and *John L. Pollok* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

†JUSTICE SCALIA and JUSTICE THOMAS join only Parts I, II, and III of this opinion.

OSI, which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals, is now investigating whether, contrary to his representations, Balsys participated in Nazi persecution during World War II. Such activity would subject him to deportation for persecuting persons because of their race, religion, national origin, or political opinion under §§ 1182(a)(3)(E) and 1251(a)(4)(D), as well as for lying on his visa application under §§ 1182(a)(6)(C)(i) and 1251(a)(1)(A).

When OSI issued a subpoena requiring Balsys to testify at a deposition, he appeared and gave his name and address, but he refused to answer any other questions, such as those directed to his wartime activities in Europe between 1940–1945 and his immigration to the United States in 1961. In response to all such questions, Balsys invoked the Fifth Amendment privilege against compelled self-incrimination, claiming that his answers could subject him to criminal prosecution. He did not contend that he would incriminate himself under domestic law,[1] but claimed the privilege because his responses could subject him to criminal prosecution by Lithuania, Israel, and Germany.

OSI responded with a petition in Federal District Court to enforce the subpoena under § 1225(a). Although the District Court found that if Balsys were to provide the information requested, he would face a real and substantial danger of prosecution by Lithuania and Israel (but not by Germany), it granted OSI's enforcement petition and ordered Balsys to testify, treating the Fifth Amendment as inapplicable to a claim of incrimination solely under foreign law. 918 F. Supp. 588 (EDNY 1996). Balsys appealed, and the Court of Appeals for the Second Circuit vacated the District Court's order, holding that a witness with a real and substantial fear of prosecution by a foreign country may assert the Fifth Amendment privilege to avoid giving testimony in a domes-

[1] The Government advises us that the statute of limitation bars criminal prosecution for any misrepresentation. Tr. of Oral Arg. 4.

tic proceeding, even if the witness has no valid fear of a criminal prosecution in this country. 119 F. 3d 122 (1997). We granted certiorari, 522 U. S. 1072 (1998), to resolve a conflict among the Circuits on this issue [2] and now reverse.

II

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. Resident aliens such as Balsys are considered "persons" for purposes of the Fifth Amendment and are entitled to the same protections under the Clause as citizens. See *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596 (1953). The parties do not dispute that the Government seeks to "compel" testimony from Balsys that would make him "a witness against himself." The question is whether there is a risk that Balsys's testimony will be used in a proceeding that is a "criminal case."

Balsys agrees that the risk that his testimony might subject him to deportation is not a sufficient ground for asserting the privilege, given the civil character of a deportation proceeding. See *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1038–1039 (1984). If, however, Balsys could demonstrate

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[2] See *United States* v. *Gecas*, 120 F. 3d 1419 (CA11 1997) (en banc) (holding that the privilege cannot be invoked based on fear of prosecution abroad); *United States* v. *(Under Seal)*, 794 F. 2d 920 (CA4) (same), cert. denied *sub nom. Araneta* v. *United States*, 479 U. S. 924 (1986); *In re Parker*, 411 F. 2d 1067 (CA10 1969) (same), vacated as moot, 397 U. S. 96 (1970).

We have granted certiorari in cases raising this question twice before but did not reach its merits in either case. See *Zicarelli* v. *New Jersey Comm'n of Investigation*, 406 U. S. 472 (1972) (finding that because the petitioner did not face a "real and substantial" risk of foreign prosecution, it was unnecessary to decide whether the privilege can be asserted based on fear of foreign prosecution); *Parker* v. *United States*, 397 U. S. 96 (1970) *(per curiam)* (vacating and remanding with instructions to dismiss as moot).

that any testimony he might give in the deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, he would be entitled to invoke the privilege. It "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding. *Kastigar* v. *United States*, 406 U. S. 441, 444–445 (1972); see also *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924) (the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"). But Balsys makes no such claim, contending rather that his entitlement to invoke the privilege arises because of a real and substantial fear that his testimony could be used against him by Lithuania or Israel in a criminal prosecution. The reasonableness of his fear is not challenged by the Government, and we thus squarely face the question whether a criminal prosecution by a foreign government not subject to our constitutional guarantees presents a "criminal case" for purposes of the privilege against self-incrimination.

III

Balsys relies in the first instance on the textual contrast between the Sixth Amendment, which clearly applies only to domestic criminal proceedings, and the Compelled Self-Incrimination Clause, with its facially broader reference to "any criminal case." The same point is developed by Balsys's *amici*,[3] who argue that "any criminal case" means exactly that, regardless of the prosecuting authority. According to the argument, the Framers' use of the adjective "any" precludes recognition of the distinction raised by the

[3] See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 5.

Government, between prosecution by a jurisdiction that is itself bound to recognize the privilege and prosecution by a foreign jurisdiction that is not. But the argument overlooks the cardinal rule to construe provisions in context. See *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991). In the Fifth Amendment context, the Clause in question occurs in the company of guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking. Because none of these provisions is implicated except by action of the government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view, and it would be strange to find such a sweep in the Clause now. See *Wharton* v. *Wise*, 153 U. S. 155, 169–170 (1894) *(noscitur a sociis);* see also *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) (same). The oddity of such a reading would be especially stark if the expansive language in question is open to another reasonable interpretation, as we think it is. Because the Fifth Amendment opens by requiring a grand jury indictment or presentment "for a capital, or otherwise infamous crime,"[4] the phrase beginning with "any" in the subsequent Self-Incrimination Clause may sensibly be read as making it clear that the privilege it provides is not so categorically limited. It is plausible to suppose the adjective was inserted only for that purpose, not as taking the further step of defining the relevant prosecutorial jurisdiction internationally. We therefore take this to be the fair reading of the adjective "any," and we read the Clause contextually as

[4] As a whole, the Amendment reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

apparently providing a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise. Since there is no helpful legislative history,[5] and because there was no different common law practice at the time of the framing, see Part III–C, *infra;* cf. *Counselman* v. *Hitchcock*, 142 U. S. 547, 563–564 (1892) (listing a sample of cases, including preframing cases, in which the privilege was asserted, none of which involve fear of foreign prosecution), there is no reason to disregard the contextual reading. This Court's precedent has indeed adopted that so-called same-sovereign interpretation.

A

The currently received understanding of the Bill of Rights as instituted "to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches" of the National Government defined in the original constitutional articles, *New York Times Co.* v. *United*

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[5] See *Gecas*, 120 F. 3d, at 1435 (noting that the Clause has "virtually no legislative history"); 5 The Founders' Constitution 262 (P. Kurland & R. Lerner eds. 1987) (indicating that the Clause as originally drafted and introduced in the First Congress lacked the phrase "any criminal case," which was added at the behest of Representative Lawrence on the ground that the Clause would otherwise be "in some degree contrary to laws passed").

In recent years, scholarly attention has refined our knowledge of the previous manifestations of the privilege against self-incrimination, the present culmination of such scholarship being R. Helmholz et al., The Privilege Against Self-Incrimination (1997). What we know of the circumstances surrounding the adoption of the Fifth Amendment, however, gives no indication that the Framers had any sense of a privilege more comprehensive than common law practice then revealed. See Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1123 (1994) ("[T]he legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege"). As to the common law practice, see Part III–C, *infra.*

States, 403 U. S. 713, 716 (1971) *(per curiam)* (Black, J., concurring) (emphasis deleted), was expressed early on in Chief Justice Marshall's opinion for the Court in the leading case of *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247 (1833): the Constitution's "limitations on power . . . are naturally, and, we think, necessarily applicable to the government created by the instrument," and not to "distinct [state] governments, framed by different persons and for different purposes."

To be sure, it would have been logically possible to decide (as in *Barron*) that the "distinct [state] governments . . . framed . . . for different purposes" were beyond the ambit of the Fifth Amendment, and at the same time to hold that the self-incrimination privilege, good against the National Government, was implicated by fear of prosecution in another jurisdiction. But after *Barron* and before the era of Fourteenth Amendment incorporation, that would have been an unlikely doctrinal combination, and no such improbable development occurred.

The precursors of today's case were those raising the question of the significance for the federal privilege of possible use of testimony in state prosecution. Only a handful of early cases even touched on the problem. In *Brown* v. *Walker*, 161 U. S. 591 (1896), a witness raised the issue, claiming the privilege in a federal proceeding based on his fear of prosecution by a State, but we found that a statute under which immunity from federal prosecution had been conferred provided for immunity from state prosecution as well, obviating any need to reach the issue raised. *Id.*, at 606–608. In *Jack* v. *Kansas*, 199 U. S. 372 (1905), a Fourteenth Amendment case, we affirmed a sentence for contempt imposed on a witness in a state proceeding who had received immunity from state prosecution but refused to answer questions based on a fear that they would subject him to federal prosecution. Although there was no reasonable fear of a prosecution by the National Government in that

case, we addressed the question whether a self-incrimination privilege could be invoked in the one jurisdiction based on fear of prosecution by the other, saying that "[w]e think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." *Id.*, at 382. A year later, in the course of considering whether a federal witness, immunized from federal prosecution, could invoke the privilege based on fear of state prosecution, we adopted the general proposition that "the possibility that information given by the witness might be used" by the other government is, as a matter of law, "a danger so unsubstantial and remote" that it fails to trigger the right to invoke the privilege. *Hale* v. *Henkel*, 201 U. S. 43, 69 (1906).

> "[I]f the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country [is] that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 B. & S. 311[, 121 Eng. Rep. 730]; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.), 1049, 1068; *State* v. *March*, 1 Jones (N. Car.), 526; *State* v. *Thomas*, 98 N. Car. 599." *Ibid.*

A holding to this effect came when *United States* v. *Murdock*, 284 U. S. 141 (1931), "definitely settled" the question whether in a federal proceeding the privilege applied on account of fear of state prosecution, concluding "that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." *United States* v. *Murdock*, 290 U. S. 389, 396 (1933).

> "The English rule of evidence against compulsory self-incrimination, on which historically that contained in

> the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, 1068. *Queen* v. *Boyes*, 1 B. & S., at 330[, 121 Eng. Rep., at 738]. This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U. S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained." *Murdock*, 284 U. S., at 149.

Murdock's resolution of the question received a subsequent complement when we affirmed again that a State could compel a witness to give testimony that might incriminate him under federal law, see *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), overruled by *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964), testimony that we had previously held to be admissible into evidence in the federal courts, see *Feldman* v. *United States*, 322 U. S. 487 (1944), overruled by *Murphy*, *supra*, at 80.

B

It has been suggested here that our precedent addressing fear of prosecution by a government other than the compelling authority fails to reflect the *Murdock* rule uniformly.

In 1927 (prior to our decision in *Murdock*), in a case involving a request for habeas relief from a deportation order, we declined to resolve whether "the Fifth Amendment guarantees immunity from self-incrimination under state statutes." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927). Although we found that the witness had waived his claim to the privilege, our decision might be read to suggest that there was some tension between the reasoning of two of the cases discussed above, *Hale* v. *Henkel* and *Brown* v. *Walker*, and the analyses contained in two others, *United States* v. *Saline Bank of Va.*, 1 Pet. 100 (1828), and *Ballmann* v. *Fagin*, 200 U. S. 186 (1906). 273 U. S., at 113. These last two cases have in fact been cited here for the claim that prior to due process incorporation, the privilege could be asserted in a federal proceeding based on fear of prosecution by a State.[6] *Saline Bank* and *Ballmann* are not, however, inconsistent with *Murdock*.

In *Saline Bank*, we permitted the defendants to refuse discovery sought by the United States in federal court, where the defendants claimed that their responses would result in incrimination under the laws of Virginia. "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." 1 Pet., at 104. But, for all the sweep of this statement, the opinion makes no mention of the Fifth Amendment, and in *Hale* v. *Henkel*, we explained that "the prosecution [in *Saline Bank*] was under a state law which imposed the penalty, and . . . the Federal court was simply

[6] The language in *Vajtauer* that has been cited in support of this suggestion says only that our conclusion that the witness waived his claim of privilege "makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by *Hale* v. *Henkel*, 201 U. S. 43; *Brown* v. *Walker*, 161 U. S. 591, 608; compare *United States* v. *Saline Bank*, 1 Pet. 100; *Ballmann* v. *Fagin*, 200 U. S. 186, 195." 273 U. S., at 113.

administering the state law." 201 U. S., at 69. The state law, which addresses prosecutions brought by the State, suggested the rule that the *Saline Bank* Court applied to the case before it; the law provided that "no disclosure made by any party defendant to such suit in equity, and no books or papers exhibited by him in answer to the bill, or under the order of the Court, shall be used as evidence against him in any . . . prosecution under this law," quoted in 1 Pet., at 104. *Saline Bank*, then, may have turned on a reading of state statutory law. Cf. McNaughton, Self-Incrimination Under Foreign Law, 45 Va. L. Rev. 1299, 1305–1306 (1959) (suggesting that *Saline Bank* represents "an application not of the privilege against self-incrimination . . . but of the principle that equity will not aid a forfeiture"). But see *Ballmann*, *supra*, at 195 (Holmes, J.) (suggesting that *Saline Bank* is a Fifth Amendment case, though this view was soon repudiated by the Court in *Hale*, as just noted).

Where *Saline Bank* is laconic, *Ballmann* is equivocal. While Ballmann specifically argued only the danger of incriminating himself under state law as his basis for invoking the privilege in a federal proceeding, and we upheld his claim of privilege, our opinion indicates that we concluded that Ballmann might have had a fear of incrimination under federal law as well as under state law. While we did suggest, contrary to the *Murdock* rule, that Ballmann might have been able to invoke the privilege based on a fear of state prosecution, the opinion says only that "[o]ne way or the other [due to the risk of incrimination under federal or state law] we are of opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him." 200 U. S., at 195–196. At its equivocal worst, *Ballmann* reigned for only two months. *Hale* v. *Henkel* explained that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty," 201 U. S., at 69, and *Ballmann* and *Saline*

Bank were later, of course, superseded by *Murdock* with its unequivocal holding that prosecution in a state jurisdiction not bound by the Clause is beyond the purview of the privilege.

C

In 1964, our precedent took a turn away from the unqualified proposition that fear of prosecution outside the jurisdiction seeking to compel testimony did not implicate a Fifth or Fourteenth Amendment privilege, as the case might be. In *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964), we reconsidered the converse of the situation in *Murdock*, whether a witness in a state proceeding who had been granted immunity from state prosecution could invoke the privilege based on fear of prosecution on federal charges. In the course of enquiring into a work stoppage at several New Jersey piers, the Waterfront Commission of New York Harbor subpoenaed the defendants, who were given immunity from prosecution under the laws of New Jersey and New York. When the witnesses persisted in refusing to testify based on their fear of federal prosecution, they were held in civil contempt, and the order was affirmed by New Jersey's highest court. *In re Application of the Waterfront Comm'n of N. Y. Harbor*, 39 N. J. 436, 449, 189 A. 2d 36, 44 (1963). This Court held the defendants could be forced to testify not because fear of federal prosecution was irrelevant but because the Self-Incrimination Clause barred the National Government from using their state testimony or its fruits to obtain a federal conviction. We explained that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U. S., at 77–78.

Murphy is a case invested with two alternative rationales. Under the first, the result reached in *Murphy* was undoubtedly correct, given the decision rendered that very same day in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), which applied the

doctrine of Fourteenth Amendment due process incorporation to the Self-Incrimination Clause, so as to bind the States as well as the National Government to recognize the privilege. *Id.*, at 3. Prior to *Malloy*, the Court had refused to impose the privilege against self-incrimination against the States through the Fourteenth Amendment, see *Twining* v. *New Jersey*, 211 U. S. 78 (1908), thus leaving state-court witnesses seeking exemption from compulsion to testify to their rights under state law, as supplemented by the Fourteenth Amendment's limitations on coerced confessions. *Malloy*, however, established that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U. S., at 8.

As the Court immediately thereafter said in *Murphy*, *Malloy* "necessitate[d] a reconsideration" of the unqualified *Murdock* rule that a witness subject to testimonial compulsion in one jurisdiction, state or federal, could not plead fear of prosecution in the other. 378 U. S., at 57. After *Malloy*, the Fifth Amendment limitation could no longer be seen as framed for one jurisdiction alone, each jurisdiction having instead become subject to the same claim of privilege flowing from the one limitation. Since fear of prosecution in the one jurisdiction bound by the Clause now implicated the very privilege binding upon the other, the *Murphy* opinion sensibly recognized that if a witness could not assert the privilege in such circumstances, the witness could be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." 378 U. S., at 55 (internal quotation marks omitted).[7] The whipsawing was possible owing to a

[7] Prior to *Murphy*, such "whipsawing" efforts had been permissible, but arguably less outrageous since, as the opinion notes, "either the 'compelling' government or the 'using' government [was] a State, and, until today,

feature unique to the guarantee against self-incrimination among the several Fifth Amendment privileges. In the absence of waiver, the other such guarantees are purely and simply binding on the government. But under the Self-Incrimination Clause, the government has an option to exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony. *Kastigar* v. *United States*, 406 U. S., at 448–449. The only condition on the government when it decides to offer immunity in place of the privilege to stay silent is the requirement to provide an immunity as broad as the privilege itself. *Id.*, at 449. After *Malloy* had held the privilege binding on the state jurisdictions as well as the National Government, it would therefore have been intolerable to allow a prosecutor in one or the other jurisdiction to eliminate the privilege by offering immunity less complete than the privilege's dual jurisdictional reach. *Murphy* accordingly held that a federal court could not receive testimony compelled by a State in the absence of a statute effectively providing for federal immunity, and it did this by imposing an exclusionary rule prohibiting the National Government "from making any such use of compelled testimony and its fruits," 378 U. S., at 79 (footnote omitted).

This view of *Murphy* as necessitated by *Malloy* was adopted in the subsequent case of *Kastigar* v. *United States*, *supra*, at 456, n. 42 ("Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in *Malloy* v. *Hogan*"). Read this way, *Murphy* rests upon the same understanding of the Self-Incrimination Clause that *Murdock* recognized and to which the earlier cases had pointed. Although the Clause serves a variety of interests in one degree or another, see

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the States were not deemed fully bound by the privilege against self-incrimination." 378 U. S., at 57, n. 6.

Part IV, *infra*, at its heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt. After *Murphy*, the immunity option open to the Executive Branch could be exercised only on the understanding that the state and federal jurisdictions were as one, with a federally mandated exclusionary rule filling the space between the limits of state immunity statutes and the scope of the privilege.[8] As so understood, *Murphy* stands at odds with Balsys's claim.

There is, however, a competing rationale in *Murphy*, investing the Clause with a more expansive promise. The *Murphy* majority opened the door to this view by rejecting this Court's previous understanding of the English common-law evidentiary privilege against compelled self-incrimination, which could have informed the Framers' understanding of the Fifth Amendment privilege. See, *e. g.*, *Murphy*, 378 U. S., at 67 (rejecting *Murdock*'s analysis of the scope of the privilege under English common law). Having removed what it saw as an unjustified, historically derived

[8] Of course, the judicial exclusion of compelled testimony functions as a fail-safe to ensure that compelled testimony is not admitted in a criminal proceeding. The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 261 (1983). The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity "would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee." *Maness* v. *Meyers*, 419 U. S. 449, 462 (1975) (footnote and internal quotation marks omitted). This general rule ensures that we do not "let the cat out with no assurance whatever of putting it back," *id.*, at 463 (internal quotation marks omitted), and leaves the decision whether to grant immunity to the Executive in accord with congressional policy, see *Pillsbury*, *supra*, at 262.

limitation on the privilege, the *Murphy* Court expressed a comparatively ambitious conceptualization of personal privacy underlying the Clause, one capable of supporting, if not demanding, the scope of protection that Balsys claims. As the Court of Appeals recognized, if we take the *Murphy* opinion at face value, the expansive rationale can be claimed quite as legitimately as the *Murdock-Malloy-Kastigar* understanding of *Murphy*'s result, and Balsys's claim accordingly requires us to decide whether *Murphy*'s innovative side is as sound as its traditional one. We conclude that it is not.

As support for the view that the Court had previously misunderstood the English rule, *Murphy* relied, first, on two preconstitutional English cases, *East India Co.* v. *Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749), and *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ch. 1750), for the proposition that a witness in an English court was permitted to invoke the privilege based on fear of prosecution in a foreign jurisdiction. See 378 U. S., at 58–59. Neither of these cases is on point as holding that proposition, however. In *East India Co.*, a defendant before the Court of Exchequer, seeking to avoid giving an explanation for his possession of certain goods, claimed the privilege on the ground that his testimony might subject him to a fine or corporal punishment. The Court of Exchequer found that the defendant would be punishable in Calcutta, then an English Colony, and said it would "not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime." 1 Ves. sen., at 247, 27 Eng. Rep., at 1011. In *Brownsword*, a defendant before the Court of Chancery claimed the privilege on the ground that her testimony could render her liable to prosecution in an English ecclesiastical court. "The general rule," the court said, "is that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land." 2 Ves. sen., at 245, 28 Eng.

Rep., at 158. Although this statement, like its counterpart in *East India Co.*, is unqualified, neither case is authority for the proposition that fear of prosecution in foreign courts implicates the privilege. For in each of these cases, the judicial system to which the witness's fears related was subject to the same legislative sovereignty that had created the courts in which the privilege was claimed.[9] In fact, when these cases were decided, and for years after adoption of the Fifth Amendment, English authority was silent on whether fear of prosecution by a foreign nation implicated the privilege, and the Vice-Chancellor so stated in 1851. See *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N. S.) 301, 331, 61 Eng. Rep. 116, 128 (Ch. 1851) (observing, in the course of an opinion that clearly involved a claim of privilege based on the fear of prosecution by another sovereign, that there is an "absence of all authority on the point").

Murphy, in fact, went on to discuss the case last cited, as well as a subsequent one. The *Murphy* majority began by acknowledging that *King of the Two Sicilies* was not authority for attacking this Court's prior view of English law. 378 U. S., at 60. In an opinion by Lord Cranworth, the Court of Chancery declined to allow defendants to assert the privilege

[9] Further, the courts of both jurisdictions, at least in some cases, recognized the privilege against self-incrimination. *East India Co.* makes specific reference to the fact that the witness's testimony might be incriminating under the laws of Calcutta. 1 Ves. sen., at 247, 27 Eng. Rep., at 1011 ("[T]hat he is punishable appears from the case of *Omichund* v. *Barker* [1 *Atk.* 21, 26 Eng. Rep. 15 (1744)], as a jurisdiction is erected in *Calcutta* for criminal facts"). As of 1726, Calcutta was a "presidency town," which was subject to the civil jurisdiction of a "mayor's court." The mayor's court followed the English Rules of Evidence, which would have included the rule against self-incrimination. 1 Woodroffe & Ameer Ali's Law of Evidence in India 13 (P. Ramaswami & S. Rajagopalan eds., 11th ed. 1962). The ecclesiastical courts of England also recognized something akin to the privilege at this time in some cases. See Helmholz, Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius Commune*, 65 N. Y. U. L. Rev. 962, 969–974 (1990) (citing cases heard in ecclesiastical courts in which the privilege was recognized).

based on their fear of prosecution in Sicily, for two reasons. 1 Sim. (N. S.), at 329, 61 Eng. Rep., at 128. The first was the court's belief that the privilege speaks only to matters that might be criminal under the laws of England: "The rule relied on by the Defendants, is one which exists merely by virtue of our own municipal law, and must, I think, have reference, exclusively, to matters penal by that law: to matters as to which, if disclosed, the Judge would be able to say, as matter of law, whether it could or could not entail penal consequences." For the second, the court relied on the unlikelihood that the defendants would ever leave England and be subject to Sicilian prosecution.

The *Murphy* majority nonetheless understood this rule to have been undermined by the subsequent case of *United States of America* v. *McRae*, 3 L. R. Ch. 79 (1867). See 378 U. S., at 61. In that suit brought by the United States against McRae in England to recover funds that he had collected there as a Confederate agent during the Civil War, the court recognized the privilege based on McRae's claim that his testimony would incriminate him in the United States. The court distinguished the litigation then before it from *King of the Two Sicilies*, indicating that though it agreed with the general principles stated by Lord Cranworth, see 3 L. R. Ch., at 84, he had not needed to lay down the broad proposition that invocation of the privilege was appropriate only with regard to matters penal under England's own law, see *id.*, at 85. The court did not say that the privilege could be invoked in any case involving fear of prosecution under foreign law, however. Instead it noted two distinctions from *King of the Two Sicilies*, the first being that the "presumed ignorance of the Judge as to foreign law" on which *King of the Two Sicilies* rested has been "completely removed by the admitted statements upon the pleadings," 3 L. R. Ch., at 85; the second being that *McRae* presented the unusual circumstance that the party seeking to compel the testimony, the United States, was also the party

that would prosecute any crime under its laws that might thereby be revealed, *id.*, at 87. The court's holding that the privilege could be invoked in such circumstances does not, however, support a general application of the privilege in any case in which a witness fears prosecution under foreign law by a party not before the court. Thus, *Murphy* went too far in saying that *McRae* overruled *King of the Two Sicilies.*[10] See *Murphy*, 378 U. S., at 71. What is of more fundamental importance, however, is that even if *McRae* had announced a new development in English law going to the heart of *King of the Two Sicilies*, it would have been irrelevant to Fifth Amendment interpretation. The presumed influence of English law on the intentions of the Framers hardly invests the Framers with clairvoyance, and subsequent English developments are not attributable to the Framers by some rule of renvoi. Cf. *Brown*, 161 U. S., at 600 (citing *Cathcart* v. *Robinson*, 5 Pet. 264, 280 (1831)). Since *McRae* neither stated nor implied any disagreement with Lord Cranworth's 1857 statement in *King of the Two Sicilies* that there was no clear prior authority on the question, the *Murphy* Court had no authority showing that *Murdock* rested on unsound historical assumptions contradicted by opinions of the English courts.

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[10] *Murphy* also cites *Heriz* v. *Riera*, 11 Sim. 318, 59 Eng. Rep. 896 (1840), as support for the claim that the English rule allowed invocation of the privilege based on fear of prosecution abroad. See 378 U. S., at 63. In that case two Spanish women brought suit in England alleging that the defendant had violated a contract that he entered into with their brother and to which they were entitled to the proceeds as his heirs. The contract provided that the plaintiffs' brother (and they as his heirs) were entitled to a share of the proceeds from a mercantile contract with the Spanish Government. The defendant responded that the contract was illegal under the laws of Spain and hence unenforceable and resisted discovery because his answers might incriminate him under the Spanish code. The court accepted the defendant's plea, though it is unclear whether the court ruled on the merits of the plaintiffs' claim or the self-incrimination issue. See Grant, Federalism and Self-Incrimination, 5 UCLA L. Rev. 1, 2 (1958).

In sum, to the extent that the *Murphy* majority went beyond its response to *Malloy* and undercut *Murdock*'s rationale on historical grounds, its reasoning cannot be accepted now. Long before today, indeed, *Murphy*'s history was shown to be fatally flawed.[11]

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[11] *Murphy*, 378 U. S., at 81, n. 1 (Harlan, J., concurring in judgment) ("The English rule is not clear"); *United States* v. *(Under Seal)*, 794 F. 2d, at 927 ("The Court's scholarship with respect to English law in this regard has been attacked, *see* Note, 69 Va. L. Rev. at 893-94 . . . . We do not enter the dispute as to whether *Murphy* represents a correct statement of the English rule at a particular time because we do not think that the *Murphy* holding depended upon the correctness of the Court's understanding of the state of English law and reliance thereon as the sole basis for decision. Rather, *Murphy* proceeds as a logical consequence to the holding in *Malloy v. Hogan* . . ."); Note, Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1944–1946, 1949, and nn. 79–81 (1996) ("The uncertainty of English law on [the question whether the privilege can be invoked based on fear of prosecution] casts doubt on the Supreme Court's holding in *Murphy*, which was based on the assertion that *McRae* 'represents the settled "English rule" regarding self-incrimination under foreign law.' Indeed, the *Murphy* Court's reliance on its idea of the 'true' English rule has been criticized by commentators, and its reading of British law was essentially overruled by the British Parliament. *Murphy*'s reliance on mistaken interpretation and application of English law weakens its precedential value" (footnotes omitted)); Note, The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court, 69 Va. L. Rev. 875, 893–895 (1983) ("[T]he English rule argument has three fatal flaws. First, the so-called English rule, decided in 1867, never was *the* English rule despite overstatements by several American commentators and the *Murphy* Court. British commentators remained uncertain for nearly a century about the extent to which, if at all, their privilege protected against foreign incrimination . . . . Second, the English courts had not decided a case involving incrimination under the criminal laws of independent foreign sovereigns by the time our Constitution was framed. The only English cases involving independent sovereigns were decided more than sixty years later. Thus, even if the fifth amendment embodied the English common law at the time it was framed, the privilege did not incorporate any rule concerning foreign incrimination. Finally, even if the English rule protected against foreign incrimination, the Supreme Court in *Zicarelli* indicated that it had not

D

Although the Court and JUSTICE BREYER's dissent differ on details, including some considerations of policy addressed in Part IV, *infra*, our basic disagreement with that dissent turns on three points. First, we start with what we think is the most probable reading of the Clause in its Fifth Amendment context, as limiting its principle to concern with prosecution by a sovereign that is itself bound by the Clause; the dissent instead emphasizes the Clause's facial breadth as consistent with a broader principle. Second, we rely on the force of our precedent, notably *Murdock*, as confirming this same-sovereign principle, as adapted to reflect the post-*Malloy* requirement of immunity effective against both sovereigns subject to the one privilege under the National Constitution; the dissent attributes less force to *Murdock*, giving weight to its tension with the *Saline Bank* language, among other things. Third, we reject *Murphy*'s restatement of the common-law background and read none of the common-law cases as authority inconsistent with our contextual reading of the Clause, later confirmed by precedent such as *Murdock;* the dissent finds support in the common-law cases for *Murphy*'s historical reexamination and the broader reading of the Clause. In the end, our contextual reading of the Clause, combined with the *Murdock* holding, places a burden on any-

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formally adopted the rule in *Murphy*" (footnotes omitted)); Capra, The Fifth Amendment and the Risk of Foreign Prosecution, N. Y. L. J., Mar. 8, 1991, p. 3 ("[D]espite Justice Goldberg's assertions in *Murphy*, it is clear that there was never a 'true' or uniform English rule. . . . [T]o the extent that the English rule would be pertinent to the Fifth Amendment privilege, it would have had to exist at the time the Fifth Amendment was adopted. Yet, as even Justice Goldberg admitted in *Murphy*, the English cases involving independent sovereigns were decided more than 60 years after the Fifth Amendment was adopted"); see also Law Reform Committee, Sixteenth Report, 1967, Cmnd. 3472, ¶11, p. 7 (explaining that English common law on the question is not "wholly consistent").

Murphy's reexamination of history also adopted the illegitimate reading of *Saline Bank*, rejected *supra*, at 678–679.

one who contests the basic same-sovereign principle, a burden that only clear, contrary, preframing common law might carry; since the dissent starts with a broader reading of the Clause and a less potent view of *Murdock*, it does not require *Murphy* and the common-law cases to satisfy such a burden before definitively finding that a more expansive principle underlies the Clause.

IV

There remains, at least on the face of the *Murphy* majority's opinion, a further invitation to revise the principle of the Clause from what *Murdock* recognized. The *Murphy* majority opens its discussion with a catalog of "Policies of the Privilege," 378 U. S., at 55 (citations and internal quotation marks omitted):

> "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life, our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent."

Some of the policies listed would seem to point no further than domestic arrangements and so raise no basis for any privilege looking beyond fear of domestic prosecution. Oth-

ers, however, might suggest a concern broad enough to encompass foreign prosecutions and accordingly to support a more expansive theory of the privilege than the *Murdock* understanding would allow.

The adoption of any such revised theory would, however, necessarily rest on *Murphy*'s reading of preconstitutional common-law cases as support for (or at least as opening the door to) the expansive view of the Framers' intent, which we and the commentators since *Murphy* have found to be unsupported. Once the *Murphy* majority's treatment of the English cases is rejected as an indication of the meaning intended for the Clause, *Murdock* must be seen as precedent at odds with Balsys's claim. That precedent aside, however, we think there would be sound reasons to stop short of resting an expansion of the Clause's scope on the highly general statements of policy expressed in the foregoing quotation from *Murphy*. While its list does indeed catalog aspirations furthered by the Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope.

A

The most general of *Murphy*'s policy items ostensibly suggesting protection as comprehensive as that sought by Balsys is listed in the opinion as "the inviolability of the human personality and . . . the right of each individual to a private enclave where he may lead a private life." 378 U. S., at 55 (internal quotation marks omitted). Whatever else those terms might cover, protection of personal inviolability and the privacy of a testimonial enclave would necessarily seem to include protection against the Government's very intrusion through involuntary interrogation.[12] If in fact

[12] We are assuming, *arguendo*, that the intrusion is a subject of the Clause's protection. See *Murphy*, 378 U. S., at 57, n. 6; *Gecas*, 120 F. 3d, at 1462 (Birch, J., dissenting); cf. *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed

these values were reliable guides to the actual scope of protection under the Clause, they would be seen to demand a very high degree of protection indeed: "inviolability" is, after all, an uncompromising term, and we know as well from Fourth Amendment law as from a layman's common sense that breaches of privacy are complete at the moment of illicit intrusion, whatever use may or may not later be made of their fruits. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) (citing *United States* v. *Calandra*, 414 U. S. 338, 354 (1974); *United States* v. *Leon*, 468 U. S. 897, 906 (1984)).

The Fifth Amendment tradition, however, offers no such degree of protection. If the Government is ready to provide the requisite use and derivative use immunity, see *Kastigar*, 406 U. S., at 453; see also *Lefkowitz* v. *Turley*, 414 U. S. 70, 84 (1973), the protection goes no further: no violation of personality is recognized and no claim of privilege will avail.[13] One might reply that the choice of the word "inviolability" was just unfortunate; while testimonial integrity may not be inviolable, it is sufficiently served by requiring the Government to pay a price in the form of use (and derivative use) immunity before a refusal to testify will be overruled. But that answer overlooks the fact that when a witness's response will raise no fear of criminal penalty, there is no protection for testimonial privacy at all. See *United States* v. *Ward*, 448 U. S. 242, 248–255 (1980).

Thus, what we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before

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by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial" (citation omitted)).

[13] The practice of exchanging silence for immunity is unchallenged here and presumably invulnerable, being apparently as old as the Fifth Amendment itself. See *Kastigar*, 406 U. S., at 445, and n. 13.

the framing[14] and refined through immunity doctrine in the intervening years. Since the Judiciary could not recognize fear of foreign prosecution and at the same time preserve the Government's existing rights to seek testimony in exchange for immunity (because domestic courts could not enforce the immunity abroad), it follows that extending protection as Balsys requests would change the balance of private and governmental interests that has seemingly been accepted for as long as there has been Fifth Amendment doctrine. The upshot is that accepting personal testimonial integrity or privacy as a prima facie justification for the development Balsys seeks would threaten a significant change in the scope of traditional domestic protection; to the extent, on the other hand, that the domestic tradition is thought worthy of preservation, an appeal to a general personal testimonial integrity or privacy is not helpful. See *Doe* v. *United States*, 487 U. S. 201, 213, n. 11 (1988) (finding no violation of the privilege "[d]espite the impact upon the inviolability of the human personality"); *Schmerber* v. *California*, 384 U. S. 757, 762 (1966) (holding that a witness cannot rely on the privilege to decline to provide blood samples); *ibid.* ("[T]he privilege has never been given the full scope which the values that it helps to protect suggest").

B

Murphy's policy catalog would provide support, at a rather more concrete level, for Balsys's argument that application of the privilege in situations like his would promote the purpose of preventing government overreaching, which on anyone's view lies at the core of the Clause's purposes. This argument begins with the premise that "cooperative internationalism" creates new incentives for the Government to facilitate foreign criminal prosecutions. Because crime, like legitimate trade, is increasingly international, a correspond-

[14] See n. 13, *supra*.

ing degree of international cooperation is coming to characterize the enterprise of criminal prosecution.[15] The mission of the OSI as shown in this case exemplifies the international cooperation that is said to undermine the legitimacy of treating separate governmental authorities as separate for purposes of liberty protection in domestic courts. Because the Government now has a significant interest in seeing individuals convicted abroad for their crimes, it is subject to the same incentive to overreach that has required application of the privilege in the domestic context. Balsys says that this argument is nothing more than the reasoning of the *Murphy* Court when it justified its recognition of a fear of state prosecution by looking to the significance of "'cooperative federalism,'" the teamwork of state and national officials to fight interstate crime. 378 U. S., at 55–56.

But Balsys invests *Murphy*'s "cooperative federalism" with a significance unsupported by that opinion. We have already pointed out that *Murphy*'s expansion upon *Murdock* is not supported by *Murphy*'s unsound historical reexamination, but must rest on *Murphy*'s other rationale, under which its holding is a consequence of *Malloy.* That latter reading is essential to an understanding of "cooperative federalism." For the *Murphy* majority, "cooperative federalism" was not important standing alone, but simply because it underscored the significance of the Court's holding that after *Malloy* it would be unjustifiably formalistic for a federal court to ignore fear of state prosecution when ruling on a privilege claim. Thus, the Court described the "whipsaw" effect that the decision in *Malloy* would have created if fear of state prosecution were not cognizable in a federal proceeding:

> "[The] policies and purposes [of the privilege] are defeated when a witness can be whipsawed into incriminating himself under both state and federal law

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[15] The Court of Appeals cited a considerable number of studies in the growing literature on the subject. 119 F. 3d 122, 130–131 (CA2 1997).

> even though the constitutional privilege against self-incrimination is applicable to each. This has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." 378 U. S., at 55–56 (citation and internal quotation marks omitted).

Since in this case there is no analog of *Malloy*, imposing the Fifth Amendment beyond the National Government, there is no premise in *Murphy* for appealing to "cooperative internationalism" by analogy to "cooperative federalism."[16] Any analogy must, instead, be to the pre-*Murphy* era when the States were not bound by the privilege. Then, testimony compelled in a federal proceeding was admissible in a state prosecution, despite the fact that shared values and similar criminal statutes of the state and national jurisdictions presumably furnished incentive for overreaching by the Government to facilitate criminal prosecutions in the States.

But even if *Murphy* were authority for considering "cooperative federalism" and "cooperative internationalism" as reasons supporting expansion of the scope of the privilege,

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[16] There is indeed nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source, the privilege being "at best an emerging principle of international law." See Amann, A Whipsaw Cuts Both Ways, 45 UCLA L. Rev. 1201, 1259 (1998) (hereinafter Amann).

In the course of discussing the Eleventh Circuit case raising the same issue as this one, Amann suggests nonetheless that the whipsaw rationale has particular salience on these facts because along with the United States, Lithuania and Israel are signatories to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G. A. Res. 2200, which recognizes something akin to the privilege. See Amann 1233, n. 206. The significance of being bound by the Covenant, however, is limited by its provision that the privilege is derogable and accordingly may be infringed if public emergency necessitates. *Id.*, at 1259, n. 354. In any event, Balsys has made no claim under the Covenant, and its current enforceability in the courts of the signatories is an issue that is not before us.

any extension would depend ultimately on an analysis of the likely costs and benefits of extending the privilege as Balsys requests. If such analysis were dispositive for us, we would conclude that Balsys has not shown that extension of the protection would produce a benefit justifying the rule he seeks.

The Court of Appeals directed careful attention to an evaluation of what would be gained and lost on Balsys's view. It concluded, for example, that few domestic cases would be adversely affected by recognizing the privilege based upon fear of foreign prosecution, 119 F. 3d, at 135–137;[17] that American contempt sanctions for refusal to testify are so lenient in comparison to the likely consequences of foreign prosecution that a witness would probably refuse to testify even if the privilege were unavailable to him, *id.*, at 142 (Block, J., concurring); that by statute and treaty the United States could limit the occasions on which a reasonable fear of foreign prosecution could be shown, as by modifying extradition and deportation standards in cases involving the privilege, *id.*, at 138–139; and that because a witness's refusal to testify may be used as evidence in a civil proceeding, deportation of people in Balsys's position would not necessarily be thwarted by recognizing the privilege as he claims it, *id.*, at 136.

The Court of Appeals accordingly thought the net burden of the expanded privilege too negligible to justify denying its expansion. We remain skeptical, however. While we will not attempt to comment on every element of the Court of Appeals's calculation, two of the points just noted would present difficulty. First, there is a question about the standard that should govern any decision to justify a truly discretionary ruling by making the assumption that it will induce the Government to adopt legislation with international implications or to seek international agreements, in order to

[17] The assessment was, of course, necessarily based on experience under the same-sovereign view of the privilege.

mitigate the burdens that the ruling would otherwise impose. Because foreign relations are specifically committed by the Constitution to the political branches, Art. II, § 2, cl. 2, we would not make a discretionary judgment premised on inducing them to adopt policies in relation to other nations without squarely confronting the propriety of grounding judicial action on such a premise.

Second, the very assumption that a witness's silence may be used against him in a deportation or extradition proceeding due to its civil nature, 119 F. 3d, at 136 (citing *Lopez-Mendoza*, 468 U. S., at 1038–1039), raises serious questions about the likely gain from recognizing fear of foreign prosecution. For if a witness claiming the privilege ended up in a foreign jurisdiction that, for whatever reason, recognized no privilege under its criminal law, the recognition of the privilege in the American courts would have gained nothing for the witness. This possibility, of course, presents a sharp contrast with the consequences of recognizing the privilege based on fear of domestic prosecution. If testimony is compelled, *Murphy* itself illustrates that domestic courts are not even wholly dependent on immunity statutes to see that no use will be made against the witness; the exclusionary principle will guarantee that. See *Murphy*, 378 U. S., at 79. Whatever the cost to the Government may be, the benefit to the individual is not in doubt in a domestic proceeding.

Since the likely gain to the witness fearing foreign prosecution is thus uncertain, the countervailing uncertainty about the loss of testimony to the United States cannot be dismissed as comparatively unimportant. That some testimony will be lost is highly probable, since the United States will not be able to guarantee immunity if testimony is compelled (absent some sort of cooperative international arrangement that we cannot assume will occur). While the Court of Appeals is doubtless correct that the expected consequences of some foreign prosecutions may be so severe that a witness will refuse to testify no matter what, not

every foreign prosecution may measure up so harshly as against the expectable domestic consequences of contempt for refusing to testify. We therefore must suppose that on Balsys's view some evidence will in fact be lost to the domestic courts, and we are accordingly unable to dismiss the position of the United States in this case, that domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege.

In sum, the most we would feel able to conclude about the net result of the benefits and burdens that would follow from Balsys's view would be a Scotch verdict. If, then, precedent for the traditional view of the scope of the Clause were not dispositive of the issue before us, if extending the scope of the privilege were open to consideration, we still would not find that Balsys had shown that recognizing his claim would be a sound resolution of the competing interests involved.

V

This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gath-

erer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

Whether such an argument should be sustained may be left at the least for another day, since its premises do not fit this case. It is true that Balsys has shown that the United States has assumed an interest in foreign prosecution, as demonstrated by OSI's mandate[18] and American treaty agreements[19] requiring the Government to give to Lithuania and Israel any evidence provided by Balsys. But this interest does not rise to the level of cooperative prosecution. There is no system of complementary substantive offenses

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[18] According to Order No. 851–79, reprinted in App. 15–17, the OSI shall "[m]aintain liaison with foreign prosecution, investigation and intelligence offices; [u]se appropriate Government agency resources and personnel for investigations, guidance, information, and analysis; and [d]irect and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorneys Offices, and other relevant Federal agencies."

[19] The United States and Lithuania have entered into an agreement that provides that the two governments "agree to cooperate in prosecution of persons who are alleged to have committed war crimes . . . agree to provide mutual legal assistance concerning the prosecution of persons suspected of having committed war crimes . . . will assist each other in the location of witnesses believed to possess relevant information about criminal actions . . . during World War II, and agree to intermediate and endeavor to make these witnesses available for the purpose of giving testimony in accordance with the laws of the Republic of Lithuania to authorized representatives of the United States Department of Justice." Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, Aug. 3, 1992, reprinted in App. in No. 96–6144 (CA2), pp. 396–397.

The District Court found that though it had not been made aware of a treaty between the United States and Israel requiring disclosure of information related to war crimes, OSI had shared such information in the past and that it would be consistent with OSI's mandate from the Attorney General for OSI to do so again. 918 F. Supp. 588, 596 (EDNY 1996).

at issue here, and the mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other. Cf. *Bartkus* v. *Illinois*, 359 U. S. 121, 122–124 (1959) (rejecting double jeopardy claim where federal officials turned over all evidence they had gathered in connection with federal prosecution of defendant for use in subsequent state prosecution of defendant). In this case there is no basis for concluding that the privilege will lose its meaning without a rule precluding compelled testimony when there is a real and substantial risk that such testimony will be used in a criminal prosecution abroad.

* * *

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

It is so ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion without reservation, I write separately to emphasize these points.

The Clause that protects every person from being "compelled in any criminal case to be a witness against himself" is a part of the broader protection afforded by the Fifth Amendment to the Constitution. That Amendment constrains the power of the Federal Government to deprive any person "of life, liberty, or property, without due process of law," just as the Fourteenth Amendment imposes comparable constraints on the power of the States. The primary office of the Clause at issue in this case is to afford protection to persons whose liberty has been placed in jeopardy in an American tribunal. The Court's holding today will not have any adverse impact on the fairness of American criminal trials.

The fact that the issue in this case has been undecided for such a long period of time suggests that our ruling will have

little, if any, impact on the fairness of trials conducted in other countries. Whether or not that suggestion is accurate, I do not believe our Bill of Rights was intended to have any effect on the conduct of foreign proceedings. If, however, we were to accept respondent's interpretation of the Clause, we would confer power on foreign governments to impair the administration of justice in this country. A law enacted by a foreign power making it a crime for one of its citizens to testify in an American proceeding against another citizen of that country would immunize those citizens from being compelled to testify in our courts. Variants of such a hypothetical law are already in existence. See *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 526, n. 6 (1987); see also *id.*, at 544–545, n. 29. Of course, the Court might craft exceptions for such foreign criminal laws, but it seems far wiser to adhere to a clear limitation on the coverage of the Fifth Amendment, including its privilege against self-incrimination. That Amendment prescribes rules of conduct that must attend any deprivation of life, liberty, or property in our Nation's courts.

JUSTICE GINSBURG, dissenting.

The privilege against self-incrimination, "closely linked historically with the abolition of torture," is properly regarded as a "landmar[k] in man's struggle to make himself civilized." E. Griswold, The Fifth Amendment Today 7 (1955); see *id.*, at 8 (Fifth Amendment expresses "one of the fundamental decencies in the relation we have developed between government and man"). In my view, the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct generally to be followed by our Nation's officialdom. It counsels officers of the United States (and of any State of the United States) against extracting testimony when the person examined reasonably fears that his words would be used against him in a later criminal prosecution.

As a restraint on compelling a person to bear witness against himself, the Amendment ordinarily should command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign. Cf. *DKT Memorial Fund Ltd.* v. *Agency for International Development*, 887 F. 2d 275, 307–308 (CADC 1989) (R. B. Ginsburg, J., concurring in part and dissenting in part) ("just as our flag carries its message . . . both at home and abroad, so does our Constitution and the values it expresses") (citation and internal quotation marks omitted); *United States* v. *Tiede*, 86 F. R. D. 227 (U. S. Court for Berlin 1979) (foreign national accused of hijacking Polish aircraft abroad was tried under German substantive law in Berlin in a court created by United States; U. S. court held foreign national entitled to jury trial as a matter of constitutional right). On this understanding of the "fundamental decenc[y]" the Fifth Amendment embodies, "its expression of our view of civilized governmental conduct," Griswold, *supra*, at 8, 9, I join JUSTICE BREYER's dissenting opinion.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

Were Aloyzas Balsys to face even a theoretical possibility that his testimony could lead a State to prosecute him for murder, the Fifth Amendment would prohibit the Federal Government from compelling that testimony. The Court concludes, however, that the Fifth Amendment does not prohibit compulsion here because Balsys faces a real and substantial danger of prosecution not, say, by California, but by a foreign nation. The Fifth Amendment, however, provides that "[n]o person . . . shall be compelled in *any* criminal case to be a witness against himself." U. S. Const., Amdt. 5 (emphasis added). This Court has not read the words "any criminal case" to limit application of the Clause to only *federal* criminal cases. See *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964). That precedent, as well

as the basic principles underlying the privilege, convince me that the Fifth Amendment's privilege against self-incrimination should encompass not only feared domestic prosecutions, but also feared foreign prosecutions where the danger of an actual foreign prosecution is substantial.

I

I begin with a point that focuses upon precedent setting forth the current understanding of the scope of the word "any," and that reveals the basic difference between the majority's view of the privilege and the view this Court has previously taken and should continue to take. The majority focuses upon one case, *Murphy* v. *Waterfront Comm'n of N. Y. Harbor, supra,* which itself discusses much historically relevant precedent. And the majority's focus upon that one case is appropriate.

Murphy holds that "the constitutional privilege against self-incrimination protects . . . a federal witness against incrimination under state . . . law." *Id.*, at 77–78. As I read *Murphy,* the Court thought this conclusion flowed naturally from its basic understanding of the scope of the Fifth Amendment privilege. On that understanding, the privilege prohibits federal courts (and state courts through the Fourteenth Amendment) from compelling a witness to furnish testimonial evidence that may be used to prove his guilt *if that witness may reasonably fear criminal prosecution.* See *id.*, at 60–63 (discussing the English cases, *King of Two Sicilies* v. *Willcox,* 1 Sim. (N. S.) 301, 61 Eng. Rep. 116 (Ch. 1851), and *United States of America* v. *McRae,* 3 L. R. Ch. 79 (1867), as ones that, if rightly understood, embody that proposition of law).

The privilege, understood in this way, requires the abolition of any "same sovereign" rule. It is often reasonable for a federal witness to fear state prosecution, and vice versa. Indeed, where testimony may incriminate and immunity has not been granted, it is so reasonable that one can say, as a

matter of law, that the privilege applies, across jurisdictions, to the entire class of cases involving federal witnesses who fear state prosecutions and also to the entire class of cases involving state witnesses who fear federal prosecutions. See *Murphy*, *supra*, at 77–78. Thus, the Fifth Amendment (or the Fourteenth Amendment) automatically prohibits compelled testimony in any such cross-jurisdictional circumstance.

If I am right about how *Murphy* should be understood, then that case directs the application of the privilege in this one. That is because the only difference between *Murphy* and this case is that one cannot say, as a matter of law, that *every* threat of a foreign prosecution is a reasonable threat. But where there is such a reasonable threat—where the threat is "real and substantial," *Zicarelli* v. *New Jersey Comm'n of Investigation*, 406 U. S. 472, 478 (1972)—the privilege, as *Murphy* understands it, would apply.

A

The majority says that one can read *Murphy* as embodying a very different rationale, a rationale that turns upon considerations of federalism—the need to consider "state and federal jurisdictions . . . as one" for purposes of applying the privilege. *Ante*, at 683. It reads *Murphy* as a case that sees at the heart of the Clause

> "the principle that the courts of a government *from which* a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." *Ante*, at 683 (emphasis added).

I have underscored the key words "from which." It is these words that tie the Clause to prosecutions by the same sovereign.

But what is the evidence that *Murphy* put any legal weight at all upon those underscored words? What reason

has the majority to believe that *Murphy* subscribes to, or depends in any way upon, this phrasing of the privilege's "principle" rather than upon the critically different "principle" I suggested above, *i. e.*, the principle that "courts may not in fairness compel a witness who reasonably fears prosecution to furnish testimony that may be used to prove his guilt?"

The majority points to two relevant *Murphy* statements. In the first, *Murphy* said that *Malloy* v. *Hogan*, 378 U. S. 1 (1964), which incorporated the Fifth Amendment privilege as part of the Fourteenth Amendment's Due Process Clause, "necessitates a reconsideration" of *United States* v. *Murdock*, 284 U. S. 141 (1931), which had held that the Fifth Amendment protected an individual only from prosecutions by the Federal Government. *Murphy*, 378 U. S., at 57. In the second, *Murphy* mentioned, as one of many items of support for its analysis, that most Fifth Amendment policies are defeated

> "when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Id.*, at 55 (quoting *Knapp* v. *Schweitzer*, 357 U. S. 371, 385 (1958) (Black, J., dissenting)).

Since the first statement mentions only a reason for reconsidering *Murdock*, since the second offers support on either analysis, and since neither refers to any "alternative rational[e]" for decision, *ante*, at 680, the majority's evidence for its reinterpretation of *Murphy* seems rather skimpy.

Now consider the reasons for believing that *Murphy* rests upon a different rationale—a rationale that, by focusing upon the basic nature and history of the underlying right, rejects *Murdock*'s "same sovereign" rule. First, *Murphy* holds that the "constitutional privilege" itself, not that privilege together with principles of federalism, "protects . . . a federal

witness against incrimination under state . . . law." *Murphy*, *supra*, at 78. Second, it says explicitly that it "reject[s]" the *Murdock* rule, not because of considerations of federalism arising out of *Malloy*, but because it is "unsupported by history or policy" and represents a "deviation" from a "correct . . . construction" of the privilege in light of its "history, policies and purposes." *Murphy*, *supra*, at 77. Third, about half of the opinion consists of an effort to demonstrate that the privilege, as understood by the English courts and by American courts prior to *Murdock*, protected individuals from compelled testimony in the face of a realistic threat of prosecution by *any* sovereign, not simply by the same sovereign that compelled the testimony. See *Murphy*, 378 U. S., at 58–70. Fourth, the rest of the Court's analysis consists of a discussion of the purposes of the privilege, which, in the Court's view, lead to a similar conclusion. See *id.*, at 55–56. Fifth, the Court explicitly rejects the analysis of commentators who argued for a "same sovereign" rule on the ground that their understanding of the privilege's purposes was incomplete. See *id.*, at 56–57, n. 5 (rejecting 8 J. Wigmore, Evidence § 2258, p. 345 (McNaughton rev. 1961)). Sixth, the Court nowhere describes its rationale in "silver platter" or similar terms that could lead one to conclude that its rule is prophylactic, enforcement based, or rests upon any rationale other than that the privilege is not limited to protection against prosecution by the same jurisdiction that compels the testimony. Cf. 378 U. S., at 80–81 (Harlan, J., concurring in judgment).

Consequently, I believe one must read *Murphy* as standing for the proposition that the privilege includes protection against being compelled to testify by the Federal Government where that testimony might be used in a criminal prosecution conducted by another sovereign. And the question the Court must consequently face is whether we should reject the rationale of that case when we answer the ques-

tion presented here. In other words, we must ask not, "what did *Murphy* hold," but "was *Murphy* right?"

B

Since *Murphy* is prevailing law, the majority bears the burden of showing that *Murphy* is wrong; and the majority says that *Murphy*'s reasoning is "fatally flawed" and legally "unsound." *Ante,* at 687–688. But it is not. *Murphy*'s reasoning finds in *Malloy*'s holding (that the privilege binds the States) a need to reexamine the "same sovereign" rule, first set forth in the earlier case of *Murdock.* Without reexamination, *Murdock*'s rule would have permitted State and Federal Governments each to have compelled testimony for use by the other. *Murphy*'s reasoning then finds the "same sovereign" rule unsound as a matter of history and of the basic purposes of the privilege.

Murphy's use of legal history is traditional. It notes that *Murdock* rested its own conclusion upon earlier English and American cases. It reads the language of those cases in light of the reasons that underlie it. It says that, so read, those cases did not stand for a "same sovereign" rule, but suggested the contrary. And it concludes that *Murdock*'s legal pedigree is suspicious or illegitimate. In a word, *Murphy* examines *Murdock*'s historical pedigree very much the way that the majority today analyzes that of *Murphy.* The difference, however, is that *Murphy* makes a better case for overturning its predecessor than does the majority.

I can reiterate the essence of *Murphy*'s analysis, amending it to fit the present case, roughly as follows:

> 1. *Murdock* thought that English law embodied a "same sovereign" rule, but it did not. Two early English cases, one decided in 1749 and the other in 1750, held that the privilege applied even though the feared prosecution was, in the one case, in Calcutta, and in the other, by ecclesiastical authorities. *East India Co.* v.

Campbell, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ch. 1750). Those cases said nothing about whether or not the law of Calcutta, church law, and English law all emanate from a single sovereign. But *Murdock* had cited a famous later English case, *King of Two Sicilies* v. *Willcox*, 1 Sim. (N. S.) 301, 61 Eng. Rep. 116 (Ch. 1851), as standing for the "same sovereign" principle.

It is true that one of the English judges in that case, Lord Cranworth, said that the privilege involves only "matters [made] penal by [English] . . . law." *Id.*, at 329, 61 Eng. Rep., at 128. But Lord Cranworth immediately qualified that conclusion by restating the conclusion in terms of its rationale, namely, that the privilege applies "to matters as to which, if disclosed, the Judge would be able to say, as matter of law, whether it could or could not entail penal consequences." *Ibid.* And, 16 years later, the English courts sustained a claim of privilege involving a threatened forfeiture in America. *United States of America* v. *McRae*, 3 L. R. Ch. 79 (1867). In doing so, the *McRae* court said both that Lord Cranworth's statement in *King of the Two Sicilies* "la[id] down . . . a proposition" that was "broad[er]" than necessary to "support the judgment," and that the true reason the privilege had not applied in the earlier case was because the judge did not "know . . . with certainty . . . the [foreign law, hence] whether the acts . . . had rendered [the defendants] amenable to punishment" and "it was doubtful whether the Defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to [Sicily]." *United States of America* v. *McRae*, *supra*, at 85, 87.

Thus, the true English rule as of the time of *Murdock*, insofar as any of these cases reveal that rule, was not a "same sovereign" rule, but a rule that the privilege did not apply to prosecutions by another sovereign *where*

the danger of any such prosecution was speculative or insubstantial. Cf. *Queen* v. *Boyes*, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (Q. B. 1861) ("[T]he danger to be apprehended must be real and appreciable . . . not a danger of an imaginary and unsubstantial character").

Where is *Murphy*'s error?

2. *Murdock* thought that earlier American cases required a "same sovereign" rule, but they did not. To the contrary: Chief Justice Marshall, in *United States* v. *Saline Bank of Va.*, 1 Pet. 100 (1828), wrote that "a party is not bound to make any discovery which would expose him to penalties." *Id.*, at 104. Justice Holmes later cited this case as authority for the proposition that the Fifth Amendment privilege "exonerated" a federal witness "from [making] disclosures which would have exposed him to the penalties of the state law." *Ballmann* v. *Fagin*, 200 U. S. 186, 195 (1906). Lower federal courts, consistent with the English rule, had held that a witness could refuse to answer questions based on the danger of incrimination in another jurisdiction. See, *e. g.*, *In re Hess*, 134 F. 109, 112 (ED Pa. 1905); *In re Graham*, 10 F. Cas. 913, 914 (No. 5,659) (SDNY 1876). True, the Court had written in dicta that "[w]e think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905). But that unexplained dicta, which a later case linked to a (misunderstood) English rule, see *Hale* v. *Henkel*, 201 U. S. 43, 68–69 (1906), provides an insufficient historical basis for *Murdock*'s summary conclusion, particularly since the Court, immediately prior to *Murdock*, had indicated that the question remained open. See *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103 (1927) (reserving question; citing *Saline Bank* and *Ballmann* v. *Fagin*).

Again, where is *Murphy*'s error?

Stated in this minimal way, *Murphy*'s historical analysis is difficult to attack. One can, of course, always point to special features of a case and thereby distinguish it. In respect to the mid-18th-century English cases, one can point out that Calcutta and the church may not have been completely separate "sovereigns." *Ante*, at 685. And *Saline Bank* might have involved application by the federal court of a state law that, without the help of the Fifth Amendment, protected a party from self-incrimination. But see *Saline Bank*, *supra*, at 103 (citing Virginia privilege statute which, by its terms, applied to suit by the *state* "Attorney General" in the *state* "Superior Court of Chancery for the district of Richmond" for recovery of a bank's capital stock "in behalf of the Commonwealth"). But this kind of criticism is beside the point. The English judges made no point of the former. See *ante*, at 685 (statements about the privilege in these cases were "unqualified"). It does not denigrate their learning to suggest that they did not articulate the precise sovereignty-related status of ecclesiastical courts or of Calcutta's criminal law in 1749. Nor did Justice Holmes make any point of the latter. See *Ballmann* v. *Fagin*, *supra*, at 195. As for the suggestion that it is illegitimate to consider the later English authorities in construing the privilege, see *ante*, at 687, one would think that, on this view, *Murdock* is at least as vulnerable as *Murphy*.

Most importantly, neither the majority today, nor the authorities it cites, see *ante*, at 688–689, n. 11, shows that the key historical points upon which *Murphy* relied are clearly wrong. At worst, *Murphy* represents one possible reading of a history that is itself unclear. *Murphy*'s main criticisms of *Murdock* are reasonable ones. Its reading of earlier cases, insofar as they were relevant to its criticism of *Murdock*, was plausible then, see Grant, Federalism and Self-Incrimination, 4 UCLA L. Rev. 549, 562 (1957) (*Murdock* "illustrates the danger of copying one's precedents directly

from the brief of counsel"); and it is plausible now. That minimalist conclusion is sufficient for present purposes. Even if *Murdock*'s 3-sentence, and *Murphy*'s 20-page, historical analyses were equally plausible, we would need something more to abandon *Murphy*, for it is the most recent, and thereby governing, precedent.

Nor can I find any other reason for rejecting *Murphy* and, thereby, resurrecting *Murdock*. The Fifth Amendment's language permits *Murphy*'s construction, for it says "any criminal case." The history of the Amendment's enactment simply does not answer the question about whether or not it applied where there is a substantial danger of prosecution in another jurisdiction. See *United States* v. *Gecas*, 120 F. 3d 1419, 1435 (CA11 1997) (en banc) (Fifth Amendment privilege "has virtually no legislative history"); Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1123 (1994) (Fifth Amendment's legislative history "adds little to our understanding of the history of the privilege"). It is possible that the language, "in any criminal case," was aimed at limiting protection to compelled testimony against *penal* interests, a reading consistent with the Court's contemporary understanding of the Clause. See, *e. g.*, *United States* v. *Ward*, 448 U. S. 242, 248–255 (1980) (rejecting claim to privilege based on fear of civil penalty, in part, because Clause "is expressly limited to 'any criminal case' "); 5 The Founders' Constitution 262 (P. Kurland & R. Lerner eds. 1987) (indicating that phrase "in any criminal case" was proposed by Representative Lawrence to ensure that the Clause was not "in some degree contrary to laws passed"). And it is also possible that the language was intended to limit the proceedings in which the privilege could be *claimed* to criminal cases, which understanding the Court rejected long ago. See *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924) (The privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsi-

bility him who gives it"). Neither of these readings is any *more* speculative, as a textual or historical matter, than reading the Clause as the majority does, against its text, to restrict the universe of feared prosecutions *upon which basis* the privilege may be asserted.

What is more, there is no suggestion that *Murphy*'s rule, applied to state and federal prosecutions, "has proven to be intolerable simply in defying practical workability." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854 (1992) (citing *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965)). Nor have the facts, or related principles of law, subsequently changed so much "as to have robbed the old rule of significant application or justification." 505 U. S., at 855 (citing *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173–174 (1989), and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)). Indeed, it was the *Murdock* rule's legitimacy that, prior to *Murphy*, consistently divided the Court. See, *e. g.*, *Irvine* v. *California*, 347 U. S. 128, 139–142 (1954) (Black, J., joined by Douglas, J., dissenting) ("I cannot agree that the [Fifth] Amendment's guarantee against self-incrimination testimony can be spirited away by the ingenious contrivance of using federally extorted confessions to convict of state crimes and vice versa"); *Feldman* v. *United States*, 322 U. S. 487, 494–503 (1944) (Black, J., joined by Douglas and Rutledge, JJ., dissenting).

The conclusion that I draw is that the rationale established through *Murphy*'s precedent governs. That rationale interprets the privilege as applicable at the least where a person faces a substantial threat of prosecution in another jurisdiction. And that reading of the privilege favors Balsys here.

II

Precedent aside, I still disagree with the Court's conclusion. As *Murphy* said, and as the Second Circuit reiterated, the Fifth Amendment reflects not one, but several different

purposes. 378 U. S., at 55; 119 F. 3d 122, 129 (1997). And whatever the disagreement about the relative weight to be given each of those purposes or their historical origins, I believe that these purposes argue in favor of the Second Circuit's interpretation. Namely, an interpretation that finds the Fifth Amendment privilege applicable where the threat of a foreign prosecution is "real and substantial," as it is here. See *United States of America* v. *McRae*, 3 L. R. Ch., at 85–87 (distinguishing *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N. S.) 301, 61 Eng. Rep. 116 (Ch. 1851), on this ground); cf. *Queen* v. *Boyes*, 1 B. & S., at 330, 121 Eng. Rep., at 738.

A

This Court has often found, for example, that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth. "At its core, the privilege reflects our fierce 'unwillingness to subject those suspected of crime to the cruel [choice] of self-accusation, perjury or contempt.' " *Pennsylvania* v. *Muniz*, 496 U. S. 582, 596 (1990) (quoting *Doe* v. *United States*, 487 U. S. 201, 212 (1988)); *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983). The privilege can reflect this value, and help protect against this indignity, even if other considerations produce only partial protection—protection that can be overcome by other needs. Cf. MacNair, Early Development of the Privilege Against Self-Incrimination, 10 Oxford J. Legal Studies 66, 70 (1990) (early ecclesiastical procedure recognized privilege until an accusation was made that person had committed an offense); *ante*, at 692 (observing that the "protection of personal testimonial inviolability" is not a "reliable guid[e]" to the "actual scope of protection under the Clause"). And that value is no less at stake where a foreign, but not a domestic, prosecution is at issue.

This Court has also said that the privilege serves to protect personal privacy, by discouraging prosecution for crimes

of thought. See *Muniz, supra,* at 595–596 (describing English Star Chamber "wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury"); *United States* v. *Nobles,* 422 U. S. 225, 233 (1975) ("The Fifth Amendment privilege . . . protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation'" (quoting *Couch* v. *United States,* 409 U. S. 322, 327 (1973))). Indeed, some have argued that the Puritans championed the privilege because, had the 17th-century state questioned them about their beliefs, they would have had to answer truthfully and thus suffer condemnation. See L. Levy, Origins of the Fifth Amendment 134 (1968) ("If [a Puritan] took the oath and lied, he committed the unpardonable and cardinal sin of perjury which was simply not an option for a religious man"). This consideration may prove less important today domestically, for the First Amendment protects against the prosecution of thought crime. But that fact also provides no reason for denying protection where the prosecution is foreign.

The Court has said that the privilege reflects, too, "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." *Murphy,* 378 U. S., at 55. This concern with governmental "overreaching" would appear implicated as much when the foreseen prosecution is by another country as when it is by another domestic jurisdiction. Indeed, the analogy to *Murphy*'s observation about "cooperative federalism," in which State and Federal Governments wage "a united front against many types of criminal activity," *id.*, at 56, is a powerful one. That is because, in the 30 years since *Murphy,* the United States has dramatically increased its level of cooperation with foreign governments to combat crime. See generally E. Nadelman, Cops Across Borders: The Internationalization of U. S. Criminal Law Enforcement (1993); Bassiouni, Policy Considerations on Inter-State Cooperation in Criminal Matters, 4 Pace Y. B.

Int'l L. 123 (1992); Zagaris, International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration, 3 Sw. J. L. & Trade Am. 1 (1996). The United States has entered into some 20 "mutual legal assistance treaties" through which it may develop and share evidence with foreign governments in order to facilitate criminal prosecutions abroad, see New MLAT Treaties Increase DOJ's Reach, 4 No. 7 DOJ Alert 7 (Apr. 18, 1994) (listing and discussing treaties); it has signed more than 50 new extradition agreements, see 18 U. S. C. § 3181 (1994 ed., Supp. II) (listing extradition treaties ratified since 1960); Nadelman, Cops Across Borders, at 489–502 (same); it has increased by an order of magnitude the number of law enforcement offices and personnel located abroad, see *id.*, at 479–486 (cataloging growth in foreign-based law enforcement personnel since 1965); and it has established a special office " 'for the purpose of centralizing and giving greater emphasis and visibility to [the Justice Department's] prosecutorial service functions in the international arena,' " which has led to a "dramatic increase in the number of extraditions" and an "even greater growth in the numbers of requests for evidence in criminal cases" since the 1970's, *id.*, at 402 (discussing DOJ's Office of International Affairs (alterations omitted)).

Indeed, the United States has a significant stake in the foreign prosecution at issue here. Congress has passed a deportation law targeted at suspected Nazi war criminals. See 8 U. S. C. § 1182(a)(3)(E). The Justice Department has established an agency whose mandate includes the assistance of foreign governments in the prosecution of those deported. See App. 15–17 (Order No. 851–79, establishing DOJ's Office of Special Investigations). And the United States has agreed with Lithuania (where Balsys may stand trial) "to cooperate in prosecution of persons who are alleged to have committed war crimes . . . [and] to provide . . . legal assistance concerning [such] prosecution[s]." Memorandum of Understanding Between United States Department of Jus-

tice and Office of Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, Aug. 3, 1992, App. in No. 96–6144 (CA2), p. 395. As the Second Circuit reasoned, since the Federal Government now has a stake in many foreign prosecutions akin to its stake in state prosecutions, a stake illustrated by this case, the privilege's purpose of preventing governmental overreaching is served by recognizing the privilege in the former class of cases, just as it is served in the cases of "cooperative federalism" identified by *Murphy*. Indeed, experience suggests that the possibility of governmental abuses in cases like this one—where the United States has an admittedly keen interest in the later, foreign prosecution—is not totally speculative. See, *e. g.*, *Demjanjuk* v. *Petrovsky*, 10 F. 3d 338 (CA6 1993).

An additional purpose served by the privilege is "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy*, *supra*, at 55. Even if this systemic value speaks to "domestic arrangements" only, *ante*, at 690, the investigation of crime is as much a part of our "system" of criminal justice as is any later criminal prosecution. Reflecting this fact, the Court has said that the Fifth Amendment affords individuals protection during the investigation, as well as the trial, of a crime. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). And the importance we place in our system of criminal investigation, and the distaste we have for its alternatives, would stand diminished if an accused were denied the Fifth Amendment's protections because the criminal case against him, though built in this country by our Government, was ultimately to be prosecuted in another. This is true regardless of whether the "Bill of Rights was intended to have any effect on the conduct of foreign proceedings." *Ante*, at 701 (STEVENS, J., concurring). The Fifth Amendment undeniably "prescribes a rule of conduct generally to be followed by our Nation's official-

dom," *ibid.* (GINSBURG, J., dissenting), and it is that conduct, not a foreign proceeding, that is at issue here.

B

If the policies and purposes that this Court has said underlie the Fifth Amendment—respect for individual dignity and privacy, prevention of governmental overreaching, preservation of an accusatorial system of criminal justice—would all be well served by applying the privilege when a witness legitimately fears foreign prosecution, then what reason could there be for reinterpreting the privilege so as not to recognize it here?

Two reasons have been suggested: First, one might see a government's compulsion of testimony followed by its own use of that testimony in a criminal prosecution as somewhat more unfair than compulsion by one government and use by another. And one might also find the States and the Federal Government so closely interconnected that the unfairness is further diminished where the prosecuting sovereign is a foreign country.

But this factor, in my view, cannot be determinative. For one thing, this issue of fairness is a matter of degree, not kind. For another, changes in transportation and communication have made relationships among nations ever closer, to the point where cooperation among international prosecutors and police forces may be as great today as among the States (or between the States and the Federal Government) a half century ago. See *supra*, at 714–715 (discussing rise in international cooperation). Finally, this Court's cases suggest that the remaining considerations—particularly the inherent indignity and cruelty to the individual in compelling self-incrimination—bulk larger in terms of the basic values that the Fifth Amendment reflects than does this single, partial, fairness consideration. See *supra*, at 712–713 (citing cases). I cannot agree that this particular feature—the fact that

prosecution by a different sovereign seems not quite as unfair as prosecution by the same sovereign—could warrant denying the privilege's application.

The second consideration is practical. The majority, as well as the Government, fear that application of the privilege might unreasonably interfere with the work of law enforcement. See *ante*, at 697–698; Brief for United States 30–36. But in my view, that fear is overstated. After all, "foreign application" of the privilege would matter only in a case where an individual could not be prosecuted domestically but the threat of foreign prosecution is substantial. Cf. *Zicarelli*, 406 U. S., at 478–481 (declining to reach privilege claim because witness did not face "real danger" of foreign prosecution). The Second Circuit points out that there have only been a handful of such cases. 119 F. 3d, at 135 (finding only six cases in the 25 years since *Zicarelli*). That is because relatively few witnesses face deportation or extradition, and a witness who will not "'be forced to enter a country disposed to prosecute him,'" 119 F. 3d, at 135 (quoting *United States* v. *Gecas*, 50 F. 3d 1549, 1560 (CA11 1995), cannot make the showing of "real and substantial" fear that *Zicarelli* would require.

Moreover, even where a substantial likelihood of foreign prosecution can be shown, the Government would only be deprived of testimony that relates to the foreign crime; the witness would not be entitled to claim a general silence. See *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951) (witness may only refuse to answer questions that might "in themselves support a conviction" or "furnish a link in the chain of evidence" for such crime). And nothing would prevent the Government, in a civil proceeding, from arguing that an adverse inference should be drawn from the witnesses' silence on particular questions, see *Baxter* v. *Palmigiano*, 425 U. S. 308, 318 (1976), or from supporting that inference with evidence from other, nonprivileged sources. Thus, without any adjustment in practice, it would seem that

the Government would lose little information, and even fewer cases, were the privilege recognized here.

In those rare instances where the need for testimony was sufficiently great, a grant of *de facto* "immunity" remains a possibility. The Government need only take steps sufficient to make the threat of foreign prosecution insubstantial. Thus, a promise by the United States that deportation will not take place, or that deportation to a different country will ensue, would seem sufficient. A further promise by the foreign nation that prosecution will not take place, or will not make use of the elicited testimony, will obviate the need even for such a deportation promise. And were a foreign sovereign to later seek extradition of the witness, the Government, under existing law, might retain the discretion to decline such a request. See 18 U. S. C. § 3186 ("Secretary of State *may* order" extraditable person "delivered to . . . foreign government"); § 3196 (giving Secretary of State discretion whether to extradite United States citizens provided treaty does not obligate her to do so).

I do not want to minimize the potential difficulties inherent in providing this kind of "immunity." It might require a change in domestic law, or in a given case, an adjustment in an understanding reached with a foreign government. In unusual circumstances, as JUSTICE STEVENS recognizes, see *ante*, at 701, it might require adjusting the legal rules that express the privilege in order to prevent a foreign government's efforts to stop its citizens from testifying in American courts. But I do not see these difficulties as creating overwhelming obstacles to the legitimate application of the privilege in instances such as the one present here. Nor do I see these difficulties as significantly greater than those that inhere in the ordinary grant of immunity, which also requires legislation, and which also can create friction among competing jurisdictions. At worst, granting *de facto* "immunity" in this type of case would mean more potentially deportable criminal aliens will remain in the United States, just as to-

day's immunity means more potentially imprisonable citizens remain at liberty. This is a price that the Amendment extracts where government wishes to compel incriminating testimony; and it is difficult to see why that price should not be paid where there is a real threat of prosecution, but it is foreign.

* * *

In sum, I see no reason why the Court should resurrect the pale shadow of *Murdock*'s "same sovereign" rule, a rule that *Murphy* demonstrated was without strong historical foundation and that would serve no more valid a purpose in today's world than it did during *Murphy*'s time. *Murphy* supports recognizing the privilege where there is a real and substantial threat of prosecution by a foreign government. Balsys is among the few to have satisfied this threshold. The basic values that this Court has said underlie the Fifth Amendment's protections are each diminished if the privilege may not be claimed here. And surmountable practical concerns should not stand in the way of constitutional principle.

For these and related reasons elaborated by the Second Circuit, I respectfully dissent.

Syllabus

MONGE *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 97–6146. Argued April 28, 1998—Decided June 26, 1998

California's "three-strikes" law provides, among other things, that a convicted felon with one prior conviction for a serious felony—such as assault where the felon inflicted great bodily injury or personally used a dangerous or deadly weapon—will have his prison term doubled. Under California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply. After petitioner was convicted on three counts of violating California drug laws, the State sought to have his sentence enhanced based on a previous assault conviction and the resulting prison term. At the sentencing hearing, the prosecutor asserted that petitioner had personally used a stick during the assault, but introduced into evidence only a prison record showing that he had been convicted of assault with a deadly weapon and had served a prison term for the offense. Finding both sentencing allegations true, the trial court, as relevant here, doubled petitioner's sentence on count one and added a 1-year enhancement for the prior prison term. On appeal, the California Court of Appeal ruled that the evidence was insufficient to trigger the sentence enhancement because the prior conviction allegations were not proved beyond a reasonable doubt, and that a remand for retrial on the sentence enhancement would violate double jeopardy principles. The State Supreme Court reversed the double jeopardy ruling, with a plurality holding that the Double Jeopardy Clause, though applicable in the capital sentencing context, see *Bullington* v. *Missouri*, 451 U. S. 430, does not extend to noncapital sentencing proceedings.

Held: The Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in noncapital sentencing proceedings. Pp. 727–734.

(a) Historically, this Court has found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense." Nor can sentencing determinations generally be analogized to an acquittal. See *United States* v. *DiFrancesco*, 449 U. S. 117, 134. In *Bullington*, this

Court established a "narrow exception" to the general rule that double jeopardy principles have no application in the sentencing context. There, after a capital defendant received a life sentence from the original sentencing jury and then obtained a new trial, the State announced its intention to seek the death penalty again. This Court imposed a double jeopardy bar, finding that the first jury's deliberations bore the hallmarks of a trial on guilt or innocence because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecutor had to establish facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial. Moreover, the *Bullington* Court reasoned that the embarrassment, expense, ordeal, anxiety, and insecurity that a capital defendant faces are at least equivalent to that faced by any defendant during the guilt phase of a criminal trial. *Bullington*'s rule has since been applied to a capital sentencing scheme in which a judge made the original determination to impose a life sentence. See *Arizona* v. *Rumsey*, 467 U. S. 203, 209–210. Pp. 727–731.

(b) *Bullington*'s rationale does not apply to California's noncapital sentencing proceedings. Even if those proceedings have the hallmarks identified in *Bullington*, a critical component of that case's reasoning was the capital sentencing context. In many respects, a capital trial's penalty phase is a continuation of the trial on guilt or innocence of capital murder. The death penalty is unique in both its severity and its finality, and the qualitative difference between a capital sentence and other penalties calls for a greater degree of reliability when it is imposed. That need for reliability accords with one of the central concerns animating the double jeopardy prohibition: preventing States from making repeated attempts to convict, thereby enhancing the possibility that an innocent person may be found guilty. Moreover, this Court has previously suggested that *Bullington*'s rationale is confined to the unique circumstances of a capital sentencing proceeding, *Caspari* v. *Bohlen*, 510 U. S. 383, 392, and has cited *Bullington* as an example of the heightened procedural protections accorded capital defendants, *Strickland* v. *Washington*, 466 U. S. 668, 686–687. Pp. 731–733.

(c) Petitioner attempts to minimize the relevance of the death penalty context by arguing that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding. *Bullington*'s holding, however, turns on both the trial-like proceedings at issue and the severity of the penalty at stake. In this Court's death penalty jurisprudence, moreover, the nature and the consequences of capital sentencing proceedings are intertwined. States' implementation of trial-like protections in noncapital sentencing proceedings is a

Syllabus

matter of legislative grace, not constitutional command, and it does not compel extension of the double jeopardy bar. Pp. 733–734.

16 Cal. 4th 826, 941 P. 2d 1121, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 734. SCALIA, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post,* p. 737.

Cliff Gardner, by appointment of the Court, 522 U. S. 1106, argued the cause and filed briefs for petitioner.

David F. Glassman, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Daniel E. Lungren*, Attorney General, *George Williamson*, Chief Assistant Attorney General, *Carol Wendelin Pollack*, Senior Assistant Attorney General, *Susan D. Martynec*, Supervising Deputy Attorney General, and *Carl N. Henry*, Deputy Attorney General.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.*

**David M. Porter* and *Robert Weisberg* filed a brief for the National Association of Criminal Defense Lawyers urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, *Ellyn H. Lazar*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio,

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether the Double Jeopardy Clause, which we have found applicable in the capital sentencing context, see *Bullington* v. *Missouri*, 451 U. S. 430 (1981), extends to noncapital sentencing proceedings. We hold that it does not, and accordingly affirm the judgment of the California Supreme Court.

I

Petitioner was charged under California law with one count of using a minor to sell marijuana, Cal. Health & Safety Code Ann. § 11361(a) (West 1991), one count of sale or transportation of marijuana, § 11360(a), and one count of possession of marijuana for sale, § 11359. In the information, the State also notified petitioner that it would seek to prove two sentence enhancement allegations: that petitioner had previously been convicted of assault and that he had served a prison term for that offense, see Cal. Penal Code Ann. §§ 245(a)(1), 667(e)(1), and 667.5 (West Supp. 1998).

Under California's "three-strikes" law, a defendant convicted of a felony who has two qualifying prior convictions for "serious felonies" receives a minimum sentence of 25 years to life; when the instant conviction was preceded by one serious felony offense, the court doubles a defendant's term of imprisonment. §§ 667(d)(1) and (e)(1)–(2). An assault conviction qualifies as a serious felony if the defendant either inflicted great bodily injury on another person or per-

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W. A. Drew Edmondson of Oklahoma, *Hardy Myers* of Oregon, *Mike Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charlie Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Dan Morales* of Texas, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, and *William U. Hill* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

J. Bradley O'Connell and *Jeffrey E. Thoma* filed a brief for the California Public Defenders Association as *amicus curiae.*

sonally used a dangerous or deadly weapon during the assault. §§ 1192.7(c)(8) and (23). According to California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply. See, *e. g.*, 16 Cal. 4th 826, 833–834, 941 P. 2d 1121, 1126 (1997).

Here, petitioner waived his right to a jury trial on the sentencing issues, and the court granted his motion to bifurcate the proceedings. After a jury entered a guilty verdict on the substantive offenses, the truth of the prior conviction allegations was argued before the court. The prosecutor asserted that petitioner had personally used a stick in committing the assault, see Tr. 189–190 (June 12, 1995), App. 12, but introduced into evidence only a prison record demonstrating that petitioner had been convicted of assault with a deadly weapon and had served a prison term for the offense, see People's Exh. 1 (filed June 12, 1995), App. 3–6. The trial court found both sentencing allegations true and imposed an 11-year term of imprisonment: 5 years on count one, doubled to 10 under the three-strikes law, and a 1-year enhancement for the prior prison term. The court also stayed a 3-year sentence on count 2 and ordered the 2-year sentence on count 3 to be served concurrently.

Petitioner appealed, and the California Court of Appeal, on its own motion, requested briefing as to whether sufficient evidence supported the finding that petitioner had a qualifying prior conviction. The State conceded that the record of the sentencing proceedings did not contain proof beyond a reasonable doubt that petitioner had personally inflicted great bodily injury or used a deadly weapon, but requested another opportunity to prove the allegations on remand. See Respondent's Supplemental Brief (Cal. App.), pp. 2–3, App. 33–35. The court, however, determined both that the

evidence was insufficient to trigger the sentence enhancement and that a remand for retrial on the allegation would violate double jeopardy principles.

The California Supreme Court reversed the Court of Appeal's ruling that the Double Jeopardy Clause bars retrial of prior conviction allegations. The three-justice plurality noted this Court's traditional reluctance to apply double jeopardy principles to sentencing proceedings and concluded that the exception recognized in *Bullington*, *supra*, did not apply. In *Bullington*, we held that a capital defendant who had received a life sentence during a penalty phase that bore "the hallmarks of [a] trial on guilt or innocence" could not be resentenced to death upon retrial following appeal. Here, the plurality acknowledged that California's proceedings to assess the truth of prior conviction allegations have the hallmarks of a trial, but it found *Bullington* distinguishable on several grounds. First, the plurality cited statements by this Court indicating that *Bullington*'s rationale is confined to the unique circumstances of capital cases. See 16 Cal. 4th, at 836–837, 941 P. 2d, at 1128 (citing *Caspari* v. *Bohlen*, 510 U. S. 383, 392 (1994); *Pennsylvania* v. *Goldhammer*, 474 U. S. 28, 30 (1985) *(per curiam)*). The plurality also reasoned that capital sentencing procedures are mandated by the Supreme Court's interpretation of the Federal Constitution, whereas the procedural protections accorded in California's sentence enhancement proceedings rest on statutory grounds. 16 Cal. 4th, at 837, 941 P. 2d, at 1128. The plurality then cited the breadth and subjectivity of the factual determinations at issue in the capital sentencing context, as well as the financial and emotional burden that the penalty phase of a capital case places on a defendant. *Id.*, at 838–839, 941 P. 2d, at 1129. Finally, the plurality explained that a qualifying strike involves a finding of a particular "status" that may be made from the record of the prior conviction, while the jury's sentencing determination in a capital case "depends on the specific facts of the defendant's present

crime, as well as an overall assessment of the defendant's character." *Id.*, at 839, 941 P. 2d, at 1130.

The concurring justice who provided the fourth vote to reverse noted that retrial on a prior conviction allegation would not require the factfinder to reevaluate the evidence underlying the substantive offense. Accordingly, she concluded that a second attempt at proving the allegation would not unfairly subject a defendant to the risk of repeated prosecution within the meaning of the Double Jeopardy Clause. *Id.*, at 846–847, 941 P. 2d, at 1134–1135 (Brown, J., concurring). Three justices dissented, asserting that under *Bullington*'s rationale, the Double Jeopardy Clause precludes successive efforts to prove prior conviction allegations. *Id.*, at 847, 941 P. 2d, at 1135 (opinion of Werdegar, J.).

The California Supreme Court's decision deepened a conflict among the state courts as to *Bullington*'s application to noncapital sentencing. Compare, *e. g.*, *State* v. *Hennings*, 100 Wash. 2d 379, 670 P. 2d 256 (1983), with *People* v. *Levin*, 157 Ill. 2d 138, 623 N. E. 2d 317 (1993). Prior to this Court's determination that the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), would bar the extension of *Bullington* to noncapital sentencing proceedings on federal habeas review, see *Caspari*, *supra*, the Federal Courts of Appeals had reached disparate conclusions as well. Compare, *e. g.*, *Briggs* v. *Procunier*, 764 F. 2d 368, 371 (CA5 1985), with *Denton* v. *Duckworth*, 873 F. 2d 144 (CA7), cert. denied, 493 U. S. 941 (1989). In view of the conflicting authority on the issue, we granted certiorari, 522 U. S. 1072 (1998).

II

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." We have previously held that it protects against successive prosecu-

tions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. See *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969). Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, see *Bullington*, 451 U. S., at 438, because the determinations at issue do not place a defendant in jeopardy for an "offense," see, *e. g.*, *Nichols* v. *United States*, 511 U. S. 738, 747 (1994) (noting that repeat-offender laws "'penaliz[e] only the last offense committed by the defendant'"). Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." *United States* v. *Watts*, 519 U. S. 148, 154 (1997) *(per curiam);* see also *Witte* v. *United States*, 515 U. S. 389, 398–399 (1995). An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948); cf. *Moore* v. *Missouri*, 159 U. S. 673, 678 (1895) ("[T]he State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence").

JUSTICE SCALIA insists that the recidivism enhancement the Court confronts here in fact constitutes an element of petitioner's offense. His dissent addresses an issue that was neither considered by the state courts nor discussed in petitioner's brief before this Court. In any event, JUSTICE SCALIA acknowledges, *post*, at 741, that his argument is squarely foreclosed by our decision in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense, see *post*, at 738 (SCALIA, J., dissenting), but there are also

cases in which fairness calls for defining a fact as a sentencing factor. A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved. Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 190–195 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (discussing the benefits of bifurcated proceedings in capital cases). In part for that reason, the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed. See *Almendarez-Torres*, *supra.* Under California law, the maximum sentence applicable to a first offender who uses a minor to sell drugs is 7 years, and a judge may double that sentence to 14 years where the offender has previously been convicted of a qualifying felony. See Cal. Health & Safety Code Ann. § 11361(a) (West 1991). That increase falls well within the range that the Court has found to be constitutionally permissible. See *Almendarez-Torres*, *supra* (upholding a potential 18-year increase to a 2-year sentence). Thus, the sentencing determination here did not place petitioner in jeopardy for an "offense."

Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not "have the qualities of constitutional finality that attend an acquittal." *United States* v. *DiFrancesco*, 449 U. S. 117, 134 (1980); see also *Bullington*, *supra,* at 438 ("The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed").

The Double Jeopardy Clause "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco*, 449 U. S., at 137. Consequently, it is a "well-established part of our constitutional jurisprudence" that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal. See *id.*, at 135; *Pearce*, *supra*, at 720; see also *Stroud* v. *United States*, 251 U. S. 15, 18 (1919) (despite a harsher sentence on retrial, the defendant was not "placed in second jeopardy within the meaning of the Constitution").

Our opinion in *Bullington* established a "narrow exception" to the general rule that double jeopardy principles have no application in the sentencing context. See *Schiro* v. *Farley*, 510 U. S. 222, 231 (1994). In *Bullington*, a capital defendant had received a sentence of life imprisonment from the original sentencing jury. The defendant subsequently obtained a new trial on the ground that the court had permitted prospective women jurors to claim automatic exemption from jury service in violation of the Sixth and Fourteenth Amendments. 451 U. S., at 436. When the State announced its intention to seek the death penalty again, the defendant alleged a double jeopardy violation. We determined that the first jury's deliberations bore the "hallmarks of the trial on guilt or innocence," *id.*, at 439, because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial, *id.*, at 438. In light of the jury's binary determination and the heightened procedural protections, we found the proceeding distinct from traditional sentencing, in which "it is impossible to conclude that a sentence less than the statutory maximum 'con-

stitute[s] a decision to the effect that the government has failed to prove its case.' " *Id.*, at 443 (quoting *Burks*, *supra*, at 15).

Moreover, we reasoned that the "embarrassment, expense and ordeal" as well as the "anxiety and insecurity" that a capital defendant faces "are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." 451 U. S., at 445. And we cited the "unacceptably high risk" that repeated attempts to persuade a jury to impose the death penalty would lead to an erroneous capital sentence. *Id.*, at 445–446. We later extended the rule set forth in *Bullington* to a capital sentencing scheme in which the judge, as opposed to a jury, had initially determined that a life sentence was appropriate. See *Arizona* v. *Rumsey*, 467 U. S. 203, 209–210 (1984).

Petitioner contends that the rationale for imposing a double jeopardy bar in *Bullington* and *Rumsey* applies with equal force to California's proceedings to determine the truth of a prior conviction allegation. Like the Missouri capital sentencing scheme at issue in *Bullington*, petitioner argues, the sentencing proceedings here have the "hallmarks of a trial on guilt or innocence" because the sentencer makes an objective finding as to whether the prosecution has proved a historical fact beyond a reasonable doubt. The determination whether a defendant in fact has qualifying prior convictions may be distinguished, petitioner maintains, from the normative decisions typical of traditional sentencing. In petitioner's view, once a defendant has obtained a favorable finding on such an issue, the State should not be permitted to retry the allegation.

Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it

warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of Burger, C. J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland* v. *Washington*, 466 U. S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

That need for reliability accords with one of the central concerns animating the constitutional prohibition against double jeopardy. As the Court explained in *Green* v. *United States*, 355 U. S. 184 (1957), the Double Jeopardy Clause prevents States from "mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.*, at 187–188. Indeed, we cited the heightened interest in accuracy in the *Bullington* decision itself. We noted that in a capital sentencing proceeding, as in a criminal trial, "'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" 451 U. S., at 441 (quoting *Addington* v. *Texas*, 441 U. S. 418, 423–424 (1979)).

Moreover, we have suggested in earlier cases that *Bullington*'s rationale is confined to the "unique circumstances of

a capital sentencing proceeding." *Caspari*, 510 U. S., at 392; see also *Goldhammer*, 474 U. S., at 30 ("[T]he decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal' ") (quoting *DiFrancesco*, 449 U. S., at 134). In addition, we have cited *Bullington* as an example of the heightened procedural protections accorded capital defendants. See *Strickland*, *supra*, at 686–687 ("A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see *[Bullington]*, that counsel's role in the proceeding is comparable to counsel's role at trial").

In an attempt to minimize the relevance of the death penalty context, petitioner argues that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding. For example, petitioner notes that *Bullington* did not overrule the Court's decision in *Stroud* v. *United States*, 251 U. S. 15 (1919)—which found the double jeopardy bar inapplicable to a particular capital sentencing proceeding—but rather distinguished it on the ground that the proceeding at issue did not bear the hallmarks of a trial on guilt or innocence. *Stroud* predates our decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); it was decided at a time when "no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court." See *Gardner*, *supra*, at 357 (opinion of STEVENS, J.). Consequently, the capital sentencing procedures at issue in *Stroud* did not resemble a trial, and the Court confronted a different question in that case. The holding of *Bullington* turns on *both* the trial-like proceedings at issue and the severity of the penalty at stake. That the Court focused on the absence of procedural safeguards in distinguishing an earlier capital

case does not mean that the *Bullington* decision rests on a purely procedural rationale.

In our death penalty jurisprudence, moreover, the nature and the consequences of capital sentencing proceedings are intertwined. We have held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion) (citation omitted). Where noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command. Many States have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements. We do not believe that because the States have done so, we are compelled to extend the double jeopardy bar. Indeed, were we to apply double jeopardy here, we might create disincentives that would diminish these important procedural protections.

* * *

We conclude that *Bullington*'s rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context. Accordingly, the judgment of the California Supreme Court is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

"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 proceed-

ing." *Burks* v. *United States*, 437 U. S. 1, 11 (1978).[1] Today, the Court ignores this cardinal principle. In this case, the prosecution attempted to prove that petitioner had previously been convicted of a qualifying felony. If the prosecution had proved this fact, petitioner would have automatically been sentenced to an additional five years in prison.[2] The prosecution, however, failed to prove its case.[3] Consequently, the Double Jeopardy Clause prohibits a "'second bite at the apple.'" *Id.*, at 17.

Until today, the Court has never held that a retrial or resentencing is permissible when the evidence in the first proceeding was *insufficient;* instead, the Court has consistently drawn a line between insufficiency of the evidence and *legal* errors that infect the first proceeding.[4] In his unanimous

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[1] See also, *e. g.*, *Poland* v. *Arizona*, 476 U. S. 147, 152 (1986) (reprosecution or resentencing prohibited whenever "a jury agrees or an appellate court decides that the prosecution has not proved its case" (internal quotation marks omitted)); cf. *Schiro* v. *Farley*, 510 U. S. 222, 231–232 (1994) ("The state is entitled to 'one fair opportunity' to prosecute a defendant, . . . and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding").

[2] The finding of this fact would have also increased petitioner's sentencing range. See Cal. Health & Safety Code Ann. § 11361(a) (West 1991). This case, then, is factually different from *Caspari* v. *Bohlen*, 510 U. S. 383, 386–387 (1994), as the factual finding in that case did not automatically increase the respondent's sentence or affect his sentencing range.

[3] The California appellate court concluded that "[t]here was insufficient evidence that [petitioner] suffered a prior felony conviction" within the meaning of the "three-strikes" law. App. 41 (emphasis omitted). It is immaterial, of course, that this determination was made by an appellate court rather than by the trial judge or jury. *Burks* v. *United States*, 437 U. S. 1, 11 (1978). The State concedes that the evidence was insufficient.

[4] See, *e. g.*, *Poland*, 476 U. S., at 154 ("[The Arizona Supreme Court] did not hold that the prosecution had failed to prove its case . . . . Indeed, the court clearly indicated that there had been no such failure by remarking that 'the trial court mistook the law when it did not find that the defendants [satisfied the disputed aggravator]'"); *United States* v. *DiFrancesco*, 449 U. S. 117, 141 (1980) ("The federal statute specifies that the

opinion for the Court in *Burks* v. *United States*, Chief Justice Burger emphasized this critical difference, *i. e.*, "between reversals due to trial error and those resulting from evidentiary insufficiency." *Id.*, at 15. He specifically noted "that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law," *ibid.*, and concluded that in order to hold, as we did, "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient," it was necessary to overrule several prior cases, *id.*, at 18. The Court's opinion today reflects the same failure to recognize the critical importance of this distinction.

I agree that California's decision to "implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements," *ante*, at 734, should not create a constitutional obligation that would not otherwise exist. But the fact that so many States have done so—not just recently, but for many years[5]—is powerful evidence that they were simply responding to the traditional understanding of fundamental fairness that produced decisions such as *In re Winship*, 397 U. S. 358 (1970),[6] and *Mullaney* v. *Wilbur*, 421 U. S. 684

Court of Appeals may increase the sentence only if the trial court has abused its discretion or employed unlawful procedures or made clearly erroneous findings. The appellate court thus is empowered to correct only a *legal* error" (emphasis added)); *Bozza* v. *United States*, 330 U. S. 160, 166–167 (1947) (error of law that infects a sentence may be corrected on appeal).

[5] See, *e. g.*, cases cited in Annot., 58 A. L. R. 59–62 (1929); cases cited in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 256–257 (1998) (SCALIA, J., dissenting); see also *ante*, at 734 ("Many States have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements").

[6] In *Winship*, despite the fact that the Court had never held "that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution," 397 U. S., at 377 (Black, J., dissenting), the traditional importance of that standard that dated "at least from our

(1975).[7] It is this same traditional understanding of fundamental fairness—dating back centuries to the common-law plea of *autrefois acquit* and buttressed by a special interest in finality—that undergirds the Double Jeopardy Clause.[8]

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

I agree with the Court 's determination that *Bullington* v. *Missouri*, 451 U. S. 430 (1981), should not be extended, and its conclusion that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. I do not, however, agree with the Court's assumption that only a sentencing proceeding was at issue here.

Like many other guarantees in the Bill of Rights, the Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law. In that tradition, defendants are charged with "offence[s]." A criminal "offence" is composed of "elements," which are factual components that must be proved by the state beyond a reasonable doubt and submitted (if the defendant so desires) to a jury. Conviction of an "offence" renders the defendant eligible for a range of potential punishments, from which a sentencing authority (judge or jury) then selects the most

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early years as a Nation," *id.*, at 361, justified our conclusion "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *id.*, at 364.

[7] In *Mullaney*, we unanimously extended the protection of *Winship* to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence. 421 U. S., at 697–698; see also *Almendarez-Torres*, 523 U. S., at 251–252 (SCALIA, J., dissenting).

[8] JUSTICE SCALIA accurately characterizes the potential consequences of today's decision as "sinister." *Post*, at 739. It is not, however, California that has taken "the first steps" down the road the Court follows today. It was the Court's decision in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986).

appropriate. That sentencer often considers new factual issues and additional evidence under much less demanding proof requirements than apply at the conviction stage. The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence—including the "same elements" test for determining whether two "offence[s]" are "the same," see *Blockburger* v. *United States,* 284 U. S. 299 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt.

I do not believe that that distinction is (as the Court seems to assume) simply a matter of the label affixed to each fact by the legislature. Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the State then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly cause[d] injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, "vain and idle enactment[s], which accomplished nothing, and most unnecessarily excited Con-

gress and the people on [their] passage." *Slaughter-House Cases*, 16 Wall. 36, 96 (1873).[1]

Although California's system is not nearly that sinister, it takes the first steps down that road. The California Code is full of "sentencing enhancements" that look exactly like separate crimes, and that expose the defendant to additional maximum punishment. Cal. Penal Code § 12022.5 (1982) is typical: "[A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall . . . be punished by an additional term of imprisonment in the state prison for three, four, or five years." Compare that provision with its federal counterpart, 18 U. S. C. § 924(c)(1), which provides that "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years." Everyone agrees that 18 U. S. C. § 924(c)(1) describes a separate crime entitling those who are charged to the constitutional protections that accompany criminal convictions. Indeed, the undisputed fact that each of the elements of § 924(c)(1) must be

[1] The Court suggests that "fundamental fairness" will sometimes call for treating a particular fact as a sentencing factor rather than an element, even if it increases the defendant's maximum sentencing exposure, because "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Ante*, at 729. Even if I agreed that putting a defendant to such a choice would be fundamentally unfair, I see no reason to assume that defendants would be eager to pursue such a strategy at the cost of forfeiting their traditional rights to jury trial and proof beyond a reasonable doubt. But in any event, there is no need to contemplate such Faustian bargains. If simultaneous consideration of two elements *would* be genuinely prejudicial to the defendant (as, for example, when one of the elements involves the defendant's prior criminal history), the trial can be bifurcated without sacrificing jury factfinding in the second phase. See *Almendarez-Torres*, 523 U. S. 224, 261, 269 (1998) (SCALIA, J., dissenting).

submitted to a jury and found beyond a reasonable doubt, combined with the fact that many courts were mistaken as to what those elements consisted of, has created considerable juridical chaos in recent years. See, *e. g.*, *Bailey* v. *United States*, 516 U. S. 137 (1995); *Bousley* v. *United States*, 523 U. S. 614 (1998). Perhaps Congress should have taken a lesson from the California Legislature, which (if my worst fears about today's holding are justified) may have stumbled upon the El Dorado sought by many in vain since the beginning of the Republic: a means of dispensing with inconvenient constitutional "rights." For now, California has used this gimmick only to eviscerate the Double Jeopardy Clause; it still provides a right to notice, jury trial, and proof beyond a reasonable doubt on "enhancement" allegations as a matter of state law. But if the Court is right today, those protections could be withdrawn tomorrow.

Earlier this Term, in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), I discussed our precedents bearing on this issue and concluded that it was a grave and doubtful question whether the Constitution permits a fact that increases the maximum sentence to which a defendant is exposed to be treated as a sentencing enhancement rather than an element of a criminal offense. See *id.*, at 260 (dissenting opinion). I stopped short of answering that question, because I thought the doctrine of constitutional doubt required us to interpret the federal statute at issue as setting forth an element rather than an enhancement, thereby avoiding the problem. *Ibid.* Since the present case involves a state statute already authoritatively construed as an enhancement by the California Supreme Court, I must now answer the constitutional question. Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a *maximum* possible sentence of seven years in prison under California law. See California Health & Safety Code Ann. § 11361(a) (West 1991). He was later sentenced to *eleven* years in prison, however, on the basis of

several additional facts that California and the Court have chosen to label "sentence enhancement allegations." However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime.[2] Monge was functionally acquitted of that crime when the California Court of Appeal held that the evidence adduced at trial was insufficient to sustain the trial court's "enhancement" findings, see *Burks* v. *United States*, 437 U. S. 1, 18 (1978). Giving the State a second chance to prove him guilty of that same crime would violate the very core of the double jeopardy prohibition.

That disposition would contradict, of course, the Court's holding in *Almendarez-Torres* that "recidivism" findings do not have to be treated as elements of the offense, *even if* they increase the maximum punishment to which the defendant is exposed. That holding was in my view a grave constitutional error affecting the most fundamental of rights. I note, in any event, that *Almendarez-Torres* left open the question whether "enhancements" that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid. That qualification is an implicit limitation on the Court's holding today.

I respectfully dissent.

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[2] The Court contends that this issue "was neither considered by the state courts nor discussed in petitioner's brief before this Court." *Ante*, at 728. But Monge has argued consistently that reconsideration of the enhancement issue would violate the Double Jeopardy Clause. He did not explicitly contend that the enhancement was in reality an element of the offense with which he was charged, but I believe that was fairly included within the argument he did make. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 99 (1991). See also *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 446 (1993).

Syllabus

BURLINGTON INDUSTRIES, INC. *v.* ELLERTH

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

No. 97–569. Argued April 22, 1998—Decided June 26, 1998

Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Slowik was a midlevel manager who had authority to hire and promote employees, subject to higher approval, but was not considered a policymaker. Against a background of repeated boorish and offensive remarks and gestures allegedly made by Slowik, Ellerth places particular emphasis on three incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In filing this lawsuit, Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The District Court granted Burlington summary judgment. The Seventh Circuit en banc reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. Among other things, those opinions focused on whether Ellerth's claim could be categorized as one of *quid pro quo* harassment, and on whether the standard for an employer's liability on such a claim should be vicarious liability or negligence.

Held: Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense. Pp. 751–766.

(a) The Court assumes an important premise yet to be established: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out. Cases based on carried-out threats are referred to often as "*quid pro quo*" cases, as distinct from bothersome attentions or sexual remarks sufficient to create a "hostile work environment." Those two terms do not appear in Title VII, which forbids only

"discriminat[ion] against any individual with respect to his . . . terms [or] conditions . . . of employment, because of . . . sex." § 2000e–2(a)(1). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 65, this Court distinguished between the two concepts, saying both are cognizable under Title VII, though a hostile environment claim requires harassment that is severe or pervasive. *Meritor* did not discuss the distinction for its bearing upon an employer's liability for discrimination, but held, with no further specifics, that agency principles controlled on this point. *Id.*, at 72. Nevertheless, in *Meritor*'s wake, Courts of Appeals held that, if the plaintiff established a *quid pro quo* claim, the employer was subject to vicarious liability. This rule encouraged Title VII plaintiffs to state their claims in *quid pro quo* terms, which in turn put expansive pressure on the definition. For example, the question presented here is phrased as whether Ellerth can state a *quid pro quo* claim, but the issue of real concern to the parties is whether Burlington has vicarious liability, rather than liability limited to its own negligence. This Court nonetheless believes the two terms are of limited utility. To the extent they illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question whether a plaintiff can prove discrimination. Hence, Ellerth's claim involves only unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. This Court accepts the District Court's finding that Ellerth made such a showing. When discrimination is thus proved, the factors discussed below, not the categories *quid pro quo* and hostile work environment, control on the issue of vicarious liability. Pp. 751–754.

(b) In deciding whether an employer has vicarious liability in a case such as this, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." § 2000e(b). Given this express direction, the Court concludes a uniform and predictable standard must be established as a matter of federal law. The Court relies on the general common law of agency, rather than on the law of any particular State. *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 740. The Restatement (Second) of Agency (hereinafter Restatement) is a useful beginning point, although common-law principles may not be wholly transferable to Title VII. See *Meritor*, *supra*, at 72. Pp. 754–755.

(c) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219(1). Although such torts generally may be either negligent or intentional, sexual harassment under Title VII presupposes intentional conduct. An intentional tort is within the scope of employment when

actuated, at least in part, by a purpose to serve the employer. *Id.*, §§ 228(1)(c), 230. Courts of Appeals have held, however, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may be actuated by personal motives unrelated and even antithetical to the employer's objectives. Thus, the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment. Pp. 755–757.

(d) However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when, *inter alia*, the employer itself was negligent or reckless, Restatement § 219(2)(b), or the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation, *id.*, § 219(2)(d). An employer is negligent, and therefore subject to liability under § 219(2)(b), if it knew or should have known about sexual harassment and failed to stop it. Negligence sets a minimum standard for Title VII liability; but Ellerth seeks to invoke the more stringent standard of vicarious liability. Section 219(2)(d) makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority (the apparent authority standard), or who was "aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). Pp. 758–759.

(e) As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from threatening to misuse actual power. Compare Restatement § 6 with § 8. Because supervisory harassment cases involve misuse of actual power, not the false impression of its existence, apparent authority analysis is inappropriate. When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule provides the appropriate analysis. Pp. 759–760.

(f) That rule requires the existence of something more than the employment relation itself because, in a sense, most workplace tortfeasors, whether supervisors or co-workers, are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims. Such an additional aid exists when a supervisor subjects a subordinate to a significant, tangible employment action, *i. e.*, a significant change in employment status, such as discharge, demotion, or undesirable reassignment. Every Federal Court of Appeals to have considered the question has correctly found vicarious liability in that circumstance. This Court imports the significant, tangible employment action concept for resolution of the vicarious

liability issue considered here. An employer is therefore subject to vicarious liability for such actions. However, where, as here, there is no tangible employment action, it is not obvious the agency relationship aids in commission of the tort. Moreover, *Meritor* holds that agency principles constrain the imposition of employer liability for supervisor harassment. Limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of antiharassment policies and grievance procedures. Thus, in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts, in this case and in *Faragher* v. *Boca Raton*, *post*, p. 775, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action. Pp. 760–765.

(g) Given the Court's explanation that the labels *quid pro quo* and hostile work environment are not controlling for employer-liability purposes, Ellerth should have an adequate opportunity on remand to prove she has a claim which would result in vicarious liability. Although she has not alleged she suffered a tangible employment action at Slowik's hands, which would deprive Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still

subject to vicarious liability for Slowik's activity, but should have an opportunity to assert and prove the affirmative defense. Pp. 765–766.
123 F. 3d 490, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 766. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 766.

James J. Casey argued the cause for petitioner. With him on the briefs were *Mary Margaret Moore* and *Robert A. Wicker*.

Ernest T. Rossiello argued the cause for respondent. With him on the brief were *Margaret A. Zuleger* and *Eric Schnapper*.

Deputy Solicitor General Underwood argued the cause for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Irving L. Gornstein*, *C. Gregory Stewart*, *Philip B. Sklover*, *Carolyn L. Wheeler*, and *Susan L. P. Starr*.*

JUSTICE KENNEDY delivered the opinion of the Court.

We decide whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Carol Connor Flowe*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Sussan L. Mahallati;* and for the Equal Employment Advisory Council by *Ann Elizabeth Reesman*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *Marsha S. Berzon*, and *Laurence Gold;* for Equal Rights Advocates et al. by *Samuel A. Marcosson*, *Beth H. Parker*, and *Rose Fua;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden*.

David Benjamin Oppenheimer, *H. Candace Gorman*, and *Paula A. Brantner* filed a brief for the National Employment Lawyers Association as *amicus curiae*.

seq., an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.

I

Summary judgment was granted for the employer, so we must take the facts alleged by the employee to be true. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam)*. The employer is Burlington Industries, the petitioner. The employee is Kimberly Ellerth, the respondent. From March 1993 until May 1994, Ellerth worked as a salesperson in one of Burlington's divisions in Chicago, Illinois. During her employment, she alleges, she was subjected to constant sexual harassment by her supervisor, one Ted Slowik.

In the hierarchy of Burlington's management structure, Slowik was a midlevel manager. Burlington has eight divisions, employing more than 22,000 people in some 50 plants around the United States. Slowik was a vice president in one of five business units within one of the divisions. He had authority to make hiring and promotion decisions subject to the approval of his supervisor, who signed the paperwork. See 912 F. Supp. 1101, 1119, n. 14 (ND Ill. 1996). According to Slowik's supervisor, his position was "not considered an upper-level management position," and he was "not amongst the decision-making or policy-making hierarchy." *Ibid.* Slowik was not Ellerth's immediate supervisor. Ellerth worked in a two-person office in Chicago, and she answered to her office colleague, who in turn answered to Slowik in New York.

Against a background of repeated boorish and offensive remarks and gestures which Slowik allegedly made, Ellerth places particular emphasis on three alleged incidents where Slowik's comments could be construed as threats to deny her

tangible job benefits. In the summer of 1993, while on a business trip, Slowik invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because Slowik was her boss. App. 155. When Ellerth gave no encouragement to remarks Slowik made about her breasts, he told her to "loosen up" and warned, "you know, Kim, I could make your life very hard or very easy at Burlington." *Id.*, at 156.

In March 1994, when Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because she was not "loose enough." *Id.*, at 159. The comment was followed by his reaching over and rubbing her knee. *Ibid.* Ellerth did receive the promotion; but when Slowik called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id.*, at 159–160.

In May 1994, Ellerth called Slowik, asking permission to insert a customer's logo into a fabric sample. Slowik responded, "I don't have time for you right now, Kim . . .— unless you want to tell me what you're wearing." *Id.*, at 78. Ellerth told Slowik she had to go and ended the call. *Ibid.* A day or two later, Ellerth called Slowik to ask permission again. This time he denied her request, but added something along the lines of, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*, at 79.

A short time later, Ellerth's immediate supervisor cautioned her about returning telephone calls to customers in a prompt fashion. 912 F. Supp., at 1109. In response, Ellerth quit. She faxed a letter giving reasons unrelated to the alleged sexual harassment we have described. *Ibid.* About three weeks later, however, she sent a letter explaining she quit because of Slowik's behavior. *Ibid.*

During her tenure at Burlington, Ellerth did not inform anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. *Ibid.*

In fact, she chose not to inform her immediate supervisor (not Slowik) because " 'it would be his duty as my supervisor to report any incidents of sexual harassment.' " *Ibid.* On one occasion, she told Slowik a comment he made was inappropriate. *Ibid.*

In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), Ellerth filed suit in the United States District Court for the Northern District of Illinois, alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII. The District Court granted summary judgment to Burlington. The court found Slowik's behavior, as described by Ellerth, severe and pervasive enough to create a hostile work environment, but found Burlington neither knew nor should have known about the conduct. There was no triable issue of fact on the latter point, and the court noted Ellerth had not used Burlington's internal complaint procedures. *Id.*, at 1118. Although Ellerth's claim was framed as a hostile work environment complaint, the District Court observed there was a *quid pro quo* "component" to the hostile environment. *Id.*, at 1121. Proceeding from the premise that an employer faces vicarious liability for *quid pro quo* harassment, the District Court thought it necessary to apply a negligence standard because the *quid pro quo* merely contributed to the hostile work environment. See *id.*, at 1123. The District Court also dismissed Ellerth's constructive discharge claim.

The Court of Appeals en banc reversed in a decision which produced eight separate opinions and no consensus for a controlling rationale. The judges were able to agree on the problem they confronted: Vicarious liability, not failure to comply with a duty of care, was the essence of Ellerth's case against Burlington on appeal. The judges seemed to agree Ellerth could recover if Slowik's unfulfilled threats to deny her tangible job benefits was sufficient to impose vicarious liability on Burlington. *Jansen* v. *Packing Corp.*

of America, 123 F. 3d 490, 494 (CA7 1997) *(per curiam)*. With the exception of Judges Coffey and Easterbrook, the judges also agreed Ellerth's claim could be categorized as one of *quid pro quo* harassment, even though she had received the promotion and had suffered no other tangible retaliation. *Ibid.*

The consensus disintegrated on the standard for an employer's liability for such a claim. Six judges, Judges Flaum, Cummings, Bauer, Evans, Rovner, and Diane P. Wood, agreed the proper standard was vicarious liability, and so Ellerth could recover even though Burlington was not negligent. *Ibid.* They had different reasons for the conclusion. According to Judges Flaum, Cummings, Bauer, and Evans, whether a claim involves a *quid pro quo* determines whether vicarious liability applies; and they in turn defined *quid pro quo* to include a supervisor's threat to inflict a tangible job injury whether or not it was completed. *Id.*, at 499. Judges Wood and Rovner interpreted agency principles to impose vicarious liability on employers for most claims of supervisor sexual harassment, even absent a *quid pro quo*. *Id.*, at 565.

Although Judge Easterbrook did not think Ellerth had stated a *quid pro quo* claim, he would have followed the law of the controlling State to determine the employer's liability, and by this standard, the employer would be liable here. *Id.*, at 552. In contrast, Judge Kanne said Ellerth had stated a *quid pro quo* claim, but negligence was the appropriate standard of liability when the *quid pro quo* involved threats only. *Id.*, at 505.

Chief Judge Posner, joined by Judge Manion, disagreed. He asserted Ellerth could not recover against Burlington despite having stated a *quid pro quo* claim. According to Chief Judge Posner, an employer is subject to vicarious liability for "act[s] that significantly alte[r] the terms or conditions of employment," or "company act[s]." *Id.*, at 515. In the emergent terminology, an unfulfilled *quid pro quo* is a

mere threat to do a company act rather than the act itself, and in these circumstances, an employer can be found liable for its negligence only. *Ibid.* Chief Judge Posner also found Ellerth failed to create a triable issue of fact as to Burlington's negligence. *Id.*, at 517.

Judge Coffey rejected all of the above approaches because he favored a uniform standard of negligence in almost all sexual harassment cases. *Id.*, at 518.

The disagreement revealed in the careful opinions of the judges of the Court of Appeals reflects the fact that Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law. We granted certiorari to assist in defining the relevant standards of employer liability. 522 U. S. 1086 (1998).

II

At the outset, we assume an important proposition yet to be established before a trier of fact. It is a premise assumed as well, in explicit or implicit terms, in the various opinions by the judges of the Court of Appeals. The premise is: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out or fulfilled. Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.

Section 703(a) of Title VII forbids

> "an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's . . . sex." 42 U. S. C. § 2000e–2(a)(1).

"*Quid pro quo*" and "hostile work environment" do not appear in the statutory text. The terms appeared first in the academic literature, see C. MacKinnon, Sexual Harassment of Working Women (1979); found their way into decisions of the Courts of Appeals, see, *e. g.*, *Henson* v. *Dundee*, 682 F. 2d 897, 909 (CA11 1982); and were mentioned in this Court's decision in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986). See generally E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J. L. & Pub. Policy 307 (1998).

In *Meritor*, the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see 477 U. S., at 65, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination. On this question *Meritor* held, with no further specifics, that agency principles controlled. *Id.*, at 72.

Nevertheless, as use of the terms grew in the wake of *Meritor*, they acquired their own significance. The standard of employer responsibility turned on which type of harass-

ment occurred. If the plaintiff established a *quid pro quo* claim, the Courts of Appeals held, the employer was subject to vicarious liability. See *Davis* v. *Sioux City*, 115 F. 3d 1365, 1367 (CA8 1997); *Nichols* v. *Frank*, 42 F. 3d 503, 513–514 (CA9 1994); *Bouton* v. *BMW of North America, Inc.*, 29 F. 3d 103, 106–107 (CA3 1994); *Sauers* v. *Salt Lake County*, 1 F. 3d 1122, 1127 (CA10 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F. 2d 178, 185–186 (CA6), cert. denied, 506 U. S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F. 2d 1311, 1316 (CA11 1989). The rule encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition. The equivalence of the *quid pro quo* label and vicarious liability is illustrated by this case. The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence. The question presented for certiorari asks:

> "Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" Pet. for Cert. i.

We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the

employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998); *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993). For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive. See *supra*, at 749. The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

When we assume discrimination can be proved, however, the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability. That is the question we must resolve.

III

We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat. We turn to principles of agency law, for the term "employer" is defined under Title VII to include "agents." 42 U. S. C. §2000e(b); see *Meritor*, *supra*, at 72. In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these

terms." *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 740 (1989). The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction. This is not federal common law in "the strictest sense, *i. e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute . . . , but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton* v. *FDIC*, 519 U. S. 213, 218 (1997). State-court decisions, applying state employment discrimination law, may be instructive in applying general agency principles, but, it is interesting to note, in many cases their determinations of employer liability under state law rely in large part on federal-court decisions under Title VII. *E. g.*, *Arizona* v. *Schallock*, 189 Ariz. 250, 259, 941 P. 2d 1275, 1284 (1997); *Lehmann* v. *Toys 'R' Us, Inc.*, 132 N. J. 587, 622, 626 A. 2d 445, 463 (1993); *Thompson* v. *Berta Enterprises, Inc.*, 72 Wash. App. 531, 537–539, 864 P. 2d 983, 986–988 (1994).

As *Meritor* acknowledged, the Restatement (Second) of Agency (1957) (hereinafter Restatement) is a useful beginning point for a discussion of general agency principles. 477 U. S., at 72. Since our decision in *Meritor*, federal courts have explored agency principles, and we find useful instruction in their decisions, noting that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* The EEOC has issued Guidelines governing sexual harassment claims under Title VII, but they provide little guidance on the issue of employer liability for supervisor harassment. See 29 CFR § 1604.11(c) (1997) (vicarious liability for supervisor harassment turns on "the particular employment relationship and the job functions performed by the individual").

A

Section 219(1) of the Restatement sets out a central principle of agency law:

> "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's "purpose, however misguided, is wholly or in part to further the master's business." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 70, p. 505 (5th ed. 1984) (hereinafter Prosser and Keeton on Torts). In applying scope of employment principles to intentional torts, however, it is accepted that "it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited." F. Mechem, Outlines of the Law of Agency § 394, p. 266 (P. Mechem 4th ed. 1952). The Restatement defines conduct, including an intentional tort, to be within the scope of employment when "actuated, at least in part, by a purpose to serve the [employer]," even if it is forbidden by the employer. Restatement §§ 228(1)(c), 230. For example, when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies. See Prosser and Keeton on Torts § 70, at 505–506.

As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. See, *e. g.*, *Harrison* v. *Eddy Potash, Inc.*, 112 F. 3d 1437, 1444 (CA10 1997), vacated on other grounds, *post*, p. 947; *Torres* v. *Pisano*, 116 F. 3d 625, 634, n. 10 (CA2 1997). But see *Kauffman* v. *Allied Signal, Inc.*, 970 F. 2d, at 184–185 (holding harassing supervisor acted within scope of employment,

but employer was not liable because of its quick and effective remediation). The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer. Cf. Mechem, *supra*, § 368 ("[F]or the time being [the supervisor] is conspicuously and unmistakably seeking a personal end"); see also Restatement § 235, Illustration 2 (tort committed while "[a]cting purely from personal ill will" not within the scope of employment); *id.*, Illustration 3 (tort committed in retaliation for failing to pay the employee a bribe not within the scope of employment). There are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer. *E. g.*, *Sims* v. *Montgomery County Comm'n*, 766 F. Supp. 1052, 1075 (MD Ala. 1990) (supervisor acting in scope of employment where employer has a policy of discouraging women from seeking advancement and "sexual harassment was simply a way of furthering that policy").

The concept of scope of employment has not always been construed to require a motive to serve the employer. *E. g.*, *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 172 (CA2 1968). Federal courts have nonetheless found similar limitations on employer liability when applying the agency laws of the States under the Federal Tort Claims Act, which makes the Federal Government liable for torts committed by employees within the scope of employment. 28 U. S. C. § 1346(b); see, *e. g.*, *Jamison* v. *Wiley*, 14 F. 3d 222, 237 (CA4 1994) (supervisor's unfair criticism of subordinate's work in retaliation for rejecting his sexual advances not within scope of employment); *Wood* v. *United States*, 995 F. 2d 1122, 1123 (CA1 1993) (Breyer, C. J.) (sexual harassment amounting to assault and battery "clearly outside the scope of employment"); see also 2 L. Jayson & R. Longstreth, Handling Federal Tort Claims § 9.07[4], p. 9–211 (1998).

The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

B

Scope of employment does not define the only basis for employer liability under agency principles. In limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. The principles are set forth in the much-cited § 219(2) of the Restatement:

> "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> "(a) the master intended the conduct or the consequences, or
>
> "(b) the master was negligent or reckless, or
>
> "(c) the conduct violated a non-delegable duty of the master, or
>
> "(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

See also § 219, Comment *e* (Section 219(2) "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment").

Subsection (a) addresses direct liability, where the employer acts with tortious intent, and indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego. None of the parties contend Slowik's rank imputes liability under this principle. There is no contention, furthermore, that a nondelegable duty is involved. See § 219(2)(c). So, for our purposes here, subsections (a) and (c) can be put aside.

Subsections (b) and (d) are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered. Under subsection (b), an employer is liable when the tort is attributable to the employer's own negli-

gence. § 219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Section 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). *Ibid.* As other federal decisions have done in discussing vicarious liability for supervisor harassment, *e. g.*, *Henson* v. *Dundee*, 682 F. 2d 897, 909 (CA11 1982), we begin with § 219(2)(d).

C

As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power. Compare Restatement § 6 (defining "power") with § 8 (defining "apparent authority"). In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context. If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one. Restatement § 8, Comment *c* ("Apparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized"). When a party seeks to impose vicarious liabil-

ity based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.

D

We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. See *Gary* v. *Long*, 59 F. 3d 1391, 1397 (CADC 1995). Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. See, *e. g.*, *Blankenship* v. *Parke Care Centers, Inc.*, 123 F. 3d 868, 872 (CA6 1997), cert. denied, 522 U. S. 1110 (1998) (sex discrimination); *McKenzie* v. *Illinois Dept. of Transp.*, 92 F. 3d 473, 480 (CA7 1996) (sex discrimination); *Daniels* v. *Essex Group, Inc.*, 937 F. 2d 1264, 1273 (CA7 1991) (race discrimination); see also 29 CFR § 1604.11(d) (1997) ("knows or should have known" standard of liability for cases of harassment between "fellow employees"). The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.

At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. See, *e. g.*, *Sauers* v. *Salt Lake County*, 1 F. 3d 1122, 1127 (CA10 1993) ("'If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing . . .'").

In *Meritor*, we acknowledged this consensus. See 477 U. S., at 70–71 ("[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions"). Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard.

In the context of this case, a tangible employment action would have taken the form of a denial of a raise or a promotion. The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Compare *Crady* v. *Liberty Nat. Bank & Trust Co. of Ind.*, 993 F. 2d 132, 136 (CA7 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"), with *Flaherty* v. *Gas Research Institute*, 31 F. 3d 451, 456 (CA7 1994) (a "bruised ego" is not enough), *Kocsis* v. *Multi-Care Management, Inc.*, 97 F. 3d 876, 887 (CA6 1996) (demotion without change in pay, benefits, duties, or prestige insufficient), and *Harlston* v. *McDonnell Douglas Corp.*, 37 F. 3d 379, 382 (CA8 1994) (reassignment to more inconvenient job insufficient).

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted

absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. See *Gary*, *supra*, at 1397; *Henson*, 682 F. 2d, at 910; *Barnes* v. *Costle*, 561 F. 2d 983, 996 (CADC 1977) (MacKinnon, J., concurring). But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. *E. g.*, *Shager* v. *Upjohn Co.*, 913 F. 2d 398, 405 (CA7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the committee functioned as the supervisor's "cat's-paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes. See *Kotcher* v. *Rosa & Sullivan Appliance Center, Inc.*, 957 F. 2d 59, 62 (CA2 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity").

For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action

against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability, as *Meritor* itself appeared to acknowledge. See *supra,* at 760–761.

Whether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. Application of the standard is made difficult by its malleable terminology, which can be read to either expand or limit liability in the context of supervisor harassment. On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. See *Meritor*, 477 U. S., at 77 (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates"). On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference.

It is this tension which, we think, has caused so much confusion among the Courts of Appeals which have sought to apply the aided in the agency relation standard to Title VII cases. The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment. In particular, we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment. See *id.*, at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible"). Congress has not altered *Mer-*

itor's rule even though it has made significant amendments to Title VII in the interim. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well. See 477 U. S., at 72 ("common-law principles may not be transferable in all their particulars to Title VII"). For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, see *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 77 (1984), and the EEOC's policy of encouraging the development of grievance procedures. See 29 CFR § 1604.11(f) (1997); EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (Mar. 19, 1990). To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 358 (1995). As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, see *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 231, n. 15 (1982), and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher* v. *Boca Raton*, *post*, p. 775, also decided today.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

IV

Relying on existing case law which held out the promise of vicarious liability for all *quid pro quo* claims, see *supra*, at 752–753, Ellerth focused all her attention in the Court of Appeals on proving her claim fit within that category. Given our explanation that the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability, see *supra*, at 754, Ellerth

should have an adequate opportunity to prove she has a claim for which Burlington is liable.

Although Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability. See *supra*, at 765.

For these reasons, we will affirm the judgment of the Court of Appeals, reversing the grant of summary judgment against Ellerth. On remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

I agree with the Court's ruling that "the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability." *Ante*, at 765. I also subscribe to the Court's statement of the rule governing employer liability, *ibid.*, which is substantively identical to the rule the Court adopts in *Faragher* v. *Boca Raton*, *post*, p. 775.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define. This rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never

informs anyone in a position of authority about the supervisor's conduct. As a result, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances: An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur.

I

Years before sexual harassment was recognized as "discriminat[ion] . . . because of . . . sex," 42 U. S. C. § 2000e–2(a)(1), the Courts of Appeals considered whether, and when, a racially hostile work environment could violate Title VII.[1] In the landmark case *Rogers* v. *EEOC*, 454 F. 2d 234 (1971), cert. denied, 406 U. S. 957 (1972), the Court of Appeals for the Fifth Circuit held that the practice of racially segregating patients in a doctor's office could amount to discrimination in "'the terms, conditions, or privileges'" of employment, thereby violating Title VII. 454 F. 2d, at 238 (quoting 42 U. S. C. § 2000e–2(a)(1)). The principal opinion in the case concluded that employment discrimination was not limited to the "isolated and distinguishable events" of "hiring, firing, and promoting." 454 F. 2d, at 238 (opinion of Goldberg, J.). Rather, Title VII could also be violated by a work environment "heavily polluted with discrimination," because of the deleterious effects of such an atmosphere on an employee's well-being. *Ibid.*

Accordingly, after *Rogers*, a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, in addition to the classic

[1] This sequence of events is not surprising, given that the primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination and that the statute's ban on sex discrimination was added as an eleventh-hour amendment in an effort to kill the bill. See *Barnes* v. *Costle*, 561 F. 2d 983, 987 (CADC 1977).

claim of so-called "disparate treatment." A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 10–11 (3d ed. 1996). A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment. See, *e. g.*, *Snell* v. *Suffolk Cty.*, 782 F. 2d 1094, 1103 (CA2 1986) ("To establish a hostile atmosphere, . . . plaintiffs must prove more than a few isolated incidents of racial enmity"); *Johnson* v. *Bunny Bread Co.*, 646 F. 2d 1250, 1257 (CA8 1981) (no violation of Title VII from infrequent use of racial slurs). This is the same standard now used when determining whether sexual harassment renders a work environment hostile. See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (actionable sexual harassment occurs when the workplace is "*permeated* with discriminatory intimidation, ridicule, and insult" (emphasis added; internal quotation marks and citation omitted)).

In race discrimination cases, employer liability has turned on whether the plaintiff has alleged an adverse employment consequence, such as firing or demotion, or a hostile work environment. If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages. See *ante*, at 760–761. This is because such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer. If, on the other hand, the employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action. See, *e. g.*, *Dennis* v. *Cty. of Fairfax*, 55 F. 3d 151, 153 (CA4 1995); *Davis* v. *Monsanto Chemical Co.*,

858 F. 2d 345, 349 (CA6 1988), cert. denied, 490 U. S. 1110 (1989). Liability has thus been imposed only if the employer is blameworthy in some way. See, *e. g.*, *Davis* v. *Monsanto Chemical Co.*, *supra*, at 349; *Snell* v. *Suffolk Cty.*, *supra*, at 1104; *DeGrace* v. *Rumsfeld*, 614 F. 2d 796, 805 (CA1 1980).

This distinction applies with equal force in cases of sexual harassment.[2] When a supervisor inflicts an adverse employment consequence upon an employee who has rebuffed his advances, the supervisor exercises the specific authority granted to him by his company. His acts, therefore, are the company's acts and are properly chargeable to it. See 123 F. 3d 490, 514 (CA7 1997) (Posner, C. J., dissenting); *ante*, at 762 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control").

If a supervisor creates a hostile work environment, however, he does not act for the employer. As the Court concedes, a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority. See *ante*, at 755–760. Indeed, a hostile work environment is antithetical to the interest of the employer. In such circumstances, an employer should be liable only if it has been negligent. That is, liability should attach only if the employer either knew, or in the exercise of

[2] The Courts of Appeals relied on racial harassment cases when analyzing early claims of discrimination based upon a supervisor's sexual harassment. For example, when the Court of Appeals for the District of Columbia Circuit held that a work environment poisoned by a supervisor's "sexually stereotyped insults and demeaning propositions" could itself violate Title VII, its principal authority was Judge Goldberg's opinion in *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971). See *Bundy* v. *Jackson*, 641 F. 2d 934, 944 (CADC 1981); see also *Henson* v. *Dundee*, 682 F. 2d 897, 901 (CA11 1982). So, too, this Court relied on *Rogers* when in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), it recognized a cause of action under Title VII for sexual harassment. See *id.*, at 65–66.

reasonable care should have known, about the hostile work environment and failed to take remedial action.[3]

Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society. See 123 F. 3d, at 513 (Posner, C. J., dissenting). Indeed, such measures could not even detect incidents of harassment such as the comments Slowik allegedly made to respondent in a hotel bar. The most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances. As one court recognized in addressing an early racial harassment claim:

> "It may not always be within an employer's power to guarantee an environment free from all bigotry. . . . [H]e can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy. . . . But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race." *DeGrace* v. *Rumsfeld*, 614 F. 2d 796, 805 (1980).

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[3] I agree with the Court that the doctrine of *quid pro quo* sexual harassment is irrelevant to the issue of an employer's vicarious liability. I do not, however, agree that the distinction between hostile work environment and *quid pro quo* sexual harassment is relevant "when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Ante*, at 753. A supervisor's threat to take adverse action against an employee who refuses his sexual demands, if never carried out, may create a hostile work environment, but that is all. Cases involving such threats, without more, should therefore be analyzed as hostile work environment cases only. If, on the other hand, the supervisor carries out his threat and causes the plaintiff a job detriment, the plaintiff may have a disparate treatment claim under Title VII. See E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J. L. & Pub. Policy 307, 309–314 (1998).

Under a negligence standard, Burlington cannot be held liable for Slowik's conduct. Although respondent alleged a hostile work environment, she never contended that Burlington had been negligent in permitting the harassment to occur, and there is no question that Burlington acted reasonably under the circumstances. The company had a policy against sexual harassment, and respondent admitted that she was aware of the policy but nonetheless failed to tell anyone with authority over Slowik about his behavior. See *ante*, at 748. Burlington therefore cannot be charged with knowledge of Slowik's alleged harassment or with a failure to exercise reasonable care in not knowing about it.

II

Rejecting a negligence standard, the Court instead imposes a rule of vicarious employer liability, subject to a vague affirmative defense, for the acts of supervisors who wield no delegated authority in creating a hostile work environment. This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based. Compounding its error, the Court fails to explain how employers can rely upon the affirmative defense, thus ensuring a continuing reign of confusion in this important area of the law.

In justifying its holding, the Court refers to our comment in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), that the lower courts should look to "agency principles" for guidance in determining the scope of employer liability, *id.*, at 72. The Court then interprets the term "agency principles" to mean the Restatement (Second) of Agency (1957). The Court finds two portions of the Restatement to be relevant: § 219(2)(b), which provides that a master is liable for his servant's torts if the master is reckless or negligent, and § 219(2)(d), which states that a master is liable for his servant's torts when the servant is "aided in accomplishing the tort by the existence of the agency relation." The Court

appears to reason that a supervisor is "aided . . . by . . . the agency relation" in creating a hostile work environment because the supervisor's "power and authority invests his or her harassing conduct with a particular threatening character." *Ante*, at 763.

Section 219(2)(d) of the Restatement provides no basis whatsoever for imposing vicarious liability for a supervisor's creation of a hostile work environment. Contrary to the Court's suggestions, the principle embodied in § 219(2)(d) has nothing to do with a servant's "power and authority," nor with whether his actions appear "threatening." Rather, as demonstrated by the Restatement's illustrations, liability under § 219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority.[4] In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf. Indeed, the Court admits as much in demonstrating why sexual harassment is not committed within the scope of a supervisor's employment and is not part of his apparent authority. See *ante,* at 755–760.

Thus although the Court implies that it has found guidance in both precedent and statute—see *ante*, at 755 ("The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction")—its holding is a product of willful policymaking, pure and simple. The only agency principle that justifies imposing employer liability in this context is the principle

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[4] See Restatement § 219, Comment *e;* § 261, Comment *a* (principal liable for an agent's fraud if "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business confided to him"); § 247, Illustrations (newspaper liable for a defamatory editorial published by editor for his own purposes).

that a master will be liable for a servant's torts if the master was negligent or reckless in permitting them to occur; and as noted, under a negligence standard, Burlington cannot be held liable. See *supra*, at 771.

The Court's decision is also in considerable tension with our holding in *Meritor* that employers are not strictly liable for a supervisor's sexual harassment. See *Meritor Savings Bank, FSB* v. *Vinson*, *supra*, at 72. Although the Court recognizes an affirmative defense—based solely on its divination of Title VII's *gestalt*, see *ante*, at 764—it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts:

> "While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ante*, at 765.

What these statements mean for district courts ruling on motions for summary judgment—the critical question for employers now subject to the vicarious liability rule—remains a mystery. Moreover, employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm. See *ibid.* In practice, therefore, employer liability very well may be the rule.

But as the Court acknowledges, this is the one result that it is clear Congress did *not* intend. See *ante,* at 763; *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S., at 72.

The Court's holding does guarantee one result: There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance. It thus truly boggles the mind that the Court can claim that its holding will effect "Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ante,* at 764. All in all, today's decision is an ironic result for a case that generated eight separate opinions in the Court of Appeals on a fundamental question, and in which we granted certiorari "to assist in defining the relevant standards of employer liability." *Ante,* at 751.

* * *

Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII. I would restore parallel treatment of employer liability for racial and sexual harassment and hold an employer liable for a hostile work environment only if the employer is truly at fault. I therefore respectfully dissent.

Syllabus

FARAGHER *v.* CITY OF BOCA RATON

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

No. 97–282. Argued March 25, 1998—Decided June 26, 1998

After resigning as a lifeguard with respondent City of Boca Raton (City), petitioner Beth Ann Faragher brought an action against the City and her immediate supervisors, Bill Terry and David Silverman, for nominal damages and other relief, alleging, among other things, that the supervisors had created a "sexually hostile atmosphere" at work by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms, and that this conduct constituted discrimination in the "terms, conditions, and privileges" of her employment in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1). Following a bench trial, the District Court concluded that the supervisors' conduct was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. The District Court then held that the City could be held liable for the harassment of its supervisory employees because the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge," of it; under traditional agency principles Terry and Silverman were acting as the City's agents when they committed the harassing acts; and a third supervisor had knowledge of the harassment and failed to report it to City officials. The Eleventh Circuit, sitting en banc, reversed. Relying on *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, and on the Restatement (Second) of Agency § 219 (1957) (Restatement), the Court of Appeals held that Terry and Silverman were not acting within the scope of their employment when they engaged in the harassing conduct, that their agency relationship with the City did not facilitate the harassment, that constructive knowledge of it could not be imputed to the City because of its pervasiveness or the supervisor's knowledge, and that the City could not be held liable for negligence in failing to prevent it.

Held: An employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim. Pp. 786–810.

(a) While the Court has delineated the substantive contours of the hostile environment Title VII forbids, see, *e. g.*, *Harris* v. *Forklift Sys-*

tems, Inc., 510 U. S. 17, 21–22, its cases have established few definitive rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive. The Court's only discussion to date of the standards of employer liability came in *Meritor*, *supra*, where the Court held that traditional agency principles were relevant for determining employer liability. Although the Court cited the Restatement §§ 219–237 with general approval, the Court cautioned that common-law agency principles might not be transferable in all their particulars. Pp. 786–792.

(b) Restatement § 219(1) provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Although Title VII cases in the Courts of Appeals have typically held, or assumed, that supervisory sexual harassment falls outside the scope of employment because it is motivated solely by individual desires and serves no purpose of the employer, these cases appear to be in tension with others defining the scope of the employment broadly to hold employers vicariously liable for employees' intentional torts, including sexual assaults, that were not done to serve the employer, but were deemed to be characteristic of its activities or a foreseeable consequence of its business. This tension is the result of differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior. The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, but rather an enquiry into whether it is proper to conclude that sexual harassment is one of the normal risks of doing business the employer should bear. An employer can reasonably anticipate the possibility of sexual harassment occurring in the workplace, and this might justify the assignment of the costs of this behavior to the employer rather than to the victim. Two things counsel in favor of the contrary conclusion, however. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope of employment and acts amounting to what the older law called frolics or detours from the course of employment. Second, the lower courts, by uniformly judging employer liability for co-worker harassment under a negligence standard, have implicitly treated such harassment outside the scope of employment. It is unlikely that such treatment would escape efforts to render them obsolete if the Court held that harassing supervisors necessarily act within the scope of their employment. The rationale for doing so would apply when the behavior was that of coemployees, because the employer generally benefits from the work of common employees as from the work of supervisors. The answer to this argument might be that the scope of supervisory employment may be treated separately because super-

visors have special authority enhancing their capacity to harass and the employer can guard against their misbehavior more easily. This answer, however, implicates an entirely separate category of agency law, considered in the next section. Given the virtue of categorical clarity, it is better to reject reliance on misuse of supervisory authority (without more) as irrelevant to the scope-of-employment analysis. Pp. 793–801.

(c) The Court of Appeals erred in rejecting a theory of vicarious liability based on § 219(2)(d) of the Restatement, which provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." It makes sense to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by use of his supervisory authority, and the aided-by-agency-relation principle of § 219(2)(d) provides an appropriate starting point for determining liability for the kind of harassment presented here. In a sense a supervisor is always assisted in his misconduct by the supervisory relationship; however, the imposition of liability based on the misuse of supervisory authority must be squared with *Meritor*'s holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination. There are two basic alternatives to counter the risk of automatic liability. The first is to require proof of some affirmative invocation of that authority by the harassing supervisor; the second is to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment. The problem with the first alternative is that there is not a clear line between the affirmative and merely implicit uses of supervisory power; such a rule would often lead to close judgment calls and results that appear disparate if not contradictory, and the temptation to litigate would be hard to resist. The second alternative would avoid this particular temptation to litigate and implement Title VII sensibly by giving employers an incentive to prevent and eliminate harassment and by requiring employees to take advantage of the preventive or remedial apparatus of their employers. Thus, the Court adopts the following holding in this case and in *Burlington Industries, Inc.* v. *Ellerth*, *ante*, p. 742, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a prepon-

derance of the evidence. See Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Pp. 801–808.

(d) Under this standard, the Eleventh Circuit's judgment must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry, and it is clear that these supervisors were granted virtually unchecked authority over their subordinates and that Faragher and her colleagues were completely isolated from the City's higher management. While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its sexual harassment policy among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors, and the record makes clear that the City's policy did not include any harassing supervisors assurance that could be bypassed in registering complaints. Under such circumstances, the Court holds as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Although the record discloses two possible grounds upon which the City might seek to excuse its failure to distribute its policy and to establish a complaint mechanism, both are contradicted by the record. The City points to nothing that might justify a conclusion by the District Court on remand that the City had exercised reasonable care. Nor is there any reason to remand for consideration of Faragher's efforts to mitigate her own damages, since the award to her was solely nominal. Pp. 808–809.

Syllabus

(e) There is no occasion to consider whether the supervisors' knowledge of the harassment could be imputed to the City. Liability on that theory could not be determined without further factfinding on remand, whereas the reversal necessary on the supervisory harassment theory renders any remand for consideration of imputed knowledge (or of negligence as an alternative to a theory of vicarious liability) entirely unjustifiable. P. 810.

111 F. 3d 1530, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 810.

William R. Amlong argued the cause for petitioner. With him on the briefs were *Martha F. Davis*, *Yolanda S. Wu*, and *Eric Schnapper*.

Irving Gornstein argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Wallace*, *C. Gregory Stewart*, *Carolyn L. Wheeler*, and *Gail S. Coleman*.

Harry A. Rissetto argued the cause for respondent. With him on the briefs were *Peter Buscemi*, *Mark S. Dichter*, *Mark A. Srere*, and *Victoria E. Houck*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *Marsha S. Berzon*, and *Laurence Gold;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Marc L. Fleischaker*, *Jack W. Londen*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Richard T. Seymour*, *Teresa A. Ferrante*, and *Steven R. Shapiro;* for the National Employment Lawyers Association by *Margaret A. Harris* and *H. Candace Gorman;* and for the National Women's Law Center, Equal Rights Advocates et al. by *Lois G. Williams*, *Nancy C. Libin*, *Jane L. Dolkart*, and *Marcia D. Greenberger*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat*, *Robin S. Conrad*, and *Sussan L. Mahallati;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman;* for the National Association of Manufacturers et al. by *William J. Kilberg*, *Douglas R. Cox*, *Jan S. Amundson*, and

JUSTICE SOUTER delivered the opinion of the Court.

This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination. We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.

I

Between 1985 and 1990, while attending college, petitioner Beth Ann Faragher worked part time and during the summers as an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of respondent, the City of Boca Raton, Florida (City). During this period, Faragher's immediate supervisors were Bill Terry, David Silverman, and Robert Gordon. In June 1990, Faragher resigned.

In 1992, Faragher brought an action against Terry, Silverman, and the City, asserting claims under Title VII, Rev. Stat. § 1979, 42 U. S. C. § 1983, and Florida law. So far as it concerns the Title VII claim, the complaint alleged that Terry and Silverman created a "sexually hostile atmosphere" at the beach by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms. The complaint contained specific allegations that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, "Date me or clean the toilets for a year." Asserting that

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Quentin Riegal; and for the Society for Human Resource Management by *Allan H. Weitzman* and *Paul Salvatore.*

Terry and Silverman were agents of the City, and that their conduct amounted to discrimination in the "terms, conditions, and privileges" of her employment, 42 U. S. C. § 2000e–2(a)(1), Faragher sought a judgment against the City for nominal damages, costs, and attorney's fees.

Following a bench trial, the United States District Court for the Southern District of Florida found that throughout Faragher's employment with the City, Terry served as Chief of the Marine Safety Division, with authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline. 864 F. Supp. 1552, 1563–1564 (1994). Silverman was a Marine Safety lieutenant from 1985 until June 1989, when he became a captain. *Id.*, at 1555. Gordon began the employment period as a lieutenant and at some point was promoted to the position of training captain. In these positions, Silverman and Gordon were responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training. *Id.*, at 1564.

The lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety Headquarters, a small one-story building containing an office, a meeting room, and a single, unisex locker room with a shower. *Id.*, at 1556. Their work routine was structured in a "paramilitary configuration," *id.*, at 1564, with a clear chain of command. Lifeguards reported to lieutenants and captains, who reported to Terry. He was supervised by the Recreation Superintendent, who in turn reported to a Director of Parks and Recreation, answerable to the City Manager. *Id.*, at 1555. The lifeguards had no significant contact with higher city officials like the Recreation Superintendent. *Id.*, at 1564.

In February 1986, the City adopted a sexual harassment policy, which it stated in a memorandum from the City Man-

ager addressed to all employees. *Id.*, at 1560. In May 1990, the City revised the policy and reissued a statement of it. *Ibid.* Although the City may actually have circulated the memos and statements to some employees, it completely failed to disseminate its policy among employees of the Marine Safety Section, with the result that Terry, Silverman, Gordon, and many lifeguards were unaware of it. *Ibid.*

From time to time over the course of Faragher's tenure at the Marine Safety Section, between 4 and 6 of the 40 to 50 lifeguards were women. *Id.*, at 1556. During that 5-year period, Terry repeatedly touched the bodies of female employees without invitation, *ibid.*, would put his arm around Faragher, with his hand on her buttocks, *id.*, at 1557, and once made contact with another female lifeguard in a motion of sexual simulation, *id.*, at 1556. He made crudely demeaning references to women generally, *id.*, at 1557, and once commented disparagingly on Faragher's shape, *ibid.* During a job interview with a woman he hired as a lifeguard, Terry said that the female lifeguards had sex with their male counterparts and asked whether she would do the same. *Ibid.*

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. *Ibid.* Another time, he pantomimed an act of oral sex. *Ibid.* Within earshot of the female lifeguards, Silverman made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them. *Id.*, at 1557–1558.

Faragher did not complain to higher management about Terry or Silverman. Although she spoke of their behavior to Gordon, she did not regard these discussions as formal complaints to a supervisor but as conversations with a person she held in high esteem. *Id.*, at 1559. Other female

lifeguards had similarly informal talks with Gordon, but because Gordon did not feel that it was his place to do so, he did not report these complaints to Terry, his own supervisor, or to any other city official. *Id.*, at 1559–1560. Gordon responded to the complaints of one lifeguard by saying that "the City just [doesn't] care." *Id.*, at 1561.

In April 1990, however, two months before Faragher's resignation, Nancy Ewanchew, a former lifeguard, wrote to Richard Bender, the City's Personnel Director, complaining that Terry and Silverman had harassed her and other female lifeguards. *Id.*, at 1559. Following investigation of this complaint, the City found that Terry and Silverman had behaved improperly, reprimanded them, and required them to choose between a suspension without pay or the forfeiture of annual leave. *Ibid.*

On the basis of these findings, the District Court concluded that the conduct of Terry and Silverman was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. *Id.*, at 1562–1563. The District Court then ruled that there were three justifications for holding the City liable for the harassment of its supervisory employees. First, the court noted that the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge," of it. *Id.*, at 1563. Next, it ruled that the City was liable under traditional agency principles because Terry and Silverman were acting as its agents when they committed the harassing acts. *Id.*, at 1563–1564. Finally, the court observed that Gordon's knowledge of the harassment, combined with his inaction, "provides a further basis for imputing liability on *[sic]* the City." *Id.*, at 1564. The District Court then awarded Faragher $1 in nominal damages on her Title VII claim. *Id.*, at 1564–1565.

A panel of the Court of Appeals for the Eleventh Circuit reversed the judgment against the City. 76 F. 3d 1155

(1996). Although the panel had "no trouble concluding that Terry's and Silverman's conduct . . . was severe and pervasive enough to create an objectively abusive work environment," *id.*, at 1162, it overturned the District Court's conclusion that the City was liable. The panel ruled that Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment, *id.*, at 1166, that they were not aided in their actions by the agency relationship, *id.*, at 1166, n. 14, and that the City had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon's actual knowledge, *id.*, at 1167, and n. 16.

In a 7-to-5 decision, the full Court of Appeals, sitting en banc, adopted the panel's conclusion. 111 F. 3d 1530 (1997). Relying on our decision in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), and on the Restatement (Second) of Agency § 219 (1957) (hereinafter Restatement), the court held that "an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate." 111 F. 3d, at 1534–1535.

Applying these principles, the court rejected Faragher's Title VII claim against the City. First, invoking standard agency language to classify the harassment by each supervisor as a "frolic" unrelated to his authorized tasks, the court found that in harassing Faragher, Terry and Silverman were acting outside of the scope of their employment and solely to further their own personal ends. *Id.*, at 1536–1537. Next, the court determined that the supervisors' agency relationship with the City did not assist them in perpetrating their harassment. *Id.*, at 1537. Though noting that "a supervisor is always aided in accomplishing hostile environment sex-

ual harassment by the existence of the agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim," the court held that traditional agency law does not employ so broad a concept of aid as a predicate of employer liability, but requires something more than a mere combination of agency relationship and improper conduct by the agent. *Ibid.* Because neither Terry nor Silverman threatened to fire or demote Faragher, the court concluded that their agency relationship did not facilitate their harassment. *Ibid.*

The en banc court also affirmed the panel's ruling that the City lacked constructive knowledge of the supervisors' harassment. The court read the District Court's opinion to rest on an erroneous legal conclusion that any harassment pervasive enough to create a hostile environment must *a fortiori* also suffice to charge the employer with constructive knowledge. *Id.*, at 1538. Rejecting this approach, the court reviewed the record and found no adequate factual basis to conclude that the harassment was so pervasive that the City should have known of it, relying on the facts that the harassment occurred intermittently, over a long period of time, and at a remote location. *Ibid.* In footnotes, the court also rejected the arguments that the City should be deemed to have known of the harassment through Gordon, *id.*, at 1538, n. 9, or charged with constructive knowledge because of its failure to disseminate its sexual harassment policy among the lifeguards, *id.*, at 1539, n. 11.

Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted different approaches. Compare, *e. g.*, *Harrison* v. *Eddy Potash, Inc.*, 112 F. 3d 1437 (CA10 1997), vacated, *post*, p. 947; 111 F. 3d 1530 (CA11 1997) (case below); *Gary* v.

Long, 59 F. 3d 1391 (CADC), cert. denied, 516 U. S. 1011 (1995); and *Karibian* v. *Columbia University*, 14 F. 3d 773 (CA2), cert. denied, 512 U. S. 1213 (1994). We granted certiorari to address the divergence, 522 U. S. 978 (1997), and now reverse the judgment of the Eleventh Circuit and remand for entry of judgment in Faragher's favor.

II

A

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1). We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition "'is not limited to "economic" or "tangible" discrimination,'" *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB* v. *Vinson*, *supra*, at 64), and that it covers more than "'terms' and 'conditions' in the narrow contractual sense." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 78 (1998). Thus, in *Meritor* we held that sexual harassment so "severe or pervasive" as to "'alter the conditions of [the victim's] employment and create an abusive working environment'" violates Title VII. 477 U. S., at 67 (quoting *Henson* v. *Dundee*, 682 F. 2d 897, 904 (CA11 1982)).

In thus holding that environmental claims are covered by the statute, we drew upon earlier cases recognizing liability for discriminatory harassment based on race and national origin, see, *e. g.*, *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972); *Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F. 2d 506 (CA8), cert. denied *sub nom. Banta* v. *United States*, 434 U. S. 819 (1977),

just as we have also followed the lead of such cases in attempting to define the severity of the offensive conditions necessary to constitute actionable sex discrimination under the statute. See, *e. g.*, *Rogers*, *supra*, at 238 ("[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment to violate Title VII).[1] See also *Daniels* v. *Essex Group, Inc.*, 937 F. 2d 1264, 1271–1272 (CA7 1991); *Davis* v. *Monsanto Chemical Co.*, 858 F. 2d 345, 349 (CA6 1988), cert. denied, 490 U. S. 1110 (1989); *Snell* v. *Suffolk County*, 782 F. 2d 1094, 1103 (CA2 1986); 1 B. Lindemann & P. Grossman, Employment Discrimination Law 349, and nn. 36–37 (3d ed. 1996) (hereinafter Lindemann & Grossman) (citing cases instructing that "[d]iscourtesy or rudeness should not be confused with racial harassment" and that "a lack of racial sensitivity does not, alone, amount to actionable harassment").

So, in *Harris*, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. 510 U. S., at 21–22. We directed courts to determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threat-

[1] Similarly, Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. See, *e. g.*, *Carrero* v. *New York City Housing Auth.*, 890 F. 2d 569, 577 (CA2 1989) (citing *Lopez* v. *S. B. Thomas, Inc.*, 831 F. 2d 1184, 1189 (CA2 1987), a case of racial harassment, for the proposition that incidents of environmental sexual harassment "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive"). Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.

ening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*, at 23. Most recently, we explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Oncale*, 523 U. S., at 81. A recurring point in these opinions is that "simple teasing," *id.*, at 82, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." *Id.*, at 80. Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992) (hereinafter Lindemann & Kadue) (footnotes omitted). We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. See, *e. g.*, *Carrero* v. *New York City Housing Auth.*, 890 F. 2d 569, 577–578 (CA2 1989); *Moylan* v. *Maries County*, 792 F. 2d 746, 749–750 (CA8 1986); See also 1 Lindemann & Grossman 805–807, n. 290 (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive).

While indicating the substantive contours of the hostile environments forbidden by Title VII, our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive. Given the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the sufficiency of the abusive conditions, not the

standards for determining an employer's liability for them. There have, for example, been myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop. See, *e. g.*, *Katz* v. *Dole*, 709 F. 2d 251, 256 (CA4 1983) (upholding employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment"); *EEOC* v. *Hacienda Hotel*, 881 F. 2d 1504, 1516 (CA9 1989) (employer liable where hotel manager did not respond to complaints about supervisors' harassment); *Hall* v. *Gus Constr. Co.*, 842 F. 2d 1010, 1016 (CA8 1988) (holding employer liable for harassment by co-workers because supervisor knew of the harassment but did nothing). In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy. Cf. *Oncale*, *supra*, at 77 (victim reported his grounds for fearing rape to company's safety supervisor, who turned him away with no action on complaint).

Nor was it exceptional that standards for binding the employer were not in issue in *Harris*, *supra*. In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer, 510 U. S., at 19, who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy. *Burns* v. *McGregor Electronic Industries, Inc.*, 955 F. 2d 559, 564 (CA8 1992) (employer-company liable where harassment was perpetrated by its owner); see *Torres* v. *Pisano*, 116 F. 3d 625, 634–635, and n. 11 (CA2) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed

automatically to the employer"), cert. denied, 522 U. S. 997 (1997); cf. *Katz*, *supra*, at 255 ("Except in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior," an employee must "demonstrat[e] the propriety of holding the employer liable").

Finally, there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown. See *Meritor*, 477 U. S., at 70–71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); *id.*, at 75 (Marshall, J., concurring in judgment) ("[W]hen a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer"); see also *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972) (imposing liability on employer for racially motivated discharge by low-level supervisor, although the "record clearly shows that [its] record in race relations . . . is exemplary").

A variety of reasons have been invoked for this apparently unanimous rule. Some courts explain, in a variation of the "proxy" theory discussed above, that when a supervisor makes such decisions, he "merges" with the employer, and his act becomes that of the employer. See, *e. g.*, *Kotcher* v. *Rosa and Sullivan Appliance Ctr., Inc.*, 957 F. 2d 59, 62 (CA2 1992) ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity"); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F. 2d 1311, 1316 (CA11 1989) ("When a supervisor requires sexual favors as a *quid pro quo* for job benefits, the supervisor, by definition, acts as the company"); see also Lindemann &

Grossman 776 (noting that courts hold employers "automatically liable" in *quid pro quo* cases because the "supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer"). Other courts have suggested that vicarious liability is proper because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing, promotion, and the like. See, *e. g.*, *Shager* v. *Upjohn Co.*, 913 F. 2d 398, 405 (CA7 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer" (citing Restatement § 228)). Others have suggested that vicarious liability is appropriate because the supervisor who discriminates in this manner is aided by the agency relation. See, *e. g.*, *Nichols* v. *Frank*, 42 F. 3d 503, 514 (CA9 1994). Finally, still other courts have endorsed both of the latter two theories. See, *e. g.*, *Harrison*, 112 F. 3d, at 1443; *Henson*, 682 F. 2d, at 910.

The soundness of the results in these cases (and their continuing vitality), in light of basic agency principles, was confirmed by this Court's only discussion to date of standards of employer liability, in *Meritor*, *supra*, which involved a claim of discrimination by a supervisor's sexual harassment of a subordinate over an extended period. In affirming the Court of Appeals's holding that a hostile atmosphere resulting from sex discrimination is actionable under Title VII, we also anticipated proceedings on remand by holding agency principles relevant in assigning employer liability and by rejecting three *per se* rules of liability or immunity. 477 U. S., at 70–72. We observed that the very definition of employer in Title VII, as including an "agent," *id.*, at 72, expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a super-

visory employee was not otherwise obvious, *ibid.*, and although we cautioned that "common-law principles may not be transferable in all their particulars to Title VII," we cited the Restatement §§ 219–237 with general approval. *Ibid.*

We then proceeded to reject two limitations on employer liability, while establishing the rule that some limitation was intended. We held that neither the existence of a company grievance procedure nor the absence of actual notice of the harassment on the part of upper management would be dispositive of such a claim; while either might be relevant to the liability, neither would result automatically in employer immunity. *Ibid.* Conversely, we held that Title VII placed some limit on employer responsibility for the creation of a discriminatory environment by a supervisor, and we held that Title VII does not make employers "always automatically liable for sexual harassment by their supervisors," *ibid.*, contrary to the view of the Court of Appeals, which had held that "an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct," *id.*, at 69–70.

Meritor's statement of the law is the foundation on which we build today. Neither party before us has urged us to depart from our customary adherence to *stare decisis* in statutory interpretation, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) (*stare decisis* has "special force" in statutory interpretation). And the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding. Civil Rights Act of 1991, § 102, 105 Stat. 1072, 42 U. S. C. § 1981a; see *Keene Corp.* v. *United States*, 508 U. S. 200, 212 (1993) (applying the "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them"). See also *infra*, at 804, n. 4.

B

The Court of Appeals identified, and rejected, three possible grounds drawn from agency law for holding the City vicariously liable for the hostile environment created by the supervisors. It considered whether the two supervisors were acting within the scope of their employment when they engaged in the harassing conduct. The court then enquired whether they were significantly aided by the agency relationship in committing the harassment, and also considered the possibility of imputing Gordon's knowledge of the harassment to the City. Finally, the Court of Appeals ruled out liability for negligence in failing to prevent the harassment. Faragher relies principally on the latter three theories of liability.

1

A "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement § 219(1). This doctrine has traditionally defined the "scope of employment" as including conduct "of the kind [a servant] is employed to perform," occurring "substantially within the authorized time and space limits," and "actuated, at least in part, by a purpose to serve the master," but as excluding an intentional use of force "unexpectable by the master." *Id.*, § 228(1).

Courts of Appeals have typically held, or assumed, that conduct similar to the subject of this complaint falls outside the scope of employment. See, *e. g.*, *Harrison*, 112 F. 3d, at 1444 (sexual harassment "'simply is not within the job description of any supervisor or any other worker in any reputable business'"); 111 F. 3d, at 1535–1536 (case below); *Andrade* v. *Mayfair Management, Inc.*, 88 F. 3d 258, 261 (CA4 1996) ("[I]llegal sexual harassment is . . . beyond the scope of supervisors' employment"); *Gary*, 59 F. 3d, at 1397 (harassing supervisor acts outside the scope of his employ-

ment in creating hostile environment); *Nichols* v. *Frank*, 42 F. 3d 503, 508 (CA9 1994) ("The proper analysis for employer liability in hostile environment cases is . . . *not* whether an employee was acting within his 'scope of employment' "); *Bouton* v. *BMW of North Am., Inc.*, 29 F. 3d 103, 107 (CA3 1994) (sexual harassment is outside scope of employment); see also *Ellerth* v. *Burlington Industries, Inc.*, decided with *Jansen* v. *Packaging Corp. of America*, 123 F. 3d 490, 561 (CA7 1997) (en banc) (Manion, J., concurring and dissenting) (supervisor's harassment would fall within scope of employment only in "the rare case indeed"), aff'd, *ante*, p. 742; Lindemann & Grossman 812 ("Hostile environment sexual harassment normally does not trigger respondeat superior liability because sexual harassment rarely, if ever, is among the official duties of a supervisor"). But cf. *Martin* v. *Cavalier Hotel Corp.*, 48 F. 3d 1343, 1351–1352 (CA4 1995) (holding employer vicariously liable in part based on finding that the supervisor's rape of employee was within the scope of employment); *Kauffman* v. *Allied Signal, Inc.*, 970 F. 2d 178, 184 (CA6) (holding that a supervisor's harassment was within the scope of his employment, but nevertheless requiring the victim to show that the employer failed to respond adequately when it learned of the harassment), cert. denied, 506 U. S. 1041 (1992). In so doing, the courts have emphasized that harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual harassment to the classic "frolic and detour" for which an employer has no vicarious liability.

These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer. In *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167 (1968), for example,

the Second Circuit charged the Government with vicarious liability for the depredation of a drunken sailor returning to his ship after a night's carouse, who inexplicably opened valves that flooded a drydock, damaging both the drydock and the ship. Judge Friendly acknowledged that the sailor's conduct was not remotely motivated by a purpose to serve his employer, but relied on the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities," and imposed vicarious liability on the ground that the sailor's conduct "was not so 'unforeseeable' as to make it unfair to charge the Government with responsibility." *Id.*, at 171. Other examples of an expansive sense of scope of employment are readily found, see, *e. g.*, *Leonbruno* v. *Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711 (1920) (opinion of Cardozo, J.) (employer was liable under worker's compensation statute for eye injury sustained when employee threw an apple at another; the accident arose "in the course of employment" because such horseplay should be expected); *Carr* v. *Wm. C. Crowell Co.*, 28 Cal. 2d 652, 171 P. 2d 5 (1946) (employer liable for actions of carpenter who attacked a coemployee with a hammer). Courts, in fact, have treated scope of employment generously enough to include sexual assaults. See, *e. g.*, *Primeaux* v. *United States*, 102 F. 3d 1458, 1462–1463 (CA8 1996) (federal police officer on limited duty sexually assaulted stranded motorist); *Mary M.* v. *Los Angeles*, 54 Cal. 3d 202, 216–221, 814 P. 2d 1341, 1349–1352 (1991) (en banc) (police officer raped motorist after placing her under arrest); *Doe* v. *Samaritan Counseling Ctr.*, 791 P. 2d 344, 348–349 (Alaska 1990) (therapist had sexual relations with patient); *Turner* v. *State*, 494 So. 2d 1291, 1296 (La. App. 1986) (National Guard recruiting officer committed sexual battery during sham physical examinations); *Lyon* v. *Carey*, 533 F. 2d 649, 655 (CADC 1976) (furniture deliveryman raped recipient of furniture); *Samuels* v. *Southern Baptist Hospital*, 594 So. 2d 571, 574 (La. App. 1992) (nursing

assistant raped patient).[2] The rationales for these decisions have varied, with some courts echoing *Bushey* in explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business, see, *e. g.*, *Mary M.*, *supra*, at 218, 814 P. 2d, at 1350, and others finding that the employee's sexual misconduct arose from or was in some way related to the employee's essential duties. See, *e. g.*, *Samuels*, *supra*, at 574 (tortious conduct was "reasonably incidental" to the performance of the nursing assistant's duties in caring for a "helpless" patient in a "locked environment").

An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one. Here it is enough to recognize that their disparate results do not necessarily reflect wildly varying terms of the particular employment contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior. In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law. As one eminent authority has observed, the "highly indefinite phrase" is "devoid of meaning in itself" and is "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keaton on Law of Torts 502 (5th ed. 1984); see also Seavey, Speculations as to "Respondeat Superior," in Studies in Agency 129, 155

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[2] It bears noting that many courts in non-Title VII cases have held sexual assaults to fall outside the scope of employment. See Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees, 76 Minn. L. Rev. 1513, 1521–1522, and nn. 33, 34 (1992) (collecting cases).

(1949) ("The liability of a master to a third person for the torts of a servant has been widely extended by aid of the elastic phrase 'scope of the employment' which may be used to include all which the court wishes to put into it"). Older cases, for example, treated smoking by an employee during working hours as an act outside the scope of employment, but more recently courts have generally held smoking on the job to fall within the scope. Prosser & Keeton, *supra*, at 504, and n. 23. It is not that employers formerly did not authorize smoking but have now begun to do so, or that employees previously smoked for their own purposes but now do so to serve the employer. We simply understand smoking differently now and have revised the old judgments about what ought to be done about it.

The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, see, *e. g.*, §§ 219, 228, 229, but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view. The Restatement itself points to such an approach, as in the commentary that the "ultimate question" in determining the scope of employment is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." *Id.*, § 229, Comment *a*. See generally *Taber* v. *Maine*, 67 F. 3d 1029, 1037 (CA2 1995) ("As the leading Torts treatise has put it, 'the integrating principle' of *respondeat superior* is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not'" (quoting 5 F. Harper, F. James, & O. Gray, Law of Torts § 26.8, pp. 40–41 (2d ed. 1986))).

In the case before us, a justification for holding the offensive behavior within the scope of Terry's and Silverman's employment was well put in Judge Barkett's dissent: "[A]

pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability." 111 F. 3d, at 1542 (opinion dissenting in part and concurring in part). It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace. See Lindemann & Kadue 4–5 (discussing studies showing prevalence of sexual harassment); *Ellerth*, 123 F. 3d, at 511 (Posner, C. J., concurring and dissenting) ("[E]veryone knows by now that sexual harassment is a common problem in the American workplace"). An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. As noted, *supra*, at 796–797, developments like this occur from time to time in the law of agency.

Two things counsel us to draw the contrary conclusion. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment. Such a distinction can readily be applied to the spectrum of possible harassing conduct by supervisors, as the following examples show. First, a supervisor might discriminate racially in job assignments in order to placate the prejudice pervasive in the labor force. Instances of this variety of the heckler's veto would be consciously intended to further the employer's interests by preserving peace in the workplace. Next, supervisors might reprimand male employees for workplace failings with banter, but respond to women's

shortcomings in harsh or vulgar terms. A third example might be the supervisor who, as here, expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer. If a line is to be drawn between scope and frolic, it would lie between the first two examples and the third, and it thus makes sense in terms of traditional agency law to analyze the scope issue, in cases like the third example, just as most federal courts addressing that issue have done, classifying the harassment as beyond the scope of employment.

The second reason goes to an even broader unanimity of views among the holdings of District Courts and Courts of Appeals thus far. Those courts have held not only that the sort of harassment at issue here was outside the scope of supervisors' authority, but, by uniformly judging employer liability for co-worker harassment under a negligence standard, they have also implicitly treated such harassment as outside the scope of common employees' duties as well. See *Blankenship* v. *Parke Care Centers, Inc.*, 123 F. 3d 868, 872–873 (CA6 1997), cert. denied, 522 U. S. 1110 (1998); *Fleming* v. *Boeing Co.*, 120 F. 3d 242, 246 (CA11 1997); *Perry* v. *Ethan Allen, Inc.*, 115 F. 3d 143, 149 (CA2 1997); *Yamaguchi* v. *United States Dept. of Air Force*, 109 F. 3d 1475, 1483 (CA9 1997); *Varner* v. *National Super Markets, Inc.*, 94 F. 3d 1209, 1213 (CA8 1996), cert. denied, 519 U. S. 1110 (1997); *McKenzie* v. *Illinois Dept. of Transp.*, 92 F. 3d 473, 480 (CA7 1996); *Andrade*, 88 F. 3d, at 261; *Waymire* v. *Harris County*, 86 F. 3d 424, 428–429 (CA5 1996); *Hirase-Doi* v. *U. S. West Communications, Inc.*, 61 F. 3d 777, 783 (CA10 1995); *Andrews* v. *Philadelphia*, 895 F. 2d 1469, 1486 (CA3 1990); cf. *Morrison* v. *Carleton Woolen Mills, Inc.*, 108 F. 3d 429, 438 (CA1 1997) (applying "knew or should have known" standard to claims of environmental harassment by a supervisor); see also 29 CFR §1604.11(d) (1997) (employer is liable for co-worker harassment if it "knows or should have known of the conduct, unless it can show that it took immediate and ap-

propriate corrective action"); 3 L. Larson & A. Larson, Employment Discrimination § 46.07[4][a], p. 46–101 (2d ed. 1998) (courts "uniformly" apply Equal Employment Opportunity Commission (EEOC) rule; "[i]t is not a controversial area"). If, indeed, the cases did not rest, at least implicitly, on the notion that such harassment falls outside the scope of employment, their liability issues would have turned simply on the application of the scope-of-employment rule. Cf. *Hunter* v. *Allis-Chalmers, Inc.*, 797 F. 2d 1417, 1422 (CA7 1986) (noting that employer will not usually be liable under *respondeat superior* for employee's racial harassment because it "would be the rare case where racial harassment . . . could be thought by the author of the harassment to help the employer's business").

It is quite unlikely that these cases would escape efforts to render them obsolete if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment. The rationale for placing harassment within the scope of supervisory authority would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of coemployees. The employer generally benefits just as obviously from the work of common employees as from the work of supervisors; they simply have different jobs to do, all aimed at the success of the enterprise. As between an innocent employer and an innocent employee, if we use scope-of-employment reasoning to require the employer to bear the cost of an actionably hostile workplace created by one class of employees (*i. e.*, supervisors), it could appear just as appropriate to do the same when the environment was created by another class (*i. e.*, co-workers).

The answer to this argument might well be to point out that the scope of supervisory employment may be treated separately by recognizing that supervisors have special authority enhancing their capacity to harass, and that the

employer can guard against their misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees. But this answer happens to implicate an entirely separate category of agency law (to be considered in the next section), which imposes vicarious liability on employers for tortious acts committed by use of particular authority conferred as an element of an employee's agency relationship with the employer. Since the virtue of categorical clarity is obvious, it is better to reject reliance on misuse of supervisory authority (without more) as irrelevant to scope-of-employment analysis.

2

The Court of Appeals also rejected vicarious liability on the part of the City insofar as it might rest on the concluding principle set forth in § 219(2)(d) of the Restatement, that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Faragher points to several ways in which the agency relationship aided Terry and Silverman in carrying out their harassment. She argues that in general offending supervisors can abuse their authority to keep subordinates in their presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint. Thus, she maintains that power conferred on Terry and Silverman by the City enabled them to act for so long without provoking defiance or complaint.

The City, however, contends that § 219(2)(d) has no application here. It argues that the second qualification of the subsection, referring to a servant "aided in accomplishing the tort by the existence of the agency relation," merely "refines" the one preceding it, which holds the employer vicari-

ously liable for its servant's abuse of apparent authority. Brief for Respondent 30–31, and n. 24. But this narrow reading is untenable; it would render the second qualification of § 219(2)(d) almost entirely superfluous (and would seem to ask us to shut our eyes to the potential effects of supervisory authority, even when not explicitly invoked). The illustrations accompanying this subsection make clear that it covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship. See Restatement § 219, Comment *e* (noting employer liability where "the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons" and where the manager who operates a store "for an undisclosed principal is enabled to cheat the customers because of his position"); *id.*, § 247, Illustration 1 (noting a newspaper's liability for a libelous editorial published by an editor acting for his own purposes).

We therefore agree with Faragher that in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.[3] Several courts, indeed, have noted what Faragher has argued, that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship. See, *e. g.*, *Rodgers* v. *Western-Southern Life Ins.*

[3] We say "starting point" because our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) into Title VII. Rather, it is to adapt agency concepts to the practical objectives of Title VII. As we said in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 72 (1986), "common-law principles may not be transferable in all their particulars to Title VII."

Co., 12 F. 3d 668, 675 (CA7 1993); *Taylor* v. *Metzger*, 152 N. J. 490, 505, 706 A. 2d 685, 692 (1998) (emphasizing that a supervisor's conduct may have a greater impact than that of colleagues at the same level); cf. *Torres*, 116 F. 3d, at 631. See also *White* v. *Monsanto Co.*, 585 So. 2d 1205, 1209–1210 (La. 1991) (a supervisor's harassment of a subordinate is more apt to rise to the level of intentional infliction of emotional distress than comparable harassment by a coemployee); *Contreras* v. *Crown Zellerbach Corp.*, 88 Wash. 2d 735, 740, 565 P. 2d 1173, 1176 (1977) (same); *Alcorn* v. *Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498–499, and n. 2, 468 P. 2d 216, 218–219, and n. 2 (1970) (same). The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion." Estrich, Sex at Work, 43 Stan. L. Rev. 813, 854 (1991). Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

In sum, there are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. We are not entitled to recognize this theory under Title VII unless we can square it with *Meritor*'s holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination,[4] and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high. To counter it, we think there are two basic alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.

There is certainly some authority for requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority before liability may be imputed. That is the way some courts have viewed the familiar cases holding the employer liable for discriminatory employment

[4] We are bound to honor *Meritor* on this point not merely because of the high value placed on *stare decisis* in statutory interpretation, *supra*, at 792, but for a further reason as well. With the amendments enacted by the Civil Rights Act of 1991, Congress both expanded the monetary relief available under Title VII to include compensatory and punitive damages, see § 102, 105 Stat. 1072, 42 U. S. C. § 1981a, and modified the statutory grounds of several of our decisions, see § 101 *et seq.* The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

action with tangible consequences, like firing and demotion. See *supra*, at 790. And we have already noted some examples of liability provided by the Restatement itself, which suggest that an affirmative misuse of power might be required. See *supra*, at 802 (telegraph operator sends false messages, a store manager cheats customers, editor publishes libelous editorial).

But neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior. Supervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist; this is the reason that courts have consistently held that acts of supervisors have greater power to alter the environment than acts of coemployees generally, see *supra*, at 802–803. How far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not reasonably be seen as actively using authority? Judgment calls would often be close, the results would often seem disparate even if not demonstrably contradictory, and the temptation to litigate would be hard to resist. We think plaintiffs and defendants alike would be poorly served by an active-use rule.

The other basic alternative to automatic liability would avoid this particular temptation to litigate, but allow an employer to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided. This composite defense would, we think, implement the statute sensibly, for reasons that are not hard to fathom.

Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrim-

ination," *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975), its "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. *Id.*, at 417. As long ago as 1980, the EEOC, charged with the enforcement of Title VII, 42 U. S. C. § 2000e–4, adopted regulations advising employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment." 29 CFR § 1604.11(f) (1997), and in 1990 the EEOC issued a policy statement enjoining employers to establish a complaint procedure "designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990) (internal quotation marks omitted). It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Ford Motor Co.* v. *EEOC,* 458 U. S. 219, 231, n. 15 (1982) (quoting C. McCormick, Law of Damages 127 (1935) (internal quotation marks omitted). An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably

failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc.* v. *Ellerth*, *ante*, p. 742, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a

demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington*, *ante*, at 762–763.

Applying these rules here, we believe that the judgment of the Court of Appeals must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry. It is undisputed that these supervisors "were granted virtually unchecked authority" over their subordinates, "directly controll[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." 111 F. 3d, at 1544 (Barkett, J., dissenting in part and concurring in part). It is also clear that Faragher and her colleagues were "completely isolated from the City's higher management." *Ibid.* The City did not seek review of these findings.

While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. App. 274. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-

flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

We have drawn this conclusion without overlooking two possible grounds upon which the City might argue for the opportunity to litigate further. There is, first, the Court of Appeals's indulgent gloss on the relevant evidence: "There is some evidence that the City did not effectively disseminate among Marine Safety employees its sexual harassment policy." 111 F. 3d, at 1539, n. 11. But, in contrast to the Court of Appeals's characterization, the District Court made an explicit finding of a "complete failure on the part of the City to disseminate said policy among Marine Safety Section employees." 864 F. Supp., at 1560. The evidence supports the District Court's finding and there is no contrary claim before us.

The second possible ground for pursuing a defense was asserted by the City in its argument addressing the possibility of negligence liability in this case. It said that it should not be held liable for failing to promulgate an antiharassment policy, because there was no apparent duty to do so in the 1985–1990 period. The City purports to rest this argument on the position of the EEOC during the period mentioned, but it turns out that the record on this point is quite against the City's position. Although the EEOC issued regulations dealing with promulgating a statement of policy and providing a complaint mechanism in 1990, see *supra*, at 806, ever since 1980 its regulations have called for steps to prevent violations, such as informing employees of their rights and the means to assert them, *ibid.* The City, after all, adopted an antiharassment policy in 1986.

The City points to nothing that might justify a conclusion by the District Court on remand that the City had exercised reasonable care. Nor is there any reason to remand for consideration of Faragher's efforts to mitigate her own damages, since the award to her was solely nominal.

3

The Court of Appeals also rejected the possibility that it could hold the City liable for the reason that it knew of the harassment vicariously through the knowledge of its supervisors. We have no occasion to consider whether this was error, however. We are satisfied that liability on the ground of vicarious knowledge could not be determined without further factfinding on remand, whereas the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable (as would be any consideration of negligence as an alternative to a theory of vicarious liability here).

III

The judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for reinstatement of the judgment of the District Court.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

For the reasons given in my dissenting opinion in *Burlington Industries, Inc.* v. *Ellerth*, *ante*, p. 742, absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment. Petitioner suffered no adverse employment consequence; thus the Court of Appeals was correct to hold that the city of Boca Raton (City) is not vicariously liable for the conduct of Chief Terry and Lieutenant Silverman. Because the Court reverses this judgment, I dissent.

As for petitioner's negligence claim, the District Court made no finding as to the City's negligence, and the Court of Appeals did not directly consider the issue. I would therefore remand the case to the District Court for further proceedings on this question alone. I disagree with the Court's

conclusion that merely because the City did not disseminate its sexual harassment policy, it should be liable as a matter of law. See *ante*, at 808–809.[1] The City should be allowed to show either that: (1) there was a reasonably available avenue through which petitioner could have complained to a City official who supervised both Chief Terry and Lieutenant Silverman, see Brief for United States and EEOC as *Amici Curiae* in *Meritor Savings Bank, FSB* v. *Vinson*, O. T. 1985, No. 84–1979, p. 26,[2] or (2) it would not have learned of the harassment even if the policy had been distributed.[3] Petitioner, as the plaintiff, would of course bear the burden of proving the City's negligence.

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[1] The harassment alleged in this case occurred intermittently over a 5-year period between 1985 and 1990; the District Court's factual findings do not indicate when in 1990 it ceased. It was only in March 1990 that the Equal Employment Opportunity Commission (EEOC) issued a "policy statement" "enjoining" employers to establish complaint procedures for sexual harassment. See *ante*, at 806. The 1980 Guideline on which the Court relies—because the EEOC has no substantive rulemaking authority under Title VII, the Court is inaccurate to refer to it as a "regulatio[n]," see *ante*, at 809—was wholly precatory and as such cannot establish negligence *per se*. See 29 CFR § 1604.11(f) (1997) ("An employer should take all steps necessary to prevent sexual harassment from occurring . . . ").

[2] The City's Employment Handbook stated that employees with "complaints or grievances" could speak to the City's Personnel and Labor Relations Director about problems at work. See App. 280. The District Court found that the City's Personnel Director, Richard Bender, moved quickly to investigate the harassment charges against Terry and Silverman once they were brought to his attention. See App. to Pet. for Cert. 80a.

[3] Even after petitioner read the City's sexual harassment policy in 1990, see App. 188, she did not file a charge with City officials. Instead, she filed suit against the City in 1992.

Reporter's Note

The next page is purposely numbered 901. The numbers between 811 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 1 THROUGH SEPTEMBER 29, 1998

JUNE 1, 1998

Certiorari Granted—Vacated and Remanded

No. 96–1721. CITIZEN POTAWATOMI NATION *v.* C&L ENTERPRISES, INC. Ct. Civ. App. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998).

No. 97–216. KIOWA TRIBE OF OKLAHOMA *v.* AIRCRAFT EQUIPMENT CO. ET AL. Sup. Ct. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998). Reported below: 939 P. 2d 1143.

Miscellaneous Orders

No. D–1922. IN RE DISBARMENT OF GOLDFLAM. Disbarment entered. [For earlier order herein, see 523 U. S. 1017.]

No. D–1924. IN RE DISBARMENT OF MONTAGUE. Disbarment entered. [For earlier order herein, see 523 U. S. 1017.]

No. D–1925. IN RE DISBARMENT OF HINDIN. Disbarment entered. [For earlier order herein, see 523 U. S. 1017.]

No. D–1926. IN RE DISBARMENT OF WELLONS. Disbarment entered. [For earlier order herein, see 523 U. S. 1043.]

No. D–1927. IN RE DISBARMENT OF MAYS. Disbarment entered. [For earlier order herein, see 523 U. S. 1044.]

No. D–1928. IN RE DISBARMENT OF GOTTLIEB. Disbarment entered. [For earlier order herein, see 523 U. S. 1044.]

No. D–1934. IN RE DISBARMENT OF SADLER. Further consideration of response to rule to show cause deferred. [For earlier order herein, see 523 U. S. 1069.]

No. D–1935. IN RE DISBARMENT OF AHAM-NEZE. L. Obioma Aham-Neze, of Houston, Tex., 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 the practice of law before this Court. The rule to show cause, issued on April 20, 1998 [523 U. S. 1069], is discharged.

No. D–1955. IN RE DISBARMENT OF BOWDEN. David Howerton Bowden, of Winston-Salem, N. C., is suspended from the practice of law in this Court, and a rule will 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–1956. IN RE DISBARMENT OF BLEECKER. Lloyd Mitchell Bleecker, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1957. IN RE DISBARMENT OF MAURICE. Ronald G. Maurice, of Marlow Heights, Md., is suspended from the practice of law in this Court, and a rule will 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–1958. IN RE DISBARMENT OF BERG. Jerome Berg, of San Francisco, Cal., is suspended from the practice of law in this Court, and a rule will 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–1959. IN RE DISBARMENT OF WARKOW. Paul J. Warkow, of Bellmore, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1960. IN RE DISBARMENT OF MEISLER. Michael Charles Meisler, of Deerfield Beach, Fla., is suspended from the practice of law in this Court, and a rule will 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. M–76. MALONE *v.* DISTRICT OF COLUMBIA BOARD OF ELECTIONS; and

No. M–77. CROSBY *v.* SHREVES ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 97–8597. MARTINEZ *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 6th Cir.; and

No. 97–8981. IN RE MONTGOMERY. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until June 22, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 97–1787. IN RE GREEN. Petition for writ of habeas corpus denied.

No. 97–8247. IN RE RIVERA; and

No. 97–8525. IN RE WASHINGTON. Petitions for writs of mandamus denied.

No. 97–8522. IN RE RIVERA. Petition for writ of prohibition denied.

Certiorari Granted

No. 97–1184. NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 *v.* DEPARTMENT OF THE INTERIOR ET AL.; and

No. 97–1243. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 132 F. 3d 157.

No. 97–1252. RENO, ATTORNEY GENERAL, ET AL. *v.* AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL. C. A. 9th Cir. Certiorari granted limited to the following question: "Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation?" Reported below: 119 F. 3d 1367.

Certiorari Denied

No. 96–1962. COHEN *v.* LITTLE SIX, INC., DBA MYSTIC LAKE CASINO. Sup. Ct. Minn. Certiorari denied. Reported below: 561 N. W. 2d 889.

No. 97–664. SETTLES ET AL. *v.* PENILLA, ADMINISTRATOR OF THE ESTATE OF PENILLA, DECEASED. C. A. 9th Cir. Certiorari denied. Reported below: 115 F. 3d 707.

No. 97–1388. MAYS ET AL. *v.* CITY OF EAST ST. LOUIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 123 F. 3d 999.

No. 97–1402. UNIVERSITY HEALTH SERVICES, INC. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 1145.

No. 97–1407. FALKENBERRY *v.* TAYLOR. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 47.

No. 97–1454. ANCHORAGE EDUCATION ASSN. ET AL. *v.* PATTERSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 807.

No. 97–1462. YEO, INDIVIDUALLY AND ON BEHALF OF HIS CHILDREN *v.* TOWN OF LEXINGTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 131 F. 3d 241.

No. 97–1497. MIZUNO ET AL. *v.* SALISBURY, CHAPTER 11 TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 858.

No. 97–1560. RAYTHEON AEROSPACE, INC., ET AL. *v.* GREENWELL. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 140.

No. 97–1594. DEPRINS *v.* VAN DAMME ET AL. Ct. App. Tex., 12th Dist. Certiorari denied. Reported below: 953 S. W. 2d 7.

No. 97–1604. KNIGHTS OF THE KU KLUX KLAN ET AL. *v.* MAYOR OF LANSING ET AL. Ct. App. Mich. Certiorari denied. Reported below: 222 Mich. App. 637, 564 N. W. 2d 177.

No. 97–1626. CUNNINGHAM *v.* NAZARIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 427.

No. 97–1627. COLLINS *v.* CITY OF HAZLEHURST. Sup. Ct. Miss. Certiorari denied. Reported below: 709 So. 2d 408.

No. 97–1645. BUSH *v.* ZEELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied.

No. 97–1647. KUCERA *v.* UNITED NEBRASKA BANK. Ct. App. Neb. Certiorari denied. Reported below: 5 Neb. App. xxi.

No. 97–1662. CLARK *v.* ROY ANDERSON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 193.

No. 97–1663. WILLOUGHBY *v.* FIELDS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 37.

No. 97–1687. ARMENIS *v.* CRAMER. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 141.

No. 97–1689. BLACKBURN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BABY BOY DOE, DECEASED *v.* BLUE MOUNTAIN WOMEN'S CLINIC ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 286 Mont. 60, 951 P. 2d 1.

No. 97–1691. PERRY *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 954 S. W. 2d 554.

No. 97–1694. HOME SAVINGS OF AMERICA *v.* MAYNARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1720. BOWER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1077, 685 N. E. 2d 393.

No. 97–1737. HOOVLER ET AL. *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 689 N. E. 2d 738.

No. 97–1758. CARLSON *v.* NEBRASKA STATE BANK (two judgments). Ct. App. Neb. Certiorari denied. Reported below: 6 Neb. App. lix.

No. 97–5623. BOOTH ET AL. *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 112 F. 3d 139.

No. 97–7275. SANCHEZ-ZUBIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 607.

No. 97–7630. MILLER *v.* UNITED STATES; and
No. 97–8083. ARROYO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 116 F. 3d 641.

No. 97–7644. CHASE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 127 F. 3d 1100.

No. 97–7772. PADILLA-PENA *v.* UNITED STATES; and

No. 97–7790. PADILLA-PENA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 129 F. 3d 457.

No. 97–8025. CANAAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 683 N. E. 2d 227.

No. 97–8096. CLOUTIER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 141, 687 N. E. 2d 930.

No. 97–8142. CALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 1402.

No. 97–8453. OWENS *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 97–8461. ORLICK *v.* KATZ. C. A. 7th Cir. Certiorari denied.

No. 97–8464. BITTAKER *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 97–8465. COOPER *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 956 S. W. 2d 234.

No. 97–8466. GRAVES *v.* CARR. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 151.

No. 97–8468. MCGREW *v.* WHITAKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 366.

No. 97–8473. WASKO *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 860.

No. 97–8476. SOBIN *v.* FAIRFAX COUNTY DEPARTMENT OF HUMAN DEVELOPMENT. Sup. Ct. Va. Certiorari denied.

No. 97–8479. CANNON *v.* SAVAGE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8480. BROWN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 700 So. 2d 684.

No. 97–8486. WALTON *v.* BARTLETT, ACTING SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8489. SLEZAK *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1260.

No. 97–8495. WARREN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1076.

No. 97–8507. EVANS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8509. DUBUC *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 97–8511. BRYANT *v.* SPECKARD, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 1076.

No. 97–8518. HUFFMAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 97–8520. FREJOMIL *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–8527. WALKER *v.* THOMAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8533. NOWIK *v.* NORTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 143.

No. 97–8534. TATAII *v.* CAYETANO. C. A. 9th Cir. Certiorari denied. Reported below: 120 F. 3d 269.

No. 97–8540. BATES *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 973 S. W. 2d 615.

No. 97–8547. HALEY *v.* FERGUSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 33.

No. 97–8556. BOWEN *v.* GUNDY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 32.

No. 97–8561. TAL-MASON *v.* REDD ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 705 So. 2d 903.

No. 97–8562. DARNE *v.* JUNTUNEN. Sup. Ct. Wis. Certiorari denied. Reported below: 215 Wis. 2d 428, 576 N. W. 2d 283.

No. 97–8573. THOMPSON *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 97–8574. TURKOWSKI *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 97–8602. KIMBLE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–8611. WILSON *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 438.

No. 97–8624. DEPREE *v.* LIBRARY OF CONGRESS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 159 F. 3d 636.

No. 97–8627. CALE *v.* STATE RETIREMENT AND PENSION SYSTEM OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 116 Md. App. 733.

No. 97–8648. STRACHAN *v.* TILLERY. C. A. 10th Cir. Certiorari denied. Reported below: 127 F. 3d 1109.

No. 97–8666. RICKETTS *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 152 F. 3d 942.

No. 97–8673. WEGNER *v.* LEWIS, INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR. C. A. 9th Cir. Certiorari denied.

No. 97–8675. EGGENA *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–8676. DARDEN *v.* DALTON, SECRETARY OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 132 F. 3d 51.

No. 97–8688. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 129 F. 3d 1266.

No. 97–8698. IGNACIO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 135 F. 3d 775.

No. 97–8700. JACOBS *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8702. LONGARIELLO *v.* SCHOOL BOARD OF DADE COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 707 So. 2d 1125.

No. 97–8706. BROWN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 330 Ark. xxii.

No. 97–8752. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–8753. KENNEDY *v.* PARAMOUNT PICTURES CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 126.

No. 97–8770. PARKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–8781. CIMINO *v.* ZUK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 1055.

No. 97–8785. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 130 F. 3d 815.

No. 97–8793. ALJAMI *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 97–8795. GRIFFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 918.

No. 97–8799. GODFREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–8810. KARASEK *v.* CITY OF DAYTON. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 97–8824. KUKU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 1435.

No. 97–8841. SWAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 919.

No. 97–8842. MCCABE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–8845. BARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 908.

No. 97–8847. PICKERING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–8848. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 1328.

No. 97–8850. BYAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1155.

No. 97–8854. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 130 F. 3d 442.

No. 97–8858. LUNA-MADELLAGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 1293.

No. 97–8860. CAPALDI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 307.

No. 97–8863. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–8867. DANIELS, AKA DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 379.

No. 97–8870. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 120 F. 3d 269.

No. 97–8878. MCCLELLAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 706 A. 2d 542.

No. 97–8879. SINDRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 919.

No. 97–8882. KNUPP *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 97–8885. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 722.

No. 97–8892. GONZALEZ-GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 136 F. 3d 6.

No. 97–8893. GILMARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–8905. HOUSER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 130 F. 3d 867.

No. 97–8908. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 140.

No. 97–8909. DesAnges *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 364.

No. 97–8911. Easter *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 429.

No. 97–8916. Victoria *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1155.

No. 97–8917. Brown *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 718.

No. 97–8921. Atkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 893.

No. 97–8973. D'Amico *v.* City of New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 132 F. 3d 145.

No. 96–1215. Gavle *v.* Little Six, Inc., dba Mystic Lake Casino, et al. Sup. Ct. Minn. Motion of Tribal Accountability Legal Rights Fund, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 555 N. W. 2d 284.

No. 97–1606. Fulcomer, Warden *v.* Frey. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 132 F. 3d 916.

No. 97–8467. Hassan *v.* AT&T Corp. et al. C. A. 4th Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition. Reported below: 134 F. 3d 363.

Rehearing Denied

No. 97–1285. Shephard *v.* Provident Life & Accident Insurance Co., 523 U. S. 1059;

No. 97–1358. Hadji-Elias et al. *v.* Los Angeles County Superior Court (Shahbaz et al., Real Parties in Interest), 523 U. S. 1060;

No. 97–1360. Shephard *v.* Pomona Fairplex et al., 523 U. S. 1060;

No. 97–7884. Valdez et al. *v.* Fonoimoana et al., 523 U. S. 1080; and

No. 97–8090. Angel *v.* Texas, 523 U. S. 1098. Petitions for rehearing denied.

JUNE 3, 1998

Certiorari Denied

No. 97–9336 (A–916). GRETZLER *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

No. 97–9362 (A–922). GRETZLER *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this application and this petition. Reported below: 146 F. 3d 675.

JUNE 4, 1998

Dismissal Under Rule 46

No. 97–1400. CHRISTY, TRUSTEE OF THE FINLEY KUMBLE ET AL. MALPRACTICE INSURANCE TRUST *v.* ALEXANDER & ALEXANDER OF NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 130 F. 3d 52.

Certiorari Denied

No. 97–1924. UNITED STATES *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of the Independent Counsel for leave to file an unredacted petition and appendix under seal granted. Motion of counsel for President Clinton for leave to file under seal an unredacted brief in opposition granted. Motion for an expedited response to the petition and for an expedited briefing and argument schedule denied. Motion by the Solicitor General, on behalf of the United States acting through the Attorney General, for access to sealed portions of the record denied. Certiorari before judgment denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case.

No. 97–1942. UNITED STATES *v.* RUBIN, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Motion of the Independent

Counsel for leave to file an unredacted petition and appendix under seal granted. Leave is granted the Solicitor General to file an unredacted response under seal to the petition. Motion for an expedited response and for an expedited briefing and argument schedule denied. Certiorari before judgment denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case.

JUNE 8, 1998

Certiorari Granted—Reversed and Remanded. (See No. 97–1217, *ante*, p. 151.)

Miscellaneous Orders

No. A–823. IN RE MARTIN. C. A. D. C. Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–842 (97–9005). BURGE *v.* COLORADO ET AL. Dist. Ct. Colo., Jefferson County. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. A–854 (97–1833). BIALCZAK ET AL. *v.* BARNETT ET AL. C. A. 7th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A–869. IN RE MARTIN. C. A. 3d Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–1919. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 523 U. S. 1016.]

No. D–1920. IN RE DISBARMENT OF SCHANER. Disbarment entered. [For earlier order herein, see 523 U. S. 1016.]

No. D–1921. IN RE DISBARMENT OF BROWN. Disbarment entered. [For earlier order herein, see 523 U. S. 1017.]

No. D–1930. IN RE DISBARMENT OF PATTERSON. Disbarment entered. [For earlier order herein, see 523 U. S. 1044.]

No. D–1931. IN RE DISBARMENT OF SOUTHARD. Disbarment entered. [For earlier order herein, see 523 U. S. 1056.]

No. D–1961. IN RE DISBARMENT OF WEISSER. Michael Harris Weisser, of North Miami Beach, Fla., is suspended from the

practice of law in this Court, and a rule will 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–1962. IN RE DISBARMENT OF NEILL. Denis Michael Neill, of Bethesda, Md., is suspended from the practice of law in this Court, and a rule will 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. M–78. DOYLE *v.* DILLON, DISTRICT ATTORNEY, NASSAU COUNTY. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. M–79. PANETTI *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 97–1418. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSN. *v.* 203 NORTH LASALLE STREET PARTNERSHIP. C. A. 7th Cir. [Certiorari granted, 523 U. S. 1106.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

No. 97–8805. HAYNES *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 29, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–1821. IN RE BOURIE;
No. 97–9092. IN RE CANTU MARTINEZ; and
No. 97–9099. IN RE BLACKMON. Petitions for writs of habeas corpus denied.

No. 97–1705. IN RE LONARDO ET AL.;
No. 97–8578. IN RE BRADIN;
No. 97–8617. IN RE SIDLES; and
No. 97–8792. IN RE CUMMINS. Petitions for writs of mandamus denied.

No. 97–8610. IN RE WHITESIDE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 97–1337. MINNESOTA ET AL. *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 124 F. 3d 904.

No. 97–53. ROBERTS, GUARDIAN FOR JOHNSON *v.* GALEN OF VIRGINIA, INC., FORMERLY DBA HUMANA HOSPITAL-UNIVERSITY OF LOUISVILLE, DBA UNIVERSITY OF LOUISVILLE HOSPITAL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 111 F. 3d 405.

No. 97–1139. UNITED STATES *v.* RODRIGUEZ-MORENO. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 121 F. 3d 841.

No. 97–1620. SEIF, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. *v.* CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING ET AL. C. A. 3d Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 132 F. 3d 925.

Certiorari Denied

No. 97–1469. CSX TRANSPORTATION, INC. *v.* MCDANIEL. Sup. Ct. Tenn. Certiorari denied. Reported below: 955 S. W. 2d 257.

No. 97–1477. LONG ET UX., INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF LONG, A MINOR, ET AL. *v.* ALACHUA COUNTY SCHOOL BOARD ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 704 So. 2d 523.

No. 97–1532. CAMP ET AL. *v.* RILEY. C. A. 11th Cir. Certiorari denied. Reported below: 84 F. 3d 437.

No. 97–1564. THRIFTWAY MARKETING CORP. ET AL. *v.* DEVANEY. Sup. Ct. N. M. Certiorari denied. Reported below: 124 N. M. 512, 953 P. 2d 277.

No. 97–1616. PAINTERS LOCAL UNION NO. 109 PENSION FUND ET AL. *v.* SMITH BARNEY, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 590.

No. 97–1631. WINDHAM *v.* CITY OF LOWELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 924.

No. 97–1634. EVANS *v.* NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 41, 952 P. 2d 958.

No. 97–1651. BROWN *v.* FORD MOTOR CO. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 700 So. 2d 932.

No. 97–1661. TEAMSTERS BREWERY & SOFT DRINK WORKERS LOCAL UNION 896, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO *v.* ANHEUSER-BUSCH, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 127.

No. 97–1667. POWELL ET AL. *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 677.

No. 97–1681. LYON METAL PRODUCTS, INC. *v.* CALIFORNIA BOARD OF EQUALIZATION. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 58 Cal. App. 4th 906, 68 Cal. Rptr. 2d 285.

No. 97–1682. DAVIS *v.* BAPTIST MEMORIAL HOSPITAL SYSTEM, DBA BAPTIST MEDICAL CENTER HOSPITAL. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 137.

No. 97–1746. IRBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1117, 716 N. E. 2d 877.

No. 97–1752. MISSOURIANS FOR TAX JUSTICE EDUCATION PROJECT, INC., ET AL. *v.* HOLDEN, MISSOURI STATE TREASURER, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 959 S. W. 2d 100.

No. 97–1769. PECARO *v.* NEW JERSEY COUNCIL ON AFFORDABLE HOUSING. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 765.

No. 97–1794. JEPPSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 128 F. 3d 1410.

No. 97–1809. DIMARTINI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1181.

No. 97–1813. ASHTON *v.* GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 97–1815. CASH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 97–7368. MCCLAIN *v.* CLARK, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 204.

No. 97–7724. WILLINGHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–7754. DOHERTY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 126 F. 3d 769.

No. 97–8160. GALLEGO *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 1065.

No. 97–8176. CARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 32.

No. 97–8189. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 46.

No. 97–8390. TONIA B. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 239 App. Div. 2d 572, 658 N. Y. S. 2d 91.

No. 97–8559. KELL *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 927.

No. 97–8563. MARKLAND *v.* FLOYD, SUPERINTENDENT, DADE CORRECTIONAL INSTITUTION AND WORK CAMP. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 721.

No. 97–8564. MARQUEZ *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 97–8570. COOKISH *v.* NEW HAMPSHIRE. Super. Ct. N. H., Merrimack County. Certiorari denied.

No. 97–8571. ADELMAN *v.* COLONIAL PARK APARTMENTS. Super. Ct. Pa. Certiorari denied. Reported below: 698 A. 2d 659.

No. 97–8572. FATHER *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 125.

No. 97–8604. TUNNICLIFF *v.* MORIARTY. C. A. 1st Cir. Certiorari denied. Reported below: 125 F. 3d 842.

No. 97–8605. ADAMES *v.* BATISTA ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–8606. JOHNSON *v.* DOE ET AL. (two judgments); and

No. 97–8607. JOHNSON *v.* DOE ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: No. 97–8606 (first judgment) and No. 97–8607, 230 App. Div. 2d 513, 660 N. Y. S. 2d 916; No. 97–8606 (second judgment), 230 App. Div. 2d 513, 660 N. Y. S. 2d 782.

No. 97–8616. PETERSON *v.* ZIMMERMAN, CHIEF JUSTICE, SUPREME COURT OF UTAH, ET AL. C. A. 10th Cir. Certiorari denied.

No. 97–8619. GILDAY *v.* DUBOIS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 124 F. 3d 277.

No. 97–8625. ANDERSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 288 Ill. App. 3d 1121, 711 N. E. 2d 832.

No. 97–8631. BENNETT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 238 App. Div. 2d 898, 660 N. Y. S. 2d 772.

No. 97–8649. MERKOBRAD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8655. RICHARDSON *v.* TURTLE WAX, INC. C. A. 7th Cir. Certiorari denied. Reported below: 129 F. 3d 1268.

No. 97–8668. PIKITUS *v.* SHENANDOAH BOROUGH COUNCIL. C. A. 3d Cir. Certiorari denied. Reported below: 149 F. 3d 1165.

No. 97–8669. J. C. *v.* IOWA. Ct. App. Iowa. Certiorari denied.

No. 97–8696. RUDD *v.* HANLEY ET AL. C. A. 5th Cir. Certiorari denied.

No. 97–8707. BRINCAT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 97–8709. BLACKMON *v.* POINDEXTER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 97–8718. LUMAN *v.* DORSEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 932.

No. 97–8801. EISENHAUER *v.* MASSACHUSETTS BAR COUNSEL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 426 Mass. 448, 689 N. E. 2d 783.

No. 97–8818. BLAIR *v.* THOMPSON, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 124.

No. 97–8822. VALENZUELA RODRIGUEZ *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 739.

No. 97–8846. PIZZO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 715 So. 2d 1202.

No. 97–8856. TYLER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 97–8869. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 894.

No. 97–8881. MITCHELL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 97–8891. DISMUKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 46.

No. 97–8894. FLUDD *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 97–8899. BLAIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 141 F. 3d 1152.

No. 97–8907. DELOACH *v.* GENERAL DYNAMICS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1456.

No. 97–8912. SPRINGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 97–8924. LOPEZ-MURCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 141.

No. 97–8926. SIDDALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 97–8929. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 247.

No. 97–8945. GANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–8955. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 895.

No. 97–8956. KIRBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1189.

No. 97–8957. CASTRO-NINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 930.

No. 97–8958. ROPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 135 F. 3d 430.

No. 97–8959. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 120 F. 3d 263.

No. 97–8969. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 737.

No. 97–8970. ALLEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 144.

No. 97–8971. HARAKAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 320.

No. 97–8972. MEZZETTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 136 F. 3d 265.

No. 97–8974. HARDING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 132 F. 3d 41.

No. 97–8982. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 130 F. 3d 676.

No. 97–8989. BRANCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 364.

No. 97–8991. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 140.

No. 97–8994. RAMIREZ-MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 860.

No. 97–8995. SORTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 141 F. 3d 1161.

No. 97–8996. BELFLOWER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 1459.

No. 97–9001. COLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–9007. MCCLINTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 135 F. 3d 1178.

No. 97–9008. KEYSER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 430.

No. 97–9010. JOHNSON *v.* CORCORAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 915.

No. 97–9012. TURNER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 134 F. 3d 361.

No. 97–9015. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 122 F. 3d 1075.

No. 97–9018. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 138 F. 3d 955.

No. 97–9023. MOORE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1343.

No. 97–9024. CROSSLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 368.

No. 97–9026. CHAO HUI LIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–9034. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 1111.

No. 97–9035. TICE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 908.

No. 97–9040. CAMINERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–9041. BOWENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 141 F. 3d 1170.

No. 97–9043. HOLT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 722.

No. 97–9044. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 135 F. 3d 1124.

No. 97–9045. HONEYCUTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1453.

No. 97–9047. ELLIOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 437.

No. 97–9066. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 920.

No. 97–9067. MULLENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1331.

No. 97–9072. BELTRAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1330.

No. 97–9074. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 97–1435. DONG *v.* SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM AND SCULPTURE GARDEN. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 125 F. 3d 877.

No. 97–1632. MCDANIEL, WARDEN, ET AL. *v.* GALLEGO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 124 F. 3d 1065.

No. 97–1650. CHAMPION, WARDEN, ET AL. *v.* SACK. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 133 F. 3d 932.

No. 97–1639. SPRAGUE ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Motion of petitioners to suggest that the Court invite the Solicitor General to file a brief presenting the views of the United States denied. Certiorari denied. Reported below: 133 F. 3d 388.

No. 97–8951. GRIFFIN *v.* CLARK, WARDEN. C. A. 7th Cir. Certiorari before judgment denied.

No. 97–9033. VALDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 97–6864. SMITH *v.* O'BRIEN ET AL., 522 U. S. 1093;

No. 97–7384. IN RE DARDEN, 523 U. S. 1003;

No. 97–7485. BROWN *v.* FLORIDA, 523 U. S. 1026;

No. 97–7513. DECKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 523 U. S. 1026;

No. 97–7864. WILLIAMS *v.* CARLTON, WARDEN, 523 U. S. 1080;

No. 97–7914. GARCIA-ROSELL *v.* UNITED STATES, 523 U. S. 1032; and

No. 97–8060. ENOCH *v.* ILLINOIS, 523 U. S. 1084. Petitions for rehearing denied.

JUNE 9, 1998

Miscellaneous Order

No. 97–9455 (A–936). IN RE CARGILL. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

Certiorari Denied

No. 97–9454 (A–935). CARGILL *v.* TURPIN, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

JUNE 15, 1998

Certiorari Granted—Vacated and Remanded

No. 97–14. MICHIGAN ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case re-

manded for further consideration in light of *Cass County* v. *Leech Lake Band of Chippewa Indians*, *ante*, p. 103. Reported below: 106 F. 3d 130.

No. 97–296. MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY *v.* BESTFOODS ET AL.; and

No. 97–464. BESTFOODS *v.* AEROJET-GENERAL CORP. ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *United States* v. *Bestfoods*, *ante*, p. 51. Reported below: 113 F. 3d 572.

No. 97–1163. DONAHEY ET UX. *v.* LIVINGSTONE ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Bestfoods*, *ante*, p. 51. Reported below: 129 F. 3d 838.

No. 97–1209. LOCKHEED AERONAUTICAL SYSTEMS CO. *v.* GRAY ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dooley* v. *Korean Air Lines Co.*, *ante*, p. 116. Reported below: 125 F. 3d 1371.

No. 97–7931. COLEMAN *v.* MINNESOTA. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kansas* v. *Hendricks*, 521 U. S. 346 (1997).

Miscellaneous Orders

No. A–901 (97–1900). BUZZETTI, DBA COZY CABIN, ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. D–1963. IN RE DISBARMENT OF MARSHALL. James Warner Marshall, of Orange, Conn., is suspended from the practice of law in this Court, and a rule will 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–1964. IN RE DISBARMENT OF GREEN. James Ryan Green, of Fontana, Wis., is suspended from the practice of law in this Court, and a rule will 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–1965. IN RE DISBARMENT OF MENDELSON. Michael Sweig Mendelson, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will 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–1966. IN RE DISBARMENT OF TAYLOR. George Michael Taylor, of Springfield, Ill., is suspended from the practice of law in this Court, and a rule will 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. M–80. AHWINONA *v.* ALASKA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and expenses granted, and the River Master is awarded a total of $2,445 for the period January 1 through March 31, 1998, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 522 U. S. 910.]

No. 96–1400. CALIFORNIA ET AL. *v.* DEEP SEA RESEARCH, INC., ET AL., 523 U. S. 491. Motion of respondent Deep Sea Research, Inc., to retax costs denied.

No. 97–8978. RUSSELL *v.* VBR. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 6, 1998, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 97–8710. IN RE CROOMS. Petition for writ of mandamus denied.

Certiorari Granted

No. 97–1489. YOUR HOME VISITING NURSE SERVICES, INC. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 132 F. 3d 1135.

No. 97–7541. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 122 F. 3d 185.

Certiorari Denied

No. 96–8874. SASSER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 23.

No. 96–9142. REEVES *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 102 F. 3d 977.

No. 97–241. ZOLLO DRUM CO., INC., ET AL. *v.* B. F. GOODRICH CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 505 and 112 F. 3d 88.

No. 97–1515. DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 130 F. 3d 1083.

No. 97–1553. VANN ET UX. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 768.

No. 97–1565. MISSISSIPPI *v.* RODERICK ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 704 So. 2d 49.

No. 97–1608. WILSON, GOVERNOR OF CALIFORNIA, ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL.; and

No. 97–1636. SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 1050.

No. 97–1649. ARNESON *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 128 F. 3d 1243.

No. 97–1658. YINGER *v.* CITY OF DEARBORN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 35.

No. 97–1664. BENDE *v.* BROGDON. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–1669. CASSAN ENTERPRISES, INC., ET AL. *v.* DOLLAR SYSTEMS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 145.

No. 97–1671. WHITEHALL TENANTS CORP. ET AL. *v.* WHITEHALL REALTY CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 133 F. 3d 908.

No. 97–1672. MOVIES, INC., ET AL. *v.* KAHN, DIRECTOR, NEW ORLEANS DEPARTMENT OF FINANCE. Civ. Dist. Ct., Orleans Parish, La. Certiorari denied.

No. 97–1674. MAY ET AL. *v.* SHUTTLE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 129 F. 3d 165.

No. 97–1680. ROSSETTO ET AL. *v.* PABST BREWING CO. C. A. 7th Cir. Certiorari denied. Reported below: 128 F. 3d 538.

No. 97–1684. LEBRON *v.* NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK). C. A. 2d Cir. Certiorari denied.

No. 97–1692. DARLING ET UX. *v.* SAVERS LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 133.

No. 97–1698. BRAND MANAGEMENT, INC., ET AL. *v.* MENARD, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 135 F. 3d 776.

No. 97–1700. PASHUCK *v.* COOKSEY, SHERIFF, COUNTY OF SALEM, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 765.

No. 97–1701. NATIONSMART CORP. ET AL. *v.* CARLON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 130 F. 3d 309.

No. 97–1703. SHONG-CHING TONG *v.* HUNT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 212.

No. 97–1723. CHILDRESS ET AL. *v.* CITY OF RICHMOND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 1205.

No. 97–1741. LEVESQUE ET UX. *v.* YAMAGUCHI ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–1793. GOETZ *v.* BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 213 Wis. 2d 494, 570 N. W. 2d 726.

No. 97–1803. MILLER *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 152 F. 3d 939.

No. 97–1805. STACY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 141 F. 3d 1170.

No. 97–1811. BLAKLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1349.

No. 97–1814. SEALS, AKA BROOKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 130 F. 3d 451.

No. 97–1823. SAILE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 130 F. 3d 443.

No. 97–1826. BIDDLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 427.

No. 97–5076. LAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 97–5347. BONNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 114 F. 3d 1202.

No. 97–5882. CHARGUALAF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 F. 3d 1196.

No. 97–6069. RIVERO-CABANAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 114 F. 3d 1170.

No. 97–6319. PYLE ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 113 F. 3d 1249.

No. 97–6823. GRANT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 216.

No. 97–6853. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 794.

No. 97–6969. REYES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 120 F. 3d 271.

No. 97–7002. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 97–7171. MCDONALD *v.* UNITED STATES; and
No. 97–7173. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 F. 3d 38.

No. 97–7179. SHELBY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 121 F. 3d 1118.

No. 97–7571. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–7811. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 117.

No. 97–7976. WOLFF, AKA CAINE, AKA OSMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 127 F. 3d 84.

No. 97–8188. WRONKA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 139.

No. 97–8446. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 710 So. 2d 1350.

No. 97–8608. KELLER *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 129 F. 3d 130.

No. 97–8630. SANCHEZ *v.* SPRUNK, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 932.

No. 97–8632. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–8633. DONOHUE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 451 Pa. Super. 594, 678 A. 2d 826.

No. 97–8635. HOGAN *v.* KAISER. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 42.

No. 97–8639. ALMEIDA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 703 So. 2d 1233.

No. 97–8642. JACKSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 707 So. 2d 1125.

No. 97–8644. HORTON *v.* MISSISSIPPI STATE SENATE. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1455.

No. 97–8646. GARNER *v.* HEAD. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–8656. HARVEY *v.* GRIGAS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8658. MCLEOD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 718 So. 2d 727.

No. 97–8662. SOLOMON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 220 Mich. App. 527, 560 N. W. 2d 651.

No. 97–8672. CROSS *v.* CITY OF NEWARK, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–8674. BORCK *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 149 Ore. 779, 944 P. 2d 1003.

No. 97–8683. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 703 So. 2d 1055.

No. 97–8685. SCHLEEPER *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 97–8686. PIERCE *v.* CARUSO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8690. KING *v.* ADAMSON ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 97–8691. KRISHNAMURTHY *v.* NIMMAGADDA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 858.

No. 97–8703. ESTEP *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 97–8708. COZZENS *v.* BOZZA ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8731. REYNOLDS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 80 Ohio St. 3d 670, 687 N. E. 2d 1358.

No. 97–8744. HUNG THANH LE *v.* OKLAHOMA; and WILLINGHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 947 P. 2d 535 (first judgment) and 1074 (second judgment).

No. 97–8780. BARBARY *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 213 Wis. 2d 122, 570 N. W. 2d 253.

No. 97–8800. HUMPHREYS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 947 P. 2d 565.

No. 97–8836. SARKAR *v.* TEMPLE UNIVERSITY. C. A. 3d Cir. Certiorari denied.

No. 97–8839. BOOHER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 97–8872. HAUCK *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8875. MOSSERI *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (two judgments). C. A. 2d Cir. Certiorari denied.

No. 97–8890. HARRIS *v.* HIGGINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 97–8900. TROXELL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 97–8933. CRAW *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1153.

No. 97–8948. STEWART *v.* MONROE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 436.

No. 97–8961. BRADLEY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 292 Ill. App. 3d 208, 685 N. E. 2d 426.

No. 97–8975. CASTAPHNEY, AKA CASTAPHENY *v.* WHITE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 427.

No. 97–9006. CAMPBELL *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 135 F. 3d 778.

No. 97–9048. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1189.

No. 97–9050. LANGLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 918.

No. 97–9057. BRANCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 139 F. 3d 900.

No. 97–9058. GIANETTA, AKA GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 139 F. 3d 913.

No. 97–9060. HALL, aka VALERIANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1261.

No. 97–9061. FRANCISCO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 152 F. 3d 939.

No. 97–9070. ZUCKERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–9076. GUNN, aka WELLS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 141 F. 3d 1150.

No. 97–9077. DELANCY *v.* CRABTREE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 780.

No. 97–9080. FEDEROWICZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 767.

No. 97–9085. SHEPPARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 595.

No. 97–9087. GRANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–9091. KELLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 F. 3d 430.

No. 97–9108. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–9110. QUEEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1330.

No. 97–9111. AVERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 917.

No. 97–9115. TOVAR-VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 137 F. 3d 1351.

No. 97–9116. TERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–9117. TOLEDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 139 F. 3d 913.

No. 97–9136. NOHARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 909.

No. 97–1666. BRYAN ET UX. *v.* CLAYTON ET AL. Dist. Ct. App. Fla., 5th Dist. Motion of American Association of Retired Persons et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 698 So. 2d 1236.

No. 97–1683. ROWLAND ET AL. *v.* GOODSON ET AL. C. A. 9th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 133 F. 3d 1141.

No. 97–1697. INOCO LTD. *v.* GOODSON ET AL. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 133 F. 3d 1141.

No. 97–9486 (A–944). PYLES *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 136 F. 3d 986.

Rehearing Denied

No. 97–1164. GLEASON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GLEASON, DECEASED *v.* NOYES ET AL., 523 U. S. 1072;

No. 97–1405. SAID *v.* RUNYON, POSTMASTER GENERAL, 523 U. S. 1076;

No. 97–1412. MAHER *v.* LONG ISLAND UNIVERSITY ET AL., 523 U. S. 1076;

No. 97–1467. PETERSON *v.* WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL., 523 U. S. 1076;

No. 97–7840. RIVERA *v.* FLORIDA, 523 U. S. 1052;

No. 97–7893. ALLARD *v.* ELO, WARDEN, 523 U. S. 1081;

No. 97–7915. FOLLETT *v.* ARIZONA, 523 U. S. 1081;

No. 97–8155. BROCKMAN *v.* SWEETWATER COUNTY SCHOOL DISTRICT NO. 1, 523 U. S. 1089;

No. 97–8173. BARRIER *v.* JOHNSON ET AL.; and BARRIER *v.* MARIN GENERAL HOSPITAL ET AL., 523 U. S. 1110; and

No. 97–8234. IN RE GRIFFIN, 523 U. S. 1058. Petitions for rehearing denied.

No. 97–954. HETZEL *v.* PRINCE WILLIAM COUNTY, VIRGINIA, ET AL., 523 U. S. 208; and

No. 97–1361. BRONX HOUSEHOLD OF FAITH ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL., 523 U. S. 1074. Motions for leave to file petitions for rehearing denied.

No. 97–8042. DIAS *v.* BOGINS, 523 U. S. 1103. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

JUNE 16, 1998

Certiorari Denied

No. 97–9170 (A–928). EATON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 139 F. 3d 990.

JUNE 18, 1998

Miscellaneous Order

No. A–959 (97–9567). WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall continue pending the sending down of the judgment of this Court.

Certiorari Denied

No. 97–9570 (A–960). WILLIAMS *v.* LOUISIANA. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 747 So. 2d 487.

No. 97–9589 (A–962). WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Application for stay of execution of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 143 F. 3d 949.

JUNE 22, 1998

Certiorari Granted—Vacated and Remanded

No. 97–1113. AMOS ET AL. *v.* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pennsylvania Dept. of Corrections* v. *Yeskey, ante,* p. 206. Reported below: 126 F. 3d 589.

No. 97–5460. APKER *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 *Hohn* v. *United States, ante,* p. 236. Reported below: 101 F. 3d 75.

Miscellaneous Orders

No. D–1891. IN RE DISBARMENT OF SINGER. Disbarment entered. [For earlier order herein, see 522 U. S. 1040.]

No. D–1937. IN RE DISBARMENT OF FEY. Disbarment entered. [For earlier order herein, see 523 U. S. 1069.]

No. D–1967. IN RE DISBARMENT OF PAHL. J. Larkin Pahl, of Raleigh, N. C., is suspended from the practice of law in this Court, and a rule will 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–1968. IN RE DISBARMENT OF HERZOG. Mitchell W. Herzog, of Eastsound, Wash., is suspended from the practice of law in this Court, and a rule will 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–1969. IN RE DISBARMENT OF BARKIN. Steven J. Barkin, of Sherman Oaks, Cal., is suspended from the practice of law in this Court, and a rule will 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–1970. IN RE DISBARMENT OF KURTZ. Phillip Kurtz, of Euclid, Ohio, is suspended from the practice of law in this Court, and a rule will 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–1971. IN RE DISBARMENT OF TOTH. Peter J. Toth, of Burlington, N. J., is suspended from the practice of law in this Court, and a rule will 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. M–81. KESSLER *v.* BROWN & WILLIAMSON ET AL.;
No. M–84. CITY OF SANTA ANA *v.* HERNANDEZ ET AL.; and
No. M–85. PHONOMETRICS, INC. *v.* NORTHERN TELECOM, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 96–8732. EDWARDS ET AL. *v.* UNITED STATES, 523 U. S. 511. Motion of petitioners to waive $2,500 fee limitation under the Criminal Justice Act denied.

No. 97–9243. IN RE KEY. Petition for writ of habeas corpus denied.

No. 97–1780. IN RE JAMES, GOVERNOR OF ALABAMA, ET AL.;
No. 97–7869. IN RE LUNDAHL; and
No. 97–8258. IN RE LUNDAHL. Petitions for writs of mandamus denied.

Certiorari Granted

No. 97–303. HUMANA INC. ET AL. *v.* FORSYTH ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 114 F. 3d 1467.

No. 97–1704. ORTIZ ET AL. *v.* FIBREBOARD CORP. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 134 F. 3d 668.

No. 97–1709. KUMHO TIRE CO., LTD., ET AL. *v.* CARMICHAEL ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 131 F. 3d 1433.

Certiorari Denied

No. 97–144. PEARSON *v.* HINES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 265.

No. 97–218. LARSEN, MARYLAND INSURANCE COMMISSIONER *v.* AMERICAN MEDICAL SECURITY, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 111 F. 3d 358.

No. 97–686. WILSON, GOVERNOR OF CALIFORNIA, ET AL. *v.* ARMSTRONG ET AL.; and CALIFORNIA ET AL. *v.* CLARK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 124 F. 3d 1019 (first judgment); 123 F. 3d 1267 (second judgment).

No. 97–795. PINAL CREEK GROUP *v.* NEWMONT MINING CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 118 F. 3d 1298.

No. 97–1399. BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT *v.* PHILIP MORRIS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 123 F. 3d 103.

No. 97–1427. JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT ET AL. *v.* MCBRYDE, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 117 F. 3d 208.

No. 97–1451. NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 130 F. 3d 1041.

No. 97–1488. ZERAN *v.* AMERICA ONLINE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 327.

No. 97–1514. INNER CITY PRESS/COMMUNITY ON THE MOVE ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 130 F. 3d 1088.

No. 97–1517. MCCLATCHY NEWSPAPERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 131 F. 3d 1026.

No. 97–1543. LEFCOURT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 125 F. 3d 79.

No. 97–1550. ROJAS *v.* FITCH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 127 F. 3d 184.

No. 97–1641. UNITED STATES *v.* MESSINO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 122 F. 3d 389.

No. 97–1660. MANN ET UX. *v.* MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 954 S. W. 2d 503.

No. 97–1677. JOOS *v.* JOOS. Ct. App. Utah. Certiorari denied.

No. 97–1708. NAKAMURA *v.* CHUN ET AL. Int. Ct. App. Haw. Certiorari denied. Reported below: 86 Haw. 523, 950 P. 2d 707.

No. 97–1710. BIOFILM, INC., ET AL. *v.* BOYNTON ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–1714. COATES *v.* SEATON. Ct. App. Colo. Certiorari denied.

No. 97–1718. MOSS *v.* GARRITY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–1719. RHETT *v.* CARNEGIE CENTER ASSOCIATES. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 290.

No. 97–1724. BARKER *v.* LEEDS ET AL. Ct. App. Ky. Certiorari denied.

No. 97–1728. SALGUERO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Alameda County. Certiorari denied.

No. 97–1730. DEER PARK INDEPENDENT SCHOOL DISTRICT ET AL. *v.* HARRIS COUNTY APPRAISAL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1095.

No. 97–1731. BOWEN *v.* OISTEAD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 800.

No. 97–1738. MAY ET AL. *v.* TOWN OF MOUNTAIN VILLAGE. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 576.

No. 97–1750. BRYANT, ON BEHALF OF BRYANT *v.* CADDO PARISH SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 608.

No. 97–1755. COFFEY *v.* COLLESTER, JUDGE, SUPERIOR COURT, MORRISTOWN, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1153.

No. 97–1757. MOORE *v.* KEEP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 928.

No. 97–1761. FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS ET AL. *v.* BURNHAM, TREASURER OF CONNECTICUT,

ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 129 F. 3d 113.

No. 97–1762. RAMIREZ *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–1766. JAKOBY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 152 F. 3d 940.

No. 97–1767. CARLYLE *v.* SAINT-EVENS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 926.

No. 97–1771. CONNOR *v.* FLYNN, EXECUTRIX OF THE ESTATE OF FLYNN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–1775. LU *v.* CHRISTIANI ET AL.; and LU *v.* HARSHBARGER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 30 (first judgment); 134 F. 3d 361 (second judgment).

No. 97–1776. PRUITT, INDIVIDUALLY AND AS NEXT FRIEND OF KACAL, A MINOR *v.* WACO INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 1329.

No. 97–1778. SAWCHYN *v.* SCOTTSDALE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 132 F. 3d 34.

No. 97–1788. DOAKES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 138 F. 3d 442.

No. 97–1797. OY PARTEK AB *v.* BOONE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BOONE, ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 707 A. 2d 765.

No. 97–1806. KRAIN *v.* ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 988, 684 N. E. 2d 826.

No. 97–1822. BROWN *v.* PLAUT, ASSOCIATE DIRECTOR FOR INSTITUTIONS, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 131 F. 3d 163.

No. 97–1842. DOYLE *v.* JEFFERSON COUNTY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 144.

No. 97–1845. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1182.

No. 97–1849. KLOPP *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 131.

No. 97–1852. SCHEUMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 132 F. 3d 37.

No. 97–1854. PIERSON *v.* WILSHIRE TERRACE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 910.

No. 97–1860. KEARNS *v.* WOOD MOTORS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 135 F. 3d 775.

No. 97–1861. GIAIMO ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 141 F. 3d 1168.

No. 97–1871. WHATLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 601.

No. 97–1901. IN RE CARANCHINI. Sup. Ct. Mo. Certiorari denied. Reported below: 956 S. W. 2d 910.

No. 97–1903. SUDWISHER *v.* ESTATE OF HOFFPAUIR ET AL. Sup. Ct. La. Certiorari denied. Reported below: 705 So. 2d 724.

No. 97–6467. SPRUILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 114 F. 3d 1178.

No. 97–6915. ALLAH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 130 F. 3d 33.

No. 97–7373. EPPS *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 126 F. 3d 1464.

No. 97–7418. HAMILTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 130 F. 3d 33.

No. 97–7956. THOMAS, AKA GREGORY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 919.

No. 97–8143. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 127 F. 3d 510.

No. 97–8279. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 138.

No. 97–8364. HALL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 958 S. W. 2d 679.

No. 97–8447. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 F. 3d 1437.

No. 97–8694. SINN *v.* RATELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 127.

No. 97–8695. SIKORA *v.* HIGLEY, ASSOCIATE WARDEN. Sup. Ct. Neb. Certiorari denied.

No. 97–8712. MOORE *v.* GRIESA ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–8715. NOCON *v.* LANDRESS, SUPERINTENDENT, AVON PARK CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 45.

No. 97–8721. PARKS *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8724. ALLEN *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8729. WOOD ET AL. *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 97–8733. SEATON *v.* MICHIGAN (two judgments). Recorder's Court, City of Detroit, Mich. Certiorari denied.

No. 97–8738. HILLIARD *v.* KAISER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 131 F. 3d 151.

No. 97–8741. WESLEY *v.* WESLEY. C. A. D. C. Cir. Certiorari denied.

No. 97–8754. PERCIVAL *v.* STINE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–8757. BROWN *v.* CITY OF SAN DIEGO POLICE DEPARTMENT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–8758. BROWN *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 97–8759. JONES *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1154.

No. 97–8760. MURILLO *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 120 F. 3d 269.

No. 97–8762. WILSON *v.* BLACKWELL, ADMINISTRATOR, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN. C. A. 3d Cir. Certiorari denied.

No. 97–8763. WATSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8768. SUTHERLIN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 574 N. W. 2d 428.

No. 97–8772. SANDERS *v.* FLYNN ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 97–8775. JACKSON *v.* LEBLANC, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 132 F. 3d 1454.

No. 97–8787. CYARS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 97–8790. COLBERT *v.* INOVA HEALTH CARE SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 134 F. 3d 362.

No. 97–8804. DE LA CRUZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 134 F. 3d 299.

No. 97–8806. JACKSON *v.* WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 915.

No. 97–8811. MARTINEZ *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 916.

No. 97–8813. MAYS ET AL. *v.* CITY OF DAYTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 809.

No. 97–8829. KILGORE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 985.

No. 97–8852. ORTIZ *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 701 So. 2d 922.

No. 97–8859. BEVERLY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 97–8865. HOOPER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 947 P. 2d 1090.

No. 97–8868. FLORES *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 146.

No. 97–8873. HUNTER *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 129 F. 3d 1259.

No. 97–8874. DREHER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 302 N. J. Super. 408, 695 A. 2d 672.

No. 97–8883. KEREKES *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 927.

No. 97–8904. TROBAUGH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 577 N. W. 2d 850.

No. 97–8915. PAYNE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 706 So. 2d 305.

No. 97–8920. WILKERSON *v.* TUTT ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8923. MINER *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 957 S. W. 2d 332.

No. 97–8932. BARBIR *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 97–8935. BUCK *v.* BOEING CO. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 925.

No. 97–8936. BYRD *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–8943. HAROLD *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 704 So. 2d 520.

No. 97–8944. DAY *v.* WALKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 433.

No. 97–8950. SWINNEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 97–9004. SWINICK *v.* ROSEN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–9017. WILSON *v.* BURTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 97–9022. LAESSIG *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1154.

No. 97–9073. THOMAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–9075. BOYD *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 97–9086. DIACONU *v.* DEFENSE LOGISTICS AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 141 F. 3d 1153.

No. 97–9089. STEELE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 768.

No. 97–9094. DEHLER *v.* SCHOTTEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 97–9105. REYNOLDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1182.

No. 97–9113. RIEBOLD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 135 F. 3d 1226.

No. 97–9142. GAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 141 F. 3d 1171.

No. 97–9147. SENTENN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 117 F. 3d 1416.

No. 97–9148. LLOYD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 124 F. 3d 206.

No. 97–9151. WAYNE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–9152. ZARAGOZA, AKA VALERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 142 F. 3d 441.

No. 97–9153. VALLEJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 140 F. 3d 1038.

No. 97–9156. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 951.

No. 97–9164. WHATLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 601.

No. 97–9165. BARTLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 437.

No. 97–9173. WOODRUFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 438.

No. 97–9180. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 124 F. 3d 218.

No. 97–9181. BIERI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–9184. HOOKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 141 F. 3d 1160.

No. 97–9187. HOBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 137 F. 3d 384.

No. 97–9191. BOLLING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 135 F. 3d 770.

No. 97–1054. CHASE MANHATTAN BANK, AS TRUSTEE OF THE IBM RETIREMENT PLAN TRUST FUND *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 121 F. 3d 557.

No. 97–1511. MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS *v.* CUMMINGS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 129 F. 3d 728.

No. 97–1706. AMERICAN LIFE & CASUALTY INSURANCE CO. *v.* TROSTEL ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE

BREYER took no part in the consideration or decision of this petition. Reported below: 133 F. 3d 679.

No. 97–1772. JONES ET VIR *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner Karyn Jones to substitute Joy Elaine Jones in place of Chris Jones, deceased, denied. Certiorari denied. Reported below: 127 F. 3d 1154.

Rehearing Denied

No. 97–1271. VISWANATHAN *v.* FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES ET AL., 523 U. S. 1106;

No. 97–1633. IN RE COSSETT, DBA COSSETT CONSTRUCTION CO., INC., 523 U. S. 1092;

No. 97–7648. KING *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., 523 U. S. 1029;

No. 97–7658. MARTINEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 523 U. S. 1010;

No. 97–7728. JARVI *v.* MCCARTHY ET AL., 523 U. S. 1061;

No. 97–7732. JACKSON *v.* NEW YORK, 523 U. S. 1061;

No. 97–7791. WALTON *v.* PRINCETON BAPTIST MEDICAL CENTER, 523 U. S. 1062;

No. 97–7822. NARRON *v.* VANCE ET AL., 523 U. S. 1097;

No. 97–7861. TOEGEMANN *v.* PROCHASKA ET AL., 523 U. S. 1080;

No. 97–8046. HAYES *v.* WESTERN WEIGHING AND INSPECTION BUREAU, 523 U. S. 1084;

No. 97–8257. IN RE JOHNSON, 523 U. S. 1105;

No. 97–8285. SMITH *v.* TEXAS, 523 U. S. 1085;

No. 97–8541. IN RE VERBECK, 523 U. S. 1105;

No. 97–8555. ZEREBNICK *v.* BECKWITH MACHINERY CO., 523 U. S. 1111;

No. 97–8596. SALAZAR *v.* UNITED STATES, 523 U. S. 1112; and

No. 97–8618. IN RE GREEN, 523 U. S. 1105. Petitions for rehearing denied.

No. 97–1512. BANKHEAD *v.* MISSISSIPPI ET AL., 523 U. S. 1078. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 97–7049. MARTIN *v.* UNITED STATES, 522 U. S. 1067. Motion for leave to file petition for rehearing denied.

JUNE 24, 1998

Certiorari Denied

No. 97–8922 (A–978). NARVAIZ *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 134 F. 3d 688.

JUNE 26, 1998

Certiorari Granted—Vacated and Remanded

No. 97–232. EDDY POTASH, INC. *v.* HARRISON. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Faragher* v. *Boca Raton*, *ante*, p. 775. Reported below: 112 F. 3d 1437.

No. 97–726. REYNOLDS *v.* CSX TRANSPORTATION, INC., ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Faragher* v. *Boca Raton*, *ante*, p. 775. Reported below: 115 F. 3d 860.

No. 97–1058. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL. *v.* FALCONE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monge* v. *California*, *ante*, p. 721. Reported below: 120 F. 3d 1082.

No. 97–1777. B. C. ROGERS PROCESSORS, INC., ET AL. *v.* BOC GROUP, INC., ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26 (1998). Reported below: 136 F. 3d 139.

No. 97–5760. DICKEY *v.* UNITED STATES. 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 *Lindh* v. *Murphy*, 521 U. S. 320 (1997).

Miscellaneous Orders

No. D–1933. IN RE DISBARMENT OF PHILLIPS. Disbarment entered. [For earlier order herein, see 523 U. S. 1057.]

No. D–1936. IN RE DISBARMENT OF GREER. Disbarment entered. [For earlier order herein, see 523 U. S. 1069.]

No. D–1938. IN RE DISBARMENT OF ROTTER. Disbarment entered. [For earlier order herein, see 523 U. S. 1069.]

No. D–1939. IN RE DISBARMENT OF IRONS. Disbarment entered. [For earlier order herein, see 523 U. S. 1069.]

No. D–1942. IN RE DISBARMENT OF COLLINS. Disbarment entered. [For earlier order herein, see 523 U. S. 1092.]

No. D–1943. IN RE DISBARMENT OF KANTOR. Further consideration of rule to show cause deferred. [For earlier order herein, see 523 U. S. 1092.]

No. D–1944. IN RE DISBARMENT OF HALL. Disbarment entered. [For earlier order herein, see 523 U. S. 1092.]

No. D–1946. IN RE DISBARMENT OF BLUMENTHAL. Disbarment entered. [For earlier order herein, see 523 U. S. 1104.]

No. D–1947. IN RE DISBARMENT OF KRUPA. Disbarment entered. [For earlier order herein, see 523 U. S. 1104.]

No. D–1951. IN RE DISBARMENT OF BREEZE. Disbarment entered. [For earlier order herein, see 523 U. S. 1114.]

No. D–1965. IN RE DISBARMENT OF MENDELSON. Michael Sweig Mendelson, of Chicago, Ill., 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 the practice of law before this Court. The rule to show cause, issued on June 15, 1998 [*ante,* p. 925], is discharged.

No. D–1972. IN RE DISBARMENT OF HYNES. Douglas James Hynes, of Farmingdale, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1973. IN RE DISBARMENT OF FALICK. Fredrick S. Falick, of Middletown, N. Y., is suspended from the practice of law in this Court, and a rule will 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. M–82. BERRY *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. M–83. ABRAMS *v.* BARNETT, WARDEN; and

No. M–87. ROBERTS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 97–826. AT&T CORP. ET AL. *v.* IOWA UTILITIES BOARD ET AL.; and AT&T CORP. ET AL. *v.* CALIFORNIA ET AL.;

No. 97–829. MCI TELECOMMUNICATIONS CORP. *v.* IOWA UTILITIES BOARD ET AL.; and MCI TELECOMMUNICATIONS CORP. *v.* CALIFORNIA ET AL.;

No. 97–830. ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ET AL. *v.* IOWA UTILITIES BOARD ET AL.;

No. 97–831. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* IOWA UTILITIES BOARD ET AL.; and FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* CALIFORNIA ET AL.;

No. 97–1075. AMERITECH CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 97–1087. GTE MIDWEST INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 97–1099. U S WEST, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 97–1141. SOUTHERN NEW ENGLAND TELEPHONE CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 8th Cir. [Certiorari granted, 522 U. S. 1089.] Motion of the Solicitor General for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 97–889. WRIGHT *v.* UNIVERSAL MARITIME SERVICE CORP. ET AL. C. A. 4th Cir. [Certiorari granted, 522 U. S. 1146.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–930. BUCKLEY, SECRETARY OF STATE OF COLORADO *v.* AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL.

C. A. 10th Cir. [Certiorari granted, 522 U. S. 1107.] Motions of Initiative & Referendum Institute and National Voter Outreach, Inc., for leave to file briefs as *amici curiae* granted.

No. 97–1130. PFAFF *v.* WELLS ELECTRONICS, INC. C. A. Fed. Cir. [Certiorari granted, 523 U. S. 1003.] Motion of Federal Circuit Bar Association for leave to file a brief as *amicus curiae* granted.

No. 97–1184. NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 *v.* DEPARTMENT OF THE INTERIOR ET AL.; and

No. 97–1243. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 903.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 97–1396. LOPEZ ET AL. *v.* MONTEREY COUNTY ET AL. D. C. N. D. Cal. [Probable jurisdiction noted, 523 U. S. 1093.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1426. CRAWFORD & CO. *v.* SONNIER, 523 U. S. 1107. Motion of respondent for attorney's fees and costs denied without prejudice to refiling in the United States Court of Appeals for the Sixth Circuit.

No. 97–1481. LIBERTY NATIONAL LIFE INSURANCE CO. *v.* DAY, 523 U. S. 1119. Motion of respondent for attorney's fees and costs denied.

No. 97–1952. IN RE HAYDEN. Petition for writ of habeas corpus denied.

No. 97–8490. IN RE RUDD;
No. 97–8802. IN RE SNYDER ET AL.;
No. 97–8861. IN RE BAEZ;
No. 97–8928. IN RE AYARS; and
No. 97–9237. IN RE IJEMBA. Petitions for writs of mandamus denied.

No. 97–1789. IN RE EIDSON; and
No. 97–8864. IN RE BETKA. Petitions for writs of prohibition denied.

Certiorari Granted

No. 97–1642. DEPARTMENT OF THE ARMY *v.* BLUE FOX, INC. C. A. 9th Cir. Certiorari granted. Reported below: 121 F. 3d 1357.

Certiorari Denied

No. 97–799. ELLERTH *v.* BURLINGTON INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 123 F. 3d 490.

No. 97–801. YANKEE ATOMIC ELECTRIC CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 112 F. 3d 1569.

No. 97–884. GECAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 120 F. 3d 1419.

No. 97–1278. INMATES OF THE SUFFOLK COUNTY JAIL ET AL. *v.* ROUSE, SHERIFF, SUFFOLK COUNTY, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 129 F. 3d 649.

No. 97–1394. SOUTHEASTERN MARITIME CO. ET AL. *v.* BROWN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 121 F. 3d 648.

No. 97–1404. MALPESO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 115 F. 3d 155.

No. 97–1440. GURNEY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 139 F. 3d 1462.

No. 97–1443. MAUSOLF ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 125 F. 3d 661.

No. 97–1444. MCLAUGHLIN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 126 F. 3d 130.

No. 97–1535. GENERAL MEDIA COMMUNICATIONS, INC., ET AL. *v.* COHEN, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 273.

No. 97–1541. SMITH ET AL. *v.* METROPOLITAN SCHOOL DISTRICT PERRY TOWNSHIP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 128 F. 3d 1014.

No. 97–1567. AMERICAN MEDICAL ASSN. *v.* PRACTICE MANAGEMENT INFORMATION CORP. C. A. 9th Cir. Certiorari denied. Reported below: 121 F. 3d 516 and 133 F. 3d 1140.

No. 97–1578. HOECHST CELANESE CORP. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 128 F. 3d 216.

No. 97–1610. BUNKER GROUP, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 818.

No. 97–1618. UNIVERSAL LIFE CHURCH, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 128 F. 3d 1294.

No. 97–1635. GOVERNMENT OF HONDURAS ET AL. *v.* HONDURAS AIRCRAFT REGISTRY, LTD., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 543.

No. 97–1646. NATIONAL ENVIRONMENTAL WASTE CORP. *v.* CITY OF RIVERSIDE; and

No. 97–1810. CITY OF RIVERSIDE *v.* NATIONAL ENVIRONMENTAL WASTE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 1052.

No. 97–1686. CAHNMANN *v.* SPRINT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 133 F. 3d 484.

No. 97–1693. HADIX ET AL. *v.* MCGINNIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 133 F. 3d 940.

No. 97–1735. RENDISH *v.* CITY OF TACOMA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 123 F. 3d 1216.

No. 97–1742. DORSEY *v.* DORSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 97–1743. COUCH *v.* SPRINT CORP. C. A. 8th Cir. Certiorari denied. Reported below: 131 F. 3d 764.

No. 97–1745. BARANDIARAN ET AL. *v.* TCW SPECIAL CREDITS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 129 F. 3d 1330.

No. 97–1747. NORTH LAWRENCE COMMUNITY SCHOOL CORP. *v.* MARY M., PARENT AND NEXT FRIEND FOR DIANE M., A MINOR.

C. A. 7th Cir. Certiorari denied. Reported below: 131 F. 3d 1220.

No. 97–1756. KENDALL *v.* KENDALL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 426 Mass. 238, 687 N. E. 2d 1228.

No. 97–1760. COASTAL PETROLEUM CO. *v.* CHILES, GOVERNOR OF FLORIDA, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 701 So. 2d 619.

No. 97–1763. MATRIX COMMUNICATIONS CORP. *v.* MCI TELECOMMUNICATIONS CORP. C. A. 1st Cir. Certiorari denied. Reported below: 135 F. 3d 27.

No. 97–1764. BAUCHMAN, BY AND THROUGH HER PARENT AND GUARDIAN, BAUCHMAN *v.* WEST HIGH SCHOOL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 542.

No. 97–1765. OGLEBAY NORTON CO. *v.* JENSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 130 F. 3d 1287.

No. 97–1781. HAYDEN ET AL. *v.* GRAYSON, CHIEF OF POLICE OF THE TOWN OF LISBON. C. A. 1st Cir. Certiorari denied. Reported below: 134 F. 3d 449.

No. 97–1782. MA ET AL. *v.* GOETSCH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 1105.

No. 97–1784. EGBERT *v.* REIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1254.

No. 97–1785. KLEIN *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 90 N. Y. 2d 929, 686 N. E. 2d 1357.

No. 97–1791. NEW IMAGE INDUSTRIES, INC. *v.* HIGH TECH MEDICAL INSTRUMENTATION, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 135 F. 3d 774.

No. 97–1799. JUMONVILLE ET VIR *v.* CITY OF KENNER. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 701 So. 2d 223.

No. 97–1800. BAZZETTA ET AL. *v.* MCGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir.

Certiorari denied. Reported below: 124 F. 3d 774 and 133 F. 3d 382.

No. 97–1801. POLLIN *v.* OREGON DEPARTMENT OF REVENUE. Sup. Ct. Ore. Certiorari denied. Reported below: 326 Ore. 427, 952 P. 2d 537.

No. 97–1804. TOTH *v.* MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 136 F. 3d 477.

No. 97–1819. LAMBING *v.* GODIVA CHOCOLATIER. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 434.

No. 97–1827. SMITH *v.* SUPREME COURT OF COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 937 P. 2d 724.

No. 97–1831. WORTHY *v.* COLLAGEN CORP. Sup. Ct. Tex. Certiorari denied. Reported below: 967 S. W. 2d 360.

No. 97–1833. BIALCZAK ET AL. *v.* BARNETT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 141 F. 3d 699.

No. 97–1843. KELLER COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 130 F. 3d 1073.

No. 97–1858. SCHWARZ *v.* KOGAN, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1387.

No. 97–1872. ARSHAL *v.* DALTON, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 903.

No. 97–1877. SHOEMAKER *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 619.

No. 97–1884. CUMMINGS *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 136 F. 3d 1468.

No. 97–1885. GARRITY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 43 Mass. App. 349, 682 N. E. 2d 937.

No. 97–1887. VINGI *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 132 F. 3d 31.

No. 97–1907. DOUCETTE *v.* SAN DIEGO UNIFIED PORT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 F. 3d 858.

No. 97–1908. CHAVEZ-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 149.

No. 97–1913. SHERWOOD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 953.

No. 97–1932. GAGLIARDI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1255.

No. 97–5745. SANCHEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–6813. CHAVEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 97–7420. GAVIN ET AL. *v.* BRANSTAD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 122 F. 3d 1081.

No. 97–7558. MARSH *v.* DALLAS INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 129 F. 3d 612.

No. 97–7829. BLODGETT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 130 F. 3d 1.

No. 97–7876. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 97–7890. WASHINGTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 549 Pa. 12, 700 A. 2d 400.

No. 97–7996. ELLIOTT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 549 Pa. 132, 700 A. 2d 1243.

No. 97–8093. WOOLLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 175, 687 N. E. 2d 979.

No. 97–8094. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 215, 687 N. E. 2d 892.

No. 97–8097. HICKEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 256, 687 N. E. 2d 910.

No. 97–8120. DOUGAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 129 F. 3d 1424.

No. 97–8127. RICHARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8291. GRIFFIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 178 Ill. 2d 65, 687 N. E. 2d 820.

No. 97–8361. DIXON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 97–8382. TENNARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 960 S. W. 2d 57.

No. 97–8427. LOVE *v.* TIPPY, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 133 F. 3d 1066.

No. 97–8470. MANN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 959 S. W. 2d 503.

No. 97–8528. WOODRUFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 131 F. 3d 1238.

No. 97–8536. SALAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 139 F. 3d 322.

No. 97–8539. O'RILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–8580. NELSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 97–8778. MUNOZ *v.* CITY OF MARTINEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 378.

No. 97–8794. JO-ANN G. *v.* CRANSTON SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 130 F. 3d 481.

No. 97–8803. HAMILTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 703 So. 2d 1038.

No. 97–8809. MADRID *v.* MARSHALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 F. 3d 147.

No. 97–8816. SHOWN *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 97–8817. SMITH *v.* JARVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 131 F. 3d 136.

No. 97–8819. ZANKICH *v.* GOODNOW. C. A. 9th Cir. Certiorari denied.

No. 97–8820. ALLMOND *v.* FAUVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 129 F. 3d 1254.

No. 97–8821. BOATWRIGHT *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 705 So. 2d 569.

No. 97–8823. MONLYN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 705 So. 2d 1.

No. 97–8834. FERGUSON *v.* JOHNSON ET AL. C. A. 1st Cir. Certiorari denied.

No. 97–8840. ROBERTS *v.* BATTELLE MEMORIAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 134 F. 3d 372.

No. 97–8843. RAYBORN *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–8851. BROOKS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 960 S. W. 2d 479.

No. 97–8855. WASHINGTON *v.* SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 50, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 130 F. 3d 825.

No. 97–8857. WHITE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 97–8866. FRANKLIN *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 97–8876. NARY *v.* HENNESSEY, SHERIFF, SAN FRANCISCO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 97–8877. KENDRICK *v.* GILLUHUGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 915.

No. 97–8938. ABDULLAH *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 F. 3d 1060.

No. 97–8953. TOLES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 947 P. 2d 180.

No. 97–8962. AYALA ET AL. *v.* SPECKARD, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 131 F. 3d 62.

No. 97–8980. MEYERS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 704 So. 2d 1368.

No. 97–8987. PHENIX *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 116, 954 P. 2d 739.

No. 97–9000. ABDESLEM *v.* UNITED STATES EMBASSY, MANILA, PHILIPPINES. C. A. D. C. Cir. Certiorari denied.

No. 97–9002. CRAFTON *v.* CRAFTON. Ct. App. Ore. Certiorari denied.

No. 97–9011. CARRILLO ET UX. *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 376.

No. 97–9020. BOOKER *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 136.

No. 97–9042. HOWELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 707 So. 2d 674.

No. 97–9063. BARCENA *v.* ILLINOIS DEPARTMENT OF PUBLIC HEALTH ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1104, 716 N. E. 2d 871.

No. 97–9082. DEVERY *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 97–9093. SCOTT *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 97–9102. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 136 F. 3d 1330.

No. 97–9107. LYONS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 97–9125. PIERCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 951.

No. 97–9140. HILT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 97–9149. LARA *v.* DUNCAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 97–9159. ZAMORA-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 381.

No. 97–9162. FRASER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 904.

No. 97–9174. VASQUEZ ET AL. *v.* STINSON, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 97–9182. BIERI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 97–9183. HILL *v.* FRENCH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 915.

No. 97–9186. GIBBONS *v.* LARKINS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 97–9194. GUANIPA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 F. 3d 1460.

No. 97–9199. FLORES-OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 139 F. 3d 1022.

No. 97–9200. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 896.

No. 97–9203. BAKSH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 149 F. 3d 1165.

No. 97–9204. CLYMORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 617.

No. 97–9208. PROCTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 141 F. 3d 1164.

No. 97–9209. PENA *v.* UNITED STATES; and
No. 97–9265. FERREIRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 1149.

No. 97–9213. SNELLING *v.* HOUSING AUTHORITY OF ST. LOUIS COUNTY ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 956 S. W. 2d 323.

No. 97–9214. SILVA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 97–9218. WHITE *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 135 F. 3d 768.

No. 97–9220. WALTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 145 F. 3d 360.

No. 97–9221. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 136 F. 3d 972.

No. 97–9223. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 138 F. 3d 955.

No. 97–9231. MARUTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 380.

No. 97–9236. MACKALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–9246. JUAREZ-JUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 909.

No. 97–9247. CORN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 97–9249. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 F. 3d 1136.

No. 97–9250. MCCLAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 1191.

No. 97–9252. JOHNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 437.

No. 97–9253. LUNA-HERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 909.

No. 97–9254. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 133 F. 3d 918.

No. 97–9257. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 135 F. 3d 951.

No. 97–9258. GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 141 F. 3d 1150.

No. 97–9260. GALLANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 136 F. 3d 1246.

No. 97–9261. FORTES, AKA BROOKSHIRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 141 F. 3d 1.

No. 97–9266. HORTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–9267. SAPP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–9268. PETERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 133 F. 3d 933.

No. 97–9269. ROUSAN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 961 So. 2d 831.

No. 97–9270. JILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 137 F. 3d 1355.

No. 97–9271. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 894.

No. 97–9272. J. A. J., A MALE JUVENILE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 134 F. 3d 905.

No. 97–9277. BOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 135 F. 3d 1247.

No. 97–9278. COTTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 139 F. 3d 899.

No. 97–9279. PALOMO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 139 F. 3d 907.

No. 97–9285. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 F. 3d 952.

No. 97–9288. FUNCHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 1405.

No. 97–9291. BUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 929.

No. 97–9294. CLIPPER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 F. 3d 637.

No. 97–9301. ALLERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 139 F. 3d 609.

No. 97–9302. BRITO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 397.

No. 97–9304. LEURO-ROSAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 97–9305. WINFIELD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 139 F. 3d 896.

No. 97–9313. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 137 F. 3d 1355.

No. 97–9314. MODRAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 149 F. 3d 1166.

No. 97–9316. HARMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 139 F. 3d 899.

No. 97–9319. SUST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1188.

No. 97–9326. DOLENC *v.* DEMORE. Commw. Ct. Pa. Certiorari denied.

No. 97–9332. SHANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 137 F. 3d 1112.

No. 97–9333. SARRAULTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 140 F. 3d 1041.

No. 97–9335. ANDRADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1180.

No. 97–9343. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 141 F. 3d 1186.

No. 97–9388. FROHWIRTH *v.* COOKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 139 F. 3d 901.

No. 97–1144. UNITED STATES *v.* OOLEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 116 F. 3d 370.

No. 97–1630. MELENDEZ *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 2d Cir. Motion of Citizen Action of New York et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 133 F. 3d 907.

No. 97–1773. THEIS RESEARCH, INC. *v.* OCTEL COMMUNICATIONS CORP. ET AL. C. A. Fed. Cir. Motion of Intellectual Property Creators et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 132 F. 3d 51.

No. 97–8837. COOPER *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 97–1494. GREB ET AL. *v.* GENERAL MOTORS CORP., 523 U. S. 1077;

No. 97–1533. MCDUFFIE, DBA D & M CONTRACTING CO. *v.* FIRST UNION NATIONAL BANK, 523 U. S. 1120;

No. 97–1540. WALKER *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL., 523 U. S. 1120;

No. 97–7568. SHAW *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 523 U. S. 1027;

No. 97–7841. IN RE ROBINSON, 523 U. S. 1071;

No. 97–8141. CUTHBERT *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, ET AL., 523 U. S. 1109; and

No. 97–8525. IN RE WASHINGTON, *ante*, p. 903. Petitions for rehearing denied.

No. 97–885. ENGELHART ET AL. *v.* CONSOLIDATED RAIL CORPORATION ET AL., 522 U. S. 1147; and

No. 97–1527. RUCK *v.* UNITED TRANSPORTATION UNION, EXECUTIVE BOARD, ET AL., 523 U. S. 1078. Motions for leave to file petitions for rehearing denied.

JULY 8, 1998

Miscellaneous Orders

No. A–33 (O. T. 1998). HENDERSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 98–5117 (A–29). IN RE HENDERSON. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

Certiorari Denied

No. 98–5116 (A–28). HENDERSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JULY 10, 1998

Rehearing Denied

No. 97–8791 (A–30). PLATH *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 523 U. S. 1143. Application for stay of execution of sentence of death, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Petition for rehearing denied.

JULY 13, 1998

Miscellaneous Orders

No. 98–5201 (A–45). IN RE THOMPSON. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 98–5202 (A–46). IN RE THOMPSON. Application for stay of execution of sentence of death, presented to JUSTICE O'CON-

NOR, and by her referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 98–5203 (A–47). THOMPSON *v.* CALDERON, WARDEN. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 151 F. 3d 918.

JULY 17, 1998

Dismissal Under Rule 46

No. 97–9463. LUCAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 132 F. 3d 1069.

JULY 20, 1998

Dismissal Under Rule 46

No. 97–1984. STINSON, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STINSON, DECEASED *v.* STATE AUTOMOBILE INSURANCE CO. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 142 F. 3d 436.

JULY 22, 1998

Miscellaneous Orders

No. A–300. EYOUM *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–888 (97–1856). PARNAR *v.* LAW OFFICES OF JOHN A. CHANIN. Sup. Ct. Haw. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

Certiorari Denied

No. 98–5284 (A–60). KING *v.* GREENE, WARDEN. 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. JUSTICE STEVENS and JUSTICE

GINSBURG would grant the application for stay of execution. Reported below: 141 F. 3d 1158.

JULY 28, 1998

Miscellaneous Orders

No. A–71 (O. T. 1998). AMSTERDAM VIDEO, INC. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. D–1923. IN RE DISBARMENT OF MCGOWEN. Disbarment entered. [For earlier order herein, see 523 U. S. 1017.]

No. D–1932. IN RE DISBARMENT OF TAUB. Disbarment entered. [For earlier order herein, see 523 U. S. 1057.]

No. D–1945. IN RE DISBARMENT OF SANBORN. Disbarment entered. [For earlier order herein, see 523 U. S. 1104.]

No. D–1949. IN RE DISBARMENT OF MEYER. Disbarment entered. [For earlier order herein, see 523 U. S. 1104.]

No. D–1950. IN RE DISBARMENT OF BOXER. Disbarment entered. [For earlier order herein, see 523 U. S. 1105.]

No. D–1953. IN RE DISBARMENT OF CHITTIM. Disbarment entered. [For earlier order herein, see 523 U. S. 1115.]

No. D–1955. IN RE DISBARMENT OF BOWDEN. Disbarment entered. [For earlier order herein, see *ante,* p. 902.]

No. D–1957. IN RE DISBARMENT OF MAURICE. Disbarment entered. [For earlier order herein, see *ante,* p. 902.]

No. D–1959. IN RE DISBARMENT OF WARKOW. Disbarment entered. [For earlier order herein, see *ante,* p. 902.]

No. D–1974. IN RE DISBARMENT OF BRAUER. David P. Brauer, of Dover, Mass., is suspended from the practice of law in this Court, and a rule will 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–1975. IN RE DISBARMENT OF ROSE. Michael Gary Rose, of Valley Stream, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1976. IN RE DISBARMENT OF KALYVAS. James T. Kalyvas, of Sarasota, Fla., is suspended from the practice of law in this Court, and a rule will 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–1977. IN RE DISBARMENT OF PRIAMOS. Paul Duane Priamos, of Cerritos, Cal., is suspended from the practice of law in this Court, and a rule will 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–1978. IN RE DISBARMENT OF BRIDGE. Winston J. Bridge, of North Port, Fla., is suspended from the practice of law in this Court, and a rule will 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–1979. IN RE DISBARMENT OF POST. Alan Franklyn Post, of Bethesda, Md., is suspended from the practice of law in this Court, and a rule will 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–1980. IN RE DISBARMENT OF FOLEY. Thomas M. Foley, of Honolulu, Haw., is suspended from the practice of law in this Court, and a rule will 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–1981. IN RE DISBARMENT OF UTTERBACK. Thomas Michael Utterback, of Leslie, Mo., is suspended from the practice of law in this Court, and a rule will 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–1982. IN RE DISBARMENT OF MOORE. Linsey Moore, of Jacksonville, Fla., is suspended from the practice of law in this Court, and a rule will 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–1983. IN RE DISBARMENT OF PLATO. Richard M. Plato, of Baytown, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 120, Orig. NEW JERSEY *v.* NEW YORK, 523 U. S. 767;

No. 96–1693. HOPKINS, WARDEN *v.* REEVES, *ante*, p. 88;

No. 96–9142. REEVES *v.* HOPKINS, WARDEN, *ante*, p. 926;

No. 96–1829. MONTANA ET AL. *v.* CROW TRIBE OF INDIANS ET AL., 523 U. S. 696;

No. 97–391. CALDERON, WARDEN, ET AL. *v.* ASHMUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, 523 U. S. 740;

No. 97–1267. PROFESSIONAL PILOTS FEDERATION ET AL. *v.* FEDERAL AVIATION ADMINISTRATION, 523 U. S. 1117;

No. 97–1407. FALKENBERRY *v.* TAYLOR, *ante*, p. 904;

No. 97–1566. DETERESA *v.* AMERICAN BROADCASTING COS., INC., ET AL., 523 U. S. 1137;

No. 97–1600. BAYER *v.* STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER ET AL., 523 U. S. 1138;

No. 97–1622. GREENE *v.* CITIBANK, N. A., ET AL., 523 U. S. 1122;

No. 97–1640. HINCHLIFFE ET AL. *v.* PRUDENTIAL HOME MORTGAGE CO., INC., 523 U. S. 1138;

No. 97–1643. PHILLIPS ET AL. *v.* CITY OF HARVEY ET AL., 523 U. S. 1138;

No. 97–1654. WEISSMAN *v.* COHN, LIFLAND, PERLMAN, HERMANN & KNOPF ET AL., 523 U. S. 1122;

No. 97–6657. BROWN *v.* RUBIN, SECRETARY OF THE TREASURY, 522 U. S. 1032;

No. 97–7583. WHITAKER *v.* WHITAKER ET AL., 523 U. S. 1028;

No. 97–7729. KREIGER *v.* VIRGINIA, 523 U. S. 1061;

No. 97–7863. VILLACRES *v.* KRAMER, WARDEN, ET AL., 523 U. S. 1080;

No. 97–7865. WHITE *v.* MCMILLAN ET AL., 523 U. S. 1080;

No. 97–7873. WHITE *v.* MCMILLAN ET AL., 523 U. S. 1080;

No. 97–7878. FULLER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 523 U. S. 1063;

No. 97–7883. DeWig *v.* Stewart, Director, Arizona Department of Correction, et al., 523 U. S. 1032;

No. 97–7945. McDonald *v.* Tennessee, 523 U. S. 1082;

No. 97–8082. Baruch *v.* Smith, Warden, et al., 523 U. S. 1098;

No. 97–8123. Walkoviak *v.* District Court of Texas, Harris County, 523 U. S. 1109;

No. 97–8186. In re Stein, 523 U. S. 1116;

No. 97–8202. In re Kennedy, 523 U. S. 1058;

No. 97–8235. In re Doyle, 523 U. S. 1058;

No. 97–8240. Dever *v.* Ohio, 523 U. S. 1085;

No. 97–8244. Gaerttner *v.* Love et al., 523 U. S. 1125;

No. 97–8263. Hesterlee *v.* Goodwin, Warden, 523 U. S. 1085;

No. 97–8304. In re Williams Lewis, 523 U. S. 1116;

No. 97–8341. Williams *v.* Moore, Director, South Carolina Department of Corrections, et al., 523 U. S. 1139;

No. 97–8358. Darden *v.* Alameda County Network of Mental Health Clients et al., 523 U. S. 1140;

No. 97–8379. Carter *v.* Curran, Attorney General of Maryland, et al., 523 U. S. 1110;

No. 97–8385. Raulerson *v.* Georgia, 523 U. S. 1127;

No. 97–8402. Bernard *v.* New York City Health and Hospital Corp., 523 U. S. 1140;

No. 97–8422. Belhomme *v.* Widnall, Secretary of the Air Force, 523 U. S. 1100;

No. 97–8452. Davis *v.* Singletary, Secretary, Florida Department of Corrections, 523 U. S. 1141;

No. 97–8492. Johnson *v.* Wyoming, 523 U. S. 1111;

No. 97–8522. In re Rivera, *ante*, p. 903;

No. 97–8534. Tataii *v.* Cayetano, *ante*, p. 907;

No. 97–8544. Viray *v.* Steuer, 523 U. S. 1129;

No. 97–8574. Turkowski *v.* Clinton, President of the United States, et al., *ante*, p. 908;

No. 97–8594. Swint *v.* United States, 523 U. S. 1112;

No. 97–8659. McQuown *v.* Safeway, Inc., 523 U. S. 1142;

No. 97–8666. Ricketts *v.* Department of the Air Force, *ante*, p. 908;

No. 97–8685. Schleeper *v.* Missouri, *ante*, p. 930;

No. 97–8692. McQuown *v.* Safeway, Inc., 523 U. S. 1142;

No. 97–8709. BLACKMON *v.* POINDEXTER, WARDEN, ET AL., *ante*, p. 919;

No. 97–8711. RAWLES *v.* HERZOG ET AL., 523 U. S. 1142;

No. 97–8735. IN RE FLYNN, 523 U. S. 1116;

No. 97–8753. KENNEDY *v.* PARAMOUNT PICTURES CORP. ET AL., *ante*, p. 909;

No. 97–8777. NORWOOD *v.* UNITED STATES, 523 U. S. 1143; and

No. 97–8931. IN RE BELL, 523 U. S. 1136. Petitions for rehearing denied.

AUGUST 12, 1998

Miscellaneous Orders

No. D–1971. IN RE DISBARMENT OF TOTH. Peter J. Toth, of Burlington, N. J., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 22, 1998 [*ante*, p. 936], is discharged.

No. 97–7597. KNOWLES *v.* IOWA. Sup. Ct. Iowa. [Certiorari granted, 523 U. S. 1019.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

Rehearing Denied

No. 97–1278. INMATES OF THE SUFFOLK COUNTY JAIL ET AL. *v.* ROUSE, SHERIFF, SUFFOLK COUNTY, ET AL., *ante*, p. 951;

No. 97–1440. GURNEY ET AL. *v.* UNITED STATES, *ante*, p. 951;

No. 97–1529. CAMPBELL *v.* UNITED STATES, 523 U. S. 1078;

No. 97–1619. GANGOPADHYAY *v.* GANGOPADHYAY, 523 U. S. 1138;

No. 97–1714. COATES *v.* SEATON, *ante*, p. 938;

No. 97–1724. BARKER *v.* LEEDS ET AL., *ante*, p. 938;

No. 97–1742. DORSEY *v.* DORSEY, *ante*, p. 952;

No. 97–1773. THEIS RESEARCH, INC. *v.* OCTEL COMMUNICATIONS CORP. ET AL., *ante*, p. 963;

No. 97–1784. EGBERT *v.* REIS ET AL., *ante*, p. 953;

No. 97–1827. SMITH *v.* SUPREME COURT OF COLORADO, *ante*, p. 954;

No. 97–1854. PIERSON *v.* WILSHIRE TERRACE CORP., *ante*, p. 940;

No. 97–1860. KEARNS *v.* WOOD MOTORS, INC., ET AL., *ante*, p. 940;

No. 97–5745. SANCHEZ *v.* UNITED STATES, *ante*, p. 955;

No. 97–6791. NGHIEM *v.* TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC., 522 U. S. 1080;

No. 97–7946. VIRAY *v.* BENEFICIAL CALIFORNIA, INC., ET AL., 523 U. S. 1123;

No. 97–7988. HAYNES *v.* KEPKA ET AL., 523 U. S. 1083;

No. 97–8029. MASON-NEUBARTH *v.* DAMERON HOSPITAL ASSN., 523 U. S. 1083;

No. 97–8120. DOUGAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 956;

No. 97–8236. DUMAS *v.* ILLINOIS, 523 U. S. 1125;

No. 97–8246. ROTHMAN *v.* UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, 523 U. S. 1125;

No. 97–8288. BILLEMEYER *v.* MISSOURI ET AL., 523 U. S. 1126;

No. 97–8310. JOHNSON *v.* CRIST, WARDEN, 523 U. S. 1086;

No. 97–8355. JACKSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 523 U. S. 1140;

No. 97–8519. DIXON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL., 523 U. S. 1128;

No. 97–8530. LAESSIG *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 523 U. S. 1129;

No. 97–8533. NOWIK *v.* NORTH DAKOTA ET AL., *ante*, p. 907;

No. 97–8570. COOKISH *v.* NEW HAMPSHIRE, *ante*, p. 917;

No. 97–8572. FATHER *v.* BOEING CO. ET AL., *ante*, p. 918;

No. 97–8578. IN RE BRADIN, *ante*, p. 914;

No. 97–8587. SANCHO *v.* UNITED STATES, 523 U. S. 1112;

No. 97–8605. ADAMES *v.* BATISTA ET AL., *ante*, p. 918;

No. 97–8617. IN RE SIDLES, *ante*, p. 914;

No. 97–8690. KING *v.* ADAMSON ET AL., *ante*, p. 930;

No. 97–8695. SIKORA *v.* HIGLEY, ASSOCIATE WARDEN, *ante*, p. 941;

No. 97–8704. HARMS *v.* UNITED STATES, 523 U. S. 1131;

No. 97–8710. IN RE CROOMS, *ante*, p. 925;

No. 97–8733. SEATON *v.* MICHIGAN (two judgments), *ante*, p. 941;

No. 97–8806. JACKSON *v.* WEST VIRGINIA ET AL., *ante*, p. 942;

No. 97–8818. BLAIR *v.* THOMPSON, SUPERINTENDENT, OREGON STATE PENITENTIARY, *ante*, p. 919;

No. 97–8838. CARTER *v.* UNITED STATES, 523 U. S. 1144;

No. 97–8840. ROBERTS *v.* BATTELLE MEMORIAL INSTITUTE, *ante*, p. 957;

No. 97–8846. PIZZO *v.* LOUISIANA, *ante*, p. 919;

No. 97–8864. IN RE BETKA, *ante*, p. 950;

No. 97–8907. DELOACH *v.* GENERAL DYNAMICS CORP., *ante*, p. 919;

No. 97–9033. VALDES *v.* UNITED STATES, *ante*, p. 923;

No. 97–9182. BIERI *v.* UNITED STATES, *ante*, p. 959; and

No. 97–9237. IN RE IJEMBA, *ante*, p. 950. Petitions for rehearing denied.

No. 97–679. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* CENTRAL OFFICE TELEPHONE, INC., *ante*, p. 214. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 97–1770. YEN *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 523 U. S. 1139. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 97–8287. CEMINCHUK *v.* COHEN, SECRETARY OF DEFENSE, ET AL., 523 U. S. 1099; and

No. 97–8434. DEYOUNG *v.* GEORGIA, 523 U. S. 1141. Motions for leave to file petitions for rehearing denied.

AUGUST 13, 1998

Miscellaneous Orders

No. D–1948. IN RE DISBARMENT OF PERLMAN. Disbarment entered. [For earlier order herein, see 523 U. S. 1104.]

No. D–1963. IN RE DISBARMENT OF MARSHALL. Disbarment entered. [For earlier order herein, see *ante*, p. 924.]

No. D–1964. IN RE DISBARMENT OF GREEN. Disbarment entered. [For earlier order herein, see *ante*, p. 924.]

No. D–1967. IN RE DISBARMENT OF PAHL. Disbarment entered. [For earlier order herein, see *ante*, p. 935.]

No. D–1969. IN RE DISBARMENT OF BARKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 935.]

No. D–1980. IN RE DISBARMENT OF FOLEY. Thomas M. Foley, of Honolulu, Haw., 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 the practice of law before this Court. The rule to show cause, issued on July 28, 1998 [*ante*, p. 967], is discharged.

No. D–1984. IN RE DISBARMENT OF TURNER. Richard LeRoy Turner, of Susanville, Cal., is suspended from the practice of law in this Court, and a rule will 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–1985. IN RE DISBARMENT OF DREW. Richard John Drew, of Flint, Mich., is suspended from the practice of law in this Court, and a rule will 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–1986. IN RE DISBARMENT OF PINCKNEY. Obie Pinckney, Jr., of Washington, D. C., is suspended from the practice of law in this Court, and a rule will 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–1987. IN RE DISBARMENT OF ANGELO. Leonard J. Angelo, of Westhampton, N. Y., is suspended from the practice of law in this Court, and a rule will 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. 97–1472. HADDLE *v.* GARRISON ET AL. C. A. 11th Cir. [Certiorari granted, 523 U. S. 1136.] Motion of respondents to dismiss the writ of certiorari as improvidently granted denied.

No. 98–5619 (A–135). IN RE HILL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 14, 1998

Dismissal Under Rule 46

No. 98–5313. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.

AUGUST 17, 1998

Vacated and Remanded After Certiorari Granted

No. 97–1620. SEIF, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. *v.* CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 915.] Judgment vacated, and case remanded with instructions to dismiss in light of *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

AUGUST 19, 1998

Certiorari Denied

No. 98–5562 (A–119). CHANDLER *v.* GREENE, WARDEN. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 145 F. 3d 1323.

AUGUST 26, 1998

Miscellaneous Order

No. A–173 (O. T. 1998). RUIZ CAMACHO *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

Certiorari Denied

No. 98–5331 (A–125). RUIZ CAMACHO *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 142 F. 3d 1279.

AUGUST 27, 1998

Miscellaneous Orders

No. D–1972. IN RE DISBARMENT OF HYNES. Disbarment entered. [For earlier order herein, see *ante*, p. 948.]

No. D–1974. IN RE DISBARMENT OF BRAUER. David P. Brauer, of Dover, Mass., 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 the practice of law before this Court. The rule to show cause, issued on July 28, 1998 [*ante*, p. 966], is discharged.

No. D–1988. IN RE DISBARMENT OF PRICE. Walter J. Price, Jr., of Huntsville, Ala., is suspended from the practice of law in this Court, and a rule will 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. 97–475. EL AL ISRAEL AIRLINES, LTD. *v.* TSUI YUAN TSENG. C. A. 2d Cir. [Certiorari granted, 523 U. S. 1117.] Motions of Air Transport Association of America and International Air Transport Association for leave to file briefs as *amici curiae* granted.

No. 97–930. BUCKLEY, SECRETARY OF STATE OF COLORADO *v.* AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., ET AL. C. A. 10th Cir. [Certiorari granted, 522 U. S. 1107.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Motion of Kerry S. Hada, Esq., to permit Paul Grant, Esq., to present oral argument *pro hac vice* denied. Motion of respondents for divided argument denied. Motion of respondent Bill Orr for leave to file a supplemental brief granted.

No. 97–1121. CITY OF CHICAGO *v.* MORALES ET AL. Sup. Ct. Ill. [Certiorari granted, 523 U. S. 1071.] Motion of Ohio et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 97–1130. PFAFF *v.* WELLS ELECTRONICS, INC. C. A. Fed. Cir. [Certiorari granted, 523 U. S. 1003.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1147. MINNESOTA *v.* CARTER; and MINNESOTA *v.* JOHNS. Sup. Ct. Minn. [Certiorari granted, 523 U. S. 1003.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1418. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSN. *v.* 203 NORTH LASALLE STREET PARTNERSHIP. C. A.

7th Cir. [Certiorari granted, 523 U. S. 1106.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1230. CITY OF WEST COVINA *v.* PERKINS ET AL. C. A. 9th Cir. [Certiorari granted, 523 U. S. 1105.] Motion of National League of Cities et al. for leave to file a brief as *amici curiae* granted.

AUGUST 28, 1998

Certiorari Denied

No. 98–5761 (A–163). DUBOIS *v.* GREENE, WARDEN. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 149 F. 3d 1168.

AUGUST 31, 1998

Certiorari Denied

No. 98–5420 (A–142). TEAGUE *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 144 F. 3d 50.

SEPTEMBER 9, 1998

Miscellaneous Orders

No. 96–1570. NYNEX CORP. ET AL. *v.* DISCON, INC. C. A. 2d Cir. [Certiorari granted, 523 U. S. 1019.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: petitioners, 25 minutes; respondent, 25 minutes; the Solicitor General, 10 minutes.

No. 97–303. HUMANA INC. ET AL. *v.* FORSYTH ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 936.] Motions of Alliance of American Insurers et al. and Consumer Credit Insurance Association for leave to file briefs as *amici curiae* granted.

No. 97–475. EL AL ISRAEL AIRLINES, LTD. *v.* TSUI YUAN TSENG. C. A. 2d Cir. [Certiorari granted, 523 U. S. 1117.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1235. CITY OF MONTEREY *v.* DEL MONTE DUNES AT MONTEREY, LTD., ET AL. C. A. 9th Cir. [Certiorari granted, 523 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1184. NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 *v.* DEPARTMENT OF THE INTERIOR ET AL.; and No. 97–1243. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 903.] Motion of petitioner National Federation of Federal Employees, Local 1309, for divided argument granted to be divided as follows: Federal Labor Relations Authority, 20 minutes; National Federation of Federal Employees, Local 1309, 10 minutes.

No. 97–1230. CITY OF WEST COVINA *v.* PERKINS ET AL. C. A. 9th Cir. [Certiorari granted, 523 U. S. 1105.] Motion of Ohio for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1337. MINNESOTA ET AL. *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 915.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 97–1396. LOPEZ ET AL. *v.* MONTEREY COUNTY ET AL. D. C. N. D. Cal. [Probable jurisdiction noted, 523 U. S. 1093.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 97–1472. HADDLE *v.* GARRISON ET AL. C. A. 11th Cir. [Certiorari granted, 523 U. S. 1136.] Motions of Lawyers Committee for Civil Rights Under Law and National Employment Lawyers Association et al. for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

SEPTEMBER 10, 1998

Probable Jurisdiction Noted

No. 98–404. DEPARTMENT OF COMMERCE ET AL. *v.* UNITED STATES HOUSE OF REPRESENTATIVES ET AL. Appeal from D. C. D. C. Motion of the parties to expedite consideration and to expedite the briefing schedule granted. Probable jurisdiction noted. Briefs of appellants and intervenor-respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, October 6, 1998. Briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 3, 1998. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 17, 1998. This Court's Rule 29.2 does not apply. Oral argument is set for Monday, November 30, 1998. Reported below: 11 F. Supp. 2d 76.

SEPTEMBER 14, 1998

Miscellaneous Orders

No. A–31 (O. T. 1998). ELLIS *v.* ILLINOIS. Sup. Ct. Ill. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. A–186 (98–5864). STRICKLER *v.* GREENE, WARDEN. 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, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 17, 1998

Dismissal Under Rule 46

No. 98–5572. RIVERA *v.* ALLIN ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 144 F. 3d 719.

SEPTEMBER 18, 1998

Certiorari Denied

No. 98–6020 (A–237). STEWART *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Applica-

tion for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 149 F. 3d 1170.

No. 98–6021 (A–238). STEWART *v.* VIRGINIA ET AL. Sup. Ct. Va. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 22, 1998

Certiorari Denied

No. 98–5650 (A–233). CASTILLO *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 141 F. 3d 218.

SEPTEMBER 25, 1998

Dismissal Under Rule 46

No. 98–5823. HAMILTON *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Order

No. A–234 (O. T. 1998). CITY OF GRENADA, MISSISSIPPI, ET AL. *v.* HUBBARD ET AL. D. C. N. D. Miss. Application for stay pending appeal, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 98–6114 (A–251). ROBERTS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. 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: 332 S. C. 488, 505 S. E. 2d 593.

SEPTEMBER 29, 1998

Probable Jurisdiction Noted

No. 98–85. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL. Appeal from D. C. E. D. N. C. Probable jurisdiction noted. Brief of appellants is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 34 F. Supp. 2d 1029.

Certiorari Granted

No. 97–843. DAVIS, AS NEXT FRIEND OF LASHONDA D. *v.* MONROE COUNTY BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 120 F. 3d 1390.

No. 97–1625. CALIFORNIA DENTAL ASSN. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 128 F. 3d 720.

No. 97–1732. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM ET AL. *v.* FELZEN ET AL. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioners is to be filed with the Clerk and served upon oppos-

ing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 134 F. 3d 873.

No. 97–2000. AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. ET AL. *v.* SULLIVAN ET AL. C. A. 3d Cir. Motion of National Association of Waterfront Employers et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 139 F. 3d 158.

No. 97–2044. UNITED STATES *v.* HAGGAR APPAREL CO. C. A. Fed. Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 127 F. 3d 1460.

No. 97–2045. SOUTH CENTRAL BELL TELEPHONE CO. ET AL. *v.* ALABAMA ET AL. Sup. Ct. Ala. Motions of AlliedSignal, Inc., et al. and Committee on State Taxation for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on

or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 711 So. 2d 1005.

No. 97–9217. PEGUERO *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 142 F. 3d 430.

No. 98–18. BROOKER *v.* DUROCHER DOCK & DREDGE ET AL. C. A. 11th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 133 F. 3d 1390.

No. 98–84. NATIONAL COLLEGIATE ATHLETIC ASSN. *v.* SMITH. C. A. 3d Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 139 F. 3d 180.

No. 98–97. ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* ROE ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED. C. A. 9th Cir. Motions of United States Justice Foundation et al. and Washington Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or be-

fore 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 134 F. 3d 1400.

No. 98–184. WYOMING *v.* HOUGHTON. Sup. Ct. Wyo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. This Court's Rule 29.2 does not apply. Reported below: 956 P. 2d 363.

Certiorari Denied

No. 98–6139 (A–245). CRUZ *v.* JOHNSON, 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 STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 159 F. 3d 1355.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 983 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

RUBIN, SECRETARY OF THE TREASURY, ET AL. *v.* UNITED STATES, ACTING THROUGH THE INDEPENDENT COUNSEL

ON APPLICATION FOR STAY

No. A–53 (98–93). Decided July 17, 1998

The Secretary of the Treasury's application to stay the Court of Appeals' decision to enforce subpoenas pending a decision on certiorari is denied. He has not demonstrated that the interim enforcement of subpoenas requiring the President's protectors to testify before a federal grand jury investigating the President will cause irreparable harm. Nor has he shown a likelihood that this Court, assuming it granted certiorari and heard the case, would reverse the Court of Appeals' judgment.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

This case is before me as Circuit Justice on the application for stay submitted by the Solicitor General, on behalf of the Secretary of the Treasury Robert E. Rubin. Because several of my colleagues are out of the country, I have decided to rule on the matter myself rather than refer it to the Conference.

An applicant for stay first must show irreparable harm if a stay is denied. In my view, the applicant has not demonstrated that denying a stay and enforcing the subpoenas pending a decision on certiorari would cause irreparable harm. The Secretary identifies two injuries that would result from denying a stay: any privileged information would be lost forever and the important interests that the "protective function privilege" protects would be destroyed. I cannot say that any harm caused by the interim enforcement of the subpoenas will be irreparable. If the Secretary's claim

of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future. On balance, the equities do not favor granting a stay.

An applicant for stay must also show that there is a likelihood that four Members of this Court will grant certiorari to review the decision of the Court of Appeals on the merits. This case is obviously not a run-of-the-mine dispute, pitting as it does the prosecution's need for testimony before a grand jury against claims involving the safety and protection of the President of the United States. I shall assume, without deciding, that four Members of this Court on that basis would grant certiorari.

But a stay applicant must also show that there is a likelihood that this Court, having granted certiorari and heard the case, would reverse the judgment of the Court of Appeals. The applicant simply has not made that showing to my satisfaction, and I believe my view would be shared by a majority of my colleagues. The opinion of the Court of Appeals seems to me cogent and correct. The District Court which considered the matter was also of that view, and none of the nine judges of the Court of Appeals even requested a vote on the applicant's suggestion for rehearing en banc.

The application for stay is accordingly denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1995, 1996 AND 1997

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1995	**1996**	**1997**	**1995**	**1996**	**1997**	**1995**	**1996**	**1997**	**1995**	**1996**	**1997**
Number of cases on dockets	11	6	7	2,456	2,430	2,432	5,098	5,165	5,253	7,565	7,602	7,692
Number disposed of during term	5	2	1	2,081	2,083	2,106	4,511	4,606	4,611	6,597	6,691	6,718
Number remaining on dockets	6	5	6	375	347	326	587	559	642	968	907	974

	TERMS		
	1995	**1996**	**1997**
Cases argued during term	90	90	96
Number disposed of by full opinions	87	87	[2] 93
Number disposed of by per curiam opinions	3	3	1
Number set for reargument	0	0	0
Cases granted review this term	106	88	90
Cases reviewed and decided without oral argument	[1] 120	83	51
Total cases to be available for argument at outset of following term	52	48	41

[1] Does not include 94–1412, denied May 30, 1995.

[2] 96–1925 and 97–288 dismissed under Rule 46.1 after argument.

JUNE 26, 1998

INDEX

ADMINISTRATIVE DECISIONS. See **Social Security Act.**

AD VALOREM TAXES. See **Taxes.**

AFFIRMATIVE DEFENSES TO EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

AGENCY. See **Civil Rights Act of 1964.**

AIRPLANE ACCIDENT. See **Maritime Law.**

AMERICANS WITH DISABILITIES ACT OF 1990.

1. *Coverage of inmates in state prisons—"Public entity."*—Title II of ADA, which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that individual's disability, covers inmates in state prisons. Pennsylvania Dept. of Corrections v. Yeskey, p. 206.

2. *Human immunodeficiency virus.*—Respondent's asymptomatic HIV infection is a "disability" under ADA, but First Circuit did not cite sufficient material to determine, as a matter of law, that treating her in petitioner's dental office would not have posed a direct threat to others' health and safety. Bragdon v. Abbott, p. 624.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. See **Jurisdiction,** 3.

APPEALABILITY CERTIFICATES. See **Jurisdiction,** 3.

APPEALS. See **Jurisdiction,** 3; **Social Security Act.**

ATTORNEY-CLIENT PRIVILEGE.

Interview notes—Deceased client.—Attorney's notes of his interview with a client shortly before client's death are protected by attorney-client privilege from subpoena by Independent Counsel, who seeks to use notes in a criminal investigation. Swidler & Berlin v. United States, p. 399.

ATTORNEYS AND CLIENTS. See **Attorney-Client Privilege; Constitutional Law,** IX, 2.

BREACH OF CONTRACT. See **Communications Act of 1934.**

CALIFORNIA. See **Constitutional Law,** I.

CERTIFICATES OF APPEALABILITY. See **Jurisdiction,** 3.

CIVIL RIGHTS ACT OF 1964.

1. *Title VII—Sexual harassment—Employer's vicarious liability—Affirmative defense.*—An employer is vicariously liable for discrimination caused by a supervisor, but subject to an affirmative defense looking to reasonableness of employer's and victim's conduct. Faragher v. Boca Raton, p. 775.

2. *Title VII—Sexual harassment—Job consequences—Affirmative defense.*—An employee who refuses a supervisor's sexual advances, yet suffers no adverse, tangible job consequences, may recover against employer without showing that employer is negligent or otherwise at fault for supervisor's actions; but employer may interpose an affirmative defense looking to reasonableness of employer's and victim's conduct. Burlington Industries, Inc. v. Ellerth, p. 742.

CIVIL RIGHTS RESTORATION. See **Criminal Law,** 2.

CLIENT FUNDS. See **Constitutional Law,** IX, 2.

COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992. See **Constitutional Law,** II, 1; IX, 1.

COMMUNICATIONS ACT OF 1934.

Filed-tariff requirements—Pre-emption of state-law claims.—Act's filed-tariff requirements pre-empt state-law claims of respondent, a reseller of long-distance services, against petitioner, a long-distance service provider, for breach of contract and tortious interference with contract. American Telephone & Telegraph Co. v. Central Office Telephone, Inc., p. 214.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980.

Polluting facility—Parent corporation's liability.—Unless corporate veil may be pierced, a parent corporation that simply participated in, and exercised control over, its subsidiary's operations may not be held liable under CERCLA as an "operator" of subsidiary's polluting facility; but a parent that actively participated in, and exercised control over, facility's operations may be held directly liable in its own right. United States v. Bestfoods, p. 51.

COMPULSORY SELF-INCRIMINATION. See **Constitutional Law,** VII.

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985. See **Employee Retirement Income Security Act of 1974.**

CONSTITUTIONAL LAW.

I. Double Jeopardy.

Noncapital sentencing proceedings—Retrial on prior conviction allegation.—Double Jeopardy Clause, which precludes retrial on a prior conviction allegation in capital sentencing proceedings, does not apply in noncapital sentencing proceedings. Monge v. California, p. 721.

II. Due Process.

1. *Coal Industry Retiree Health Benefit Act of 1992—Health care benefits funding.*—Court of Appeals' decision, that Act's allocation of liability for funding health care benefits for coal industry retirees and their dependents does not violate Due Process Clause as applied to a company that left coal industry in 1965, is reversed. Eastern Enterprises v. Apfel, p. 498.

2. *Jury instructions—Lesser included offense.—Beck* v. *Alabama*, 447 U. S. 625—which invalidated a state law prohibiting lesser included offense instructions in capital cases, when such offenses to charged crime existed under state law—does not require state courts to instruct juries on offenses that are not lesser included offenses of charged crime under state law. Hopkins v. Reeves, p. 88.

III. Excessive Fines.

Failure to report currency transport—Full forfeiture of funds.—Where respondent's sole offense was his failure to report to Government, as required by federal law, that he was leaving United States with more than $10,000 in currency, forfeiture of entire $357,144 he failed to declare would violate Excessive Fines Clause because it would be grossly disproportional to gravity of his offense. United States v. Bajakajian, p. 321.

IV. Extradition Clause.

Habeas relief—State court's authority.—New Mexico Supreme Court exceeded its authority under Extradition Clause and Extradition Act when it affirmed a habeas grant releasing respondent from custody even though New Mexico Governor had previously ordered him extradited to Ohio. New Mexico ex rel. Ortiz v. Reed, p. 151.

V. Freedom of Expression.

National Foundation on the Arts and the Humanities Act of 1965—Selection criteria for National Endowment for the Arts grants.—Title 20 U. S. C. § 954(d)(1)—which requires NEA to consider "general standards of decency and respect for . . . diverse beliefs and values" in awarding grants—is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles. National Endowment for Arts v. Finley, p. 569.

CONSTITUTIONAL LAW—Continued.

VI. Presentment Clause.

Line Item Veto Act.—Act's procedures for Presidential cancellation of provisions of duly enacted laws violate Presentment Clause. Clinton v. City of New York, p. 417.

VII. Privilege Against Self-Incrimination.

Domestic proceeding—Fear of foreign prosecution.—A witness in a domestic proceeding may not claim Fifth Amendment privilege against self-incrimination based on fear of prosecution by a foreign nation. United States v. Balsys, p. 666.

VIII. Searches and Seizures.

Admissibility of evidence—Parole revocation hearing.—Exclusionary rule, which generally prohibits introduction at a criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights, does not apply in parole revocation hearings. Pennsylvania Bd. of Probation and Parole v. Scott, p. 357.

IX. Taking of Property.

1. *Coal Industry Retiree Health Benefit Act of 1992—Health care benefits funding.*—Court of Appeals' decision, that Act's allocation of liability for funding health care benefits for coal industry retirees and their dependents does not violate Takings Clause as applied to a company that left coal industry in 1965, is reversed. Eastern Enterprises v. Apfel, p. 498.

2. *Interest on Lawyers Trust Account program—Use of client funds.*—Interest earned on client funds deposited by an attorney in an "IOLTA" account is client's "private property" for Takings Clause purposes. Phillips v. Washington Legal Foundation, p. 156.

CONTRACT ACTIONS. See **Communications Act of 1934.**

CORPORATIONS. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

CRIMINAL LAW. See also **Attorney-Client Privilege; Constitutional Law,** I; II, 2; IV; VIII**; Jurisdiction,** 3.

1. *Dealing in firearms without a license—"Willfully."*—Firearms Owners' Protection Act's prohibition of "willfully" violating 18 U. S. C. § 922(a)(1)(A)—which forbids dealing in firearms without a federal license—requires proof only that defendant knew that his conduct was unlawful, not that he also knew of licensing requirement. Bryan v. United States, p. 184.

2. *Federal firearms restrictions—Restoration of civil rights.*—Where State of conviction has restored a felon's civil rights but restricts

CRIMINAL LAW—Continued.

his right to possess some types of firearms, his prior conviction remains a conviction for purposes of a federal law forbidding a person convicted of a serious offense to possess any firearm, 18 U. S. C. § 922(g)(1), and requiring an enhanced sentence for a three-time violent felon who violates § 922(g), § 924(e). Caron v. United States, p. 308.

3. *Mandatory prison term—Carrying a firearm during a drug offense.*—"[C]arries a firearm," as it is used in 18 U. S. C. § 924(c)(1)—which imposes a 5-year mandatory prison term upon a person who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime"—applies to a person who knowingly possesses and conveys firearms in a vehicle, including in locked glove compartment or trunk. Muscarello v. United States, p. 125.

4. *Proper venue—Federal money-laundering charges.*—A Missouri District Court is not proper venue for respondent's trial on money-laundering charges where laundering alleged in indictment occurred entirely in Florida. United States v. Cabrales, p. 1.

CURRENCY TRANSPORT OUT OF UNITED STATES. See **Constitutional Law,** III.

DEATH ON THE HIGH SEAS ACT. See **Maritime Law.**

DECENCY STANDARDS IN NATIONAL ENDOWMENT FOR THE ARTS GRANTS. See **Constitutional Law,** V.

DELIBERATE INDIFFERENCE LIABILITY STANDARD. See **Education Amendments of 1972.**

DISABILITY BENEFITS. See **Social Security Act.**

DISABILITY DISCRIMINATION. See **Americans with Disabilities Act of 1990.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964.**

DISCRIMINATION ON BASIS OF DISABILITY. See **Americans with Disabilities Act of 1990.**

DISCRIMINATION ON BASIS OF SEX. See **Civil Rights Act of 1964; Education Amendments of 1972.**

DOUBLE JEOPARDY. See **Constitutional Law,** I.

DRUG TRAFFICKING CRIMES. See **Criminal Law,** 3.

DUE PROCESS. See **Constitutional Law,** II.

EDUCATION AMENDMENTS OF 1972.

Title IX—Implied cause of action—Teacher-student sexual harassment.—Monetary damages in a Title IX implied cause of action may not be recovered for teacher-student sexual harassment unless a school district official with authority to institute corrective measures on district's behalf has actual notice of, and is deliberately indifferent to, teacher's misconduct. Gebser v. Lago Vista Independent School Dist., p. 274.

EIGHTH AMENDMENT. See **Constitutional Law,** III.

ELEVENTH AMENDMENT. See **Jurisdiction,** 2.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Group health plan—Continuation of coverage.—Where Consolidated Omnibus Budget Reconciliation Act of 1985 amended ERISA to permit a beneficiary of an employer's group health plan to elect continuing coverage that he might otherwise lose because of a qualifying event, such as termination of employment, an employer may not deny such continuation coverage to a qualified beneficiary who is covered under another health plan at time he elects COBRA coverage. Geissal v. Moore Medical Corp., p. 74.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** II, 1; IX, 1; **Employee Retirement Income Security Act of 1974.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

ENHANCED SENTENCES. See **Criminal Law,** 2.

ENVIRONMENTAL POLLUTION. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

EXCESSIVE FINES. See **Constitutional Law,** III.

EXCLUSIONARY RULE. See **Constitutional Law,** VIII.

EXTRADITION. See **Constitutional Law,** IV.

FEAR OF FOREIGN PROSECUTION. See **Constitutional Law,** VII.

FEDERAL COURTS. See **Jurisdiction,** 2.

FEDERAL ELECTION CAMPAIGN ACT OF 1971. See **Standing to Sue,** 2.

FEDERAL RULES OF CIVIL PROCEDURE. See **Jurisdiction,** 1.

FEDERAL-STATE RELATIONS. See **Communications Act of 1934; Criminal Law,** 2; **Jurisdiction,** 2.

FIFTH AMENDMENT. See **Constitutional Law,** I; II, 1; V; VII; IX.

FILED-RATE REQUIREMENTS. See **Communications Act of 1934.**

FIREARMS. See **Criminal Law,** 1, 2, 3.

FIRST AMENDMENT. See **Constitutional Law,** V.

FLORIDA. See **Criminal Law,** 4.

FOREIGN PROSECUTION AS BASIS FOR CLAIMING PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** VII.

FORFEITURE OF FUNDS. See **Constitutional Law,** III.

FOURTEENTH AMENDMENT. See **Constitutional Law,** I; II, 2.

FOURTH AMENDMENT. See **Constitutional Law,** VIII.

FREEDOM OF EXPRESSION. See **Constitutional Law,** V.

FUNDING FOR ARTS. See **Constitutional Law,** V.

GROUP HEALTH PLANS. See **Employee Retirement Income Security Act of 1974.**

HABEAS CORPUS. See **Constitutional Law,** IV; **Jurisdiction,** 3.

HEALTH CARE BENEFITS. See **Constitutional Law,** II, 1; IX, 1; **Employee Retirement Income Security Act of 1974.**

HIV AS A DISABILITY. See **Americans with Disabilities Act of 1990,** 2.

IMPLIED CAUSES OF ACTION. See **Education Amendments of 1972.**

INDEPENDENT COUNSEL. See **Attorney-Client Privilege.**

INDIANS. See **Taxes.**

INMATES' RIGHTS. See **Americans with Disabilities Act of 1990,** 1.

INTEREST ON LAWYERS TRUST ACCOUNT (IOLTA) PROGRAMS. See **Constitutional Law,** IX, 2.

JURISDICTION.

1. *Court of Appeals—Settlement reopening.*—Neither Federal Rule of Civil Procedure 60(b) nor Quiet Title Act gave Fifth Circuit jurisdiction to reopen a settlement agreement in which title to disputed land was quieted in United States in return for a payment to respondents. United States v. Beggerly, p. 38.

JURISDICTION—Continued.

2. *Federal courts—Removal jurisdiction.*—Presence in an otherwise removable case of a claim that may be barred by Eleventh Amendment does not destroy federal courts' removal jurisdiction to hear remaining claims. Wisconsin Dept. of Corrections v. Schacht, p. 381.

3. *Supreme Court—Habeas corpus—Denial of certificate of appealability.*—This Court has jurisdiction under 28 U. S. C. § 1254(1) to review a denial by a circuit judge or a court of appeals of an application for a certificate of appealability, which is required by § 2253(c)(1), as amended by Antiterrorism and Effective Death Penalty Act of 1996, before an appeal may be taken from an order denying habeas relief. Hohn v. United States, p. 236.

JURY INSTRUCTIONS. See **Constitutional Law,** II, 2.

KAL 007. See **Maritime Law.**

LAWYERS AND CLIENTS. See **Attorney-Client Privilege; Constitutional Law,** IX, 2.

LESSER INCLUDED OFFENSES. See **Constitutional Law,** II, 2.

LICENSING REQUIREMENTS FOR FIREARMS. See **Criminal Law,** 1.

LINE ITEM VETO ACT. See **Constitutional Law,** VI; **Standing to Sue,** 1.

LOCAL TAXES. See **Taxes.**

LONG-DISTANCE SERVICE. See **Communications Act of 1934.**

MANDATORY PRISON TERMS. See **Criminal Law,** 3.

MARITIME LAW.

Airplane accident—Survival action—Pre-death pain and suffering.—Because Death on the High Seas Act does not authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages. Dooley v. Korean Air Lines Co., p. 116.

MINERS' HEALTH CARE BENEFITS. See **Constitutional Law,** II, 1; IX, 1.

MISSOURI. See **Criminal Law,** 4.

MONEY LAUNDERING. See **Criminal Law,** 4.

NATIONAL ENDOWMENT FOR THE ARTS GRANTS. See **Constitutional Law,** V.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES ACT OF 1965. See **Constitutional Law,** V.

NEW MEXICO. See **Constitutional Law,** IV.

NONCAPITAL SENTENCING PROCEEDINGS. See **Constitutional Law,** I.

OHIO. See **Constitutional Law,** IV.

PAROLE REVOCATION HEARINGS. See **Constitutional Law,** VIII.

PIERCING CORPORATE VEIL. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

POLITICAL COMMITTEES. See **Standing to Sue,** 2.

POLLUTION. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

PRE-DEATH PAIN AND SUFFERING DAMAGES. See **Maritime Law.**

PRE-EMPTION OF STATE LAW. See **Communications Act of 1934.**

PRESENTMENT CLAUSE. See **Constitutional Law,** VI.

PRESIDENT'S AUTHORITY TO CANCEL PORTIONS OF LAWS. See **Constitutional Law,** VI; **Standing to Sue,** 1.

PRIOR CONVICTION ALLEGATIONS. See **Constitutional Law,** I.

PRISONERS' RIGHTS. See **Americans with Disabilities Act of 1990,** 1.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** VII.

PROPERTY RIGHTS. See **Constitutional Law,** IX, 2; **Jurisdiction,** 1.

PUBLIC SCHOOLS' LIABILITY FOR TEACHER-STUDENT SEXUAL HARASSMENT. See **Education Amendments of 1972.**

QUIET TITLE ACT. See **Jurisdiction,** 1.

REASONABLENESS STANDARD OF CONDUCT. See **Civil Rights Act of 1964.**

REMAND ORDERS. See **Social Security Act.**

REMOVAL JURISDICTION. See **Jurisdiction,** 2.

RESERVATION LAND. See **Taxes.**

RESTORATION OF CIVIL RIGHTS. See **Criminal Law,** 2.

RETIREES' HEALTH CARE BENEFITS. See **Constitutional Law,** II, 1; IX, 1.

RETRIALS ON PRIOR CONVICTION ALLEGATIONS. See **Constitutional Law,** I.

RIGHT TO REMAIN SILENT. See **Constitutional Law,** VII.

SCHOOLS' LIABILITY FOR TEACHER-STUDENT SEXUAL HARASSMENT. See **Education Amendments Act of 1972.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VIII.

SELF-INCRIMINATION. See **Constitutional Law,** VII.

SENTENCING. See **Constitutional Law,** I; **Criminal Law,** 3.

SETTLEMENT AGREEMENTS. See **Jurisdiction,** 1.

SEXUAL HARASSMENT. See **Civil Rights Act of 1964; Education Amendments of 1972.**

SOCIAL SECURITY ACT.

Disability benefits—Appeal of a remand order.—A Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding case to agency for further proceedings. Forney v. Apfel, p. 266.

SOVEREIGN IMMUNITY. See **Jurisdiction,** 2.

STANDING TO SUE.

1. *Line Item Veto Act.*—Appellees, who claim to have been injured when provisions of duly enacted laws were canceled pursuant to Act, have standing to challenge Act's constitutionality. Clinton v. City of New York, p. 417.

2. *Voters—Federal Election Commission's political committee decision.*—Respondent voters have standing to challenge FEC's decision that an organization is not a political committee subject to Federal Election Campaign Act of 1971 disclosure requirements regarding its membership, contributions, and expenditures; case is remanded for FEC to decide issue under its new regulations. Federal Election Comm'n v. Akins, p. 11.

STATE TAXES. See **Taxes.**

SUBPOENAS. See **Attorney-Client Privilege.**

SUPREME COURT. See also **Jurisdiction,** 3.

Term statistics, p. 1303.

SURVIVAL ACTION FOR DAMAGES. See **Maritime Law.**

TAKING OF PROPERTY. See **Constitutional Law,** IX.

TAXES.

State and local ad valorem taxes—Reservation land.—State and local governments may impose ad valorem taxes on reservation land that was make alienable by Congress and sold to non-Indians, but was later repurchased by tribe. Cass County v. Leech Lake Band of Chippewa Indians, p. 103.

TEACHER-STUDENT SEXUAL HARASSMENT. See **Education Amendments of 1972.**

TELECOMMUNICATIONS. See **Communications Act of 1934.**

TITLE DISPUTES. See **Jurisdiction,** 1.

TITLE IX. See **Education Amendments of 1972.**

TITLE VII. See **Civil Rights Act of 1964.**

TORTIOUS INTERFERENCE WITH CONTRACT. See **Communications Act of 1934.**

TRUST ACCOUNTS. See **Constitutional Law,** IX, 2.

VAGUENESS. See **Constitutional Law,** V.

VENUE. See **Criminal Law,** 4.

VICARIOUS LIABILITY FOR DISCRIMINATORY CONDUCT. See **Civil Rights Act of 1964.**

VOTERS. See **Standing to Sue,** 2.

WORDS AND PHRASES.

1. *"Carries a firearm."* 18 U. S. C. § 924(c)(1). Muscarello v. United States, p. 125.

2. *"First becomes . . . covered."* Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1162(2)(D)(i). Geissal v. Moore Medical Corp., p. 74.

3. *"Operated."* § 107(a)(2), Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9507(a)(2). United States v. Bestfoods, p. 51.

4. *"Physical . . . impairment that substantially limits one or more of [an individual's] major life activities."* Americans with Disabilities Act of 1990, 42 U. S. C. § 12102(2)(A). Bragdon v. Abbott, p. 624.

WORDS AND PHRASES—Continued.

5. "*Public entity.*" Americans with Disabilities Act of 1990, 42 U. S. C. § 12132. Pennsylvania Dept. of Corrections v. Yeskey, p. 206.

6. "*Willfully.*" Firearms Owners' Protection Act, 18 U. S. C. § 924(a)(1)(D). Bryan v. United States, p. 184.