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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2001

MARCH 4 THROUGH JUNE 3, 2002

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

505 U. S. 624, n. 5, line 10: add "Homer nodded." after ". . . n. 3, *supra*."

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

BYRON R. WHITE, Associate Justice.*

OFFICERS OF THE COURT

JOHN D. ASHCROFT, Attorney General.
THEODORE B. OLSON, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
PAMELA TALKIN, Marshal.
SHELLEY L. DOWLING, Librarian.

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*Justice White, who retired effective June 28, 1993 (509 U. S. ix), died on April 15, 2002. See *post*, p. v.

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.)

DEATH OF JUSTICE WHITE

Supreme Court of the United States

TUESDAY, APRIL 16, 2002

Present: Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, and Justice Breyer.

The Chief Justice said:

As we open this morning, I want to pay tribute to our friend and colleague Byron R. White, a retired Justice of this Court, who died yesterday morning in Colorado.

Byron White was nominated to the Court by President Kennedy on April 3, 1962, and was confirmed by the Senate eight days later. He took the oath of office forty years ago today, on April 16, 1962. He was the 93rd Justice to serve on this Court.

Justice White was born and raised in Colorado. He was a rare combination of brilliant scholar and gifted athlete. He attended the University of Colorado, earning ten varsity letters, winning a Rhodes scholarship to Oxford. Before attending Oxford, he played professional football for the old Pittsburgh Pirates. When he returned from Oxford, he attended Yale Law School while playing football for the Detroit Lions on the weekends. He served as an intelligence officer for the Navy during World War II.

Justice White was graduated from Yale Law School, earning the Cullen Prize for high academic grades. He clerked for Chief Justice Vinson and then returned home to Colorado where he practiced law for fourteen years, before joining the

Justice Department as deputy attorney general under Robert Kennedy. Less than a year later, President Kennedy named him to the Court.

Justice White was an able colleague and a good friend. He came as close as any to meriting Matthew Arnold's description of Sophocles: he "saw life steadily and he saw it whole." All of us who served with him feel a sense of personal loss. Our condolences go out to his wife, Marion, his two children, and their families.

At an appropriate time in the fall, the traditional memorial observance of the Court and the Bar will be held in this Courtroom.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2001

NEW YORK ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.

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

No. 00–568. Argued October 3, 2001—Decided March 4, 2002*

When the Federal Power Act (FPA) became law in 1935, most electric utilities operated as separate, local monopolies subject to state or local regulation; their sales were "bundled," meaning that consumers paid a single charge for both the cost of the electricity and the cost of its delivery; and there was little competition among utility companies. Section 201(b) of the FPA gave the Federal Power Commission (predecessor to respondent Federal Energy Regulatory Commission (FERC)) jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce"; § 205 prohibited, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the [Commission's] jurisdiction"; and § 206 gave the Commission the power to correct such unlawful practices. Since 1935, the number of electricity suppliers has increased dramatically and technological advances have allowed electricity to be delivered over three major "grids" in the continental United States. In all but three States, any electricity entering a grid becomes part of a vast pool of energy moving in interstate commerce. As a result, power companies can transmit electricity over long dis-

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*Together with No. 00–809, *Enron Power Marketing, Inc.* v. *Federal Energy Regulatory Commission et al.*, also on certiorari to the same court.

tances at a low cost. However, public utilities retain ownership of the transmission lines that their competitors must use to deliver electricity to wholesale and retail customers and thus can refuse to deliver their competitors' energy or deliver that power on terms and conditions less favorable than those they apply to their own transmissions. In Order No. 888, FERC found such practices discriminatory under § 205. Invoking its § 206 authority, FERC (1) ordered "functional unbundling" of wholesale generation and transmission services, which means that each utility must state separate rates for its wholesale generation, transmission, and ancillary services, and must take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and others; (2) imposed a similar open access requirement on unbundled *retail* transmissions in interstate commerce; and (3) declined to extend the open access requirement to the transmission component of bundled retail sales, concluding that unbundling such transmissions was unnecessary and would raise difficult jurisdictional issues that could be more appropriately considered in other proceedings. After consolidating a number of review petitions, the District of Columbia Circuit upheld most of Order No. 888. Here, the petition of New York et al. (collectively New York) questions FERC's assertion of jurisdiction over unbundled retail transmissions, and the petition of Enron Power Marketing, Inc. (Enron), questions FERC's refusal to assert jurisdiction over bundled retail transmissions.

Held:

1. FERC did not exceed its jurisdiction by including unbundled retail transmissions within the scope of Order No. 888's open access requirements. New York insists that retail transactions are subject only to state regulation, but the electric industry has changed since the FPA was enacted, at which time the electricity universe was neatly divided into spheres of retail versus wholesale sales. The FPA's plain language readily supports FERC's jurisdiction claim. Section 201(b) gives FERC jurisdiction over "electric energy in interstate commerce," and the unbundled transmissions that FERC has targeted are made such transmissions by the national grid's nature. No statutory language limits FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sales* jurisdiction to that market. In the face of this clear statutory language, New York's arguments supporting its contention that the statute draws a bright jurisdictional line between wholesale and retail transactions are unpersuasive. Its argument that the Court of Appeals applied an erroneous standard of review because it ignored the presumption against federal pre-emption of state law focuses on the wrong legal question. The type of pre-emption at issue

Syllabus

here concerns the rule that a federal agency may pre-empt state law only when it is acting within the scope of congressionally delegated authority. Because the FPA unambiguously gives FERC jurisdiction over the "transmission of electric energy in interstate commerce," without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid. New York's attempts to discredit this straightforward statutory analysis by reference to the FPA's legislative history are unavailing. And its arguments that FERC jurisdiction over unbundled retail transmissions will impede sound energy policy are properly addressed to FERC or to the Congress. Pp. 16–24.

2. FERC's decision not to regulate bundled retail transmissions was a statutorily permissible policy choice. Contrary to Enron's argument, FERC chose not to assert jurisdiction over such transmissions, but it did not hold itself powerless to claim jurisdiction. Indeed, FERC explicitly reserved decision on that jurisdictional issue, and the reasons FERC supplied for doing so provide valid support for that decision. Having determined that the remedy it ordered constituted a sufficient response to the problems it had identified in the wholesale market, FERC had no § 206 obligation to regulate bundled retail transmissions or to order universal unbundling. This Court also agrees with FERC's conclusion that regulating bundled retail transmissions raises difficult jurisdictional issues. Pp. 25–28.

225 F. 3d 667, affirmed.

STEVENS, J., delivered the opinion of the Court, Parts II and III of which were unanimous, and Parts I and IV of which were joined by REHNQUIST, C. J., and O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 28.

Lawrence G. Malone argued the cause and filed briefs for petitioners State of New York et al. in No. 00–568 and a brief for respondents State Public Service Commissions in No. 00–809. With him on the briefs were *Jonathan D. Feinberg* and *Carl F. Patka.*

Louis R. Cohen argued the cause and filed briefs for petitioner in No. 00–809 and a brief for respondent Enron Power Marketing, Inc., in No. 00–568. With him on the briefs were *Joseph E. Killory, Jr.*, *Jonathan J. Frankel*, *I. Jay Palansky*, *Jeffrey D. Watkiss*, and *Joseph R. Hartsoe.* Briefs for re-

spondents under this Court's Rule 12.6 in support of petitioner in No. 00–809 were filed by *James van R. Springer* and *Steven L. Miller* for the Electric Power Supply Association; and by *Sara D. Schotland* for the Electricity Consumers Resource Council et al. Briefs for respondents under this Court's Rule 12.6 in support of petitioners in No. 00–568 were filed by *Robert C. McDiarmid*, *Cynthia S. Bogorad*, and *Peter J. Hopkins* for the Transmission Access Policy Study Group; and by *Michael A. Mullett* for Citizens Action Coalition of Indiana, Inc.

Deputy Solicitor General Kneedler argued the cause for respondents in both cases. With him on the brief for respondent Federal Energy Regulatory Commission were *Acting Solicitor General Underwood*, *Austin C. Schlick*, *Cynthia A. Marlette*, and *Timm L. Abendroth*. *Charles G. Cole*, *Alice E. Loughran*, *Edward H. Comer*, and *Barbara A. Hindin* filed a brief for the Edison Electric Institute, respondent in both cases.†

JUSTICE STEVENS delivered the opinion of the Court.

These cases raise two important questions concerning the jurisdiction of the Federal Energy Regulatory Commission (FERC or Commission) over the transmission of electricity. First, if a public utility "unbundles"—*i. e.*, separates—the cost of transmission from the cost of electrical energy when billing its retail customers, may FERC require the utility to transmit competitors' electricity over its lines on the same terms that the utility applies to its own energy transmis-

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†*Bohdan R. Pankiw* and *John A. Levin* filed a brief for the Pennsylvania Public Utility Commission as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of California et al. by *Bill Lockyer*, Attorney General, *Peter Siggins*, Chief Deputy Attorney General, *Rick Frank*, Chief Assistant Attorney General, *Morris Beatus*, Senior Assistant Attorney General, *Gary M. Cohen*, and *William Julian II;* and for Electrical Engineers et al. by *Charles J. Cooper*.

sions? Second, must FERC impose that requirement on utilities that continue to offer only "bundled" retail sales?

In Order No. 888, issued in 1996 with the stated purpose of "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities,"[1] FERC answered yes to the first question and no to the second. It based its answers on provisions of the Federal Power Act (FPA), as added by § 213, 49 Stat. 847, and as amended, 16 U. S. C. § 824 *et seq.*, enacted in 1935. Whether or not the 1935 Congress foresaw the dramatic changes in the power industry that have occurred in recent decades, we are persuaded, as was the Court of Appeals, that FERC properly construed its statutory authority.

I

In 1935, when the FPA became law, most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems. Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation. Their sales were "bundled," meaning that consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery. Competition among utilities was not prevalent.

Prior to 1935, the States possessed broad authority to regulate public utilities, but this power was limited by our cases holding that the negative impact of the Commerce Clause prohibits state regulation that directly burdens interstate commerce.[2] When confronted with an attempt by Rhode Is-

[1] FERC Stats. & Regs., Regs. Preambles, Jan. 1991–June 1996, ¶ 31,036, p. 31,632, 61 Fed. Reg. 21540 (1996). Order No. 888 also deals with the recovery of "stranded costs" by utilities, but this aspect of the order is not before us.

[2] For example, in cases involving the interstate transmission of natural gas, we held that a State could regulate direct sales to consumers even when the gas was drawn from interstate mains, *Pennsylvania Gas Co.* v. *Public Serv. Comm'n of N. Y.*, 252 U. S. 23 (1920); *Public Util. Comm'n of*

land to regulate the rates charged by a Rhode Island plant selling electricity to a Massachusetts company, which resold the electricity to the city of Attleboro, Massachusetts, we invalidated the regulation because it imposed a "direct burden upon interstate commerce." *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 89 (1927). Creating what has become known as the "*Attleboro* gap," we held that this interstate transaction was not subject to regulation by either Rhode Island or Massachusetts, but only "by the exercise of the power vested in Congress." *Id.*, at 90.

When it enacted the FPA in 1935,[3] Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated, see, *e. g.*, *id.*, at 87–88 (explaining, prior to the FPA's enactment, that state regulations affecting interstate utility transactions were permissible if they did not directly burden interstate commerce). The FPA charged the Federal Power Commission (FPC), the predecessor of FERC, "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Util. Co.* v. *FPC*, 411 U. S. 747, 758 (1973). Specifically, in § 201(b) of the FPA, Congress recognized the FPC's jurisdiction as including "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in inter-

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Kan. v. *Landon*, 249 U. S. 236 (1919), but that a State could not regulate the rate at which gas from out-of-state producers was sold to independent distributing companies for resale to local consumers, *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 309 (1924).

[3] The FPA was enacted as Title II of the Public Utility Act of 1935, 49 Stat. 847. Title I of the Public Utility Act—not at issue here—regulated financial practices of interstate holding companies that controlled a large number of public utilities.

state commerce." 16 U. S. C. § 824(b). Furthermore, § 205 of the FPA prohibited, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U. S. C. §§ 824d(a)–(b), and § 206 gave the FPC the power to correct such unlawful practices, 16 U. S. C. § 824e(a).

Since 1935, and especially beginning in the 1970's and 1980's, the number of electricity suppliers has increased dramatically. Technological advances have made it possible to generate electricity efficiently in different ways and in smaller plants.[4] In addition, unlike the local power networks of the past, electricity is now delivered over three major networks, or "grids," in the continental United States. Two of these grids—the "Eastern Interconnect" and the "Western Interconnect"—are connected to each other. It is only in Hawaii and Alaska and on the "Texas Interconnect"—which covers most of that State—that electricity is distributed entirely within a single State. In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.[5] As a result, it is now possible for

[4] In Order No. 888, FERC noted that the optimum size of electric generation plants has shifted from the larger, 500 megawatt plants (with 10-year lead time) of the past to the smaller, 50-to-150 megawatt plants (with 1-year lead time) of the present. These smaller plants can produce energy at a cost of 3-to-5 cents per kilowatt-hour, as opposed to the older plants' production cost of 4-to-15 cents per kilowatt-hour. Order No. 888, at 31,641.

[5] See Brief for Respondent FERC 4–5. Over the years, FERC has described the interconnected grids in a number of proceedings. For example, in 1967, the FPC considered whether Florida Power & Light Co. (FPL)—a utility attached to what was then the regional grid for the southeastern United States—transmitted energy in interstate commerce as a result of that attachment. The FPC concluded that FPL's transmissions were in interstate commerce: "[S]ince electric energy can be delivered virtually instantaneously when needed on a system at a speed of 186,000

power companies to transmit electric energy over long distances at a low cost. As FERC has explained, "the nature and magnitude of coordination transactions" have enabled utilities to operate more efficiently by transferring substantial amounts of electricity not only from plant to plant in one area, but also from region to region, as market conditions fluctuate. Order No. 888, at 31,641.

Despite these advances in technology that have increased the number of electricity providers and have made it possible for a "customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma," *Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667, 681 (CADC 2000) (case below), public utilities retain ownership of the transmission lines that must be used by their competitors to deliver electric energy to wholesale and retail customers. The utilities' control of transmission facilities gives them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and condi-

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miles per second, such energy can be and is transmitted to FPL when needed from out-of-state generators, and in turn can be and is transmitted from FPL to help meet out-of-state demands; . . . there is a cause and effect relationship in electric energy occurring throughout every generator and point on the FPL, Corp, Georgia, and Southern systems which constitutes interstate transmission of electric energy by, to, and from FPL." *In re Florida Power & Light Co.*, 37 F. P. C. 544, 549 (1967). This Court found the FPC's findings sufficient to establish the FPC's jurisdiction. *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 469 (1972).

As *amici* explain in less technical terms, "[e]nergy flowing onto a power network or grid *energizes the entire grid,* and consumers then draw undifferentiated energy from that grid." Brief for Electrical Engineers et al. as *Amici Curiae* 2. As a result, explain *amici,* any activity on the interstate grid affects the rest of the grid. *Ibid. Amici* dispute the States' contentions that electricity functions "the way water flows through a pipe or blood cells flow through a vein" and "can be controlled, directed and traced" as these substances can be, calling such metaphors "inaccurate and highly misleading." *Id.,* at 2, 5.

tions less favorable than those they apply to their own transmissions. *E. g.*, Order No. 888, at 31,643–31,644.[6]

Congress has addressed these evolving conditions in the electricity market on two primary occasions since 1935. First, Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), 92 Stat. 3117, 16 U. S. C. § 2601 *et seq.*, to promote the development of new generating facilities and to conserve the use of fossil fuels. Because the traditional utilities controlled the transmission lines and were reluctant to purchase power from "nontraditional facilities," PURPA directed FERC to promulgate rules requiring utilities to purchase electricity from "qualifying cogeneration and small power production facilities." *FERC* v. *Mississippi*, 456 U. S. 742, 751 (1982); see 16 U. S. C. § 824a–3(a).

Over a decade later, Congress enacted the Energy Policy Act of 1992 (EPAct), 106 Stat. 2776. This law authorized FERC to order individual utilities to provide transmission services to unaffiliated wholesale generators (*i. e.*, to "wheel" power) on a case-by-case basis. See 16 U. S. C. §§ 824j–824k. Exercising its authority under the EPAct, FERC ordered a utility to "wheel" power for a complaining wholesale competitor 12 times, in 12 separate proceedings. Order No. 888, at 31,646. FERC soon concluded, however, that these individual proceedings were too costly and time consuming to provide an adequate remedy for undue discrimination throughout the market. *Ibid.*

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[6] In addition to policing utilities' anticompetitive behavior through the various statutory provisions that explicitly address the electric industry, discussed in more detail below, the Government has also used the antitrust laws to this end. For example, in *Otter Tail Power Co.* v. *United States*, 410 U. S. 366 (1973), the Court permitted the Government to seek antitrust remedies against a utility company which, among other things, refused to sell power at wholesale to some municipalities and refused to transfer competitors' power over its lines. *Id.*, at 368. The Court concluded that the FPA's existence did not preclude the applicability of the antitrust laws. *Id.*, at 372.

Thus, in 1995, FERC initiated the rulemaking proceeding that led to the adoption of the order presently under review. FERC proposed a rule that would "require that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services." Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs., 1988–1999, ¶ 32,514, p. 33,047, 60 Fed. Reg. 17662 (hereinafter NPRM). The stated purpose of the proposed rule was "to encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets." NPRM 33,048. The NPRM stated:

> "The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs. Thus, market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition."[7] *Id.*, at 33,049.

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[7] Later in the NPRM, FERC explained that § 206 of the FPA authorizes FERC to remedy unduly discriminatory practices, and found: "that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices." NPRM 33,052.

Rather than grounding its legal authority in Congress' more recent electricity legislation, FERC cited §§ 205–206 of the 1935 FPA—the provisions concerning FERC's power to remedy unduly discriminatory practices—as providing the authority for its rulemaking. See 16 U. S. C. §§ 824d–824e.

In 1996, after receiving comments on the NPRM, FERC issued Order No. 888. It found that electric utilities were discriminating in the "bulk power markets," in violation of § 205 of the FPA, by providing either inferior access to their transmission networks or no access at all to third-party wholesalers of power. Order No. 888, at 31,682–31,684. Invoking its authority under § 206, it prescribed a remedy containing three parts that are presently relevant.

First, FERC ordered "functional unbundling" of wholesale generation and transmission services. *Id.*, at 31,654. FERC defined "functional unbundling" as requiring each utility to state separate rates for its wholesale generation, transmission, and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others.

Second, FERC imposed a similar open access requirement on unbundled *retail* transmissions in interstate commerce. Although the NPRM had not envisioned applying the open access requirements to retail transmissions, but rather "would have limited eligibility to wholesale transmission customers," FERC ultimately concluded that it was "irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer." *Id.*, at 31,689. Thus, "if a public utility voluntarily offers unbundled retail access," or if a State requires unbundled retail access, "the affected retail customer *must* obtain its unbundled transmis-

sion service under a non-discriminatory transmission tariff on file with the Commission." *Ibid.*[8]

Third, FERC rejected a proposal that the open access requirement should apply to "the transmission component of bundled retail sales." *Id.*, at 31,699. Although FERC noted that "the unbundling of retail transmission and generation . . . would be helpful in achieving comparability," it concluded that such unbundling was not "necessary" and would raise "difficult jurisdictional issues" that could be "more appropriately considered" in other proceedings. *Ibid.*

In its analysis of the jurisdictional issues, FERC distinguished between transmissions and sales. It explained:

> "[Our statutory jurisdiction] over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of power. However, the unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation." *Id.*, at 31,781.[9]

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[8] While it concluded that "the rates, terms, and conditions of all unbundled transmission service" were subject to its jurisdiction, FERC stated that it would "give deference to state recommendations" regarding the regulation of retail transmissions "when state recommendations are consistent with our open access policies." Order No. 888, at 31,689.

[9] FERC also explained that it did not assert "jurisdiction to order retail transmission directly to an ultimate consumer," *id.*, at 31,781, and that States had "authority over the *service* of delivering electric energy to

In 1997, in response to numerous petitions for rehearing and clarification, FERC issued Order No. 888–A, FERC Stats. & Regs., Regs. Preambles, July 1996–Dec. 2001, ¶ 31,048, p. 30,172, 62 Fed. Reg. 12274. With respect to various challenges to its jurisdiction, FERC acknowledged that it did not have the "authority to order, *sua sponte*, open-access transmission services by public utilities," but explained that § 206 of the FPA explicitly required it to remedy the undue discrimination that it had found. Order No. 888–A, at 30,202; see 16 U. S. C. § 824e(a). FERC also rejected the argument that its failure to assert jurisdiction over bundled retail transmissions was inconsistent with its assertion of jurisdiction over unbundled retail transmissions. FERC repeated its explanation that it did not believe that regulation of bundled retail transmissions (*i. e.*, the "functional unbundling" of retail transmissions) "was necessary," and again stated that such unbundling would raise serious jurisdictional questions. Order No. 888–A, at 30,225. FERC did not, however, state that it had no power to regu-

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end users. . . . State regulation of most power production and virtually all distribution and consumption of electric energy is clearly distinguishable from this Commission's responsibility to ensure open and nondiscriminatory interstate transmission service. Nothing adopted by the Commission today, including its interpretation of its authority over retail transmission or how the separate distribution and transmission functions and assets are discerned when retail service is unbundled, is inconsistent with traditional state regulatory authority in this area." *Id.*, at 31,782–31,783.

With respect to distinguishing "Commission-jurisdictional facilities used for transmission in interstate commerce" from "state-jurisdictional local distribution facilities," *id.*, at 31,783, FERC identified seven relevant factors, *id.*, at 31,771, 31,783–31,784. Recognizing the state interest in maintaining control of local distribution facilities, FERC further explained that, "in instances of unbundled retail wheeling that occurs as a result of a state retail access program, we will defer to recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the Commission's technical test for local distribution facilities . . . ." *Id.*, at 31,783–31,785.

late the transmission component of bundled retail sales. *Id.*, at 30,225–30,226. Rather, FERC reiterated that States have jurisdiction over the retail *sale* of power, and stated that, as a result, "[o]ur assertion of jurisdiction . . . arises only if the [unbundled] retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program." *Id.*, at 30,226.

II

A number of petitions for review of Order No. 888 were consolidated for hearing in the Court of Appeals for the District of Columbia. After considering a host of objections, the Court of Appeals upheld most provisions of the order. Specifically, it affirmed FERC's jurisdictional rulings that are at issue in the present cases. 225 F. 3d, at 681.

The Court of Appeals first explained that the open access requirements in the orders—for both retail and wholesale transmissions—were "premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry." *Id.*, at 683. It held that FERC's factual determinations were reasonable and that §§ 205 and 206 of the FPA gave the Commission authority to prescribe a marketwide remedy for a marketwide problem. Interpreting Circuit precedent—primarily cases involving the transmission of natural gas, *e. g.*, *Associated Gas Distributors* v. *FERC*, 824 F. 2d 981 (CADC 1987)—the Court of Appeals concluded that even though FERC's general authority to order open access was "limited," the statute made an exception "where FERC finds undue discrimination." 225 F. 3d, at 687–688.

In its discussion of "Federal Versus State Jurisdiction over Transmission Services," *id.*, at 690–696, the Court of Appeals also endorsed FERC's reasoning. The Court of Appeals first addressed the complaints of the state regulatory commissions that Order No. 888 "went too far" by going beyond

the regulation of wholesale transactions and "assert[ing] jurisdiction over all unbundled retail transmissions." *Id.*, at 691, 692. The Court of Appeals concluded that the plain language of § 201 of the FPA, which this Court has construed broadly,[10] supported FERC's regulation of transmissions in interstate commerce that were part of unbundled retail sales, as § 201 gives FERC jurisdiction over the "transmission of electric energy in interstate commerce." 16 U. S. C. § 824(b)(1). Even if the FPA were ambiguous, the Court of Appeals explained that, given the technological complexities of the national grids, it would have deferred to the Commission's interpretation of § 201 "as giving it jurisdiction over both wholesale and retail transmissions." 225 F. 3d, at 694.

The Court of Appeals next addressed the complaints of transmission-dependent producers and wholesalers that Order No. 888 did not "go far enough." *Id.*, at 692. The Court of Appeals was not persuaded that FERC's assertion of jurisdiction over unbundled retail transmission required FERC to assert jurisdiction over bundled retail transmissions or to mandate unbundling of retail transmissions. *Id.*, at 694. Noting that the FPA "clearly contemplates state jurisdiction over local distribution facilities and retail sales," the Court of Appeals held:

> "A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale. Yet FERC has jurisdiction over one, while the states have jurisdiction over the other. FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must also defer under *Chevron* [*U. S. A. Inc.*

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[10] See *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453 (1972); *Jersey Central Power & Light Co.* v. *FPC*, 319 U. S. 61 (1943).

> v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984)]." *Id.*, at 694–695.

Because of the importance of the proceeding, we granted both the petition of the State of New York et al. (collectively New York) questioning FERC's assertion of jurisdiction over unbundled retail transmissions and the petition of Enron Power Marketing, Inc. (Enron), questioning FERC's refusal to assert jurisdiction over bundled retail transmissions. 531 U. S. 1189 (2001). We address these two questions separately. At the outset, however, we note that no petitioner questions the validity of the order insofar as it applies to wholesale transactions: The parties dispute only the proper scope of FERC's jurisdiction over *retail* transmissions. Furthermore, we are not confronted with any factual issues. Finally, we agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce. See, *e. g.*, *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 466–467 (1972); n. 5, *supra.*

III

The first question is whether FERC exceeded its jurisdiction by including unbundled retail transmissions within the scope of its open access requirements in Order No. 888. New York argues that FERC overstepped in this regard, and that such transmissions—because they are part of retail transactions—are properly the subject of state regulation. New York insists that the jurisdictional line between the States and FERC falls between the wholesale and retail markets.

As the Court of Appeals explained, however, the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was "neatly divided into spheres of retail versus wholesale sales." 225 F. 3d, at 691. As the Court of Appeals also explained, the plain language of the FPA readily supports FERC's claim of jurisdiction. Section 201(b) of the FPA states that FERC's

jurisdiction includes "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U. S. C. § 824(b). The unbundled retail transmissions targeted by FERC are indeed transmissions of "electric energy in interstate commerce," because of the nature of the national grid. There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale. See *ibid.;* cf. *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621, 636 (1972) (interpreting similar provisions of the Natural Gas Act, 15 U. S. C. § 717(b), to mean that FPC jurisdiction "applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale").

In the face of this clear statutory language, New York advances three arguments in support of its submission that the statute draws a bright jurisdictional line between wholesale transactions and retail transactions. First, New York contends that the Court of Appeals applied an erroneous standard of review because it ignored the presumption against federal pre-emption of state law; second, New York claims that other statutory language and legislative history shows a congressional intent to safeguard pre-existing state regulation of the delivery of electricity to retail customers; and third, New York argues that FERC jurisdiction over retail transmissions would impede sound energy policy. These arguments are unpersuasive.

The Presumption against Pre-emption

Pre-emption of state law by federal law can raise two quite different legal questions. The Court has most often stated a "presumption against pre-emption" when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by,

the existence of Federal Government authority. See, *e. g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985) (citing cases); see also *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992). In such a situation, the Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Hillsborough County*, 471 U. S., at 715 (quoting *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977)). These are not such cases, however, because the question presented does not concern the validity of a conflicting state law or regulation.

The other context in which "pre-emption" arises concerns the rule "that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 374 (1986). This is the sort of case we confront here—defining the proper scope of the federal power. Such a case does not involve a "presumption against pre-emption," as New York argues, but rather requires us to be certain that Congress has conferred authority on the agency. As we have explained, the best way to answer such a question—*i. e.*, whether federal power may be exercised in an area of pre-existing state regulation—"is to examine the nature and scope of the authority granted by Congress to the agency." *Ibid.* In other words, we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.

As noted above, the text of the FPA gives FERC jurisdiction over the "transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in

interstate commerce." 16 U. S. C. § 824(b). The references to "transmission" in commerce and "sale" at wholesale were made part of § 201 of the statute when it was enacted in 1935.[11] Subsections (c) and (d) of § 201 explain, respectively, the meaning of the terms "transmission" and "sale of electric energy at wholesale."[12] This statutory text thus unambiguously authorizes FERC to assert jurisdiction over two sepa-

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[11] This reference is found twice in § 201 of the FPA. Section 201(a), as codified in 16 U. S. C. § 824(a), states in full: "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of *the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce* is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (Emphasis added.)

Section 201(b)(1), as codified in 16 U. S. C. § 824(b)(1), states in full: "The provisions of this subchapter shall apply to *the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce*, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (Emphasis added.)

[12] Section 201(c) of the FPA, as codified in 16 U. S. C. § 824(c), explains that "[f]or the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States." Finally, § 201(d), as codified in 16 U. S. C. § 824(d), states that the "term 'sale of electric energy at wholesale' when used in this subchapter, means a sale of electric energy to any person for resale."

rate activities—transmitting and selling. It is true that FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity *transmissions* contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.

Legislative History

Attempting to discredit this straightforward analysis of the statutory language, New York calls our attention to numerous statements in the legislative history indicating that the 1935 Congress intended to do no more than close the "*Attleboro* gap," by providing for federal regulation of wholesale, interstate electricity transactions that the Court had held to be beyond the reach of state authority in *Attleboro*, 273 U. S., at 89. To support this argument, and to demonstrate that the 1935 Congress did not intend to supplant any traditionally state-held jurisdiction, New York points to language added to the FPA in the course of the legislative process that evidences a clear intent to preserve state jurisdiction over local facilities. For example, § 201(a) provides that federal regulation is "to extend only to those matters which are not subject to regulation by the States." 16 U. S. C. § 824(a). And § 201(b) states that FERC has no jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U. S. C. § 824(b).

It is clear that the enactment of the FPA in 1935 closed the "*Attleboro* gap" by authorizing federal regulation of interstate, wholesale sales of electricity—the precise subject matter beyond the jurisdiction of the States in *Attleboro.* And it is true that the above-quoted language from § 201(a) concerning the States' reserved powers is consistent with

the view that the FPA was no more than a gap-closing statute. It is, however, perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation. See, *e. g.*, *Attleboro*, 273 U. S., at 85–86 (noting, prior to the enactment of the FPA, that States could regulate aspects of interstate wholesale sales, as long as such regulation did not directly burden interstate commerce). More importantly, as discussed above, the FPA authorized federal regulation of interstate *transmissions* as well as of interstate wholesale sales, and such transmissions were not of concern in *Attleboro*. Thus, even if *Attleboro* catalyzed the enactment of the FPA, *Attleboro* does not define the outer limits of the statute's coverage.

Furthermore, the portion of § 201(a) cited by New York concerning the preservation of existing state jurisdiction is actually consistent with Order No. 888, because unbundled interstate transmissions of electric energy have never been "subject to regulation by the States," 16 U. S. C. § 824(a). Indeed, unbundled transmissions have been a recent development. As FERC explained, at the time that the FPA was enacted, transmissions were bundled with the energy itself, and electricity was delivered to both wholesale and retail customers as a complete, bundled package. Order No. 888, at 31,639. Thus, in 1935, there was neither state nor federal regulation of what did not exist.[13]

[13] FERC recognized this point in reaching its jurisdictional conclusion: "Rather than claiming 'new' jurisdiction, the Commission is applying the same statutory framework to a business environment in which . . . retail sales and transmission service are provided in separate transactions. . . . Because these types of products and transactions were not prevalent in the past, the jurisdictional issue before us did not arise and . . . the Commission cannot be viewed as 'disturbing' the jurisdiction of state regulators prior to and after the *Attleboro* case." Order No. 888–A, at 30,339–30,340.

Moreover, we have described the precise reserved state powers language in § 201(a) as a mere "'policy declaration'" that "'cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'" *FPC* v. *Southern Cal. Edison Co.*, 376 U. S. 205, 215 (1964) (quoting *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 527 (1945)); see also *United States* v. *Public Util. Comm'n of Cal.*, 345 U. S. 295, 311 (1953). Because the FPA contains such "a clear and specific grant of jurisdiction" to FERC over interstate transmissions, as discussed above, the prefatory language cited by New York does not undermine FERC's jurisdiction.

New York is correct to point out that the legislative history is replete with statements describing Congress' intent to preserve state jurisdiction over local facilities. The sentiment expressed in those statements is incorporated in the second sentence of § 201(b) of the FPA, as codified in 16 U. S. C. § 824(b), which provides:

> "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Yet, Order No. 888 does not even arguably affect the States' jurisdiction over three of these subjects: generation facilities, transmissions in intrastate commerce, or transmissions consumed by the transmitter. Order No. 888 does discuss local distribution facilities, and New York argues that, as a result, FERC has improperly invaded the States' authority "over facilities used in local distribution," 16 U. S. C. § 824(b). However, FERC has not attempted to control local distri-

bution facilities through Order No. 888. To the contrary, FERC has made clear that it does not have jurisdiction over such facilities, Order No. 888, at 31,969, and has merely set forth a seven-factor test for identifying these facilities, without purporting to regulate them, *id.*, at 31,770–31,771.

New York also correctly states that the legislative history demonstrates Congress' interest in retaining state jurisdiction over retail sales. But again, FERC has carefully avoided assuming such jurisdiction, noting repeatedly that "the FPA does not give the Commission jurisdiction over sales of electric energy at retail." *Id.*, at 31,969. Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*. And, as discussed below, FERC did not assert jurisdiction over bundled retail transmissions, leaving New York with control over even the transmission component of bundled retail sales.

Our evaluation of the extensive legislative history reviewed in New York's brief is affected by the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935. No party to these cases has presented evidence that Congress foresaw the industry's transition from one of local, self-sufficient monopolies to one of nationwide competition and electricity transmission. Nor is there evidence that the 1935 Congress foresaw the possibility of unbundling electricity transmissions from sales. More importantly, there is no evidence that if Congress had foreseen the developments to which FERC has responded, Congress would have objected to FERC's interpretation of the FPA. Whatever persuasive effect legislative history may have in other contexts, here it is not particularly helpful because of the interim developments in the electric industry. Thus, we are left with the statutory text as the clearest guidance. That text unquestionably supports FERC's jurisdiction to order unbundling of wholesale transactions (which

none of the parties before us questions), as well as to regulate the unbundled transmissions of electricity retailers.

Sound Energy Policy

New York argues that FERC jurisdiction over unbundled retail transmission will impede sound energy policy. Specifically, New York cites the States' interest in overseeing the maintenance of transmission lines and the siting of new lines. It is difficult for us to evaluate the force of these arguments because New York has not separately analyzed the impact of the loss of control over unbundled retail transmissions, as opposed to the loss of control over retail transmissions generally, and FERC has only regulated unbundled transactions. Moreover, FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. See, *e. g.*, Order No. 888, at 31,782, n. 543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); *id.*, at 31,782, n. 544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges"). We do note that the Edison Electric Institute, which is a party to these cases, and which represents that its members own approximately 70% of the transmission facilities in the country, does not endorse New York's objections to Order No. 888. And, regardless of their persuasiveness, the sort of policy arguments forwarded by New York are properly addressed to the Commission or to the Congress, not to this Court. *E. g.*, *Chemehuevi Tribe* v. *FPC*, 420 U. S. 395, 423 (1975).

IV

Objecting to FERC's order from the opposite direction, Enron argues that the FPA gives FERC the power to apply its open access remedy to *bundled* retail transmissions of electricity, and, given FERC's findings of undue discrimination, that FERC had a duty to do so. In making this argument, Enron persistently claims that FERC held that it had no jurisdiction to grant the relief that Enron seeks.[14] That assumption is incorrect: FERC chose not to assert such jurisdiction, but it did not hold itself powerless to claim jurisdiction. Indeed, FERC explicitly reserved decision on the jurisdictional issue that Enron claims FERC decided. See Order No. 888, at 31,699 (explaining that Enron's position raises "numerous difficult jurisdictional issues that we believe are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before us in the context of a state retail wheeling program"). Absent Enron's flawed assumption, FERC's ruling is clearly acceptable.

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[14] See, *e. g.,* Brief for Petitioner in No. 00–809, p. 12 ("FERC . . . held itself powerless to address the vast majority of the problem"); *id.,* at 14 ("FERC determined, however, that it did not have authority to extend its functional unbundling remedy to transmissions for bundled retail sales"); *id.,* at 18 ("FERC's decision that it did not have jurisdiction to apply [an open access transmission tariff] to transmissions for bundled retail sales was contrary to law"); *id.*, at 20 ("[FERC found] no jurisdiction when the cost of the transmission is bundled with the cost of power at retail").

Surprisingly, FERC seemed to agree with Enron's characterization of its holding at some places in its own brief. *E. g.,* Brief for Respondent FERC 44–45 ("The Commission reasonably concluded that *Congress has not authorized* federal regulation of the transmission component of bundled retail sales of electric energy" (emphasis added)). Yet, FERC's brief also stated more accurately that FERC had decided not to assert jurisdiction, rather than concluded that it lacked the power to do so. *E. g., id.*, at 15 ("[FERC] was not asserting jurisdiction to order utilities to unbundle their retail services . . ."); *id.,* at 49 (citing "the Commission's reasonable decision not to override the States' historical regulation of transmission that is bundled with a retail sale of energy").

As noted above, in both Order No. 888 and rehearing Order No. 888–A, FERC gave two reasons for refusing to extend its open access remedy to bundled retail transmissions. First, FERC explained that such relief was not "necessary." Order No. 888, at 31,699; see also Order No. 888–A, at 30,225. Second, FERC noted that the regulation of bundled retail transmissions "raises numerous difficult jurisdictional issues" that did not need to be resolved in the present context. Order No. 888, at 31,699; see also Order No. 888–A, at 30,225–30,226. Both of these reasons provide valid support for FERC's decision not to regulate bundled retail transmissions.

First, with respect to FERC's determination that it was not "necessary" to include bundled retail transmissions in its remedy, it must be kept in mind exactly what it was that FERC sought to remedy in the first place: a problem with the *wholesale* power market. FERC's findings, as Enron itself recognizes, concerned electric utilities' use of their market power to "'deny their *wholesale* customers access to competitively priced electric generation,'" thereby "'deny-[ing] consumers the substantial benefits of lower electricity prices.'" Brief for Petitioner in No. 00–809, pp. 12–13 (quoting NPRM 33,052) (emphasis added). The title of Order No. 888 confirms FERC's focus: "Promoting *Wholesale Competition* Through Open Access Non-Discriminatory Transmission Services . . . ." Order No. 888, at 31,632 (emphasis added). Indeed, FERC has, from the outset, identified its goal as "facilitat[ing] competitive *wholesale* electric power markets." NPRM 33,049 (emphasis added).

To remedy the wholesale discrimination it found, FERC chose to regulate all wholesale transmissions. It also regulated unbundled retail transmissions, as was within its power to do. See Part III, *supra.* However, merely because FERC believed that those steps were appropriate to remedy discrimination in the wholesale electricity market does not, as Enron alleges, lead to the conclusion that the regulation

of *bundled* retail transmissions was "necessary" as well. Because FERC determined that the remedy it ordered constituted a sufficient response to the problems FERC had identified in the wholesale market, FERC had no § 206 obligation to regulate bundled retail transmissions or to order universal unbundling.[15]

Of course, it may be true that FERC's findings concerning discrimination in the wholesale electricity market suggest that such discrimination exists in the retail electricity market as well, as Enron alleges. Were FERC to investigate this alleged discrimination and make findings concerning undue discrimination in the retail electricity market, § 206 of the FPA would require FERC to provide a remedy for that discrimination. See 16 U. S. C. § 824e(a) (upon a finding of undue discrimination, "the Commission shall determine the just and reasonable . . . regulation, practice, or contract . . . and shall fix the same by order"). And such a remedy could very well involve FERC's decision to regulate bundled retail transmissions—Enron's desired outcome. However, because the scope of the order presently under review did not concern discrimination in the retail market, Enron is wrong to argue that § 206 requires FERC to provide a full array of retail-market remedies.

Second, we can agree with FERC's conclusion that Enron's desired remedy "raises numerous difficult jurisdictional issues," Order No. 888, at 31,699, without deciding whether Enron's ultimate position on those issues is correct. The issues raised by New York concerning FERC's jurisdiction over unbundled retail transmissions are themselves serious.

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[15] Indeed, given FERC's acknowledgment "that recovery of legitimate stranded costs is critical to the successful transition of the electric utility industry from a tightly regulated, cost-of-service utility industry to an open access, competitively priced power industry," NPRM 33,052, it was appropriate for FERC to confine the scope of its remedy to what was truly "necessary": the broader the remedy, the more complicated FERC's already challenging goal of permitting utilities to recover stranded costs.

See Part III, *supra.* It is obvious that a federal order claiming jurisdiction over *all* retail transmissions would have even greater implications for the States' regulation of retail sales—a state regulatory power recognized by the same statutory provision that authorizes FERC's transmission jurisdiction. See 16 U. S. C. § 824(b) (giving FERC jurisdiction over "transmission of electric energy," but recognizing state jurisdiction over "any . . . sale of electric energy" other than "sale of electric energy at wholesale"). But even if we assume, for present purposes, that Enron is *correct* in its claim that the FPA gives FERC the authority to regulate the transmission component of a bundled retail sale, we nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues. Like the Court of Appeals, we are satisfied that FERC's choice not to assert jurisdiction over bundled retail transmissions in a rulemaking proceeding focusing on the wholesale market "represents a statutorily permissible policy choice." 225 F. 3d, at 694–695.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring in part and dissenting in part.

Today the Court finds that the Federal Energy Regulatory Commission (FERC or Commission) properly construed its statutory authority when it determined that: (1) it may require a utility that "unbundles" the cost of transmission from the cost of electric energy to transmit competitors' electricity over its lines on the same terms that the utility applies to its own energy transmissions; and (2) it need not impose that requirement on utilities that continue to offer only "bundled" retail sales. Under the Federal Power Act (FPA), 16

U. S. C. § 824 *et seq.*, FERC has jurisdiction over all interstate transmission, regardless of the type of transaction with which it is associated, and I concur in the Court's holding with respect to transmission used for unbundled retail sales and join Parts II and III of its opinion. I dissent, however, from the Court's resolution of the question concerning transmission used for bundled retail sales because I believe that the Court fails to properly assess both the Commission's jurisdictional analysis and its justification for excluding bundled retail transmission from the Open Access Transmission Tariff (OATT). FERC's explanations are inadequate and do not warrant our deference.

I

While the Court does not foreclose the possibility that FERC's jurisdiction extends to transmission associated with bundled retail sales, the Court defers to FERC's decision not to apply the OATT to such transmission on the ground that the Commission made a permissible policy choice, *ante*, at 28 (quoting *Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667, 694–695 (CADC 2000)), and by reference to FERC's assertions that: (1) such relief was not "necessary," *ante*, at 26 (citing Order No. 888, FERC Stats. & Regs., Regs. Preambles, Jan. 1991–June 1996, ¶ 31,036, p. 31,699; Order No. 888–A, FERC Stats. & Regs., Regs. Preambles, July 1996–Dec. 2001, ¶ 31,048, p. 30,225); and (2) "the regulation of bundled retail transmissions 'raises numerous difficult jurisdictional issues' that did not need to be resolved in the present context." *Ante*, at 26 (citing Order No. 888, at 31,699; Order No. 888–A, at 30,225–30,226). The Court concludes that both reasons "provide valid support for FERC's decision not to regulate bundled retail transmissions." *Ante*, at 26.[1]

[1] I note that the "reasons" upon which the Court relies were made only in the specific context of FERC's explanation of its decision not to unbundle retail transmission and distribution. Order No. 888, at 31,698–31,699. The comments were not given as a general explanation for FERC's

I disagree. The Court defers to the Court of Appeals' characterization of FERC's decision as a "policy choice," rather than to any such characterization made by FERC itself.[2] But a *post-hoc* rationalization offered by the Court of Appeals is an insufficient basis for deference. "[A]n agency's action must be upheld, if at all, *on the basis articulated by the agency itself.*" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983) (emphasis added).

Therefore, in order to properly assess FERC's decision not to apply the OATT to transmission connected to bundled retail sales, we must carefully evaluate the two justifications that the Court points to and relies on. Neither is sufficient. As I discuss below, FERC failed to explain why regulating such transmission is not "necessary," and FERC's inconclusive jurisdictional analysis does not provide a sound basis for our deference.

A

I cannot support the Court's reliance on FERC's explanation that "[a]lthough the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, we do not believe it is necessary." Order No. 888, at 31,699. Aside from this conclusory statement, FERC provides no explanation as to why such regulation is unnecessary and attaches no findings to support this single statement. As such, we

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decision not to apply the OATT to transmission associated with bundled retail sales, and FERC did not rely on the second explanation in Order No. 888–A. See *infra*, at 41.

[2] Specifically, the Court of Appeals stated that, in light of the fact that a regulator could reasonably construe the transmission component of bundled retail sales as either part of a retail sale or a transmission service in interstate commerce, "FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must also defer under *Chevron* [*U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984)]." 225 F. 3d 667, 694–695 (CADC 2000).

have no basis for determining whether FERC's decision is justified. A brief review of the electric industry, and the nature of transmission in particular, further calls into question both FERC's conclusory statement and its logical inference: That regulation of transmission is not necessary when used in connection with one type of transaction but is necessary when used for another.

An electric power system consists of three divisions: generation, transmission, and local distribution. Electricity is generated at power plants where "a fuel such as coal, gas, oil, uranium or hydro power is used to spin a turbine which turns a generator to generate electricity." Brief for Electrical Engineers et al. as *Amici Curiae* 12 (hereinafter Brief for Electrical Engineers). "[G]enerating stations continuously feed electric energy into a web of transmission lines (loosely referred to as 'the grid') at very high voltages." P. Fox-Penner, Electric Utility Restructuring: A Guide to the Competitive Era 5 (1997) (hereinafter Fox-Penner). The transmission lines in turn feed "*substations* (essentially transformers) that reduce voltage and spread the power from each transmission line to many successively smaller *distribution* lines, culminating at the retail user." *Id.*, at 23.[3]

Unlike the other electricity components—and with the exception of transmission in Alaska, Hawaii, and parts of Texas—transmission is inherently interstate.[4] It takes place over a network or grid, which consists of a configura-

[3] At the local distribution centers, "the power flow is split to send power to a number of primary feeder lines that lead to other transformers that again step down and feed the power to secondary service lines that in turn deliver the power to the utility's customers." Brief for Electrical Engineers 13.

[4] In the contiguous United States, this system is composed of three major grids: the Eastern Interconnection, the Western Interconnection, and the Texas Interconnection. Restructuring of the Electric Power Industry: A Capsule of Issues and Events, Energy Information Administration 6 (DOE/EIA–X037, Jan. 2000).

tion of interconnected transmission lines that cross state lines. Brief for Electrical Engineers 13. These lines are owned and operated by the Nation's larger utilities. No individual utility, however, has "'control over the actual transfers of electric power and energy with any particular electric system with which it is interconnected.'" *Id.*, at 15 (quoting *Florida Power & Light Co.*, 37 F. P. C. 544, 549 (1967)). Electricity flows at extremely high voltages across the network in uncontrollable ways and cannot be easily directed through a particular path from a specific generator to a consumer. Fox-Penner 26–27. The "[t]ransfer of electricity from one point to another will, to some extent, flow over all transmission lines in the interconnection, not just those in the direct path of the transfer." Van Nostrand's Scientific Encyclopedia 1096 (D. Considine ed., 8th ed. 1995). The energy flow depends on "where the load (demand for electricity) and generation are at any given moment, with the energy always following the path (or paths) of least resistance." Brief for Electrical Engineers 13. The paths, however, "change moment by moment." Fox-Penner 27. And "[t]rying to predict the flow of electrons is akin to putting a drop of ink into a water pipe flowing into a pool, and then trying to predict how the ink drop will diffuse into the pool, and which combination of outflow pipes will eventually contain ink." *Ibid.*

Nonetheless, buyers and sellers do negotiate particular contract paths, "route[s] *nominally* specified in an agreement to have electricity transmitted between two points." T. Brennan, Shock to the System 76 (1996) (emphasis added).[5]

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[5] FERC notes that whether transmission is in interstate commerce "does not turn on whether the contract path for a particular power or transmission sale crosses state lines, but rather follows the physical flow of electricity." Order No. 888, Appendix G, at 31,968. FERC states that "[b]ecause of the highly integrated nature of the electric system, this results in most transmission of electric energy being 'in interstate commerce.'" *Ibid.*

In practice, however, it is quite possible that most of the power will never flow over the negotiated transmission lines. The transactional arrangements, therefore, bear little resemblance to the physical behavior of electricity transmitted on a power grid and, as such, it is impossible for either a utility or FERC to isolate or distinguish between the transmission used for bundled or unbundled wholesale or retail sales.

Given that it is impossible to identify which utility's lines are used for any given transmission, FERC's decision to exclude transmission because it is associated with a particular type of transaction appears to make little sense. And this decision may conflict with FERC's statutory mandate to regulate when it finds unjust, unreasonable, unduly discriminatory, or preferential treatment with respect to any transmission subject to its jurisdiction. See 16 U. S. C. §§ 824d, 824e.[6] FERC clearly recognizes the statute's mandate, stating in Order No. 888–A that "our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, as necessary to eliminate undue discrimination and protect electric-

[6] Section 824d(b), for example, provides:

"No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Section 824e(a) further provides that whenever FERC, after conducting a hearing, finds that "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, *the Commission shall determine* the just and reasonable rate, charge, classification, . . . practice, or contract to be thereafter observed and in force, and shall fix the same by order." (Emphasis added.)

ity customers." Order No. 888–A, at 30,176.[7] And it is certainly possible that utilities that own or control lines on the grid discriminate against entities that seek to use their transmission lines regardless of whether the utilities themselves bundle or unbundle their transactions.[8] The fact that FERC found undue discrimination with respect to transmission used in connection with both bundled and unbundled wholesale sales and unbundled retail sales indicates that such discrimination exists regardless of whether the transmission is used in bundled or unbundled sales. Without more, FERC's conclusory statement that "unbundling of retail transmission" is not "necessary" lends little support to its decision not to regulate such transmission. And it sim-

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[7] FERC likewise states in Order No. 888, at 31,634, that the "legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce." FERC also recognized that to comply with the statute's mandate, it "must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others." *Id.*, at 31,635.

[8] For example, the Electric Power Supply Association explains that transmission owning utilities may discriminate against entities that seek to use their transmission systems, thereby preventing the entities from using their lines, in the following ways: (1) They may block available transfer capacity—the capability of the physical transmission network to facilitate activity over and above its committed uses—by overscheduling transmission for their own retail loads across "valuable" transmission paths; (2) they may improperly avoid certain costs that other entities would be subject to; or (3) they may fail to make accurate disclosure of available transfer capability, causing "serious difficulties for suppliers attempting to schedule electricity sales across their transmission facilities." Brief for Respondent Electric Power Supply Association 7–9. Similarly, petitioner Enron explains that a "utility can reserve superior transmission capacity for its own bundled retail sales, at times even closing its facilities to other transmissions . . . forcing competitors of the utility to scramble for less direct, less predictable and more expensive transmission options." Brief for Petitioner in No. 00–809, pp. 41–42.

ply cannot be the case that the nature of the commercial transaction controls the scope of FERC's jurisdiction.

To be sure, I would not prejudge whether FERC *must* require that transmission used for bundled retail sales be subject to FERC's open access tariff. At a minimum, however, FERC should have determined whether regulating transmission used in connection with bundled retail sales was in fact "necessary to eliminate undue discrimination and protect electricity customers." *Ibid.* FERC's conclusory statement instills little confidence that it either made this determination or that it complied with the unambiguous dictates of the statute. While the Court essentially ignores the statute's mandatory prescription by approving of FERC's decision as a permissible "policy choice," the FPA simply does not give FERC discretion to base its decision not to remedy undue discrimination on a "policy choice."

The Court itself struggles to find support for FERC's conclusion that it was not "necessary" to regulate bundled retail transmission in order to remedy discrimination. First, the Court points to the fact that FERC's findings concerned electric utilities' use of their market power to "'deny their *wholesale* customers access to competitively priced electric generation,' thereby 'deny[ing] consumers the substantial benefits of lower electricity prices.'" *Ante*, at 26 (quoting Brief for Petitioner in No. 00–809, pp. 12–13). Second, the Court notes that the title of Order No. 888 confirms FERC's focus because it references promoting wholesale competition. *Ante*, at 26. Finally, the Court relies on the fact that FERC has identified its goal as "'facilitat[ing] competitive *wholesale* electric power markets.'" *Ibid.* (quoting Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs., 1988–1999, ¶ 32,514, p. 33,049; 60 Fed. Reg. 17662).

I fail to understand how these statements support FERC's determination that it was not "necessary" to regulate bundled retail transmission. Utilities that bundle may use their market power to discriminate against those seeking access

to the lines in connection with *either* retail or wholesale sales. It is certainly possible, perhaps even likely, that the only way to remedy undue discrimination and ensure open access to transmission services is to regulate *all* utilities that operate transmission facilities, and not just those that use their own lines for the purpose of wholesale sales or in connection with unbundled retail transactions. FERC does not suggest that the only entities that engage in discriminatory behavior are those that use their transmission facilities for wholesale sales or unbundled retail sales. And relying on FERC's reference to wholesale markets makes little sense when FERC regulates transmission connected to retail sales so long as the transmission is in a State that unbundles retail sales or where the utility voluntarily unbundles. See *infra*, at 41–42.

"We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . ." *Motor Vehicle Mfrs. Assn.*, 463 U. S., at 48. Here, FERC's failure to do so prevents us from evaluating whether or not the agency engaged in reasoned decisionmaking when it determined that it was not "necessary" to regulate bundled retail transmission.

B

The Court also relies on FERC's explanation that the prospect of unbundling retail transmission and generation "raises numerous difficult jurisdictional issues that we believe are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before us in the context of a state retail wheeling program." Order No. 888, at 31,699. The Court provides the following explanation for its decision to rely on this statement:

> "But even if we assume, for present purposes, that Enron is *correct* in its claim that the FPA gives FERC the authority to regulate the transmission component of

> a bundled retail sale, we nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues." *Ante*, at 28.

This explanation is wholly unsatisfying, both because the Court's reliance on FERC's statement fails to take into account the unambiguous language of the statute and because FERC has given various inconsistent explanations of its jurisdiction.

1

FERC's statement implies that its decision not to regulate was based, at least in part, both on a determination that the statute is ambiguous and on a determination that certain interstate transmission may fall outside of its jurisdiction. The FPA, however, unambiguously grants FERC jurisdiction over the interstate transmission of electric energy in interstate commerce. 16 U. S. C. § 824(b)(1). As the Court notes, "[t]here is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market." *Ante*, at 17. The Court correctly recognizes that "the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer." *Ante*, at 20.

Similarly, although FERC draws a jurisdictional line between transmission used in connection with bundled and unbundled retail sales, the statute makes no such distinction. The terms "bundled" and "unbundled" are not found in the statute.[9] The only jurisdictional line that the statute draws with regard to transmission is between interstate and intrastate. See § 824(b)(1). Congress does not qualify its grant

[9] The difference between the two types of sales is that with an unbundled retail sale, a utility, either voluntarily or pursuant to state law, presents separate charges for the electricity, the transmission service, and the delivery service. In a bundled sale, all components are combined as one charge. See Brief for Petitioner in No. 00–809, at 4–5.

to FERC of jurisdiction over interstate transmission. Nor does the Court explain how the statute grants FERC jurisdiction over unbundled retail transmission, yet is ambiguous with respect to the question of bundled retail transmission.

Even if I agreed that the statute is ambiguous, FERC did not purport to resolve an ambiguity in the passage upon which the Court relies. Instead, FERC *refused to resolve* what it considered to be a statutory ambiguity, in part because it determined that resolving this question was too difficult. Thus, while under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984), the Court will defer to an agency's reasonable *interpretation* of an ambiguous statute, this passage does not provide an interpretation to which the Court can defer.

2

FERC does provide more explicit interpretations of its jurisdiction elsewhere. It is difficult, however, to isolate FERC's position on this matter because FERC presents different interpretations in its orders, its brief, and at oral argument. At certain points, FERC affirmatively states that it lacks jurisdiction to regulate this transmission; at other times, FERC is noncommittal. The Court's heavy reliance on *one* statement, therefore, is misplaced. And while the Court recognizes in a footnote that FERC made conflicting representations, see *ante*, at 25, n. 14, in deciding to defer to the agency the Court fails to place any weight on the fact that the agency presented inconsistent positions. See *United States* v. *Mead Corp.*, 533 U. S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . ."). These inconsistencies alone, however, convince me that the Court should neither defer to the aforementioned statement of FERC's

jurisdiction nor rely on any other explanation provided by FERC.

For example, in its brief FERC argues that because the statute is ambiguous, the Court of Appeals properly deferred under *Chevron* to FERC's reasonable decision not to regulate. Brief for Respondent FERC 49. FERC then contends that it made a reasonable finding that it *lacked* jurisdiction over the transmission component of bundled retail sales and that it was therefore not required to regulate the transmission component. *Id.*, at 49–50; see also *id.*, at 44 ("The Commission reasonably concluded that Congress has not authorized federal regulation of the transmission component of bundled retail sales of electric energy"). The brief also notes, however, that FERC *has* attempted to regulate transmission connected to retail bundled sales and maintains that it continues to believe that it has authority to require public utilities to treat customers of unbundled interstate transmission in a manner comparable to the treatment afforded bundled transmission users. *Id.*, at 48.[10]

At oral argument, FERC proposed a different explanation. It stated that the agency was not disclaiming its authority to order the unbundling of the transmission component of a

[10] FERC earlier rejected the proposed curtailment provisions of a public utility's federal OATT that favored the utility's bundled retail customers over its wholesale transmission customers. It asserted that, in compliance with Order No. 888 and in order to enforce the OATT, it could regulate transmission curtailment in a manner that had an indirect effect upon the utility's services to its retail customers. Brief for Respondent FERC 48; see *Northern States Power Co.* v. *FERC*, 176 F. 3d 1090, 1095 (CA8 1999). The United States Court of Appeals for the Eighth Circuit, noting that "FERC concede[d] that it has no jurisdiction whatsoever over the state's regulation of [the utility's] bundled retail sales activities," held that FERC exceeded its authority under the FPA. *Id.*, at 1096. While I do not endorse the court's conclusion with respect to FERC's jurisdiction, I note that the Court of Appeals pointed to the inconsistencies in FERC's position, explaining that "FERC's observation that no inherent conflict exists between its mandates and practical application is viewed through an adversarial bias." *Id.*, at 1094.

retail sale. Tr. of Oral Arg. 42–43. FERC explained that it lacks jurisdiction over the transmission "*as long as* the State hasn't unbundled [the retail sale], the utility has not unbundled it, and FERC has not exercised whatever authority it would have to unbundle it." *Id.*, at 50 (emphasis added).

FERC's orders present still more views of its jurisdiction. As already noted, when considering whether FERC should unbundle retail transmission and generation, FERC asserts that this particular question "raises numerous difficult jurisdictional issues" more appropriately considered at a later time. Order No. 888, at 31,699. FERC, at other points, however, makes clear its belief that there *is* a jurisdictional line between unbundled and bundled retail transmission. Explaining its "legal determination" that it has exclusive jurisdiction over unbundled retail transmission in interstate commerce, FERC notes that it found "compelling the fact that section 201 of the FPA, *on its face*, gives the Commission jurisdiction over transmission in interstate commerce (by public utilities) without qualification." *Id.*, at 31,781. Nonetheless, when addressing why "its authority attaches only to unbundled, but not bundled, retail transmission in interstate commerce," FERC affirmatively states that "we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail" and that "[u]nder the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales." *Ibid.*

By contrast, when the "retail transaction is broken into two products that are sold separately," FERC "believe[s] the jurisdictional lines change." *Ibid.* FERC explains:

> "In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Com-

> mission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation." *Ibid.*

FERC here concludes that the *act of unbundling itself* changes its jurisdictional lines. Unbundling, FERC notes, may occur in one of two ways: (1) voluntarily by a public utility or (2) as a result of a state retail access program that orders unbundling. *Ibid.* Either action brings the transmission within the scope of FERC's jurisdiction.

Subsequently, in Order No. 888–A, FERC responded to rehearing requests by supplanting its earlier conclusion that "the matter raises numerous difficult jurisdictional issues" with the explanation quoted above from Order No. 888, at 31,781. See Order No. 888–A, at 30,225. It is possible, therefore, that FERC abandoned its "difficult jurisdictional issues" explanation altogether. Thus, while it is true that FERC, at one point, evades the jurisdictional question by deeming it too "difficult" to resolve, more often than not FERC affirmatively concludes that it in fact does not have jurisdiction over the transmission at issue here. From this survey of FERC's positions, I can only conclude that the Court's singular reliance on the one statement is misguided.

3

Finally, to the extent that FERC has concluded that it *lacks* jurisdiction over transmission connected to bundled retail sales, it ignores the clear statutory mandate. By refusing to regulate the transmission associated with retail sales in States that have chosen not to unbundle retail sales, FERC has set up a system under which: (a) each State's internal policy decisions concerning whether to require unbundling controls the nature of federal jurisdiction; (b) a utility's voluntary decision to unbundle determines whether FERC has jurisdiction; and (c) utilities that are allowed to

continue bundling may discriminate against other companies attempting to use their transmission lines. The statute neither draws these distinctions nor provides that the jurisdictional lines shift based on actions taken by the States, the public utilities, or FERC itself. While Congress understood that transmission is a necessary component of all energy sales, it granted FERC jurisdiction over all interstate transmission, without qualification. As such, these distinctions belie the statutory text.

II

As the foregoing demonstrates, I disagree with the deference the Court gives to FERC's decision not to regulate transmission connected to bundled retail sales. Because the statute unambiguously grants FERC jurisdiction over all interstate transmission and § 824e mandates that FERC remedy undue discrimination with respect to all transmission within its jurisdiction, at a minimum the statute required FERC to consider whether there was discrimination in the marketplace warranting application of either the OATT or some other remedy.

I would not, as petitioner Enron requests, compel FERC to apply the OATT to bundled retail transmissions. I would vacate the Court of Appeals' judgment and require FERC on remand to engage in reasoned decisionmaking to determine whether there is undue discrimination with respect to transmission associated with retail bundled sales, and if so, what remedy is appropriate.

For all of these reasons, I respectfully dissent from Part IV of the Court's opinion.

Syllabus

YOUNG ET UX. *v.* UNITED STATES

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

No. 00–1567. Argued January 9, 2002—Decided March 4, 2002

If the Internal Revenue Service (IRS) has a claim for certain taxes for which the return was due within three years before the individual taxpayer files a bankruptcy petition, its claim enjoys eighth priority under 11 U. S. C. § 507(a)(8)(A)(i), and is nondischargeable in bankruptcy under § 523(a)(1)(A). The IRS assessed a tax liability against petitioners for their failure to include payment with their 1992 income tax return filed on October 15, 1993. On May 1, 1996, petitioners filed a Chapter 13 bankruptcy petition, which they moved to dismiss before a reorganization plan was approved. On March 12, 1997, the day before the Bankruptcy Court dismissed the Chapter 13 petition, petitioners filed a Chapter 7 petition. A discharge was granted, and the case was closed. When the IRS subsequently demanded that they pay the tax debt, petitioners asked the Bankruptcy Court to reopen the Chapter 7 case and declare the debt discharged under § 523(a)(1)(A), claiming that it fell outside § 507(a)(8)(A)(i)'s "three-year lookback period" because it pertained to a tax return due more than three years before their Chapter 7 filing. The court reopened the case, but sided with the IRS. Petitioners' tax return was due more than three years before their Chapter 7 filing but less than three years before their Chapter 13 filing. Holding that the "lookback period" is tolled during the pendency of a prior bankruptcy petition, the court concluded that the 1992 debt had not been discharged when petitioners were granted a discharge under Chapter 7. The District Court and the First Circuit agreed.

Held: Section 507(a)(8)(A)(i)'s lookback period is tolled during the pendency of a prior bankruptcy petition. Pp. 46–54.

(a) The lookback period is a limitations period subject to traditional equitable tolling principles. It prescribes a period in which certain rights may be enforced, encouraging the IRS to protect its rights before three years have elapsed. Thus, it serves the same basic policies furthered by all limitations periods: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U. S. 549, 555. The fact that the lookback commences on a date that may precede the date when the IRS discovers its claim does not make it a substantive component of the Bankruptcy Code as petitioners claim. Pp. 46–49.

(b) Congress is presumed to draft limitations periods in light of the principle that such periods are customarily subject to equitable tolling unless tolling would be inconsistent with statutory text. Tolling is appropriate here. Petitioners' Chapter 13 petition erected an automatic stay under § 362(a), which prevented the IRS from taking steps to collect the unpaid taxes. When petitioners later filed their Chapter 7 petition, the three-year lookback period therefore excluded time during which their Chapter 13 petition was pending. Because their 1992 tax return was due within that three-year period, the lower courts properly held that the tax debt was not discharged. Tolling is appropriate regardless of whether petitioners filed their Chapter 13 petition in good faith or solely to run down the lookback period. In either case, the IRS was disabled from protecting its claim. Pp. 49–51.

(c) The statutory provisions invoked by petitioners—§§ 523(b), 108(c), and 507(a)(8)(A)(ii)—do not display an intent to preclude tolling here. Pp. 51–53.

233 F. 3d 56, affirmed.

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

Grenville Clark III argued the cause and filed briefs for petitioners.

Patricia A. Millett argued the cause for the United States. With her on the briefs were *Solicitor General Olson*, *Assistant Attorney General O'Connor*, *Deputy Solicitor General Wallace*, *Bruce R. Ellisen*, and *Thomas J. Sawyer*.

JUSTICE SCALIA delivered the opinion of the Court.

A discharge under the Bankruptcy Code does not extinguish certain tax liabilities for which a return was due within three years before the filing of an individual debtor's petition. 11 U. S. C. §§ 523(a)(1)(A), 507(a)(8)(A)(i). We must decide whether this "three-year lookback period" is tolled during the pendency of a prior bankruptcy petition.

I

Petitioners Cornelius and Suzanne Young failed to include payment with their 1992 income tax return, due and filed on

October 15, 1993 (petitioners had obtained an extension of the April 15 deadline). About $15,000 was owing. The Internal Revenue Service (IRS) assessed the tax liability on January 3, 1994, and petitioners made modest monthly payments ($40 to $300) from April 1994 until November 1995. On May 1, 1996, they sought protection under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Hampshire. The bulk of their tax liability (about $13,000, including accrued interest) remained due. Before a reorganization plan was confirmed, however, the Youngs moved on October 23, 1996, to dismiss their Chapter 13 petition, pursuant to 11 U. S. C. § 1307(b). On March 12, 1997, one day before the Bankruptcy Court dismissed their Chapter 13 petition, the Youngs filed a new petition, this time under Chapter 7. This was a "no asset" petition, meaning that the Youngs had no assets available to satisfy unsecured creditors, including the IRS. A discharge was granted June 17, 1997; the case was closed September 22, 1997.

The IRS subsequently demanded payment of the 1992 tax debt. The Youngs refused and petitioned the Bankruptcy Court to reopen their Chapter 7 case and declare the debt discharged. In their view, the debt fell outside the Bankruptcy Code's "three-year lookback period," §§ 523(a)(1)(A), 507(a)(8)(A)(i), and had therefore been discharged, because it pertained to a tax return due on October 15, 1993, more than three years before their Chapter 7 filing on March 12, 1997. The Bankruptcy Court reopened the case but sided with the IRS. Although the Youngs' 1992 income tax return was due more than three years before they filed their Chapter 7 petition, it was due less than three years before they filed their Chapter 13 petition on May 1, 1996. Holding that the "three-year lookback period" is tolled during the pendency of a prior bankruptcy petition, the Bankruptcy Court concluded that the 1992 tax debt had not been discharged. The District Court for the District of New Hampshire and Court

of Appeals for the First Circuit agreed. 233 F. 3d 56 (2000). We granted certiorari. 533 U. S. 976 (2001).

II

Section 523(a) of the Bankruptcy Code excepts certain individual debts from discharge, including any tax "of the kind and for the periods specified in section . . . 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed." § 523(a)(1)(A). Section 507(a), in turn, describes the priority of certain claims in the distribution of the debtor's assets. Subsection 507(a)(8)(A)(i) gives eighth priority to "allowed unsecured claims of governmental units, only to the extent that such claims are for— . . . a tax on or measured by income or gross receipts— . . . *for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition* . . . ." (Emphasis added.) This is commonly known as the "three-year lookback period." If the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed, the claim enjoys eighth priority under § 507(a)(8)(A)(i) and is nondischargeable in bankruptcy under § 523(a)(1)(A).

The terms of the lookback period appear to create a loophole: Since the Code does not prohibit back-to-back Chapter 13 and Chapter 7 filings (as long as the debtor did not receive a discharge under Chapter 13, see §§ 727(a)(8), (9)), a debtor can render a tax debt dischargeable by first filing a Chapter 13 petition, then voluntarily dismissing the petition when the lookback period for the debt has lapsed, and finally refiling under Chapter 7. During the pendency of the Chapter 13 petition, the automatic stay of § 362(a) will prevent the IRS from taking steps to collect the unpaid taxes, and if the Chapter 7 petition is filed after the lookback period has expired, the taxes remaining due will be dischargeable. Peti-

tioners took advantage of this loophole, which, they believe, is permitted by the Bankruptcy Code.

We disagree. The three-year lookback period is a limitations period subject to traditional principles of equitable tolling. Since nothing in the Bankruptcy Code precludes equitable tolling of the lookback period, we believe the courts below properly excluded from the three-year limitation the period during which the Youngs' Chapter 13 petition was pending.

A

The lookback period is a limitations period because it prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced. 1 H. Wood, Limitations of Actions § 1, p. 1 (4th D. Moore ed. 1916). Old tax claims—those pertaining to returns due more than three years before the debtor filed the bankruptcy petition—become dischargeable, so that a bankruptcy decree will relieve the debtor of the obligation to pay. The period thus encourages the IRS to protect its rights—by, say, collecting the debt, 26 U. S. C. §§ 6501, 6502 (1994 ed. and Supp. V), or perfecting a tax lien, §§ 6322, 6323(a), (f) (1994 ed.)—before three years have elapsed. If the IRS sleeps on its rights, its claim loses priority and the debt becomes dischargeable. Thus, as petitioners concede, the lookback period serves the same "basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U. S. 549, 555 (2000). It is true that, unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies [1] for enforcing the claim (viz., priority and

[1] Equitable remedies may still be available. Traditionally, for example, a mortgagee could sue in equity to foreclose mortgaged property even though the underlying debt was time barred. *Hardin* v. *Boyd*, 113 U. S. 756, 765–766 (1885); 2 G. Glenn, Mortgages §§ 141–142, pp. 812–818 (1943); see also *Beach* v. *Ocwen Fed. Bank*, 523 U. S. 410, 415–416 (1998) (recoup-

nondischargeability in bankruptcy); that makes it a more limited statute of limitations, but a statute of limitations nonetheless.

Petitioners argue that the lookback period is a substantive component of the Bankruptcy Code, not a procedural limitations period. The lookback period commences on the date the return for the tax debt "is last due," § 507(a)(8)(A)(i), not on the date the IRS discovers or assesses the unpaid tax. Thus, the IRS may have less than three years to protect itself against the risk that a debt will become dischargeable in bankruptcy.

To illustrate, petitioners offer the following variation on this case: Suppose the Youngs filed their 1992 tax return on October 15, 1993, but had not received (as they received here) an extension of the April 15, 1993, due date. Assume the remaining facts of the case are unchanged: The IRS assessed the tax on January 3, 1994; petitioners filed a Chapter 13 petition on May 1, 1996; that petition was voluntarily dismissed and the Youngs filed a new petition under Chapter 7 on March 12, 1997. In this hypothetical, petitioners argue, their tax debt would have been dischargeable in the *first* petition under Chapter 13. Over three years would have elapsed between the due date of their return (April 15, 1993) and their Chapter 13 petition (May 1, 1996). But the IRS—which may not have discovered the debt until petitioners filed a return on October 15, 1993—would have enjoyed less than three years to collect the debt or prevent the debt from becoming dischargeable in bankruptcy (by perfecting a tax lien). The Code even contemplates this possibility, petitioners believe. Section 523(a)(1)(B)(ii) renders a tax debt nondischargeable if it arises from an untimely return filed within *two years* before a bankruptcy petition. Thus, if petitioners had filed their return on April 30, 1994 (more than two years before their Chapter 13 petition), and if the IRS had been

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ment is available after a limitations period has lapsed); *United States* v. *Dalm*, 494 U. S. 596, 611 (1990) (same).

unaware of the debt until the return was filed, the IRS would have had only *two years* to act before the debt became dischargeable in bankruptcy. For these reasons, petitioners believe the lookback period is not a limitations period, but rather a *definition* of dischargeable taxes.

We disagree. In the sense in which petitioners use the term, *all* limitations periods are "substantive": They *define* a subset of claims eligible for certain remedies. And the lookback is not distinctively "substantive" merely because it commences on a date that may precede the date when the IRS discovers its claim. There is nothing unusual about a statute of limitations that commences when the claimant has a complete and present cause of action, whether or not he is aware of it. See 1 C. Corman, Limitation of Actions § 6.1, pp. 370, 378 (1991); 2 Wood, *supra,* § 276c(1), at 1411. As for petitioners' reliance on § 523(a)(1)(B)(ii), that section proves, at most, that Congress put different limitations periods on different kinds of tax debts. All tax debts falling within the terms of the three-year lookback period are nondischargeable in bankruptcy. §§ 523(a)(1)(A), 507(a)(8)(A)(i). Even if a tax debt falls outside the terms of the lookback period, it is nonetheless nondischargeable if it pertains to an untimely return filed within two years before the bankruptcy petition. § 523(a)(1)(B)(ii). These provisions are complementary; they do not suggest that the lookback period is something other than a limitations period.

B

It is hornbook law that limitations periods are "customarily subject to 'equitable tolling,'" *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 95 (1990), unless tolling would be "inconsistent with the text of the relevant statute," *United States* v. *Beggerly,* 524 U. S. 38, 48 (1998). See also *American Pipe & Constr. Co.* v. *Utah,* 414 U. S. 538, 558–559 (1974); *Holmberg* v. *Armbrecht,* 327 U. S. 392, 397 (1946); *Bailey* v. *Glover,* 21 Wall. 342, 349–350 (1875). Congress must be presumed to draft limitations periods in light of this back-

ground principle. Cf. *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 589–590 (1995); *United States* v. *Shabani*, 513 U. S. 10, 13 (1994). That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and "appl[y] the principles and rules of equity jurisprudence." *Pepper* v. *Litton*, 308 U. S. 295, 304 (1939); see also *United States* v. *Energy Resources Co.*, 495 U. S. 545, 549 (1990).

This Court has permitted 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." *Irwin, supra*, at 96 (footnotes omitted). We have acknowledged, however, that tolling might be appropriate in other cases, see, *e. g.*, *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 151 (1984) *(per curiam)*, and this, we believe, is one. Cf. *Amy* v. *Watertown (No. 2)*, 130 U. S. 320, 325–326 (1889); 3 J. Story, Equity Jurisprudence § 1974, pp. 558–559 (14th W. Lyon ed. 1918). The Youngs' Chapter 13 petition erected an automatic stay under § 362, which prevented the IRS from taking steps to protect its claim. When the Youngs filed a petition under Chapter 7, the three-year lookback period therefore excluded time during which their Chapter 13 petition was pending. The Youngs' 1992 tax return was due within that three-year period. Hence the lower courts properly held that the tax debt was not discharged when the Youngs were granted a discharge under Chapter 7.

Tolling is in our view appropriate regardless of petitioners' intentions when filing back-to-back Chapter 13 and Chapter 7 petitions—whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period. In either case, the IRS was disabled from protecting its claim during the pendency of the Chapter 13 petition, and this pe-

riod of disability tolled the three-year lookback period when the Youngs filed their Chapter 7 petition.

C

Petitioners invoke several statutory provisions which they claim display an intent to preclude tolling here. First they point to § 523(b), which, they believe, explicitly permits discharge in a Chapter 7 proceeding of certain debts that were nondischargeable (as this tax debt was) in a prior Chapter 13 proceeding. Petitioners misread the provision. Section 523(b) declares that

> "a debt that was *excepted from discharge* under subsection (a)(1), (a)(3), or (a)(8) of this section . . . in a prior case concerning the debtor . . . is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title." (Emphasis added.)

The phrase "excepted from discharge" in this provision is not synonymous (as petitioners would have it) with "nondischargeable." It envisions a prior bankruptcy proceeding that progressed *to the discharge stage*, from which discharge a particular debt was actually "excepted." It thus has no application to the present case; and even if it did, the very same arguments in favor of tolling that we have found persuasive with regard to § 507 would apply to § 523 as well. One might perhaps have expected an explicit tolling provision in § 523(b) if that subsection applied *only* to those debts "excepted from discharge" in the earlier proceeding that were subject to the three-year lookback—but in fact it also applies to excepted debts (see § 523(a)(3)) that were subject to no limitations period. And even the need for tolling as to debts that *were* subject to the three-year lookback is minimal, since a separate provision of the Code, § 727(a)(9), constrains successive discharges under Chapters 13 and 7: Generally speaking, six years must elapse between filing of the

two bankruptcy petitions, which would make the need for tolling of the three-year limitation nonexistent. The absence of an explicit tolling provision in § 523 therefore suggests nothing.

Petitioners point to two provisions of the Code, which, in their view, do contain a tolling provision. Its presence there, and its absence in § 507, they argue, displays an intent to preclude equitable tolling of the lookback period. We disagree. Petitioners point first to § 108(c), which reads:

> "Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . , and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay . . . with respect to such claim."

Petitioners believe § 108(c)(1) contains a tolling provision. The lower courts have split over this issue, compare, *e. g.*, *Rogers* v. *Corrosion Products, Inc.*, 42 F. 3d 292, 297 (CA5), cert. denied, 515 U. S. 1160 (1995), with *Garbe Iron Works, Inc.* v. *Priester*, 99 Ill. 2d 84, 457 N. E. 2d 422 (1983); we need not resolve it here. Even assuming petitioners are correct, we would draw no negative inference from the presence of an express tolling provision in § 108(c)(1) and the absence of one in § 507. It would be quite reasonable for Congress to instruct *nonbankruptcy* courts (including state courts) to toll *nonbankruptcy* limitations periods (including state-law limitations periods) while, at the same time, assuming that bankruptcy courts will use their inherent equitable powers to toll the federal limitations periods within the Code.

Finally, petitioners point to a tolling provision in § 507(a)(8)(A), the same subsection that sets forth the three-year lookback period. Subsection 507(a)(8)(A) grants eighth priority to tax claims pertaining to returns that were *due* within the three-year lookback period, § 507(a)(8)(A)(i), and to claims that were *assessed* within 240 days before the debtor's bankruptcy petition, § 507(a)(8)(A)(ii). Whereas the three-year lookback period contains no express tolling provision, the 240-day lookback period is tolled "any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending." § 507(a)(8)(A)(ii). Petitioners believe this express tolling provision, appearing in the same subsection as the three-year lookback period, demonstrates a statutory intent *not* to toll the three-year lookback period.

If anything, § 507(a)(8)(A)(ii) demonstrates that the Bankruptcy Code *incorporates* traditional equitable principles. An "offer in compromise" is a settlement offer submitted by a debtor. When § 507(a)(8)(A)(ii) was enacted, it was IRS practice—though no statutory provision required it—to stay collection efforts (if the Government's interests would not be jeopardized) during the pendency of an "offer in compromise," 26 CFR § 301.7122–1(d)(2) (1978); M. Saltzman, IRS Practice and Procedure ¶ 15.07[1], p. 15–47 (1981).[2] Thus, a court would not have equitably tolled the 240-day lookback period during the pendency of an "offer in compromise," since tolling is inappropriate when a claimant has voluntarily chosen not to protect his rights within the limitations period. See, *e. g.*, *Irwin*, 498 U. S., at 96. Hence the tolling provision in § 507(a)(8)(A)(ii) *supplements* rather than displaces principles of equitable tolling.

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[2] The Code was amended in 1998 to prohibit collection efforts during the pendency of an offer in compromise. See 26 U. S. C. § 6331(k) (1994 ed., Supp. V).

* * *

We conclude that the lookback period of 11 U. S. C. § 507(a)(8)(A)(i) is tolled during the pendency of a prior bankruptcy petition. The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

Syllabus

UNITED STATES *v.* VONN

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

No. 00–973. Argued November 6, 2001—Decided March 4, 2002

Federal Rule of Criminal Procedure 11 lays out steps that a judge must take to ensure that a guilty plea is knowing and voluntary. Rule 11(h)'s requirement that any variance from those procedures "which does not affect substantial rights shall be disregarded" is similar to the general "harmless-error" rule in Rule 52(a). However, Rule 11(h) does not include a plain-error provision comparable to Rule 52(b), which provides that a defendant who fails to object to trial error may nonetheless have a conviction reversed by showing among other things that plain error affected his substantial rights. After respondent Vonn was charged with federal bank robbery and firearm crimes, the Magistrate Judge twice advised him of his constitutional rights, including the right to be represented by counsel at every stage of the proceedings; Vonn signed a statement saying that he had read and understood his rights; and he answered yes to the court's questions whether he had understood the court's explanation of his rights and whether he had read and signed the statement. When Vonn later pleaded guilty to robbery, the court advised him of the constitutional rights he was relinquishing, but skipped the advice required by Rule (11)(c)(3) that he would have the right to assistance of counsel at trial. Subsequently, Vonn pleaded guilty to the firearm charge and to a later-charged conspiracy count. Again, the court advised him of the rights he was waiving, but did not mention the right to counsel. Eight months later, Vonn moved to withdraw his guilty plea on the firearm charge but did not cite Rule 11 error. The court denied the motion and sentenced him. On appeal, he sought to set aside all of his convictions, for the first time raising Rule 11. The Ninth Circuit agreed that there had been error and held that Vonn's failure to object before the District Court to the Rule 11 omission was of no import because Rule 11(h) subjects all Rule 11 violations to harmless-error review. Declining to go beyond the plea proceeding in considering whether Vonn was aware of his rights, the court held that the Government had not met its burden, under harmless-error review, of showing no effect on substantial rights, and vacated the convictions.

Held:

1. A defendant who lets Rule 11 error pass without objection in the trial court must satisfy Rule 52(b)'s plain-error rule. Pp. 62–74.

Syllabus

(a) Relying on the canon that expressing one item of a commonly associated group or series excludes another left unmentioned, Vonn claims that Rule 11(h)'s specification of harmless-error review shows an intent to exclude the plain-error standard with which harmless error is paired in Rule 52. However, this canon is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives. Here, the harmless- and plain-error alternatives are associated together in Rule 52, having apparently equal dignity with Rule 11(h), and applying by its terms to error in the application of any other Rule of Criminal Procedure. To hold that Rule 11(h)'s terms imply that the latter half of Rule 52 has no application to Rule 11 errors would amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1017, as to require strong support. Support, however, is not readily found, for Vonn has merely selected one possible interpretation of the supposedly intentional omission of a Rule 52(b) counterpart while logic would equally allow a reading that, without a plain-error rule, a silent defendant has no right of review on direct appeal. Pp. 63–66.

(b) Vonn attempts to find support for his reading by pointing beyond the Rule's text to *McCarthy* v. *United States*, 394 U. S. 459—which was decided when Rule 11 was relatively primitive—and the developments in that case's wake culminating in Rule 11(h)'s enactment. One clearly expressed Rule 11(h) objective was to end the practice of reversing automatically for any Rule 11 error, a practice stemming from reading *McCarthy* expansively to require that Rule 52(a)'s harmless-error provision could not be applied in Rule 11 cases. However, *McCarthy* had nothing to do with the choice between harmless-error and plain-error review. Nor is there any persuasive reason to think that when the Advisory Committee and Congress considered Rule 11(h) they accepted the view Vonn erroneously attributes to this Court in *McCarthy.* The Advisory Committee focused on the disarray, after *McCarthy*, among Courts of Appeals in treating trivial errors. The cases cited in the Committee's Notes cannot reliably be read to suggest that plain-error review should never apply to Rule 11 errors, when the Notes never made such an assertion and the cases never mentioned the plain-error/harmless-error distinction. Rather, the Committee should be taken at its word that the harmless-error provision was added because some courts read *McCarthy* to require that Rule 52(a)'s general harmless-error provision did not apply to Rule 11 proceedings. The Committee implied nothing more than it said, and it certainly did not implicitly repeal Rule 52(b) so far as it might cover a Rule 11 case. Pp. 66–71.

Syllabus

(c) Vonn's position would also have a tendency to undercut the object of Rule 32(e), which governs guilty plea withdrawal by creating an incentive to file withdrawal motions before sentence, not afterward. This tends to separate meritorious second thoughts and mere sour grapes over a sentence once pronounced. But the incentive to think and act early when Rule 11 is at stake would prove less substantial if a defendant could be silent until direct appeal, when the Government would always have the burden to prove harmlessness. Pp. 72–74.

2. A reviewing court may consult the whole record when considering the effect of any Rule 11 error on substantial rights. The Advisory Committee intended the error's effect to be assessed on an existing record, but it did not mean to limit that record strictly to the plea proceeding, as the Ninth Circuit did here. *McCarthy* ostensibly supports that court's position; but it was decided before Rule 11(h) was enacted, and it was not a case with a record on point. Here, in addition to the transcript of the plea hearing and Rule 11 colloquy, the record shows that Vonn was advised of his right to trial counsel during his initial appearance and twice at his first arraignment, and that four times either he or his counsel affirmed that he had heard or read a statement of his rights and understood them. Because there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceeding, cf. *Bousley* v. *United States*, 523 U. S. 614, 618, the record of Vonn's initial appearance and arraignments is relevant in fact and well within the Advisory Committee's understanding of the record that should be open to consideration. Since the transcripts of Vonn's first appearance and arraignment were not presented to the Ninth Circuit, this Court should not resolve their bearing on his claim before the Ninth Circuit has done so. Pp. 74–76.

224 F. 3d 1152, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, Part III of which was unanimous, and Parts I and II of which were joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 76.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Olson*, *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Keeney*, *Paul R. Q. Wolfson*, and *Joel M. Gershowitz*.

Monica Knox argued the cause for respondent. With her on the brief was *Maria E. Stratton.**

JUSTICE SOUTER delivered the opinion of the Court.

The Government avoids reversal of a criminal conviction by showing that trial error, albeit raised by a timely objection, affected no substantial right of the defendant and was thus harmless. Fed. Rule Crim. Proc. 52(a). A defendant who failed to object to trial error may nonetheless obtain reversal of a conviction by carrying the converse burden, showing among other things that plain error did affect his substantial rights. Fed. Rule Crim. Proc. 52(b).

Rule 11(h) of the Federal Rules of Criminal Procedure is a separate harmless-error rule applying only to errors committed under Rule 11, the rule meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea. Like Rule 52(a), it provides that a failure to comply with Rule 11 that "does not affect substantial rights shall be disregarded." Rule 11(h) does not include a plain-error provision comparable to Rule 52(b).

The first question here is whether a defendant who lets Rule 11 error pass without objection in the trial court must carry the burdens of Rule 52(b) or whether even the silent defendant can put the Government to the burden of proving the Rule 11 error harmless.[1] The second question is

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**Saul M. Pilchen* and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

[1] This question is rightly before us even though the Government did not urge the Court of Appeals to adopt a plain-error standard. As the Court of Appeals recognized, 224 F. 3d 1152, 1155 (CA9 2000), this position was squarely barred by Circuit precedent holding that any Rule 11 error is subject to harmless-error review. *United States* v. *Odedo*, 154 F. 3d 937, 940 (CA9 1998). Although the Government did not challenge *Odedo* as controlling precedent, we have previously held that such a claim is preserved if made by the current litigant in "the recent proceeding upon

whether a court reviewing Rule 11 error under either standard is limited to examining the record of the colloquy between court and defendant when the guilty plea was entered, or may look to the entire record begun at the defendant's first appearance in the matter leading to his eventual plea.

We hold that a silent defendant has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights.

I

On February 28, 1997, respondent Alphonso Vonn was charged with armed bank robbery, under 18 U. S. C. §§ 2113(a) and (d), and using and carrying a firearm during and in relation to a crime of violence, under 18 U. S. C. § 924(c). Vonn appeared that day before a Magistrate Judge, who advised him of his constitutional rights, including "the right to retain and to be represented by an attorney of [his] own choosing at each and every sta[g]e of the proceedings." App. 15. Vonn said that he had heard and understood his rights, and the judge appointed counsel to represent him.

On March 17, 1997, three days after being indicted, Vonn, along with his appointed counsel, appeared in court for his arraignment. Again, the Magistrate Judge told Vonn about his rights, including the right to counsel at all stages of the proceedings. Vonn's counsel gave the court a form entitled "Statement of Defendant's Constitutional Rights," on which

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which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent." *United States* v. *Williams*, 504 U. S. 36, 44–45 (1992). Although there evidently was some confusion as to the Government's precise position in *Odedo*, presumably because the Government argued there, as here, that failure to raise a Rule 11 objection constitutes "waiver," the Court of Appeals understood the Government to contend that "forfeited error" is subject to plain-error review. That, coupled with the fact that the Government did not concede below that *Odedo* was correctly decided, is enough for us to take up this question.

Vonn said he understood his rights, including the right to counsel. His counsel signed a separate statement that he was satisfied that Vonn had read and understood the statement of his rights. The Clerk of Court then asked Vonn whether he had heard and understood the court's explanation of his rights, and whether he had read and signed the statement, and Vonn said yes to each question.

On May 12, 1997, Vonn came before the court and indicated that he would plead guilty to armed bank robbery but would go to trial on the firearm charge. The court then addressed him and, up to a point, followed Rule 11(c)(3) of the Federal Rules of Criminal Procedure. The judge advised Vonn of the constitutional rights he would relinquish by pleading guilty, but skipped the required advice that if Vonn were tried he would have "the right to the assistance of counsel."

Several months later, the stakes went up when the grand jury returned a superseding indictment, charging Vonn under an additional count of conspiracy to commit bank robbery. Although he first pleaded not guilty to this charge as well as the firearm count, at a hearing on September 3, 1997, Vonn said he intended to change both pleas to guilty. Again, the court advised Vonn of rights waived by guilty pleas, but failed to mention the right to counsel if he went to trial. This time, the prosecutor tried to draw the court's attention to its error, saying that she did not "remember hearing the Court inform the defendant of his right to assistance of counsel." *Id.*, at 61. The court, however, may have mistaken the remark as going to Rule 11(c)(2), and answered simply that Vonn was represented by counsel.[2]

Eight months later, Vonn moved to withdraw his guilty plea on the firearm charge. He did not, however, cite Rule 11 error but instead based his request on his own mistake

[2] Rule 11(c)(2) provides that "if the defendant is not represented by an attorney," the court must inform the defendant that he "has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent [him]."

about facts relevant to the charge. The court denied this motion, and on June 22, 1998, sentenced Vonn to 97 months in prison.

On appeal, Vonn sought to set aside not only the firearm conviction but the other two as well, for the first time making an issue of the District Judge's failure to advise him of his right to counsel at trial, as required by the Rule. The Court of Appeals agreed there had been error, and held that Vonn's failure to object before the District Court to its Rule 11 omission was of no import, since Rule 11(h) "supersedes the normal waiver rule," and subjects all Rule 11 violations to harmless-error review, 224 F. 3d 1152, 1155 (CA9 2000) (citing *United States* v. *Odedo*, 154 F. 3d 937 (CA9 1998)). The consequence was to put the Government to the burden of showing no effect on substantial rights.[3] The court declined to "go beyond the plea proceeding in considering whether the defendant was aware of his rights," and did not accept the record of Vonn's plea colloquies as evidence that Vonn was aware of his continuing right to counsel at trial. 224 F. 3d, at 1155. It held the Government had failed to shoulder its burden to show the error harmless and vacated Vonn's convictions.

We granted certiorari, 531 U. S. 1189 (2001), to resolve conflicts among the Circuits on the legitimacy of (1) placing the burden of plain error on a defendant appealing on the basis of Rule 11 error raised for the first time on appeal,[4] and (2) looking beyond the plea colloquy to other parts of the

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[3] As already noted, n. 1, *supra*, the Government in this case did not specifically argue that the plain-error rule, Rule 52(b), governs this case; that was its position in *Odedo*, 154 F. 3d, at 939, on which the Court of Appeals relied for authority here. Hence, the Court of Appeals in this case went no further than to reject the Government's waiver argument.

[4] Compare, *e. g.*, 224 F. 3d, at 1155 (case below); *United States* v. *Lyons*, 53 F. 3d 1321, 1322, n. 1 (CADC 1995), with *United States* v. *Gandia-Maysonet*, 227 F. 3d 1, 5–6 (CA1 2000); *United States* v. *Bashara*, 27 F. 3d 1174, 1178 (CA6 1994); *United States* v. *Cross*, 57 F. 3d 588, 590 (CA7 1995); and *United States* v. *Quinones*, 97 F. 3d 473, 475 (CA11 1996).

official record to see whether a defendant's substantial rights were affected by a deviation from Rule 11.[5] We think the Court of Appeals was mistaken on each issue, and vacate and remand.

II

Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant. The Rule has evolved over the course of 30 years from general scheme to detailed plan, which now includes a provision for dealing with a slip-up by the judge in applying the Rule itself. Subsection (h) reads that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The language comes close to tracking the text of Rule 52(a), providing generally for "harmless-error" review, that is, consideration of error raised by a defendant's timely objection, but subject to an opportunity on the Government's part to carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights. See Fed. Rule Crim. Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); *United States* v. *Olano*, 507 U. S. 725, 734 (1993).

Rule 52(a), however, has a companion in Rule 52(b), a "plain-error" rule covering issues not raised before the district court in a timely way: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." When an appellate court considers error that qualifies as plain, the tables are turned on demonstrating the substantiality of any effect on

[5] Compare, *e. g.*, 224 F. 3d, at 1155, with *United States* v. *Parkins*, 25 F. 3d 114, 118 (CA2 1994); *United States* v. *Johnson*, 1 F. 3d 296, 302 (CA5 1993); *United States* v. *Lovett*, 844 F. 2d 487, 492 (CA7 1988); *United States* v. *Jones*, 143 F. 3d 1417, 1420 (CA11 1998); and *Lyons*, *supra*, at 1322–1323.

a defendant's rights: the defendant who sat silent at trial has the burden to show that his "substantial rights" were affected. *Id.*, at 734–735. And because relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Id.*, at 736 (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)).

The question here is whether Congress's importation of the harmless-error standard into Rule 11(h) without its companion plain-error rule was meant to eliminate a silent defendant's burdens under the Rule 52(b) plain-error review, and instead give him a right to subject the Government to the burden of demonstrating harmlessness. If the answer is yes, a defendant loses nothing by failing to object to obvious Rule 11 error when it occurs. We think the answer is no.

A

Vonn's most obvious recourse is to argue from the text itself: Rule 11(h) unequivocally provides that a trial judge's "variance" from the letter of the Rule 11 scheme shall be disregarded if it does not affect substantial rights, the classic shorthand formulation of the harmless-error standard. It includes no exception for nonobjecting defendants.

Despite this unqualified simplicity, however, Vonn does not argue that Rule 11 error must always be reviewed on the 11(h) standard, with its burden on the Government to show an error harmless. Even though Rule 11(h) makes no distinction between direct and collateral review, Vonn does not claim even that the variant of harmless-error review applicable on collateral attack, see *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993), would apply when evaluating Rule 11 error on habeas review. Rather, he concedes that the adoption of 11(h) had no effect on the stringent standard for collateral review of Rule 11 error under 28 U. S. C. § 2255 (1994 ed.), as established by our holding in *United States* v. *Timmreck*,

441 U. S. 780 (1979), that a defendant cannot overturn a guilty plea on collateral review absent a showing that the Rule 11 proceeding was "'inconsistent with the rudimentary demands of fair procedure'" or constituted a "'complete miscarriage of justice,'" *id.*, at 783 (quoting *Hill* v. *United States*, 368 U. S. 424, 428 (1962)). The concession is prudent, for the Advisory Committee Notes explaining the adoption of Rule 11(h) speak to a clear intent to leave *Timmreck* undisturbed,[6] and there is no question of *Timmreck*'s validity in the aftermath of the 1983 amendments.

Whatever may be the significance of the text of Rule 11(h) for our issue, then, it cannot be as simple as the face of the provision itself. Indeed, the closest Vonn gets to a persuasive argument that Rule 11 excuses a silent defendant from the burdens of plain-error review is his invocation of the common interpretive canon for dealing with a salient omission from statutory text. He claims that the specification of harmless-error review in 11(h) shows an intent to exclude the standard with which harmless error is paired in Rule 52, the plain-error standard with its burdens on silent defendants. The congressional choice to express the one standard of review without its customary companion does not, however, speak with any clarity in Vonn's favor.

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[6] In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed. See *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153, 165–166, n. 9 (1988) (where "Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted"). Although the Notes are the product of the Advisory Committee, and not Congress, they are transmitted to Congress before the rule is enacted into law. See Amendments to Rules of Criminal Procedure, H. R. Doc. No. 98–55 (1983) (submitting to Congress amendments to the Federal Rules of Criminal Procedure, including the addition of Rule 11(h), accompanied by the report of the Judicial Conference containing the Advisory Committee Notes to the amendment).

At best, as we have said before, the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 703 (1991); cf. *Burns* v. *United States*, 501 U. S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent"). Here, the plausibility of an expression-exclusion reading of Rule 11(h) is subject to one strike without even considering what such a reading would mean in practice, or examining the circumstances of adopting 11(h). For here the harmless- and plain-error alternatives are associated together in the formally enacted Rule 52, having apparently equal dignity with Rule 11(h), and applying by its terms to error in the application of any other Rule of criminal procedure. To hold that the terms of Rule 11(h) imply that the latter half of Rule 52 has no application to Rule 11 errors would consequently amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1017 (1984), as to require strong support.

Support, however, is not readily found. In the first place, even if we indulge Vonn with the assumption that Congress meant to imply something by failing to pair a plain-error provision with the harmless-error statement in Rule 11(h), just what it would have meant is subject to argument. Vonn thinks the implication is that defendants who let Rule 11 error pass without objection are relieved of the burden on silent defendants generally under the plain-error rule, to show the error plain, prejudicial, and disreputable to the judicial system. But, of course, this is not the only "implication" consistent with Congress's choice to say nothing about Rule 11 plain error. It would be equally possible, as a mat-

ter of logic, to argue that if Rule 52(b) were implicitly made inapplicable to Rule 11 errors, a defendant who failed to object to Rule 11 errors would have no right of review on direct appeal whatever. A defendant's right to review of error he let pass in silence depends upon the plain-error rule; no plain-error rule, no direct review. Vonn has, then, merely selected one possible interpretation of the supposedly intentional omission of a Rule 52(b) counterpart, even though logic would equally allow another one, not to Vonn's liking.

B

Recognition of the equivocal character of any claimed implication of speaking solely in terms of harmless error forces Vonn to look beyond the text in hope of finding confirmation for his reading as opposed to the one less hospitable to silent defendants. And this effort leads him to claim support in *McCarthy* v. *United States*, 394 U. S. 459 (1969), and the developments in the wake of that case culminating in the enactment of Rule 11(h). This approach, at least, gets us on the right track, for the one clearly expressed objective of Rule 11(h) was to end the practice, then commonly followed, of reversing automatically for any Rule 11 error, and that practice stemmed from an expansive reading of *McCarthy.* What that case did, and did not, hold is therefore significant.

When *McCarthy* was decided, Rule 11 was relatively primitive, requiring without much detail that the trial court personally address a defendant proposing to plead guilty and establish on the record that he was acting voluntarily, with an understanding of the charge and upon a factual basis supporting conviction. *Id.*, at 462.[7] When McCarthy stood be-

[7] Prior to its amendment in 1975, Rule 11 provided, in relevant part:

"The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

fore the District Court to plead guilty to tax evasion, however, the judge's colloquy with him went no further than McCarthy's understanding of his right to a jury trial, the particular sentencing possibilities, and the absence of any threats or promises. There was no discussion of the elements of the crime charged, or the facts that might support it. Indeed, despite the allegation that McCarthy had acted "willfully and knowingly," his lawyer consistently argued at the sentencing hearing that his client had merely been neglectful, *ibid.* Although defense counsel raised no objection to the trial court's deficient practice under Rule 11, this Court reversed the conviction on direct review. The Court rested the result solely on the trial judge's obvious failure to conform to the Rule, *id.*, at 464, and emphasized that the Rule's procedural safeguards served important constitutional interests in guarding against inadvertent and ignorant waivers of constitutional rights, *id.*, at 465. Although the Government asked to have the case remanded for further evidentiary hearing and an opportunity to show that McCarthy's plea had been made knowingly and voluntarily, the Court said no and ordered the plea and resulting conviction vacated.

Vonn does not, of course, claim that *McCarthy* held that a silent defendant had no plain-error burden, but he says that this must have been the Court's understanding, or it would have taken McCarthy's failure to object to the trial judge's Rule 11 failings, combined with his failure to meet the requirements of the plain-error rule, as a bar to relief. This reasoning is unsound, however, for two reasons, the first being that not a word was said in *McCarthy* about the plain-error rule, or for that matter about harmless error. The opinion said nothing about Rule 52 or either of the rules by name. The parties' briefs said nothing. The only serious issue was raised by the Government's request to remand the case for a new evidentiary hearing on McCarthy's state of mind when he entered the plea, and not even this had any-

thing to do with either the harmless- or plain-error rule. Under the former, the Government's opportunity and burden is to show the error harmless based on the entire record before the reviewing court, see *United States* v. *Hasting*, 461 U. S. 499, 509, n. 7 (1983); under the plain-error rule the Government likewise points to parts of the record to counter any ostensible showing of prejudice the defendant may make, see *United States* v. *Young*, 470 U. S. 1, 16 (1985). Under either rule, the Government's opportunity is to persuade with what it has, not to initiate further litigation. Yet further litigation is what the Government wanted in *McCarthy*. It argued that if the Court did not think that the existing record demonstrated that McCarthy's plea had been knowing and voluntary, the Court should remand for a further hearing with new evidence affirmatively making this showing, 394 U. S., at 469. When the Court said no, it made no reference to harmless or plain error, but cited the object of Rule 11 to eliminate time-wasting litigation after the fact about how knowing and voluntary a defendant really had been at an earlier hearing. *Id.*, at 469–470. And it expressed intense skepticism that any defendant would succeed, no matter how little he understood, once the evidence at a subsequent hearing showed that he had desired to plead. *Id.*, at 469. In sum, *McCarthy* had nothing to do with the choice between harmless-error and plain-error review; the issue was simply whether the Government could extend the litigation for additional evidence.

Vonn's attempt to read the *McCarthy* Court's mind is therefore purely speculative. What is worse, however, his speculation is less plausible than the view that the Court would probably have held that McCarthy satisfied the plain-error burdens if that had mattered. There was no question that the trial judge had failed to observe Rule 11, and the failing was obvious. So was the prejudice to McCarthy. Having had no explanation from the judge of the knowing and willful state of mind charged as of the time of the tax

violation, he pleaded guilty and was later sentenced at a hearing in which his lawyer repeatedly represented that McCarthy had been guilty of nothing but sloppiness.[8] The contradiction between the plea and the denial of the mental state alleged bespoke the prejudice of an unknowing plea, to which the judge's indifference was an affront to the integrity of the judicial system. While we need not religitate or rewrite *McCarthy* at this point, it is safe to say that the actual opinion is not even speculative authority that the plain-error rule stops short of Rule 11 errors.

Nor is there any persuasive reason to think that when the Advisory Committee and Congress later came to consider Rule 11(h) they accepted the view Vonn erroneously attributes to this Court in *McCarthy.* The attention of the Advisory Committee to the problem of Rule 11 error was not drawn by *McCarthy* so much as by events that subsequently invested that case with a significance beyond its holding. In 1975, a few years after *McCarthy* came down, Congress transformed Rule 11 into a detailed formula for testing a defendant's readiness to proceed to enter a plea of guilty, obliging the judge to give specified advice about the charge, the applicable criminal statute, and even collateral law. The Court in *McCarthy* had, for example, been content to say that a defendant would need to know of the right against self-incrimination and rights to jury trial and confrontation before he could knowingly plead. But the 1975 revision of Rule 11 required instruction on such further matters as cross-examination in addition to confrontation, see Fed. Rule Crim. Proc. 11(c)(3); the right to counsel "at . . . trial" even when the defendant stood in court with a lawyer next to him (as in this case), see *ibid.;* and even the consequences of any

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[8] Nor did McCarthy claim that the guilty plea should be accepted on the *Alford* theory that a defendant may plead guilty while protesting innocence when he makes a conscious choice to plead simply to avoid the expenses or vicissitudes of trial. *North Carolina* v. *Alford,* 400 U. S. 25 (1970).

perjury the defendant might commit at the plea hearing, see Rule 11(c)(5).

Although the details newly required in Rule 11 colloquies did not necessarily equate to the importance of the overarching issues of knowledge and voluntariness already addressed in the earlier versions of the Rule, some Courts of Appeals felt bound to treat all Rule 11 lapses as equal and to read *McCarthy* as mandating automatic reversal for any one of them. See Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1568 (hereinafter Advisory Committee's Notes) (citing *United States* v. *Boone*, 543 F. 2d 1090 (CA4 1976); *United States* v. *Journet*, 544 F. 2d 633 (CA2 1976)). This approach imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified, and by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11. Advisory Committee's Notes 1568.

The Advisory Committee reasoned that, although a rule of *per se* reversal might have been justified at the time *McCarthy* was decided, "[a]n inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require." Advisory Committee's Notes 1568. After the amendments, "it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance." *Ibid.*

Vonn thinks the Advisory Committee's report also includes a signal that it meant to dispense with a silent defendant's plain-error burdens. He stresses that the report cited Courts of Appeals cases of "crabbed interpretation" that had given relief to nonobjecting defendants. By proposing only a harmless-error amendment to correct the mistakes made

in these cases, he says, the Committee must have thought that the Government's only answer to nonobjecting defendants should be to prove error harmless, if it could. But this argument ignores the fact that these cases were not merely instances of automatic reversal, but were cited along with harmless-error cases as illustrations of the "considerable disagreement" that arose after *McCarthy* among Courts of Appeals in treating errors of trivial significance. See Advisory Committee's Notes 1568. Given the Advisory Committee's apparent focus on the disarray among courts, the citations Vonn points to cannot reliably be read to suggest that plain-error review should never apply to Rule 11 errors, when the Advisory Committee Notes never made such an assertion and the reported cases cited by the Committee never mentioned the plain-error/harmless-error distinction.

We think, rather, that the significance of Congress's choice to adopt a harmless-error rule is best understood by taking the Advisory Committee at its word. "It must . . . be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings." *Id.*, at 1569. The Committee said it was responding simply to a claim that the harmless-error rule did not apply. Having pinpointed that problem, it gave a pinpoint answer. If instead the Committee had taken note of claims that "Rule 52" did not apply, or that "neither harmless-error nor plain-error rule applied," one could infer that enacting a harmless-error rule and nothing more was meant to rule out anything but harmless-error treatment. But by providing for harmless-error review in response to nothing more than the claim that harmless-error review would itself be erroneous, the Advisory Committee implied nothing more than it said, and it certainly did not implicitly repeal Rule 52(b) so far as it might cover a Rule 11 case.

C

A further reason to doubt that Congress could have intended Vonn's position is the tendency it would have to undercut the object of Rule 32(e), which governs withdrawing a plea of guilty by creating an incentive to file withdrawal motions before sentence, not afterward. A trial judge is authorized to grant such a presentence motion if the defendant carries the burden of showing a "fair and just reason" for withdrawal, and a defendant who fails to move for withdrawal before sentencing has no further recourse except "direct appeal or . . . motion under 28 U. S. C. 2255," subject to the rules covering those later stages. Fed. Rule Crim. Proc. 32(e). Whatever the "fair and just" standard may require on presentence motions,[9] the Advisory Committee Notes confirm the textual suggestion that the Rule creates a "'near-presumption'" against granting motions filed after sentencing, Advisory Committee's Notes on 1983 Amendment to Fed. Rule Crim. Proc. 32, 18 U. S. C. App., p. 1621 (quoting *United States* v. *Barker*, 514 F. 2d 208, 219 (CADC 1975)). This is only good sense; in acting as an incentive to think through a guilty plea before sentence is imposed, the Rule tends to separate meritorious second thoughts (say, a defendant's doubts about his understanding) and mere sour grapes over a sentence once pronounced. The "near-presumption" concentrates plea litigation in the trial courts, where genuine mistakes can be corrected easily, and promotes the finality required in a system as heavily dependent on guilty pleas as ours.

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[9] The Courts of Appeals have held that a Rule 11 violation that is harmless under Rule 11(h) does not rise to the level of a "fair and just reason" for withdrawing a guilty plea. See *United States* v. *Driver*, 242 F. 3d 767, 769 (CA7 2001) ("Even an established violation of Rule 11 can be harmless error . . . and thus not a 'fair and just reason' to return to Square One"); *United States* v. *Siegel*, 102 F. 3d 477, 481 (CA11 1996); *United States* v. *Martinez-Molina*, 64 F. 3d 719, 734 (CA1 1995).

But the incentive to think and act early when Rule 11 is at stake would prove less substantial if Vonn's position were law; a defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders. This result might, perhaps, be sufferable if there were merit in Vonn's objection that applying the plain-error standard to a defendant who stays mum on Rule 11 error invites the judge to relax. The plain-error rule, he says, would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge. But, rhetoric aside, that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge, and the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on.[10]

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[10] Contrary to JUSTICE STEVENS's suggestion, *post*, at 78–80 (opinion concurring in part and dissenting in part), there is nothing "perverse" about conditioning the Government's harmless-error burden on an objection when the judge commits Rule 11 error. A defendant's right to counsel on entering a guilty plea is expressly recognized in Rule 11(c)(2), and counsel is obliged to understand the Rule 11 requirements. It is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court. It therefore makes sense to require counsel to call a Rule 11 failing to the court's attention. It is perfectly true that an uncounseled defendant may not, in fact, know enough to spot a Rule 11 error, but when a defendant chooses self-representation after a warning from the court of the perils this entails, see *Faretta* v. *California*, 422 U. S. 806, 835 (1975), Rule 11 silence is one of the perils he assumes. Any other approach is at odds with Congress's object in adopting Rule 11, recognized in *McCarthy* v. *United States*, 394 U. S. 459, 465 (1969), to combat defendants' "often frivolous" attacks on the validity of their guilty pleas, by aiding the district judge in determining whether the defendant's plea was knowing and

In sum, there are good reasons to doubt that expressing a harmless-error standard in Rule 11(h) was meant to carry any implication beyond its terms. At the very least, there is no reason persuasive enough to think 11(h) was intended to repeal Rule 52(b) for every Rule 11 case.

III

The final question goes to the scope of an appellate court's enquiry into the effect of a Rule 11 violation, whatever the review, plain error or harmless. The Court of Appeals confined itself to considering the record of "the plea proceeding," 224 F. 3d, at 1156, applying Circuit precedent recognizing that the best evidence of a defendant's understanding when pleading guilty is the colloquy closest to the moment he enters the plea. While there is no doubt that this position serves the object of Rule 11 to eliminate wasteful *post hoc* probes into a defendant's psyche, *McCarthy*, 394 U. S., at 470, the Court of Appeals was more zealous than the policy behind the Rule demands. The Advisory Committee intended the effect of error to be assessed on an existing record, no question, but it did not mean to limit that record strictly to the plea proceedings: the enquiry "'must be resolved solely on the basis of the Rule 11 transcript' and the other portions (*e. g.*, sentencing hearing) of the limited record made in such cases." Advisory Committee's Notes 1569 (quoting *United States* v. *Coronado*, 554 F. 2d 166, 170, n. 5 (CA5 1977)).

True, language in *McCarthy* ostensibly supports the position taken by the Court of Appeals (which did not, however, rest on it); we admonished that "[t]here is no adequate substi-

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voluntary and creating a record at the time of the plea supporting that decision.

Vonn's final retort that application of the plain-error rule would tend to leave some "unconstitutional pleas" uncorrected obviates the question in this case, which is who bears the burden of proving that Rule 11 error did or did not prejudice the defendant: the Government or the defendant?

tute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him," 394 U. S., at 470 (emphasis in original). But *McCarthy* was decided before the enactment of Rule 11(h), which came with the commentary just quoted, and *McCarthy* in any event was not a case with a record of anything on point, even outside the Rule 11 hearing. The Government responded to the laconic plea colloquy not by referring to anything illuminating in the record; instead it brought up the indictment, tried to draw speculative inferences from conversations McCarthy probably had with his lawyer, and sought to present new evidence. The only serious alternative to "the record at the time the plea [was] entered" was an evidentiary hearing for further factfinding by the trial court.

Here, however, there is a third source of information, outside the four corners of the transcript of the plea hearing and Rule 11 colloquy, but still part of the record. Transcripts brought to our attention show that Vonn was advised of his right to trial counsel during his initial appearance before the Magistrate Judge and twice at his first arraignment. The record shows that four times either Vonn or his counsel affirmed that Vonn had heard or read a statement of his rights and understood what they were. Because there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceeding, cf. *Bousley* v. *United States*, 523 U. S. 614, 618 (1998) (a defendant with a copy of his indictment before pleading guilty is presumed to know the nature of the charge against him), the record of Vonn's initial appearance and arraignment is relevant in fact, and well within the Advisory Committee's understanding of "other portions . . . of the limited record" that should be open to consideration. It may be considered here.

The transcripts covering Vonn's first appearance and arraignment were not, however, presented to the Court of Appeals. Probably owing to that court's self-confinement to a

narrower record, it made no express ruling on the part of the Government's rehearing motion requesting to make the first-appearance and arraignment transcripts part of the appellate record. For that reason, even with the transcripts now in the parties' joint appendix filed with us, we should not resolve their bearing on Vonn's claim before the Court of Appeals has done so. *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103 (2001).

We therefore vacate the Court of Appeals's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

For the reasons stated in Part III of the Court's opinion, I agree that the effect of a violation of Rule 11 of the Federal Rules of Criminal Procedure should be evaluated on the basis of the entire record, rather than just the record of the plea colloquy, and that a remand is therefore required. Contrary to the Court's analysis in Part II of its opinion, however, I am firmly convinced that the history, the text of Rule 11, and the special office of the Rule all support the conclusion, "urged by the Government" in *McCarthy* v. *United States*, 394 U. S. 459, 469 (1969), that the burden of demonstrating that a violation of that Rule is harmless is "place[d] upon the Government," *ibid.*

In *McCarthy*, after deciding that the trial judge had not complied with Rule 11, the Court had to "determine the effect of that noncompliance, an issue that ha[d] engendered a sharp difference . . . among the courts of appeals." *Id.*, at 468. The two alternatives considered by those courts were the automatic reversal rule that we ultimately unanimously endorsed in *McCarthy* and the harmless-error rule urged by

the Government.[1] No one even argued that the defendant should have the burden of proving prejudice.[2] The Court's conclusion that "prejudice inheres in a failure to comply with Rule 11" was uncontroversial.[3] *Id.*, at 471.

During the years preceding the 1983 amendment to Rule 11, it was generally understood that noncompliance with Rule 11 in direct appeal cases required automatic reversal. See Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1568 (hereinafter Advisory Committee's Notes) (citing *United States* v. *Boone*, 543 F. 2d 1090 (CA4 1976); *United States* v. *Journet*, 544 F. 2d 633 (CA2 1976)). Thus, prior to the addition of Rule 11(h), *neither* plain-error[4] nor harmless-error review applied to Rule 11 violations. Rejecting *McCarthy*'s "ex-

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[1] *McCarthy* was decided 15 years after the adoption of Rule 52, and yet neither the parties nor the Court discussed the application of that Rule despite the fact that the defendant had failed to object to the Rule 11 error.

[2] Nor did the Government make such an argument in the Court of Appeals in this case. That should be a sufficient reason for refusing to consider the argument here, see *United States* v. *Williams*, 504 U. S. 36, 55–61 (1992) (STEVENS, J., dissenting), but, as in *Williams*, the Court finds it appropriate to accord "a special privilege for the Federal Government," *id.*, at 59.

[3] "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *McCarthy*, 394 U. S., at 471–472. Not a word in the proceedings that led to the amendment rejecting the automatic reversal remedy questioned the validity of the proposition that every violation of the Rule is presumptively prejudicial. The amendment merely gives the Government the opportunity to overcome that presumption.

[4] Rule 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." When a court reviews for plain error, the burden is on the defendant to show that the error affected his substantial rights. *United States* v. *Olano*, 507 U. S. 725, 734–735 (1993).

treme sanction of automatic reversal" for technical violations, Congress added subsection 11(h), which closely tracks the harmless-error language of Rule 52(a).[5] Advisory Committee's Notes 1569. As the Advisory Committee's Notes make clear, "Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead *merely* rejects the extreme sanction of automatic reversal." *Ibid.* (emphasis deleted and added). The plain text thus embodies Congress' choice of incorporating the standard found in Rule 52(a), while omitting that of Rule 52(b).[6] Because the pre-existing background of Rule 11 was that Rule 52(b) did not apply, and because the amendment adding Rule 52(a) via subsection (h) did not also add Rule 52(b), the straightforward conclusion is that plain-error review does not apply to Rule 11 errors.

Congress' decision to apply *only* Rule 52(a)'s harmless-error standard to Rule 11 errors is tailored to the purpose of the Rule. The very premise of the required Rule 11 colloquy is that, even if counsel is present, the defendant may not adequately understand the rights set forth in the Rule unless the judge explains them. It is thus perverse to place the burden on the uninformed defendant to object to deviations from Rule 11 or to establish prejudice arising out of the judge's failure to mention a right that he does not know he

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[5] Rule 52(a) states: "Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 11(h) states: "Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

[6] The Court incorrectly asserts that this is an argument for repeal by implication of Rule 52(b). *Ante*, at 65 ("To hold that the terms of Rule 11(h) imply that the latter half of Rule 52 has no application to Rule 11 errors would consequently amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored"). This ignores the fact that prior to the enactment of Rule 11(h), courts applied neither Rule 52(a) nor (b) to Rule 11 violations.

has.[7] Under the Court's approach, the Government bears the burden of establishing no harm only when the defendant objects to the district court's failure to inform him. In other words, the Government must show prejudice only when the defendant asks the judge to advise him of a right of which the Rule 11 colloquy assumes he is unaware. To see the implausibility of this, imagine what such an objection would sound like: "Your Honor, I object to your failure to inform me of my right to assistance of counsel if I proceed to trial."

Despite this implausible scenario, and to support the result that it reaches, the Court's analysis relies upon an image of a cunning defendant, who is fully knowledgeable of his rights, and who games the system by sitting silently as the district court, apparently less knowledgeable than the defendant, slips up in following the dictates of Rule 11. See, *e. g.*, *ante*, at 63 ("[A] defendant loses nothing by failing to

[7] The Court states that this is like any other application of the plain-error rule as it is applied to all trial errors. *Ante*, at 73 ("The plain-error rule, [Vonn] says, would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge. But, rhetoric aside, that is always the point of the plain-error rule . . ."). Unlike most rules that apply to a trial, however, the special purpose of the Rule 11 colloquy is to provide information to a defendant prior to accepting his plea. Given this purpose, it is inconceivable that Congress intended the same rules for review of noncompliance to apply. A parallel example from the self-representation context illustrates this point. Pursuant to *Faretta* v. *California*, 422 U. S. 806 (1975), a defendant who wishes to represent himself must "be made aware of the dangers and disadvantages of self-representation," *id.*, at 835. Assume a defendant states that he wishes to proceed *pro se*, and the trial judge makes no attempt to warn the defendant of the dangers and disadvantages of self-representation. If the defendant makes no objection to the trial court's failure to warn, surely we would not impose a plain-error review standard upon this nonobjecting defendant. This is so because the assumption of *Faretta*'s warning requirement is that the defendant is unaware of the dangers. It is illogical in this context, as in the Rule 11 context, to require the presumptively unknowing defendant to object to the court's failure to adequately inform. Congress' decision to apply the harmless-error standard to all Rule 11 errors surely reflects this logic.

object to obvious Rule 11 error when it occurs"); *ante*, at 73 ("[A] defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory"). My analysis is based on a fundamentally different understanding of the considerations that motivated the Rule 11 colloquy requirements in the first place. Namely, in light of the gravity of a plea, the court will assume no knowledge on the part of the defendant, even if represented by counsel, and the court must inform him of a base level of information before accepting his plea.[8]

The express inclusion in Rule 11 of a counterpart to Rule 52(a) and the omission of a counterpart to Rule 52(b) is best understood as a reflection of the fact that it is only fair to place the burden of proving the impact of the judge's error on the party who is aware of it rather than the party who is unaware of it. This burden allocation gives incentive to the judge to follow meticulously the Rule 11 requirements and to the prosecutor to correct Rule 11 errors at the time of the colloquy. The Court's approach undermines those incentives.

I would remand to the Court of Appeals to determine whether, taking account of the entire record, the Government has met its burden of establishing that the District Court's failure to inform the respondent of his right to counsel at trial was harmless.

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[8] See *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences").

Syllabus

RAGSDALE ET AL. *v.* WOLVERINE WORLD WIDE, INC.

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

No. 00–6029. Argued January 7, 2002—Decided March 19, 2002

The Family and Medical Leave Act of 1993 (FMLA or Act) guarantees qualifying employees 12 weeks of unpaid leave each year and encourages businesses to adopt more generous policies. Respondent Wolverine World Wide, Inc., granted petitioner Ragsdale 30 weeks of medical leave under its more generous policy in 1996. It refused her request for additional leave or permission to work part time and terminated her when she did not return to work. She filed suit, alleging that 29 CFR § 825.700(a), a Labor Department regulation, required Wolverine to grant her 12 additional weeks of leave because it had not informed her that the 30-week absence would count against her FMLA entitlement. The District Court granted Wolverine summary judgment, finding that the regulation was in conflict with the statute and invalid because it required Wolverine to grant Ragsdale more than 12 weeks of FMLA-compliant leave in one year. The Eighth Circuit agreed.

Held: Section 825.700(a) is contrary to the Act and beyond the Secretary of Labor's authority. Pp. 86–96.

(a) To determine whether § 825.700(a) is a valid exercise of the Secretary's authority to issue regulations necessary to carry out the FMLA, see 29 U. S. C. § 2654, this Court must consult the Act, viewing it as a "symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569. Among other things, the Act subjects an employer that interferes with, restrains, or denies the exercise of an employee's FMLA rights, § 2615(a)(1), to consequential damages and equitable relief, § 2617(a)(1); and requires the employer to post a notice of FMLA rights on its premises, § 2619(a). The Secretary's regulations require, in addition, that an employer give employees written notice that an absence will be considered FMLA leave. 29 CFR § 825.208. Even assuming that this regulatory requirement is valid, the Secretary's categorical penalty for its breach is contrary to the Act. Section 825.700(a) punishes an employer's failure to provide timely notice of the FMLA designation by denying the employer any credit for leave granted before the notice, and the penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse. The employee will be entitled to 12 additional weeks of leave even if he or

she would have acted in the same manner had notice been given and can sue if not granted the additional leave. Pp. 86–89.

(b) This penalty is incompatible with the FMLA's remedial mechanism. To prevail under § 2617, an employee must prove that the employer violated § 2615 by interfering with, restraining, or denying the exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation. In contrast, § 825.700(a) establishes an irrebuttable presumption that the employee's exercise of FMLA rights was restrained. There is no empirical or logical basis for this presumption, as the facts of this case demonstrate. Ragsdale has not shown that she would have taken less, or intermittent, leave had she received the required notice. In fact her physician did not clear her to work until long after her 30-week leave period had ended. Blind to the reality that she would have taken the entire 30-week absence even had Wolverine complied with the notice regulations, § 825.700(a) required the company to give her 12 more weeks and rendered it liable under § 2617 when it denied her request and terminated her. The regulation fundamentally alters the FMLA's cause of action by relieving employees of the burden of proving any real impairment of their rights and resulting prejudice. The Government claims that its categorical rule is easier to administer than a fact-specific inquiry, but Congress chose a remedy requiring the retrospective, case-by-case examination the Secretary now seeks to eliminate. The regulation instructs courts to ignore § 2617's command that employees prove impairment of their statutory rights and resulting harm. Agencies are not authorized to contravene Congress' will in this manner. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356. Pp. 89–92.

(c) Section 825.700(a) would be an unreasonable choice even if the Secretary were authorized to circumvent the FMLA's remedial provisions for the sake of administrative convenience. Categorical rules reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful. However, when the generalizations fail to hold in the run of cases, as is true here, the justification for the categorical rule disappears. See, *e. g.*, *State Oil Co.* v. *Khan*, 522 U. S. 3, 8–22. Pp. 92–93.

(d) Inasmuch as the Secretary's penalty will have no substantial relation to the harm to the employee in the run of cases, it also amends the FMLA's fundamental guarantee of entitlement to a "total" of 12 weeks of leave in a 12-month period, a compromise between employers who wanted fewer weeks and employees who wanted more. Courts

and agencies must respect and give effect to such compromises. However, the Secretary's penalty subverts this balance by entitling certain employees to leave beyond the statutory mandate. Pp. 93–94.

(e) That the penalty is disproportionate and inconsistent with Congress' intent is also evident from § 2619, which assesses a $100 fine for an employer's willful failure to post a general notice. In contrast, the regulation establishes a much heavier sanction for any violation of the Secretary's supplemental notice requirement. P. 95.

(f) Section 825.700(a) is also in considerable tension with the statute's admonition that nothing in the Act should discourage employers from adopting more generous policies. Congress was well aware that the more generous employers, discouraged by technical rules and burdensome administrative requirements, might be pushed down to the Act's minimum standard, yet § 825.700(a)'s severe, across-the-board penalty is directed at such employers. Pp. 95–96.

(g) In holding that the bounds of the Secretary's discretion to issue regulations were exceeded here, this Court does not decide whether the notice and designation requirements are themselves valid or whether other remedies for their breach might be consistent with the statute. P. 96.

218 F. 3d 933, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 96.

L. Oneal Sutter argued the cause for petitioners. With him on the briefs was *Eric Schnapper.*

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson, Deputy Solicitor General Kneedler, Howard M. Radzely, Allen H. Feldman, Nathaniel I. Spiller,* and *Ellen L. Beard.*

Richard D. Bennett argued the cause for respondent. With him on the brief was *James Francis Barna.**

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Jonathan P. Hiatt, James B. Coppess, Judith L. Lichtman,* and *Laurence*

JUSTICE KENNEDY delivered the opinion of the Court.

Qualifying employees are guaranteed 12 weeks of unpaid leave each year by the Family and Medical Leave Act of 1993 (FMLA or Act), 107 Stat. 6, as amended, 29 U. S. C. § 2601 *et seq.* (1994 ed. and Supp. V). The Act encourages businesses to adopt more generous policies, and many employers have done so. Respondent Wolverine World Wide, Inc., for example, granted petitioner Tracy Ragsdale 30 weeks of leave when cancer kept her out of work in 1996. Ragsdale nevertheless brought suit under the FMLA. She alleged that because Wolverine was in technical violation of certain Labor Department regulations, she was entitled to more leave.

One of these regulations, 29 CFR § 825.700(a) (2001), did support Ragsdale's claim. It required the company to grant her 12 more weeks of leave because it had not informed her that the 30-week absence would count against her FMLA entitlement. We hold that the regulation is contrary to the Act and beyond the Secretary of Labor's authority. Ragsdale was entitled to no more leave, and Wolverine was entitled to summary judgment.

I

Ragsdale began working at a Wolverine factory in 1995, but in the following year she was diagnosed with Hodgkin's disease. Her prescribed treatment involved surgery and months of radiation therapy. Though unable to work during this time, she was eligible for seven months of unpaid sick leave under Wolverine's leave plan. Ragsdale requested

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Gold; and for the National Employment Lawyers Association et al. by *Ronald B. Schwartz* and *Paula A. Brantner.*

Ann Elizabeth Reesman, Daniel V. Yager, Stephen A. Bokat, Robin S. Conrad, and *Heather L. MacDougall* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging affirmance.

Jack Whitacre filed a brief for Human Resource Management as *amicus curiae.*

and received a 1-month leave of absence on February 21, 1996, and asked for a 30-day extension at the end of each of the seven months that followed. Wolverine granted the first six requests, and Ragsdale missed 30 consecutive weeks of work. Her position with the company was held open throughout, and Wolverine maintained her health benefits and paid her premiums during the first six months of her absence. Wolverine did not notify her, however, that 12 weeks of the absence would count as her FMLA leave.

In September, Ragsdale sought a seventh 30-day extension, but Wolverine advised her that she had exhausted her seven months under the company plan. Her condition persisted, so she requested more leave or permission to work on a part-time basis. Wolverine refused and terminated her when she did not come back to work.

Ragsdale filed suit in the United States District Court for the Eastern District of Arkansas. Her claim relied on the Secretary's regulation, which provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR § 825.700(a) (2001). The required designation had not been made, so Ragsdale argued that her 30 weeks of leave did "not count against [her] FMLA entitlement." *Ibid.* It followed that when she was denied additional leave and terminated after 30 weeks, the statute guaranteed her 12 more weeks. She sought reinstatement, backpay, and other relief.

When the parties filed cross-motions for summary judgment, Wolverine conceded it had not given Ragsdale specific notice that part of her absence would count as FMLA leave. It maintained, however, that it had complied with the statute by granting her 30 weeks of leave—more than twice what the Act required. The District Court granted summary judgment to Wolverine. In the court's view the regulation was in conflict with the statute and invalid because, in effect, it required Wolverine to grant Ragsdale more than

12 weeks of FMLA-compliant leave in one year. The Court of Appeals for the Eighth Circuit agreed. 218 F. 3d 933 (2000).

We granted certiorari, 533 U. S. 928 (2001), and now affirm.

II

Wolverine's challenge concentrates on the validity of a single sentence in § 825.700(a). This provision is but a small part of the administrative structure the Secretary devised pursuant to Congress' directive to issue regulations "necessary to carry out" the Act. 29 U. S. C. § 2654 (1994 ed.). The Secretary's judgment that a particular regulation fits within this statutory constraint must be given considerable weight. See *United States* v. *O'Hagan*, 521 U. S. 642, 673 (1997) (citing *Batterton* v. *Francis*, 432 U. S. 416, 424–426 (1977)). Our deference to the Secretary, however, has important limits: A regulation cannot stand if it is "'arbitrary, capricious, or manifestly contrary to the statute.'" *United States* v. *O'Hagan*, *supra*, at 673 (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984)). To determine whether § 825.700(a) is a valid exercise of the Secretary's authority, we must consult the Act, viewing it as a "symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569 (1995).

The FMLA's central provision guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a disabling health problem; a family member's serious illness; or the arrival of a new son or daughter. 29 U. S. C. § 2612(a)(1). During the mandatory 12 weeks, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1). The Act makes it un-

lawful for an employer to "interfere with, restrain, or deny the exercise of" these rights, § 2615(a)(1), and violators are subject to consequential damages and appropriate equitable relief, § 2617(a)(1).

A number of employers have adopted policies with terms far more generous than the statute requires. Congress encouraged as much, mandating in the Act's penultimate provision that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." § 2653. Some employers, like Wolverine, allow more than the 12-week annual minimum; others offer paid leave. U. S. Dept. of Labor, D. Cantor et al., Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 5–10, 5–12 (2001) (22.9% of FMLA-covered establishments allow more than 12 weeks of leave per year; 62.7% provide paid disability leave). As long as these policies meet the Act's minimum requirements, leave taken may be counted toward the 12 weeks guaranteed by the FMLA. See 60 Fed. Reg. 2230 (1995) ("[E]mployers may designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies").

With this statutory structure in place, the Secretary issued regulations requiring employers to inform their workers about the relationship between the FMLA and leave granted under company plans. The regulations make it the employer's responsibility to tell the employee that an absence will be considered FMLA leave. 29 CFR § 825.208(a) (2001). Employers must give written notice of the designation, along with detailed information concerning the employee's rights and responsibilities under the Act, "within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible." § 825.301(c).

The regulations are in addition to a notice provision explicitly set out in the statute. Section 2619(a) requires employers to "keep posted, in conspicuous places . . . , a notice . . . setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." According to the Secretary, the more comprehensive and individualized notice required by the regulations is necessary to ensure that employees are aware of their rights when they take leave. See 60 Fed. Reg. 2220 (1995). We need not decide today whether this conclusion accords with the text and structure of the FMLA, or whether Congress has instead "spoken to the precise question" of notice, *Chevron*, *supra*, at 842, and so foreclosed the notice regulations. Even assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act's remedial design.

The penalty is set out in a separate regulation, § 825.700, which is entitled "What if an employer provides more generous benefits than required by the FMLA?" This is the sentence on which Ragsdale relies:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR § 825.700(a) (2001).

This provision punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice. The penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse. If the employee takes an undesignated absence of 12 weeks or more, the regulation always gives him or her the right to 12 more weeks of leave that year. The fact that the employee would have acted in the same manner if notice had been given is, in the Secretary's view, irrelevant. Indeed, as we understand the Sec-

retary's position, the employer would be required to grant the added 12 weeks even if the employee had full knowledge of the FMLA and expected the absence to count against the 12-week entitlement. An employer who denies the employee this additional leave will be deemed to have violated the employee's rights under § 2615 and so will be liable for damages and equitable relief under § 2617.

The categorical penalty is incompatible with the FMLA's comprehensive remedial mechanism. To prevail under the cause of action set out in § 2617, an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered. Cf. *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 292–293 (2002) (provisions in Title VII stating that plaintiffs "may recover" damages and "appropriate" equitable relief "refer to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case").

Section 825.700(a), Ragsdale contends, reflects the Secretary's understanding that an employer's failure to comply with the designation requirement might sometimes burden an employee's exercise of basic FMLA rights in violation of § 2615. Consider, for instance, the right under § 2612(b)(1) to take intermittent leave when medically necessary. An employee who undergoes cancer treatments every other week over the course of 12 weeks might want to work during the off weeks, earning a paycheck and saving six weeks for later. If she is not informed that her absence qualifies

as FMLA leave—and if she does not know of her right under the statute to take intermittent leave—she might take all 12 of her FMLA-guaranteed weeks consecutively and have no leave remaining for some future emergency. In circumstances like these, Ragsdale argues, the employer's failure to give the notice required by the regulation could be said to "deny," "restrain," or "interfere with" the employee's exercise of her right to take intermittent leave.

This position may be reasonable, but the more extreme one embodied in § 825.700(a) is not. The penalty provision does not say that in certain situations an employer's failure to make the designation will violate § 2615 and entitle the employee to additional leave. Rather, the regulation establishes an irrebuttable presumption that the employee's exercise of FMLA rights was impaired—and that the employee deserves 12 more weeks. There is no empirical or logical basis for this presumption, as the facts of this case well demonstrate. Ragsdale has not shown that she would have taken less leave or intermittent leave if she had received the required notice. As the Court of Appeals noted—and Ragsdale did not dispute in her petition for certiorari—"Ragsdale's medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period." 218 F. 3d, at 940. In fact her physician did not clear her to work until December, long after her 30-week leave period had ended. Even if Wolverine had complied with the notice regulations, Ragsdale still would have taken the entire 30-week absence. Blind to this reality, the Secretary's provision required the company to grant Ragsdale 12 more weeks of leave—and rendered it liable under § 2617 when it denied her request and terminated her.

The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice. In the case at hand, the regulation permitted Ragsdale to bring suit under § 2617,

despite her inability to show that Wolverine's actions restrained her exercise of FMLA rights. Section 825.700(a) transformed the company's failure to give notice—along with its refusal to grant her more than 30 weeks of leave—into an actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to reinstatement and backpay, even though reinstatement could not be said to be "appropriate" in these circumstances and Ragsdale lost no compensation "by reason of" Wolverine's failure to designate her absence as FMLA leave. By mandating these results absent a showing of consequential harm, the regulation worked an end run around important limitations of the statute's remedial scheme.

In defense of the regulation, the Government notes that a categorical penalty requiring the employer to grant more leave is easier to administer than one involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice. "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (quoting *ETSI Pipeline Project* v. *Missouri*, 484 U. S. 495, 517 (1988)). By its nature, the remedy created by Congress requires the retrospective, case-by-case examination the Secretary now seeks to eliminate. The purpose of the cause of action is to permit a court to inquire into matters such as whether the employee would have exercised his or her FMLA rights in the absence of the employer's actions. To determine whether damages and equitable relief are appropriate under the FMLA, the judge or jury must ask what steps the employee would have taken had circumstances been different—considering, for example, when the employee would have returned to work after taking leave. Though the Secretary could not

enact rules purporting to make these kinds of determinations for the courts, § 825.700(a) has this precise effect.

For this reason, the Government's reliance upon *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), is misplaced. Just as the FMLA does not itself require employers to give individualized notice, see *supra*, at 88, the Truth in Lending Act did not itself require lenders to make certain disclosures mandated by the regulation at issue in *Mourning*. In sustaining the regulation, we observed that the disclosure requirement was not contrary to the statute and that the Federal Reserve Board's rulemaking authority was much broader than the Secretary's is here. See 411 U. S., at 361–362 (quoting 15 U. S. C. § 1604 (1970 ed.) (empowering the Board to issue regulations not only necessary "to carry out the purposes of [the statute]," but also "necessary or proper . . . to prevent circumvention or evasion [of the statute], or to facilitate compliance therewith")). The crucial distinction, however, is that although we referred to the Board's regulation as a "remedial measure," 411 U. S., at 371, the disclosure requirement was in fact enforced through the statute's pre-existing remedial scheme and in a manner consistent with it. The Board simply assessed violators the $100 minimum statutory fine applicable to lenders who failed to make required disclosures. See *id.*, at 376. In contrast, § 825.700(a) enforces the individualized notice requirement in a way that contradicts and undermines the FMLA's pre-existing remedial scheme. While § 2617 says that employees must prove impairment of their statutory rights and resulting harm, the Secretary's regulation instructs the courts to ignore this command. Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner.

Furthermore, even if the Secretary were authorized to reconfigure the FMLA's cause of action for her administrative convenience, this particular rule would be an unreasonable choice. As we have noted in other contexts, categorical

rules—such as the rule of *per se* antitrust illegality—reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977); *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 486–487 (1992) (SCALIA, J., dissenting). When the generalizations fail to hold in the run of cases—when, for example, a particular restraint of trade does not usually present a pronounced risk of injury to competition—the justification for the categorical rule disappears. See, *e. g.*, *State Oil Co.* v. *Khan*, 522 U. S. 3, 8–22 (1997) (rejecting *per se* ban on vertical maximum price fixing). That said, the generalization made by the Secretary's categorical penalty—that the proper redress for an employer's violation of the notice regulations is a full 12 more weeks of leave—holds true in but few cases. The employee who would have taken the absence anyway, of course, would need no more leave; but the regulation provides 12 additional weeks. Even the employee who would have chosen to work on an intermittent basis—say, every other week, see *supra*, at 89–90—could claim an entitlement not to 12 weeks of leave but instead to the 6 weeks he or she would not have taken. To be sure, 12 more weeks might be an appropriate make-whole remedy for an employee who would not have taken any leave at all if the notice had been given. It is not a "fair assumption," *United States* v. *O'Hagan*, 521 U. S., at 676, however, that this fact pattern will occur in any but the most exceptional of cases.

To the extent the Secretary's penalty will have no substantial relation to the harm suffered by the employee in the run of cases, it also amends the FMLA's most fundamental substantive guarantee—the employee's entitlement to "a total of 12 workweeks of leave during any 12-month period." §2612(a)(1). Like any key term in an important piece of legislation, the 12-week figure was the result of compromise between groups with marked but divergent inter-

ests in the contested provision. Employers wanted fewer weeks; employees wanted more. See H. R. Rep. No. 102–135, pt. 1, p. 37 (1991). Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." § 2601(b).

Courts and agencies must respect and give effect to these sorts of compromises. *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 818–819 (1980). The Secretary's chosen penalty subverts the careful balance, for it gives certain employees a right to more than 12 weeks of FMLA-compliant leave in a given 1-year period. This is so in part because the employee will often enjoy every right guaranteed by the FMLA during part or all of an undesignated absence. Under the Secretary's regulations, moreover, employers must comply with the FMLA's minimum requirements during these undesignated periods. See, *e. g.*, 29 CFR § 825.208(c) (2001) (an employee on paid leave "is subject to the full protections of the Act" during "the absence preceding the notice to the employee of the [FMLA] designation"). Here, the Secretary required Wolverine to maintain Ragsdale's health benefits for at least 12 weeks of her 30-week absence; if it had not, Ragsdale could have sued. The penalty provision, in turn, required the company to grant Ragsdale 12 more weeks after the 30 weeks had passed. Section 2654 merely authorizes the Secretary to issue rules "necessary to carry out" the Act, but these regulations extended Wolverine's liability far beyond the 12-week total guaranteed by the statute. It is no answer to say, as the Government does, that the Secretary's provision is consistent with the Act because employers must provide more than 12 weeks of leave only when they do not comply with the individualized notice requirement. If this argument carried the day, a penalty of 24 weeks—or 36, or 48—would also be permissible. Just as those provisions would be contrary to the FMLA's 12-week mandate, so is § 825.700(a).

That the Secretary's penalty is disproportionate and inconsistent with Congress' intent is evident as well from the sole notice provision in the Act itself. As noted above, § 2619 directs employers to post a general notice informing employees of their FMLA rights. See *supra*, at 88. This provision sets out its own penalty for noncompliance: "Any employer that willfully violates this section may be assessed a civil monetary penalty not to exceed $100 for each separate offense." § 2619(b). Congress believed that a $100 fine, enforced by the Secretary, was the appropriate penalty for willful violations of the only notice requirement specified in the statute. The regulation, in contrast, establishes a much heavier sanction, enforced not by the Secretary but by employees, for both willful and inadvertent violations of a supplemental notice requirement.

Section 825.700(a) is also in considerable tension with the statute's admonition that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." § 2653. The FMLA was intended to pull certain employers up to the minimum standard, but Congress was well aware of the danger that it might push more generous employers down to the minimum at the same time. Technical rules and burdensome administrative requirements, Congress knew, might impose unforeseen liabilities and discourage employers from adopting policies that varied much from the basic federal requirements.

Although § 825.700(a) itself is directed toward employers "provid[ing] more generous benefits than required by the FMLA," its severe and across-the-board penalty could cause employers to discontinue these voluntary programs. Compliance with the designation requirement is easy enough for companies meeting only the minimum federal requirements: All leave is given the FMLA designation. Matters are quite different for companies like Wolverine, which offer more

diverse and expansive options to their employees. In addition to allowing more than 12 weeks of leave per year, these employers might also provide leave for non-FMLA reasons, or to employees who are not yet FMLA eligible—leave the Secretary may not permit to be designated as FMLA leave. See, *e. g.*, 60 Fed. Reg. 2230 (1995) ("Leave granted under circumstances that do not meet . . . specified reasons for FMLA-qualifying leave may *not* be counted against [the] FMLA's 12-week entitlement"). Those employers must decide, almost as soon as leave is requested, whether to designate the absence as FMLA leave. The answer might not always be obvious, and this decision may require substantial investigation. The regulation imposes a high price for a good-faith but erroneous characterization of an absence as non-FMLA leave, and employers like Wolverine might well conclude that the simpler, less generous route is the preferable one.

These considerations persuade us that § 825.700(a) effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here. The FMLA guaranteed Ragsdale 12—not 42—weeks of leave in 1996.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court today holds that the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U. S. C. § 2601 *et seq.* (1994 ed. and Supp. V), clearly precludes the Secretary of Labor from adopting a rule requiring an employer to give an em-

ployee notice that leave is FMLA qualifying before the leave may be counted against the employer's 12-week obligation. Because I believe the Secretary is justified in requiring such individualized notice and because I think that nothing in the Act constrains the Secretary's ability to secure compliance with that requirement by refusing to count the leave against the employer's statutory obligation, I respectfully dissent.

I

I begin with the question the Court set aside, see *ante*, at 88, whether the Secretary was justified in requiring individualized notice at all. The FMLA gives the Secretary the notice and comment rulemaking authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U. S. C. § 2654 (1994 ed.). In light of this explicit congressional delegation of rulemaking authority, we must uphold the Secretary's regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

The Secretary has reasonably determined that individualized notice is necessary to implement the FMLA's provisions. According to the Secretary, to fulfill the FMLA's purposes, employees need to be aware of their rights and responsibilities under the Act. See 60 Fed. Reg. 2220 (1995) ("The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave"). Although the Act requires that each employer post a general notice of FMLA rights, 29 U. S. C. § 2619(a), the provision of individualized notice provides additional assurance that employees taking leave are aware of their rights under the Act. Individualized notice reminds employees of the existence of the Act and its protections at the very moment they become relevant. See also 29 CFR § 825.301(b)(1) (2001) (notice must also include information about various FMLA rights and obligations).

Perhaps more importantly, individualized notice indicates to employees that the Act applies to them specifically. To trigger employers' FMLA obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave. See § 825.208(a)(2). They may not be aware that their leave is protected under the FMLA. For many employees, the individualized notice required by the Secretary may therefore be their first opportunity to learn that their leave is in fact protected by the FMLA. This not only assists employees in enforcing their entitlement to 12 weeks of leave, but also helps them take advantage of their other rights under the Act (such as their right to take intermittent leave, 29 U. S. C. § 2612(b)(1), or to substitute accrued paid leave, § 2612(b)(2)), and facilitates their enforcement of the employer's other obligations (such as the obligation to continue health insurance coverage during FMLA leave, § 2614(c)(1), and the obligation to restore the employee to a position upon return from leave, § 2614(a)).

Individualized notice also informs employees whether the employer plans to provide FMLA and employer-sponsored leave consecutively or concurrently. This can facilitate leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave they will ultimately be provided.

Given these reasons, the Secretary's decision to require individualized notice is not arbitrary and capricious. Respondent does not disagree, instead arguing that, whether or not these reasons are valid, requiring individualized notice is contrary to the Act. Because the Act explicitly requires other sorts of notice, such as the requirement that the employer post a general notice, § 2619(a), and requirements that an employee notify the employer of the need for or reasons for FMLA leave, §§ 2612(e)(1), 2613, respondent argues that Congress intended that the Secretary not enact any other notice requirements.

The Act, however, provides no indication that its notice provisions are intended to be exclusive. Nor does it make sense for them to be so. Different notice requirements serve different functions. The requirement that employees notify their employers of their reasons for leave, for instance, informs employers that their obligations have been triggered and allows them to use the certification mechanisms provided in the Act. § 2613. The requirement that employees give advance notice when leave is foreseeable, § 2612(e)(1), facilitates employer planning. That the Act provides for notice to further these objectives indicates nothing about whether the Secretary may permissibly use the same tool to further different ends.

Even the provision that may seem most similar, the general notice requirement, § 2619(a), serves a significantly different purpose than the Secretary's requirement. Although both inform employees of their rights under the Act, the general notice requirement is particularly useful to employees who might otherwise never approach their employer with a leave request, while the individualized notice requirement is targeted at employees after they have informed the employer of their request for leave. Moreover, even if the purposes of both sorts of notice were identical, it is not at all clear that, by providing for one sort of notice to further these objectives, Congress intended to preclude the Secretary from bolstering this purpose with an additional notice requirement. I therefore conclude that nothing in the Act precludes the Secretary from accomplishing her goals through a requirement of individualized notice.

II

Also at issue before the Court is whether the Secretary may secure compliance with the individualized notice requirement by providing that leave will not count against the employer's 12-week obligation unless the employer fulfills this requirement. The Court concludes that this means

of securing compliance is inconsistent with the cause of action the Act provides when employers "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U. S. C. § 2615. The Court appears to see two different kinds of conflict. At times, the Court seems to suggest that, insofar as the purpose of the individualized notice requirement is to enable the employee to enforce the Act's specific protections (such as the right to be reinstated at the end of the leave period), the Act restricts employees to bringing § 2615 actions to redress violations of these protections and not the notice requirement itself. See *ante*, at 91 (The Secretary's penalty provision "transformed the company's failure to give notice . . . into an actionable violation of § 2615"). Under that section, employees bear the burden of proving the violation, and their recovery is limited to whatever damages they can show they have suffered because of the employer's violation. § 2617 (1994 ed. and Supp. V).

If this is in fact the Court's view, it would effectively eviscerate the individualized notice requirement. Under such a scheme, an employer could feel no obligation to provide individualized notice, only an obligation to refrain from otherwise violating the Act's other provisions. This would seriously impede the Secretary's goals. While the fear of litigation under § 2615 might go some way toward deterring employers from, for instance, failing to reinstate employees who have taken leave or discontinuing their health insurance while they are on leave, it would do so less effectively than if employees were explicitly informed that their leave was FMLA qualifying at the moment it was taken. More importantly, the potential for § 2615 liability would do nothing to further some of the Secretary's other goals, such as making employees aware that the range of options provided by the FMLA is available to them. Without individualized notice, for instance, employees may not be made aware that they have the option of requesting intermittent

leave, § 2612(b)(1), or the option of asking the employer to substitute accrued paid vacation or sick leave for unpaid FMLA leave, § 2612(b)(2). An employer may only be liable under § 2615 for denying these options if the employee knows enough to request them. A rule that would restrict FMLA remedies to violations of § 2615 based on denials of other statutorily protected rights would thus be equivalent to denying the Secretary the power to enforce an individualized notice requirement at all. Because I believe the individualized notice requirement is justified, and because the Secretary's power to create such a requirement must also include a power to enforce it in some way, this extreme view of the Act's remedial scheme should be rejected.

At other times, however, the Court suggests a less extreme view—that the Secretary may be allowed to require individualized notice, but that the remedy for failing to give such notice must also lie under § 2615, requiring the employee to prove harm from the employer's failure to notify. See *ante*, at 91 (suggesting that the appropriate rule is one "involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice"). This was the approach adopted by the Court of Appeals, allowing recovery when an "employer's failure to give notice . . . interfere[s] with or [denies] an employee's substantive FMLA rights." 218 F. 3d 933, 939 (CA8 2000).

But there is no reason to restrict the Secretary's remedy to § 2615 actions. The Secretary is charged with adopting regulations that are "necessary to carry out" the Act. § 2654. This includes the power to craft appropriate remedies for regulatory violations. In *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), where the Federal Reserve Board was empowered to "prescribe regulations to carry out the purposes of" the Truth in Lending Act, 15 U. S. C. § 1604, this Court deferred to its choice of remedies, asserting that "[w]e have consistently held

that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 411 U. S., at 371–372.

Just as the fact that the Act provides for certain sorts of notice does not preclude the Secretary from providing for other sorts, the fact that the Act provides for certain remedies does not tie the hands of the Secretary to provide for others. The Court's argument to the contrary seems to be based on something like the maxim *expressio unius est exclusio alterius*—that Congress' decision to provide for one remedy indicates that it did not intend for the Secretary to have authority to create any others. Because of the deference given to agencies on matters about which the statutes they administer are silent, *Chevron*, 467 U. S., at 843, however, *expressio unius* ought to have somewhat reduced force in this context. See *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F. 2d 685, 694 (CADC 1991). For example, in *Mourning*, this Court deferred to the agency's decision to impose a set fine on lenders who violated a regulation, rejecting the argument that, because the Truth in Lending Act provided for one sort of remedy, the agency lacked authority to impose any other sort of penalty. Although the penalty was set in an amount equal to the minimum fine set forth in the statute, it clearly went beyond the statute's remedial scheme, which required that damages be set in an amount related to the lender's finance charge. Cf. *ante*, at 92. In so holding, we stated:

> "[T]he objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary." 411 U. S., at 376.

Moreover, the Act itself provides some remedies that fall outside the framework of 29 U. S. C. § 2615—for instance, the fine for failure to post a general notice of FMLA rights, § 2619(b). This confirms that § 2615 is not intended to be the exclusive remedy for violations of the Act or its implementing regulations. Respondent conceded at oral argument that the Secretary could secure compliance with the individual notice requirement through establishment of a fine, a remedy that goes beyond § 2615. Tr. of Oral Arg. 28. If the Secretary may enforce her regulations with a fine, what in the Act precludes her from enforcing them as appropriate through a range of remedies, such as treble damages, cease and desist orders punishable by contempt, or, in this case, additional leave?

The Court further claims that, even if the Secretary has the power to craft her own remedy for violation of the regulation, the particular remedy she has chosen is unreasonable. See *ante*, at 92–93. The Court does not take issue with the reasonableness of a categorical remedy, one that is not necessarily tailored to the individual loss of each litigant. See *Mourning*, *supra*, at 377 (approving of such "prophylactic" rules). The Court's argument is instead based on its assertion that the categorical remedy the Secretary has chosen is too harsh. In the Court's judgment, 12 weeks of additional leave is too great a punishment because few employees will have actually suffered this much harm from the employer's failure to give individualized notice. See *ante*, at 93.

We are bound, however, to defer to the Secretary's judgment of the likely harms of lack of notice so long as it is reasonable. I believe that it is. The Secretary has determined that a variety of purposes will be served through individualized notice, including facilitating employee planning, and enabling enforcement of the Act's protections and use of its various options by making employees aware that their leave is FMLA qualifying at the moment they take it. For those employees who ultimately bring suit for denial

of notice, it is difficult to quantify their damages retrospectively—it requires knowing not only what options an employee would have been likely to take had notice been given, but also the extent to which that employee's ability to plan leave was compromised. Moreover, an employer's failure to give individualized notice may itself cause some employees (unaware that their leave is FMLA qualifying) not to bring suit at all. I therefore see no reason to doubt the Secretary's judgment that 12 additional weeks of leave is an appropriate penalty for failing to provide individualized notice.

The Court further suggests that the Secretary's remedy is contrary to the statute in two other ways. First, it claims that the penalty would exceed the FMLA's guarantee of 12 weeks of leave under §§2612(a)(1) and (d)(1). See *ante*, at 93–94. But nothing requires an employer to provide more than 12 weeks of leave—an employer may avoid this penalty by following the regulation. The penalty the Secretary has chosen no more extends an employer's obligations under the Act than would any fine or other remedy for a violation of those obligations. Nor, as the Court notes, would a longer penalty violate this aspect of the Act. See *ante*, at 94. To the extent that an even lengthier penalty would be inappropriate, it would be because it is unreasonable, not because it is contrary to the Act's 12-week allotment.

Moreover, providing this notice is not at all onerous. In most situations, notice will require nothing more than informing the employee of what the employer already knows: that the leave is FMLA qualifying. The employer will eventually have to make this designation to comply with the Act's recordkeeping requirements. 29 U. S. C. §2616(b). At most, the regulation moves up the time of this designation. When an employer is unsure at the time the leave begins whether it qualifies, the regulations allow an interim designation followed by later confirmation. 29 CFR

§ 825.208(e)(2) (2001). This is hardly the "high price" of which the Court complains. See *ante*, at 96.

Second, the Court claims that the penalty would discourage employers from voluntarily providing more leave than the FMLA requires, contrary to the Act's assertion that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining [more generous] leave policies," § 2653. See *ante*, at 95. This section sets out a general interpretive principle, however, and should not be construed as removing from the Secretary the power to craft any regulation that might have even a small discouraging effect, no matter how otherwise important. Moreover, because of the ease with which an employer may meet its obligation to provide individualized notice, this effect will be minimal.

For these reasons, I would reverse the judgment of the Court of Appeals and remand the case for appropriate proceedings.

Syllabus

EDELMAN *v.* LYNCHBURG COLLEGE

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

No. 00–1072. Argued January 8, 2002—Decided March 19, 2002

Title VII of the Civil Rights Act of 1964 requires that a "charge" of employment discrimination be filed with the Equal Employment Opportunity Commission "within [a specified number of] days after the alleged unlawful . . . practice occurred," § 706(e)(1), and that the charge "be in writing under oath or affirmation," § 706(b). An EEOC regulation permits an otherwise timely filer to verify a charge after the time for filing has expired. After respondent Lynchburg College denied academic tenure to petitioner Edelman, he faxed a letter to the EEOC in November 1997, claiming that the College had subjected him to gender-based, national origin, and religious discrimination. Edelman made no oath or affirmation. The EEOC advised him to file a charge within the applicable 300-day time limit and sent him a Form 5 Charge of Discrimination, which he returned 313 days after he was denied tenure. Edelman subsequently sued in a Virginia state court on various state-law claims, but later added a Title VII cause of action. The College then removed the case to federal court and moved to dismiss, claiming that Edelman's failure to file the verified Form 5 with the EEOC within the applicable filing period was a bar to subject-matter jurisdiction. Edelman replied that his November 1997 letter was a timely filed charge and that under the EEOC regulation, the Form 5 verification related back to the letter. The District Court dismissed the Title VII complaint, finding that the letter was not a "charge" under Title VII because neither Edelman nor the EEOC treated it as one. The Fourth Circuit affirmed, holding that Title VII's plain language foreclosed the relation-back regulation. The court reasoned that, because a charge requires verification and must be filed within the limitations period, it follows that a charge must be verified within that period.

Held: The EEOC's relation-back regulation is an unassailable interpretation of § 706. Pp. 112–119.

(a) There is nothing plain in reading "charge" to require an oath by definition. Title VII nowhere defines "charge." Section 706(b) merely requires that a charge be verified, without saying when; § 706(e)(1) provides that a charge must be filed within a given period, without indicating whether it must be verified when filed. Neither provision incorporates the other so as to give a definition by necessary implication.

Syllabus

The Fourth Circuit's assumption that §§ 706(b) and (e)(1) must be read as one, with "charge" defined as "under oath or affirmation," was a doubtful structural and logical leap. Nor is the gap bridged by the commonsense rule that statutes are to be read as a whole, see *United States* v. *Morton*, 467 U. S. 822, 828, for the two quite different objectives of the timing and verification requirements prevent reading "charge" to subsume them both by definition. The time limitation is meant to encourage a potential charging party to raise a discrimination claim before it gets stale, while the verification requirement is intended to protect employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury. The latter object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC. The statute is thus open to interpretation and the regulation addresses a legitimate question. Pp. 112–113.

(b) The College's argument that the regulation addressed a substantive issue over which the EEOC has no rulemaking power is simply a recast of the plain language argument just rejected. Moreover, there is no need to resolve the degree of deference reviewing courts owe the regulation because this Court finds that the rule is not only reasonable, but states the position the Court would adopt were it interpreting the statute from scratch. Pp. 113–114.

(c) Although the verification provision is meant to forestall catchpenny claims of disgruntled but not necessarily aggrieved employees, Congress presumably did not mean to affect Title VII's nature as a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process, see, *e. g.*, *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 124. Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied. This Court would be hard pressed to take issue with the EEOC's position after deciding, in *Becker* v. *Montgomery*, 532 U. S. 757, 765, that a failure to comply with Federal Rule of Civil Procedure 11's signature requirement did not require dismissal of a timely filed but unsigned notice of appeal because nothing prevented later cure of the signature defect. There is no reason to think that relation back of the oath here is any less reasonable than relation back of the signature in *Becker*. In fact, it would be passing strange to disagree with the EEOC even without *Becker*, for a long history of judicial practice with oath

requirements supports the relation-back cure. Moreover, the legislative history indicates that Congress amended Title VII several times without once casting doubt on the EEOC's construction. Pp. 115–118.

(d) This Court's judgment does not reach the District Court's conclusion that Edelman's letter was not a charge under Title VII because neither Edelman nor the EEOC treated it as one. The Court notes, however, that that view has some support at the factual level in that the EEOC admittedly failed to comply with § 706(e)(1)'s requirement that "notice of the charge . . . be served upon the person . . . charge[d] within ten days" of filing with the EEOC. Edelman's counsel agrees with the Government that the significance of the delayed notice to the College will be open on remand. Pp. 118–119.

228 F. 3d 503, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, *post,* p. 119. O'CONNOR, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post,* p. 120.

Eric Schnapper argued the cause for petitioner. With him on the briefs was *Elaine Charlson Bredehoft.*

Lisa S. Blatt argued the cause for the United States et al. as *amici curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Deputy Solicitor General Clement*, *Paul R. Q. Wolfson*, *Philip B. Sklover*, and *Barbara L. Sloan.*

Alexander W. Bell argued the cause for respondent. With him on the brief was *Mary V. Barney.**

JUSTICE SOUTER delivered the opinion of the Court.

The scheme of redress for employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, requires a complainant to file a "charge" with the Equal Employment Opportunity Commission within a certain time

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**Ann Elizabeth Reesman* and *Rae T. Vann* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

Paula A. Brantner filed a brief for the National Employment Lawyers Association as *amicus curiae.*

after the conduct alleged, 78 Stat. 259, 42 U. S. C. § 2000e–5(e)(1) (1994 ed.), and to affirm or swear that the allegations are true, § 2000e–5(b). The issue here is the validity of an EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired. We sustain the regulation.

I

On June 6, 1997, respondent Lynchburg College denied academic tenure to petitioner Leonard Edelman, who faxed a letter to an EEOC field office on November 14, 1997, claiming "gender-based employment discrimination, exacerbated by discrimination on the basis of . . . national origin and religion." App. 52. Edelman made no oath or affirmation.

On November 26, 1997, Edelman's lawyer wrote to the field office requesting an interview with an EEOC investigator and stating his "understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997." *Id.*, at 54. An EEOC employee replied to Edelman and advised him to arrange an interview with a member of the field office. Without referring to the lawyer's letter, the employee reminded Edelman that "a charge of discrimination must be filed within the time limits imposed by law." *Id.*, at 57. In Edelman's case, the filing period was 300 days after the alleged discriminatory practice.[1]

After the interview, the EEOC sent Edelman a Form 5 Charge of Discrimination for him to review and verify by

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[1] A Title VII complainant generally has 180 days from the time of the alleged unlawful employment practice to file with the EEOC, 42 U. S. C. § 2000e–5(e)(1) (1994 ed.), but a 300-day filing period applies if the charging party "institute[s] proceedings with a State or local agency with authority to grant or seek relief" from unlawful employment practices. *Ibid.;* see also *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 110 (1988). Virginia has such an agency, operating under a work-sharing agreement with the EEOC. See *Tinsley* v. *First Union Nat. Bank*, 155 F. 3d 435, 439–442 (CA4 1998).

oath or affirmation. On April 15, 1998, 313 days after the June 6, 1997, denial of tenure, the EEOC received the verified Form 5, which it forwarded to the College for response. After completing an investigation, the EEOC issued Edelman a notice of right to sue.

Edelman first sued in a Virginia state court on various state-law claims, but later added a cause of action under Title VII, 42 U. S. C. § 2000e–2(a)(1). The College then removed the case to Federal District Court and moved to dismiss, claiming that Edelman's failure to file the verified Form 5 with the EEOC within the applicable filing period was a bar to subject-matter jurisdiction. Edelman replied that his November 1997 letter was a timely filed charge and that under an EEOC regulation, 29 CFR § 1601.12(b) (1997),[2] the verification on the Form 5 related back to the letter.

The District Court found, however, that the November letter was not a "charge" within the meaning of Title VII because neither Edelman nor the EEOC treated it as one, App. to Pet. for Cert. 22–24, with the consequence that there was no timely filing to which the verification on Form 5 could relate back. After finding no ground for equitable tolling of the filing requirements, the District Court dismissed the Title VII complaint and remanded the state-law claims. *Id.*, at 24–25.

A divided panel of the Court of Appeals affirmed. 228 F. 3d 503, 512 (CA4 2000). The majority held that the plain language of the statute foreclosed the EEOC regulation

[2] The regulation provides in relevant part that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received."

allowing a later oath to relate back to an earlier charge. The majority reasoned that the verification and filing provisions in § 706 of Title VII [3] were interdependent in defining "charge": "Because a charge requires verification . . . , and because a charge must be filed within the limitations period, . . . it follows that a charge must be verified within the limitations period." *Id.*, at 508.

Judge Luttig concurred only in the judgment. *Id.*, at 512–513. He said that although the majority probably had "the better interpretation" of the statute, *id.*, at 513, its reading of the filing and verification requirements as one was not compelled by the language, and the court was "bound to give deference" to the EEOC's construction, *ibid.* He nonetheless joined in the judgment for the District Court's reasons.

Because of a conflict among the Courts of Appeals,[4] we granted certiorari, 533 U. S. 928 (2001), and now reverse.

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[3] Section 706(b) reads in relevant part that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U. S. C. § 2000e–5(b). As to filing, § 706(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . , such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred." § 2000e–5(e)(1).

[4] Compare, *e. g.*, 228 F. 3d 503, 509 (CA4 2000) (case below); *Shempert* v. *Harwick Chemical Corp.*, 151 F. 3d 793, 796–797 (CA8 1998), with *Philbin* v. *General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321, 323–324 (CA7 1991) *(per curiam); Peterson* v. *Wichita*, 888 F. 2d 1307, 1308 (CA10 1989),

II

A

Section 706 of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e–5, governs the filing of charges of discrimination with the EEOC. Section 706(b) requires "[c]harges" to "be in writing under oath or affirmation . . . contain[ing] such information and . . . in such form as the Commission requires." § 2000e–5(b). Section 706(e)(1) provides that "[a] charge . . . shall be filed within one hundred and eighty [or in some cases, three hundred] days after the alleged unlawful employment practice occurred." § 2000e–5(e)(1).

Neither provision defines "charge," which is likewise undefined elsewhere in the statute. Section 706(b) merely requires the verification of a charge, without saying when it must be verified; § 706(e)(1) provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed. Neither provision incorporates the other so as to give a definition by necessary implication.

The assumption of the Court of Appeals that the two provisions must be read as one, with "charge" defined as "under oath or affirmation," was thus a structural and logical leap. Nor is the gap bridged by the rule of common sense that statutes are to be read as a whole, see *United States* v. *Morton*, 467 U. S. 822, 828 (1984). Although reading the two provisions together would not be facially inconsistent, doing that would ignore the two quite different objectives of the timing and verification requirements, which stand in the way of reading "charge" to subsume them both by definition. The point of the time limitation is to encourage a potential charging party to raise a discrimination claim before it gets

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cert. denied, 495 U. S. 932 (1990); *Casavantes* v. *California State Univ.*, 732 F. 2d 1441, 1443 (CA9 1984); *Price* v. *Southwestern Bell Tel. Co.*, 687 F. 2d 74, 77, and n. 3 (CA5 1982).

stale, for the sake of a reliable result and a speedy end to any illegal practice that proves out.[5] The verification requirement has the different object of protecting employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury.[6] This object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC. There is accordingly nothing plain in reading "charge" to require an oath by definition. Questionable would be the better word.

B

The statute is thus open to interpretation and the regulation addresses a legitimate question. Before we touch on the merits of the EEOC's position, however, two threshold matters about the status of the regulation can be given short shrift. The first is whether the agency's rulemaking exceeded its authority to adopt "suitable procedural regulations," 42 U. S. C. § 2000e–12(a), and instead addressed a substantive issue over which the EEOC has no rulemaking power, see *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257 (1991); *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 141 (1976). Although the College argues that the EEOC's regulation "alter[s] a substantive requirement included by Congress in the statute," Brief for Respondent 32–33, this is really nothing more than a recast of the plain language argument; the College is merely restating the position we

[5] See *Delaware State College* v. *Ricks*, 449 U. S. 250, 256–257 (1980) ("Limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past").

[6] See *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 76, n. 32 (1984) ("The function of an oath is to impress upon its taker an awareness of his duty to tell the truth").

just rejected, that Congress defined "charge" as a verified accusation.

The other issue insignificant in this case, however prominent it is in much of the litigation that goes on over agency rulemaking, is the degree of deference owed to the regulation by reviewing courts. We agree with the Government as *amicus* that deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984), does not necessarily require an agency's exercise of express notice-and-comment rulemaking power,[7] see Brief for United States et al. as *Amici Curiae* 19, n. 11; we so observed in *United States* v. *Mead Corp.*, 533 U. S. 218, 230–231 (2001) ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"). But there is no need to resolve any question of deference here. We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much.[8]

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[7] Title VII does not require the EEOC to utilize notice-and-comment procedures. Section 713(a) of Title VII requires the procedural regulations to "be in conformity with the standards and limitations" of the Administrative Procedure Act, 5 U. S. C. §§ 551–559. 42 U. S. C. § 2000e–12(a) (1994 ed.). And the Administrative Procedure Act, 5 U. S. C. § 553(b), excepts "rules of agency organization, procedure, or practice" from notice-and-comment procedures unless required by statute.

[8] We, of course, do not mean to say that the EEOC's position is the "only one permissible." See *Commercial Office Products*, 486 U. S., at 125 (O'Connor, J., concurring in part and concurring in judgment). The agency might, for example, have decided that the time to test the complainant's seriousness is before the agency expends any effort on the case, and so have required a verified complaint prior to interview. Justice O'Connor suggests, see *post*, at 122 (opinion concurring in judgment), that recognizing this implies that a sphere of deference is appropriate, and so resolves the *Chevron* question. But not all deference is deference under *Chevron*, see *United States* v. *Mead Corp.*, 533 U. S. 218, 234 (2001),

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A complaint to the EEOC starts the agency down the road to investigation, conciliation, and enforcement, and it is no small thing to be called upon to respond. As we said before, the verification provision is meant to provide some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees. In requiring the oath or affirmation, however, Congress presumably did not mean to affect the nature of Title VII as "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 124 (1988); *Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972). Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.[9]

We would be hard pressed to take issue with the EEOC's position after deciding *Becker* v. *Montgomery*, 532 U. S. 757

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and there is no need to resolve deference issues when there is no need for deference.

[9] The general practice of EEOC staff members is to prepare a formal charge of discrimination for the complainant to review and to verify, once the allegations have been clarified. See Brief for United States et al. as *Amici Curiae* 24. The complainant must submit a verified charge before the agency will require a response from the employer. See Brief for United States et al. as *Amici Curiae* on Pet. for Cert. 16.

Respondent argues that the employer will be prejudiced by these procedures because "there would be no deadline for verifying a charge." Brief for Respondent 34, n. 26. But this is not our case, which simply challenges relation back *per se*, and our understanding is that the EEOC's standard practice is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further with the complaint. See App. 57; Brief for United States et al. as *Amici Curiae* on Pet. for Cert. 17.

(2001), last Term. In that case, we considered whether the Federal Rule of Civil Procedure 11 signature requirement entailed the dismissal of a notice of appeal that was timely filed in the district court but was not signed within the filing period. We held that while the timing and content requirements for the notice of appeal were "jurisdictional in nature," nothing prevented later cure of the signature defect, 532 U. S., at 765. There is no reason to think that relation back of the oath here is any less reasonable than relation back of the signature in *Becker*. Both are aimed at stemming the urge to litigate irresponsibly, and if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency.[10] In fact, it would be passing strange to disagree with the EEOC even without *Becker*, for a long history of practice with oath requirements supports the relation-back cure.

Where a statute or supplemental rule requires an oath,[11] courts have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing.[12] This background law not only persuades by its reg-

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[10] We also note that Rule 15(c) of the Federal Rules of Civil Procedure permits the relation back of amendments to pleadings under specified circumstances.

[11] See, *e. g.*, Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("[A] person who asserts an interest in or right against the property that is the subject of the [civil forfeiture] action must file a verified statement identifying the interest or right").

[12] See, *e. g.*, *United States* v. *United States Currency in Amount of $103,387.27*, 863 F. 2d 555, 561–563 (CA7 1988); *Johnston Broadcasting Co.* v. *FCC*, 175 F. 2d 351, 355–356 (CADC 1949); see also 5A C. Wright & A. Miller, Federal Practice and Procedure § 1339, p. 150 (2d ed. 1990) ("Even if a federal rule or statute requires verification, a failure to comply does not render the document fatally defective"). In *Armstrong* v. *Fernandez*, 208 U. S. 324, 330 (1908), we approved a bankruptcy court's allowance of *nunc pro tunc* verification of a petition filed under the Bankruptcy Act of 1898.

State-court practice before and after Congress enacted the Civil Rights Act of 1964 has been, for the greater part, the same as federal. See, *e. g.*, *United Farm Workers of Am.* v. *Agricultural Labor Relations Bd.*, 37

ularity over time but points to tacit congressional approval of the EEOC's position, Congress being presumed to have known of this settled judicial treatment of oath requirements when it enacted and later amended Title VII.[13]

This presumption is complemented by the fact that Congress amended Title VII several times[14] without once casting doubt on the EEOC's construction.[15] During the

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Cal. 3d 912, 915, 694 P. 2d 138, 140 (1985) (en banc); *Easter Seal Soc. for Disabled Children* v. *Berry*, 627 A. 2d 482, 489 (D. C. 1993); *Maliszewski* v. *Human Rights Comm'n*, 269 Ill. App. 3d 472, 474–477, 646 N. E. 2d 625, 626–628 (1995); *Workman* v. *Workman*, 46 N. E. 2d 718, 724 (Ind. App. 1943) (en banc); *Pulliam* v. *Pulliam*, 163 Kan. 497, 499–500, 183 P. 2d 220, 222–223 (1947); *Southside Civic Assn.* v. *Warrington*, 93–0890, pp. 3–4 (La. App. 4/1/94), 635 So. 2d 721, 723–724, pet. for writ denied, 94–1219 (La. 7/1/94), 639 So. 2d 1168; *Drury Displays, Inc.* v. *Board of Adjustment*, 760 S. W. 2d 112, 114 (Mo. 1998); *Chisholm* v. *Vocational School for Girls*, 103 Mont. 503, 506–509, 64 P. 2d 838, 841–842 (1936); *In re Estate of Sessions*, 217 Ore. 340, 347–349, 341 P. 2d 512, 516–517 (1959); *State ex rel. Williams* v. *Jones*, 164 S. W. 2d 823, 826 (Tenn. 1942); *Greene* v. *Union Pac. Stages, Inc.*, 182 Wash. 143, 145, 45 P. 2d 611, 612 (1935). But see, *e. g., Dinwiddie* v. *Board of County Comm'rs*, 103 N. M. 442, 445, 708 P. 2d 1043, 1046 (1985), cert. denied, 476 U. S. 1117 (1986) (denying leave to amend and dismissing unverified complaint contesting election).

[13] See *North Star Steel Co.* v. *Thomas*, 515 U. S. 29, 34 (1995) ("'[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them'" (citation omitted)).

[14] See, *e. g.*, Pub. L. 102–166, 105 Stat. 1075; Pub. L. 92–261, 86 Stat. 104.

[15] Respondent argues that the regulation became inconsistent with Title VII when Congress passed the 1972 amendments to the legislation. Brief for Respondent 20–25, 37. In 1972, during the floor debate over the Senate version (S. 2515) of the Equal Employment Opportunity Act of 1972, Senator Allen noted that the committee amendments omitted the requirement that a charge be made under oath, and proposed an amendment to define a charge to "'mean an accusation of discrimination supported by oath or affirmation.'" 118 Cong. Rec. 4815 (1972). The Senator expressed his view that the amendment preserved what he believed to be an existing requirement under the 1964 Act that "charges are to be filed and made under oath in writing." *Ibid.* This understanding was neither confirmed nor denied, but Senator Williams, the bill's floor manager, suggested that rather than the "one coverall, blanket" definition proposed by Senator Allen, the oath requirement could be included at the beginning of

debates over the Equal Employment Opportunity Act of 1972, amending the Civil Rights Act of 1964, the text of the EEOC procedural regulations, including the predecessor of § 1601.12(b), was placed in the Congressional Record. 118 Cong. Rec. 718 (1972). By then the regulation was six years old, and had been upheld and applied by the federal courts.[16] By amending the law without repudiating the regulation, Congress "suggests its consent to the Commission's practice." *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S. 590, 600, n. 17 (1981); see also *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 69 (1984).

III

We accordingly hold the EEOC's relation-back regulation to be an unassailable interpretation of § 706 and therefore reverse. Our judgment does not, however, reach the conclusion drawn by the District Court, and the single judge on the Court of Appeals, that Edelman's letter was not a charge under the statute because neither he nor the EEOC

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§ 706(b). *Ibid.* So modified, the amendment was adopted by voice vote and enacted into law.

Besides refining the language of § 706 of Title VII, the 1972 amendments extended the basic time period for filing a charge with the EEOC from 90 to 180 days, and from 210 to 300 days in deferral States. Pub. L. 92–261, 86 Stat. 104. Congress also added a requirement that the EEOC notify employers within 10 days of receiving a filed charge. *Ibid.* In view of the above-described exchange over the phrasing of the verification requirement, and because Congress enacted this requirement while at the same time amending the charge-filing deadline in § 706(e), respondent advocates our reading the 1972 amendments as a "congressional compromise." Brief for Respondent 24. We are asked, in other words, to conclude that Congress lengthened the time for filing charges only because Congress, at the same time, required that a charge necessarily be verified when first filed. The evidence for such a *quid pro quo* is, however, equivocal.

[16] See, *e. g.*, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F. 2d 355, 357 (CA6 1969); *Georgia Power Co.* v. *EEOC*, 412 F. 2d 462, 466–467 (CA5 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230–231 (CA5 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359–360 (CA7 1968).

treated it as one. It is enough to say here that at the factual level their view has some support. Although § 706(e)(1) of Title VII provides that the "notice of the charge . . . shall be served upon the person against whom such charge is made within ten days" of filing with the EEOC, 42 U. S. C. §§ 2000e–5(b) and (e)(1), the Government's lawyer acknowledged at oral argument that the EEOC failed to "comply with its obligation to provide the employer with notice" within 10 days after receiving Edelman's letter of November 14, 1997. Tr. of Oral Arg. 16. Edelman's counsel agreed with the Government that the significance of the delayed notice to the College would be open on remand. *Id.*, at 9–10, 17.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

Congress has authorized the Equal Employment Opportunity Commission (EEOC) "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII]. Regulations issued under this section shall be in conformity with the standards and limitations of" the Administrative Procedure Act (APA). 42 U. S. C. § 2000e–12(a) (1994 ed.). The EEOC promulgated 29 CFR § 1601.12(b) (1997) pursuant to its clear statutory authority to issue procedural regulations. See § 1601.1 ("The regulations set forth . . . contain the *procedures* established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII . . ." (emphasis added)). I concur because I read the Court's opinion to hold that the EEOC possessed the authority to promulgate this procedural regulation, and that the regulation is reasonable, not proscribed by the statute, and issued in conformity with the APA.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring in the judgment.

The Court today holds that there is no need in this case to defer to the Equal Employment Opportunity Commission's regulation because the agency's position is the one it "would adopt even if there were no formal rule and [the Court] were interpreting the statute from scratch." *Ante*, at 114. I do not agree that the EEOC has adopted the most natural interpretation of Title VII's provisions regarding the filing with the EEOC of charges of discrimination. See 42 U. S. C. § 2000e–5 (1994 ed.). But, because the statute is at least somewhat ambiguous, I would defer to the agency's interpretation. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984); *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 125 (1988) (O'CONNOR, J., concurring in part and concurring in judgment) ("[D]eference [to the EEOC] is particularly appropriate on this type of technical issue of agency procedure"). I think the regulation, 29 CFR § 1601.12(b) (1997), should be sustained on this alternative basis.

Title VII requires "charges" of discrimination to "be in writing under oath or affirmation." 42 U. S. C. § 2000e–5(b). It also requires "charge[s]" to "be filed within one hundred and eighty [or in some circumstances three hundred] days after the alleged unlawful employment practice occurred." § 2000e–5(e)(1). The most natural reading of these provisions is that the first is intended to be definitional, defining a "charge" as an allegation of discrimination made in writing under oath or affirmation. The second then specifies the time period in which such a verified charge must be filed. That Congress intended the provisions to be read together in this way is suggested by the fact that the two provisions are found in subsections of the same section of the statute. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and

with a view to their place in the overall statutory scheme"). Surprisingly, however, the Court holds that the best reading is precisely the opposite—it says it "clearly agree[s] with the EEOC" that charges do not need to be verified within the specified time period. See *ante*, at 114.

Despite the fact that I think the best reading of the statute is that a charge must be made under oath or affirmation within the specified time, this is not the only possible reading of the statute. The definition section of the statute, 42 U. S. C. § 2000e, which expressly defines a number of terms, does not define the word "charge" to mean an allegation made under oath or affirmation. In fact, the definition section does not define the word "charge" at all. And the provision stating that "charges shall be in writing under oath or affirmation" is not framed as a definition—it does not say, for example, that a charge *is* an allegation made in writing under oath or affirmation. Because the statute does not explicitly define "charge" to incorporate verification but only suggests it, the requirement that charges be verified and the requirement that charges be filed within the specified time could be read as independent requirements that do not need to be satisfied simultaneously. Congress, therefore, cannot be said to have "*unambiguously* expressed [its] intent" that the charge must be under oath or affirmation when filed. *Chevron*, 467 U. S., at 843 (emphasis added). Given this ambiguity, under our decision in *Chevron*, "the question . . . [becomes] whether the agency's [position] is based on a permissible construction of the statute," *ibid.*, or, in other words, whether the agency's position is "reasonable," *id.*, at 845. If so, then we must give it "controlling weight," *id.*, at 844.

I find the regulation to be reasonable for some of the same reasons that the Court finds it to be the best interpretation of the statute. As the Court notes, Title VII is "'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" *Ante*, at 115 (quoting *Com-*

mercial Office Products Co., *supra*, at 124). Permitting relation back of an oath omitted from an original filing is reasonable because it helps ensure that lay complainants will not inadvertently forfeit their rights. The regulation is also consistent, as the Court explains, with the common-law practice of allowing later verifications to relate back. See *ante*, at 116–117. For these reasons, I think the regulation is reasonable and should be sustained.

The Court reserved the question of whether the EEOC's regulation is entitled to *Chevron* deference. See *ante*, at 114. I doubt that it is possible to reserve this question while simultaneously maintaining, as the Court does, see *ante*, at 114–115, n. 8, that the agency is free to change its interpretation. To say that the matter is ambiguous enough to permit agency choice and to suggest that the Court would countenance a different choice is to say that the Court would (because it must) defer to a reasonable agency choice. Indeed, the concurring opinion that the Court cites for the proposition that the agency could change its position was premised on the idea that the agency was entitled to deference. See *Commercial Office Products Co.*, *supra*, at 125–126 (O'CONNOR, J., concurring in part and concurring in judgment).

I think the EEOC's regulation is entitled to *Chevron* deference. We have, of course, previously held that because the EEOC was not given rulemaking authority to interpret the *substantive* provisions of Title VII, its substantive regulations do not receive *Chevron* deference, but instead only receive consideration according to the standards established in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257 (1991) ("[T]he level of deference afforded [the agency's judgment] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control' ")

(quoting *Skidmore, supra,* at 140); *General Elec. Co.* v. *Gilbert,* 429 U. S. 125, 141–142 (1976). The EEOC has, however, been given "authority from time to time to issue . . . suitable *procedural* regulations to carry out the provisions of" Title VII, 42 U. S. C. § 2000e–12(a) (emphasis added). The regulation at issue here, which permits relation back of amendments to charges filed with the EEOC, is clearly such a procedural regulation. See, *e. g.,* Fed. Rule Civ. Proc. 15 (establishing rules for amendments to pleadings and relation back as part of the Federal Rules of Civil Procedure). Thus, as the Court recognizes, see *ante,* at 113–114, the EEOC was exercising authority explicitly delegated to it by Congress when it promulgated this rule.

The regulation was also promulgated pursuant to sufficiently formal procedures. Although the EEOC originally issued the regulation without undergoing formal notice-and-comment procedures, it was repromulgated pursuant to those procedures in 1977. See 42 Fed. Reg. 42022, 42023 (1977); *id.,* at 55388, 55389. We recognized in *United States* v. *Mead Corp.,* 533 U. S. 218 (2001), that although notice-and-comment procedures are not required for *Chevron* deference, notice-and-comment is "significant . . . in pointing to *Chevron* authority," and that an "overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230–231. I see no reason why a repromulgation pursuant to notice-and-comment procedures should be less entitled to deference than an original promulgation pursuant to those procedures. Cf. *Smiley* v. *Citibank (South Dakota), N. A.,* 517 U. S. 735, 741 (1996) (giving deference to "a full-dress regulation . . . adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure . . . deliberation" even though the regulation was prompted by litigation).

Moreover, the regulation is codified in the Code of Federal Regulations, 29 CFR § 1601.12(b) (1997), and so is binding

on all the parties coming before the EEOC, as well as on the EEOC itself. In this regard, it is distinguishable from the Customs Service ruling letters at issue in *Mead Corp.*, *supra*, at 233, which we found not to be binding on third parties and to be changeable by the Customs Service merely upon notice, and to which we therefore denied *Chevron* deference. See also *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) (denying *Chevron* deference to an agency opinion letter that we suggested lacked "the force of law," but stating that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation").

Because I believe the regulation is entitled to review under *Chevron*, and because the regulation is reasonable, I concur in the judgment.

Syllabus

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *v.* RUCKER ET AL.

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

No. 00–1770. Argued February 19, 2002—Decided March 26, 2002*

Title 42 U. S. C. § 1437d(*l*)(6) provides that each "public housing agency shall utilize leases . . . provid[ing] that . . . any drug-related criminal activity on or off [federally assisted low-income housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." Respondents are four such tenants of the Oakland Housing Authority (OHA). Paragraph 9(m) of their leases obligates them to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . any drug-related criminal activity on or near the premises." Pursuant to United States Department of Housing and Urban Development (HUD) regulations authorizing local public housing authorities to evict for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants, OHA instituted state-court eviction proceedings against respondents, alleging violations of lease paragraph 9(m) by a member of each tenant's household or a guest. Respondents filed federal actions against HUD, OHA, and OHA's director, arguing that § 1437d(*l*)(6) does not require lease terms authorizing the eviction of so-called "innocent" tenants, and, in the alternative, that if it does, the statute is unconstitutional. The District Court's issuance of a preliminary injunction against OHA was affirmed by the en banc Ninth Circuit, which held that HUD's interpretation permitting the eviction of so-called "innocent" tenants is inconsistent with congressional intent and must be rejected under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843.

Held: Section 1437d(*l*)(6)'s plain language unambiguously requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity. Congress' decision

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*Together with No. 00–1781, *Oakland Housing Authority et al.* v. *Rucker et al.*, also on certiorari to the same court.

not to impose any qualification in the statute, combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement. See *United States* v. *Monsanto,* 491 U. S. 600, 609. Because "any" has an expansive meaning—*i. e.,* "one or some indiscriminately of whatever kind," *United States* v. *Gonzales,* 520 U. S. 1, 5—*any* drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about. The Ninth Circuit's ruling that "under the tenant's control" modifies not just "other person," but also "member of the tenant's household" and "guest," runs counter to basic grammar rules and would result in a nonsensical reading. Rather, HUD offers a convincing explanation for the grammatical imperative that "under the tenant's control" modifies only "other person": By "control," the statute means control in the sense that the tenant has permitted access to the premises. Implicit in the terms "household member" or "guest" is that access to the premises has been granted by the tenant. Section 1437d(*l*)(6)'s unambiguous text is reinforced by comparing it to 21 U. S. C. § 881(a)(7), which subjects all leasehold interests to civil forfeiture when used to commit drug-related criminal activities, but expressly exempts tenants who had no knowledge of the activity, thereby demonstrating that Congress knows exactly how to provide an "innocent owner" defense. It did not provide one in § 1437d(*l*)(6). Given that Congress has directly spoken to the precise question at issue, *Chevron, supra,* at 842, other considerations with which the Ninth Circuit attempted to bolster its holding are unavailing, including the legislative history, the erroneous conclusion that the plain reading of the statute leads to absurd results, the canon of constitutional avoidance, and reliance on inapposite decisions of this Court to cast doubt on § 1437d(*l*)(6)'s constitutionality under the Due Process Clause. Pp. 130–136.

237 F. 3d 1113, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which all other Members joined, except BREYER, J., who took no part in the consideration or decision of the cases.

James A. Feldman argued the cause for the federal petitioner. With him on the briefs were *Solicitor General Olson, Assistant Attorney General McCallum, Deputy Solicitor General Kneedler, Barbara C. Biddle, Howard S. Scher, Richard A. Hauser, Carole W. Wilson, Howard M. Schmeltzer,* and *Harold J. Rennett. Gary T. Lafayette*

argued the cause for the private petitioners in No. 00–1781. With him on the briefs was *Susan T. Kumagai.*

Paul Renne argued the cause for respondents in both cases. With him on the brief were *James Donato*, *Whitty Somvichian*, and *John Murcko.*†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

With drug dealers "increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants," Congress passed the Anti-Drug Abuse Act of 1988. § 5122, 102 Stat. 4301, 42 U. S. C. § 11901(3) (1994 ed.). The Act, as later amended, provides that each "public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U. S. C. § 1437d(*l*)(6) (1994 ed., Supp. V). Petitioners say that this statute requires lease terms that allow a local public

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†Briefs of *amici curiae* urging reversal were filed for the Council of Large Public Housing Authorities et al. by *William F. Maher* and *Robert A. Graham;* for the International City-County Management Association et al. by *Richard Ruda* and *James I. Crowley;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Catherine M. Bishop* and *Julie E. Levin;* for the American Civil Liberties Union et al. by *Mark J. Lopez*, *Steven R. Shapiro*, and *Alan L. Schlosser;* for the National Network to End Domestic Violence et al. by *Bruce D. Sokler* and *Fernando R. Laguarda;* for the Pennsylvania Association of Resident Councils et al. by *Eileen D. Yacknin* and *Richard S. Matesic;* and for Lawrence Lessig et al. by *David T. Goldberg* and *Daniel N. Abrahamson.*

Kirsten D. Levingston, *Michael S. Feldberg*, and *Martha F. Davis* filed a brief for the Coalition to Protect Public Housing et al. as *amici curiae.*

housing authority to evict a tenant when a member of the tenant's household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity. Respondents say it does not. We agree with petitioners.

Respondents are four public housing tenants of the Oakland Housing Authority (OHA). Paragraph 9(m) of respondents' leases, tracking the language of § 1437d(*l*)(6), obligates the tenants to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premise[s]." App. 59. Respondents also signed an agreement stating that the tenant "understand[s] that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted." *Id.*, at 69.

In late 1997 and early 1998, OHA instituted eviction proceedings in state court against respondents, alleging violations of this lease provision. The complaint alleged: (1) that the respective grandsons of respondents William Lee and Barbara Hill, both of whom were listed as residents on the leases, were caught in the apartment complex parking lot smoking marijuana; (2) that the daughter of respondent Pearlie Rucker, who resides with her and is listed on the lease as a resident, was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment;[1] and (3) that on three instances within a 2-month period, respondent Herman Walker's caregiver and two others were found with cocaine in Walker's apartment. OHA had issued Walker notices of a lease violation on the first two occasions, before initiating the eviction action after the third violation.

United States Department of Housing and Urban Development (HUD) regulations administering § 1437d(*l*)(6) require

[1] In February 1998, OHA dismissed the unlawful detainer action against Rucker, after her daughter was incarcerated, and thus no longer posed a threat to other tenants.

lease terms authorizing evictions in these circumstances. The HUD regulations closely track the statutory language,[2] and provide that "[i]n deciding to evict for criminal activity, the [public housing authority] shall have discretion to consider all of the circumstances of the case . . . ." 24 CFR § 966.4(*l*)(5)(i) (2001). The agency made clear that local public housing authorities' discretion to evict for drug-related activity includes those situations in which "[the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." 56 Fed. Reg. 51560, 51567 (1991).

After OHA initiated the eviction proceedings in state court, respondents commenced actions against HUD, OHA, and OHA's director in United States District Court. They challenged HUD's interpretation of the statute under the Administrative Procedure Act, 5 U. S. C. § 706(2)(A), arguing that 42 U. S. C. § 1437d(*l*)(6) does not require lease terms authorizing the eviction of so-called "innocent" tenants, and, in the alternative, that if it does, then the statute is unconstitutional.[3] The District Court issued a preliminary injunction, enjoining OHA from "terminating the leases of tenants pursuant to paragraph 9(m) of the 'Tenant Lease' for drug-related criminal activity that does not occur within the ten-

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[2] The regulations require public housing authorities (PHAs) to impose a lease obligation on tenants:

"To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

"(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

"(B) Any drug-related criminal activity on or near such premises.

"Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit." 24 CFR § 966.4(f)(12)(i) (2001).

[3] Respondents Rucker and Walker also raised Americans with Disabilities Act claims that are not before this Court. And all of the respondents raised state-law claims against OHA that are not before this Court.

ant's apartment unit when the tenant did not know of and had no reason to know of, the drug-related criminal activity." App. to Pet. for Cert. in No. 00–1770, pp. 165a–166a.

A panel of the Court of Appeals reversed, holding that § 1437d(*l*)(6) unambiguously permits the eviction of tenants who violate the lease provision, regardless of whether the tenant was personally aware of the drug activity, and that the statute is constitutional. See *Rucker* v. *Davis*, 203 F. 3d 627 (CA9 2000). An en banc panel of the Court of Appeals reversed and affirmed the District Court's grant of the preliminary injunction. See *Rucker* v. *Davis*, 237 F. 3d 1113 (2001). That court held that HUD's interpretation permitting the eviction of so-called "innocent" tenants "is inconsistent with Congressional intent and must be rejected" under the first step of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). 237 F. 3d, at 1126.

We granted certiorari, 533 U. S. 976 (2001), 534 U. S. 813 (2001), and now reverse, holding that 42 U. S. C. § 1437d(*l*)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.

That this is so seems evident from the plain language of the statute. It provides that "[e]ach public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U. S. C. § 1437d(*l*)(6) (1994 ed., Supp. V). The en banc Court of Appeals thought the statute did not address "the level of personal knowledge or fault that is required for eviction." 237 F. 3d, at 1120. Yet Congress' decision not to impose any

qualification in the statute, combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement. See *United States* v. *Monsanto*, 491 U. S. 600, 609 (1989). As we have explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997). Thus, *any* drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about.

The en banc Court of Appeals also thought it possible that "under the tenant's control" modifies not just "other person," but also "member of the tenant's household" and "guest." 237 F. 3d, at 1120. The court ultimately adopted this reading, concluding that the statute prohibits eviction where the tenant, "for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest." *Id.*, at 1126. But this interpretation runs counter to basic rules of grammar. The disjunctive "or" means that the qualification applies only to "other person." Indeed, the view that "under the tenant's control" modifies everything coming before it in the sentence would result in the nonsensical reading that the statute applies to "a public housing tenant . . . under the tenant's control." HUD offers a convincing explanation for the grammatical imperative that "under the tenant's control" modifies only "other person": "by 'control,' the statute means control in the sense that the tenant has permitted access to the premises." 66 Fed. Reg. 28781 (2001). Implicit in the terms "household member" or "guest" is that access to the premises has been granted by the tenant. Thus, the plain language of § 1437d(*l*)(6) requires leases that grant public housing authorities the discretion to terminate tenancy without regard to the tenant's knowledge of the drug-related criminal activity.

Comparing § 1437d(*l*)(6) to a related statutory provision reinforces the unambiguous text. The civil forfeiture statute that makes all leasehold interests subject to forfeiture when used to commit drug-related criminal activities expressly exempts tenants who had no knowledge of the activity: "[N]o property shall be forfeited under this paragraph . . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U. S. C. § 881(a)(7) (1994 ed.). Because this forfeiture provision was amended in the same Anti-Drug Abuse Act of 1988 that created 42 U. S. C. § 1437d(*l*)(6), the en banc Court of Appeals thought Congress "meant them to be read consistently" so that the knowledge requirement should be read into the eviction provision. 237 F. 3d, at 1121–1122. But the two sections deal with distinctly different matters. The "innocent owner" defense for drug forfeiture cases was already in existence prior to 1988 as part of 21 U. S. C. § 881(a)(7). All that Congress did in the 1988 Act was to add leasehold interests to the property interests that might be forfeited under the drug statute. And if such a forfeiture action were to be brought against a leasehold interest, it would be subject to the pre-existing "innocent owner" defense. But 42 U. S. C. § 1437(d)(*l*)(6), with which we deal here, is a quite different measure. It is entirely reasonable to think that the Government, when seeking to transfer private property to itself in a forfeiture proceeding, should be subject to an "innocent owner defense," while it should not be when acting as a landlord in a public housing project. The forfeiture provision shows that Congress knew exactly how to provide an "innocent owner" defense. It did not provide one in § 1437d(*l*)(6).

The en banc Court of Appeals next resorted to legislative history. The Court of Appeals correctly recognized that reference to legislative history is inappropriate when the text of the statute is unambiguous. 237 F. 3d, at 1123. Given that the en banc Court of Appeals' finding of textual ambigu-

ity is wrong, see *supra,* at 130–132, there is no need to consult legislative history.[4]

Nor was the en banc Court of Appeals correct in concluding that this plain reading of the statute leads to absurd results.[5] The statute does not *require* the eviction of any ten-

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[4] Even if it were appropriate to look at legislative history, it would not help respondents. The en banc Court of Appeals relied on two passages from a 1990 Senate Report on a proposed amendment to the eviction provision. 237 F. 3d, at 1123 (citing S. Rep. No. 101–316 (1990)). But this Report was commenting on language from a Senate version of the 1990 amendment, which was never enacted. The language in the Senate version, which would have imposed a different standard of cause for eviction for drug-related crimes than the unqualified language of § 1437d(*l*)(6), see 136 Cong. Rec. 15991, 16012 (1990) (reproducing S. 566, 101st Cong., 2d Sess., §§ 521(f) and 714(a) (1990)), was rejected at Conference. See H. R. Conf. Rep. No. 101–943, p. 418 (1990). And, as the dissent from the en banc decision below explained, the passages may plausibly be read as a mere suggestion about how local public housing authorities should exercise the "*wide* discretion to evict tenants connected with drug-related criminal behavior" that the lease provision affords them. 237 F. 3d, at 1134 (Sneed, J., dissenting).

Respondents also cite language from a House Report commenting on the Civil Asset Forfeiture Reform Act of 2000, codified at 18 U. S. C. § 983. Brief for Respondents 15–16. For the reasons discussed *supra,* at 132 and this page, legislative history concerning forfeiture provisions is not probative on the interpretation of § 1437d(*l*)(6).

A 1996 amendment to § 1437d(*l*)(6), enacted five years after HUD issued its interpretation of the statute, supports our holding. The 1996 amendment expanded the reach of § 1437d(*l*)(6), changing the language of the lease provision from applying to activity taking place "on or near" the public housing premises, to activity occurring "on or off" the public housing premises. See Housing Opportunity Program Extension Act of 1996, § 9(a)(2), 110 Stat. 836. But Congress, "presumed to be aware" of HUD's interpretation rejecting a knowledge requirement, made no other change to the statute. *Lorillard* v. *Pons,* 434 U. S. 575, 580 (1978).

[5] For the reasons discussed above, no-fault eviction, which is specifically authorized under § 1437d(*l*)(6), does not violate § 1437d(*l*)(2), which prohibits public housing authorities from including "unreasonable terms and conditions [in their leases]." In addition, the general statutory provision in the latter section cannot trump the clear language of the more specific § 1437d(*l*)(6). See *Green* v. *Bock Laundry Machine Co.,* 490 U. S. 504, 524–526 (1989).

ant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," 42 U. S. C. § 11901(2) (1994 ed. and Supp. V), "the seriousness of the offending action," 66 Fed. Reg., at 28803, and "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action," *ibid.* It is not "absurd" that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity. Such "no-fault" eviction is a common "incident of tenant responsibility under normal landlord-tenant law and practice." 56 Fed. Reg., at 51567. Strict liability maximizes deterrence and eases enforcement difficulties. See *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 14 (1991).

And, of course, there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." 56 Fed. Reg., at 51567. With drugs leading to "murders, muggings, and other forms of violence against tenants," and to the "deterioration of the physical environment that requires substantial government expenditures," 42 U. S. C. § 11901(4) (1994 ed., Supp. V), it was reasonable for Congress to permit no-fault evictions in order to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," § 11901(1) (1994 ed.).

In another effort to avoid the plain meaning of the statute, the en banc Court of Appeals invoked the canon of constitutional avoidance. But that canon "has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Cooperative,* 532 U. S. 483, 494 (2001). "Any other conclusion, while purporting to be an exercise in

judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *United States* v. *Albertini*, 472 U. S. 675, 680 (1985). There are, moreover, no "serious constitutional doubts" about Congress' affording local public housing authorities the discretion to conduct no-fault evictions for drug-related crime. *Reno* v. *Flores*, 507 U. S. 292, 314, n. 9 (1993) (emphasis deleted).

The en banc Court of Appeals held that HUD's interpretation "raise[s] serious questions under the Due Process Clause of the Fourteenth Amendment," because it permits "tenants to be deprived of their property interest without any relationship to individual wrongdoing." 237 F. 3d, at 1124–1125 (citing *Scales* v. *United States*, 367 U. S. 203, 224–225 (1961); *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482 (1915)). But both of these cases deal with the acts of government as sovereign. In *Scales*, the United States criminally charged the defendant with knowing membership in an organization that advocated the overthrow of the United States Government. In *Danaher*, an Arkansas statute forbade discrimination among customers of a telephone company. The situation in the present cases is entirely different. The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required. *Scales* and *Danaher* cast no constitutional doubt on such actions.

The Court of Appeals sought to bolster its discussion of constitutional doubt by pointing to the fact that respondents have a property interest in their leasehold interest, citing *Greene* v. *Lindsey*, 456 U. S. 444 (1982). This is undoubtedly true, and *Greene* held that an effort to deprive a tenant of such a right without proper notice violated the Due Process Clause of the Fourteenth Amendment. But, in the present

cases, such deprivation will occur in the state court where OHA brought the unlawful detainer action against respondents. There is no indication that notice has not been given by OHA in the past, or that it will not be given in the future. Any individual factual disputes about whether the lease provision was actually violated can, of course, be resolved in these proceedings.[6]

We hold that "Congress has directly spoken to the precise question at issue." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 842. Section 1437d(*l*)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.

Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER took no part in the consideration or decision of these cases.

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[6] The en banc Court of Appeals cited only the due process constitutional concern. Respondents raise two others: the First Amendment and the Excessive Fines Clause. We agree with Judge O'Scannlain, writing for the panel that reversed the injunction, that the statute does not raise substantial First Amendment or Excessive Fines Clause concerns. *Lyng* v. *Automobile Workers*, 485 U. S. 360 (1988), forecloses respondents' claim that the eviction of unknowing tenants violates the First Amendment guarantee of freedom of association. See 203 F. 3d 627, 647 (2000). And termination of tenancy "is neither a cash nor an in-kind payment imposed by and payable to the government" and therefore is "not subject to analysis as an excessive fine." *Id.*, at 648.

Syllabus

HOFFMAN PLASTIC COMPOUNDS, INC. *v.* NATIONAL LABOR RELATIONS BOARD

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

No. 00–1595. Argued January 15, 2002—Decided March 27, 2002

Petitioner hired Jose Castro on the basis of documents appearing to verify his authorization to work in the United States, but laid him and others off after they supported a union-organizing campaign at petitioner's plant. Respondent National Labor Relations Board (Board) found that the layoffs violated the National Labor Relations Act (NLRA) and ordered backpay and other relief. At a compliance hearing before an Administrative Law Judge (ALJ) to determine the amount of backpay, Castro testified, *inter alia*, that he was born in Mexico, that he had never been legally admitted to, or authorized to work in, this country, and that he gained employment with petitioner only after tendering a birth certificate belonging to a friend born in Texas. Based on this testimony, the ALJ found that the Board was precluded from awarding Castro relief by *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, and by the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility. The Board reversed with respect to backpay, citing its precedent holding that the most effective way to further the immigration policies embodied in IRCA is to provide the NLRA's protections and remedies to undocumented workers in the same manner as to other employees. The Court of Appeals denied review and enforced the Board's order.

Held: Federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States. Pp. 142–152.

(a) This Court has consistently set aside the Board's backpay awards to employees found guilty of serious illegal conduct in connection with their employment. See, *e. g.*, *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 40–47. Since *Southern S. S. Co.*, the Court has never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. See, *e. g.*, *Sure-Tan*, *supra*, in which the Court set aside an award of reinstatement and backpay to undocumented alien workers who were not authorized

to reenter this country following their voluntary departure when their employers unlawfully reported them to the Immigration and Naturalization Service in retaliation for union activity. Among other things, the Court there found that the Board's authority with respect to the selection of remedies was limited by federal immigration policy as expressed in the Immigration and Nationality Act (INA), and held that, in order to avoid a potential conflict with the INA with respect to backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not "lawfully entitled to be present and employed in the United States." 467 U. S., at 903. This case is controlled by the *Southern Steamship* line of cases. *ABF Freight System, Inc.* v. *NLRB*, 510 U. S. 317, 325, distinguished. Pp. 142–146.

(b) As a matter of plain language, *Sure-Tan*'s express limitation of backpay to documented alien workers forecloses the backpay award to Castro, who was never lawfully entitled to be present or employed in the United States. But the Court need not resolve whether, read in context, *Sure-Tan*'s limitation applies only to aliens who left the United States and thus cannot claim backpay without lawful reentry. The question presented here is better analyzed through a wider lens, focusing on a legal landscape now significantly changed. The *Southern S. S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may have to yield. Whether or not this was the situation at the time of *Sure-Tan*, it is precisely the situation today. Two years after *Sure-Tan*, Congress enacted IRCA, a comprehensive scheme that made combating the employment of illegal aliens in the United States central to the policy of immigration law. *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 194, and n. 8. Among other things, IRCA established an extensive "employment verification system," 8 U. S. C. § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3). It also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents, § 1324c(a), an offense that Castro committed when obtaining employment with petitioner. Thus, allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.

Syllabus

However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award. Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against petitioner, including orders that it cease and desist its NLRA violations and conspicuously post a notice detailing employees' rights and its prior unfair practices, which are sufficient to effectuate national labor policy regardless of whether backpay accompanies them, *Sure-Tan, supra,* at 904, and n. 13. Pp. 146–152.

237 F. 3d 639, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 153.

Ryan D. McCortney argued the cause for petitioner. With him on the briefs was *Maurice Baskin.*

Paul R. Q. Wolfson argued the cause for respondent. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Wallace*, *Arthur F. Rosenfeld*, *John H. Ferguson*, *Norton J. Come*, and *John Emad Arbab.**

**Ann Elizabeth Reesman* and *Daniel V. Yager* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Daniel Smirlock*, Deputy Solicitor General, and *M. Patricia Smith* and *Seth Kupperberg*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Earl I. Anzai* of Hawaii, *Thomas F. Reilly* of Massachusetts, *Darrell V. McGraw, Jr.*, of West Virginia, and *Anabelle Rodriguez* of Puerto Rico; for the American Civil Liberties Union Foundation et al. by *Craig Goldblatt* and *Lucas Guttentag;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Michael Rubin;* for Employers and Employer Organizations by *David A. Schulz*, *Jeffrey H. Drichta*, and *Michael J. Wishnie;* and for the National Employment Law Project et al. by *Rebecca Smith*, *James Reif*, and *James Williams.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The National Labor Relations Board (Board) awarded backpay to an undocumented alien who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).

Petitioner Hoffman Plastic Compounds, Inc. (petitioner or Hoffman), custom-formulates chemical compounds for businesses that manufacture pharmaceutical, construction, and household products. In May 1988, petitioner hired Jose Castro to operate various blending machines that "mix and cook" the particular formulas per customer order. Before being hired for this position, Castro presented documents that appeared to verify his authorization to work in the United States. In December 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL–CIO, began a union-organizing campaign at petitioner's production plant. Castro and several other employees supported the organizing campaign and distributed authorization cards to co-workers. In January 1989, Hoffman laid off Castro and other employees engaged in these organizing activities.

Three years later, in January 1992, respondent Board found that Hoffman unlawfully selected four employees, including Castro, for layoff "in order to rid itself of known union supporters" in violation of § 8(a)(3) of the National Labor Relations Act (NLRA).[1] 306 N. L. R. B. 100. To remedy this violation, the Board ordered that Hoffman (1) cease and desist from further violations of the NLRA, (2) post a detailed notice to its employees regarding the remedial order, and (3) offer reinstatement and backpay to the

[1] Section 8(a)(3) of the NLRA prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 49 Stat. 452, as added, 61 Stat. 140, 29 U. S. C. § 158(a)(3).

four affected employees. *Id.*, at 107–108. Hoffman entered into a stipulation with the Board's General Counsel and agreed to abide by the Board's order.

In June 1993, the parties proceeded to a compliance hearing before an Administrative Law Judge (ALJ) to determine the amount of backpay owed to each discriminatee. On the final day of the hearing, Castro testified that he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States. 314 N. L. R. B. 683, 685 (1994). He admitted gaining employment with Hoffman only after tendering a birth certificate belonging to a friend who was born in Texas. *Ibid.* He also admitted that he used this birth certificate to fraudulently obtain a California driver's license and a Social Security card, and to fraudulently obtain employment following his layoff by Hoffman. *Ibid.* Neither Castro nor the Board's General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States. *Ibid.* Based on this testimony, the ALJ found the Board precluded from awarding Castro backpay or reinstatement as such relief would be contrary to *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984), and in conflict with IRCA, which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility. 314 N. L. R. B., at 685–686.

In September 1998, four years after the ALJ's decision, and nine years after Castro was fired, the Board reversed with respect to backpay. 326 N. L. R. B. 1060. Citing its earlier decision in *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B. 408 (1995), the Board determined that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees." 326 N. L. R. B., at 1060. The Board thus found that Castro was entitled to

$66,951 of backpay, plus interest. *Id.*, at 1062. It calculated this backpay award from the date of Castro's termination to the date Hoffman first learned of Castro's undocumented status, a period of 4½ years. *Id.*, at 1061. A dissenting Board member would have affirmed the ALJ and denied Castro all backpay. *Id.*, at 1062 (opinion of Hurtgen).

Hoffman filed a petition for review of the Board's order in the Court of Appeals. A panel of the Court of Appeals denied the petition for review. 208 F. 3d 229 (CADC 2000). After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. 237 F. 3d 639 (2001). We granted certiorari, 533 U. S. 976 (2001), and now reverse.[2]

This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad, see, *e. g.*, *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344, 346–347 (1953), is

[2] The Courts of Appeals have divided on the question whether the Board may award backpay to undocumented workers. Compare *NLRB* v. *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 134 F. 3d 50, 56 (CA2 1997) (holding that illegal workers could collect backpay under the NLRA), and *Local 512, Warehouse and Office Workers' Union* v. *NLRB*, 795 F. 2d 705, 719–720 (CA9 1986) (same), with *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F. 2d 1115, 1121–1122 (CA7 1992) (holding that illegal workers could not collect backpay under the NLRA). The question has a checkered career before the Board, as well. Compare *Felbro, Inc.*, 274 N. L. R. B. 1268, 1269 (1985) (illegal workers could not be awarded backpay in light of *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984)), with *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B. 408, 415 (1995) (illegal workers could be awarded backpay notwithstanding *Sure-Tan*); Memorandum GC 87–8 from Office of General Counsel, NLRB, The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminatees, 1987 WL 109409 (Oct. 27, 1988) (stating Board policy that illegal workers could not be awarded backpay in light of IRCA), with Memorandum GC 98–15 from Office of General Counsel, NLRB, Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent, 1998 WL 1806350 (Dec. 4, 1998) (stating Board policy that illegal workers could be awarded backpay notwithstanding IRCA).

not unlimited, see, *e. g.*, *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257–258 (1939); *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 46–47 (1942); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 532–534 (1984); *Sure-Tan, Inc.* v. *NLRB*, *supra*, at 902–904. Since the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment. In *Fansteel*, the Board awarded reinstatement with backpay to employees who engaged in a "sit down strike" that led to confrontation with local law enforcement officials. We set aside the award, saying:

> "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work." 306 U. S., at 255.

Though we found that the employer had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts. Two years later, in *Southern S. S. Co.*, *supra*, the Board awarded reinstatement with backpay to five employees whose strike on shipboard had amounted to a mutiny in violation of federal law. We set aside the award, saying:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives." 316 U. S., at 47.

Although the Board had argued that the employees' conduct did not in fact violate the federal mutiny statute, we rejected this view, finding the Board's interpretation of a statute so

far removed from its expertise merited no deference from this Court. *Id.*, at 40–46. Since *Southern S. S. Co.*, we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. Thus, we have precluded the Board from enforcing orders found in conflict with the Bankruptcy Code, see *Bildisco*, *supra*, at 527–534, 529, n. 9 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"), rejected claims that federal antitrust policy should defer to the NLRA, *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 626 (1975), and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act, *Carpenters* v. *NLRB*, 357 U. S. 93, 108–110 (1958).

Our decision in *Sure-Tan* followed this line of cases and set aside an award closely analogous to the award challenged here. There we confronted for the first time a potential conflict between the NLRA and federal immigration policy, as then expressed in the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* Two companies had unlawfully reported alien-employees to the Immigration and Naturalization Service (INS) in retaliation for union activity. Rather than face INS sanction, the employees voluntarily departed to Mexico. The Board investigated and found the companies acted in violation of §§ 8(a)(1) and (3) of the NLRA. The Board's ensuing order directed the companies to reinstate the affected workers and pay them six months' backpay.

We affirmed the Board's determination that the NLRA applied to undocumented workers, reasoning that the immigration laws "as presently written" expressed only a "'peripheral concern'" with the employment of illegal aliens. 467 U. S., at 892 (quoting *De Canas* v. *Bica*, 424 U. S. 351, 360 (1976)). "For whatever reason," Congress had not "made it

a separate criminal offense" for employers to hire an illegal alien, or for an illegal alien "to accept employment after entering this country illegally." *Sure-Tan*, 467 U. S., at 892–893. Therefore, we found "no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA." *Id.*, at 893.

With respect to the Board's selection of remedies, however, we found its authority limited by federal immigration policy. See *id.*, at 903 ("In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective' " (quoting *Southern S. S. Co.*, *supra*, at 47)). For example, the Board was prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States. *Sure-Tan*, 467 U. S., at 903. Thus, to avoid "a potential conflict with the INA," the Board's reinstatement order had to be conditioned upon proof of "the employees' legal reentry." *Ibid.* "Similarly," with respect to backpay, we stated: "[T]he employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Ibid.* "[I]n light of the practical workings of the immigration laws," such remedial limitations were appropriate even if they led to "[t]he probable unavailability of the [NLRA's] more effective remedies." *Id.*, at 904.

The Board cites our decision in *ABF Freight System, Inc.* v. *NLRB*, 510 U. S. 317 (1994), as authority for awarding backpay to employees who violate federal laws. In *ABF Freight*, we held that an employee's false testimony at a compliance proceeding did not require the Board to deny reinstatement with backpay. The question presented was "a narrow one," *id.*, at 322, limited to whether the Board was obliged to "adopt a rigid rule" that employees who testify falsely under oath automatically forfeit NLRA remedies, *id.*,

at 325. There are significant differences between that case and this. First, we expressly did not address whether the Board could award backpay to an employee who engaged in "serious misconduct" unrelated to internal Board proceedings, *id.*, at 322, n. 7, such as threatening to kill a supervisor, *ibid.* (citing *Precision Window Mfg.* v. *NLRB*, 963 F. 2d 1105, 1110 (CA8 1992)), or stealing from an employer, 510 U. S., at 322, n. 7 (citing *NLRB* v. *Commonwealth Foods, Inc.*, 506 F. 2d 1065, 1068 (CA4 1974)). Second, the challenged order did not implicate federal statutes or policies administered by other federal agencies, a "most delicate area" in which the Board must be "particularly careful in its choice of remedy." *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 172 (1962). Third, the employee misconduct at issue, though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law. See, *e. g.*, 237 F. 3d, at 657, n. 2 (Sentelle, J., dissenting) ("The perjury statute provides for criminal sanctions; it does not forbid a present or potential perjurer from obtaining a job" (distinguishing *ABF Freight*)). For these reasons, we believe the present case is controlled by the *Southern S. S. Co.* line of cases, rather than by *ABF Freight.*

It is against this decisional background that we turn to the question presented here. The parties and the lower courts focus much of their attention on *Sure-Tan*, particularly its express limitation of backpay to aliens "lawfully entitled to be present and employed in the United States." 467 U. S., at 903. All agree that as a matter of plain language, this limitation forecloses the award of backpay to Castro. Castro was never lawfully entitled to be present or employed in the United States, and thus, under the plain language of *Sure-Tan*, he has no right to claim backpay. The Board takes the view, however, that read in context, this limitation applies only to aliens who left the United States and thus cannot claim backpay without lawful reentry. Brief for Re-

spondent 17–24. The Court of Appeals agreed with this view. 237 F. 3d, at 642–646. Another Court of Appeals, however, agrees with Hoffman, and concludes that *Sure-Tan* simply meant what it said, *i. e.*, that any alien who is "not lawfully entitled to be present and employed in the United States" cannot claim backpay. See *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F. 2d 1115, 1118–1121 (CA7 1992); Brief for Petitioner 7–20. We need not resolve this controversy. For whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.

The *Southern S. S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield. Whether or not this was the situation at the time of *Sure-Tan*, it is precisely the situation today. In 1986, two years after *Sure-Tan*, Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States. § 101(a)(1), 100 Stat. 3360, 8 U. S. C. § 1324a. As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 194, and n. 8 (1991). It did so by establishing an extensive "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).[3] This verification system is critical to the

[3] For an alien to be "authorized" to work in the United States, he or she must possess "a valid social security account number card," § 1324a(b)(C)(i), or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section," § 1324a(b)(C)(ii). See

IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)–(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U. S. C. § 1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions.

Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The Board asks that we overlook this

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also § 1324a(h)(3)(B) (defining "unauthorized alien" as any alien "[not] authorized to be so employed by this chapter or by the Attorney General"). Regulations implementing these provisions are set forth at 8 CFR § 274a (2001).

fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.

The Board contends that awarding limited backpay to Castro "reasonably accommodates" IRCA, because, in the Board's view, such an award is not "inconsistent" with IRCA. Brief for Respondent 29–42. The Board argues that because the backpay period was closed as of the date Hoffman learned of Castro's illegal status, Hoffman could have employed Castro during the backpay period without violating IRCA. *Id.*, at 37. The Board further argues that while IRCA criminalized the misuse of documents, "it did not make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents." *Id.*, at 38. This latter statement, of course, proves little: The mutiny statute in *Southern S. S. Co.*, and the INA in *Sure-Tan*, were likewise understandably silent with respect to such things as backpay awards under the NLRA. What matters here, and what sinks both of the Board's claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities.[4] Far from "accommo-

[4] JUSTICE BREYER contends otherwise, pointing to a single Committee Report from one House of a politically divided Congress, *post*, at 157 (dissenting opinion) (citing H. R. Rep. No. 99–682, pt. 1 (1986)), which is a

dating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.

Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations. The Board admits that had the INS detained Castro, or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay. See Brief for Respondent 7–8 (citing *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B., at 416). Cf. *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S., at 196, n. 11 ("[U]ndocumented aliens taken into custody are not entitled to work") (construing 8 CFR § 103.6(a) (1991)). Castro thus qualifies for the Board's award only by remaining inside the United States illegally. See, *e. g.*, *A. P. R. A. Fuel Buyers Group*, 134 F. 3d, at 62, n. 4 (Jacobs, J., concurring in part and dissenting in part) ("Considering that NLRB proceedings can span a whole decade, this is no small inducement to prolong illegal presence in the country"). Similarly, Castro cannot mitigate damages, a duty our cases require, see *Sure-*

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rather slender reed, *e. g.*, *Bank One Chicago, N. A.* v. *Midwest Bank & Trust Co.*, 516 U. S. 264, 279 (1996) (SCALIA, J., concurring in part and concurring in judgment). Even assuming that a Committee Report can shed light on what Congress intended in IRCA, the Report cited by JUSTICE BREYER says nothing about the Board's authority to award backpay to illegal aliens. The Board in fact initially read the Report as stating Congress' view that such awards are foreclosed. Memorandum GC 88–9 from Office of General Counsel, NLRB, Reinstatement and Backpay Remedies for Discriminatees Who Are "Undocumented Aliens," 1988 WL 236182, *3 (Sept. 1, 1988) ("[T]he relevant committee report points out [that] *Sure-Tan* was the existing law and that decision itself limited the remedial powers of the NLRB. Clearly, Congress did not intend to overrule *Sure-Tan*"). Other courts have observed that the Report "merely endorses the first holding of *Sure-Tan* that undocumented aliens are employees within the meaning of the NLRA." *Del Rey Tortilleria, Inc.*, 976 F. 2d, at 1121 (citation omitted). Our first holding in *Sure-Tan* is not at issue here and does not bear at all on the scope of Board remedies with respect to undocumented workers.

Tan, 467 U. S., at 901 (citing *Seven-Up Bottling*, 344 U. S., at 346; *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 198 (1941)), without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers. The Board here has failed to even consider this tension. See 326 N. L. R. B., at 1063, n. 10 (finding that Castro adequately mitigated damages through interim work with no mention of ALJ findings that Castro secured interim work with false documents).[5]

We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to

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[5] When questioned at oral argument about the tension between affirmative mitigation duties under the NLRA and explicit prohibitions against employment of illegal aliens in IRCA, the Government candidly stated: "[T]he board has not examined this issue in detail." Tr. of Oral Arg. 32. JUSTICE BREYER says that we should nonetheless defer to the Government's view that the Board's remedy is entirely consistent with IRCA. *Post*, at 161 (dissenting opinion). But such deference would be contrary to *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 40–46 (1942), where the Government told us that the Board's remedy was entirely consistent with the federal maritime laws, and *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 529–532 (1984), where the Government told us that the Board's remedy was entirely consistent with the Bankruptcy Code, and *Sure-Tan*, 467 U. S., at 892–894, 902–905, where the Government told us that the Board's remedy was entirely consistent with the INA. See also *Carpenters* v. *NLRB*, 357 U. S. 93, 108–110 (1958) (rejecting Government position that we should defer to the Board's interpretation of the Interstate Commerce Act). We did not defer to the Government's position in any of these cases, and there is even less basis for doing so here since IRCA—unlike the maritime statutes, the Bankruptcy Code, or the INA—not only speaks directly to matters of employment but expressly criminalizes the only employment relationship at issue in this case.

fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. See *supra*, at 140. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. 306 N. L. R. B., at 100–101. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. *NLRB* v. *Warren Co.*, 350 U. S. 107, 112–113 (1955) (Congress gave the Board civil contempt power to enforce compliance with the Board's orders). We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them. *Sure-Tan*, 467 U. S., at 904. See also *id.*, at 904, n. 13 ("This threat of contempt sanctions . . . provides a significant deterrent against future violations of the [NLRA]"). As we concluded in *Sure-Tan*, "in light of the practical workings of the immigration laws," any "perceived deficienc[y] in the NLRA's existing remedial arsenal" must be "addressed by congressional action," not the courts. *Id.*, at 904. In light of IRCA, this statement is even truer today.[6]

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[6] Because the Board is precluded from imposing punitive remedies, *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 9–12 (1940), it is an open question whether awarding backpay to undocumented aliens, who have no entitlement to work in the United States at all, might constitute a prohibited punitive remedy against an employer. See *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F. 2d, at 1119 (finding that undocumented workers discharged in violation of the NLRA have not been harmed in a legal sense and should not be entitled to backpay, because the "'award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to

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

I cannot agree that the backpay award before us "runs counter to," or "trenches upon," national immigration policy. *Ante*, at 147, 149 (citing the Immigration Reform and Control Act of 1986 (IRCA)). As *all* the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board's limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent. Consequently, the order is lawful. See *ante*, at 142 (recognizing "broad" scope of Board's remedial authority).

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The Court does not deny that the employer in this case dismissed an employee for trying to organize a union—a crude and obvious violation of the labor laws. See 29 U. S. C. § 158(a)(3) (1994 ed.); *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 398 (1983). And it cannot deny that the Board has especially broad discretion in choosing an appropriate remedy for addressing such violations. *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612, n. 32 (1969) (Board "draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts"). Nor can it deny that in such circumstances backpay awards serve critically important remedial purposes. *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 263 (1969). Those purposes involve more than victim compensation; they also include deterrence, *i. e.*, discouraging

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those individuals who have suffered harm' ") (quoting *Local 512, Warehouse and Office Workers Union* v. *NLRB*, 795 F. 2d, at 725 (Beezer, J., dissenting in part)). Because we find the remedy foreclosed on other grounds, we do not address whether the award at issue here is " 'punitive' and hence beyond the authority of the Board." *Sure-Tan*, *supra*, at 905, n. 14.

employers from violating the Nation's labor laws. See *ante*, at 152 (recognizing the deterrent purposes of the National Labor Relations Act (NLRA)); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 904, n. 13 (1984) (same).

Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. *Ante*, at 152. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B. 408, 415, n. 38 (1995) (without potential backpay order employer might simply discharge employees who show interest in a union "secure in the knowledge" that only penalties were requirements "to cease and desist and post a notice"); cf. *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 185 (1973); cf. also *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 296, n. 11 (2002) (backpay award provides important incentive to report illegal employer conduct); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975) ("It is the reasonably certain prospect of a backpay award" that leads employers to "shun practices of dubious legality"). Hence the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.

Where in the immigration laws can the Court find a "policy" that might warrant taking from the Board this critically important remedial power? Certainly not in any statutory language. The immigration statutes say that an employer may not knowingly employ an illegal alien, that an alien may not submit false documents, and that the employer must verify documentation. See 8 U. S. C. §§ 1324a(a)(1), 1324a(b); 18 U. S. C. § 1546(b)(1). They provide specific penalties, including criminal penalties, for violations. *Ibid.;* 8 U. S. C. §§ 1324a(e)(4), 1324a(f)(1). But the statutes' language itself does not explicitly state how a violation is to effect the en-

forcement of other laws, such as the labor laws. What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty? The immigration statutes' language simply does not say.

Nor can the Court comfortably rest its conclusion upon the immigration laws' purposes. For one thing, the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants toward the United States. H. R. Rep. No. 99–682, pt. 1, p. 45 (1986). To permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, *supra*, at 410–415 (no significant influence from so speculative a factor); *Patel* v. *Quality Inn South*, 846 F. 2d 700, 704 (CA11 1988) (aliens enter the country "in the hope of getting a job," not gaining "the protection of our labor laws"); *Peterson* v. *Neme*, 222 Va. 477, 482, 281 S. E. 2d 869, 872 (1981) (same); *Arteaga* v. *Literski*, 83 Wis. 2d 128, 132, 265 N. W. 2d 148, 150 (1978) (same); H. R. Rep. No. 99–682, at 45 (same).

To *deny* the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees. Were the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today, see 237 F. 3d 639, 648 (CADC 2001)—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective,

would be obvious and serious. But even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for, as the Board has told us, the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i. e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations. See Brief for Respondent 30–32; Tr. of Oral Arg. 41, 47; cf. also General Accounting Office, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops 8 (GAO/HEHS–95–29, Nov. 1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens). The Court has recognized these considerations in stating that the labor laws must apply to illegal aliens in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens" and therefore there will be "fewer incentives for aliens themselves to enter." *Sure-Tan*, *supra*, at 893–894. The Court today accomplishes the precise opposite.

The immigration law's specific labor-law-related purposes also favor preservation, not elimination, of the Board's back-pay powers. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, *supra*, at 414 (immigration law seeks to combat the problem of aliens' willingness to "work in substandard conditions and for starvation wages"); cf. also *Sure-Tan*, 467 U. S., at 893 ("[E]nforcement of the NLRA . . . is compatible with the policies" of the Immigration and Nationality Act). As I just mentioned and as this Court has held, the immigration law foresees application of the Nation's labor laws to protect "workers who are illegal immigrants." *Id.*, at 891–893; H. R. Rep. No. 99–682, at 58. And a policy of *applying* the labor laws must encompass a policy of *enforcing* the labor laws effectively. Otherwise, as JUSTICE KENNEDY once put the matter, "we would leave helpless the very persons who most need protection from exploitative employer practices."

NLRB v. *Apollo Tire Co.*, 604 F. 2d 1180, 1184 (CA9 1979) (concurring opinion). That presumably is why those in Congress who wrote the immigration statute stated explicitly and unequivocally that the immigration statute does *not* take from the Board *any* of its remedial authority. H. R. Rep. No. 99–682, at 58 (IRCA does not "undermine or diminish in any way labor protections in existing law, or . . . limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees").

Neither does precedent help the Court. Indeed, in *ABF Freight System, Inc.* v. *NLRB*, 510 U. S. 317 (1994), this Court *upheld* an award of backpay to an unlawfully discharged employee guilty of a serious crime, namely, perjury committed during the Board's enforcement proceedings. *Id.*, at 323. See also *id.*, at 326–331 (SCALIA, J., concurring in judgment while stressing seriousness of misconduct). The Court unanimously held that the Board retained "broad discretion" to remedy the labor law violation through a backpay award, while leaving enforcement of the criminal law to ordinary perjury-related civil and criminal penalties. See *id.*, at 325; see also 18 U. S. C. § 1621 (criminal penalties for perjury).

The Court, trying to distinguish *ABF Freight*, says that the Court there left open "whether the Board could award backpay to an employee who engaged in 'serious misconduct' unrelated to internal Board proceedings." *Ante*, at 146. But the Court does not explain why (assuming misconduct of equivalent seriousness) lack of a relationship to Board proceedings matters, nor why the Board should have to do more than take that misconduct into account—as it did here. 326 N. L. R. B. 1060, 1060–1062 (1998) (thoroughly discussing relevance of immigration policies); see also *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B., at 412–414 (same). The Court adds that the Board order in *ABF Freight* "did not implicate federal statutes or policies administered by other

federal agencies." *Ante*, at 146. But it does not explain why this matters when, as here, the Attorney General, whose Department—through the Immigration and Naturalization Service—administers the immigration statutes, *supports* the Board's order. Nor does it explain why the perjury statute at issue in *ABF Freight* was not a "statute . . . administered by" another "agenc[y]." See 510 U. S., at 329 (SCALIA, J., concurring in judgment) (noting Department of Justice officials' responsibility for prosecuting perjury).

The Court concludes that the employee misconduct at issue in *ABF Freight*, "though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal." *Ante*, at 146. But this conclusion rests upon an implicit assumption—the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified. See *supra*, at 155–157.

At the same time, the two earlier cases upon which the Court relies, *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), and *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 47 (1942), offer little support for its conclusion. The Court correctly characterizes both cases as ones in which this Court set aside the Board's remedy (more specifically, reinstatement). *Ante*, at 142–144. But the Court does not focus upon the underlying circumstances—which in those cases were very different from the circumstances present here. In both earlier cases, the employer had committed an independent unfair labor practice—in the one by creating a company union, *Fansteel*, *supra*, at 250, in the other by refusing to recognize the employees' elected representative, *Southern S. S. Co.*, *supra*, at 32–36, 48–49. In both cases, the employees had responded with unlawful acts of their own—a sit-in and a mutiny. *Fansteel*, *supra*, at 252; *Southern S. S. Co.*, *supra*, at 48. And in both cases, the Court held that the employees' own unlawful conduct provided the employer with "good cause" for discharge, severing any con-

nection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay. *Fansteel*, *supra*, at 254–259; *Southern S. S. Co.*, *supra*, at 47–49.

By way of contrast, the present case concerns a discharge that was not for "good cause." The discharge did not sever any connection with an unfair labor practice. Indeed, the discharge *was* the unfair labor practice. Hence a determination that backpay was inappropriate in the former circumstances (involving a *justifiable* discharge) tells us next to nothing about the appropriateness as a legal remedy in the latter (involving an *un*justifiable discharge), the circumstances present here.

The Court also refers to the statement in *Sure-Tan, Inc.* v. *NLRB*, 467 U. S., at 903, that "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." The Court, however, does not rely upon this statement as determining its conclusion. See *ante*, at 146–147. And it is right not to do so. See *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979) ("[L]anguage of an opinion" must be "read in context" and not "parsed" like a statute). *Sure-Tan* involved an order reinstating (with backpay) illegal aliens who had left the country and returned to Mexico. 467 U. S., at 888–889. In order to collect the backpay to which the order entitled them, the aliens would have had to reenter the country illegally. Consequently, the order itself could not have been enforced without leading to a violation of criminal law. *Id.*, at 903. Nothing in the Court's opinion suggests that the Court intended its statement to reach to circumstances different from and not at issue in *Sure-Tan*, where an order, such as the order before us, does not require the alien to engage in further illegal behavior.

Finally, the Court cannot reasonably rely upon the award's negative features taken together. The Court summarizes those negative features when it says that the Board "asks

that we . . . award backpay to an illegal alien [1] for years of work not performed, [2] for wages that could not lawfully have been earned, and [3] for a job obtained in the first instance by a criminal fraud." *Ante*, at 148–149. The first of these features has little persuasive force, given the facts that (1) backpay ordinarily and necessarily is awarded to a discharged employee who may not find other work, and (2) the Board is able to tailor an alien's backpay award to avoid rewarding that alien for his legal inability to mitigate damages by obtaining lawful employment elsewhere. See, *e. g.*, *Sure-Tan*, *supra*, at 901–902, n. 11 (basing backpay on "representative employee"); *A. P. R. A. Fuel*, 320 N. L. R. B., at 416 (providing backpay for reasonable period); 326 N. L. R. B., at 1062 (cutting off backpay when employer learned of unlawful status).

Neither can the remaining two features—unlawfully earned wages and criminal fraud—prove determinative, for they tell us only a small portion of the relevant story. After all, the same backpay award that compensates an employee in the circumstances the Court describes *also* requires an employer who has violated the labor laws to make a meaningful monetary payment. Considered from this equally important perspective, the award simply requires that employer to pay an employee whom the employer believed could lawfully have worked in the United States, (1) for years of work that he would have performed, (2) for a portion of the wages that he would have earned, and (3) for a job that the employee would have held—had that employer not unlawfully dismissed the employee for union organizing. In ignoring these latter features of the award, the Court undermines the public policies that underlie the Nation's labor laws.

Of course, the Court believes it is necessary to do so in order to vindicate what it sees as conflicting immigration law policies. I have explained why I believe the latter policies do not conflict. See *supra*, at 155–157. But even were I wrong, the law requires the Court to respect the Board's

conclusion, rather than to substitute its own independent view of the matter for that of the Board. The Board reached its conclusion after carefully considering both labor law and immigration law. 326 N. L. R. B., at 1060–1062; see *A. P. R. A. Fuel Oil Buyers Group, Inc.*, *supra*, at 412–414. In doing so the Board has acted "with a discriminating awareness of the consequences of its action" on the immigration laws. *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 174 (1962). The Attorney General, charged with immigration law enforcement, has told us that the Board is right. See 8 U. S. C. § 1324a(e) (Immigration and Naturalization Service placed within the Department of Justice, under authority of Attorney General who is charged with responsibility for immigration law enforcement); cf. *United States* v. *Mead Corp.*, 533 U. S. 218, 258–259, n. 6 (2001) (SCALIA, J., dissenting) (Solicitor General's statements represent agency's position); *Jean* v. *Nelson*, 472 U. S. 846, 856, and n. 3 (1985) (agency's position with respect to its regulation during litigation "arrives with some authority"). And the Board's position is, at the least, a reasonable one. Consequently, it is lawful. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) (requiring courts to uphold reasonable agency position).

For these reasons, I respectfully dissent.

Syllabus

MICKENS *v.* TAYLOR, WARDEN

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

No. 00–9285. Argued November 5, 2001—Decided March 27, 2002

A Virginia jury convicted petitioner of the premeditated murder of Timothy Hall during or following the commission of an attempted forcible sodomy, and sentenced petitioner to death. Petitioner filed a federal habeas petition alleging, *inter alia*, that he was denied effective assistance of counsel because one of his court-appointed attorneys had a conflict of interest at trial. Petitioner's lead attorney, Bryan Saunders, had represented Hall on assault and concealed-weapons charges at the time of the murder. The same juvenile court judge who dismissed the charges against Hall later appointed Saunders to represent petitioner. Saunders did not disclose to the court, his co-counsel, or petitioner that he had previously represented Hall. The District Court denied habeas relief, and an en banc majority of the Fourth Circuit affirmed. The majority rejected petitioner's argument that the juvenile court judge's failure to inquire into a potential conflict either mandated automatic reversal of his conviction or relieved him of the burden of showing that a conflict of interest adversely affected his representation. The court concluded that petitioner had not demonstrated adverse effect.

Held: In order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance. Pp. 166–176.

(a) A defendant alleging ineffective assistance generally must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* v. *Washington*, 466 U. S. 668, 694. An exception to this general rule presumes a probable effect upon the outcome where assistance of counsel has been denied entirely or during a critical stage of the proceeding. The Court has held in several cases that "circumstances of that magnitude," *United States* v. *Cronic*, 466 U. S. 648, 659, n. 26, may also arise when the defendant's attorney actively represented conflicting interests. In *Holloway* v. *Arkansas*, 435 U. S. 475, the Court created an automatic reversal rule where counsel is forced to represent co-defendants over his timely objection, unless the trial court has determined that there is no conflict. In *Cuyler* v. *Sullivan*, 446 U. S. 335,

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the Court declined to extend *Holloway* and held that, absent objection, a defendant must demonstrate that a conflict of interest actually affected the adequacy of his representation, 446 U. S., at 348–349. Finally, in *Wood* v. *Georgia,* 450 U. S. 261, the Court granted certiorari to consider an equal-protection violation, but then remanded for the trial court to determine whether a conflict of interest that the record strongly suggested actually existed, *id.*, at 273. Pp. 166–170.

(b) This Court rejects petitioner's argument that the remand instruction in *Wood,* directing the trial court to grant a new hearing if it determined that "an actual conflict of interest existed," 450 U. S., at 273, established that where the trial judge neglects a duty to inquire into a potential conflict the defendant, to obtain reversal, need only show that his lawyer was subject to a conflict of interest, not that the conflict adversely affected counsel's performance. As used in the remand instruction, "an actual conflict of interest" meant precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties. It was shorthand for *Sullivan*'s statement that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief," 446 U. S., at 349–350 (emphasis added). The notion that *Wood* created a new rule *sub silentio* is implausible. Moreover, petitioner's proposed rule of automatic reversal makes little policy sense. Thus, to void the conviction petitioner had to establish, at a minimum, that the conflict of interest adversely affected his counsel's performance. The Fourth Circuit having found no such effect, the denial of habeas relief must be affirmed. Pp. 170–174.

(c) The case was presented and argued on the assumption that (absent some exception for failure to inquire) *Sullivan* would be applicable to a conflict rooted in counsel's obligations to former clients. The Court does not rule upon the correctness of that assumption. Pp. 174–176.

240 F. 3d 348, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post,* p. 176. STEVENS, J., *post,* p. 179, and SOUTER, J., *post,* p. 189, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 209.

Robert J. Wagner, by appointment of the Court, 533 U. S. 927, argued the cause for petitioner. With him on the briefs were *Robert E. Lee* and *Mark E. Olive.*

Robert Q. Harris, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *Randolph A. Beales,* Attorney General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Olson, Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben, Gregory G. Garre,* and *Joel M. Gershowitz.**

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.

I

In 1993, a Virginia jury convicted petitioner Mickens of the premeditated murder of Timothy Hall during or following the commission of an attempted forcible sodomy. Finding the murder outrageously and wantonly vile, it sentenced petitioner to death. In June 1998, Mickens filed a petition for writ of habeas corpus, see 28 U. S. C. § 2254 (1994 ed. and Supp. V), in the United States District Court for the Eastern District of Virginia, alleging, *inter alia,* that he was denied effective assistance of counsel because one of his court-appointed attorneys had a conflict of interest at trial. Federal habeas counsel had discovered that petitioner's lead trial attorney, Bryan Saunders, was representing Hall (the victim) on assault and concealed-weapons charges at the time of the murder. Saunders had been appointed to represent Hall, a juvenile, on March 20, 1992, and had met with him once for 15 to 30 minutes some time the following week. Hall's body was discovered on March 30, 1992, and four days

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Lawrence J. Fox filed a brief for Legal Ethicists et al. as *amici curiae.*

later a juvenile court judge dismissed the charges against him, noting on the docket sheet that Hall was deceased. The one-page docket sheet also listed Saunders as Hall's counsel. On April 6, 1992, the same judge appointed Saunders to represent petitioner. Saunders did not disclose to the court, his co-counsel, or petitioner that he had previously represented Hall. Under Virginia law, juvenile case files are confidential and may not generally be disclosed without a court order, see Va. Code Ann. § 16.1–305 (1999), but petitioner learned about Saunders' prior representation when a clerk mistakenly produced Hall's file to federal habeas counsel.

The District Court held an evidentiary hearing and denied petitioner's habeas petition. A divided panel of the Court of Appeals for the Fourth Circuit reversed, 227 F. 3d 203 (2000), and the Court of Appeals granted rehearing en banc, 240 F. 3d 348 (2001). As an initial matter, the 7-to-3 en banc majority determined that petitioner's failure to raise his conflict-of-interest claim in state court did not preclude review, concluding that petitioner had established cause and that the "inquiry as to prejudice for purposes of excusing [petitioner's] default . . . incorporates the test for evaluating his underlying conflict of interest claim." *Id.*, at 356–357. On the merits, the Court of Appeals assumed that the juvenile court judge had neglected a duty to inquire into a potential conflict, but rejected petitioner's argument that this failure either mandated automatic reversal of his conviction or relieved him of the burden of showing that a conflict of interest adversely affected his representation. Relying on *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the court held that a defendant must show "both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known," 240 F. 3d, at 355–356. Concluding that petitioner had not demonstrated adverse effect, *id.*, at 360, it affirmed the District Court's denial of habeas relief. We

granted a stay of execution of petitioner's sentence and granted certiorari. 532 U. S. 970 (2001).

II

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." This right has been accorded, we have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U. S. 648, 658 (1984). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984); and it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.

There is an exception to this general rule. We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Cronic*, *supra*, at 658–659; see also *Geders* v. *United States*, 425 U. S. 80, 91 (1976); *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963). But only in "circumstances of that magnitude" do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. *Cronic*, *supra*, at 659, n. 26.

We have held in several cases that "circumstances of that magnitude" may also arise when the defendant's attorney actively represented conflicting interests. The nub of the question before us is whether the principle established by these cases provides an exception to the general rule of

Strickland under the circumstances of the present case. To answer that question, we must examine those cases in some detail.[1]

In *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), defense counsel had objected that he could not adequately represent the divergent interests of three codefendants. *Id.*, at 478–480. Without inquiry, the trial court had denied counsel's motions for the appointment of separate counsel and had refused to allow counsel to cross-examine any of the defendants on behalf of the other two. The *Holloway* Court deferred to the judgment of counsel regarding the existence of a disabling conflict, recognizing that a defense attorney is in the best position to determine when a conflict exists, that he has an ethical obligation to advise the court of any problem, and that his declarations to the court are "virtually made

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[1] JUSTICE BREYER rejects *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), and *Wood* v. *Georgia*, 450 U. S. 261 (1981), as "a sensible [and] coherent framework for dealing with" this case, *post*, at 209 (dissenting opinion), and proposes instead the "categorical rule," *post*, at 211, that when a "breakdown in the criminal justice system creates . . . the appearance that the proceeding will not reliably serve its function as a vehicle for determination of guilt and innocence, and the resulting criminal punishment will not be regarded as fundamentally fair," *ibid.* (internal quotation marks omitted), reversal must be decreed without proof of prejudice. This seems to us less a categorical rule of decision than a restatement of the issue to be decided. *Holloway*, *Sullivan*, and *Wood* establish the framework that they do precisely because that framework is thought to identify the situations in which the conviction will reasonably not be regarded as fundamentally fair. We believe it eminently performs that function in the case at hand, and that JUSTICE BREYER is mistaken to think otherwise. But if he does think otherwise, a proper regard for the judicial function—and especially for the function of this Court, which must lay down rules that can be followed in the innumerable cases we are unable to review—would counsel that he propose some other "sensible [and] coherent framework," rather than merely saying that prior representation of the victim, plus the capital nature of the case, plus judicial appointment of the counsel, see *post*, at 210, strikes him as producing a result that will not be regarded as fundamentally fair. This is not a rule of law but expression of an ad hoc "fairness" judgment (with which we disagree).

under oath." *Id.*, at 485–486 (internal quotation marks omitted). *Holloway* presumed, moreover, that the conflict, "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation," *id.*, at 490, undermined the adversarial process. The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants "effectively sea[l] his lips on crucial matters" and make it difficult to measure the precise harm arising from counsel's errors. *Id.*, at 489–490. *Holloway* thus creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. *Id.*, at 488 ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic").

In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the respondent was one of three defendants accused of murder who were tried separately, represented by the same counsel. Neither counsel nor anyone else objected to the multiple representation, and counsel's opening argument at Sullivan's trial suggested that the interests of the defendants were aligned. *Id.*, at 347–348. We declined to extend *Holloway*'s automatic reversal rule to this situation and held that, absent objection, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation." 446 U. S., at 348–349. In addition to describing the defendant's burden of proof, *Sullivan* addressed separately a trial court's duty to inquire into the propriety of a multiple representation, construing *Holloway* to require inquiry only when "the trial court knows or reasonably should know that a particular conflict exists," 446 U. S., at 347[2]—which is not

[2] In order to circumvent *Sullivan*'s clear language, JUSTICE STEVENS suggests that a trial court must scrutinize representation by appointed counsel more closely than representation by retained counsel. *Post*, at 184 (dissenting opinion). But we have already rejected the notion that

to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which "inheres in almost every instance of multiple representation," *id.*, at 348. In *Sullivan,* no "special circumstances" triggered the trial court's duty to inquire. *Id.*, at 346.

Finally, in *Wood* v. *Georgia,* 450 U. S. 261 (1981), three indigent defendants convicted of distributing obscene materials had their probation revoked for failure to make the requisite $500 monthly payments on their $5,000 fines. We granted certiorari to consider whether this violated the Equal Protection Clause, but during the course of our consideration certain disturbing circumstances came to our attention: At the probation-revocation hearing (as at all times since their arrest) the defendants had been represented by the lawyer for their employer (the owner of the business that purveyed the obscenity), and their employer paid the attorney's fees. The employer had promised his employees he would pay their fines, and had generally kept that promise but had not done so in these defendants' case. This record suggested that the employer's interest in establishing a favorable equal-protection precedent (reducing the fines he would have to pay for his indigent employees in the future) diverged from the defendants' interest in obtaining leniency or paying lesser fines to avoid imprisonment. Moreover, the possibility that counsel was actively representing the conflicting interests of employer and defendants "was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.*, at 272.

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the Sixth Amendment draws such a distinction. "A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel . . . . The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." *Sullivan, supra,* at 344.

Because "[o]n the record before us, we [could not] be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him," *ibid.*, we remanded for the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed," *id.*, at 273.

Petitioner argues that the remand instruction in *Wood* established an "unambiguous rule" that where the trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain reversal of the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance. Brief for Petitioner 21.[3] He relies upon the lan-

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[3] Petitioner no longer argues, as he did below and as JUSTICE SOUTER does now, *post*, at 202 (dissenting opinion), that the Sixth Amendment requires reversal of his conviction without further inquiry into whether the potential conflict that the judge should have investigated was real. Compare 240 F. 3d 348, 357 (CA4 2001) (en banc), with Tr. of Oral Arg. 23–25. Some Courts of Appeals have read a footnote in *Wood* v. *Georgia*, 450 U. S., at 272, n. 18, as establishing that outright reversal is mandated when the trial court neglects a duty to inquire into a potential conflict of interest. See, *e. g.*, *Campbell* v. *Rice*, 265 F. 3d 878, 884–885, 888 (CA9 2001); *Ciak* v. *United States*, 59 F. 3d 296, 302 (CA2 1995). But see *Brien* v. *United States*, 695 F. 2d 10, 15, n. 10 (CA1 1982). The *Wood* footnote says that *Sullivan* does not preclude "raising . . . a conflict-of-interest problem that is apparent in the record" and that "*Sullivan mandates* a reversal when the trial court has failed to make [the requisite] inquiry." *Wood*, *supra*, at 272, n. 18. These statements were made in response to the dissent's contention that the majority opinion had "gone beyond" *Cuyler* v. *Sullivan*, see 450 U. S., at 272, n. 18, in reaching a conflict-of-interest due process claim that had been raised neither in the petition for certiorari nor before the state courts, see *id.*, at 280 (White, J., dissenting). To the extent the "*mandates* a reversal" statement goes beyond the assertion of mere jurisdiction to reverse, it is dictum—and dictum inconsistent with the disposition in *Wood*, which was *not* to reverse but to vacate and remand for the trial court to conduct the inquiry it had omitted.

JUSTICE SOUTER labors to suggest that the *Wood* remand order is part of "a coherent scheme," *post*, at 194, in which automatic reversal is re-

guage in the remand instruction directing the trial court to grant a new revocation hearing if it determines that "an actual conflict of interest existed," *Wood*, *supra*, at 273, without requiring a further determination that the conflict adversely affected counsel's performance. As used in the remand instruction, however, we think "an actual conflict of interest" meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties. It was shorthand for the statement in *Sullivan* that "a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief." 446 U. S., at 349–350 (emphasis added).[4] This is the only interpreta-

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quired when the trial judge fails to inquire into a potential conflict that was apparent before the proceeding was "held or completed," but a defendant must demonstrate adverse effect when the judge fails to inquire into a conflict that was not apparent before the end of the proceeding, *post*, at 202. The problem with this carefully concealed "coherent scheme" (no case has ever mentioned it) is that in *Wood* itself the court did not decree automatic reversal, even though it found that "the *possibility* of a conflict of interest was sufficiently apparent *at the time of* the revocation hearing to impose upon the court a duty to inquire further." 450 U. S., at 272 (second emphasis added). Indeed, the State had actually notified the judge of a potential conflict of interest "'[d]uring the probation revocation hearing.'" *Id.*, at 272, and n. 20. JUSTICE SOUTER's statement that "the signs that a conflict may have occurred were clear to the judge at the close of the probation revocation proceeding," *post*, at 201—when it became apparent that counsel had neglected the "strategy more obviously in the defendants' interest, of requesting the court to reduce the fines or defer their collection," *post*, at 198—would more accurately be phrased "the *effect of the conflict upon counsel's performance* was clear to the judge at the close of the probation revocation proceeding."

[4] JUSTICE STEVENS asserts that this reading (and presumably JUSTICE SOUTER's reading as well, *post*, at 201), is wrong, *post*, at 186–187; that *Wood* only requires petitioner to show that a real conflict existed, not that it affected counsel's performance, *post*, at 187. This is so because we "unambiguously stated" that a conviction must be reversed whenever the trial court fails to investigate a potential conflict, *post*, at 186–187 (citing

tion consistent with the *Wood* Court's earlier description of why it could not decide the case without a remand: "On the record before us, we cannot be sure whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him. *If this was the case*, the due process rights of petitioners were not respected . . . ." 450 U. S., at 272 (emphasis added). The notion that *Wood* created a new rule *sub silentio*—and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue—is implausible.[5]

Petitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan*-mandated inquiry, makes little policy sense. As discussed, the rule applied when the trial judge is not aware of the

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Wood footnote). As we have explained earlier, n. 3, *supra*, this dictum simply contradicts the remand order in *Wood*.

[5] We have used "actual conflict of interest" elsewhere to mean what was required to be shown in *Sullivan*. See *United States* v. *Cronic*, 466 U. S. 648, 662, n. 31 (1984) ("[W]e have presumed prejudice when counsel labors under an actual conflict of interest . . . . See *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980)"). And we have used "conflict of interest" to mean a division of loyalties *that affected counsel's performance*. In *Holloway*, 435 U. S., at 482, we described our earlier opinion in *Glasser* v. *United States*, 315 U. S. 60 (1942), as follows:

"The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart's desire to protect Kretske's interests, and was thus 'indicative of Stewart's struggle to serve two masters . . . .' [315 U. S.], at 75. After identifying *this conflict of interests*, the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." (Emphasis added.)

Thus, the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance—thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown. See *Sullivan*, *supra*, at 348–349. The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable. Cf. *United States* v. *Cronic*, 466 U. S., at 662, n. 31. Nor does the trial judge's failure to make the *Sullivan*-mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at the trial.

Nor, finally, is automatic reversal simply an appropriate means of enforcing *Sullivan*'s mandate of inquiry. Despite JUSTICE SOUTER's belief that there must be a threat of sanction (to wit, the risk of conferring a windfall upon the defendant) in order to induce "resolutely obdurate" trial judges to follow the law, *post*, at 208, we do not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule, see *United States* v. *Leon*, 468 U. S. 897, 916–917 (1984). And in any event, the *Sullivan* standard, which requires proof of effect upon representation but (once such effect is shown) presumes prejudice, already creates an "incentive" to inquire into a potential conflict. In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney. We doubt that the deterrence of "judicial dereliction" that would be achieved by an automatic reversal rule is significantly greater.

Since this was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court's failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner's

burden of proof; it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance. The Court of Appeals having found no such effect, see 240 F. 3d, at 360, the denial of habeas relief must be affirmed.

III

Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown. The case was presented and argued on the assumption that (absent some exception for failure to inquire) *Sullivan* would be applicable—requiring a showing of defective performance, but *not* requiring in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial. That assumption was not unreasonable in light of the holdings of Courts of Appeals, which have applied *Sullivan* "unblinkingly" to "all kinds of alleged attorney ethical conflicts," *Beets* v. *Scott*, 65 F. 3d 1258, 1266 (CA5 1995) (en banc). They have invoked the *Sullivan* standard not only when (as here) there is a conflict rooted in counsel's obligations to *former* clients, see, *e. g.*, *Perillo* v. *Johnson*, 205 F. 3d 775, 797–799 (CA5 2000); *Freund* v. *Butterworth*, 165 F. 3d 839, 858–860 (CA11 1999); *Mannhalt* v. *Reed*, 847 F. 2d 576, 580 (CA9 1988); *United States* v. *Young*, 644 F. 2d 1008, 1013 (CA4 1981), but even when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, *United States* v. *Hearst*, 638 F. 2d 1190, 1193 (CA9 1980), a job with the prosecutor's office, *Garcia* v. *Bunnell*, 33 F. 3d 1193, 1194–1195, 1198, n. 4 (CA9 1994), the teaching of classes to Internal Revenue Service agents, *United States* v. *Michaud*, 925 F. 2d 37, 40–42 (CA1 1991), a romantic "entanglement" with the prosecutor, *Summerlin* v. *Stewart*, 267 F. 3d 926, 935–941 (CA9 2001), or fear of antagonizing the

trial judge, *United States* v. *Sayan*, 968 F. 2d 55, 64–65 (CADC 1992).

It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "[U]ntil," it said, "a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U. S., at 350 (emphasis added). Both *Sullivan* itself, see *id.*, at 348–349, and *Holloway*, see 435 U. S., at 490–491, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. See also Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125–140 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941–950 (1978). Not all attorney conflicts present comparable difficulties. Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation.[6] See *Sullivan*, *supra*, at 346, n. 10 (citing the Rule).

[6] Federal Rule of Criminal Procedure 44(c) provides:

"Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. See *Nix* v. *Whiteside*, 475 U. S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

* * *

For the reasons stated, the judgment of the Court of Appeals is

Affirmed.

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

In its comprehensive analysis the Court has said all that is necessary to address the issues raised by the question presented, and I join the opinion in full. The trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice. We did not grant certiorari on a second question presented by petitioner: whether, if we rejected his proposed presumption, he had nonetheless established that a conflict of interest adversely affected his representation. I write separately to emphasize that the facts of this case well illustrate why a wooden rule requiring reversal is inappropriate for cases like this one.

At petitioner's request, the District Court conducted an evidentiary hearing on the conflict claim and issued a thorough opinion, which found that counsel's brief representation of the victim had no effect whatsoever on the course of petitioner's trial. See *Mickens* v. *Greene*, 74 F. Supp. 2d 586 (ED Va. 1999). The District Court's findings depend upon credibility judgments made after hearing the testimony of petitioner's counsel, Bryan Saunders, and other witnesses. As a reviewing court, our role is not to speculate about counsel's motives or about the plausibility of alternative litigation strategies. Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous. See *Lackawanna County District Attorney* v. *Coss*, 532 U. S. 394, 406 (2001) (opinion of O'CONNOR, J.). The District Court found that Saunders did not believe he had any obligation to his former client, Timothy Hall, that would interfere with the litigation. See 74 F. Supp. 2d, at 606 ("[T]he Court concludes that, as a factual matter, Saunders did not believe that any continuing duties to a former client might interfere with his consideration of all facts and options for his current client" (internal quotation marks and alteration omitted)). Although the District Court concluded that Saunders probably did learn some matters that were confidential, it found that nothing the attorney learned was relevant to the subsequent murder case. See *ibid.* ("[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing" (emphasis deleted)). Indeed, even if Saunders had learned relevant information, the District Court found that he labored under the impression he had no continuing duty at all to his deceased client. See *id.*, at 605 ("[T]he record here reflects that, as far as Saunders was concerned, his allegiance to Hall, '[e]nded when I walked in the courtroom and they told me he was dead and the case was gone'") (quoting Hearing Tr. 156–157, 218 (Jan. 13, 1999)). While Saunders' belief

may have been mistaken, it establishes that the prior representation did not influence the choices he made during the course of the trial. This conclusion is a good example of why a case-by-case inquiry is required, rather than simply adopting an automatic rule of reversal.

Petitioner's description of roads not taken would entail two degrees of speculation. We would be required to assume that Saunders believed he had a continuing duty to the victim, and we then would be required to consider whether in this hypothetical case, the counsel would have been blocked from pursuing an alternative defense strategy. The District Court concluded that the prosecution's case, coupled with the defendant's insistence on testifying, foreclosed the strategies suggested by petitioner after the fact. According to the District Court, there was no plausible argument that the victim consented to sexual relations with his murderer, given the bruises on the victim's neck, blood marks showing the victim was stabbed before or during sexual intercourse, and, most important, petitioner's insistence on testifying at trial that he had never met the victim. See 74 F. Supp. 2d, at 607 ("[T]he record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy"). The basic defense at the guilt phase was that petitioner was not at the scene; this is hardly consistent with the theory that there was a consensual encounter.

The District Court said the same for counsel's alleged dereliction at the sentencing phase. Saunders' failure to attack the character of the 17-year-old victim and his mother had nothing to do with the putative conflict of interest. This strategy was rejected as likely to backfire, not only by Saunders, but also by his co-counsel, who owed no duty to Hall. See *id.*, at 608 ("[T]he record here dispels the contention that the failure to use negative information about Hall is attributable to any conflict of interest on the part of Saunders"). These facts, and others relied upon by the District Court, provide compelling evidence that a theoretical conflict does

not establish a constitutional violation, even when the conflict is one about which the trial judge should have known.

The constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures. If it were otherwise, the judge's duty would not be limited to cases where the attorney is suspected of harboring a conflict of interest. The Sixth Amendment protects the defendant against an ineffective attorney, as well as a conflicted one. See *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984). It would be a major departure to say that the trial judge must step in every time defense counsel appears to be providing ineffective assistance, and indeed, there is no precedent to support this proposition. As the Sixth Amendment guarantees the defendant the assistance of counsel, the infringement of that right must depend on a deficiency of the lawyer, not of the trial judge. There is no reason to presume this guarantee unfulfilled when the purported conflict has had no effect on the representation.

With these observations, I join the opinion of the Court.

JUSTICE STEVENS, dissenting.

This case raises three uniquely important questions about a fundamental component of our criminal justice system—the constitutional right of a person accused of a capital offense to have the effective assistance of counsel for his defense.[1] The first is whether a capital defendant's attorney

[1] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This protection is applicable to state, as well as federal, criminal proceedings. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). We have long recognized the paramount importance of the right to effective assistance of counsel. *United States* v. *Cronic*, 466 U. S. 648, 653–654 (1984) ("'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have'" (citation omitted)).

has a duty to disclose that he was representing the defendant's alleged victim at the time of the murder. Second, is whether, assuming disclosure of the prior representation, the capital defendant has a right to refuse the appointment of the conflicted attorney. Third, is whether the trial judge, who knows or should know of such prior representation, has a duty to obtain the defendant's consent before appointing that lawyer to represent him. Ultimately, the question presented by this case is whether, if these duties exist and if all of them are violated, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States* v. *Cronic*, 466 U. S. 648, 658 (1984).

I

The first critical stage in the defense of a capital case is the series of pretrial meetings between the accused and his counsel when they decide how the case should be defended. A lawyer cannot possibly determine how best to represent a new client unless that client is willing to provide the lawyer with a truthful account of the relevant facts. When an indigent defendant first meets his newly appointed counsel, he will often falsely maintain his complete innocence. Truthful disclosures of embarrassing or incriminating facts are contingent on the development of the client's confidence in the undivided loyalty of the lawyer. Quite obviously, knowledge that the lawyer represented the victim would be a substantial obstacle to the development of such confidence.

It is equally true that a lawyer's decision to conceal such an important fact from his new client would have comparable ramifications. The suppression of communication and truncated investigation that would unavoidably follow from such a decision would also make it difficult, if not altogether impossible, to establish the necessary level of trust that should

characterize the "delicacy of relation" between attorney and client.[2]

In this very case, it is likely that Mickens misled his counsel, Bryan Saunders, given the fact that Mickens gave false testimony at his trial denying any involvement in the crime despite the overwhelming evidence that he had killed Timothy Hall after a sexual encounter. In retrospect, it seems obvious that the death penalty might have been avoided by acknowledging Mickens' involvement, but emphasizing the evidence suggesting that their sexual encounter was consensual. Mickens' habeas counsel garnered evidence suggesting that Hall was a male prostitute, App. 137, 149, 162, 169; that the area where Hall was killed was known for prostitution, *id.*, at 169–170; and that there was no evidence that Hall was forced to the secluded area where he was ultimately murdered. An unconflicted attorney could have put forward a defense tending to show that Mickens killed Hall only after the two engaged in consensual sex, but Saunders offered no such defense. This was a crucial omission—a finding of forcible sodomy was an absolute prerequisite to Mickens' eligibility for the death penalty.[3] Of course, since that

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[2] *Williams* v. *Reed*, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824). Discussing the necessity of full disclosure to the preservation of the lawyer-client relationship, Justice Story stated: "I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client."

[3] At the guilt phase, the trial court judge instructed Mickens' jury as follows: "If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of, or subsequent to, attempted forcible sodomy . . . [but do find a malicious, willful, deliberate, premeditated killing], then you shall find the defendant guilty of first degree murder. If you find the defendant guilty of first degree murder, then you shall fix his punishment at: (1) Imprisonment for life; or (2) A specific term of imprisonment, but not less than twenty [20] years . . . ." App. 58–59.

strategy would have led to conviction of a noncapital offense, counsel would have been unable to persuade the defendant to divulge the information necessary to support such a defense and then ultimately to endorse the strategy unless he had earned the complete confidence of his client.

Saunders' concealment of essential information about his prior representation of the victim was a severe lapse in his professional duty. The lawyer's duty to disclose his representation of a client related to the instant charge is not only intuitively obvious, it is as old as the profession. Consider this straightforward comment made by Justice Story in 1824:

> "An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity." *Williams* v. *Reed*, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me.).

Mickens' lawyer's violation of this fundamental obligation of disclosure is indefensible. The relevance of Saunders' prior representation of Hall to the new appointment was far too important to be concealed.

II

If the defendant is found guilty of a capital offense, the ensuing proceedings that determine whether he will be put to death are critical in every sense of the word. At those proceedings, testimony about the impact of the crime on the victim, including testimony about the character of the victim, may have a critical effect on the jury's decision. *Payne* v.

Tennessee, 501 U. S. 808 (1991). Because a lawyer's fiduciary relationship with his deceased client survives the client's death, *Swidler & Berlin* v. *United States*, 524 U. S. 399 (1998), Saunders necessarily labored under conflicting obligations that were irreconcilable. He had a duty to protect the reputation and confidences of his deceased client, and a duty to impeach the impact evidence presented by the prosecutor.[4]

Saunders' conflicting obligations to his deceased client, on the one hand, and to his living client, on the other, were unquestionably sufficient to give Mickens the right to insist on different representation.[5] For the "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client," *Von Moltke* v. *Gillies*, 332 U. S. 708, 725 (1948).[6] Moreover, in my judgment, the right to conflict-free counsel is just as firmly protected by the Constitution as the defendant's right

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[4] For example, at the time of Hall's death, Saunders was representing Hall in juvenile court for charges arising out of an incident involving Hall's mother. She had sworn out a warrant for Hall's arrest charging him with assault and battery. Despite knowledge of this, Mickens' lawyer offered no rebuttal to the victim-impact statement submitted by Hall's mother that "'all [she] lived for was that boy.'" *Id.*, at 297.

[5] A group of experts in legal ethics, acting as *amici curiae*, submit that the conflict in issue in this case would be nonwaivable pursuant to the standard articulated in the ABA Ann. Model Rules of Professional Conduct (4th ed. 1999) (hereinafter Model Rule). Brief for Legal Ethicists et al. as *Amici Curiae* 16 ("[T]he standard test to determine if a conflict is non-waiveable is whether a 'disinterested lawyer would conclude that the client should not agree to the representation under the circumstances'" (quoting Model Rule 1.7, Comment 5)). Unfortunately, because Mickens was not informed of the fact that his appointed attorney was the lawyer of the alleged victim, the questions whether Mickens would have waived this conflict and consented to the appointment, or whether governing standards of professional responsibility would have precluded him from doing so, remain unanswered.

[6] Although the conflict in this case is plainly intolerable, I, of course, do not suggest that every conflict, or every violation of the code of ethics, is a violation of the Constitution.

of self-representation recognized in *Faretta* v. *California*, 422 U. S. 806 (1975).[7]

III

When an indigent defendant is unable to retain his own lawyer, the trial judge's appointment of counsel is itself a critical stage of a criminal trial. At that point in the proceeding, by definition, the defendant has no lawyer to protect his interests and must rely entirely on the judge. For that reason it is "the solemn duty of a . . . judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." *Von Moltke*, 332 U. S., at 722.

This duty with respect to indigent defendants is far more imperative than the judge's duty to investigate the possibility of a conflict that arises when retained counsel represents either multiple or successive defendants. It is true that in a situation of retained counsel, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler* v. *Sullivan*, 446 U. S. 335, 347 (1980).[8] But when, as was true in this

[7] "[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." 422 U. S., at 820–821.

[8] Part III of the Court's opinion is a foray into an issue that is not implicated by the question presented. In dicta, the Court states that *Sullivan* may not even apply in the first place to *successive* representations. *Ante*, at 175–176. Most Courts of Appeals, however, have applied *Sullivan* to claims of successive representation as well as to some insidious conflicts arising from a lawyer's self-interest. See cases cited *ante*, at 174–175. We have done the same. See *Wood* v. *Georgia*, 450 U. S. 261 (1981) (applying *Sullivan* to a conflict stemming from a third-party payment arrange-

case, the judge is not merely reviewing the permissibility of the defendants' choice of counsel, but is responsible for making the choice herself, and when she knows or should know that a conflict does exist, the duty to make a thorough inquiry is manifest and unqualified.[9] Indeed, under far less compelling circumstances, we squarely held that when a record discloses the "possibility of a conflict" between the interests of the defendants and the interests of the party paying their counsel's fees, the Constitution imposes a duty of inquiry on the state-court judge even when no objection was made. *Wood* v. *Georgia*, 450 U. S. 261, 267, 272 (1981).

IV

Mickens had a constitutional right to the services of an attorney devoted solely to his interests. That right was violated. The lawyer who did represent him had a duty to disclose his prior representation of the victim to Mickens and to the trial judge. That duty was violated. When Mickens had no counsel, the trial judge had a duty to "make a thorough inquiry and to take all steps necessary to insure the fullest protection of" his right to counsel. *Von Moltke*, 332

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ment). Neither we nor the Courts of Appeals have applied this standard "unblinkingly," as the Court accuses, *ante*, at 174, but rather have relied upon principled reason. When a conflict of interest, whether multiple, successive, or otherwise, poses so substantial a risk that a lawyer's representation would be materially and adversely affected by diverging interests or loyalties and the trial court judge knows of this and yet fails to inquire, it is a "[c]ircumstanc[e] of [such] magnitude" that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U. S., at 659–660.

[9] There is no dispute before us as to the appointing judge's knowledge. The court below assumed, *arguendo*, that the judge who, upon Hall's death, dismissed Saunders from his representation of Hall and who then three days later appointed Saunders to represent Mickens in the killing of Hall "reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." 240 F. 3d 348, 357 (CA4 2001). This assumption has not been challenged.

U. S., at 722. Despite knowledge of the lawyer's prior representation, she violated that duty.

We will never know whether Mickens would have received the death penalty if those violations had not occurred nor precisely what effect they had on Saunders' representation of Mickens.[10] We do know that he did not receive the kind of representation that the Constitution guarantees. If Mickens had been represented by an attorney-impostor who never passed a bar examination, we might also be unable to determine whether the impostor's educational shortcomings "'actually affected the adequacy of his representation.'" *Ante*, at 171 (emphasis deleted). We would, however, surely set aside his conviction if the person who had represented him was not a real lawyer. Four compelling reasons make setting aside the conviction the proper remedy in this case.

First, it is the remedy dictated by our holdings in *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), and *Wood* v. *Georgia*, 450 U. S. 261 (1981). In this line of precedent, our focus was properly upon the duty of the trial court judge to inquire into a potential conflict. This duty was triggered either via defense counsel's objection, as was the case in *Holloway*, or some other "special circumstances" whereby the serious potential for conflict was brought to the attention of the trial court judge. *Sullivan*, 446 U. S., at 346. As we unambiguously stated in *Wood*, "*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict

[10] I disagree with the Court's assertion that the inquiry mandated by *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), will not aid in the determination of conflict and effect. *Ante*, at 171. As we have stated, "the evil [of conflict-ridden counsel] is in what the advocate finds himself compelled to *refrain* from doing, . . . [making it] difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978). An adequate inquiry by the appointing or trial court judge will augment the record thereby making it easier to evaluate the impact of the conflict.

exists.'" 450 U. S., at 272, n. 18. It is thus wrong for the Court to interpret Justice Powell's language as referring only to a division of loyalties "that affected counsel's performance." *Ante*, at 171, and n. 3 (emphasis deleted).[11] *Wood* nowhere hints of this meaning of "actual conflict of interest" 450 U. S., at 273, nor does it reference *Sullivan* in "shorthand," *ante*, at 171. Rather, *Wood* cites *Sullivan* explicitly in order to make a factual distinction: In a circumstance, such as in *Wood*, in which the judge knows or should know of the conflict, no showing of adverse effect is required. But when, as in *Sullivan*, the judge lacked this knowledge, such a showing is required. *Wood*, 450 U. S., at 272–274.[12]

[11] The Court concedes that if Mickens' attorney had objected to the appointment based upon the conflict of interest and the trial court judge had failed to inquire, then reversal without inquiry into adverse effect would be required. *Ante*, at 173–174. The Court, in addition to ignoring the mandate of *Wood*, reads *Sullivan* too narrowly. In *Sullivan* we did not ask *only* whether an objection was made in order to ascertain whether the trial court had a duty to inquire. Rather, we stated that "[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest. The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. No participant in Sullivan's trial ever objected to the multiple representation. . . . On these facts, we conclude that the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation." 446 U. S., at 347–348.

It is also counter to our precedent to treat all Sixth Amendment challenges involving conflicts of interest categorically, without inquiry into the surrounding factual circumstances. In *Cronic*, we cited *Holloway* as an *example* of a case involving "surrounding circumstances [making] it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U. S., at 661, and n. 28. The surrounding circumstances in the present case were far more egregious than those requiring reversal in either *Holloway* or *Wood*.

[12] Because the appointing judge knew of the conflict, there is no need in this case to decide what should be done when the judge neither knows, nor should know, about the existence of an intolerable conflict. Nevertheless the Court argues that it makes little sense to reverse automatically

Second, it is the only remedy that responds to the real possibility that Mickens would not have received the death penalty if he had been represented by conflict-free counsel during the critical stage of the proceeding in which he first met with his lawyer. We should presume that the lawyer for the victim of a brutal homicide is incapable of establishing the kind of relationship with the defendant that is essential to effective representation.

Third, it is the only remedy that is consistent with the legal profession's historic and universal condemnation of the representation of conflicting interests without the full disclosure and consent of all interested parties.[13] The Court's novel and naïve assumption that a lawyer's divided loyalties

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upon a showing of actual conflict when the trial court judge knows (or reasonably should know) of a potential conflict and yet has failed to inquire, but *not* to do so when the trial court judge does not know of the conflict. *Ante*, at 172–173. Although it is true that the defendant faces the same potential for harm as a result of a conflict in either instance, in the former case the court committed the error and in the latter the harm is entirely attributable to the misconduct of defense counsel. A requirement that the defendant show adverse effect when the court committed no error surely does not justify such a requirement when the court did err. It is the Court's rule that leads to an anomalous result. Under the Court's analysis, if defense counsel objects to the appointment, reversal without inquiry into adverse effect is required. *Ante*, at 173–174. But counsel's failure to object posed a greater—not a lesser—threat to Mickens' Sixth Amendment right. Had Saunders objected to the appointment, Mickens would at least have been apprised of the conflict.

[13] Every state bar in the country has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest unless the client has waived the conflict. University Publications of America, National Reporter on Legal Ethics and Professional Responsibility, Vols. I–IV (2001) (reprinting the professional responsibility codes for the 50 States). See also Model Rule 1.7, at 91–92, Comments 3 and 4 ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests").

are acceptable unless it can be proved that they actually affected counsel's performance is demeaning to the profession.

Finally, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). Setting aside Mickens' conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases. Death is a different kind of punishment from any other that may be imposed in this country. "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977). A rule that allows the State to foist a murder victim's lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice.

I respectfully dissent.

JUSTICE SOUTER, dissenting.

A judge who knows or should know that counsel for a criminal defendant facing, or engaged in, trial has a potential conflict of interests is obliged to enquire into the potential conflict and assess its threat to the fairness of the proceeding. See *Wheat* v. *United States*, 486 U. S. 153, 160 (1988); *Wood* v. *Georgia*, 450 U. S. 261, 272 (1981); *Cuyler* v. *Sullivan*, 446 U. S. 335, 347 (1980). Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 484 (1978). Unless the judge finds that the risk of inadequate representation is too remote for further concern, or finds that the defendant has intelligently assumed the risk and waived any potential Sixth or Fourteenth Amendment claim of inadequate counsel, the court must see that the lawyer is replaced. See *ibid.*; *Glasser* v. *United States*, 315 U. S. 60, 70 (1942). Cf. *Wheat*, *supra*, at 162; Ad-

visory Committee's Notes on 1979 Amendments to Fed. Rule Crim. Proc. 44(c), 18 U. S. C. App., p. 1655.

The District Judge reviewing the federal habeas petition in this case found that the state judge who appointed Bryan Saunders to represent petitioner Mickens on a capital murder charge knew or should have known that obligations stemming from Saunders's prior representation of the victim, Timothy Hall, potentially conflicted with duties entailed by defending Mickens.[1] *Mickens* v. *Greene,* 74 F. Supp. 2d 586, 613–615 (ED Va. 1999). The state judge was therefore obliged to look further into the extent of the risk and, if necessary, either secure Mickens's knowing and intelligent assumption of the risk or appoint a different lawyer. The state judge, however, did nothing to discharge her constitutional duty of care. *Id.*, at 614. In the one case in which we have devised a remedy for such judicial dereliction, we held that the ensuing judgment of conviction must be reversed and the defendant afforded a new trial. *Holloway,*

[1] The parties do not dispute that the appointing judge in this case knew or reasonably should have known that Saunders had represented Hall on assault and battery charges brought against him by his mother and a separate concealed-weapon charge at the time of his murder. Lodging to App. 390, 393. The name "BRYAN SAUNDERS," in large, handwritten letters, was prominently visible as the appointed lawyer on a one-page docket sheet four inches above where the judge signed her name and wrote: "Remove from docket. Def[endant] deceased." *Id.*, at 390. The same judge then called Saunders the next business day to ask if he would "do her a favor" and represent the only person charged with having killed the victim. App. 142. And, if that were not enough, Mickens's arrest warrants, which were apparently before the judge when she appointed Saunders, charged Mickens with the murder, "'on or about March 30, 1992,'" of "'Timothy Jason Hall, white male, age 17.'" *Mickens* v. *Greene,* 74 F. Supp. 2d 586, 614 (ED Va. 1999). The juvenile-court judge, whom circumstances had thrust into the unusual position of having to appoint counsel in a notorious capital case, certainly knew or had reason to know of the possibility that Saunders's 14-day representation of the murder victim, up to the start of the previous business day, may have created a risk of impairing his representation of Mickens in his upcoming murder trial.

supra, at 491; see also *Wood*, *supra*, at 272, n. 18. That should be the result here.

I

The Court today holds, instead, that Mickens should be denied this remedy because Saunders failed to employ a formal objection as a means of bringing home to the appointing judge the risk of conflict. *Ante*, at 173–174. Without an objection, the majority holds, Mickens should get no relief absent a showing that the risk turned into an actual conflict with adverse effect on the representation provided to Mickens at trial. *Ibid.* But why should an objection matter when even without an objection the state judge knew or should have known of the risk and was therefore obliged to enquire further? What would an objection have added to the obligation the state judge failed to honor? The majority says that in circumstances like those now before us, we have already held such an objection necessary for reversal, absent proof of actual conflict with adverse effect, so that this case calls simply for the application of precedent, albeit precedent not very clearly stated. *Ante*, at 171–172.

The majority's position is error, resting on a mistaken reading of our cases. Three are on point, *Holloway* v. *Arkansas*, *supra*; *Cuyler* v. *Sullivan*, *supra*; and *Wood* v. *Georgia*, *supra*.

In *Holloway*, a trial judge appointed one public defender to represent three criminal defendants tried jointly. 435 U. S., at 477. Three weeks before trial, counsel moved for separate representation; the court held a hearing and denied the motion. *Ibid.* The lawyer moved again for appointment of separate counsel before the jury was empaneled, on the ground that one or two of the defendants were considering testifying at trial, in which event the one lawyer's ability to cross-examine would be inhibited. *Id.*, at 478. The court again denied his motion. *Ibid.* After the prosecution rested, counsel objected to the joint representation a third time, advising the court that all three defendants had de-

cided to testify; again the court refused to appoint separate lawyers. *Id.*, at 478–480. The defendants gave inconsistent testimony and were convicted on all counts. *Id.*, at 481.

This Court held that the motions apprised the trial judge of a "risk" that continuing the joint representation would subject defense counsel in the pending trial to the impossible obligations of simultaneously furthering the conflicting interests of the several defendants, *id.*, at 484, and we reversed the convictions on the basis of the judge's failure to respond to the prospective conflict, without any further showing of harm, *id.*, at 491. In particular, we rejected the argument that a defendant tried subject to such a disclosed risk should have to show actual prejudice caused by subsequent conflict. *Id.*, at 488. We pointed out that conflicts created by multiple representation characteristically deterred a lawyer from taking some step that he would have taken if unconflicted, and we explained that the consequent absence of footprints would often render proof of prejudice virtually impossible. *Id.*, at 489–491.

Next came *Sullivan*, involving multiple representation by two retained lawyers of three defendants jointly indicted but separately tried, 446 U. S., at 337. Sullivan, the defendant at the first trial, had consented to joint representation by the same lawyers retained by the two other accused, because he could not afford counsel of his own. *Ibid.* Sullivan was convicted of murder; the other two were acquitted in their subsequent trials. *Id.*, at 338. Counsel made no objection to the multiple representation before or during trial, *ibid.;* nor did the convicted defendant argue that the trial judge otherwise knew or should have known of the risk described in *Holloway*, that counsel's representation might be impaired by conflicting obligations to the defendants to be tried later, 446 U. S., at 343.

This Court held that multiple representation did not raise enough risk of impaired representation in a coming trial to

trigger a trial court's duty to enquire further, in the absence of "special circumstances."[2] *Id.*, at 346. The most obvious special circumstance would be an objection. See *Holloway*, *supra*, at 488. Indeed, because multiple representation was not suspect *per se*, and because counsel was in the best position to anticipate a risk of conflict, the Court spoke at one point as though nothing but an objection would place a court on notice of a prospective conflict. *Sullivan*, 446 U. S., at 348 ("[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" (footnote omitted)). But the Court also explained that courts must rely on counsel in "large measure," *id.*, at 347, that is, not exclusively, and it spoke in general terms of a duty to enquire that arises when "the trial court knows or reasonably should know that a particular conflict exists,"[3] *ibid.* (footnote omitted). Accord-

[2] The constitutional rule binding the state courts is thus more lenient than Rule 44(c) of the Federal Rules of Criminal Procedure, which provides:

"Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

See *Wheat* v. *United States*, 486 U. S. 153, 161 (1988).

[3] By "particular conflict" the Court was clearly referring to a risk of conflict detectable on the horizon rather than an "actual conflict" that had already adversely affected the defendant's representation. The Court had just cited and quoted *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), which held that the judge was obligated to enquire into the risk of a prospective conflict, *id.*, at 484. This reading is confirmed by the *Sullivan* Court's subsequent terminology: Because the trial judge in *Sullivan* had had no duty to enquire into "a particular conflict" upon notice of multiple

ingly, the Court did not rest the result simply on the failure of counsel to object, but said instead that "[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest," *ibid.* For that reason, it held respondent bound to show "that a conflict of interest actually affected the adequacy of his representation." *Id.*, at 349.

The different burdens on the *Holloway* and *Sullivan* defendants are consistent features of a coherent scheme for dealing with the problem of conflicted defense counsel; a prospective risk of conflict subject to judicial notice is treated differently from a retrospective claim that a completed proceeding was tainted by conflict, although the trial judge had not been derelict in any duty to guard against it. When the problem comes to the trial court's attention before any potential conflict has become actual, the court has a duty to act prospectively to assess the risk and, if the risk is not too remote, to eliminate it or to render it acceptable through a defendant's knowing and intelligent waiver. This duty is something more than the general responsibility to rule without committing legal error; it is an affirmative obligation to investigate a disclosed possibility that defense counsel will be unable to act with uncompromised loyalty to his client. It was the judge's failure to fulfill that duty of care to enquire further and do what might be necessary that the *Holloway* Court remedied by vacating the defendant's subsequent conviction. 435 U. S., at 487, 491. The error occurred when the judge failed to act, and the remedy restored the defend-

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representation alone, the convicted defendant could get no relief without showing "actual conflict" with "adverse effect." 446 U. S., at 347–350.

Of course, a judge who gets wind of conflict during trial may have to enquire in both directions: prospectively to assess the risk of conflict if the lawyer remains in place; if there is no such risk requiring removal and mistrial, conversely, the judge may have to enquire retrospectively to see whether a conflict has actually affected the defendant adversely. See *infra*, at 202.

ant to the position he would have occupied if the judge had taken reasonable steps to fulfill his obligation. But when the problem of conflict comes to judicial attention not prospectively, but only after the fact, the defendant must show an actual conflict with adverse consequence to him in order to get relief. *Sullivan*, *supra*, at 349. Fairness requires nothing more, for no judge was at fault in allowing a trial to proceed even though fraught with hidden risk.

In light of what the majority holds today, it bears repeating that, in this coherent scheme established by *Holloway* and *Sullivan*, there is nothing legally crucial about an objection by defense counsel to tell a trial judge that conflicting interests may impair the adequacy of counsel's representation. Counsel's objection in *Holloway* was important as a fact sufficient to put the judge on notice that he should enquire. In most multiple-representation cases, it will take just such an objection to alert a trial judge to prospective conflict, and the *Sullivan* Court reaffirmed that the judge is obliged to take reasonable prospective action whenever a timely objection is made. 446 U. S., at 346. But the Court also indicated that an objection is not required as a matter of law: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an enquiry." *Id.*, at 347. The Court made this clear beyond cavil 10 months later when Justice Powell, the same Justice who wrote the *Sullivan* opinion, explained in *Wood* v. *Georgia* that *Sullivan* "*mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" 450 U. S., at 272, n. 18 (emphasis in original).

Since the District Court in this case found that the state judge was on notice of a prospective potential conflict, 74 F. Supp. 2d, at 613–615, this case calls for nothing more than the application of the prospective notice rule announced and exemplified by *Holloway* and confirmed in *Sullivan* and *Wood*. The remedy for the judge's dereliction of duty

should be an order vacating the conviction and affording a new trial.

But in the majority's eyes, this conclusion takes insufficient account of *Wood*, whatever may have been the sensible scheme staked out by *Holloway* and *Sullivan*, with a defendant's burden turning on whether a court was apprised of a conflicts problem prospectively or retrospectively. The majority says that *Wood* holds that the distinction is between cases where counsel objected and all other cases, regardless of whether a trial court was put on notice prospectively in some way other than by an objection on the record. See *ante*, at 172–174. In *Wood*, according to the majority, the trial court had notice, there was no objection on the record, and the defendant was required to show actual conflict and adverse effect.

Wood is not easy to read, and I believe the majority misreads it. The first step toward seeing where the majority goes wrong is to recall that the Court in *Wood* said outright what I quoted before, that *Sullivan* "*mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" 450 U. S., at 272, n. 18. This statement of a trial judge's obligation, like the statement in *Sullivan* that it quoted, 446 U. S., at 347, said nothing about the need for an objection on the record. True, says the majority, but the statement was dictum to be disregarded as "inconsistent" with *Wood*'s holding. *Ante*, at 168–169, n. 2. This is a polite way of saying that the *Wood* Court did not know what it was doing; that it stated the general rule of reversal for failure to enquire when on notice (as in *Holloway*), but then turned around and held that such a failure called for reversal only when the defendant demonstrated an actual conflict (as in *Sullivan*).

This is not what happened. *Wood* did not hold that in the absence of objection, the *Sullivan* rule governs even when a judge is prospectively on notice of a risk of conflicted counsel.

Careful attention to *Wood* shows that the case did not involve prospective notice of risk unrealized, and that it held nothing about the general rule to govern in such circumstances. What *Wood* did decide was how to deal with a possible conflict of interests that becomes known to the trial court only at the conclusion of the trial proceeding at which it may have occurred, and becomes known not to a later habeas court but to the judge who handed down sentences at trial, set probation 19 months later after appeals were exhausted, and held a probation revocation proceeding 4 months after that.[4]

The *Wood* defendants were convicted of distributing obscene material as employees of an adult bookstore and theater, after trials at which they were defended by privately retained counsel. 450 U. S., at 262–263. They were each ordered to pay fines and sentenced to 12-month prison terms that were suspended in favor of probation on the condition that they pay their fines in installments, which they failed to do. *Id.*, at 263–264. The *Wood* Court indicated that by the end of the proceeding to determine whether probation should be revoked because of the defendants' failure to pay, the judge was on notice that defense counsel might have been laboring under a conflict between the interests of the defendant employees and those of their employer, possibly as early as the time the sentences were originally handed down nearly two years earlier, App. 11–16 in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027 (Mar. 18, 1977, sentencing). See *Wood*, 450 U. S., at 272 ("at the revocation hearing, or at earlier stages of the proceedings below"). The fines were so high that the original sentencing assumption must have been that the store and theater owner would pay them; defense counsel was paid by the employer, at least during the trial; the State

[4] The same trial judge presided over each stage of these proceedings. See App. 11–41 in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027.

pointed out a possible conflict to the judge;[5] and counsel was attacking the fines with an equal protection argument, which weakened the strategy more obviously in the defendants' interest, of requesting the court to reduce the fines or defer their collection. *Id.*, at 272–273. This was enough, according to the *Wood* Court, to tell the judge that defense counsel may have been acting to further the owner's desire for a test case on equal protection, rather than the defendants' interests in avoiding ruinous fines or incarceration. *Ibid.*

What is significant is that, as this Court thus described the circumstances putting the judge on notice, they were not complete until the revocation hearing was finished (nearly

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[5] The State indicated that defense counsel labored under a possible conflict of interests between the employer and the defendants, but it was not the conflict in issue here, and so, from the *Wood* Court's perspective, the State's objection, though a relevant fact in alerting the judge like the fact of multiple representation in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), was not sufficient to put the judge on notice of his constitutional duty to enquire into a "particular conflict," *id.*, at 347. State's counsel suggested that in arguing for forgiveness of fines owing to inability to pay, defense counsel was merely trying to protect the employer from an obligation to the defendants to pay the fines. App. A to Brief in Opposition in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027, at 14–15, 27–28 (transcript of Jan. 26, 1979, probation revocation hearing). But as to forgiveness of the fines, the interests of the employer and defendants were aligned; the State's lawyer argued to the court nonetheless that counsel's allegiance to the employer prevented him from pressing the employer to honor its obligation to pay, and suggested to the judge that he should appoint separate counsel to enforce it. *Id.*, at 14. The judge did enquire into this alleged conflict and accepted defense counsel's rejoinder that such a conflict was not relevant to a hearing on whether probation should be revoked for inability to pay and that any such agreement to pay fines for violating the law would surely be unenforceable as a matter of public policy. *Id.*, at 14–17. The majority is thus mistaken in its claim that the State's objection sufficed to put the court on notice of a duty to enquire as to the particular conflict of interest to the *Wood* Court, see *ante*, at 170–171, n. 3, unless the majority means to say that mention of any imagined conflict is sufficient to put a judge on notice of a duty to enquire into the full universe of possible conflicts.

two years after sentencing) and the judge knew that the lawyer was relying heavily on equal protection instead of arguments for leniency to help the defendants. The Court noted that counsel stated he had sent a letter to the trial court after sentencing, saying the fines were more than the defendants could afford, *id.*, at 268, n. 13, a move obviously in the defendants' interest. On the other hand, a reference to "equal protection," which the Court could have taken as a reflection of the employer's interest, did not occur until the very end of the revocation hearing. See App. A to Brief in Opposition in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027, at 72 (transcript of Jan. 26, 1979, probation revocation hearing).[6] The *Wood* Court also knew that a motion stressing equal protection was not filed by defense counsel until two weeks after the revocation hearing, on the day before probation was to be revoked and the defendants locked up, App. 35–36 in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027 (Joint Motions to Modify Conditions of Probation Order—Filed Feb. 12, 1979). 450 U. S., at 268. Since, in the Court's view, counsel's emphasis on the equal protection claim was one of the facts that

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[6] At one point, about a quarter of the way into the hearing, defense counsel said: "And I think the universal rule is in the United States, because of the Fourteenth Amendment of the United States Constitution, legal protection, you cannot, or should not, lock up an accused for failure to pay a fine; because of his inability or her inability to pay the fine, if that person, and this is a crucial point, Your Honor, if that person, like to quote from Bennett versus Harper, was incapable of paying the fine, rather than refusing and neglecting to do so." App. A to Brief in Opposition in *Wood* v. *Georgia*, O. T. 1979, No. 79–6027, at 19. Defense counsel also cited two equal protection decisions of this Court, *Tate* v. *Short*, 401 U. S. 395 (1971), and *Williams* v. *Illinois*, 399 U. S. 235 (1970); it may very well be that he meant to say "equal protection" rather than "legal protection" or the latter was in fact a garbled transcription, but it seems unlikely that the *Wood* Court was referring to this statement when it said counsel "was pressing a constitutional attack rather than making the arguments for leniency," 450 U. S., at 272, because it was made to supplement, not replace, appeals to leniency based on the specific financial situations of the individual defendants.

together put the judge on notice of something amiss, and since the record shows that it was not clear that counsel was favoring the equal protection argument until, at the earliest, the very close of the revocation hearing, and more likely the day he filed his motion two weeks later, the Court could only have meant that the judge was put on notice of a conflict that may actually have occurred, not of a potential conflict that might occur later.[7] At that point, as the Court saw it, there were only two further facts the judge would have needed to know to determine whether there had been an actual disqualifying conflict, and those were whether a concern for the interest of the employer had weakened the lawyer's arguments for leniency, and whether the defendants had been informed of the conflict and waived their rights to unconflicted counsel.

This Court, of course, was in no position to resolve these remaining issues in the first instance. Whether the lawyer's failure to press more aggressively for leniency was caused by a conflicting interest, for example, had never been explored at the trial level and there was no record to consult on the point.[8] In deciding what to do, the *Wood* Court had

[7] The phrasing of the remand instruction confirms the conclusion that the *Wood* Court perceived the duty to enquire neglected by the judge as retrospective in nature: The "[state] court [on remand] should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier." *Id.*, at 273. From the Court's vantage point, another compelling reason for suspecting a conflict of interests was the fact that the employer apparently paid for the appeal, in which counsel argued the equal protection question only, *id.*, at 267, n. 11; but, of course, this would have been unknown to the judge at the revocation hearing.

[8] There was certainly cause for reasonable disagreement on the issue. As Justice White pointed out, absent relevant evidence in the record, it was reasonable that the employer might have refused to pay because the defendants were no longer employees, or because it no longer owned adult establishments. *Id.*, at 282–283, and n. 9 (dissenting opinion). Indeed, counsel said that he was no longer paid by the employer for his representa-

two established procedural models to look to: *Holloway*'s procedure of vacating judgment [9] when a judge had failed to enquire into a prospective conflict, and *Sullivan*'s procedure of determining whether the conflict that may well have occurred had actually occurred with some adverse effect.

Treating the case as more like *Sullivan* and remanding was obviously the correct choice. *Wood* was not like *Holloway*, in which the judge was put on notice of a risk before trial, that is, a prospective possibility of conflict. It was, rather, much closer to *Sullivan*, since any notice to a court went only to a conflict, if there was one, that had pervaded a completed trial proceeding extending over two years. The only difference between *Wood* and *Sullivan* was that, in *Wood*, the signs that a conflict may have occurred were clear to the judge at the close of the probation revocation proceeding, whereas the claim of conflict in *Sullivan* was not raised until after judgment in a separate habeas proceeding, see 446 U. S., at 338. The duty of the *Wood* judge could only have been to enquire into the past (what had happened two years earlier at sentencing, the setting of probation 19 months later, the ensuing failures to pay, and the testimony that had already been given at the revocation hearing), just like the responsibility of the state and federal habeas courts reviewing the record in *Sullivan* in postconviction proceedings, see 446 U. S., at 338–339. Since the *Wood* judge's duty was unlike the *Holloway* judge's obligation to take care for the future, it would have made no sense for the *Wood* Court to impose a *Holloway* remedy.

The disposition in *Wood* therefore raises no doubt about the consistency of the *Wood* Court. Contrary to the majori-

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tion of the defendants once they were put on probation, *id.*, at 281, n. 7 (White, J., dissenting).

[9] In this case, the order would have been to vacate the commitment order based on the probation violation, and perhaps even the antecedent fine. See *id.*, at 274, n. 21 (majority opinion).

ty's conclusion, see *ante,* at 168–169, n. 2, there was no tension at all between acknowledging the rule of reversal to be applied when a judge fails to enquire into a known risk of prospective conflict, *Wood,* 450 U. S., at 272, n. 18, while at the same time sending the *Wood* case itself back for a determination about actual, past conflict, *id.,* at 273–274. *Wood* simply followed and confirmed the pre-existing scheme established by *Holloway* and *Sullivan.* When a risk of conflict appears before a proceeding has been held or completed and a judge fails to make a prospective enquiry, the remedy is to vacate any subsequent judgment against the defendant. See *Holloway,* 435 U. S., at 491. When the possibility of conflict does not appear until a proceeding is over and any enquiry must be retrospective, a defendant must show actual conflict with adverse effect. See *Sullivan, supra,* at 349.

Wood, then, does not affect the conclusion that would be reached here on the basis of *Holloway* and *Sullivan.* This case comes to us with the finding that the judge who appointed Saunders knew or should have known of the risk that he would be conflicted owing to his prior appointment to represent the victim of the crime, 74 F. Supp. 2d, at 613–615; see n. 1, *supra.* We should, therefore, follow the law settled until today, in vacating the conviction and affording Mickens a new trial.

II

Since the majority will not leave the law as it is, however, the question is whether there is any merit in the rule it now adopts, of treating breaches of a judge's duty to enquire into prospective conflicts differently depending on whether defense counsel explicitly objected. There is not. The distinction is irrational on its face, it creates a scheme of incentives to judicial vigilance that is weakest in those cases presenting the greatest risk of conflict and unfair trial, and it reduces the so-called judicial duty to enquire into so many empty words.

The most obvious reason to reject the majority's rule starts with the accepted view that a trial judge placed on notice of a risk of prospective conflict has an obligation then and there to do something about it, *Holloway*, *supra*, at 484. The majority does not expressly repudiate that duty, see *ante*, at 167–168, which is too clear for cavil. It should go without saying that the best time to deal with a known threat to the basic guarantee of fair trial is before the trial has proceeded to become unfair. See *Holloway*, *supra*, at 484; *Glasser*, 315 U. S., at 76. Cf. *Pate* v. *Robinson*, 383 U. S. 375, 386–387 (1966) (judge's duty to conduct hearing as to competency to stand trial). It would be absurd, after all, to suggest that a judge should sit quiescent in the face of an apparent risk that a lawyer's conflict will render representation illusory and the formal trial a waste of time, emotion, and a good deal of public money. And as if that were not bad enough, a failure to act early raises the specter, confronted by the *Holloway* Court, that failures on the part of conflicted counsel will elude demonstration after the fact, simply because they so often consist of what did not happen. 435 U. S., at 490–492. While a defendant can fairly be saddled with the characteristically difficult burden of proving adverse effects of conflicted decisions after the fact when the judicial system was not to blame in tolerating the risk of conflict, the burden is indefensible when a judge was on notice of the risk but did nothing.

With so much at stake, why should it matter how a judge learns whatever it is that would point out the risk to anyone paying attention? Of course an objection from a conscientious lawyer suffices to put a court on notice, as it did in *Holloway;* and probably in the run of multiple-representation cases nothing short of objection will raise the specter of trouble. But sometimes a wide-awake judge will not need any formal objection to see a risk of conflict, as the federal habeas court's finding in this very case shows. 74 F. Supp. 2d, at 613–615. Why, then, pretend contrary to fact

that a judge can never perceive a risk unless a lawyer points it out? Why excuse a judge's breach of judicial duty just because a lawyer has fallen down in his own ethics or is short on competence? Transforming the factually sufficient trigger of a formal objection into a legal necessity for responding to any breach of judicial duty is irrational.

Nor is that irrationality mitigated by the Government's effort to analogize the majority's objection requirement to the general rule that in the absence of plain error litigants get no relief from error without objection. The Government as *amicus* argues for making a formal objection crucial because judges are not the only ones obliged to take care for the integrity of the system; defendants and their counsel need inducements to help the courts with timely warnings. Brief for United States as *Amicus Curiae* 9, 26–27. The fallacy of the Government's argument, however, has been on the books since *Wood* was decided. See 450 U. S., at 265, n. 5 ("It is unlikely that [the lawyer on whom the conflict of interest charge focused] would concede that he had continued improperly to act as counsel"). The objection requirement works elsewhere because the objecting lawyer believes that he sights an error being committed by the judge or opposing counsel. See, *e. g.*, *United States* v. *Vonn*, *ante*, at 72–73 (error in judge's Rule 11 plea colloquy). That is hardly the motive to depend on when the risk of error, if there is one, is being created by the lawyer himself in acting subject to a risk of conflict, 227 F. 3d 203, 213–217 (CA4 2000), vacated en banc, 240 F. 3d 348 (CA4 2001). The law on conflicted counsel has to face the fact that one of our leading cases arose after a trial in which counsel may well have kept silent about conflicts not out of obtuseness or inattention, but for the sake of deliberately favoring a third party's interest over the clients, and this very case comes to us with reason to suspect that Saunders suppressed his conflicts for the sake of a second fee in a case getting public attention. While the perceptive and conscientious lawyer (as in *Holloway*) needs

nothing more than ethical duty to induce an objection, the venal lawyer is not apt to be reformed by a general rule that says his client will have an easier time reversing a conviction down the road if the lawyer calls attention to his own venality.[10]

The irrationality of taxing defendants with a heavier burden for silent lawyers naturally produces an equally irrational scheme of incentives operating on the judges. The judge's duty independent of objection, as described in *Sullivan* and *Wood*, is made concrete by reversal for failure to honor it. The plain fact is that the specter of reversal for failure to enquire into risk is an incentive to trial judges to keep their eyes peeled for lawyers who wittingly or otherwise play loose with loyalty to their clients and the fundamental guarantee of a fair trial. See *Wheat*, 486 U. S., at 161. Cf. *Pate*, *supra*, at 386–387 (reversal as remedy for state trial judge's failure to discharge duty to ensure competency to stand trial). That incentive is needed least when defense counsel points out the risk with a formal objection,

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[10] The Government contends that not requiring a showing of adverse effect in no-objection cases would "provide the defense with a *dis*incentive to bring conflicts to the attention of the trial court, since remaining silent could afford a defendant with a reliable ground for reversal in the event of conviction." Brief for United States as *Amicus Curiae* 27. This argument, of course, has no force whatsoever in the case of the venal conflicted lawyer who remains silent out of personal self-interest or the obtuse lawyer who stays silent because he could not recognize a conflict if his own life depended on it. And these are precisely the lawyers presenting the danger in no-objection cases; the savvy and ethical lawyer would comply with his professional duty to disclose conflict concerns to the court. But even assuming the unlikely case of a savvy lawyer who recognizes a potential conflict and does not know for sure whether to object timely on that basis as a matter of professional ethics, an objection on the record is still the most reliable factually sufficient trigger of the judicial duty to enquire, dereliction of which would result in a reversal, and it is therefore beyond the realm of reasonable conjecture to suggest that such a lawyer would forgo an objection on the chance that a court in postconviction proceedings may find an alternative factual basis giving rise to a duty to enquire.

and needed most with the lawyer who keeps risk to himself, quite possibly out of self-interest. Under the majority's rule, however, it is precisely in the latter situation that the judge's incentive to take care is at its ebb. With no objection on record, a convicted defendant can get no relief without showing adverse effect, minimizing the possibility of a later reversal and the consequent inducement to judicial care.[11] This makes no sense.

The Court's rule makes no sense unless, that is, the real point of this case is to eliminate the judge's constitutional duty entirely in no-objection cases, for that is certainly the practical consequence of today's holding. The defendant has the same burden to prove adverse effect (and the prospect of reversal is the same) whether the judge has no reason to know of any risk or every reason to know about it short of

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[11] Lest anyone be wary that a rule requiring reversal for failure to enquire when on notice would be too onerous a check on trial judges, a survey of Courts of Appeals already applying the *Holloway* rule in no-objection cases shows a commendable measure of restraint and respect for the circumstances of fellow judges in state and federal trial courts, finding the duty to enquire violated only in truly outrageous cases. See, *e. g.*, *Campbell* v. *Rice*, 265 F. 3d 878, 887–888 (CA9 2001) (reversing conviction under *Holloway* when trial judge failed to enquire after the prosecutor indicated defense counsel had just been arraigned by the prosecutor's office on felony drug charges); *United States* v. *Rogers*, 209 F. 3d 139, 145–146 (CA2 2000) (reversing conviction when District Court failed to enquire on notice that counsel for defendant alleging police misconduct was a police commissioner); *United States* v. *Allen*, 831 F. 2d 1487, 1495–1496 (CA9 1987) (finding Magistrate Judge had reasonably enquired into joint representation of 17 codefendants who entered a group guilty plea, but reversing because the District Court failed to enquire when defense counsel later gave the court a list "rank[ing] the defendants by their relative culpability"). Under the majority's rule, the defendants in each of these cases should have proved that there was an actual conflict of interests that adversely affected their representation. Particularly galling in light of the first two cases is the majority's surprising and unnecessary intimation that this Court's conflicts jurisprudence should not be available or is somehow less important to those who allege conflicts in contexts other than multiple representation. See *ante*, at 175.

explicit objection.[12] In that latter case, the duty explicitly described in *Sullivan* and *Wood* becomes just a matter of words, devoid of sanction; it ceases to be any duty at all.

As that duty vanishes, so does the sensible regime under which a defendant's burden on conflict claims took account of the opportunities to ensure against conflicted counsel in the first place. Convicted defendants had two alternative avenues to show entitlement to relief. A defendant might, first, point to facts indicating that a judge knew or should have known of a "'particular conflict,'" *Wood*, 450 U. S., at 272, n. 18 (quoting *Sullivan*, 446 U. S., at 347), before that risk had a chance to play itself out with an adverse result. If he could not carry the burden to show that the trial judge had fallen down in the duty to guard against conflicts prospec-

[12] Requiring a criminal defendant to prove a conflict's adverse effect in all no-objection cases only makes sense on the Court's presumption that the Sixth Amendment right against ineffective assistance of counsel is at its core nothing more than a utilitarian right against unprofessional errors that have detectable effects on outcome. See *ante*, at 166 ("[I]t also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation"). On this view, the exception in *Holloway* for objection cases turns solely on the theory that "harm" can safely be presumed when counsel objects to no avail at the sign of danger. See *ante*, at 168. But this Court in *Strickland* v. *Washington*, 466 U. S. 668, 693–694 (1984), held that a specific "outcome-determinative standard" is "not quite appropriate" and spoke instead of the Sixth Amendment right as one against assistance of counsel that "undermines the reliability of the result of the proceeding," *id.*, at 693, or "confidence in the outcome," *id.*, at 694. And the *Holloway* Court said that once a conflict objection is made and unheeded, the conviction "must be reversed . . . even if no particular prejudice is shown and even if the defendant was clearly guilty." 435 U. S., at 489 (internal quotation marks and citation omitted). What is clear from *Strickland* and *Holloway* is that the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings. A revelation that a trusted advocate could not place his client's interest above the interests of self and others in the satisfaction of his professional responsibilities will destroy that confidence, regardless of outcome.

tively, the defendant was required to show, from the perspective of an observer looking back after the allegedly conflicted representation, that there was an actual conflict of interests with an adverse effect. The first route was preventive, meant to avoid the waste of costly after-the-fact litigation where the risk was clear and easily avoidable by a reasonably vigilant trial judge; the second was retrospective, with a markedly heavier burden justified when the judiciary was not at fault, but at least alleviated by dispensing with any need to show prejudice. Today, the former system has been skewed against recognizing judicial responsibility. The judge's duty applies only when a *Holloway* objection fails to induce a resolutely obdurate judge to take action upon the explicit complaint of a lawyer facing impossible demands. In place of the forsaken judicial obligation, we can expect more time-consuming post-trial litigation like this, and if this case is any guide, the added time and expense are unlikely to purchase much confidence in the judicial system.[13]

I respectfully dissent.

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[13] Whether adverse effect was shown was not the question accepted, and I will not address the issue beyond noting that the case for an adverse effect appears compelling in at least two respects. Before trial, Saunders admittedly failed even to discuss with Mickens a trial strategy of reasonable doubt about the forcible sex element, without which death was not a sentencing option. App. 211–213; see also *id.*, at 219. In that vein, Saunders apparently failed to follow leads by looking for evidence that the victim had engaged in prostitution, even though the victim's body was found on a mattress in an area where illicit sex was common. *Id.*, at 202–217; Lodging to App. 397–398. There may be doubt whether these failures were the result of incompetence or litigation strategy rather than a conflicting duty of loyalty to the victim or to self to avoid professional censure for failing to disclose the conflict risk to Mickens (though strategic choice seems unlikely given that Saunders did not even raise the possibility of a consent defense as an option to be considered). But there is little doubt as to the course of the second instance of alleged adverse effect: Saunders knew for a fact that the victim's mother had initiated charges of assault and battery against her son just before he died because Saunders had been appointed to defend him on those very charges, *id.*, at 390 and

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The Commonwealth of Virginia seeks to put the petitioner, Walter Mickens, Jr., to death after having appointed to represent him as his counsel a lawyer who, at the time of the murder, was representing the very person Mickens was accused of killing. I believe that, in a case such as this one, a categorical approach is warranted and automatic reversal is required. To put the matter in language this Court has previously used: By appointing this lawyer to represent Mickens, the Commonwealth created a "structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991).

The parties spend a great deal of time disputing how this Court's precedents of *Holloway* v. *Arkansas*, 435 U. S. 475 (1978), *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), and *Wood* v. *Georgia*, 450 U. S. 261 (1981), resolve the case. Those precedents involve the significance of a trial judge's "failure to inquire" if that judge "knew or should have known" of a "potential" conflict. The majority and dissenting opinions dispute the meaning of these cases as well. Although I express no view at this time about how our precedents should treat *most* ineffective-assistance-of-counsel claims involving an alleged conflict of interest (or, for that matter, whether *Holloway*, *Sullivan*, and *Wood* provide a sensible or coherent framework for dealing with those cases at all), I am convinced that *this* case is not governed by those precedents, for the following reasons.

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393. Yet Saunders did nothing to counter the mother's assertion in the post-trial victim-impact statement given to the trial judge that "'all [she] lived for was that boy,'" *id.*, at 421; see also App. 219–222. Saunders could not have failed to see that the mother's statement should be rebutted, and there is no apparent explanation for his failure to offer the rebuttal he knew, except that he had obtained the information as the victim's counsel and subject to an obligation of confidentiality.

First, this is the kind of representational incompatibility that is egregious on its face. Mickens was represented by the murder victim's lawyer; that lawyer had represented the victim on a criminal matter; and that lawyer's representation of the victim had continued until one business day before the lawyer was appointed to represent the defendant.

Second, the conflict is exacerbated by the fact that it occurred in a capital murder case. In a capital case, the evidence submitted by both sides regarding the victim's character may easily tip the scale of the jury's choice between life or death. Yet even with extensive investigation in post-trial proceedings, it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel's decisions regarding, for example: which avenues to take when investigating the victim's background; which witnesses to call; what type of impeachment to undertake; which arguments to make to the jury; what language to use to characterize the victim; and, as a general matter, what basic strategy to adopt at the sentencing stage. Given the subtle forms that prejudice might take, the consequent difficulty of proving actual prejudice, and the significant likelihood that it will nonetheless occur when the same lawyer represents both accused killer and victim, the cost of litigating the existence of actual prejudice in a particular case cannot be easily justified. Cf. *United States* v. *Cronic*, 466 U. S. 648, 657–658 (1984) (explaining the need for categorical approach in the event of "actual breakdown of the adversarial process").

Third, the Commonwealth itself *created* the conflict in the first place. Indeed, it was the *same judge* who dismissed the case against the victim who then appointed the victim's lawyer to represent Mickens one business day later. In light of the judge's active role in bringing about the incompatible representation, I am not sure why the concept of a judge's "duty to inquire" is thought to be central to this case. No "inquiry" by the trial judge could have shed more light

on the conflict than was obvious on the face of the matter, namely, that the lawyer who would represent Mickens today is the same lawyer who yesterday represented Mickens' alleged victim in a criminal case.

This kind of breakdown in the criminal justice system creates, at a minimum, the appearance that the proceeding will not "'reliably serve its function as a vehicle for determination of guilt or innocence,'" and the resulting "'criminal punishment'" will not "'be regarded as fundamentally fair.'" *Fulminante*, *supra*, at 310. This appearance, together with the likelihood of prejudice in the typical case, is serious enough to warrant a categorical rule—a rule that does not require proof of prejudice in the individual case.

The Commonwealth complains that this argument "relies heavily on the immediate visceral impact of learning that a lawyer previously represented the victim of his current client." Brief for Respondent 34. And that is so. The "visceral impact," however, arises out of the obvious, unusual nature of the conflict. It arises from the fact that the Commonwealth seeks to execute a defendant, having provided that defendant with a lawyer who, only yesterday, represented the victim. In my view, to carry out a death sentence so obtained would invariably "diminis[h] faith" in the fairness and integrity of our criminal justice system. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 811–812 (1987) (plurality opinion). Cf. *United States* v. *Olano*, 507 U. S. 725, 736 (1993) (need to correct errors that seriously affect the "'fairness, integrity or public reputation of judicial proceedings'"). That is to say, it would diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend.

I therefore dissent.

Syllabus

BARNHART, COMMISSIONER OF SOCIAL SECURITY *v.* WALTON

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

No. 00–1937. Argued January 16, 2002—Decided March 27, 2002

The Social Security Act authorizes payment of Title II disability insurance benefits and Title XVI Supplemental Security Income to individuals who have an "*inability* to engage in any substantial gainful activity *by reason of* any medically determinable . . . *impairment* . . . *which has lasted or can be expected to last for a continuous period of not less than 12 months.*" 42 U. S. C. § 423(d)(1)(A) (emphasis added); accord, § 1382c(a)(3)(A). The Social Security Administration (Agency) denied benefits to respondent Walton, finding that his "inability" to engage in substantial gainful activity lasted only 11 months. The District Court affirmed, but the Fourth Circuit reversed, holding that the 12-month duration requirement modifies "impairment" not "inability," that the statute leaves no doubt that no similar duration requirement relates to an "inability," and that therefore Walton was entitled to benefits despite Agency regulations restricting them to those unable to work for 12 months. The court decided further that Walton qualified for benefits because, prior to his return to work, his "inability" would have been "expected" to last 12 months. It conceded that the Agency had made Walton's actual return to work within 12 months of his onset date and before the Agency's decision date determinative on this point, 20 CFR §§ 404.1520(b), 1592(d)(2), but found that the regulations conflicted with the statute. It noted that Walton's work simply counted as part of a 9-month trial work period during which persons "entitled" to Title II benefits may work without loss of benefits, 42 U. S. C. § 422(c).

Held: The Agency's interpretations of the statute fall within its lawful interpretative authority. Pp. 217–225.

(a) The Agency's reading of the term "inability" is reasonable. The statute requires both an "inability" to engage in any substantial gainful activity and an "impairment" providing "reason" for the "inability," adding that the "impairment" must last or be expected to last not less than 12 months. The Agency has determined in both its formal regulations and its interpretation of those regulations that the "inability" must last the same amount of time. Courts grant considerable leeway to an agency's interpretation of its own regulations, and the Agency has properly interpreted its regulation here. Thus, this Court must decide

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(1) whether the statute unambiguously forbids that interpretation, and if not, (2) whether the interpretation exceeds permissible bounds. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. First, the Act does not unambiguously forbid the regulation. That the statute's 12-month phrase modifies only "impairment" shows only that the provision says nothing explicitly about the "inability's" duration. Such silence normally creates, but does not resolve, ambiguity. Second, the Agency's construction is permissible. It supplies a duration requirement, which the statute demands, in a way that consistently reconciles the statutory "impairment" and "inability" language. The Agency's regulations also reflect the Agency's own longstanding interpretation, which should be accorded particular deference, *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 522, n. 12. Finally, Congress has frequently amended or reenacted the relevant provisions without change. Walton's claim that Title II's 5-month waiting period for entitlement protects against a claimant with a chronic, but only briefly disabling, disease shows, at most, that the Agency could have chosen other reasonable time periods. Moreover, Title XVI has no such period, yet Walton offers no explanation why its identical definitional language should be interpreted differently in a closely related context. Walton's argument that the Agency's interpretation should be disregarded because its formal regulations were only recently enacted is also rejected. *E. g.*, *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741. And the Agency's longstanding interpretation is not automatically deprived of the judicial deference otherwise its due because it was previously reached through means less formal than notice-and-comment rulemaking. *Chevron*, *supra*, at 843. Pp. 217–222.

(b) Also consistent with the statute is the Agency's regulation providing that "[y]ou are *not entitled* to a trial work period" if "you perform work . . . within 12 months of the onset of the impairment . . . *and before* the date of *any . . . decision finding . . . you . . . disabled*," 20 CFR § 404.1592(d)(2) (emphasis added). The statute is ambiguous, and the regulation treats a pre-Agency-decision actual return to work as if it were determinative of the "can be expected to last" question. The statute's complexity, the vast number of claims it engenders, and the consequent need for agency expertise and administrative experience lead the Court to read the statute as delegating to the Agency considerable authority to fill in matters of detail related to its administration. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44. The interpretation at issue is such a matter. Pp. 222–225.

235 F. 3d 184, reversed.

BREYER, J., delivered the opinion of the Court, Parts I and III of which were unanimous, and Part II of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 226.

Jeffrey A. Lamken argued the cause for petitioner. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Kneedler*, *John C. Hoyle*, and *Mark S. Davies.*

Kathryn L. Pryor argued the cause for respondent. With her on the brief was *James W. Speer.**

JUSTICE BREYER delivered the opinion of the Court.

The Social Security Act authorizes payment of disability insurance benefits and Supplemental Security Income to individuals with disabilities. See 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.* (1994 ed. and Supp. V) (Title II disability insurance benefits); § 1381 *et seq.* (Title XVI supplemental security income). For both types of benefits the Act defines the key term "disability" as an

> "*inability* to engage in any substantial gainful activity *by reason of* any medically determinable physical or mental *impairment* which can be expected to result in death or *which has lasted or can be expected to last for a continuous period of not less than 12 months.*" § 423(d)(1)(A) (1994 ed.) (Title II) (emphasis added); accord, § 1382c(a)(3)(A) (1994 ed., Supp. V) (Title XVI).

This case presents two questions about the Social Security Administration's interpretation of this definition.

First, the Social Security Administration (which we shall call the Agency) reads the term "inability" as including a "12 month" requirement. In its view, the "inability" (to engage in any substantial gainful activity) must last, or must be ex-

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**Rochelle Bobroff*, *Michael Schuster*, and *Robert E. Rains* filed a brief for AARP et al. as *amici curiae* urging affirmance.

pected to last, for *at least 12 months.* Second, the Agency reads the term "expected to last" as applicable only when the "inability" has *not yet* lasted 12 months. In the case of a later Agency determination—where the "inability" *did not* last 12 months—the Agency will automatically assume that the claimant failed to meet the duration requirement. It will not look back to decide hypothetically whether, despite the claimant's actual return to work before 12 months expired, the "inability" nonetheless *might have been* expected to last that long.

The Court of Appeals for the Fourth Circuit held both these interpretations of the statute unlawful. We hold, to the contrary, that both fall within the Agency's lawful interpretive authority. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Consequently, we reverse.

I

In 1996 Cleveland Walton, the respondent, applied for both Title II disability insurance benefits and Title XVI Supplemental Security Income. The Agency found that (1) by October 31, 1994, Walton had developed a serious mental illness involving both schizophrenia and associated depression; (2) the illness caused him then to lose his job as a full-time teacher; (3) by mid-1995 he began to work again part time as a cashier; and (4) by December 1995 he was working as a cashier full time.

The Agency concluded that Walton's mental illness had prevented him from engaging in any significant work, *i. e.*, from "engag[ing] in any substantial gainful activity," for 11 months—from October 31, 1994 (when he lost his teaching job) until the end of September 1995 (when he earned income sufficient to rise to the level of "substantial gainful activity"). See 20 CFR §§ 404.1574, 416.974 (2001). And because the statute demanded an "inability to engage in any substantial gainful activity" lasting 12, not 11, months, Walton was not entitled to benefits.

Walton sought court review. The District Court affirmed the Agency's decision, but the Court of Appeals for the Fourth Circuit reversed. *Walton* v. *Apfel*, 235 F. 3d 184, 186–187 (2000). The court said that the statute's 12-month duration requirement modifies the word "impairment," not the word "inability." *Id.*, at 189. It added that the statute's "language . . . leaves no doubt" that there is no similar "duration requirement" related to an "inability" (to engage in substantial gainful activity). *Ibid.* It concluded that, because the statute's language "speaks clearly" and is "unambiguous," Walton was entitled to receive benefits despite agency regulations restricting benefits to those unable to work for a 12-month period. *Ibid.*

The court went on to decide that, in any event, Walton qualified because, prior to Walton's return to work, one would have "expected" his "inability" to last 12 months. *Id.*, at 189–190. It conceded that the Agency had made Walton's actual return to work determinative on this point. See 20 CFR §§ 404.1520(b), 1592(d)(2) (2001). But it found unlawful the Agency regulations that gave the Agency the benefit of hindsight—on the ground that they conflicted with the statute's clear command. 235 F. 3d, at 190.

For either reason, the Fourth Circuit concluded, Walton became "entitled" to Title II benefits no later than April 1995, five months after the onset of his illness. See 42 U. S. C. §§ 423(a)(1)(D)(i), 423(a)(1)(D)(ii) (providing for a 5-month "waiting period" before a claimant is "entitled" to benefits), 423(c)(2)(A) (1994 ed.). It added that Walton's later work as a cashier was legally beside the point. That work simply counted as part of a 9-month "trial work period," which the statute grants to those "entitled" to Title II benefits, and which it permits them to perform without loss of benefits. § 422(c).

The Government sought certiorari. It pointed out that the Fourth Circuit's first holding conflicts with those of other Circuits, compare 235 F. 3d, at 189–190, with *Titus* v. *Sulli-*

van, 4 F. 3d 590, 594–595 (CA8 1993), and *Alexander* v. *Richardson*, 451 F. 2d 1185 (CA10 1971). It added that the Fourth Circuit's views were contrary to well-settled law and would create additional Social Security costs of $80 billion over 10 years. We granted the writ. We now reverse.

II

The statutory definition of "disability" has two parts. First, it requires a certain kind of "inability," namely, an "inability to engage in any substantial gainful activity." Second, it requires an "impairment," namely, a "physical or mental impairment," which provides "reason" for the "inability." The statute adds that the "impairment" must be one that "has lasted or can be expected to last . . . not less than 12 months." But what about the "inability"? Must it also last (or be expected to last) for the same amount of time?

The Agency has answered this question in the affirmative. Acting pursuant to statutory rulemaking authority, 42 U. S. C. §§ 405(a) (Title II), 1383(d)(1) (Title XVI), it has promulgated formal regulations that state that a claimant is not disabled "regardless of [his] medical condition," if he is doing "substantial gainful activity." 20 CFR § 404.1520(b) (2001). And the Agency has interpreted this regulation to mean that the claimant is not disabled if "within 12 months after the onset of an impairment . . . the impairment no longer prevents substantial gainful activity." 65 Fed. Reg. 42774 (2000). Courts grant an agency's interpretation of its own regulations considerable legal leeway. *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965). And no one here denies that the Agency has properly interpreted its own regulation.

Consequently, the legal question before us is whether the Agency's interpretation of the statute is lawful. This Court has previously said that, if the statute speaks clearly "to the precise question at issue," we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467

U. S., at 842–843. If, however, the statute "is silent or ambiguous with respect to the specific issue," we must sustain the Agency's interpretation if it is "based on a permissible construction" of the Act. *Id.*, at 843. Hence we must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible. *Ibid.;* see also *United States* v. *Mead Corp.*, 533 U. S. 218, 227 (2001).

First, the statute does not unambiguously forbid the regulation. The Fourth Circuit believed the contrary primarily for a linguistic reason. It pointed out that, linguistically speaking, the statute's "12-month" phrase modifies only the word "impairment," not the word "inability." And to that extent we agree. After all, the statute, in parallel phrasing, uses the words "which can be expected to result in death." And that structurally parallel phrase makes sense in reference to an "impairment," but makes no sense in reference to the "inability."

Nonetheless, this linguistic point is insufficient. It shows that the particular statutory provision says nothing explicitly about the "inability's" duration. But such silence, after all, normally creates ambiguity. It does not resolve it.

Moreover, a nearby provision of the statute says that an

> "individual shall be determined to be under a disability only if his . . . impairment . . . [is] of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy." 42 U. S. C. § 423(d)(2)(A) (Title II); accord, § 1382c(a)(3)(B) (Title XVI).

In other words, the statute, in the two provisions, specifies that the "impairment" must last 12 months and also be severe enough to prevent the claimant from engaging in virtually any "substantial gainful work." The statute, we con-

cede, nowhere explicitly says that the "impairment" must be *that severe* (*i. e.*, severe enough to prevent "substantial gainful work") for 12 months. But that is a fair inference from the language. See Brief for AARP et al. as *Amici Curiae* 13 (conceding that an *impairment* must remain of "disabling severity" for 12 months). At the very least the statute is ambiguous in that respect. And, if so, then it is an equally fair inference that the "inability" must last 12 months. That is because the latter statement (*i. e.*, that the claimant must be unable to "engage in any substantial gainful activity" for a year) is the virtual equivalent of the former statement (*i. e.*, that the "impairment" must remain severe enough to prevent the claimant from engaging in "substantial gainful work" for a year). It simply rephrases the same point in a slightly different way.

Second, the Agency's construction is "permissible." The interpretation makes considerable sense in terms of the statute's basic objectives. The statute demands some duration requirement. No one claims that the statute would permit an individual with a chronic illness—say, high blood pressure—to qualify for benefits if that illness, while itself lasting for a year, were to permit a claimant to return to work after only a week, or perhaps even a day, away from the job. The Agency's interpretation supplies a duration requirement, which the statute demands, while doing so in a way that consistently reconciles the statutory "impairment" and "inability" language.

In addition, the Agency's regulations reflect the Agency's own longstanding interpretation. See Social Security Ruling 82–52, p. 106 (cum. ed. 1982) ("In considering 'duration,' it is the inability to engage in [substantial gainful activity] that must last the required 12-month period"); Disability Insurance State Manual § 316 (Sept. 9, 1965), Government Lodging, Tab C, § 316 ("Duration of impairment refers to that period of time during which an individual is continuously unable to engage in substantial gainful activity because

of" an impairment); OASI Disability Insurance Letter No. 39 (Jan. 22, 1957), *id.*, Tab A, p. 1 (duration requirement refers to the "expected duration of the *medical impairment*" at a "level of severity sufficient to preclude" substantial gainful activity"). And this Court will normally accord particular deference to an agency interpretation of "longstanding" duration. *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 522, n. 12 (1982).

Finally, Congress has frequently amended or reenacted the relevant provisions without change. *E. g.*, Social Security Amendments of 1965, § 303(a)(1), 79 Stat. 366; see also S. Rep. No. 404, 89th Cong., 1st Sess., pt. I, pp. 98–99 (1965) ("[T]he committee's bill . . . provide[s] for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled* throughout a continuous period of 12 calendar months" (emphasis added)); *id.*, at 98 (rejecting effort to provide benefits to those with "short-term, temporary disabilit[ies]," defined as inability to work for six months); H. R. Rep. No. 92–231, p. 56 (1971) ("No benefit is payable, however, unless the *disability* is expected to last (or has lasted) at least 12 consecutive months" (emphasis added)); S. Rep. No. 744, 90th Cong., 1st Sess., 49 (1967) ("The committee also believes . . . that an individual who does substantial gainful work despite an impairment or impairments that otherwise might be considered disabling is not disabled for purposes of establishing a period of disability"). These circumstances provide further evidence—if more is needed—that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 845–846 (1986).

Walton points in reply to Title II language stating that a claimant who is "under a disability . . . shall be entitled to a . . . benefit . . . beginning with the first month after" a "waiting period" of "five consecutive calendar months . . . throughout which" he "has been under a disa-

bility." 42 U. S. C. §§ 423(a)(1)(D)(i), 423(c)(2)(A). He adds that this 5-month "waiting period" assures a lengthy period of time during which the applicant (who must be "under a disability" throughout) has been unable to work. And it thereby provides ironclad protection against the claimant who suffers a chronic, but only briefly disabling, disease, such as the claimant who suffers high blood pressure in our earlier example. See *supra*, at 219. This claim does not help Walton, however, for it shows, at most, that the Agency might have chosen other reasonable time periods—a matter not disputed. Regardless, Walton's "waiting period" argument could work only in respect to Title II, not Title XVI. Title XVI has no waiting period, though it uses identical definitional language. And Walton does not explain why we should interpret the same statutory words differently in closely related contexts. See *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 342 (1994) ("'[I]dentical words used in different parts of the same act are intended to have the same meaning'" (quoting *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986) (some internal quotation marks omitted)).

Walton also asks us to disregard the Agency's interpretation of its formal regulations on the ground that the Agency only recently enacted those regulations, perhaps in response to this litigation. We have previously rejected similar arguments. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741 (1996); *United States* v. *Morton*, 467 U. S. 822, 835–836, n. 21 (1984).

Regardless, the Agency's interpretation is one of long standing. See *supra*, at 220. And the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking, see 5 U. S. C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due. Cf. *Chevron*, 467 U. S., at 843 (stating, without delineation of means, that the "'power of an administrative agency to administer a congres-

sionally created . . . program necessarily requires the formulation of policy' " (quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974))). If this Court's opinion in *Christensen* v. *Harris County*, 529 U. S. 576 (2000), suggested an absolute rule to the contrary, our later opinion in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), denied the suggestion. *Id.*, at 230–231 ("[T]he want of" notice and comment "does not decide the case"). Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. 533 U. S., at 230–231 (citing *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257 (1995)). It indicated that whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue. 533 U. S., at 229–231. And it discussed at length why *Chevron* did not require deference in the circumstances there present—a discussion that would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive. 533 U. S., at 231–234.

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. See *United States* v. *Mead Corp.*, *supra;* cf. also 1 K. Davis & R. Pierce, Administrative Law Treatise §§ 1.7, 3.3 (3d ed. 1994).

For these reasons, we find the Agency's interpretation lawful.

III

Walton's second claim is more complex. For purposes of making that claim, Walton assumes what we have just decided, namely, that the statute's "12 month" duration require-

ments apply to both the "impairment" and the "inability" to work requirements. Walton also concedes that he returned to work after 11 months. But Walton claims that his work from month 11 to month 12 does not count against him because it is part of a "trial work" period that the statute grants to those "entitled" to Title II benefits. See 42 U. S. C. § 422(c). And Walton adds, he was "entitle[d]" to benefits because—even though he returned to work after 11 months—his "impairment" and his "inability" to work were nonetheless "*expected* to last" for at least "12 months" *before* he returned to work.

To illustrate Walton's argument, we simplify the actual circumstances. We imagine: (1) On January 1, Year One, Walton developed (a) a severe impairment, which (b) made him unable to work; (2) Eleven (not twelve) months later, on December 1, Year One, Walton returned to work; (3) On July 1, Year Two, the Agency adjudicated, and denied, Walton's claim for benefits. Walton argues that, even though he returned to work after 11 months, had the Agency looked at the matter, not *ex post*, but as if it were looking *prior* to his return to work, the Agency would have had to conclude that both his "impairment" and his "inability" to work "*can be expected* to last for a continuous period of not less than 12 months." § 423(d)(1)(A). He consequently satisfied the 12-month duration requirement and became "entitled" to benefits before he returned to work; he was in turn entitled to a "trial work" period; and his subsequent work as a cashier, being "trial work," should not count against him.

The Agency's regulations plainly reject this view of the statute. They say, "You are *not entitled* to a trial work period" if "you perform work . . . within 12 months of the onset of the impairment(s) . . . *and before* the date of *any* notice of determination or *decision finding . . . you . . . disabled.*" 20 CFR § 404.1592(d)(2) (2001). This regulation means that the Agency, deciding before the end of Year One, might have found that Walton's impairment (or inability to work) "*can*

be expected to last" for 12 months. But the Agency, deciding after Year One in which Walton in fact returned to work, would not ask whether his impairment (or inability to work) *could have been* expected to last 12 months.

The legal question is whether this Agency regulation is consistent with the statute. The Court of Appeals, accepting Walton's view, concluded that it is not. It said that the Agency's rules—permitting the use of hindsight when reviewing claims—are inconsistent with the statute's plain language, 235 F. 3d, at 191. And, here, other courts have agreed. See *Salamalekis* v. *Commissioner of Soc. Sec.*, 221 F. 3d 828 (CA6 2000); *Newton* v. *Chater*, 92 F. 3d 688 (CA8 1996); *Walker* v. *Secretary of Health and Human Servs.*, 943 F. 2d 1257 (CA10 1991); *McDonald* v. *Bowen*, 818 F. 2d 559 (CA7 1986).

Nonetheless, we believe that Agency regulation is lawful. See *Chevron*, *supra*, at 843. The statute is ambiguous. It says nothing about how the Agency, when it adjudicates a matter after Year One, is to treat an earlier return to work. Its language "can be expected to last" 12 months, 42 U. S. C. § 423(d)(1)(A), simply does not say as of what time the law measures the "expectation." Indeed, from a linguistic perspective, the phrase "can be expected" foresees a decisionmaker who is looking into the future, not a decisionmaker who is in the future, looking back into the past in order to see what then "was," "could be," or "could have been" expected. And read in context, the purpose of the phrase "can be expected to last" might be one of permitting the Agency to award benefits before 12 months have expired, not one of denying the Agency the benefit of hindsight. See 65 Fed. Reg., at 42780; cf. also S. Rep. No. 404, at 99.

At the same time, the Agency's regulation seems a reasonable, hence permissible, interpretation of the statute. In effect it treats a pre-Agency-decision actual return to work, *e. g.*, Walton's return in December Year One, as if it were determinative of the expectation question. With Year Two's hindsight, Walton's "inability" to work "can" not "be

expected to last 12 months." And use of that hindsight avoids the need for the Year Two decisionmaker in effect to answer a highly unwieldy question in what grammarians might call the pluperfect future tense.

Of course, administrators and judges are capable of answering hypothetical questions of this kind. But here the question concerns what must be a contrary-to-fact speculation about the future. It is a speculation that, however often raised, would rarely prove easy to resolve. And the statute's purpose does not demand its resolution. Indeed, one might ask why, other things being equal, a claimant who returns to work too early ordinarily to qualify for benefits nonetheless should qualify *if, but only if, that return was a kind of medical surprise.* Of course, as Walton says, such a rule would help encourage (or at least not discourage) a claimant's early return to work. See generally S. Rep. No. 1856, 86th Cong., 2d Sess., 15–16 (1960). But the statute does not demand that the Agency make of this desirable end an overriding interpretive principle. And the Agency has recognized and addressed the problem of work disincentives in other ways. See, *e. g.*, 20 CFR §§ 404.1574(c), 404.1575(d) (2001).

The statute's complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44 (1981). The interpretation at issue here is such a matter. The statute's language is ambiguous. And the Agency's interpretation is reasonable.

We conclude that the Agency's regulation is lawful.

* * *

The judgment of the Fourth Circuit is

Reversed.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all but Part II of the Court's opinion.

I agree that deference is owed to regulations of the Social Security Administration (SSA) interpreting the definition of "disability," 42 U. S. C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1994 ed. and Supp. V). See 65 Fed. Reg. 42774 (2000). As the Court acknowledges, the recency of these regulations is irrelevant, see *ante*, at 220–221 (citing *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741 (1996); *United States* v. *Morton*, 467 U. S. 822, 835–836, n. 21 (1984)). I would therefore not go on, as the Court does, *ante*, at 219–222, to address the SSA's prior interpretation of the definition of "disability" in a 1982 Social Security Ruling, a 1965 Disability Insurance State Manual, and a 1957 OASI Disability Insurance Letter.

I do not believe, to begin with, that "particular deference" is owed "to an agency interpretation of 'longstanding' duration," *ante*, at 220. That notion is an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one "correct" interpretation of a statutory text. A "longstanding" agency interpretation, particularly one that dated back to the very origins of the statute, was more likely to reflect the single correct meaning. See, *e. g.*, *Watt* v. *Alaska*, 451 U. S. 259, 272–273 (1981). But once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference. Cf. *Rust* v. *Sullivan*, 500 U. S. 173, 186–187 (1991); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 863–864 (1984).

If, however, the Court does wish to credit the SSA's earlier interpretations—both for the purpose of giving the agency's position "particular deference" and for the purpose of relying upon congressional reenactment with presumed knowledge

of the agency position, see *ante*, at 219–220—then I think the Court should state why those interpretations were authoritative enough (or whatever-else-enough *Mead* requires) to qualify for deference. See *United States* v. *Mead Corp.*, 533 U. S. 218 (2001). I of course agree that more than notice-and-comment rulemaking qualifies, see *ante*, at 221–222, but that concession alone does not validate the Social Security Ruling, the Disability Insurance State Manual, and the OASI Disability Insurance Letter. (Only the latter two, I might point out, antedate the congressional reenactments upon which the Court relies.)

The SSA's recently enacted regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said.

Per Curiam

ADAMS ET AL. *v.* FLORIDA POWER CORP. ET AL.

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

No. 01–584. Argued March 20, 2002—Decided April 1, 2002

Certiorari dismissed. Reported below: 255 F. 3d 1322.

John G. Crabtree argued the cause for petitioners. With him on the briefs was *Edward L. Scott.*

Glen D. Nager argued the cause for respondents. With him on the brief were *Daniel H. Bromberg, Rodney E. Gaddy,* and *Nancy F. Reynolds.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Laurie A. McCann, Daniel B. Kohrman, Thomas W. Osborne,* and *Melvin Radowitz;* for the Cornell University Chapter of the American Association of University Professors et al. by *Michael Evan Gold;* and for the National Employment Lawyers Association by *Cathy Ventrell-Monsees.*

Briefs of *amici curiae* urging affirmance were filed for the Atlantic Legal Foundation by *Martin S. Kaufman;* for the Chamber of Commerce of the United States by *Mark S. Dichter, Stephen A. Bokat,* and *Joshua A. Ulman;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman* and *Rae T. Vann;* and for the Pacific Legal Foundation by *John H. Findley.*

Alfred W. Blumrosen, Ruth G. Blumrosen, Archibald J. Thomas III, and *Russell S. Bohn* filed a brief for the Academy of Florida Trial Lawyers as *amicus curiae.*

Syllabus

SAO PAULO STATE OF THE FEDERATIVE REPUBLIC OF BRAZIL *v.* AMERICAN TOBACCO CO., INC., ET AL.

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

No. 01–835. Decided April 1, 2002

Respondents moved the District Judge in this tobacco-products liability case to recuse himself under 28 U. S. C. § 455(a) because, before his appointment to the bench, his name appeared on a motion to file an *amicus* brief by the Louisiana Trial Lawyers Association (LTLA) in the similar *Gilboy* suit against some of the same defendants. As he had done in a companion case, *Republic of Panama I*, the judge refused to disqualify himself on the grounds that he was erroneously listed as LTLA president on the *Gilboy* motion when he no longer held that post, and that he took no part in preparation or approval of the *Gilboy* brief. In *Republic of Panama I*, the judge found it unsurprising that he was unaware of the brief because the LTLA affixed its president's name to all motions to file *amicus* briefs. The Fifth Circuit reversed, citing its prior decision reversing the judge's order denying recusal in *Republic of Panama I*.

Held: The Fifth Circuit's decision is inconsistent with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, which stated that § 455(a) requires judicial recusal "if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge" of his interest or bias in the case, *id.*, at 861 (internal quotation marks omitted and emphasis added). The Fifth Circuit considered what a reasonable person would believe without knowing that the judge's name was added mistakenly and without his knowledge to a *pro forma* motion to file an *amicus* brief in a separate controversy. The decision whether his impartiality might reasonably be questioned should not have been made in disregard of the facts that he took no part in the preparation or approval of the *amicus* brief and that he was only vaguely aware of that brief. When those facts are taken into account, it is self-evident that a reasonable person would not believe that he had any interest or bias.

Certiorari granted; 250 F. 3d 315, reversed and remanded.

PER CURIAM.

Section 455(a) of 28 U. S. C. (1994 ed.) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In this tobacco-products liability case, the Court of Appeals for the Fifth Circuit held that § 455(a) required disqualification of a District Judge whose name appeared erroneously, prior to his appointment to the bench, on a motion to file an *amicus* brief in a similar suit against some of the same defendants. *Republic of Panama* v. *American Tobacco Co.*, 250 F. 3d 315 (2001) *(per curiam) (Republic of Panama II)*. We grant the writ of certiorari and reverse.

Petitioner, Sao Paulo State, brought this suit against respondent tobacco companies in Louisiana state court. It alleged that respondents had conspired to conceal the health risks of smoking, thereby preventing it from adopting policies that would have reduced smoking by Sao Paulo citizens. It seeks compensation for the costs of treating their smoking-related health problems. The suit was removed to the United States District Court for the Eastern District of Louisiana and assigned to District Judge Carl J. Barbier, who had presided over a companion case, *Republic of Panama* v. *American Tobacco Co.*, No. 98–3279, 1999 WL 350030 (ED La., May 28, 1999) *(Republic of Panama I)*, vacated and remanded, 217 F. 3d 343 (CA5 2000). As in that case, respondents filed a motion seeking Judge Barbier's recusal under § 455(a) because of his involvement, prior to appointment to the bench, in a similar suit against some of the respondents.

Almost nine years before the present suit was commenced, Judge Barbier's name appeared on a motion to file an *amicus curiae* brief in *Gilboy* v. *American Tobacco Co.*, 582 So. 2d 1263 (La. 1991). The motion was submitted by the Louisiana Trial Lawyers Association (LTLA), and erroneously listed Judge Barbier as the association's president, a position from which he had retired about six months earlier. The motion also correctly listed as a member of the LTLA's

amicus curiae committee which approved the brief Michael St. Martin, who represents petitioner in the case before us. The *amicus* brief itself—which did not list either Judge Barbier or Mr. St. Martin—supported the *Gilboy* plaintiff's claim that cigarettes are addictive and cause cancer, and that the defendants failed to warn consumers about these dangers. Brief for LTLA as *Amicus Curiae* in No. 90–C–2686 (La. Sup. Ct.), App. to Brief in Opposition 9a; *Gilboy, supra,* at 1266.

Respondents argued that Judge Barbier's association with the *Gilboy amicus* brief created an "appearance of partiality" requiring disqualification under § 455(a). Brief in Opposition 3. Judge Barbier disagreed. Adopting his reasons for denying recusal in *Republic of Panama I,* he refused to disqualify himself because his name appeared in error on the motion to file the *amicus* brief and because he took no part in preparation or approval of the brief. Minute Entry in Civ. Action Nos. 00–0922, 98–3279 (ED La., May 26, 2000), App. to Pet. for Cert. 43a; Tr. of Proceeding on Motion for Recusal in *Republic of Panama I,* pp. 21, 37–40 (Feb. 3, 1999), App. to Pet. for Cert. 48a–51a (Tr. of Proceeding). Indeed, he was previously unaware of it, which he found unsurprising because the LTLA affixed the president's name to all motions to file *amicus* briefs, despite the fact that the president had absolutely no role in preparation or approval of the briefs. Tr. of Status Conf. in *Republic of Panama I,* pp. 7–8 (Dec. 21, 1998), App. to Pet. for Cert. 53a (Tr. of Status Conf.); Tr. of Proceeding 37–40, App. to Pet. for Cert. 49a–51a. Judge Barbier also noted in *Republic of Panama I* that he had never practiced law with Mr. St. Martin or any other lawyer listed on the motion, had no personal knowledge of the disputed facts in *Gilboy,* had never taken a position with respect to any of the issues raised in petitioner's suit, and had never been involved in a tobacco-related case "one way or another in my whole legal career." Tr. of

Status Conf. 9, App. to Pet. for Cert. 54a. See also Tr. of Proceeding 39–40, App. to Pet. for Cert. 50a–51a.

The Court of Appeals for the Fifth Circuit reversed, citing its prior decision reversing Judge Barbier's order denying recusal in *Republic of Panama I.* In that case, the Fifth Circuit said:

> "The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama. The trial judge's assertions that he did not participate directly in the writing or researching of the amicus brief do not dissipate the doubts that a reasonable person would probably have about the court's impartiality. We acknowledge that this is a close case for recusal." 217 F. 3d, at 347.

Judge Parker concurred, agreeing that the court was bound by its decision in *Republic of Panama I,* but arguing that that decision was "erroneous because it requires recusal on the basis of a judge's public statements on the law made prior to becoming a judge . . . ." *Republic of Panama II, supra,* at 318. Rehearing en banc was denied over the dissent of six judges, who argued that the decision below amounts to an "issue recusal" rule, requiring disqualification whenever a judge has pre-judicial association with a legal position. 265 F. 3d 299, 306 (2001) (joint dissent of Wiener and Parker, JJ.).

We need not consider the argument advanced by the dissenting judges, since this case is easily disposed of on other grounds. The Fifth Circuit's decision is inconsistent with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847 (1988), which stated that § 455(a) requires judicial recusal "if a reasonable person, *knowing all the circumstances,*

would expect that the judge would have actual knowledge" of his interest or bias in the case. *Id.*, at 861 (internal quotation marks omitted and emphasis added). The Fifth Circuit reached the conclusion that recusal was required because it considered what a reasonable person would believe *without* knowing (or giving due weight to the fact) that the judge's name was added mistakenly and without his knowledge to a *pro forma* motion to file an *amicus* brief in a separate controversy. Although Judge Barbier was indeed a leader of the LTLA at that time (he was a member of the association's executive committee), he took no part in the preparation or approval of the *amicus* brief; indeed, he was only "vaguely aware" of the case. Tr. of Status Conf. 8, App. to Pet. for Cert. 54a. The decision whether his "impartiality might reasonably be questioned" should not have been made in disregard of these facts; and when they are taken into account we think it self-evident that a reasonable person would not believe he had any interest or bias.

Accordingly, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Syllabus

ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL.

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

No. 00–795. Argued October 30, 2001—Decided April 16, 2002

The Child Pornography Prevention Act of 1996 (CPPA) expands the federal prohibition on child pornography to include not only pornographic images made using actual children, 18 U. S. C. § 2256(8)(A), but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct," § 2256(8)(B), and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct," § 2256(8)(D). Thus, § 2256(8)(B) bans a range of sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. Section 2256(8)(D) is aimed at preventing the production or distribution of pornographic material pandered as child pornography. Fearing that the CPPA threatened their activities, respondents, an adult-entertainment trade association and others, filed this suit alleging that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling production of works protected by the First Amendment. The District Court disagreed and granted the Government summary judgment, but the Ninth Circuit reversed. Generally, pornography can be banned only if it is obscene under *Miller* v. *California*, 413 U. S. 15, but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process, *New York* v. *Ferber*, 458 U. S. 747, 758, and in prosecuting those who promote such sexual exploitation, *id.*, at 761. The Ninth Circuit held the CPPA invalid on its face, finding it to be substantially overbroad because it bans materials that are neither obscene under *Miller* nor produced by the exploitation of real children as in *Ferber*.

Held: The prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Pp. 244–258.

(a) Section 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in

support of limiting the freedom of speech have no justification in this Court's precedents or First Amendment law. Pp. 244–256.

(1) The CPPA is inconsistent with *Miller*. It extends to images that are not obscene under the *Miller* standard, which requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value, 413 U. S., at 24. Materials need not appeal to the prurient interest under the CPPA, which proscribes any depiction of sexually explicit activity, no matter how it is presented. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards. The CPPA also prohibits speech having serious redeeming value, proscribing the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature for centuries. A number of acclaimed movies, filmed without any child actors, explore themes within the wide sweep of the statute's prohibitions. If those movies contain a single graphic depiction of sexual activity within the statutory definition, their possessor would be subject to severe punishment without inquiry into the literary value of the work. This is inconsistent with an essential First Amendment rule: A work's artistic merit does not depend on the presence of a single explicit scene. See, *e. g.*, *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413, 419. Under *Miller*, redeeming value is judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin*, 408 U. S. 229, 231 *(per curiam)*. The CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition. Pp. 244–249.

(2) The CPPA finds no support in *Ferber*. The Court rejects the Government's argument that speech prohibited by the CPPA is virtually indistinguishable from material that may be banned under *Ferber*. That case upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. 458 U. S., at 759. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. See *id.*, at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. *Id.*, at 760. Under

either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came. In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts. The Government's argument that these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech, see *id.*, at 762, suffers from two flaws. First, *Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the First Amendment's protection. See *id.*, at 764–765. Second, *Ferber* did not hold that child pornography is by definition without value. It recognized some works in this category might have significant value, see *id.*, at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression, *id.*, at 763. Because *Ferber* relied on the distinction between actual and virtual child pornography as supporting its holding, it provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. Pp. 249–251.

(3) The Court rejects other arguments offered by the Government to justify the CPPA's prohibitions. The contention that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See, *e. g.*, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 130–131. That the evil in question depends upon the actor's unlawful conduct, defined as criminal quite apart from any link to the speech in question, establishes that the speech ban is not narrowly drawn. The argument that virtual child pornography whets pedophiles' appetites and encourages them to engage in illegal conduct is unavailing because the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, *Stanley* v. *Georgia*, 394 U. S. 557, 566, absent some showing of a direct connection between the speech and imminent illegal conduct, see, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 *(per curiam)*. The argument that eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well is somewhat implausible because

few pornographers would risk prosecution for abusing real children if fictional, computerized images would suffice. Moreover, even if the market deterrence theory were persuasive, the argument cannot justify the CPPA because, here, there is no underlying crime at all. Finally, the First Amendment is turned upside down by the argument that, because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds of images must be prohibited. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612. The Government's rejoinder that the CPPA should be read not as a prohibition on speech but as a measure shifting the burden to the accused to prove the speech is lawful raises serious constitutional difficulties. The Government misplaces its reliance on § 2252A(c), which creates an affirmative defense allowing a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is insufficient because it does not apply to possession or to images created by computer imaging, even where the defendant could demonstrate no children were harmed in producing the images. Thus, the defense leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones. Pp. 251–256.

(b) Section 2256(8)(D) is also substantially overbroad. The Court disagrees with the Government's view that the only difference between that provision and § 2256(8)(B)'s "appears to be" provision is that § 2256(8)(D) requires the jury to assess the material at issue in light of the manner in which it is promoted, but that the determination would still depend principally upon the prohibited work's content. The "conveys the impression" provision requires little judgment about the image's content; the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted. The Government's other arguments in support of the CPPA do not bear on § 2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. Pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. See *Ginzburg* v. *United*

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States, 383 U. S. 463, 474. Where a defendant engages in the "commercial exploitation" of erotica solely for the sake of prurient appeal, *id.*, at 466, the context created may be relevant to evaluating whether the materials are obscene. Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. Proscribed material is tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." Thus, the CPPA does more than prohibit pandering. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. Pp. 257–258.

(c) In light of the foregoing, respondents' contention that §§ 2256(8)(B) and 2256(8)(D) are void for vagueness need not be addressed. P. 258.

198 F. 3d 1083, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 259. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined as to Part II, *post*, p. 260. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined except for the paragraph discussing legislative history, *post*, p. 267.

Deputy Solicitor General Clement argued the cause for petitioners. With him on the briefs were *Solicitor General Olson*, *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Irving L. Gornstein*, *Barbara L. Herwig*, and *Jacob M. Lewis*.

H. Louis Sirkin argued the cause for respondents. With him on the brief were *Laura A. Abrams* and *John P. Feldmeier*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New Jersey et al. by *John J. Farmer, Jr.*, Attorney General of New Jersey, and

JUSTICE KENNEDY delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. § 2251 *et seq.*, abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who

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Patrick DeAlmeida and *Carol Johnston*, Deputy Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Herbert D. Soll* of the Northern Mariana Islands, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, and *James E. Doyle* of Wisconsin; for the National Center for Missing & Exploited Children by *Dennis DeConcini* and *Susan M. Kalp;* for the National Law Center for Children and Families et al. by *J. Robert Flores*, *Bruce A. Taylor*, and *Janet M. LaRue;* for the National Legal Foundation by *Barry C. Hodge;* for Morality in Media, Inc., by *Robin S. Whitehead;* and for Senator Sam Brownback et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *James M. Henderson, Sr.*, *David A. Cortman*, *Colby M. May*, *Walter M. Weber*, and *Benjamin W. Bull.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *William Bennett Turner*, *Ann E. Beeson*, and *Steven R. Shapiro;* for the Association of American Publishers, Inc., et al. by *R. Bruce Rich*, *Jonathan Bloom*, and *Michael A. Bamberger;* and for the Liberty Project by *Jodie L. Kelley* and *Daniel Mach.*

look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U. S. C. § 2251.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York* v. *Ferber*, 458 U. S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.*, at 758. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller* v. *California*, 413 U. S. 15 (1973). *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U. S., at 761.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U. S. C. §§ 1460–1466. Like the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.

I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. 18 U. S. C. § 2252 (1994 ed.). The CPPA retains that prohibition at 18 U. S. C. § 2256(8)(A) and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse." § 2256(2).

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Finding (3), notes following § 2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id.*, Find-

ings (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See *id.*, Finding (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge § 2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. See S. Rep. No. 104–358, p. 22 (1996) ("This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography"). The statute is not so limited in its reach, however, as it punishes even

those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' . . . will be treated as 'criminal contraband.'" App. to Pet. for Cert. 62a–63a.

The Court of Appeals for the Ninth Circuit reversed. See 198 F. 3d 1083 (1999). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York* v. *Ferber*, 458 U. S. 747 (1982). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. 198 F. 3d, at 1097. The Court of Appeals voted to

deny the petition for rehearing en banc, over the dissent of three judges. See 220 F. 3d 1113 (2000).

While the Ninth Circuit found the CPPA invalid on its face, four other Courts of Appeals have sustained it. See *United States* v. *Fox*, 248 F. 3d 394 (CA5 2001); *United States* v. *Mento*, 231 F. 3d 912 (CA4 2000); *United States* v. *Acheson*, 195 F. 3d 645 (CA11 1999); *United States* v. *Hilton*, 167 F. 3d 61 (CA1), cert. denied, 528 U. S. 844 (1999). We granted certiorari. 531 U. S. 1124 (2001).

II

The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." The government may violate this mandate in many ways, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In

its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. See Congressional Findings, notes following § 2251; see also U. S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. *E. g.*, 18 U. S. C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.*, 360 U. S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech" (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); see also *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment' ") (quoting *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989)); *Carey* v. *Population Services Int'l*, 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not

embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F. 3d, at 1101. It would be necessary for us to take this step to uphold the statute.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller* v. *California*, 413 U. S. 15 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Id.*, at 24. The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages.

Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U. S. C. § 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See § 2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U. S. National Survey of State Laws 384–388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021–1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E. g.*, Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. See Predictable and Less So, the Academy Award Contenders, N. Y. Times, Feb. 14, 2001, p. E11. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her

to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. See "American Beauty" Tops the Oscars, N. Y. Times, Mar. 27, 2000, p. E1. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413, 419 (1966) (plurality opinion) ("[T]he social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness"). Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972) *(per*

curiam). For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York* v. *Ferber*, 458 U. S., at 761. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. *Id.*, at 761, n. 12; see also *id.*, at 775 (O'Connor, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation." *Id.*, at 761, n. 12.

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Id.*, at 759. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. See *id.*, at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material

by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 760. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

Later, in *Osborne* v. *Ohio*, 495 U. S. 103 (1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.*, at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the "victims of child pornography." *Id.*, at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra*, at 251–253.

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 458 U. S., at 759. While the Government asserts that the images can lead to actual instances of child abuse, see *infra*, at 251–254, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See 458 U. S., at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). This argument, however, suffers from two flaws. First, *Ferber*'s judg-

ment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.*, at 764–765 ("[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection").

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, see *id.*, at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.*, at 763. *Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable mate-

rials to children, see *Ginsberg* v. *New York*, 390 U. S. 629 (1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989). In *Butler* v. *Michigan*, 352 U. S. 380, 381 (1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to "'incite minors to violent or depraved or immoral acts.'" A unanimous Court agreed upon the important First Amendment principle that the State could not "reduce the adult population . . . to reading only what is fit for children." *Id.*, at 383. We have reaffirmed this holding. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno* v. *American Civil Liberties Union*, 521 U. S., at 875 (The "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults"); *Sable Communications* v. *FCC*, *supra*, at 130–131 (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well

beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.*, 360 U. S., at 689; see also *Bartnicki* v. *Vopper*, 532 U. S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess* v. *Indiana*, 414 U. S. 105, 108 (1973) *(per curiam)*. The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*. There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit

speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne*, 495 U. S., at 109–110. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E. g.*, *Bartnicki*, *supra*, at 529 (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of im-

ages. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick* v. *Oklahoma*, 413 U. S., at 612. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U. S. C. § 2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult

for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

In sum, § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

IV

Respondents challenge § 2256(8)(D) as well. This provision bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The parties treat the section as nearly identical to the provision prohibiting materials that appear to be child pornography. In the Government's view, the difference between the two is that "the 'conveys the impression' provision requires the jury to assess the material at issue in light of the manner in which it is promoted." Brief for Petitioners 18, n. 3. The Government's assumption, however, is that the determination would still depend principally upon the content of the prohibited work.

We disagree with this view. The CPPA prohibits sexually explicit materials that "conve[y] the impression" they depict minors. While that phrase may sound like the "appears to be" prohibition in § 2256(8)(B), it requires little judgment about the content of the image. Under § 2256(8)(D), the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

The Government does not offer a serious defense of this provision, and the other arguments it makes in support of the CPPA do not bear on § 2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. The Court has recognized that pandering may be relevant, as an evidentiary matter, to

the question whether particular materials are obscene. See *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966) ("[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test"). Where a defendant engages in the "commercial exploitation of erotica solely for the sake of their prurient appeal," *id.*, at 466, the context he or she creates may itself be relevant to the evaluation of the materials.

Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." *Ibid.* As a consequence, the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment.

V

For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Having reached this conclusion, we need not address respondents' further contention that the provisions are unconstitutional because of vague statutory language.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. § 2251 *et seq.*, is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer generated, thereby raising a reasonable doubt as to their guilt. See Brief for Petitioners 37. At this time, however, the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a "computer-generated images" defense. See *id.*, at 37–38, and n. 8. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because "[t]his analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ante,* at 255. But if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, see *ante,* at 256, implicitly accepting that some

regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the Court.

Justice O'Connor, with whom The Chief Justice and Justice Scalia join as to Part II, concurring in the judgment in part and dissenting in part.

The Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. § 2251 *et seq.*, proscribes the "knowin[g]" reproduction, distribution, sale, reception, or possession of images that fall under the statute's definition of child pornography, § 2252A(a). Possession is punishable by up to 5 years in prison for a first offense, § 2252A(b), and all other transgressions are punishable by up to 15 years in prison for a first offense, § 2252A(a). The CPPA defines child pornography to include "any visual depiction . . . of sexually explicit conduct" where "such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct," § 2256(8)(B) (emphasis added), or "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," § 2256(8)(D) (emphasis added). The statute defines "sexually explicit conduct" as "actual or simulated—. . . sexual intercourse . . . ; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person." § 2256(2).

The CPPA provides for two affirmative defenses. First, a defendant is not liable for possession if the defendant possesses less than three proscribed images and promptly destroys such images or reports the matter to law enforcement. § 2252A(d). Second, a defendant is not liable for the remaining acts proscribed in § 2252A(a) if the images involved were

produced using only adult subjects and are not presented in such a manner as to "convey the impression" they contain depictions of minors engaging in sexually explicit conduct. § 2252A(c).

This litigation involves a facial challenge to the CPPA's prohibitions of pornographic images that "appea[r] to be . . . of a minor" and of material that "conveys the impression" that it contains pornographic images of minors. While I agree with the Court's judgment that the First Amendment requires that the latter prohibition be struck down, I disagree with its decision to strike down the former prohibition in its entirety. The "appears to be . . . of a minor" language in § 2256(8)(B) covers two categories of speech: pornographic images of adults that look like children ("youthful adult pornography") and pornographic images of children created wholly on a computer, without using any actual children ("virtual child pornography"). The Court concludes, correctly, that the CPPA's ban on youthful adult pornography is overbroad. In my view, however, respondents fail to present sufficient evidence to demonstrate that the ban on virtual child pornography is overbroad. Because invalidation due to overbreadth is such "strong medicine," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), I would strike down the prohibition of pornography that "appears to be" of minors only insofar as it is applied to the class of youthful adult pornography.

I

Respondents assert that the CPPA's prohibitions of youthful adult pornography, virtual child pornography, and material that "conveys the impression" that it contains actual child pornography are overbroad, that the prohibitions are content-based regulations not narrowly tailored to serve a compelling Government interest, and that the prohibitions are unconstitutionally vague. The Government not only disagrees with these specific contentions, but also requests that

the Court exclude youthful adult and virtual child pornography from the protection of the First Amendment.

I agree with the Court's decision not to grant this request. Because the Government may already prohibit obscenity without violating the First Amendment, see *Miller* v. *California*, 413 U. S. 15, 23 (1973), what the Government asks this Court to rule is that it may also prohibit youthful adult and virtual child pornography that is merely indecent without violating that Amendment. Although such pornography looks like the material at issue in *New York* v. *Ferber*, 458 U. S. 747 (1982), no children are harmed in the process of creating such pornography. *Id.*, at 759. Therefore, *Ferber* does not support the Government's ban on youthful adult and virtual child pornography. See *ante*, at 249–251. The Government argues that, even if the production of such pornography does not directly harm children, this material aids and abets child abuse. See *ante*, at 251–254. The Court correctly concludes that the causal connection between pornographic images that "appear" to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech. See *ante*, at 250.

I also agree with the Court's decision to strike down the CPPA's ban on material presented in a manner that "conveys the impression" that it contains pornographic depictions of actual children ("actual child pornography"). 18 U. S. C. § 2256(8)(D). The Government fails to explain how this ban serves any compelling state interest. Any speech covered by § 2256(8)(D) that is obscene, actual child pornography, or otherwise indecent is prohibited by other federal statutes. See §§ 1460–1466 (obscenity), 2256(8)(A), (B) (actual child pornography), 2256(8)(B) (youthful adult and virtual child pornography). The Court concludes that § 2256(8)(D) is overbroad, but its reasoning also persuades me that the provision is not narrowly tailored. See *ante*, at 257–258. The provision therefore fails strict scrutiny. *United States*

v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000).

Finally, I agree with the Court that the CPPA's ban on youthful adult pornography is overbroad. The Court provides several examples of movies that, although possessing serious literary, artistic, or political value and employing only adult actors to perform simulated sexual conduct, fall under the CPPA's proscription on images that "appea[r] to be . . . of a minor engaging in sexually explicit conduct," 18 U. S. C. § 2256(8)(B). See *ante*, at 247–248 (citing Romeo and Juliet, Traffic, and American Beauty). Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA. § 2252A(d).

II

I disagree with the Court, however, that the CPPA's prohibition of virtual child pornography is overbroad. Before I reach that issue, there are two preliminary questions: whether the ban on virtual child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. See *Ferber*, *supra*, at 756–757 (citing cases). This interest is promoted by efforts directed against sexual offenders and actual child pornography. These efforts, in turn, are supported by the CPPA's ban on virtual child pornography. Such images whet the appetites of child molesters, § 121, 110 Stat. 3009–26, Congressional Findings (4), (10)(B), notes following 18 U. S. C. § 2251, who may use the images to seduce young children, *id.*, Finding (3). Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer generated. *Id.*, Finding (6)(A). Respondents may be correct that no defendant has success-

fully employed this tactic. See, *e. g.*, *United States* v. *Fox*, 248 F. 3d 394 (CA5 2001); *United States* v. *Vig*, 167 F. 3d 443 (CA8 1999); *United States* v. *Kimbrough*, 69 F. 3d 723 (CA5 1995); *United States* v. *Coleman*, 54 M. J. 869 (Army Ct. Crim. App. 2001). But, given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable. Computer-generated images lodged with the Court by *amici curiae* National Law Center for Children and Families et al. bear a remarkable likeness to actual human beings. Anyone who has seen, for example, the film Final Fantasy: The Spirits Within (H. Sakaguchi and M. Sakakibara directors, 2001) can understand the Government's concern. Moreover, this Court's cases do not require Congress to wait for harm to occur before it can legislate against it. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 212 (1997).

Respondents argue that, even if the Government has a compelling interest to justify banning virtual child pornography, the "appears to be . . . of a minor" language is not narrowly tailored to serve that interest. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). They assert that the CPPA would capture even cartoon sketches or statues of children that were sexually suggestive. Such images surely could not be used, for instance, to seduce children. I agree. A better interpretation of "appears to be . . . of" is "virtually indistinguishable from"—an interpretation that would not cover the examples respondents provide. Not only does the text of the statute comfortably bear this narrowing interpretation, the interpretation comports with the language that Congress repeatedly used in its findings of fact. See, *e. g.*, Congressional Finding (8), notes following 18 U. S. C. § 2251 (discussing how "visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children" may whet the appetites of

child molesters). See also *id.*, Findings (5), (12). Finally, to the extent that the phrase "appears to be . . . of" is ambiguous, the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring. See *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual child pornography is narrowly tailored, but would also assuage any fears that the "appears to be . . . of a minor" language is vague. The narrow reading greatly limits any risks from "'discriminatory enforcement.'" *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 872 (1997). Respondents maintain that the "virtually indistinguishable from" language is also vague because it begs the question: from whose perspective? This problem is exaggerated. This Court has never required "mathematical certainty" or "'meticulous specificity'" from the language of a statute. *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972).

The Court concludes that the CPPA's ban on virtual child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. See *Reno*, *supra*, at 896 (O'Connor, J., concurring in judgment in part and dissenting in part) (citing *Broadrick*, 413 U. S., at 615). Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer generated and contain images that "appea[r] to be . . .

of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

III

Although in my view the CPPA's ban on youthful adult pornography appears to violate the First Amendment, the ban on virtual child pornography does not. It is true that both bans are authorized by the same text: The statute's definition of child pornography to include depictions that "appea[r] to be" of children in sexually explicit poses. 18 U. S. C. § 2256(8)(B). Invalidating a statute due to overbreadth, however, is an extreme remedy, one that should be employed "sparingly and only as a last resort." *Broadrick*, *supra*, at 613. We have observed that "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily." *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989).

Heeding this caution, I would strike the "appears to be" provision only insofar as it is applied to the subset of cases involving youthful adult pornography. This approach is similar to that taken in *United States* v. *Grace*, 461 U. S. 171 (1983), which considered the constitutionality of a federal statute that makes it unlawful to "parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U. S. C. § 13k (1994 ed.). The term "Supreme Court . . . grounds" technically includes the sidewalks surrounding the Court, but because sidewalks have traditionally been considered a public forum, the Court held the statute unconstitutional only when applied to sidewalks.

Although 18 U. S. C. § 2256(8)(B) does not distinguish between youthful adult and virtual child pornography, the CPPA elsewhere draws a line between these two classes of

speech. The statute provides an affirmative defense for those who produce, distribute, or receive pornographic images of individuals who are actually adults, § 2252A(c), but not for those with pornographic images that are wholly computer generated. This is not surprising given that the legislative findings enacted by Congress contain no mention of youthful adult pornography. Those findings focus explicitly only on actual child pornography and virtual child pornography. See, *e. g.*, Finding (9), notes following § 2251 ("[T]he danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct"). Drawing a line around, and striking just, the CPPA's ban on youthful adult pornography not only is consistent with Congress' understanding of the categories of speech encompassed by § 2256(8)(B), but also preserves the CPPA's prohibition of the material that Congress found most dangerous to children.

In sum, I would strike down the CPPA's ban on material that "conveys the impression" that it contains actual child pornography, but uphold the ban on pornographic depictions that "appea[r] to be" of minors so long as it is not applied to youthful adult pornography.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins in part, dissenting.

I agree with Part II of JUSTICE O'CONNOR's opinion concurring in the judgment in part and dissenting in part. Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so. *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 195 (1997) (we

"'accord substantial deference to the predictive judgments of Congress'" in First Amendment cases).

I also agree with JUSTICE O'CONNOR that serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value, such as Traffic or American Beauty. *Ante*, at 262–263 (opinion concurring in judgment in part and dissenting in part). I write separately, however, because the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. § 2251 *et seq.*, need not be construed to reach such materials.

We normally do not strike down a statute on First Amendment grounds "when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 769 (1982) (appreciating "the wide-reaching effects of striking down a statute on its face"); *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"). This case should be treated no differently.

Other than computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA's definition of "sexually explicit conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of:

> "[A]ctual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person." 18 U. S. C. § 2256(2).

The Court and JUSTICE O'CONNOR suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to "simulated" intercourse. *Ante,* at 247–248 (majority opinion); *ante,* at 263 (opinion concurring in judgment in part and dissenting in part). Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber*, *supra,* at 773–774. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute.[1]

The reference to "simulated" has been part of the definition of "sexually explicit conduct" since the statute was first passed. See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95–225, 92 Stat. 7. But the inclusion of "simulated" conduct, alongside "actual" conduct, does not change the "hard core" nature of the image banned. The reference to "simulated" conduct simply brings within the statute's reach depictions of hardcore pornography that are "made to look genuine," Webster's Ninth New Collegiate Dictionary 1099 (1983)—including the main target of the CPPA, computer-generated images virtually indistinguishable from real children engaged in sexually explicit conduct. Neither actual conduct nor simulated conduct, however, is properly construed to reach depictions such as those in a film portrayal of Romeo and Juliet, *ante,* at 247–248 (majority opinion); *ante,* at 263 (O'CONNOR, J., concurring in judgment

[1] Of course, even the narrow class of youthful looking adult images prohibited under the CPPA is subject to an affirmative defense so long as materials containing such images are not advertised or promoted as child pornography. 18 U. S. C. § 2252A(c).

in part and dissenting in part), which are far removed from the hardcore pornographic depictions that Congress intended to reach.

Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

> "[T]he legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions 'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'" *United States* v. *Hilton*, 167 F. 3d 61, 72 (1999) (quoting S. Rep. No. 104–358, pt. I, p. 7 (1996)).

Judge Ferguson similarly observed in his dissent in the Court of Appeals in this case:

> "From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on 'real' child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children." *Free Speech Coalition* v. *Reno*, 198 F. 3d 1083, 1102 (CA9 1999).

See also S. Rep. No. 104–358, pt. IV(C), at 21 ("[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging i[n] sexually explicit conduct, even where a depicted individual may appear to be a minor" (emphasis in original)); *id.*, pt. I, at 7 ("[The CPPA] addresses the problem of 'high-tech kiddie porn'"). We have looked to legislative history to limit the scope of child pornography statutes in the past, *United States* v.

X-Citement Video, Inc., 513 U. S. 64, 73–77 (1994), and we should do so here as well.[2]

This narrow reading of "sexually explicit conduct" not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had "sexually explicit conduct" been thought to reach the sort of material the Court says it does, then films such as Traffic and American Beauty would not have been made the way they were. *Ante*, at 247–248 (discussing these films' portrayals of youthful looking adult actors engaged in sexually suggestive conduct). Traffic won its Academy Award in 2001. American Beauty won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court, *ante*, at 244 ("[F]ew legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law"), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that "convey the impression" of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach "the sordid business of pandering" which lies outside the bounds of First Amendment protection. *Ginzburg* v. *United States*, 383 U. S. 463, 467 (1966); *e. g.*, *id.*, at 472 (conduct that "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed," may lose First Amendment protection); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 831–832 (2000) (SCALIA, J., dissenting) (collecting cases). This is how the Government asks us to construe the statute, Brief for Petitioners 18, and n. 3; Tr. of Oral Arg. 27, and it is the most plausible reading of the text, which prohibits only materials "*advertised, promoted, presented, described, or distributed in such a manner* that conveys the

[2] JUSTICE SCALIA does not join this paragraph discussing the statute's legislative record.

impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U. S. C. § 2256(8)(D) (emphasis added).

The First Amendment may protect the video shopowner or film distributor who promotes material as "entertaining" or "acclaimed" regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. See *Ginzburg*, *supra*, at 474–476; cf. *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) ("In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene"). I would construe "conveys the impression" as limited to the panderer, which makes the statute entirely consistent with *Ginzburg* and other cases.

The Court says that "conveys the impression" goes well beyond *Ginzburg* to "prohibi[t] [the] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain." *Ante*, at 258. The Court's concern is that an individual who merely possesses protected materials (such as videocassettes of Traffic or American Beauty) might offend the CPPA regardless of whether the individual actually intended to possess materials containing unprotected images. *Ante*, at 248; see also *ante*, at 263 (O'CONNOR, J., concurring in judgment in part and dissenting in part) ("Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA").

This concern is a legitimate one, but there is, again, no need or reason to construe the statute this way. In

X-Citement Video, *supra*, we faced a provision of the Protection of Children Against Sexual Exploitation Act of 1977, the precursor to the CPPA, which lent itself much less than the present statute to attributing a "knowingly" requirement to the contents of the possessed visual depictions. We held that such a requirement nonetheless applied, so that the Government would have to prove that a person charged with possessing child pornography actually knew that the materials contained depictions of real minors engaged in sexually explicit conduct. 513 U. S., at 77–78. In light of this holding, and consistent with the narrow class of images the CPPA is intended to prohibit, the CPPA can be construed to prohibit only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer-generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U. S., at 615. The aim of ensuring the enforceability of our Nation's child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals' judgment, and uphold the statute in its entirety.

Syllabus

UNITED STATES *v.* CRAFT

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

No. 00–1831. Argued January 14, 2002—Decided April 17, 2002

When respondent's husband failed to pay federal income tax liabilities assessed against him, a federal tax lien attached to "all [of his] property and rights to property." 26 U. S. C. § 6321. After the notice of the lien was filed, respondent and her husband jointly executed a quitclaim deed purporting to transfer to her his interest in a piece of real property in Michigan that they owned as tenants by the entirety. Subsequently, the Internal Revenue Service (IRS) agreed to release the lien and allow respondent to sell the property with half the net proceeds to be held in escrow pending determination of the Government's interest in the property. She brought this action to quiet title to the escrowed proceeds. The Government claimed, among other things, that its lien had attached to the husband's interest in the tenancy by the entirety. The District Court granted the Government summary judgment, but the Sixth Circuit held that no lien attached because the husband had no separate interest in the entireties property under Michigan law, and remanded the case for consideration of an alternative claim not at issue here. In affirming the District Court's decision on remand, the Sixth Circuit held that its prior opinion on the issue whether the lien attached to the husband's entireties property was the law of the case.

Held: The husband's interests in the entireties property constitute "property" or "rights to property" to which a federal tax lien may attach. Pp. 278–289.

(a) Because the federal tax lien statute itself creates no property rights, *United States* v. *Bess*, 357 U. S. 51, 55, this Court looks initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach and then to federal law to determine whether such state-delineated rights qualify as property or rights to property under § 6321, *Drye* v. *United States*, 528 U. S. 49, 58. A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. State law determines which sticks are in a person's bundle, but federal law determines whether those sticks constitute property for federal tax lien purposes. In looking to state law, this Court must consider the substance of the state law rights, not the labels the State gives them or the conclusions it draws from them. Pp. 278–279.

Syllabus

(b) Michigan law gave respondent's husband, among other rights, the right to use the entireties property, the right to exclude others from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with respondent's consent and to receive half the proceeds from such a sale, the right to encumber the property with respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally. Pp. 279–282.

(c) The rights Michigan law granted respondent's husband qualify as "property" or "rights to property" under § 6321. The broad statutory language authorizing the tax lien reveals that Congress meant to reach every property interest that a taxpayer might have. *United States* v. *National Bank of Commerce*, 472 U. S. 713, 719–720. The husband's rights of use, exclusion, and income alone may be sufficient to subject his entireties interest to the lien, for they gave him a substantial degree of control over the property. See *Drye*, *supra*, at 61. He also had the right to alienate the property with respondent's consent. The unilateral alienation stick is not essential to "property." Federal tax liens may attach to property that cannot be unilaterally alienated, *United States* v. *Rodgers*, 461 U. S. 677, and excluding such property would exempt a rather large amount of what is commonly thought of as property. A number of the sticks in respondent's husband's bundle were presently existing, so it is not necessary to consider whether his survivorship right alone, which respondent claims is an expectancy, would qualify as property or rights to property. Were this Court to reach a contrary conclusion, the entireties property would belong to no one for § 6321 purposes because respondent had no more interest in the property than her husband. Such a result seems absurd and would allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system. Legislative history does not support respondent's position that Congress did not intend that a federal tax lien attach to an entireties property interest. And the common-law background of the tax lien statute's enactment is not enough to overcome the broad language Congress actually used. Pp. 283–288.

(d) That Michigan makes a different choice with respect to state law creditors does not dictate the choice here. Because § 6321's interpretation is a federal question, this Court is in no way bound by state courts' answers to similar questions involving state law. Pp. 288–289.

233 F. 3d 358, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Kennedy, Souter, Ginsburg, and Breyer, JJ., joined.

SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 289. THOMAS, J., filed a dissenting opinion, in which STEVENS and SCALIA, JJ., joined, *post*, p. 290.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General O'Connor*, *Deputy Solicitor General Wallace*, *David English Carmack*, and *Joan I. Oppenheimer*.

Jeffrey S. Sutton argued the cause for respondent. With him on the briefs were *Chad A. Readler*, *Jeffrey A. Moyer*, and *Michael Dubetz, Jr.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case raises the question whether a tenant by the entirety possesses "property" or "rights to property" to which a federal tax lien may attach. 26 U. S. C. § 6321. Relying on the state law fiction that a tenant by the entirety has no separate interest in entireties property, the United States Court of Appeals for the Sixth Circuit held that such property is exempt from the tax lien. We conclude that, despite the fiction, each tenant possesses individual rights in the estate sufficient to constitute "property" or "rights to property" for the purposes of the lien, and reverse the judgment of the Court of Appeals.

I

In 1988, the Internal Revenue Service (IRS) assessed $482,446 in unpaid income tax liabilities against Don Craft, the husband of respondent Sandra L. Craft, for failure to file federal income tax returns for the years 1979 through 1986. App. to Pet. for Cert. 45a, 72a. When he failed to pay, a federal tax lien attached to "all property and rights to property, whether real or personal, belonging to" him. 26 U. S. C. § 6321.

At the time the lien attached, respondent and her husband owned a piece of real property in Grand Rapids, Michigan, as tenants by the entirety. App. to Pet. for Cert. 45a. After notice of the lien was filed, they jointly executed a

quitclaim deed purporting to transfer the husband's interest in the property to respondent for one dollar. *Ibid.* When respondent attempted to sell the property a few years later, a title search revealed the lien. The IRS agreed to release the lien and allow the sale with the stipulation that half of the net proceeds be held in escrow pending determination of the Government's interest in the property. *Ibid.*

Respondent brought this action to quiet title to the escrowed proceeds. The Government claimed that its lien had attached to the husband's interest in the tenancy by the entirety. It further asserted that the transfer of the property to respondent was invalid as a fraud on creditors. *Id.*, at 46a–47a. The District Court granted the Government's motion for summary judgment, holding that the federal tax lien attached at the moment of the transfer to respondent, which terminated the tenancy by the entirety and entitled the Government to one-half of the value of the property. No. 1:93–CV–306, 1994 WL 669680, *3 (WD Mich., Sept. 12, 1994).

Both parties appealed. The Sixth Circuit held that the tax lien did not attach to the property because under Michigan state law, the husband had no separate interest in property held as a tenant by the entirety. 140 F. 3d 638, 643 (1998). It remanded to the District Court to consider the Government's alternative claim that the conveyance should be set aside as fraudulent. *Id.*, at 644.

On remand, the District Court concluded that where, as here, state law makes property exempt from the claims of creditors, no fraudulent conveyance can occur. 65 F. Supp. 2d 651, 657–658 (WD Mich. 1999). It found, however, that respondent's husband's use of nonexempt funds to pay the mortgage on the entireties property, which placed them beyond the reach of creditors, constituted a fraudulent act under state law, and the court awarded the IRS a share of the proceeds of the sale of the property equal to that amount. *Id.*, at 659.

Both parties appealed the District Court's decision, the Government again claiming that its lien attached to the husband's interest in the entireties property. The Court of Appeals held that the prior panel's opinion was law of the case on that issue. 233 F. 3d 358, 363–369 (CA6 2000). It also affirmed the District Court's determination that the husband's mortgage payments were fraudulent. *Id.*, at 369–375.

We granted certiorari to consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached. 533 U. S. 976 (2001).

II

Whether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes "property and rights to property" for the purposes of the federal tax lien statute, 26 U. S. C. § 6321, is ultimately a question of federal law. The answer to this federal question, however, largely depends upon state law. The federal tax lien statute itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U. S. 51, 55 (1958); see also *United States* v. *National Bank of Commerce*, 472 U. S. 713, 722 (1985). Accordingly, "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U. S. 49, 58 (1999).

A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. See B. Cardozo, Paradoxes of Legal Science 129 (1928) (reprint 2000); see also *Dickman* v. *Commissioner*, 465 U. S. 330, 336 (1984). State law determines only which sticks are in a person's bundle.

Whether those sticks qualify as "property" for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien. In *Drye* v. *United States*, *supra*, we considered a situation where state law allowed an heir subject to a federal tax lien to disclaim his interest in the estate. The state law also provided that such a disclaimer would "creat[e] the legal fiction" that the heir had predeceased the decedent and would correspondingly be deemed to have had no property interest in the estate. *Id.*, at 53. We unanimously held that this state law fiction did not control the federal question and looked instead to the realities of the heir's interest. We concluded that, despite the State's characterization, the heir possessed a "right to property" in the estate—the right to accept the inheritance or pass it along to another—to which the federal lien could attach. *Id.*, at 59–61.

III

We turn first to the question of what rights respondent's husband had in the entireties property by virtue of state law. In order to understand these rights, the tenancy by the entirety must first be placed in some context.

English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common, joint tenancy, and tenancy by the entirety. 1 G. Thompson, Real Property § 4.06(g) (D. Thomas ed. 1994) (hereinafter Thompson). The tenancy in common is now the most common form of concurrent ownership. 7 R. Powell & P. Rohan, Real Property § 51.01[3] (M. Wolf ed. 2001) (hereinafter Powell). The common law characterized tenants in common as each owning

a separate fractional share in undivided property. *Id.*, § 50.01[1]. Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. Tenants in common have many other rights in the property, including the right to use the property, to exclude third parties from it, and to receive a portion of any income produced from it. *Id.*, §§ 50.03–50.06.

Joint tenancies were the predominant form of concurrent ownership at common law, and still persist in some States today. 4 Thompson § 31.05. The common law characterized each joint tenant as possessing the entire estate, rather than a fractional share: "[J]oint-tenants have one and the same interest . . . held by one and the same undivided possession." 2 W. Blackstone, Commentaries on the Laws of England 180 (1766). Joint tenants possess many of the rights enjoyed by tenants in common: the right to use, to exclude, and to enjoy a share of the property's income. The main difference between a joint tenancy and a tenancy in common is that a joint tenant also has a right of automatic inheritance known as "survivorship." Upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it. *Id.*, at 183; 7 Powell § 51.01[3]. Joint tenants' right to alienate their individual shares is also somewhat different. In order for one tenant to alienate his or her individual interest in the tenancy, the estate must first be severed—that is, converted to a tenancy in common with each tenant possessing an equal fractional share. *Id.*, § 51.04[1]. Most States allowing joint tenancies facilitate alienation, however, by allowing severance to automatically accompany a conveyance of that interest or any other overt act indicating an intent to sever. *Ibid.*

A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons. 4

Thompson § 33.02. Because of the common-law fiction that the husband and wife were one person at law (that person, practically speaking, was the husband, see J. Cribbet et al., Cases and Materials on Property 329 (6th ed. 1990)), Blackstone did not characterize the tenancy by the entirety as a form of concurrent ownership at all. Instead, he thought that entireties property was a form of single ownership by the marital unity. Orth, Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate, 1997 B. Y. U. L. Rev. 35, 38–39. Neither spouse was considered to own any individual interest in the estate; rather, it belonged to the couple.

Like joint tenants, tenants by the entirety enjoy the right of survivorship. Also like a joint tenancy, unilateral alienation of a spouse's interest in entireties property is typically not possible without severance. Unlike joint tenancies, however, tenancies by the entirety cannot easily be severed unilaterally. 4 Thompson § 33.08(b). Typically, severance requires the consent of both spouses, *id.*, § 33.08(a), or the ending of the marriage in divorce, *id.*, § 33.08(d). At common law, all of the other rights associated with the entireties property belonged to the husband: as the head of the household, he could control the use of the property and the exclusion of others from it and enjoy all of the income produced from it. *Id.*, § 33.05. The husband's control of the property was so extensive that, despite the rules on alienation, the common law eventually provided that he could unilaterally alienate entireties property without severance subject only to the wife's survivorship interest. Orth, *supra*, at 40–41.

With the passage of the Married Women's Property Acts in the late 19th century granting women distinct rights with respect to marital property, most States either abolished the tenancy by the entirety or altered it significantly. 7 Powell § 52.01[2]. Michigan's version of the estate is typical of the modern tenancy by the entirety. Following Blackstone, Michigan characterizes its tenancy by the entirety as creat-

ing no individual rights whatsoever: "It is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other . . . . Each is vested with an entire title." *Long* v. *Earle*, 277 Mich. 505, 517, 269 N. W. 577, 581 (1936). And yet, in Michigan, each tenant by the entirety possesses the right of survivorship. Mich. Comp. Laws Ann. § 554.872(g) (West Supp. 1997), recodified at § 700.2901(2)(g) (West Supp. Pamphlet 2001). Each spouse—the wife as well as the husband—may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. See § 557.71 (West 1988). Neither spouse may unilaterally alienate or encumber the property, *Long* v. *Earle*, *supra*, at 517, 269 N. W., at 581; *Rogers* v. *Rogers*, 136 Mich. App. 125, 134, 356 N. W. 2d 288, 292 (1984), although this may be accomplished with mutual consent, *Eadus* v. *Hunter*, 249 Mich. 190, 228 N. W. 782 (1930). Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divorce decree specifies otherwise. Mich. Comp. Laws Ann. § 552.102 (West 1988).

In determining whether respondent's husband possessed "property" or "rights to property" within the meaning of 26 U. S. C. § 6321, we look to the individual rights created by these state law rules. According to Michigan law, respondent's husband had, among other rights, the following rights with respect to the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

IV

We turn now to the federal question of whether the rights Michigan law granted to respondent's husband as a tenant by the entirety qualify as "property" or "rights to property" under § 6321. The statutory language authorizing the tax lien "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U. S., at 719–720. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U. S. 265, 267 (1945). We conclude that the husband's rights in the entireties property fall within this broad statutory language.

Michigan law grants a tenant by the entirety some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994) ("[T]he right to exclude others" is " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property' " (quoting *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979))); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982) (including "use" as one of the "[p]roperty rights in a physical thing"). These rights alone may be sufficient to subject the husband's interest in the entireties property to the federal tax lien. They gave him a substantial degree of control over the entireties property, and, as we noted in *Drye*, "in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' [t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property." 528 U. S., at 61 (some internal quotation marks omitted).

The husband's rights in the estate, however, went beyond use, exclusion, and income. He also possessed the right to alienate (or otherwise encumber) the property with the consent of respondent, his wife. *Loretto*, *supra*, at 435 (the

right to "dispose" of an item is a property right). It is true, as respondent notes, that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. See also *post*, at 296–297 (THOMAS, J., dissenting). There is no reason to believe, however, that this one stick—the right of unilateral alienation—is essential to the category of "property."

This Court has already stated that federal tax liens may attach to property that cannot be unilaterally alienated. In *United States* v. *Rodgers*, 461 U. S. 677 (1983), we considered the Federal Government's power to foreclose homestead property attached by a federal tax lien. Texas law provided that "'the owner or claimant of the property claimed as homestead [may not], if married, sell or abandon the homestead without the consent of the other spouse.'" *Id.*, at 684–685 (quoting Tex. Const., Art. 16, § 50). We nonetheless stated that "[i]n the homestead context . . . , there is no doubt . . . that not only do *both* spouses (rather than neither) have an independent interest in the homestead property, but that a federal tax lien can at least *attach* to each of those interests." 461 U. S., at 703, n. 31; cf. *Drye*, *supra*, at 60, n. 7 (noting that "an interest in a spendthrift trust has been held to constitute '"property" for purposes of § 6321' even though the beneficiary may not transfer that interest to third parties").

Excluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would, moreover, exempt a rather large amount of what is commonly thought of as property. It would exempt not only the type of property discussed in *Rodgers*, but also some community property. Community property States often provide that real community property cannot be alienated without the consent of both spouses. See, *e. g.*, Ariz. Rev. Stat. Ann. § 25–214(C) (2000); Cal. Fam. Code Ann. § 1102 (West 1994); Idaho Code § 32–912 (1996); La. Civ. Code Ann., Art. 2347 (West Supp. 2002); Nev. Rev. Stat. Ann. § 123.230(3)

(Supp. 2001); N. M. Stat. Ann. § 40–3–13 (1999); Wash. Rev. Code § 26.16.030(3) (1994). Accordingly, the fact that respondent's husband could not unilaterally alienate the property does not preclude him from possessing "property and rights to property" for the purposes of § 6321.

Respondent's husband also possessed the right of survivorship—the right to automatically inherit the whole of the estate should his wife predecease him. Respondent argues that this interest was merely an expectancy, which we suggested in *Drye* would not constitute "property" for the purposes of a federal tax lien. 528 U. S., at 60, n. 7 ("[We do not mean to suggest] that an expectancy that has pecuniary value . . . would fall within § 6321 prior to the time it ripens into a present estate"). *Drye* did not decide this question, however, nor do we need to do so here. As we have discussed above, a number of the sticks in respondent's husband's bundle were presently existing. It is therefore not necessary to decide whether the right to survivorship alone would qualify as "property" or "rights to property" under § 6321.

That the rights of respondent's husband in the entireties property constitute "property" or "rights to property" "belonging to" him is further underscored by the fact that, if the conclusion were otherwise, the entireties property would belong to no one for the purposes of § 6321. Respondent had no more interest in the property than her husband; if neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system. Johnson, After *Drye:* The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests, 75 Ind. L. J. 1163, 1171 (2000).

JUSTICE SCALIA's and JUSTICE THOMAS' dissents claim that the conclusion that the husband possessed an interest in the entireties property to which the federal tax lien could

attach is in conflict with the rules for tax liens relating to partnership property. See *post,* at 289 (opinion of SCALIA, J.); see also *post,* at 295–296, n. 4 (opinion of THOMAS, J.). This is not so. As the authorities cited by JUSTICE THOMAS reflect, the federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets. *Ibid.* (citing B. Bittker & M. McMahon, Federal Income Taxation of Individuals ¶ 44.5[4][a] (2d ed. 1995 and 2000 Cum. Supp.)); see also 1 A. Bromberg & L. Ribstein, Partnership § 3.05(d) (2002–1 Supp.) (hereinafter Bromberg & Ribstein) (citing Uniform Partnership Act § 28, 6 U. L. A. 744 (1995)). As a holder of this lien, the Federal Government is entitled to "receive . . . the profits to which the assigning partner would otherwise be entitled," including predissolution distributions and the proceeds from dissolution. Uniform Partnership Act § 27(1), *id.,* at 736.

There is, however, a difference between the treatment of entireties property and partnership assets. The Federal Government may not compel the sale of partnership assets (although it may foreclose on the partner's interest, 1 Bromberg & Ribstein § 3.05(d)(3)(iv)). It is this difference that is reflected in JUSTICE SCALIA's assertion that partnership property cannot be encumbered by an individual partner's debts. See *post,* at 289. This disparity in treatment between the two forms of ownership, however, arises from our decision in *United States* v. *Rodgers*, *supra* (holding that the Government may foreclose on property even where the coowners lack the right of unilateral alienation), and not our holding today. In this case, it is instead the dissenters' theory that departs from partnership law, as it would hold that the Federal Government's lien does not attach to the husband's interest in the entireties property at all, whereas the lien may attach to an individual's interest in partnership property.

Respondent argues that, whether or not we would conclude that respondent's husband had an interest in the entireties property, legislative history indicates that Congress did not intend that a federal tax lien should attach to such an interest. In 1954, the Senate rejected a proposed amendment to the tax lien statute that would have provided that the lien attach to "property or rights to property (including the interest of such person as tenant by the entirety)." S. Rep. No. 1622, 83d Cong., 2d Sess., 575 (1954). We have elsewhere held, however, that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute," *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990), reasoning that "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). This case exemplifies the risk of relying on such legislative history. As we noted in *United States* v. *Rodgers*, 461 U. S., at 704, n. 31, some legislative history surrounding the 1954 amendment indicates that the House intended the amendment to be nothing more than a "clarification" of existing law, and that the Senate rejected the amendment only because it found it "superfluous." See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A406 (1954) (noting that the amendment would "clarif[y] the term 'property and rights to property' by expressly including therein the interest of the delinquent taxpayer in an estate by the entirety"); S. Rep. No. 1622, at 575 ("It is not clear what change in existing law would be made by the parenthetical phrase. The deletion of the phrase is intended to continue the existing law").

The same ambiguity that plagues the legislative history accompanies the common-law background of Congress' enactment of the tax lien statute. Respondent argues that

Congress could not have intended the passage of the federal tax lien statute to alter the generally accepted rule that liens could not attach to entireties property. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991) ("[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident'"). The common-law rule was not so well established with respect to the application of a federal tax lien that we must assume that Congress considered the impact of its enactment on the question now before us. There was not much of a common-law background on the question of the application of federal tax liens, as the first court of appeals cases dealing with the application of such a lien did not arise until the 1950's. *United States* v. *Hutcherson*, 188 F. 2d 326 (CA8 1951); *Raffaele* v. *Granger*, 196 F. 2d 620 (CA3 1952). This background is not sufficient to overcome the broad statutory language Congress did enact, authorizing the lien to attach to "all property and rights to property" a taxpayer might have.

We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." *Sanford* v. *Bertrau*, 204 Mich. 244, 247, 169 N. W. 880, 881 (1918). But that by no means dictates our choice. The interpretation of 26 U. S. C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, "'exempt status under state law does not bind the federal collector.'" *Drye* v. *United States*, 528 U. S., at 59. See also *Rodgers*, *supra*, at 701 (clarifying that the Supremacy Clause "provides the

underpinning for the Federal Government's right to sweep aside state-created exemptions").

V

We express no view as to the proper valuation of respondent's husband's interest in the entireties property, leaving this for the Sixth Circuit to determine on remand. We note, however, that insofar as the amount is dependent upon whether the 1989 conveyance was fraudulent, see *post*, at 290, n. 1 (THOMAS, J., dissenting), this case is somewhat anomalous. The Sixth Circuit affirmed the District Court's judgment that this conveyance was not fraudulent, and the Government has not sought certiorari review of that determination. Since the District Court's judgment was based on the notion that, because the federal tax lien could not attach to the property, transferring it could not constitute an attempt to evade the Government creditor, 65 F. Supp. 2d, at 657–659, in future cases, the fraudulent conveyance question will no doubt be answered differently.

The judgment of the United States Court of Appeals for the Sixth Circuit is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join JUSTICE THOMAS's dissent, which points out (to no relevant response from the Court) that a State's decision to treat the marital partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members, is no more novel and no more "artificial" than a State's decision to treat the commercial partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members.

I write separately to observe that the Court nullifies (insofar as federal taxes are concerned, at least) a form of prop-

erty ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

The Court today allows the Internal Revenue Service (IRS) to reach proceeds from the sale of real property that did not belong to the taxpayer, respondent's husband, Don Craft,[1] because, in the Court's view, he "possesse[d] individual rights in the [tenancy by the entirety] estate sufficient to constitute 'property' or 'rights to property' for the purposes of the lien" created by 26 U. S. C. § 6321. *Ante*, at 276. The Court does not contest that the tax liability the IRS seeks to satisfy is Mr. Craft's alone, and does not claim that, under Michigan law, real property held as a tenancy by the entirety belongs to either spouse individually. Nor does the Court

[1] The Grand Rapids property was tenancy by the entirety property owned by Mr. and Mrs. Craft when the tax lien attached, but was conveyed by the Crafts to Mrs. Craft by quitclaim deed in 1989. That conveyance terminated the entirety estate. Mich. Comp. Laws Ann. § 557.101 (West 1988); see also *United States* v. *Certain Real Property Located at 2525 Leroy Lane*, 910 F. 2d 343, 351 (CA6 1990). The District Court and Court of Appeals both held that the transfer did not constitute a fraudulent conveyance, a ruling the Government has not appealed. The IRS is undoubtedly entitled to any proceeds that Mr. Craft received or to which he was entitled from *the 1989 conveyance* of the tenancy by the entirety property for $1; at that point the tenancy by the entirety estate was destroyed and at least half of the proceeds, or 50 cents, was "property" or "rights to property" "belonging to" Mr. Craft. By contrast, the proceeds that the IRS claims here are from *Mrs. Craft's 1992 sale* of the property to a third party. At the time of the sale, she owned the property in fee simple, and accordingly Mr. Craft neither received nor was entitled to these funds.

suggest that the federal tax lien attaches to particular "rights to property" held individually by Mr. Craft. Rather, borrowing the metaphor of "property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property," *ante,* at 278, the Court proposes that so long as sufficient "sticks" in the bundle of "rights to property" "belong to" a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer, *ante,* at 285.

This amorphous construct ignores the primacy of state law in defining property interests, eviscerates the statutory distinction between "property" and "rights to property" drawn by § 6321, and conflicts with an unbroken line of authority from this Court, the lower courts, and the IRS. Its application is all the more unsupportable in this case because, in my view, it is highly unlikely that the limited individual "rights to property" recognized in a tenancy by the entirety under Michigan law are themselves subject to lien. I would affirm the Court of Appeals and hold that Mr. Craft did not have "property" or "rights to property" to which the federal tax lien could attach.

I

Title 26 U. S. C. § 6321 provides that a federal tax lien attaches to "all property and rights to property, whether real or personal, belonging to" a delinquent taxpayer. It is uncontested that a federal tax lien itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess,* 357 U. S. 51, 55 (1958) (construing the 1939 version of the federal tax lien statute). Consequently, the Government's lien under § 6321 "cannot extend beyond the property interests held by the delinquent taxpayer," *United States* v. *Rodgers,* 461 U. S. 677, 690–691 (1983), under state law. Before today, no one disputed that the IRS, by operation of § 6321, "steps into the taxpayer's shoes," and has the same rights as the taxpayer in property or rights to property sub-

ject to the lien. B. Bittker & M. McMahon, Federal Income Taxation of Individuals ¶ 44.5[4][a] (2d ed. 1995 and 2000 Cum. Supp.) (hereinafter Bittker). I would not expand "'the nature of the legal interest'" the taxpayer has in the property beyond those interests recognized under state law. *Aquilino* v. *United States*, 363 U. S. 509, 513 (1960) (citing *Morgan* v. *Commissioner*, 309 U. S. 78, 82 (1940)).

A

If the Grand Rapids property "belong[ed] to" Mr. Craft under state law prior to the termination of the tenancy by the entirety, the federal tax lien would have attached to the Grand Rapids property. But that is not this case. As the Court recognizes, pursuant to Michigan law, as under English common law, property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. See *ante*, at 280–282. Neither spouse has "any separate interest in such an estate." *Sanford* v. *Bertrau*, 204 Mich. 244, 249, 169 N. W. 880, 882 (1918); see also *Long* v. *Earle*, 277 Mich. 505, 517, 269 N. W. 577, 581 (1936) ("Each [spouse] is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title"). An entireties estate constitutes an indivisible "sole tenancy." See *Budwit* v. *Herr*, 339 Mich. 265, 272, 63 N. W. 2d 841, 844 (1954); see also *Tyler* v. *United States*, 281 U. S. 497, 501 (1930) ("[T]he tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor"). Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it did not "belong" to either respondent or her husband individually when the IRS asserted its lien for Mr. Craft's individual tax liability. Thus, the property was not property to which the federal tax lien could attach for Mr. Craft's tax liability.

The Court does not dispute this characterization of Michigan's law with respect to the essential attributes of the tenancy by the entirety estate. However, relying on *Drye* v. *United States*, 528 U. S. 49, 59 (1999), which in turn relied upon *United States* v. *Irvine*, 511 U. S. 224 (1994), and *United States* v. *Mitchell*, 403 U. S. 190 (1971), the Court suggests that Michigan's definition of the tenancy by the entirety estate should be overlooked because federal tax law is not controlled by state legal fictions concerning property ownership. *Ante*, at 279. But the Court misapprehends the application of *Drye* to this case.

Drye, like *Irvine* and *Mitchell* before it, was concerned not with whether state law recognized "property" as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created. *Drye* held only that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held, and that a federal lien therefore attached to the taxpayer's interest in the estate. 528 U. S., at 61 (recognizing that a disclaimer does not restore the *status quo ante* because the heir "determines who will receive the property—himself if he does not disclaim, a known other if he does"). Similarly, in *Irvine*, the Court held that a state law allowing an individual to disclaim a gift could not force the Court to be "struck blind" to the fact that the transfer of "property" or "property rights" for which the gift tax was due had already occurred; "*state property transfer rules* do not transfer into federal taxation rules." 511 U. S., at 239–240 (emphasis added). See also *Mitchell*, *supra*, at 204 (holding that right to renounce a marital interest under state law does not indicate that the taxpayer had no right to property before the renunciation).

Extending this Court's "state law fiction" jurisprudence to determine whether property or rights to property *exist* under state law in the first place works a sea change in the

role States have traditionally played in "creating and defining" property interests. By erasing the careful line between state laws that purport to disclaim or exempt property interests after the fact, which the federal tax lien does not respect, and state laws' definition of property and property rights, which the federal tax lien does respect, the Court does not follow *Drye*, but rather creates a new federal common law of property. This contravenes the previously settled rule that the definition and scope of property is left to the States. See *Aquilino*, *supra*, at 513, n. 3 (recognizing unsoundness of leaving the definition of property interests to a nebulous body of federal law, "because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law").

B

That the Grand Rapids property does not belong to Mr. Craft under Michigan law does not end the inquiry, however, since the federal tax lien attaches not only to "property" but also to any "rights to property" belonging to the taxpayer. While the Court concludes that a laundry list of "rights to property" belonged to Mr. Craft as a tenant by the entirety,[2] it does not suggest that the tax lien attached to any of these particular rights.[3] Instead, the Court gathers

[2] The parties disagree as to whether Michigan law recognizes the "rights to property" identified by the Court as *individual* rights "belonging to" each tenant in entireties property. Without deciding a question better resolved by the Michigan courts, for the purposes of this case I will assume, *arguendo*, that Michigan law recognizes separate interests in these "rights to property."

[3] Nor does the Court explain how such "rights to property" survived the destruction of the tenancy by the entirety, although, for all intents and purposes, it acknowledges that such rights as it identifies exist by virtue of the tenancy by the entirety estate. Even Judge Ryan's concurrence in the Sixth Circuit's first ruling in this matter is best read as making the

these rights together and opines that there were sufficient sticks to form a bundle, so that "respondent's husband's interest in the entireties property constituted 'property' or 'rights to property' for the purposes of the federal tax lien statute." *Ante*, at 288, 285.

But the Court's "sticks in a bundle" metaphor collapses precisely because of the distinction expressly drawn by the statute, which distinguishes between "property" and "rights to property." The Court refrains from ever stating whether this case involves "property" or "rights to property" even though § 6321 specifically provides that the federal tax lien attaches to "property" and "rights to property" "belonging to" the delinquent taxpayer, and not to an imprecise construct of "individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purposes of the lien." *Ante,* at 276.[4]

Federal Government's right to execute its lien dependent upon the factual finding that the conveyance was a fraudulent transaction. See 140 F. 3d 638, 648–649 (1998).

[4] The Court's reasoning that because a taxpayer has rights to property a federal tax lien can attach not only to those rights but also to the property itself could have far-reaching consequences. As illustration, in the partnership setting as elsewhere, the Government's lien under § 6321 places the Government in no better position than the taxpayer to whom the property belonged: "[F]or example, the lien for a partner's unpaid income taxes attaches to his interest in the firm, not to the firm's assets." Bittker ¶ 44.5[4][a]. Though partnership property currently is "not subject to attachment or execution, except on a claim against the partnership," Rev. Rul. 73–24, 1973–1 Cum. Bull. 602; cf. *United States* v. *Kaufman*, 267 U. S. 408 (1925), under the logic of the Court's opinion partnership property could be attached for the tax liability of an individual partner. Like a tenant in a tenancy by the entirety, the partner has significant rights to use, enjoy, and control the partnership property in conjunction with his partners. I see no principled way to distinguish between the propriety of attaching the federal tax lien to partnership property to satisfy the tax liability of a partner, in contravention of current practice, and the propriety of attaching the federal tax lien to tenancy by the entirety property in order to satisfy the tax liability of one spouse, also in contravention of current practice. I do not doubt that a tax lien

Rather than adopt the majority's approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular "rights to property" to which the federal tax lien could attach. He did not.[5] Such "rights to property" that have been subject to the § 6321 lien are valuable and "pecuniary," *i. e.*, they can be attached, and levied upon or sold by the Government.[6] *Drye,* 528 U. S., at 58–60, and n. 7. With such rights subject to lien, the taxpayer's interest has "ripen[ed] into a present estate" of some form and is more than a mere expectancy, *id.*, at 60, n. 7, and thus the taxpayer has an apparent right "to channel that value to [another]," *id.*, at 61.

In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. *Rogers* v. *Rogers*,

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may attach to a partner's partnership interest to satisfy his individual tax liability, but it is well settled that the lien does not, thereby, attach to property belonging to the partnership. The problem for the IRS in this case is that, unlike a partnership interest, such limited rights that Mr. Craft had in the Grand Rapids property are not the kind of rights to property to which a lien can attach, and the Grand Rapids property itself never "belong[ed] to" him under Michigan law.

[5] Even such rights as Mr. Craft arguably had in the Grand Rapids property bear no resemblance to those to which a federal tax lien has ever attached. See W. Elliott, Federal Tax Collections, Liens, and Levies ¶¶ 9.09[3][a]–[f] (2d ed. 1995 and 2000 Cum. Supp.) (hereinafter Elliott) (listing examples of rights to property to which a federal tax lien attaches, such as the right to compel payment; the right to withdraw money from a bank account, or to receive money from accounts receivable; wages earned but not paid; installment payments under a contract of sale of real estate; annuity payments; a beneficiary's rights to payment under a spendthrift trust; a liquor license; an easement; the taxpayer's interest in a timeshare; options; the taxpayer's interest in an employee benefit plan or individual retirement account).

[6] See 26 U. S. C. §§ 6331, 6335–6336.

136 Mich. App. 125, 135–137, 356 N. W. 2d 288, 293–294 (1984). This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. See 4 G. Thompson, Real Property § 37.14(a) (D. Thomas ed. 1994) (noting that a married person's power to devise one-half of the community property is "consistent with the fundamental characteristic of community property": "community ownership means that each spouse owns 50% of each community asset").[7] See also *Drye*, 528 U. S., at 61 ("[I]n determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' the *important consideration is the breadth of the control the taxpayer could exercise over the property*" (emphasis added, citation and brackets omitted)).

It is clear that some of the individual rights of a tenant in entireties property are primarily personal, dependent upon the taxpayer's status as a spouse, and similarly not susceptible to a tax lien. For example, the right to use the property in conjunction with one's spouse and to exclude all others appears particularly ill suited to being transferred to another, see *ibid.*, and to lack "exchangeable value," *id.*, at 56.

Nor do other identified rights rise to the level of "rights to property" to which a § 6321 lien can attach, because they represent, at most, a contingent future interest, or an "expectancy" that has not "ripen[ed] into a present estate." *Id.*, at 60, n. 7 ("Nor do we mean to suggest that an expec-

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[7] And it is similarly different from the situation in *United States* v. *Rodgers*, 461 U. S. 677 (1983), where the question was not whether a vested property interest in the family home to which the federal tax lien could attach "belong[ed] to" the taxpayer. Rather, in *Rodgers*, the only question was whether the federal tax lien for the husband's tax liability could be *foreclosed* against the property under 26 U. S. C. § 7403, despite his wife's homestead right under state law. See 461 U. S., at 701–703, and n. 31.

tancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate"). Cf. *Bess*, 357 U. S., at 55–56 (holding that no federal tax lien could attach to proceeds of the taxpayer's life insurance policy because "[i]t would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy"). By way of example, the survivorship right wholly depends upon one spouse outliving the other, at which time the survivor gains "substantial rights, in respect of the property, theretofore never enjoyed by [the] survivor." *Tyler*, 281 U. S., at 503. While the Court explains that it is "not necessary to decide whether the right to survivorship alone would qualify as 'property' or 'rights to property' " under § 6321, *ante*, at 285, the facts of this case demonstrate that it would not. Even assuming both that the right of survivability continued after the demise of the tenancy estate and that the tax lien could attach to such a contingent future right, creating a lienable interest upon the death of the nonliable spouse, it would not help the IRS here; respondent's husband predeceased her in 1998, and there is no right of survivorship at issue in this case.

Similarly, while one spouse might escape the absolute limitations on individual action with respect to tenancy by the entirety property by obtaining the right to one-half of the property upon divorce, or by agreeing with the other spouse to sever the tenancy by the entirety, neither instance is an event of sufficient certainty to constitute a "right to property" for purposes of § 6321. Finally, while the federal tax lien could arguably have attached to a tenant's right to any "rents, products, income, or profits" of real property held as tenants by the entirety, Mich. Comp. Laws Ann. § 557.71 (West 1988), the Grand Rapids property created no rents, products, income, or profits for the tax lien to attach to.

In any event, all such rights to property, dependent as they are upon the existence of the tenancy by the entirety

estate, were likely destroyed by the quitclaim deed that severed the tenancy. See n. 1, *supra.* Unlike a lien attached to the property itself, which would survive a conveyance, a lien attached to a "right to property" falls squarely within the maxim that "the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out." Bittker ¶ 44.5[4][a] (noting that "a state judgment terminating the taxpayer's rights to an asset also extinguishes the federal tax lien attached thereto"). See also Elliott ¶ 9.09[3][d][i] (explaining that while a tax lien may attach to a taxpayer's option on property, if the option terminates, the Government's lien rights would terminate as well).

Accordingly, I conclude that Mr. Craft had neither "property" nor "rights to property" to which the federal tax lien could attach.

II

That the federal tax lien did not attach to the Grand Rapids property is further supported by the consensus among the lower courts. For more than 50 years, every federal court reviewing tenancies by the entirety in States with a similar understanding of tenancy by the entirety as Michigan has concluded that a federal tax lien cannot attach to such property to satisfy an individual spouse's tax liability.[8] This

[8] See *IRS* v. *Gaster*, 42 F. 3d 787, 791 (CA3 1994) (concluding that the IRS is not entitled to a lien on property owned as a tenancy by the entirety to satisfy the tax obligations of one spouse); *Pitts* v. *United States*, 946 F. 2d 1569, 1571–1572 (CA4 1991) (same); *United States* v. *American Nat. Bank of Jacksonville*, 255 F. 2d 504, 507 (CA5), cert. denied, 358 U. S. 835 (1958) (same); *Raffaele* v. *Granger*, 196 F. 2d 620, 622–623 (CA3 1952) (same); *United States* v. *Hutcherson*, 188 F. 2d 326, 331 (CA8 1951) (explaining that the interest of one spouse in tenancy by the entirety property "is not a right to property or property in any sense"); *United States* v. *Nathanson*, 60 F. Supp. 193, 194 (ED Mich. 1945) (finding no designation in the Federal Revenue Act for imposing tax upon property held by the entirety for taxes due from one person alone); *Shaw* v. *United States*, 94 F. Supp. 245, 246 (WD Mich. 1939) (recognizing that the nature of the estate under Michigan law precludes the tax lien from attaching to ten-

consensus is supported by the IRS' consistent recognition, arguably against its own interest, that a federal tax lien against one spouse cannot attach to property or rights to property held as a tenancy by the entirety.[9]

That the Court fails to so much as mention this consensus, let alone address it or give any reason for overruling it, is puzzling. While the positions of the lower courts and the IRS do not bind this Court, one would be hard pressed to explain why the combined weight of these judicial and administrative sources—including the IRS' instructions to its own employees—do not constitute relevant authority.

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ancy by the entirety property for the tax liability of one spouse). See also *Benson* v. *United States*, 442 F. 2d 1221, 1223 (CADC 1971) (recognizing the Government's concession that property owned by the parties as tenants by the entirety cannot be subjected to a tax lien for the debt of one tenant); *Cole* v. *Cardoza*, 441 F. 2d 1337, 1343 (CA6 1971) (noting Government concession that, under Michigan law, it had no valid claim against real property held by tenancy by the entirety).

[9] See, *e. g.*, Internal Revenue Manual § 5.8.4.2.3 (RIA 2002), available at WESTLAW, RIA–IRM database (Mar. 29, 2002) (listing "property owned as tenants by the entirety" as among the assets beyond the reach of the Government's tax lien); *id.*, § 5.6.1.2.3 (recognizing that a *consensual* lien may be appropriate "when the federal tax lien does not attach to the property in question. For example, an assessment exists against only one spouse and the federal tax lien does not attach to real property held as tenants by the entirety"); IRS Chief Counsel Advisory (Aug. 17, 2001) (noting that consensual liens, or mortgages, are to be used "as a means of securing the Government's right to collect from property the assessment lien does not attach to, *such as real property held as a tenancy by the entirety*" (emphasis added)); IRS Litigation Bulletin No. 407 (Aug. 1994) ("Traditionally, the government has taken the view that a federal tax lien against a single debtor-spouse does not attach to property or rights to property held by both spouses as tenants by the entirety"); IRS Litigation Bulletin No. 388 (Jan. 1993) (explaining that neither the Department of Justice nor IRS chief counsel interpreted *United States* v. *Rodgers*, 461 U. S. 677 (1983), to mean that a federal tax lien against one spouse encumbers his or her interest in entireties property, and noting that it "do[es] not believe the Department will again argue the broader interpretation of *Rodgers,*" which would extend the reach of the federal tax lien to property held by the entireties); *Benson*, *supra*, at 1223; *Cardoza*, *supra*, at 1343.

III

Finally, while the majority characterizes Michigan's view that the tenancy by the entirety property does not belong to the individual spouses as a "state law fiction," *ante*, at 276, our precedents, including *Drye*, 528 U. S., at 58–60, hold that state, not federal, law defines property interests. Ownership by "the marriage" is admittedly a fiction of sorts, but so is a partnership or corporation. There is no basis for ignoring this fiction so long as federal law does not define property, particularly since the tenancy by the entirety property remains subject to lien for the tax liability of *both* tenants.

Nor do I accept the Court's unsupported assumption that its holding today is necessary because a contrary result would "facilitat[e] abuse of the federal tax system." *Ante*, at 285. The Government created this straw man, Brief for United States 30–32, suggesting that the property transfer from the tenancy by the entirety to respondent was somehow improper, see *id.*, at 30–31, n. 20 (characterizing scope of "[t]he tax avoidance scheme sanctioned by the court of appeals in this case"), even though it chose *not* to appeal the lower court's contrary assessment. But the longstanding consensus in the lower courts that tenancy by the entirety property is *not* subject to lien for the tax liability of one spouse, combined with the Government's failure to adduce any evidence that this has led to wholesale tax fraud by married individuals, suggests that the Court's policy rationale for its holding is simply unsound.

Just as I am unwilling to overturn this Court's longstanding precedent that States define and create property rights and forms of ownership, *Aquilino*, 363 U. S., at 513, n. 3, I am equally unwilling to redefine or dismiss as fictional forms of property ownership that the State has recognized in favor of an amorphous federal common-law definition of property. I respectfully dissent.

Syllabus

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL.

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

No. 00–1167. Argued January 7, 2002—Decided April 23, 2002

Respondent Tahoe Regional Planning Agency (TRPA) imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Petitioners, real estate owners affected by the moratoria and an association representing such owners, filed parallel suits, later consolidated, claiming that TRPA's actions constituted a taking of their property without just compensation. The District Court found that TRPA had not effected a "partial taking" under the analysis set out in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104; however, it concluded that the moratoria did constitute a taking under the categorical rule announced in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, because TRPA temporarily deprived petitioners of all economically viable use of their land. On appeal, TRPA successfully challenged the District Court's takings determination. Finding that the only question in this facial challenge was whether *Lucas*' rule applied, the Ninth Circuit held that because the regulations had only a temporary impact on petitioners' fee interest, no categorical taking had occurred; that *Lucas* applied to the relatively rare case in which a regulation permanently denies all productive use of an entire parcel, whereas the moratoria involved only a temporal slice of the fee interest; and that *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, concerned the question whether compensation is an appropriate remedy for a temporary taking, not whether or when such a taking has occurred. The court also concluded that *Penn Central*'s ad hoc balancing approach was the proper framework for analyzing whether a taking had occurred, but that petitioners had not challenged the District Court's conclusion that they could not make out a claim under *Penn Central*'s factors.

Held: The moratoria ordered by TRPA are not *per se* takings of property requiring compensation under the Takings Clause. Pp. 321–343.

(a) Although this Court's physical takings jurisprudence, for the most part, involves the straightforward application of *per se* rules, its regulatory takings jurisprudence is characterized by "essentially ad hoc,

factual inquiries," *Penn Central*, 438 U. S., at 124, designed to allow "careful examination and weighing of all the relevant circumstances," *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 636 (O'Connor, J., concurring). The longstanding distinction between physical and regulatory takings makes it inappropriate to treat precedent from one as controlling on the other. Petitioners rely on *First English* and *Lucas*—both regulatory takings cases—to argue for a categorical rule that whenever the government imposes a deprivation of all economically viable use of property, no matter how brief, it effects a taking. In *First English*, 482 U. S., at 315, 318, 321, the Court addressed the separate remedial question of how compensation is measured once a regulatory taking is established, but not the different and prior question whether the temporary regulation was in fact a taking. To the extent that the Court referenced that antecedent question, it recognized that a regulation temporarily denying an owner all use of her property might not constitute a taking if the denial was part of the State's authority to enact safety regulations, or if it were one of the normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. Thus, *First English* did not approve, and implicitly rejected, petitioners' categorical approach. Nor is *Lucas* dispositive of the question presented. Its categorical rule—requiring compensation when a regulation permanently deprives an owner of "*all* economically beneficial uses" of his land, 505 U. S., at 1019—does not answer the question whether a regulation prohibiting any economic use of land for 32 months must be compensated. Petitioners attempt to bring this case under the rule in *Lucas* by focusing exclusively on the property during the moratoria is unavailing. This Court has consistently rejected such an approach to the "denominator" question. See, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 497. To sever a 32-month segment from the remainder of each fee simple estate and then ask whether that segment has been taken in its entirety would ignore *Penn Central*'s admonition to focus on "the parcel as a whole," 438 U. S., at 130–131. Both dimensions of a real property interest—the metes and bounds describing its geographic dimensions and the term of years describing its temporal aspect—must be considered when viewing the interest in its entirety. A permanent deprivation of all use is a taking of the parcel as a whole, but a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted. *Lucas* was carved out for the "extraordinary case" in which a regulation permanently deprives property of all use; the default rule remains that a fact specific inquiry is required in the regulatory taking context. Nevertheless, the Court will consider petitioners' argument that the interest in protecting property owners

from bearing 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, justifies creating a new categorical rule. Pp. 321–332.

(b) "Fairness and justice" will not be better served by a categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking. That rule would apply to numerous normal delays in obtaining, *e. g.*, building permits, and would require changes in practices that have long been considered permissible exercises of the police power. Such an important change in the law should be the product of legislative rulemaking, not adjudication. More importantly, for the reasons set out in JUSTICE O'CONNOR's concurring opinion in *Palazzolo*, 533 U. S., at 636, the better approach to a temporary regulatory taking claim requires careful examination and weighing of all the relevant circumstances—only one of which is the length of the delay. A narrower rule excluding normal delays in processing permits, or covering only delays of more than a year, would have a less severe impact on prevailing practices, but would still impose serious constraints on the planning process. Moratoria are an essential tool of successful development. The interest in informed decisionmaking counsels against adopting a *per se* rule that would treat such interim measures as takings regardless of the planners' good faith, the landowners' reasonable expectations, or the moratorium's actual impact on property values. The financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or abandon the practice altogether. And the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. Here, TRPA obtained the benefit of comments and criticisms from interested parties during its deliberations, but a categorical rule tied to the deliberations' length would likely create added pressure on decisionmakers to quickly resolve land-use questions, disadvantaging landowners and interest groups less organized or familiar with the planning process. Moreover, with a temporary development ban, there is less risk that individual landowners will be singled out to bear a special burden that should be shared by the public as a whole. It may be true that a moratorium lasting more than one year should be viewed with special skepticism, but the District Court found that the instant delay was not unreasonable. The restriction's duration is one factor for a court to consider in appraising regulatory takings claims, but with respect to that factor, the temptation to adopt *per se* rules in either direction must be resisted. Pp. 333–342.

216 F. 3d 764, affirmed.

Syllabus

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 343. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 355.

Michael M. Berger argued the cause for petitioners. With him on the briefs were *Gideon Kanner* and *Lawrence L. Hoffman.*

John G. Roberts, Jr., argued the cause for respondents. With him on the brief were *Frankie Sue Del Papa,* Attorney General of Nevada, and *William J. Frey,* Deputy Attorney General, *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Assistant Attorney General, *Matthew Rodriquez,* Senior Assistant Attorney General, and *Daniel L. Siegel,* Supervising Deputy Attorney General, *E. Clement Shute, Jr., Fran M. Layton, Ellison Folk, John L. Marshall,* and *Richard J. Lazarus.*

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Cruden, Deputy Solicitor General Kneedler,* and *Malcolm L. Stewart.**

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Small Property Owners et al. by *Martin S. Kaufman;* for the American Farm Bureau Federation et al. by *John J. Rademacher* and *Nancy McDonough;* for the Institute for Justice by *William H. Mellor, Clint Bolick, Scott Bullock,* and *Richard A. Epstein;* for the National Association of Home Builders by *Christopher G. Senior* and *David Crump;* for the Pacific Legal Foundation et al. by *R. S. Radford, June Babiracki Barlow,* and *Sonia M. Younglove;* and for the Washington Legal Foundation by *Daniel J. Popeo, Richard A. Samp,* and *Douglas B. Levene.*

Briefs of *amici curiae* urging affirmance were filed for the State of Vermont et al. by *William H. Sorrell,* Attorney General of Vermont, and *Bridget Asay,* Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland,

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution.[1] This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81–5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83–21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32-month period, a brief description of the events leading up to the moratoria and a comment on the two per-

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Thomas F. Reilly of Massachusetts, *Mike McGrath* of Montana, *John J. Farmer, Jr.*, of New Jersey, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Anabelle Rodriguez* of Puerto Rico, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, and *Christine O. Gregoire* of Washington; for the American Planning Association et al. by *Robert H. Freilich;* for the Council of State Governments et al. by *Richard Ruda* and *Timothy J. Dowling;* for the National Audubon Society et al. by *John D. Echeverria;* and for Thomas Dunne et al. by *Karl M. Manheim.*

Nancie G. Marzulla filed a brief for Defenders of Property Rights as *amicus curiae.*

[1] Often referred to as the "Just Compensation Clause," the final Clause of the Fifth Amendment provides: ". . . nor shall private property be taken for public use without just compensation." It applies to the States as well as the Federal Government. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 239, 241 (1897); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U. S. 155, 160 (1980).

manent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is "uniquely beautiful," 34 F. Supp. 2d 1226, 1230 (Nev. 1999), that President Clinton was right to call it a "'national treasure that must be protected and preserved,'" *ibid.*, and that Mark Twain aptly described the clarity of its waters as "'not *merely* transparent, but dazzlingly, brilliantly so,'" *ibid.* (emphasis added) (quoting M. Twain, Roughing It 174–175 (1872)).

Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters.[2] Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the "'noble sheet of blue water'" beloved by Twain and countless others. 34 F. Supp. 2d, at 1230. As the District Court found, "[d]ramatic decreases in clarity first began to be noted in the late 1950's/early 1960's, shortly after development at the lake began in earnest." *Id.*, at 1231. The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

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[2] According to a Senate Report: "Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the [former] Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development." S. Rep. No. 91–510, pp. 3–4 (1969).

The upsurge of development in the area has caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development." *Ibid.*

> "Impervious coverage—such as asphalt, concrete, buildings, and even packed dirt—prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area—especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves." *Ibid.*

Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity."[3]

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered "high hazard" lands. Moreover, certain areas near streams or wetlands known as "Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem . . . is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff," *id.*, at 1232, conservation efforts have focused on controlling growth in these high hazard areas.

In the 1960's, when the problems associated with the burgeoning development began to receive significant atten-

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[3] The District Court added: "Or at least, for a very, very long time. Estimates are that, should the lake turn green, it could take over 700 years for it to return to its natural state, if that were ever possible at all." 34 F. Supp. 2d, at 1231.

tion, jurisdiction over the Basin, which occupies 501 square miles, was shared by the States of California and Nevada, five counties, several municipalities, and the Forest Service of the Federal Government. In 1968, the legislatures of the two States adopted the Tahoe Regional Planning Compact, see 1968 Cal. Stats. no. 998, p. 1900, § 1; 1968 Nev. Stats. p. 4, which Congress approved in 1969, Pub. L. 91–148, 83 Stat. 360. The compact set goals for the protection and preservation of the lake and created TRPA as the agency assigned "to coordinate and regulate development in the Basin and to conserve its natural resources." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 394 (1979).

Pursuant to the compact, in 1972 TRPA adopted a Land Use Ordinance that divided the land in the Basin into seven "land capability districts," based largely on steepness but also taking into consideration other factors affecting runoff. Each district was assigned a "land coverage coefficient—a recommended limit on the percentage of such land that could be covered by impervious surface." Those limits ranged from 1% for districts 1 and 2 to 30% for districts 6 and 7. Land in districts 1, 2, and 3 is characterized as "high hazard" or "sensitive," while land in districts 4, 5, 6, and 7 is "low hazard" or "non-sensitive." The SEZ lands, though often treated as a separate category, were actually a subcategory of district 1. 34 F. Supp. 2d, at 1232.

Unfortunately, the 1972 ordinance allowed numerous exceptions and did not significantly limit the construction of new residential housing. California became so dissatisfied with TRPA that it withdrew its financial support and unilaterally imposed stricter regulations on the part of the Basin located in California. Eventually the two States, with the approval of Congress and the President, adopted an extensive amendment to the compact that became effective on December 19, 1980. Pub. L. 96–551, 94 Stat. 3233; Cal.

Govt. Code Ann. § 66801 (West Supp. 2002); Nev. Rev. Stat. § 277.200 (1980).

The 1980 Tahoe Regional Planning Compact (Compact) redefined the structure, functions, and voting procedures of TRPA, App. 37, 94 Stat. 3235–3238; 34 F. Supp. 2d, at 1233, and directed it to develop regional "environmental threshold carrying capacities"—a term that embraced "standards for air quality, water quality, soil conservation, vegetation preservation and noise." 94 Stat. 3235, 3239. The Compact provided that TRPA "shall adopt" those standards within 18 months, and that "[w]ithin 1 year after" their adoption (*i. e.*, by June 19, 1983), it "shall" adopt an amended regional plan that achieves and maintains those carrying capacities. *Id.*, at 3240. The Compact also contained a finding by the legislatures of California and Nevada "that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." *Id.*, at 3243. Accordingly, for the period prior to the adoption of the final plan ("or until May 1, 1983, whichever is earlier"), the Compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also prohibited each city and county in the Basin from granting any more permits in 1981, 1982, or 1983 than had been granted in 1978.[4]

During this period TRPA was also working on the development of a regional water quality plan to comply with the Clean Water Act, 33 U. S. C. § 1288 (1994 ed.). Despite

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[4] App. 104–107. This moratorium did not apply to rights that had vested before the effective date of the 1980 Compact. *Id.*, at 107–108. Two months after the 1980 Compact became effective, TRPA adopted its Ordinance 81–1 broadly defining the term "project" to include the construction of any new residence and requiring owners of land in districts 1, 2, or 3, to get a permit from TRPA before beginning construction of homes on their property. 34 F. Supp. 2d 1226, 1233 (Nev. 1999).

the fact that TRPA performed these obligations in "good faith and to the best of its ability," 34 F. Supp. 2d, at 1233, after a few months it concluded that it could not meet the deadlines in the Compact. On June 25, 1981, it therefore enacted Ordinance 81–5 imposing the first of the two moratoria on development that petitioners challenge in this proceeding. The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact. App. 159, 191.

The District Court made a detailed analysis of the ordinance, noting that it might even prohibit hiking or picnicking on SEZ lands, but construed it as essentially banning any construction or other activity that involved the removal of vegetation or the creation of land coverage on all SEZ lands, as well as on class 1, 2, and 3 lands in California. 34 F. Supp. 2d, at 1233–1235. Some permits could be obtained for such construction in Nevada if certain findings were made. *Id.*, at 1235. It is undisputed, however, that Ordinance 81–5 prohibited the construction of any new residences on SEZ lands in either State and on class 1, 2, and 3 lands in California.

Given the complexity of the task of defining "environmental threshold carrying capacities" and the division of opinion within TRPA's governing board, the District Court found that it was "unsurprising" that TRPA failed to adopt those thresholds until August 26, 1982, roughly two months after the Compact deadline. *Ibid.* Under a liberal reading of the Compact, TRPA then had until August 26, 1983, to adopt a new regional plan. 94 Stat. 3240. "Unfortunately, but again not surprisingly, no regional plan was in place as of that date." 34 F. Supp. 2d, at 1235. TRPA therefore adopted Resolution 83–21, "which completely suspended all project reviews and approvals, including the acceptance of new proposals," and which remained in effect until a new regional plan was adopted on April 26, 1984. Thus, Resolu-

tion 83–21 imposed an 8-month moratorium prohibiting all construction on high hazard lands in either State. In combination, Ordinance 81–5 and Resolution 83–21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case.

On the same day that the 1984 plan was adopted, the State of California filed an action seeking to enjoin its implementation on the ground that it failed to establish land-use controls sufficiently stringent to protect the Basin. *Id.*, at 1236. The District Court entered an injunction that was upheld by the Court of Appeals and remained in effect until a completely revised plan was adopted in 1987. Both the 1984 injunction and the 1987 plan contained provisions that prohibited new construction on sensitive lands in the Basin. As the case comes to us, however, we have no occasion to consider the validity of those provisions.

II

Approximately two months after the adoption of the 1984 plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe-Sierra Preservation Council, Inc., a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of the 1980 Compact, App. 34, primarily for the purpose of constructing "at a time of their choosing" a single-family home "to serve as a permanent, retirement or

vacation residence," *id.*, at 36. When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building." *Ibid.*[5]

Petitioners' complaints gave rise to protracted litigation that has produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions.[6] For present purposes, however, we need only describe those courts' disposition of the claim that three actions taken by TRPA—Ordinance 81–5, Resolution 83–21, and the 1984 regional plan—constituted takings of petitioners' property without just compensation.[7] Indeed, the challenge to the 1984 plan is not before us because both the District Court and the Court of Appeals held that it was the federal injunction against implementing that plan, rather than the plan itself, that caused the post-1984 injuries that petitioners allegedly suffered, and those rulings are not encompassed within our limited grant of certiorari.[8] Thus,

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[5] As explained, *supra*, at 309, the petitioners who purchased land after the 1972 compact did so amidst a heavily regulated zoning scheme. Their property was already classified as part of land capability districts 1, 2, and 3, or SEZ land. And each land classification was subject to regulations as to the degree of artificial disturbance the land could safely sustain.

[6] 911 F. 2d 1331 (1990); 938 F. 2d 153 (1991); 34 F. 3d 753 (1994); 216 F. 3d 764 (2000); 611 F. Supp. 110 (1985); 808 F. Supp. 1474 (1992); 808 F. Supp. 1484 (1992).

[7] In 1991, petitioners amended their complaint to allege that the adoption of the 1987 plan also constituted an unconstitutional taking. Ultimately both the District Court and the Court of Appeals held that this claim was barred by California's 1-year statute of limitations and Nevada's 2-year statute of limitations. See 216 F. 3d, at 785–789. Although the validity of the 1987 plan is not before us, we note that other litigants have challenged certain applications of that plan. See *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725 (1997).

[8] In his dissent, THE CHIEF JUSTICE contends that the 1984 plan is before us because the 1980 Compact is a proximate cause of petitioners'

we limit our discussion to the lower courts' disposition of the claims based on the 2-year moratorium (Ordinance 81–5) and the ensuing 8-month moratorium (Resolution 83–21).

The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner's use of her property that it produces "nearly the same result as a direct appropriation." 34 F. Supp. 2d, at 1238. The court noted that all of the claims in this case "are of the 'regulatory takings' variety." *Id.*, at 1239. Citing our decision in *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), it then stated that a "regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land." 34 F. Supp. 2d, at 1239. The District Court rejected the first alternative based on its finding that "further development on high hazard lands such as [petitioners'] would lead to significant additional damage to the lake." *Id.*, at 1240.[9] With respect

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injuries, *post*, at 343–345. Petitioners, however, do not challenge the Court of Appeals' holding on causation in their briefs on the merits, presumably because they understood when we granted certiorari on the question "[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution," 533 U. S. 948 (2001), we were only interested in the narrow question decided today. Throughout the District Court and Court of Appeals decisions the phrase "temporary moratorium" refers to two things and two things only: Ordinance 81–5 and Resolution 83–21. The dissent's novel theory of causation was not briefed, nor was it discussed during oral argument.

[9] As the District Court explained: "There is a direct connection between the potential development of plaintiffs' lands and the harm the lake would suffer as a result thereof. Further, there has been no suggestion by the plaintiffs that any less severe response would have adequately addressed the problems the lake was facing. Thus it is difficult to see

to the second alternative, the court first considered whether the analysis adopted in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), would lead to the conclusion that TRPA had effected a "partial taking," and then whether those actions had effected a "total taking."[10]

Emphasizing the temporary nature of the regulations, the testimony that the "average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years," and the failure of petitioners to offer specific evidence of harm, the District Court concluded that "consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking." 34 F. Supp. 2d, at 1240. In the absence of evidence regarding any of the individual plaintiffs, the court evaluated the "average" purchasers' intent and found that such purchasers "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit." *Id.*, at 1241.[11]

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how a more proportional response could have been adopted. Given that TRPA's actions had widespread application, and were not aimed at an individual landowner, the plaintiffs would appear to bear the burden of proof on this point. They have not met this burden—nor have they really attempted to do so. Although unwilling to stipulate to the fact that TRPA's actions substantially advanced a legitimate state interest, the plaintiffs did not seriously contest the matter at trial." 34 F. Supp. 2d, at 1240 (citation omitted).

[10] The *Penn Central* analysis involves "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001).

[11] The court stated that petitioners "had plenty of time to build before the restrictions went into effect—and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works." In addition, the court found "the fact that no evidence was introduced regarding the specific diminution in value of any of the plaintiffs' individual properties clearly weighs against a finding that there was a partial taking of the plaintiffs' property." 34 F. Supp. 2d, at 1241.

The District Court had more difficulty with the "total taking" issue. Although it was satisfied that petitioners' property did retain some value during the moratoria,[12] it found that they had been temporarily deprived of "all economically viable use of their land." *Id.*, at 1245. The court concluded that those actions therefore constituted "categorical" takings under our decision in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). It rejected TRPA's response that Ordinance 81–5 and Resolution 83–21 were "reasonable temporary planning moratoria" that should be excluded from *Lucas*' categorical approach. The court thought it "fairly clear" that such interim actions would not have been viewed as takings prior to our decisions in *Lucas* and *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), because "[z]oning boards, cities, counties and other agencies used them all the time to 'maintain the status quo pending study and governmental decision making.'" 34 F. Supp. 2d, at 1248–1249 (quoting *Williams* v. *Central*, 907 P. 2d 701, 706 (Colo. App. 1995)). After expressing uncertainty as to whether those cases required a holding that moratoria on development automatically effect takings, the court concluded that TRPA's actions did so, partly because neither the ordinance nor the resolution, even though intended to be temporary from the beginning, contained an

[12] The pretrial order describes purchases by the United States Forest Service of private lots in environmentally sensitive areas during the periods when the two moratoria were in effect. During the 2-year period ending on August 26, 1983, it purchased 215 parcels in California at an average price of over $19,000 and 45 parcels in Nevada at an average price of over $39,000; during the ensuing 8-month period, it purchased 167 California parcels at an average price of over $29,000 and 27 Nevada parcels at an average price of over $41,000. App. 76–77. Moreover, during those periods some owners sold sewer and building allocations to owners of higher capability lots "for between $15,000 and $30,000." *Id.*, at 77.

express termination date. 34 F. Supp. 2d, at 1250–1251.[13] Accordingly, it ordered TRPA to pay damages to most petitioners for the 32-month period from August 24, 1981, to April 25, 1984, and to those owning class 1, 2, or 3 property in Nevada for the 8-month period from August 27, 1983, to April 25, 1984. *Id.*, at 1255.

Both parties appealed. TRPA successfully challenged the District Court's takings determination, and petitioners unsuccessfully challenged the dismissal of their claims based on the 1984 and 1987 plans. Petitioners did not, however, challenge the District Court's findings or conclusions concerning its application of *Penn Central*. With respect to the two moratoria, the Ninth Circuit noted that petitioners had expressly disavowed an argument "that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*" and that they did not "dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact."[14] Accordingly, the only question before the court was "whether the rule set forth in *Lucas* applies—that is, whether a cate-

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[13] Ordinance 81–5 specified that it would terminate when the regional plan became finalized. And Resolution 83–21 was limited to 90 days, but was renewed for an additional term. Nevertheless, the District Court distinguished these measures from true "temporary" moratoria because there was no fixed date for when they would terminate. 34 F. Supp. 2d, at 1250–1251.

[14] 216 F. 3d, at 773. "Below, the district court ruled that the regulations did not constitute a taking under *Penn Central*'s ad hoc approach, but that they did constitute a categorical taking under *Lucas* [v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992)]. See *Tahoe-Sierra Preservation Council*, 34 F. Supp. 2d at 1238–45. The defendants appealed the district court's latter holding, but the plaintiffs did not appeal the former. And even if arguments regarding the *Penn Central* test were fairly encompassed by the defendants' appeal, the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." *Ibid.*

gorical taking occurred because Ordinance 81–5 and Resolution 83–21 denied the plaintiffs 'all economically beneficial or productive use of land.'" 216 F. 3d 764, 773 (2000). Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking.

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners' fee interest in the properties, no categorical taking had occurred. It reasoned:

> "Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments." *Id.*, at 774.

Putting to one side "cases of physical invasion or occupation," *ibid.*, the court read our cases involving regulatory taking claims to focus on the impact of a regulation on the parcel as a whole. In its view a "planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type

of use across all of the parcel." *Id.*, at 776. In each situation, a regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.[15]

The Court of Appeals distinguished *Lucas* as applying to the "'relatively rare'" case in which a regulation denies all productive use of an entire parcel, whereas the moratoria involve only a "temporal 'slice'" of the fee interest and a form of regulation that is widespread and well established. 216 F. 3d, at 773–774. It also rejected petitioners' argument that our decision in *First English* was controlling. According to the Court of Appeals, *First English* concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred. 216 F. 3d, at 778. Faced squarely with the question whether a taking had occurred, the court held that *Penn Central* was the appropriate framework for analysis. Petitioners, however, had failed to challenge the District

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[15] The Court of Appeals added:

"Each of these three types of regulation will have an impact on the parcel's value, because each will affect an aspect of the owner's 'use' of the property—by restricting *when* the 'use' may occur, *where* the 'use' may occur, or *how* the 'use' may occur. Prior to *Agins* [v. *City of Tiburon*, 447 U. S. 255 (1980)], the Court had already rejected takings challenges to regulations eliminating all 'use' on a portion of the property, and to regulations restricting the type of 'use' across the breadth of the property. *See Penn Central*, 438 U. S. at 130–31 . . . ; *Keystone Bituminous Coal Ass'n*, 480 U. S. at 498–99 . . . ; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384, 397 . . . (1926) (75% diminution in value caused by zoning law); *see also William C. Haas & Co.* v. *City & County of San Francisco*, 605 F. 2d 1117, 1120 (9th Cir. 1979) (value reduced from $2,000,000 to $100,000). In those cases, the Court 'uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a "taking."' *Penn Central*, 438 U. S. at 131 . . . ; *see also Concrete Pipe and Products, Inc.* v. *Construction Laborers Pension Trust*, 508 U. S. 602, 645 . . . (1993). There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development." *Id.*, at 776–777.

Court's conclusion that they could not make out a taking claim under the *Penn Central* factors.

Over the dissent of five judges, the Ninth Circuit denied a petition for rehearing en banc. 228 F. 3d 998 (2000). In the dissenters' opinion, the panel's holding was not faithful to this Court's decisions in *First English* and *Lucas*, nor to Justice Holmes admonition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922), that "'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.'" 228 F. 3d, at 1003. Because of the importance of the case, we granted certiorari limited to the question stated at the beginning of this opinion. 533 U. S. 948 (2001). We now affirm.

III

Petitioners make only a facial attack on Ordinance 81–5 and Resolution 83–21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they "face an uphill battle," *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987), that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have

already endorsed their view, and that it is a logical application of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear 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).

We shall first explain why our cases do not support their proposed categorical rule—indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case.[16] Resisting "[t]he temptation to adopt what amount to *per se* rules in either direction," *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 636 (2001) (O'Connor, J., concurring), we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from

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[16] Despite our clear refusal to hold that a moratorium never effects a taking, The Chief Justice accuses us of "allow[ing] the government to '. . . take private property without paying for it,'" *post*, at 349. It may be true that under a *Penn Central* analysis petitioners' land was taken and compensation would be due. But petitioners failed to challenge the District Court's conclusion that there was no taking under *Penn Central*. *Supra*, at 317, and n. 14.

making certain uses of her private property.[17] Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," *Penn Central*, 438 U. S., at 124, designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U. S., at 636 (O'CONNOR, J., concurring).

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); or when its planes use private airspace to approach a government airport, *United States* v. *Causby*, 328 U. S. 256 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting

[17] In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

tenants unwilling to pay a higher rent, *Block* v. *Hirsh*, 256 U. S. 135 (1921); that bans certain private uses of a portion of an owner's property, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987); or that forbids the private use of certain airspace, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee* v. *Escondido*, 503 U. S. 519, 523 (1992). See also *Loretto*, 458 U. S., at 440; *Keystone*, 480 U. S., at 489, n. 18.

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking,"[18] and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings con-

[18] To illustrate the importance of the distinction, the Court in *Loretto*, 458 U. S., at 430, compared two wartime takings cases, *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 116 (1951), in which there had been an "actual taking of possession and control" of a coal mine, and *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958), in which, "by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations . . . ." 458 U. S., at 431. *Loretto* then relied on this distinction in dismissing the argument that our discussion of the physical taking at issue in the case would affect landlord-tenant laws. "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.*, at 440 (citing *Penn Central*).

text to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.[19] "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 522 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of eco-

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[19] According to THE CHIEF JUSTICE's dissent, even a temporary, use-prohibiting regulation should be governed by our physical takings cases because, under *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1017 (1992), "from the landowner's point of view," the moratorium is the functional equivalent of a forced leasehold, *post*, at 348. Of course, from both the landowner's and the government's standpoint there are critical differences between a leasehold and a moratorium. Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.

THE CHIEF JUSTICE stretches *Lucas*' "equivalence" language too far. For even a regulation that constitutes only a minor infringement on property may, from the landowner's perspective, be the functional equivalent of an appropriation. *Lucas* carved out a narrow exception to the rules governing regulatory takings for the "extraordinary circumstance" of a permanent deprivation of all beneficial use. The exception was only partially justified based on the "equivalence" theory cited by THE CHIEF JUSTICE's dissent. It was also justified on the theory that, in the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses," it is less realistic to assume that the regulation will secure an "average reciprocity of advantage," or that government could not go on if required to pay for every such restriction. 505 U. S., at 1017–1018. But as we explain, *infra*, at 339–341, these assumptions hold true in the context of a moratorium.

nomic life to promote the common good," *Penn Central*, 438 U. S., at 124.

Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here. A brief review of some of the cases that led to our decision in *Lucas*, however, will help to explain why the holding in that case does not answer the question presented here.

As we noted in *Lucas*, it was Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922),[20] that gave birth to our regulatory takings jurisprudence.[21]

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[20] The case involved "a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house." *Mahon*, 260 U. S., at 412. Mahon sought to prevent Pennsylvania Coal from mining under his property by relying on a state statute, which prohibited any mining that could undermine the foundation of a home. The company challenged the statute as a taking of its interest in the coal without compensation.

[21] In *Lucas*, we explained: "Prior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642 (1879) . . . . Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U. S., at 414–415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too

In subsequent opinions we have repeatedly and consistently endorsed Holmes' observation that "if regulation goes too far it will be recognized as a taking." *Id.*, at 415. Justice Holmes did not provide a standard for determining when a regulation goes "too far," but he did reject the view expressed in Justice Brandeis' dissent that there could not be a taking because the property remained in the possession of the owner and had not been appropriated or used by the public.[22] After *Mahon*, neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking."

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in "'essentially ad hoc, factual inquiries.'" *Lucas*, 505 U. S., at 1015 (quoting *Penn Central*, 438 U. S., at 124). Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple "mathematically precise" formula.[23] Justice Brennan's opinion for the Court in *Penn*

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far it will be recognized as a taking.' *Ibid.*" 505 U. S., at 1014 (citation omitted).

[22] Justice Brandeis argued: "Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public." *Mahon*, 260 U. S., at 417 (dissenting opinion).

[23] In her concurring opinion in *Palazzolo*, 533 U. S., at 633, JUSTICE O'CONNOR reaffirmed this approach: "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a

Central did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'" *Id.*, at 130–131.

This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb* v. *Fox*, 274 U. S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S., at 498, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus*, 444 U. S., at 65–66.

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court must examine." *Ibid.* "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Id.*, at 634. "The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." *Id.*, at 636.

While the foregoing cases considered whether particular regulations had "gone too far" and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 636 (1981), Justice Brennan identified that question and explained how he would answer it:

> "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.*, at 658.

Justice Brennan's proposed rule was subsequently endorsed by the Court in *First English*, 482 U. S., at 315, 318, 321. *First English* was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In *First English*, the Court unambiguously and repeatedly characterized the issue to be decided as a "compensation question" or a "remedial question." *Id.*, at 311 ("The disposition of the case on these grounds isolates the remedial question for our consideration"); see also *id.*, at 313, 318. And the Court's statement of its holding was equally unambiguous: "We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.*, at 321 (emphasis added). In fact, *First English* expressly disavowed any ruling on the

merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged. *Id.*, at 312–313 ("We reject appellee's suggestion that . . . we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question"). After our remand, the California courts concluded that there had not been a taking, *First English Evangelical Church of Glendale* v. *County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), and we declined review of that decision, 493 U. S. 1056 (1990).

To the extent that the Court in *First English* referenced the antecedent takings question, we identified two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking. First, we recognized that "the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 482 U. S., at 313. Second, we limited our holding "to the facts presented" and recognized "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which [were] not before us." *Id.*, at 321. Thus, our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.

Similarly, our decision in *Lucas* is not dispositive of the question presented. Although *Lucas* endorsed and applied a categorical rule, it was not the one that petitioners propose. Lucas purchased two residential lots in 1988 for $975,000. These lots were rendered "valueless" by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of $1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that "was unconditional and permanent." 505 U. S.,

at 1012. While the State's appeal was pending, the statute was amended to authorize exceptions that might have allowed Lucas to obtain a building permit. Despite the fact that the amendment gave the State Supreme Court the opportunity to dispose of the appeal on ripeness grounds, it resolved the merits of the permanent takings claim and reversed. Since "Lucas had no reason to proceed on a 'temporary taking' theory at trial," we decided the case on the permanent taking theory that both the trial court and the State Supreme Court had addressed. *Ibid.*

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. *Id.*, at 1019. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id.*, at 1017. The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. *Id.*, at 1019, n. 8.[24] Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*. *Lucas*, 505 U. S., at 1019–1020, n. 8.[25]

Certainly, our holding that the permanent "obliteration of the value" of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation

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[24] JUSTICE KENNEDY concurred in the judgment on the basis of the regulation's impact on "reasonable, investment-backed expectations." 505 U. S., at 1034.

[25] It is worth noting that *Lucas* underscores the difference between physical and regulatory takings. See *supra*, at 322–325. For under our physical takings cases it would be irrelevant whether a property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.

prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." 438 U. S., at 130–131. We have consistently rejected such an approach to the "denominator" question. See *Keystone*, 480 U. S., at 497. See also *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question"). Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. 34 F. Supp. 2d, at 1242–1245. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.[26]

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the

[26] THE CHIEF JUSTICE's dissent makes the same mistake by carving out a 6-year interest in the property, rather than considering the parcel as a whole, and treating the regulations covering that segment as analogous to a total taking under *Lucas*, *post*, at 351.

term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7–9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. *Agins* v. *City of Tiburon*, 447 U. S., at 263, n. 9 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'" (quoting *Danforth* v. *United States*, 308 U. S. 271, 285 (1939))).

Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the "extraordinary case" in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will consider whether the interest in protecting individual property owners from bearing public burdens "which, in all fairness and justice, should be borne by the public as a whole," *Armstrong* v. *United States*, 364 U. S., at 49, justifies creating a new rule for these circumstances.[27]

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[27] *Armstrong*, like *Lucas*, was a case that involved the "total destruction by the Government of all value" in a specific property interest. 364 U. S., at 48–49. It is nevertheless perfectly clear that Justice Black's oft-quoted comment about the underlying purpose of the guarantee that private prop-

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Considerations of "fairness and justice" arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of seven different theories. First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" which were put to one side in our opinion in *First English*, 482 U. S., at 321. Third, we could adopt a rule like the one suggested by an *amicus* supporting petitioners that would "allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements" would "kick in."[28] Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a "series of rolling moratoria" that were the functional equivalent of a permanent taking.[29] Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Cf. *Monterey* v. *Del Monte Dunes at*

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erty shall not be taken for a public use without just compensation applies to partial takings as well as total takings.

[28] Brief for the Institute for Justice as *Amicus Curiae* 30. Although *amicus* describes the 1-year cutoff proposal as the "better approach by far," *ibid.*, its primary argument is that *Penn Central* should be overruled, *id.*, at 20 ("*All* partial takings by way of land use restriction should be subject to the same prima facie rules for compensation as a physical occupation for a limited period of time").

[29] Brief for Petitioners 44. See also Pet. for Cert. i.

Monterey, Ltd., 526 U. S. 687, 698 (1999). Sixth, apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey*. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

As the case comes to us, however, none of the last four theories is available. The "rolling moratoria" theory was presented in the petition for certiorari, but our order granting review did not encompass that issue, 533 U. S. 948 (2001); the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period. 216 F. 3d, at 769. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact. Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it. Nonetheless, each of the three *per se* theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous

"normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," 482 U. S., at 321, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U. S., at 413. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.[30]

More importantly, for reasons set out at some length by JUSTICE O'CONNOR in her concurring opinion in *Palazzolo* v. *Rhode Island*, 533 U. S., at 636, we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." In that opinion, JUSTICE O'CONNOR specifically considered the role that the "temporal relationship between regulatory enactment and title acquisition" should play in the analysis of a takings claim. *Id.*, at 632. We have no occasion to address that particular issue in this case, because it involves a differ-

[30] In addition, we recognize the anomaly that would be created if we were to apply *Penn Central* when a landowner is permanently deprived of 95% of the use of her property, *Lucas*, 505 U. S., at 1019, n. 8, and yet find a *per se* taking anytime the same property owner is deprived of all use for only five days. Such a scheme would present an odd inversion of Justice Holmes' adage: "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block* v. *Hirsh*, 256 U. S. 135, 157 (1921).

ent temporal relationship—the distinction between a temporary restriction and one that is permanent. Her comments on the "fairness and justice" inquiry are, nevertheless, instructive:

> "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. . . .
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> "The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is '"designed to bar 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."' *Penn Central*, [438 U. S.], at 123–124 (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)). The concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed 'any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' *Penn Central*, *supra*, at 124 (quoting *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962)). The outcome instead 'depends largely "upon the particular circumstances [in that] case."' *Penn Central*, *supra*, at 124 (quoting *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958))." *Id.*, at 633.

In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process.[31] Unlike the "extraordinary circumstance" in which the government deprives a property owner of all economic use, *Lucas*, 505 U. S., at 1017, moratoria like Ordinance 81–5 and Resolution 83–21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy.[32] In fact, the consensus in the planning com-

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[31] Petitioners fail to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays. They contend that a permit applicant need only comply with certain specific requirements in order to receive one and can expect to develop at the end of the process, whereas there is nothing the landowner subject to a moratorium can do but wait, with no guarantee that a permit will be granted at the end of the process. Brief for Petitioners 28. Setting aside the obvious problem with basing the distinction on a course of events we can only know after the fact—in the context of a facial challenge—petitioners' argument breaks down under closer examination because there is no guarantee that a permit will be granted, or that a decision will be made within a year. See, *e. g.*, *Dufau* v. *United States*, 22 Cl. Ct. 156 (1990) (holding that 16-month delay in granting a permit did not constitute a temporary taking). Moreover, under petitioners' modified categorical rule, there would be no *per se* taking if TRPA simply delayed action on all permits pending a regional plan. Fairness and justice do not require that TRPA be penalized for achieving the same result, but with full disclosure.

[32] See, *e. g.*, *Santa Fe Village Venture* v. *Albuquerque*, 914 F. Supp. 478, 483 (N. M. 1995) (30-month moratorium on development of lands within the Petroglyph National Monument was not a taking); *Williams* v. *Central*, 907 P. 2d 701, 703–706 (Colo. App. 1995) (10-month moratorium on development in gaming district while studying city's ability to absorb growth was not a compensable taking); *Woodbury Place Partners* v. *Woodbury*, 492 N. W. 2d 258 (Minn. App. 1993) (moratorium pending review

munity appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development.[33] Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.[34]

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of plan for land adjacent to interstate highway was not a taking even though it deprived property owner of all economically viable use of its property for two years); *Zilber* v. *Moranga*, 692 F. Supp. 1195 (ND Cal. 1988) (18-month development moratorium during completion of a comprehensive scheme for open space did not require compensation). See also Wayman, Leaders Consider Options for Town Growth, Charlotte Observer, Feb. 3, 2002, p. 15M (describing 10-month building moratorium imposed "to give town leaders time to plan for development"); Wallman, City May Put Reins on Beach Projects, Sun-Sentinel, May 16, 2000, p. 1B (2-year building moratorium on beachfront property in Fort Lauderdale pending new height, width, and dispersal regulations); Foderaro, In Suburbs, They're Cracking Down on the Joneses, N. Y. Times, Mar. 19, 2001, p. A1 (describing moratorium imposed in Eastchester, New York, during a review of the town's zoning code to address the problem of oversized homes); Dawson, Commissioners recommend Aboite construction ban be lifted, Fort Wayne News Sentinel, May 4, 2001, p. 1A (3-year moratorium to allow improvements in the water and sewage treatment systems).

[33] See J. Juergensmeyer & T. Roberts, Land Use Planning and Control Law §§ 5.28(G) and 9.6 (1998); Garvin & Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, 48 Land Use Law & Zoning Digest 3 (June 1996) ("With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view"); Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urb. L. 65 (1971).

[34] THE CHIEF JUSTICE offers another alternative, suggesting that delays of six years or more should be treated as *per se* takings. However, his dissent offers no explanation for why 6 years should be the cutoff point rather than 10 days, 10 months, or 10 years. It is worth emphasizing that we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth. A finding in the 1980 Compact itself, which presumably was endorsed by all three legislative bodies that participated in its enactment, attests to the importance of that concern. 94 Stat. 3243 ("The legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan").

As JUSTICE KENNEDY explained in his opinion for the Court in *Palazzolo*, it is the interest in informed decisionmaking that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims:

> "These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable

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because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay.

> and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. See *Suitum* [v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 736, and n. 10 (1997)] (noting difficulty of demonstrating that 'mere enactment' of regulations restricting land use effects a taking)." 533 U. S., at 620–621.

We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. In the proceedings involving the Lake Tahoe Basin, for example, the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations.[35] Since a categorical rule tied to the length of deliberations would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as or-

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[35] Petitioner Preservation Council, "through its authorized representatives, actively participated in the entire TRPA regional planning process leading to the adoption of the 1984 Regional Plan at issue in this action, and attended and expressed its views and concerns, orally and in writing, at each public hearing held by the Defendant TRPA in connection with the consideration of the 1984 Regional Plan at issue herein, as well as in connection with the adoption of Ordinance 81–5 and the Revised 1987 Regional Plan addressed herein." App. 24.

ganized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 835 (1987). At least with a moratorium there is a clear "reciprocity of advantage," *Mahon*, 260 U. S., at 415, because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone*, 480 U. S., at 491. In fact, there is reason to believe property values often will continue to increase despite a moratorium. See, *e. g.*, *Growth Properties, Inc.* v. *Klingbeil Holding Co.*, 419 F. Supp. 212, 218 (Md. 1976) (noting that land values could be expected to increase 20% during a 5-year moratorium on development). Cf. *Forest Properties, Inc.* v. *United States*, 177 F. 3d 1360, 1367 (CA Fed. 1999) (record showed that market value of the entire parcel increased despite denial of permit to fill and develop lake-bottom property). Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally

unacceptable.[36] Formulating a general rule of this kind is a suitable task for state legislatures.[37] In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to *per se* rules in either direction must be resisted." *Palazzolo*, 533 U. S., at 636 (O'CONNOR, J., concurring). There may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court's opinion illustrates, petitioners' proposed rule is simply "too blunt an instrument" for identifying those cases. *Id.*, at 628. We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

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[36] We note that the temporary restriction that was ultimately upheld in the *First English* case lasted for more than six years before it was replaced by a permanent regulation. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

[37] Several States already have statutes authorizing interim zoning ordinances with specific time limits. See Cal. Govt. Code Ann. § 65858 (West Supp. 2002) (authorizing interim ordinance of up to two years); Colo. Rev. Stat. § 30–28–121 (2001) (six months); Ky. Rev. Stat. Ann. § 100.201 (2001) (one year); Mich. Comp. Laws Ann. § 125.215 (West 2001) (three years); Minn. Stat. § 394.34 (2000) (two years); N. H. Rev. Stat. Ann. § 674:23 (West 2001) (one year); Ore. Rev. Stat. Ann. § 197.520 (1997) (10 months); S. D. Codified Laws § 11–2–10 (2001) (two years); Utah Code Ann. § 17–27–404 (1995) (18 months); Wash. Rev. Code § 35.63.200 (2001); Wis. Stat. § 62.23(7)(d) (2001) (two years). Other States, although without specific statutory authority, have recognized that reasonable interim zoning ordinances may be enacted. See, *e. g.*, *S. E. W. Freil* v. *Triangle Oil Co.*, 76 Md. App. 96, 543 A. 2d 863 (1988); *New Jersey Shore Builders Assn.* v. *Dover Twp. Comm.*, 191 N. J. Super. 627, 468 A. 2d 742 (1983); *SCA Chemical Waste Servs., Inc.* v. *Konigsberg*, 636 S. W. 2d 430 (Tenn. 1982); *Sturgess* v. *Chilmark*, 380 Mass. 246, 402 N. E. 2d 1346 (1980); *Lebanon* v. *Woods*, 153 Conn. 182, 215 A. 2d 112 (1965).

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

For over half a decade petitioners were prohibited from building homes, or any other structures, on their land. Because the Takings Clause requires the government to pay compensation when it deprives owners of all economically viable use of their land, see *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

I

"A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986) (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922)).[1] In failing to undertake this inquiry, the Court

[1] We are not bound by the Court of Appeals' determination that petitioners' claim under 42 U. S. C. § 1983 (1994 ed., Supp. V) permitted only challenges to Ordinance 81–5 and Regulation 83–21. Petitioners sought certiorari on the Court of Appeals' ruling that respondent Tahoe Regional Planning Agency (hereinafter respondent) did not cause petitioners' injury from 1984 to 1987. Pet. for Cert. 27–30. We did not grant certiorari on any of the petition's specific questions presented, but formulated the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" 533 U. S. 948–949 (2001). This Court's Rule 14(1)(a) provides that a "question presented is deemed to comprise every subsidiary question fairly included therein." The question of how long the moratorium on land development lasted is necessarily subsumed within the question whether the moratorium constituted a taking. Petitioners did not assume otherwise. Their brief on the merits argues that respondent "effectively blocked all construction for the past two decades." Brief for Petitioners 7.

ignores much of the impact of respondent's conduct on petitioners. Instead, it relies on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984. *Ante,* at 312, 313–314. During that period, Ordinance 81–5 and Regulation 83–21 prohibited development pending the adoption of a new regional land-use plan. The adoption of the 1984 Regional Plan (hereinafter Plan or 1984 Plan) did not, however, change anything from petitioners' standpoint. After the adoption of the 1984 Plan, petitioners still could make no use of their land.

The Court of Appeals disregarded this post-April 1984 deprivation on the ground that respondent did not "cause" it. In a 42 U. S. C. § 1983 action, "the plaintiff must demonstrate that the defendant's conduct was the actionable cause of the claimed injury." 216 F. 3d 764, 783 (CA9 2000). Applying this principle, the Court of Appeals held that the 1984 Plan did not amount to a taking because the Plan actually allowed permits to issue for the construction of single-family residences. Those permits were never issued because the District Court immediately issued a temporary restraining order, and later a permanent injunction that lasted until 1987, prohibiting the approval of any building projects under the 1984 Plan. Thus, the Court of Appeals concluded that the "1984 Plan itself could not have constituted a taking," because it was the injunction, not the Plan, that prohibited development during this period. *Id.,* at 784. The Court of Appeals is correct that the 1984 Plan did not cause petitioners' injury. But that is the right answer to the wrong question. The causation question is not limited to whether the 1984 Plan caused petitioners' injury; the question is whether respondent caused petitioners' injury.

We have never addressed the § 1983 causation requirement in the context of a regulatory takings claim, though language in *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), suggests that ordinary principles of proximate cause

govern the causation inquiry for takings claims. *Id.*, at 124. The causation standard does not require much elaboration in this case, because respondent was undoubtedly the "moving force" behind petitioners' inability to build on their land from August 1984 through 1987. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978) (§ 1983 causation established when government action is the "moving force" behind the alleged constitutional violation). The injunction in this case issued because the 1984 Plan did not comply with the 1980 Tahoe Regional Planning Compact (Compact) and regulations issued pursuant to the Compact. And, of course, respondent is responsible for the Compact and its regulations.

On August 26, 1982, respondent adopted Resolution 82–11. That resolution established "environmental thresholds for water quality, soil conservation, air quality, vegetation preservation, wildlife, fisheries, noise, recreation, and scenic resources." *California* v. *Tahoe Regional Planning Agency*, 766 F. 2d 1308, 1311 (CA9 1985). The District Court enjoined the 1984 Plan in part because the Plan would have allowed 42,000 metric tons of soil per year to erode from some of the single-family residences, in excess of the Resolution 82–11 threshold for soil conservation. *Id.*, at 1315; see also *id.*, at 1312. Another reason the District Court enjoined the 1984 Plan was that it did not comply with article V(g) of the Compact, which requires a finding, "with respect to each project, that the project will not cause the established [environmental] thresholds to be exceeded." *Ibid.* Thus, the District Court enjoined the 1984 Plan because the Plan did not comply with the environmental requirements of respondent's regulations and of the Compact itself.

Respondent is surely responsible for its own regulations, and it is also responsible for the Compact as it is the governmental agency charged with administering the Compact. Compact, Art. I(c), 94 Stat. 3234. It follows that respondent was the "moving force" behind petitioners' inability to de-

velop their land from April 1984 through the enactment of the 1987 plan. Without the environmental thresholds established by the Compact and Resolution 82–11, the 1984 Plan would have gone into effect and petitioners would have been able to build single-family residences. And it was certainly foreseeable that development projects exceeding the environmental thresholds would be prohibited; indeed, that was the very purpose of enacting the thresholds.

Because respondent caused petitioners' inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.

II

I now turn to determining whether a ban on all economic development lasting almost six years is a taking. *Lucas* reaffirmed our "frequently expressed" view that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U. S., at 1019. See also *Agins* v. *City of Tiburon*, 447 U. S. 255, 258–259 (1980). The District Court in this case held that the ordinances and resolutions in effect between August 24, 1981, and April 25, 1984, "did in fact deny the plaintiffs all economically viable use of their land." 34 F. Supp. 2d 1226, 1245 (Nev. 1999). The Court of Appeals did not overturn this finding. And the 1984 injunction, issued because the environmental thresholds issued by respondent did not permit the development of single-family residences, forced petitioners to leave their land economically idle for at least another three years. The Court does not dispute that petitioners were forced to leave their land economically idle during this period. See *ante*, at 312. But the Court refuses to apply *Lucas* on the ground that the deprivation was "temporary."

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between

"temporary" and "permanent" prohibitions is tenuous. The "temporary" prohibition in this case that the Court finds is not a taking lasted almost six years.[2] The "permanent" prohibition that the Court held to be a taking in *Lucas* lasted less than two years. See 505 U. S., at 1011–1012. The "permanent" prohibition in *Lucas* lasted less than two years because the law, as it often does, changed. The South Carolina Legislature in 1990 decided to amend the 1988 Beachfront Management Act to allow the issuance of "'special permits' for the construction or reconstruction of habitable structures seaward of the baseline." *Id.*, at 1011–1012. Land-use regulations are not irrevocable. And the government can even abandon condemned land. See *United States* v. *Dow*, 357 U. S. 17, 26 (1958). Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."

Our opinion in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), rejects any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land. *First English* stated that "'temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent

[2] Even under the Court's mistaken view that the ban on development lasted only 32 months, the ban in this case exceeded the ban in *Lucas*.

takings, for which the Constitution clearly requires compensation." *Id.*, at 318. Because of *First English*'s rule that "temporary deprivations of use are compensable under the Takings Clause," the Court in *Lucas* found nothing problematic about the later developments that potentially made the ban on development temporary. 505 U. S., at 1011–1012 (citing *First English, supra*); see also 505 U. S., at 1033 (KENNEDY, J., concurring in judgment) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones" (citing *First English, supra*, at 318)).

More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U. S., at 1017. The regulation in *Lucas* was the "practical equivalence" of a long-term physical appropriation, *i. e.*, a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is a forced leasehold. For example, assume the following situation: Respondent is contemplating the creation of a National Park around Lake Tahoe to preserve its scenic beauty. Respondent decides to take a 6-year leasehold over petitioners' property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park.

Surely that leasehold would require compensation. In a series of World War II-era cases in which the Government had condemned leasehold interests in order to support the war effort, the Government conceded that it was required

to pay compensation for the leasehold interest.[3] See *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373, 376 (1945). From petitioners' standpoint, what happened in this case is no different than if the government had taken a 6-year lease of their property. The Court ignores this "practical equivalence" between respondent's deprivation and the deprivation resulting from a leasehold. In so doing, the Court allows the government to "do by regulation what it cannot do through eminent domain—i. e., take private property without paying for it." 228 F. 3d 998, 999 (CA9 2000) (Kozinski, J., dissenting from denial of rehearing en banc).

Instead of acknowledging the "practical equivalence" of this case and a condemned leasehold, the Court analogizes to other areas of takings law in which we have distinguished between regulations and physical appropriations, see *ante*, at 321–324. But whatever basis there is for such distinctions in those contexts does not apply when a regulation deprives a landowner of all economically beneficial use of his land. In addition to the "practical equivalence" from the landowner's perspective of such a regulation and a physical appropriation, we have held that a regulation denying all productive use of land does not implicate the traditional justification for differentiating between regulations and physical appropriations. In "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," it is less likely that "the legislature is simply

[3] There was no dispute that just compensation was required in those cases. The disagreement involved how to calculate that compensation. In *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), for example, the issues before the Court were how to value the leasehold interest (*i. e.*, whether the "long-term rental value [should be] the sole measure of the value of such short-term occupancy," *id.*, at 380), whether the Government had to pay for the respondent's removal of personal property from the condemned warehouse, and whether the Government had to pay for the reduction in value of the respondent's equipment and fixtures left in the warehouse. *Id.*, at 380–381.

'adjusting the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned," *Lucas*, *supra*, at 1017–1018 (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U. S., at 124, and *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415), and more likely that the property "is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, *supra*, at 1018.

The Court also reads *Lucas* as being fundamentally concerned with value, *ante*, at 329–331, rather than with the denial of "all economically beneficial or productive use of land," 505 U. S., at 1015. But *Lucas* repeatedly discusses its holding as applying where "*no* productive or economically beneficial use of land is permitted." *Id.*, at 1017; see also *ibid.* ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"); *id.*, at 1016 ("[T]he Fifth Amendment is violated when land-use regulation . . . *denies an owner economically viable use of his land*"); *id.*, at 1018 ("[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses"); *ibid.* ("[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service"); *id.*, at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking"). Moreover, the Court's position that value is the *sine qua non* of the *Lucas* rule proves too much. Surely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition (see *supra*, at 347), that the development ban would be amended.

Lucas is implicated when the government deprives a landowner of "all economically beneficial or productive use of land." 505 U. S., at 1015. The District Court found, and the Court agrees, that the moratorium "temporarily" deprived petitioners of "'all economically viable use of their land.'" *Ante*, at 316. Because the rationale for the *Lucas* rule applies just as strongly in this case, the "temporary" denial of all viable use of land for six years is a taking.

III

The Court worries that applying *Lucas* here compels finding that an array of traditional, short-term, land-use planning devices are takings. *Ante*, at 334–335, 337–338. But since the beginning of our regulatory takings jurisprudence, we have recognized that property rights "are enjoyed under an implied limitation." *Mahon*, *supra*, at 413. Thus, in *Lucas*, after holding that the regulation prohibiting all economically beneficial use of the coastal land came within our categorical takings rule, we nonetheless inquired into whether such a result "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U. S., at 1029. Because the regulation at issue in *Lucas* purported to be permanent, or at least long term, we concluded that the only implied limitation of state property law that could achieve a similar long-term deprivation of all economic use would be something "achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Ibid.*

When a regulation merely delays a final land-use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking. We thus noted in *First English* that our discussion of temporary takings did not apply "in the case

of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U. S., at 321. We reiterated this last Term: "The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 627 (2001). Zoning regulations existed as far back as colonial Boston, see Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 789 (1995), and New York City enacted the first comprehensive zoning ordinance in 1916, see 1 Anderson's American Law of Zoning § 3.07, p. 92 (K. Young rev. 4th ed. 1995). Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations. See *Lucas*, *supra,* at 1034 (KENNEDY, J., concurring in judgment).

But a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law.[4] Moratoria are "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change." 1 E. Ziegler, Rathkopf's The Law of Zoning and

[4] Six years is not a "cutoff point," *ante*, at 338, n. 34; it is the length involved in this case. And the "explanation" for the conclusion that there is a taking in this case is the fact that a 6-year moratorium far exceeds any moratorium authorized under background principles of state property law. See *infra*, at 353–354. This case does not require us to undertake a more exacting study of state property law and discern exactly how long a moratorium must last before it no longer can be considered an implied limitation of property ownership (assuming, that is, that a moratorium on all development is a background principle of state property law, see *infra*, at 353).

Planning § 13:3, p. 13–6 (4th ed. 2001). Typical moratoria thus prohibit only certain categories of development, such as fast-food restaurants, see *Schafer* v. *New Orleans*, 743 F. 2d 1086 (CA5 1984), or adult businesses, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), or all commercial development, see *Arnold Bernhard & Co.* v. *Planning & Zoning Comm'n*, 194 Conn. 152, 479 A. 2d 801 (1984). Such moratoria do not implicate *Lucas* because they do not deprive landowners of all economically beneficial use of their land. As for moratoria that prohibit all development, these do not have the lineage of permit and zoning requirements and thus it is less certain that property is acquired under the "implied limitation" of a moratorium prohibiting all development. Moreover, unlike a permit system in which it is expected that a project will be approved so long as certain conditions are satisfied, a moratorium that prohibits all uses is by definition contemplating a new land-use plan that would prohibit all uses.

But this case does not require us to decide as a categorical matter whether moratoria prohibiting all economic use are an implied limitation of state property law, because the duration of this "moratorium" far exceeds that of ordinary moratoria. As the Court recognizes, *ante*, at 342, n. 37, state statutes authorizing the issuance of moratoria often limit the moratoria's duration. California, where much of the land at issue in this case is located, provides that a moratorium "shall be of no further force and effect 45 days from its date of adoption," and caps extension of the moratorium so that the total duration cannot exceed two years. Cal. Govt. Code Ann. § 65858(a) (West Supp. 2002); see also Minn. Stat. § 462.355, subd. 4 (2000) (limiting moratoria to 18 months, with one permissible extension, for a total of two years). Another State limits moratoria to 120 days, with the possibility of a single 6-month extension. Ore. Rev. Stat. Ann. § 197.520(4) (1997). Others limit moratoria to six

months without any possibility of an extension. See Colo. Rev. Stat. § 30–28–121 (2001); N. J. Stat. Ann. § 40:55D–90(b) (1991).[5] Indeed, it has long been understood that moratoria on development exceeding these short time periods are not a legitimate planning device. See, *e. g.*, *Holdsworth* v. *Hague*, 9 N. J. Misc. 715, 155 A. 892 (1931).

Resolution 83–21 reflected this understanding of the limited duration of moratoria in initially limiting the moratorium in this case to 90 days. But what resulted—a "moratorium" lasting nearly six years—bears no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law.

Because the prohibition on development of nearly six years in this case cannot be said to resemble any "implied limitation" of state property law, it is a taking that requires compensation.

* * *

Lake Tahoe is a national treasure, and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens. Justice Holmes' admonition of 80 years ago again rings true: "We are in danger of forgetting that 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." *Mahon*, 260 U. S., at 416.

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[5] These are just some examples of the state laws limiting the duration of moratoria. There are others. See, *e. g.*, Utah Code Ann. §§ 17–27–404(3)(b)(i)–(ii) (1995) (temporary prohibitions on development "may not exceed six months in duration," with the possibility of extensions for no more than "two additional six-month periods"). See also *ante*, at 337, n. 31.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I join THE CHIEF JUSTICE's dissent. I write separately to address the majority's conclusion that the temporary moratorium at issue here was not a taking because it was not a "taking of 'the parcel as a whole.'" *Ante*, at 332. While this questionable rule* has been applied to various alleged regulatory takings, it was, in my view, rejected in the context of *temporal* deprivations of property by *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 318 (1987), which held that temporary and permanent takings "are not different in kind" when a landowner is deprived of all beneficial use of his land. I had thought that *First English* put to rest the notion that the "relevant denominator" is land's infinite life. Consequently, a regulation effecting a total deprivation of the use of a so-called "temporal slice" of property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking; "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1017 (1992).

A taking is exactly what occurred in this case. No one seriously doubts that the land-use regulations at issue rendered petitioners' land unsusceptible of *any* economically beneficial use. This was true at the inception of the mora-

*The majority's decision to embrace the "parcel as a whole" doctrine as *settled* is puzzling. See, *e. g.*, *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 631 (2001) (noting that the Court has "at times expressed discomfort with the logic of [the parcel as a whole] rule"); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1017, n. 7 (1992) (recognizing that "uncertainty regarding the composition of the denominator in [the Court's] 'deprivation' fraction has produced inconsistent pronouncements by the Court," and that the relevant calculus is a "difficult question").

torium, and it remains true today. These individuals and families were deprived of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased. The Court assures them that "a temporary prohibition on economic use" cannot be a taking because "[l]ogically . . . the property will recover value as soon as the prohibition is lifted." *Ante,* at 332. But the "logical" assurance that a "temporary restriction . . . merely causes a diminution in value," *ibid.*, is cold comfort to the property owners in this case or any other. After all, "*[i]n the long run* we are all dead." J. Keynes, Monetary Reform 88 (1924).

I would hold that regulations prohibiting all productive uses of property are subject to *Lucas' per se* rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the "temporary" moratorium is lifted. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place. It is regrettable that the Court has charted a markedly different path today.

Syllabus

THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* WESTERN STATES MEDICAL CENTER ET AL.

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

No. 01–344. Argued February 26, 2002—Decided April 29, 2002

Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to an individual patient's needs. The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempts "compounded drugs" from the Food and Drug Administration's (FDA) standard drug approval requirements under the Federal Food, Drug, and Cosmetic Act (FDCA), so long as the providers of the compounded drugs abide by several restrictions, including that the prescription be "unsolicited," 21 U. S. C. § 353a(a), and that the providers "not advertise or promote the compounding of any particular drug, class of drug, or type of drug," § 353a(c). Respondents, a group of licensed pharmacies that specialize in compounding drugs, sought to enjoin enforcement of the advertising and solicitation provisions, arguing that they violate the First Amendment's free speech guarantee. The District Court agreed and granted respondents summary judgment, holding that the provisions constitute unconstitutional restrictions on commercial speech under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566. Affirming in relevant part, the Ninth Circuit held that the restrictions in question fail *Central Hudson*'s test because the Government had not demonstrated that the restrictions would directly advance its interests or that alternatives less restrictive of speech were unavailable.

Held: The FDAMA's prohibitions on soliciting prescriptions for, and advertising, compounded drugs amount to unconstitutional restrictions on commercial speech. Pp. 366–377.

(a) For a commercial speech regulation to be constitutionally permissible under the *Central Hudson* test, the speech in question must concern lawful activity and not be misleading, the asserted governmental interest to be served by the regulation must be substantial, and the regulation must "directly advanc[e]" the governmental interest and "not [be] more extensive than is necessary to serve that interest," 447 U. S., at 566. Pp. 366–368.

(b) The Government asserts that three substantial interests underlie the FDAMA: (1) preserving the effectiveness and integrity of the

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FDCA's new drug approval process and the protection of the public health it provides; (2) preserving the availability of compounded drugs for patients who, for particularized medical reasons, cannot use commercially available products approved by the FDA; and (3) achieving the proper balance between those two competing interests. Preserving the new drug approval process is clearly an important governmental interest, as is permitting the continuation of the practice of compounding so that patients with particular needs may obtain medications suited to those needs. Because pharmacists do not make enough money from small-scale compounding to make safety and efficacy testing of their compounded drugs economically feasible, however, it would not make sense to require compounded drugs created to meet the unique needs of individual patients to undergo the entire new drug approval process. The Government therefore needs to be able to draw a line between small-scale compounding and large-scale drug manufacturing. The Government argues that the FDAMA's speech-related provisions provide just such a line: As long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval. However, even assuming that the FDAMA's prohibition on advertising compounded drugs "directly advance[s]" the Government's asserted interests, the Government has failed to demonstrate that the speech restrictions are "not more extensive than is necessary to serve [those] interest[s]." *Central Hudson*, *supra*, at 566. If the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so. *E. g.*, *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 490–491. Several non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible here. For example, the Government could ban the use of commercial scale manufacturing or testing equipment in compounding drug products, prohibit pharmacists from compounding more drugs in anticipation of receiving prescriptions than in response to prescriptions already received, or prohibit them from offering compounded drugs at wholesale to other state licensed persons or commercial entities for resale. The Government has not offered any reason why such possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process. Pp. 368–373.

(c) Even if the Government had argued (as does the dissent) that the FDAMA's speech-related restrictions were motivated by a fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions. This

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concern rests on the questionable assumption that doctors would prescribe unnecessary medications and amounts to a fear that people would make bad decisions if given truthful information, a notion that the Court rejected as a justification for an advertising ban in, *e. g.*, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770. Pp. 373–376.

(d) If the Government's failure to justify its decision to regulate speech were not enough to convince the Court that the FDAMA's advertising provisions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be. Forbidding the advertisement of compounded drugs would prevent pharmacists with no interest in mass-producing medications, but who serve clienteles with special medical needs, from telling the doctors treating those clients about the alternative drugs available through compounding. For example, a pharmacist serving a children's hospital where many patients are unable to swallow pills would be prevented from telling the children's doctors about a new development in compounding that allowed a drug that was previously available only in pill form to be administered another way. The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to directly further any asserted governmental objective confirms that the prohibition is unconstitutional. Pp. 376–377.

238 F. 3d 1090, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, and Thomas, JJ., joined. Thomas, J., filed a concurring opinion, *post*, p. 377. Breyer, J., filed a dissenting opinion, in which Rehnquist, C. J., and Stevens and Ginsburg, JJ., joined, *post*, p. 378.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Matthew D. Roberts*, *Douglas N. Letter*, *Alex M. Azar II*, *Daniel E. Troy*, and *Patricia J. Kaeding*.

Howard M. Hoffmann argued the cause and filed a brief for respondents.*

*Briefs of *amici curiae* urging affirmance were filed for the International Academy of Compounding Pharmacists by *Alan E. Untereiner* and *Arnon D. Siegel;* for the National Community Pharmacists Association by *Kenneth S. Geller* and *John M. Rector;* and for Julian M. Whitaker, M.D., et al. by *Jonathan W. Emord* and *Claudia A. Lewis-Eng*.

Michael H. McConihe filed a brief for the American Pharmaceutical Association as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 127(a) of the Food and Drug Administration Modernization Act of 1997 (FDAMA or Act), 111 Stat. 2328, 21 U. S. C. § 353a, exempts "compounded drugs" from the Food and Drug Administration's standard drug approval requirements as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs. Respondents, a group of licensed pharmacies that specialize in compounding drugs, sought to enjoin enforcement of the subsections of the Act dealing with advertising and solicitation, arguing that those provisions violate the First Amendment's free speech guarantee. The District Court agreed with respondents and granted their motion for summary judgment, holding that the provisions do not meet the test for acceptable government regulation of commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980). The court invalidated the relevant provisions, severing them from the rest of § 127(a).

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, agreeing that the provisions regarding advertisement and promotion are unconstitutional but finding them not to be severable from the rest of § 127(a). Petitioners challenged only the Court of Appeals' constitutional holding in their petition for certiorari, and respondents did not file a cross-petition. We therefore address only the constitutional question, having no occasion to review the Court of Appeals' severability determination. We conclude, as did the courts below, that § 127(a)'s provisions regarding advertisement and promotion amount to unconstitutional restrictions on commercial speech, and we therefore affirm.

I

Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create

a medication tailored to the needs of an individual patient. Compounding is typically used to prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product. It is a traditional component of the practice of pharmacy, see J. Thompson, A Practical Guide to Contemporary Pharmacy Practice 11.3 (1998), and is taught as part of the standard curriculum at most pharmacy schools, see American Council on Pharmaceutical Education, Accreditation Standards and Guidelines for the Professional Program in Pharmacy Leading to the Doctor of Pharmacy Degree, Standard 10(a) (adopted June 14, 1997). Many States specifically regulate compounding practices as part of their regulation of pharmacies. See, *e. g.*, Cal. Code Regs., tit. 16, §§ 1716.2, 1751 (2002); Ind. Admin. Code, tit. 856, §§ 1–30–8, 1–30–18, 1–28–8 (2001); N. H. Code Admin. Rules Ann. Pharmacy, pts. PH 404, PH 702.01 (2002); 22 Tex. Admin. Code § 291.36 (2002). Some require all licensed pharmacies to offer compounding services. See, *e. g.*, 49 Pa. Code § 27.18(p)(2) (2002); W. Va. Code St. Rules, tit. 15, § 19.4 (2002). Pharmacists may provide compounded drugs to patients only upon receipt of a valid prescription from a doctor or other medical practitioner licensed to prescribe medication. See, *e. g.*, Okla. Admin. Code §§ 535:15–10–3, 535:15–10–9(d) (2001); Colo. State Board of Pharmacy Rule 3.02.10 (2001).

The Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), 21 U. S. C. §§ 301–397, regulates drug manufacturing, marketing, and distribution. Section 505(a) of the FDCA, 52 Stat. 1052, as amended, 76 Stat. 784, provides that "[n]o person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed [with the Food and Drug Administration] is effective with respect to such drug." 21 U. S. C. § 355(a). "[N]ew drug" is defined by § 201(p)(1) of the FDCA, 52 Stat. 1041, as amended, 76 Stat. 781, as "[a]ny drug . . . not

generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof." 21 U. S. C. § 321(p). The FDCA invests the Food and Drug Administration (FDA) with the power to enforce its requirements. § 371(a).

For approximately the first 50 years after the enactment of the FDCA, the FDA generally left regulation of compounding to the States. Pharmacists continued to provide patients with compounded drugs without applying for FDA approval of those drugs. The FDA eventually became concerned, however, that some pharmacists were manufacturing and selling drugs under the guise of compounding, thereby avoiding the FDCA's new drug requirements. In 1992, in response to this concern, the FDA issued a Compliance Policy Guide, which announced that the "FDA may, in the exercise of its enforcement discretion, initiate federal enforcement actions . . . when the scope and nature of a pharmacy's activities raises the kinds of concerns normally associated with a manufacturer and . . . results in significant violations of the new drug, adulteration, or misbranding provisions of the Act." Compliance Policy Guide 7132.16 (hereinafter Guide), App. to Pet. for Cert. 76a. The Guide explained that the "FDA recognizes that pharmacists traditionally have extemporaneously compounded and manipulated reasonable quantities of drugs upon receipt of a valid prescription for an individually identified patient from a licensed practitioner," and that such activity was not the subject of the Guide. *Id.*, at 71a. The Guide said, however, "that while retail pharmacies . . . are exempted from certain requirements of the [FDCA], they are not the subject of any general exemption from the new drug, adulteration, or misbranding provisions" of the FDCA. *Id.*, at 72a. It stated that the "FDA believes that an increasing number of establishments with retail pharmacy licenses are engaged in

manufacturing, distributing, and promoting unapproved new drugs for human use in a manner that is clearly outside the bounds of traditional pharmacy practice and that constitute violations of the [FDCA]." *Ibid.* The Guide expressed concern that drug products "manufactured and distributed in commercial amounts without [the] FDA's prior approval" could harm the public health. *Id.*, at 73a.

In light of these considerations, the Guide announced that it was FDA policy to permit pharmacists to compound drugs after receipt of a valid prescription for an individual patient or to compound drugs in "very limited quantities" before receipt of a valid prescription if they could document a history of receiving valid prescriptions "generated solely within an established professional practitioner-patient-pharmacy relationship" and if they maintained the prescription on file as required by state law. *Id.*, at 73a–75a. Compounding in such circumstances was permitted as long as the pharmacy's activities did not raise "the kinds of concerns normally associated with a manufacturer." *Id.*, at 76a. The Guide listed nine examples of activities that the FDA believed raised such concerns and that would therefore be considered by the agency in determining whether to bring an enforcement action. These activities included: "[s]oliciting business (*e. g.*, promoting, advertising, or using salespersons) to compound specific drug products, product classes, or therapeutic classes of drug products"; "[c]ompounding, regularly, or in inordinate amounts, drug products that are commercially available . . . and that are essentially generic copies of commercially available, FDA–approved drug products"; using commercial scale manufacturing or testing equipment to compound drugs; offering compounded drugs at wholesale; and "[d]istributing inordinate amounts of compounded products out of state." *Id.*, at 76a–77a. The Guide further warned that pharmacies could not dispense drugs to third parties for resale to individual patients without losing their status as retail entities. *Id.*, at 75a.

Congress turned portions of this policy into law when it enacted the FDAMA in 1997. The FDAMA, which amends the FDCA, exempts compounded drugs from the FDCA's "new drug" requirements and other requirements provided the drugs satisfy a number of restrictions. First, they must be compounded by a licensed pharmacist or physician in response to a valid prescription for an identified individual patient, or, if prepared before the receipt of such a prescription, they must be made only in "limited quantities" and in response to a history of the licensed pharmacist's or physician's receipt of valid prescription orders for that drug product within an established relationship between the pharmacist, the patient, and the prescriber. 21 U. S. C. § 353a(a). Second, the compounded drug must be made from approved ingredients that meet certain manufacturing and safety standards, §§ 353a(b)(1)(A)–(B), and the compounded drug may not appear on an FDA list of drug products that have been withdrawn or removed from the market because they were found to be unsafe or ineffective, § 353a(b)(1)(C). Third, the pharmacist or physician compounding the drug may not "compound regularly or in inordinate amounts (as defined by the Secretary) any drug products that are essentially copies of a commercially available drug product." § 353a(b)(1)(D). Fourth, the drug product must not be identified by the FDA as a drug product that presents demonstrable difficulties for compounding in terms of safety or effectiveness. § 353a(b)(3)(A). Fifth, in States that have not entered into a "memorandum of understanding" with the FDA addressing the distribution of "inordinate amounts" of compounded drugs in interstate commerce, the pharmacy, pharmacist, or physician compounding the drug may not distribute compounded drugs out of state in quantities exceeding five percent of that entity's total prescription orders. § 353a(b)(3)(B). Finally, and most relevant for this litigation, the prescription must be "unsolicited," § 353a(a), and the pharmacy, licensed pharmacist, or licensed physician

compounding the drug may "not advertise or promote the compounding of any particular drug, class of drug, or type of drug," § 353a(c). The pharmacy, licensed pharmacist, or licensed physician may, however, "advertise and promote the compounding service." *Ibid.*

Respondents are a group of licensed pharmacies that specialize in drug compounding. They have prepared promotional materials that they distribute by mail and at medical conferences to inform patients and physicians of the use and effectiveness of specific compounded drugs. Fearing that they would be prosecuted under the FDAMA if they continued to distribute those materials, respondents filed a complaint in the United States District Court for the District of Nevada, arguing that the Act's requirement that they refrain from advertising and promoting their products if they wish to continue compounding violates the Free Speech Clause of the First Amendment. Specifically, they challenged the requirement that prescriptions for compounded drugs be "unsolicited," 21 U. S. C. § 353a(a), and the requirement that pharmacists "not advertise or promote the compounding of any particular drug, class of drug, or type of drug," § 353a(c). The District Court granted summary judgment to respondents, finding that the FDAMA's speech-related provisions constitute unconstitutional restrictions on commercial speech under *Central Hudson*, 447 U. S., at 566, and that their enforcement should therefore be enjoined. *Western States Medical Center* v. *Shalala*, 69 F. Supp. 2d 1288 (Nev. 1999). The District Court, however, found those provisions to be severable from the rest of § 127(a) of the FDAMA, 21 U. S. C. § 353a, and so left the Act's other compounding requirements intact.

The Government appealed both the holding that the speech-related provisions were unconstitutional and the holding that those provisions were severable from the rest of § 127(a). The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. *Western States Med-*

ical Center v. *Shalala,* 238 F. 3d 1090 (2001). The Court of Appeals agreed that the FDAMA's advertisement and solicitation restrictions fail *Central Hudson*'s test for permissible regulation of commercial speech, finding that the Government had not demonstrated that the speech restrictions would directly advance its interests or that alternatives less restrictive of speech were unavailable. The Court of Appeals disagreed, however, that the speech-related restrictions were severable from the rest of § 127(a), 21 U. S. C. § 353a, explaining that the FDAMA's legislative history demonstrated that Congress intended to exempt compounding from the FDCA's requirements only in return for a prohibition on promotion of specific compounded drugs. Accordingly, the Court of Appeals invalidated § 127(a) in its entirety.

We granted certiorari, 534 U. S. 992 (2001), to consider whether the FDAMA's prohibitions on soliciting prescriptions for, and advertising, compounded drugs violate the First Amendment. Because neither party petitioned for certiorari on the severability issue, we have no occasion to review that portion of the Court of Appeals' decision. Likewise, the provisions of the FDAMA outside § 127(a), which are unrelated to drug compounding, are not an issue here and so remain unaffected.

II

The parties agree that the advertising and soliciting prohibited by the FDAMA constitute commercial speech. In *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), the first case in which we explicitly held that commercial speech receives First Amendment protection, we explained the reasons for this protection: "It is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable." *Id.*, at 765. Indeed, we recognized that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than

his interest in the day's most urgent political debate." *Id.*, at 763. We have further emphasized:

> "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *Edenfield* v. *Fane*, 507 U. S. 761, 767 (1993).

Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional. See *Virginia Bd. of Pharmacy*, *supra*, at 770. In *Central Hudson*, *supra*, we articulated a test for determining whether a particular commercial speech regulation is constitutionally permissible. Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." *Id.*, at 566. If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." *Ibid.* Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

Neither party has challenged the appropriateness of applying the *Central Hudson* framework to the speech-related provisions at issue here. Although several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases, see, *e. g.*, *Greater New Orleans Broadcasting Assn., Inc.* v.

United States, 527 U. S. 173, 197 (1999) (THOMAS, J., concurring in judgment); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501, 510–514 (1996) (opinion of STEVENS, J., joined by KENNEDY and GINSBURG, JJ.); *id.*, at 517 (SCALIA, J., concurring in part and concurring in judgment); *id.*, at 518 (THOMAS, J., concurring in part and concurring in judgment), there is no need in this case to break new ground. "'*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.'" *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 554–555 (2001) (quoting *Greater New Orleans*, *supra*, at 184).

III

The Government does not attempt to defend the FDAMA's speech-related provisions under the first prong of the *Central Hudson* test; *i. e.*, it does not argue that the prohibited advertisements would be about unlawful activity or would be misleading. Instead, the Government argues that the FDAMA satisfies the remaining three prongs of the *Central Hudson* test.

The Government asserts that three substantial interests underlie the FDAMA. The first is an interest in "preserv[ing] the effectiveness and integrity of the FDCA's new drug approval process and the protection of the public health that it provides." Brief for Petitioners 19. The second is an interest in "preserv[ing] the availability of compounded drugs for those individual patients who, for particularized medical reasons, cannot use commercially available products that have been approved by the FDA." *Id.*, at 19–20. Finally, the Government argues that "[a]chieving the proper balance between those two independently compelling but competing interests is itself a substantial governmental interest." *Id.*, at 20.

Explaining these interests, the Government argues that the FDCA's new drug approval requirements are critical to the public health and safety. It claims that the FDA's

experience with drug regulation demonstrates that proof of the safety and effectiveness of a new drug needs to be established by rigorous, scientifically valid clinical studies because impressions of individual doctors, who cannot themselves compile sufficient safety data, cannot be relied upon. The Government also argues that a premarket approval process, under which manufacturers are required to put their proposed drugs through tests of safety and effectiveness in order to obtain FDA approval to market the drugs, is the best way to guarantee drug safety and effectiveness.

While it praises the FDCA's new drug approval process, the Government also acknowledges that "because obtaining FDA approval for a new drug is a costly process, requiring FDA approval of all drug products compounded by pharmacies for the particular needs of an individual patient would, as a practical matter, eliminate the practice of compounding, and thereby eliminate availability of compounded drugs for those patients who have no alternative treatment." *Id.*, at 26. The Government argues that eliminating the practice of compounding drugs for individual patients would be undesirable because compounding is sometimes critical to the care of patients with drug allergies, patients who cannot tolerate particular drug delivery systems, and patients requiring special drug dosages.

Preserving the effectiveness and integrity of the FDCA's new drug approval process is clearly an important governmental interest, and the Government has every reason to want as many drugs as possible to be subject to that approval process. The Government also has an important interest, however, in permitting the continuation of the practice of compounding so that patients with particular needs may obtain medications suited to those needs. And it would not make sense to require compounded drugs created to meet the unique needs of individual patients to undergo the testing required for the new drug approval process. Pharmacists do not make enough money from

small-scale compounding to make safety and efficacy testing of their compounded drugs economically feasible, so requiring such testing would force pharmacists to stop providing compounded drugs. Given this, the Government needs to be able to draw a line between small-scale compounding and large-scale drug manufacturing. That line must distinguish compounded drugs produced on such a small scale that they could not undergo safety and efficacy testing from drugs produced and sold on a large enough scale that they could undergo such testing and therefore must do so.

The Government argues that the FDAMA's speech-related provisions provide just such a line, *i. e.*, that, in the terms of *Central Hudson*, they "directly advanc[e] the governmental interest[s] asserted." 447 U. S., at 566. Those provisions use advertising as the trigger for requiring FDA approval—essentially, as long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval. If they advertise their compounded drugs, however, FDA approval is required. The Government explains that traditional (or, in its view, desirable) compounding responds to a physician's prescription and an individual patient's particular medical situation, and that "[a]dvertising the particular products created in the provision of [such] service (as opposed to advertising the compounding service itself) is not necessary to . . . this type of responsive and customized service." Brief for Petitioners 34. The Government argues that advertising particular products is useful in a broad market but is not useful when particular products are designed in response to an individual's "often unique need[s]." *Ibid.* The Government contends that, because of this, advertising is not typically associated with compounding for particular individuals. In contrast it is typically associated, the Government claims, with large-scale production of a drug for a substantial market. The Government argues that advertis-

ing, therefore, is "a fair proxy for actual or intended large-scale manufacturing," and that Congress' decision to limit the FDAMA's compounding exemption to pharmacies that do not engage in promotional activity was "rationally calculated" to avoid creating "'a loophole that would allow unregulated drug manufacturing to occur under the guise of pharmacy compounding.'" *Id.*, at 35 (quoting 143 Cong. Rec. S9839 (Sept. 24, 1997) (statement of Sen. Kennedy)).

The Government seems to believe that without advertising it would not be possible to market a drug on a large enough scale to make safety and efficacy testing economically feasible. The Government thus believes that conditioning an exemption from the FDA approval process on refraining from advertising is an ideal way to permit compounding and yet also guarantee that compounding is not conducted on such a scale as to undermine the FDA approval process. Assuming it is true that drugs cannot be marketed on a large scale without advertising, the FDAMA's prohibition on advertising compounded drugs might indeed "directly advanc[e]" the Government's interests. *Central Hudson*, 447 U. S., at 566. Even assuming that it does, however, the Government has failed to demonstrate that the speech restrictions are "not more extensive than is necessary to serve [those] interest[s]." *Ibid.* In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so. In *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476 (1995), for example, we found a law prohibiting beer labels from displaying alcohol content to be unconstitutional in part because of the availability of alternatives "such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . , or limiting the labeling ban only to malt liquors." *Id.*, at 490–491. The fact that "all of [these alternatives] could advance the Government's asserted inter-

est in a manner less intrusive to . . . First Amendment rights" indicated that the law was "more extensive than necessary." *Id.*, at 491. See also *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S., at 507 (plurality opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance").

Several non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible here. First, it seems that the Government could use the very factors the FDA relied on to distinguish compounding from manufacturing in its 1992 Guide. For example, the Government could ban the use of "commercial scale manufacturing or testing equipment for compounding drug products." Guide, App. to Pet. for Cert. 76a. It could prohibit pharmacists from compounding more drugs in anticipation of receiving prescriptions than in response to prescriptions already received. See *ibid.* It could prohibit pharmacists from "[o]ffering compounded drug products at wholesale to other state licensed persons or commercial entities for resale." *Id.*, at 77a. Alternately, it could limit the amount of compounded drugs, either by volume or by numbers of prescriptions, that a given pharmacist or pharmacy sells out of state. See *ibid.* Another possibility not suggested by the Guide would be capping the amount of any particular compounded drug, either by drug volume, number of prescriptions, gross revenue, or profit that a pharmacist or pharmacy may make or sell in a given period of time. It might even be sufficient to rely solely on the non-speech-related provisions of the FDAMA, such as the requirement that compounding only be conducted in response to a prescription or a history of receiving a prescription, 21 U. S. C. § 353a(a), and the limitation on the percentage of a pharmacy's total sales that out-of-state sales of compounded drugs may represent, § 353a(b)(3)(B).

The Government has not offered any reason why these possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process. Indeed, there is no hint that the Government even considered these or any other alternatives. Nowhere in the legislative history of the FDAMA or petitioners' briefs is there any explanation of why the Government believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests. Yet "[i]t is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield* v. *Fane*, 507 U. S., at 770 (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 71, n. 20 (1983)). The Government simply has not provided sufficient justification here. If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.

The dissent describes another governmental interest—an interest in prohibiting the sale of compounded drugs to "patients who may not clearly need them," *post*, at 379 (opinion of BREYER, J.)—and argues that "Congress could . . . conclude that the advertising restrictions 'directly advance'" that interest, *post*, at 384. Nowhere in its briefs, however, does the Government argue that this interest motivated the advertising ban. Although, for the reasons given by the dissent, Congress conceivably could have enacted the advertising ban to advance this interest, we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational. See L. Tribe, American Constitutional Law 1444–1446 (2d ed. 1988) (describing the "rational basis" or "conceivable basis" test); see also, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981) (sustaining a milk packaging regulation under the "rational basis" test

because "the Minnesota Legislature could rationally have decided that [the regulation] might foster greater use of environmentally desirable alternatives" (emphasis deleted)). The *Central Hudson* test is significantly stricter than the rational basis test, however, requiring the Government not only to identify specifically "a substantial interest to be achieved by [the] restrictio[n] on commercial speech," 447 U. S., at 564, but also to prove that the regulation "directly advances" that interest and is "not more extensive than is necessary to serve that interest," *id.*, at 566. The Government has not met any of these requirements with regard to the interest the dissent describes.

Even if the Government had argued that the FDAMA's speech-related restrictions were motivated by a fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions. Aside from the fact that this concern rests on the questionable assumption that doctors would prescribe unnecessary medications (an assumption the dissent is willing to make based on one magazine article and one survey, *post,* at 383–384, neither of which was relied upon by the Government), this concern amounts to a fear that people would make bad decisions if given truthful information about compounded drugs. See *supra,* at 368 (explaining that the Government does not claim the advertisements forbidden by the FDAMA would be false or misleading). We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information. In *Virginia Bd. of Pharmacy,* the State feared that if people received price advertising from pharmacists, they would "choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business" and would "destroy the pharmacist-customer relationship" by going from one

pharmacist to another. We found these fears insufficient to justify a ban on such advertising. 425 U. S., at 769. We explained:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*, at 770 (citation omitted).

See also *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S., at 503 ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. . . . The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good" (citation omitted)).

Even if the Government had asserted an interest in preventing people who do not need compounded drugs from obtaining those drugs, the statute does not directly advance that interest. The dissent claims that the Government "must exclude from the area of permitted drug sales . . . those compounded drugs sought by patients who may not

clearly need them." *Post*, at 379. Yet the statute does not directly forbid such sales. It instead restricts advertising, of course not just to those who do not need compounded drugs, but also to individuals who do need compounded drugs and their doctors. Although the advertising ban may reduce the demand for compounded drugs from those who do not need the drugs, it does nothing to prevent such individuals from obtaining compounded drugs other than requiring prescriptions. But if it is appropriate for the statute to rely on doctors to refrain from prescribing compounded drugs to patients who do not need them, it is not clear why it would not also be appropriate to rely on doctors to refrain from prescribing compounded drugs to patients who do not need them in a world where advertising was permitted.

The dissent may also be suggesting that the Government has an interest in banning the advertising of compounded drugs because patients who see such advertisements will be confused about the drugs' risks. See *post*, at 387 ("[The Government] fears the systematic effect . . . of advertisements that will not fully explain the complicated risks at issue"). This argument is precluded, however, by the fact that the Government does not argue that the advertisements are misleading. Even if the Government did argue that it had an interest in preventing misleading advertisements, this interest could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown.

If the Government's failure to justify its decision to regulate speech were not enough to convince us that the FDAMA's advertising provisions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be. Forbidding the advertisement of compounded drugs would affect pharmacists other than those interested in producing drugs on a large scale. It would prevent pharmacists

with no interest in mass-producing medications, but who serve clienteles with special medical needs, from telling the doctors treating those clients about the alternative drugs available through compounding. For example, a pharmacist serving a children's hospital where many patients are unable to swallow pills would be prevented from telling the children's doctors about a new development in compounding that allowed a drug that was previously available only in pill form to be administered another way. Forbidding advertising of particular compounded drugs would also prohibit a pharmacist from posting a notice informing customers that if their children refuse to take medications because of the taste, the pharmacist could change the flavor, and giving examples of medications where flavoring is possible. The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to directly further any asserted governmental objective confirms our belief that the prohibition is unconstitutional.

Accordingly, we affirm the Court of Appeals' judgment that the speech-related provisions of FDAMA § 127(a) are unconstitutional.

So ordered.

JUSTICE THOMAS, concurring.

I concur because I agree with the Court's application of the test set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). I continue, however, to adhere to my view that cases such as this should not be analyzed under the *Central Hudson* test. "I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 523 (1996) (opinion concurring in part and concurring in judgment).

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE GINSBURG join, dissenting.

Federal law requires strict safety and efficacy testing of all "new" prescription "drugs." 21 U. S. C. § 355. See 21 CFR § 310.3(h) (2002) (defining "new drug" broadly). This testing process requires for every "new drug" a preclinical investigation and three separate clinical tests, including small, controlled studies of healthy and diseased humans as well as scientific double-blind studies designed to identify any possible health risk or side effect associated with the new drug. Practical Guide to Food and Drug Law and Regulation 95–102 (K. Piña & W. Pines eds. 1998). The objective of this elaborate and time-consuming regulatory regime is to identify those health risks—both large and small—that a doctor or pharmacist might not otherwise notice.

At the same time, the law exempts from its testing requirements prescription drugs produced through "compounding"—a process "by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient." *Ante*, at 360–361. The exemption is available, however, only if the pharmacist meets certain specified conditions, including the condition that the pharmacist not "advertise or promote the compounding of any *particular* drug." 21 U. S. C. § 353a(c) (emphasis added).

The Court holds that this condition restricts "commercial speech" in violation of the First Amendment. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 564 (1980). It concedes that the statutory provision tries to "[p]reserv[e] the effectiveness and integrity of the . . . new drug approval process," *ante*, at 369, and it assumes without deciding that the statute might "'directly advance'" that interest, *ante*, at 371. It nonetheless finds the statute unconstitutional because it could advance that interest in other, less restrictive ways. *Ante*, at 372–373. I disagree with this conclusion, and I believe that the Court

seriously undervalues the importance of the Government's interest in protecting the health and safety of the American public.

I

In my view, the advertising restriction "directly advances" the statute's important safety objective. That objective, as the Court concedes, is to confine the sale of untested, compounded, drugs to where they are medically needed. But to do so the statute must exclude from the area of permitted drug sales *both* (1) those drugs that traditional drug manufacturers might supply after testing—typically drugs capable of being produced in large amounts, *and* (2) those compounded drugs sought by patients who may not clearly need them—including compounded drugs produced in small amounts.

The majority's discussion focuses upon the first exclusionary need, but it virtually ignores the second. It describes the statute's objective simply as drawing a "line" that will "*distinguish* compounded drugs produced on such a *small scale* that they could not undergo safety and efficacy testing *from* drugs produced and sold on a *large* enough *scale* that they could undergo such testing and therefore must do so." *Ante*, at 370 (emphasis added). This description overlooks the need for a second line—a line that will *distinguish* (1) sales of compounded drugs to those who clearly need them from (2) sales of compounded drugs to those for whom a specially tailored but untested drug is a convenience but not a medical necessity. That is to say, the statute, in seeking to confine distribution of untested tailored drugs, must look both at the amount supplied (to help decide whether ordinary manufacturers might provide a tested alternative) and at the nature of demand (to help separate genuine need from simple convenience). Cf. 143 Cong. Rec. S9840 (Sept. 24, 1997) (remarks of Sen. Kennedy) (understanding that "some of the conditions are intended to ensure that the volume of compounding does not approach that ordinarily asso-

ciated with drug manufacturing" while others are "intended to ensure that the compounded drugs that qualify for the exemption have appropriate assurances of quality and safety since [they] would not be subject to the more comprehensive regulatory requirements that apply to manufactured drug products").

This second intermediate objective is logically related to Congress' primary end—the minimizing of safety risks. The statute's basic exemption from testing requirements inherently creates risks simply by placing untested drugs in the hands of the consumer. Where an individual has a specific medical need for a specially tailored drug those risks are likely offset. But where an untested drug is a convenience, not a necessity, that offset is unlikely to be present.

That presumably is why neither the Food and Drug Administration (FDA) nor Congress anywhere suggests that all that matters is the total *amount* of a particular drug's sales. That is why the statute's history suggests that the amount supplied is not the whole story. See S. Rep. No. 105–43, p. 67 (1997) (statute seeks to assure "continued availability of compounded drug products as a component of *individualized* therapy, . . . while . . . prevent[ing] *small-scale* manufacturing under the guise of compounding" (emphasis added)); accord, H. R. Conf. Rep. No. 105–399, p. 94 (1997). That is why the statute itself, as well as the FDA policy that the statute reflects, lists several distinguishing factors, of which advertising is one. See FDA Compliance Policy Guide 7132.16, reprinted in App. to Pet. for Cert. 71a–77a (hereinafter Compliance Policy Guide). And that is likely why, when faced with the possibility of severing the advertising restriction from the rest of the statute, the Government argued that the "other conditions in section 353a alone are inadequate to achieve Congress's desired balance among competing interests." See Brief for Appellants in No. 99–17424 (CA9), p. 57. See also *id.*, at 55 (to nullify advertising restrictions would undermine " 'finely tuned balance' " achieved

by requiring that "pharmacies refrain from promoting and soliciting prescriptions for particular compounded drug products until they have been proven safe and effective").

Ensuring that the risks associated with compounded drug prescriptions are offset by the benefits is also why public health authorities, testifying in Congress, insisted that the doctor's prescription represent an *individualized* determination of need. See, *e. g.*, FDA Reform Legislation: Hearings before the Subcommittee on Health and the Environment of the House Committee on Commerce, 104th Cong., 2d Sess., 120 (1996) (hereinafter FDA Reform Legislation) (statement of Mary K. Pendergast, Deputy Commissioner of the FDA and Senior Advisor to the Commissioner) (Allowing traditional compounding is "good medicine" because "an individual physician" was making "an individualized determination for a patient"). See also National Association of Boards of Pharmacy, Model State Pharmacy Act and Rules, Art. I, § 1.05(e) (1996) (hereinafter NABP Model Act) (defining "[c]ompounding" as involving a prescription "based on the Practitioner/patient/Pharmacist relationship in the course of professional practice").

And that, in part, is why federal and state authorities have long permitted pharmacists to advertise the fact that they compound drugs, while forbidding the advertisement of individual compounds. See Compliance Policy Guide 76a; Good Compounding Practices Applicable to State Licensed Pharmacies, NABP Model Act, App. C.2, subpart A (forbidding pharmacists to "solicit business (*e. g.*, promote, advertise, or use salespersons) to compound specific drug products"). The definitions of drug manufacturing and compounding used by the NABP and at least 13 States reflect similar distinctions. NABP Model Act, Art. I, §§ 105(e), (t), and (u) (defining drug manufacturing to "include the promotion and marketing of such drugs or devices" but excluding any reference to promotion or marketing from the definition of drug compounding); Alaska Stat. §§ 08.80.480(3) and (15) (2000)

(same); La. Stat. Ann. §§37:1164(5) and (25) (West 2000) (same); Miss. Code Ann. §§73–21–73(c) and (s) (Lexis 1973–2000) (same); Mont. Code Ann. §37–7–101(7) (1997) (same); N. H. Rev. Stat. Ann. §§318–1(III) and (VIII) (Supp. 2001) (same); N. M. Stat. Ann. §§61–11–2(C) and (Q) (2001) (same); Ohio Rev. Code Ann. §3715.01(14) (West Supp. 2002) (same); Okla. Stat., Tit. 59, §§353.1(20) and (26) (Supp. 2002) (same); S. C. Code Ann. §§40–43–30(7) and (29) (2001) (same); Tenn. Code Ann. §§63–10–404(4) and (18) (1997) (same); Tex. Occ. Code Ann. §§551.003(9) and (23) (2002 Pamphlet) (same); W. Va. Code §§30–5–1b(c) and (o) (1966–1998) (same).

These policies and statutory provisions reflect the view that individualized consideration is more likely present, and convenience alone is more likely absent, when demand for a compounding prescription originates with a doctor, not an advertisement. The restrictions try to assure that demand is generated doctor-to-patient-to-pharmacist, not pharmacist-to-advertisement-to-patient-to-doctor. And they do so in order to diminish the likelihood that those who do not genuinely need untested compounded drugs will not receive them.

There is considerable evidence that the relevant means—the advertising restrictions—directly advance this statutory objective. No one denies that the FDA's complex testing system for new drugs—a system that typically relies upon double-blind or other scientific studies—is more likely to find, and to assess, small safety risks than are physicians or pharmacists relying upon impressions and anecdotes. See *supra*, at 378.

Nor can anyone deny that compounded drugs carry with them special risks. After all, compounding is not necessarily a matter of changing a drug's flavor, cf. *ante*, at 377, but rather it is a matter of combining different ingredients in new, untested ways, say, adding a pain medication to an antihistamine to counteract allergies or increasing the ratio of approved ingredients in a salve to help the body absorb it

at a faster rate. And the risks associated with the untested combination of ingredients or the quicker absorption rate or the working conditions necessary to change an old drug into its new form can, for some patients, mean infection, serious side effects, or even death. See, *e. g.*, J. Thompson, A Practical Guide to Contemporary Pharmacy Practice 11.5 (1998) (hereinafter Contemporary Pharmacy Practice). Cf. 21 CFR § 310.3(h)(1) (2002) (considering a drug to be "new" and subject to the approval process if the "substance which composes such drug" is new); § 310.3(h)(3) (considering a drug to be "new" and subject to the approval process if approved ingredients are combined in new proportions).

There is considerable evidence that consumer oriented advertising will create strong consumer-driven demand for a particular drug. See, *e. g.*, National Institute for Health Care Management, Factors Affecting the Growth of Prescription Drug Expenditures iii (July 9, 1999) (three antihistamine manufacturers spent $313 million on advertising in 1998 and accounted for 90% of prescription drug antihistamine market); Kritz, Ask Your Doctor About . . . Which of the Many Advertised Allergy Drugs Are Right for You? Washington Post, June 6, 2000, Health, p. 9 (The manufacturer of the world's top selling allergy drug, the eighth best-selling drug in the United States, spent almost $140 million in 1999 on advertising); 1999 Prevention Magazine 10 (spending on direct-to-consumer advertising of prescription medicine increased from $965.2 million in 1997 to $1.33 billion in 1998).

And there is strong evidence that doctors will often respond affirmatively to a patient's request for a specific drug that the patient has seen advertised. See *id.*, at 32 (84% of consumers polled report that doctors accommodate their request for a specific drug); Henry J. Kaiser Family Foundation, Understanding the Effects of Direct-to-Consumer Prescription Drug Advertising 3 (Nov. 2001) (A foundation survey found that more than one in eight Americans had asked

for—and received—a specific prescription from their doctor in response to an advertisement).

In these circumstances, Congress could reasonably conclude that doctors will respond affirmatively to a patient's request for a compounded drug even if the doctor would not normally prescribe it. When a parent learns that a child's pill can be administered in liquid form, when a patient learns that a compounded skin cream has an enhanced penetration rate, or when an allergy sufferer learns that a compounded antiinflammatory/allergy medication can alleviate a sinus headache without the sedative effects of antihistamines, that parent or patient may well ask for the desired prescription. And the doctor may well write the prescription even in the absence of special need—at least if any risk likely to arise from lack of testing is so small that only *scientific testing*, not anecdote or experience, would reveal it. It is consequently not surprising that 71% of the active members of the American Academy of Family Physicians "believe that direct-to-consumer advertising pressures physicians into prescribing drugs that they would not ordinarily prescribe." Rosenthal, Berndt, Donohue, Frank, & Epstein, Promotion of Prescription Drugs to Consumers, 346 New Eng. J. Med. 498–505 (2002) (citing Lipsky, The Opinions and Experiences of Family Physicians Regarding Direct-To-Consumer Advertising, 45 J. Fam. Pract. 495–499 (1997)).

Of course, the added risks in any such individual case may be small. But those individual risks added together can significantly affect the public health. At least, the FDA and Congress could reasonably reach that conclusion. And that fact, along with the absence of any significant evidence that the advertising restrictions have prevented doctors from learning about, or obtaining, compounded drugs, means that the FDA and Congress could also conclude that the advertising restrictions "directly advance" the statute's safety goal. They help to assure that demand for an untested compounded drug originates with the doctor, responding to an

individual's special medical needs; they thereby help to restrict the untested drug's distribution to those most likely to need it; and they thereby advance the statute's safety goals. There is no reason for this Court, as a matter of constitutional law, to reach a different conclusion.

II

I do not believe that Congress could have achieved its safety objectives in significantly less restrictive ways. Consider the several alternatives the Court suggests. First, it says that "the Government could ban the use of 'commercial scale manufacturing or testing equipment for compounding drug products.'" *Ante,* at 372. This alternative simply restricts compounding to drugs produced in small batches. It would neither limit the total quantity of compounded drugs produced, nor help in any way to assure the kind of individualized doctor-patient need determination that the statute's advertising restriction are designed to help achieve.

Second, the Court says that the Government "could prohibit pharmacists from compounding more drugs in anticipation of receiving prescriptions than in response to prescriptions already received." *Ibid.* This alternative, while addressing the issue of quantity, does virtually nothing to promote the second, need-related statutory objective.

Third, the Court says the Government "could prohibit pharmacists from '[o]ffering compounded drug products at wholesale to other state licensed persons or commercial entities for resale." *Ibid.* This alternative is open to the same objection.

Fourth, the Court says the Government "could limit the amount of compounded drugs, either by volume or by numbers of prescriptions, that a given pharmacist or pharmacy sells out of state." *Ibid.* This alternative, applying only to out-of-state sales, would not significantly restrict sales, either in respect to amounts or in respect to patient need.

In fact, it could prevent compounded drugs from reaching out-of-state patients who genuinely need them.

Fifth, the Court says that the Government could "ca[p] the amount of any particular compounded drug, either by drug volume, number of prescriptions, gross revenue, or profit." *Ibid.* This alternative, like the others, ignores the patient-need problem, while simultaneously threatening to prevent compounded drugs from reaching those who genuinely need them, say, a patient whose prescription represents one beyond the arbitrarily imposed quantitative limit.

Sixth, the Court says that the Government could rely upon "non-speech-related provisions of the FDAMA, such as the requirement that compounding only be conducted in response to a prescription." *Ibid.* This alternative also ignores the patient-need problem and was specifically rejected by the Government in the Court of Appeals for the Ninth Circuit. See *supra*, at 380–381.

The Court adds that "[t]he Government has not offered any reason why these possibilities, alone or in combination, would be insufficient." *Ante*, at 373. The Government's failure to do so may reflect the fact that only the Court, not any of the respondents, has here suggested that these "alternatives," alone or in combination, would prove sufficient. In fact, the FDA's Compliance Policy Guide, from which the Court draws its first four alternatives, specifically warned that these alternatives alone were insufficient to successfully distinguish traditional compounding from unacceptable manufacturing. See Compliance Policy Guide 77a.

III

The Court responds to the claim that advertising compounded drugs causes people to obtain drugs that do not promote their health, by finding it implausible given the need for a prescription and by suggesting that it is not relevant. The First Amendment, it says, does not permit the Government to control the content of advertising, where

doing so flows from "fear" that "people would make bad decisions if given truthful information about compounded drugs." *Ante*, at 374. This response, however, does not fully explain the Government's regulatory rationale; it fails to take account of considerations that make the claim more than plausible (if properly stated); and it is inconsistent with this Court's interpretation of the Constitution.

It is an oversimplification to say that the Government "fear[s]" that doctors or patients "would make bad decisions if given truthful information." *Ibid.* Rather, the Government fears the safety consequences of multiple compound-drug prescription decisions initiated not by doctors but by pharmacist-to-patient advertising. Those consequences flow from the adverse cumulative effects of multiple individual decisions each of which may seem perfectly reasonable considered on its own. The Government fears that, taken together, these apparently rational individual decisions will undermine the safety testing system, thereby producing overall a net balance of harm. See, *e. g.*, FDA Reform Legislation 121 (statement of David A. Kessler, Commissioner of the FDA) (voicing concerns about "quality controls" and the integrity of the drug-testing system). Consequently, the Government leaves pharmacists free to explain through advertisements what compounding is, to advertise that they engage in compounding, and to advise patients to discuss the matter with their physicians. And it forbids advertising the specific drug in question, not because it fears the "information" the advertisement provides, but because it fears the systematic effect, insofar as advertisements solicit business, of advertisements that will not fully explain the complicated risks at issue. And this latter fear is more than plausible. See Part I, *supra*.

I do not deny that the statute restricts the circulation of some truthful information. It prevents a pharmacist from including in an advertisement the information that "this pharmacy will compound Drug X." Nonetheless, this Court

has not previously held that commercial advertising restrictions automatically violate the First Amendment. Rather, the Court has applied a more flexible test. It has examined the restriction's proportionality, the relation between restriction and objective, the fit between ends and means. In doing so, the Court has asked whether the regulation of commercial speech "directly advances" a "substantial" governmental objective and whether it is "more extensive than is necessary" to achieve those ends. See *Central Hudson*, 447 U. S., at 566. It has done so because it has concluded that, from a constitutional perspective, commercial speech does not warrant application of the Court's strictest speech-protective tests. And it has reached this conclusion in part because restrictions on commercial speech do not often repress individual self-expression; they rarely interfere with the functioning of democratic political processes; and they often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment. See, *e. g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 499 (1996) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions"); L. Tribe, American Constitutional Law § 12–15, p. 903 (2d ed. 1988) ("[C]ommercial speech doctrine" seeks to accommodate "the right to speak and hear expression *about* goods and services" with "the right of government to regulate the sales *of* such goods and services" (emphasis in original)).

I have explained why I believe the statute satisfies this more flexible test. See Parts I and II, *supra.* The Court, in my view, gives insufficient weight to the Government's regulatory rationale, and too readily assumes the existence of practical alternatives. It thereby applies the commercial speech doctrine too strictly. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 349 (2001) (flexibility necessary

if FDA is to "pursu[e] difficult (and often competing) objectives"). See also *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (Blackmun, J., concurring) (warning against overly demanding search for less restrictive alternatives).

In my view, the Constitution demands a more lenient application, an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech, and which, in particular, clearly distinguishes between "commercial speech" and other forms of speech demanding stricter constitutional protection. Otherwise, an overly rigid "commercial speech" doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections. As history in respect to the Due Process Clause shows, any such transformation would involve a tragic constitutional misunderstanding. See *id.*, at 189 (Blackmun, J., concurring).

IV

Finally, the majority would hold the statute unconstitutional because it prohibits pharmacists from advertising compounded drugs to doctors. *Ante*, at 376–377. Doctors, however, obtain information about individual drugs through many other channels. And there is no indication that restrictions on commercial advertising have had any negative effect on the flow of this information. See *e. g.*, Contemporary Pharmacy Practice 11.4 (compounded drug information "available" and "widely disseminated" through books, journals, monographs, and vendors). Nor, with one exception, have doctors or groups of doctors complained that the statute will interfere with that flow of information in the future. But see Brief for Julian M. Whitaker, M.D., et al. as *Amici Curiae* 1 (alleging, without evidentiary support, that the regulations prevent doctors from knowing how to

get "competitively priced compounded drugs as efficiently as possble").

Regardless, we here consider a facial attack on the statute. The respondents here focus their attack almost entirely upon consumer-directed advertising. They have not fully addressed separate questions involving the effect of advertising restrictions on information received by physicians. I would consequently leave these questions in abeyance. Considering the statute only insofar as it applies to advertising directed at consumers, I would hold it constitutional.

For these reasons, I dissent.

Syllabus

US AIRWAYS, INC. *v.* BARNETT

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

No. 00–1250. Argued December 4, 2001—Decided April 29, 2002

After respondent Barnett injured his back while a cargo handler for petitioner US Airways, Inc., he transferred to a less physically demanding mailroom position. His new position later became open to seniority-based employee bidding under US Airways' seniority system, and employees senior to him planned to bid on the job. US Airways refused his request to accommodate his disability by allowing him to remain in the mailroom, and he lost his job. He then filed suit under the Americans with Disabilities Act of 1990 (ADA or Act), which prohibits an employer from discriminating against "an individual with a disability" who with "reasonable accommodation" can perform a job's essential functions, 42 U. S. C. §§ 12112(a) and (b), unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business," § 12112(b)(5)(A). Finding that altering a seniority system would result in an "undue hardship" to both US Airways and its nondisabled employees, the District Court granted the company summary judgment. The Ninth Circuit reversed, holding that the seniority system was merely a factor in the undue hardship analysis and that a case-by-case, fact intensive analysis is required to determine whether any particular assignment would constitute an undue hardship.

Held: An employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an "accommodation" is not "reasonable." However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case. Pp. 396–406.

(a) Many lower courts have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way, holding that a plaintiff/employee (to defeat a defendant/employer's summary judgment motion) need only show that an "accommodation" seems reasonable on its face, *i. e.*, ordinarily or in the run of cases. The defendant/employer then must show special (typically case-specific) circumstances demonstrating undue hardship in the particular circumstances. Neither US Airways' position—that no accommodation violating a seniority system's rules is reasonable—nor Barnett's position—that "reasonable accommodation" authorizes a court to consider only the requested accom-

modation's ability to meet an individual's disability-related needs—is a proper interpretation of the Act. Pp. 396–402.

(b) Here, the question is whether a proposed accommodation that would normally be reasonable is rendered unreasonable because the assignment would violate a seniority system's rules. Ordinarily the answer is "yes." The statute does not require proof on a case-by-case basis that a seniority system should prevail because it would not be reasonable in the run of cases that the assignment trump such a system's rules. Analogous case law has recognized the importance of seniority to employee-management relations, finding, *e. g.*, that collectively bargained seniority trumps the need for reasonable accommodation in the linguistically similar Rehabilitation Act, see, *e. g.*, *Eckles* v. *Consolidated Rail Corp.*, 94 F. 3d 1041, 1047–1048. And the relevant seniority system advantages, and related difficulties resulting from violations of seniority rules, are not limited to collectively bargained systems, but also apply to many systems (like the one at issue) unilaterally imposed by management. A typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment—*e. g.*, job security and an opportunity for steady and predictable advancement based on objective standards—that might be undermined if an employer were required to show more than the system's existence. Nothing in the statute suggests that Congress intended to undermine seniority systems in such a way. Pp. 402–405.

(c) The plaintiff (here the employee) remains free to show that special circumstances warrant a finding that, despite the seniority system's presence, the requested accommodation is reasonable on the particular facts. Special circumstances might alter the important expectations created by a seniority system. The plaintiff might show, for example, that the employer, having retained the right to change the system unilaterally, exercises the right fairly frequently, reducing employee expectations that the system will be followed—to the point where the requested accommodation will not likely make a difference. The plaintiff might also show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. The plaintiff has the burden of showing special circumstances and must explain why, in the particular case, an exception to the seniority system can constitute a reasonable accommodation even though in the ordinary case it cannot. Pp. 405–406.

(d) The lower courts took a different view of this matter, and neither party has had an opportunity to seek summary judgment in accordance with the principles set forth here. P. 406.

228 F. 3d 1105, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined. STEVENS, J., *post,* p. 406, and O'CONNOR, J., *post,* p. 408, filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 411. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 420.

Walter E. Dellinger argued the cause for petitioner. With him on the briefs were *Lawrence M. Nagin* and *Robert A. Siegel.*

Claudia Center argued the cause for respondent. With her on the brief were *William C. McNeill III, Eric Schnapper, Todd Schneider, Guy Wallace,* and *Robert W. Rychlik.**

JUSTICE BREYER delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 328, 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. V), prohibits an employer from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of the job. §§ 12112(a) and (b) (1994 ed.). This case, arising in the context of summary judgment, asks us how the Act resolves a potential conflict between: (1) the interests of a disabled worker who seeks assignment to a particular position as a "reasonable accommodation," and (2) the interests of other workers with superior rights to bid for the job under an em-

*Briefs of *amici curiae* urging reversal were filed for the Air Transport Association of America, Inc., et al. by *John J. Gallagher* and *Margaret H. Spurlin;* and for the Equal Employment Advisory Council et al. 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, Deborah Greenfield, James B. Coppess, Michael H. Gottesman,* and *Laurence Gold;* and for the National Employment Lawyers Association et al. by *Brian East* and *Paula A. Brantner.*

Peter J. Petesch, Thomas J. Walsh, Jr., Timothy S. Bland, and *David S. Harvey, Jr.,* filed a brief for the Society for Human Resource Management as *amicus curiae.*

ployer's seniority system. In such a case, does the accommodation demand trump the seniority system?

In our view, the seniority system will prevail in the run of cases. As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not "reasonable." Hence such a showing will entitle an employer/defendant to summary judgment on the question—unless there is more. The plaintiff remains free to present evidence of special circumstances that make "reasonable" a seniority rule exception in the particular case. And such a showing will defeat the employer's demand for summary judgment. Fed. Rule Civ. Proc. 56(e).

I

In 1990, Robert Barnett, the plaintiff and respondent here, injured his back while working in a cargo-handling position at petitioner US Airways, Inc. He invoked seniority rights and transferred to a less physically demanding mailroom position. Under US Airways' seniority system, that position, like others, periodically became open to seniority-based employee bidding. In 1992, Barnett learned that at least two employees senior to him intended to bid for the mailroom job. He asked US Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom. After permitting Barnett to continue his mailroom work for five months while it considered the matter, US Airways eventually decided not to make an exception. And Barnett lost his job.

Barnett then brought this ADA suit claiming, among other things, that he was an "individual with a disability" capable of performing the essential functions of the mailroom job, that the mailroom job amounted to a "reasonable accommodation" of his disability, and that US Airways, in refusing to assign him the job, unlawfully discriminated

against him. US Airways moved for summary judgment. It supported its motion with appropriate affidavits, Fed. Rule Civ. Proc. 56, contending that its "well-established" seniority system granted other employees the right to obtain the mailroom position.

The District Court found that the undisputed facts about seniority warranted summary judgment in US Airways' favor. The Act says that an employer who fails to make "reasonable accommodations to the known physical or mental limitations of an [employee] with a disability" discriminates "*unless*" the employer "can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business." 42 U. S. C. § 12112(b)(5)(A) (emphasis added). The court said:

> "[T]he uncontroverted evidence shows that the USAir seniority system has been in place for 'decades' and governs over 14,000 USAir Agents. Moreover, seniority policies such as the one at issue in this case are common to the airline industry. Given this context, it seems clear that the USAir employees were justified in relying upon the policy. As such, any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees." App. to Pet. for Cert. 96a.

An en banc panel of the United States Court of Appeals for the Ninth Circuit reversed. It said that the presence of a seniority system is merely "a factor in the undue hardship analysis." 228 F. 3d 1105, 1120 (2000). And it held that "[a] case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer." *Ibid.*

US Airways petitioned for certiorari, asking us to decide whether

> "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation'

> even though another employee is entitled to hold the position under the employer's bona fide and established seniority system." Brief for Petitioner i.

The Circuits have reached different conclusions about the legal significance of a seniority system. Compare 228 F. 3d, at 1120, with *EEOC* v. *Sara Lee Corp.*, 237 F. 3d 349, 354 (CA4 2001). We agreed to answer US Airways' question.

II

In answering the question presented, we must consider the following statutory provisions. First, the ADA says that an employer may not "discriminate against a qualified individual with a disability." 42 U. S. C. § 12112(a). Second, the ADA says that a "qualified" individual includes "an individual with a disability who, *with* or without *reasonable accommodation*, can perform the essential functions of" the relevant "employment position." § 12111(8) (emphasis added). Third, the ADA says that "discrimination" includes an employer's "*not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, *unless* [the employer] can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business." § 12112(b)(5)(A) (emphasis added). Fourth, the ADA says that the term "'reasonable accommodation' may include . . . reassignment to a vacant position." § 12111(9)(B).

The parties interpret this statutory language as applied to seniority systems in radically different ways. In US Airways' view, the fact that an accommodation would violate the rules of a seniority system always shows that the accommodation is not a "reasonable" one. In Barnett's polar opposite view, a seniority system violation never shows that an accommodation sought is not a "reasonable" one. Barnett concedes that a violation of seniority rules might help to show that the accommodation will work "undue" employer "hardship," but that is a matter for an employer to demonstrate

case by case. We shall initially consider the parties' main legal arguments in support of these conflicting positions.

A

US Airways' claim that a seniority system virtually always trumps a conflicting accommodation demand rests primarily upon its view of how the Act treats workplace "preferences." Insofar as a requested accommodation violates a disability-neutral workplace rule, such as a seniority rule, it grants the employee with a disability treatment that other workers could not receive. Yet the Act, US Airways says, seeks only "equal" treatment for those with disabilities. See, *e. g.*, 42 U. S. C. § 12101(a)(9). It does not, it contends, require an employer to grant preferential treatment. Cf. H. R. Rep. No. 101–485, pt. 2, p. 66 (1990); S. Rep. No. 101–116, pp. 26–27 (1989) (employer has no "obligation to prefer *applicants* with disabilities over other *applicants*" (emphasis added)). Hence it does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference.

While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i. e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.

Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the ac-

commodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. See 42 U. S. C. § 12111(9)(b) (setting forth examples such as "job restructuring," "part-time or modified work schedules," "acquisition or modification of equipment or devices," "and other similar accommodations"). Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption. Nor have the lower courts made any such suggestion. Cf. *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F. 3d 638, 648 (CA1 2000) (requiring leave beyond that allowed under the company's own leave policy); *Hendricks-Robinson* v. *Excel Corp.*, 154 F. 3d 685, 699 (CA7 1998) (requiring exception to employer's neutral "physical fitness" job requirement).

In sum, the nature of the "reasonable accommodation" requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption. The simple fact that an accommodation would provide a "preference"—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not "reasonable." As a result, we reject the position taken by US Airways and JUSTICE SCALIA to the contrary.

US Airways also points to the ADA provisions stating that a " 'reasonable accommodation' may include . . . reassignment to a *vacant* position." § 12111(9)(B) (emphasis added). And

it claims that the fact that an established seniority system would assign that position to another worker automatically and always means that the position is not a "vacant" one. Nothing in the Act, however, suggests that Congress intended the word "vacant" to have a specialized meaning. And in ordinary English, a seniority system can give employees seniority rights allowing them to bid for a "vacant" position. The position in this case was held, at the time of suit, by Barnett, not by some other worker; and that position, under the US Airways seniority system, became an "open" one. Brief for Petitioner 5. Moreover, US Airways has said that it "reserves the right to change any and all" portions of the seniority system at will. Lodging of Respondent 2 (US Air Personnel Policy Guide for Agents). Consequently, we cannot agree with US Airways about the position's vacancy; nor do we agree that the Act would automatically deny Barnett's accommodation request for that reason.

B

Barnett argues that the statutory words "reasonable accommodation" mean only "effective accommodation," authorizing a court to consider the requested accommodation's ability to meet an individual's disability-related needs, and nothing more. On this view, a seniority rule violation, having nothing to do with the accommodation's effectiveness, has nothing to do with its "reasonableness." It might, at most, help to prove an "undue hardship on the operation of the business." But, he adds, that is a matter that the statute requires the employer to demonstrate, case by case.

In support of this interpretation Barnett points to Equal Employment Opportunity Commission (EEOC) regulations stating that "reasonable accommodation means . . . . [m]odifications or adjustments . . . that *enable* a qualified individual with a disability to perform the essential functions of [a] position." 29 CFR § 1630(o)(ii) (2001) (emphasis added). See also H. R. Rep. No. 101–485, pt. 2, at 66; S. Rep. No. 101–116,

at 35 (discussing reasonable accommodations in terms of "effectiveness," while discussing costs in terms of "undue hardship"). Barnett adds that any other view would make the words "reasonable accommodation" and "undue hardship" virtual mirror images—creating redundancy in the statute. And he says that any such other view would create a practical burden of proof dilemma.

The practical burden of proof dilemma arises, Barnett argues, because the statute imposes the burden of demonstrating an "undue hardship" upon the employer, while the burden of proving "reasonable accommodation" remains with the plaintiff, here the employee. This allocation seems sensible in that an employer can more frequently and easily prove the presence of business hardship than an employee can prove its absence. But suppose that an employee must counter a claim of "seniority rule violation" in order to prove that an "accommodation" request is "reasonable." Would that not force the employee to prove what is in effect an absence, *i. e.*, an absence of hardship, despite the statute's insistence that the employer "demonstrate" hardship's presence?

These arguments do not persuade us that Barnett's legal interpretation of "reasonable" is correct. For one thing, in ordinary English the word "reasonable" does not mean "effective." It is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. An *ineffective* "modification" or "adjustment" will not *accommodate* a disabled individual's limitations. Nor does an ordinary English meaning of the term "reasonable accommodation" make of it a simple, redundant mirror image of the term "undue hardship." The statute refers to an "undue hardship on the operation of the business." 42 U. S. C. § 12112(b)(5)(A). Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of em-

ployee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.

Neither does the statute's primary purpose require Barnett's special reading. The statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace. See generally §§ 12101(a) and (b). These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike. They will sometimes require affirmative conduct to promote entry of disabled people into the work force. See *supra*, at 397–398. They do not, however, demand action beyond the realm of the reasonable.

Neither has Congress indicated in the statute, or elsewhere, that the word "reasonable" means no more than "effective." The EEOC regulations do say that reasonable accommodations "enable" a person with a disability to perform the essential functions of a task. But that phrasing simply emphasizes the statutory provision's basic objective. The regulations do not say that "enable" and "reasonable" mean the same thing. And as discussed below, no court of appeals has so read them. But see 228 F. 3d, at 1122–1123 (Gould, J., concurring).

Finally, an ordinary language interpretation of the word "reasonable" does not create the "burden of proof" dilemma to which Barnett points. Many of the lower courts, while rejecting both US Airways' and Barnett's more absolute views, have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way.

They have held that a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, *i. e.*, ordinarily or in the run of cases. See, *e. g.*, *Reed* v. *LePage Bakeries, Inc.*, 244 F. 3d 254, 259 (CA1 2001)

(plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer); *Borkowski* v. *Valley Central School Dist.*, 63 F. 3d 131, 138 (CA2 1995) (plaintiff satisfies "burden of production" by showing "plausible accommodation"); *Barth* v. *Gelb*, 2 F. 3d 1180, 1187 (CADC 1993) (interpreting parallel language in Rehabilitation Act, stating that plaintiff need only show he seeks a "*method of accommodation* that is reasonable in the run of cases" (emphasis in original)).

Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances. See *Reed*, *supra*, at 258 ("'undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular [employer's] operations'") (quoting *Barth*, *supra*, at 1187); *Borkowski*, *supra*, at 138 (after plaintiff makes initial showing, burden falls on employer to show that particular accommodation "would cause it to suffer an undue hardship"); *Barth*, *supra*, at 1187 ("undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular agency's operations").

Not every court has used the same language, but their results are functionally similar. In our opinion, that practical view of the statute, applied consistently with ordinary summary judgment principles, see Fed. Rule Civ. Proc. 56, avoids Barnett's burden of proof dilemma, while reconciling the two statutory phrases ("reasonable accommodation" and "undue hardship").

III

The question in the present case focuses on the relationship between seniority systems and the plaintiff's need to show that an "accommodation" seems reasonable on its face, *i. e.*, ordinarily or in the run of cases. We must assume that the plaintiff, an employee, is an "individual with a disability." He has requested assignment to a mailroom position as a

"reasonable accommodation." We also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system. See § 12111(9) ("reasonable accommodation" may include "reassignment to a vacant position"). Does that circumstance mean that the proposed accommodation is not a "reasonable" one?

In our view, the answer to this question ordinarily is "yes." The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.

A

Several factors support our conclusion that a proposed accommodation will not be reasonable in the run of cases. Analogous case law supports this conclusion, for it has recognized the importance of seniority to employee-management relations. This Court has held that, in the context of a Title VII religious discrimination case, an employer need not adapt to an employee's special worship schedule as a "reasonable accommodation" where doing so would conflict with the seniority rights of other employees. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 79–80 (1977). The lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation in the context of the linguistically similar Rehabilitation Act. See *Eckles* v. *Consolidated Rail Corp.*, 94 F. 3d 1041, 1047–1048 (CA7 1996) (collecting cases); *Shea* v. *Tisch*, 870 F. 2d 786, 790 (CA1 1989); *Carter* v. *Tisch*, 822 F. 2d 465, 469 (CA4 1987); *Jasany* v. *United States Postal Service*, 755 F. 2d 1244, 1251–1252 (CA6 1985). And several Circuits, though differing in their reasoning, have reached a similar conclusion in the context of seniority and the ADA. See *Smith* v. *Mid-*

land Brake, Inc., 180 F. 3d 1154, 1175 (CA10 1999); *Feliciano* v. *Rhode Island*, 160 F. 3d 780, 787 (CA1 1998); *Eckles*, *supra*, at 1047–1048. All these cases discuss *collectively bargained* seniority systems, not systems (like the present system) which are unilaterally imposed by management. But the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems.

For one thing, the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment. These benefits include "job security and an opportunity for steady and predictable advancement based on objective standards." Brief for Petitioner 32 (citing Fallon & Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 57–58). See also 1 B. Lindemann & P. Grossman, Employment Discrimination Law 72 (3d ed. 1996) ("One of the most important aspects of competitive seniority is its use in determining who will be laid off during a reduction in force"). They include "an element of due process," limiting "unfairness in personnel decisions." Gersuny, Origins of Seniority Provisions in Collective Bargaining, 33 Lab. L. J. 518, 519 (1982). And they consequently encourage employees to invest in the employing company, accepting "less than their value to the firm early in their careers" in return for greater benefits in later years. J. Baron & D. Kreps, Strategic Human Resources: Frameworks for General Managers 288 (1999).

Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules. Such management

decisionmaking, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs; it would take place outside, as well as inside, the confines of a court case; and it might well take place fairly often. Cf. ADA, 42 U. S. C. § 12101(a)(1) (estimating that some 43 million Americans suffer from physical or mental disabilities). We can find nothing in the statute that suggests Congress intended to undermine seniority systems in this way. And we consequently conclude that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient.

B

The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is "reasonable" on the particular facts. That is because special circumstances might alter the important expectations described above. Cf. *Borkowski*, 63 F. 3d, at 137 ("[A]n accommodation that imposed burdens that would be unreasonable for most members of an industry might nevertheless be required of an individual defendant in light of that employer's particular circumstances"). See also *Woodman* v. *Runyon*, 132 F. 3d 1330, 1343–1344 (CA10 1997). The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to say that the plaintiff must bear

the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case. And to do so, the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation" even though in the ordinary case it cannot.

IV

In its question presented, US Airways asked us whether the ADA requires an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer's "established seniority system." We answer that *ordinarily* the ADA does not require that assignment. Hence, a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer—unless there is more. The plaintiff must present evidence of that "more," namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.

Because the lower courts took a different view of the matter, and because neither party has had an opportunity to seek summary judgment in accordance with the principles we set forth here, we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, my colleagues' separate writings prompt these additional comments.

A possible conflict with an employer's seniority system is relevant to the question whether a disabled employee's requested accommodation is "reasonable" within the meaning of the Americans with Disabilities Act of 1990. For that

reason, to the extent that the Court of Appeals concluded that a seniority system is only relevant to the question whether a given accommodation would impose an "undue hardship" on an employer, or determined that such a system has only a minor bearing on the reasonableness inquiry, it misread the statute.

Although the Court of Appeals did not apply the standard that the Court endorses today, it correctly rejected the *per se* rule that petitioner has pressed upon us and properly reversed the District Court's entry of summary judgment for petitioner. The Court of Appeals also correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether petitioner violated the statute by failing to engage in an interactive process concerning respondent's three proposed accommodations. 228 F. 3d 1105, 1117 (CA9 2000) (en banc). This latter holding is untouched by the Court's opinion today.

Among the questions that I have not been able to answer on the basis of the limited record that has been presented to us are: (1) whether the mailroom position held by respondent became open for bidding merely in response to a routine airline schedule change,[1] or as the direct consequence of the layoff of several thousand employees;[2] (2) whether respondent's requested accommodation should be viewed as an assignment to a vacant position,[3] or as the maintenance of the status quo;[4] and (3) exactly what impact the grant of respondent's request would have had on other employees.[5]

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[1] Brief for Respondent 3 (quoting Lodging of Respondent 7–8 (letter, dated Mar. 8, 1994, from petitioner's counsel to Equal Employment Opportunity Commission)).

[2] Brief for Petitioner 5 (citing App. 21 (declaration in support of petitioner's summary judgment motion)).

[3] See *post*, at 409–410 (O'CONNOR, J., concurring).

[4] See *post*, at 423 (SOUTER, J., dissenting).

[5] See, *e. g.*, *ibid.* ("There was no evidence in the District Court of any unmanageable ripple effects from Barnett's request").

As I understand the Court's opinion, on remand, respondent will have the burden of answering these and other questions in order to overcome the presumption that petitioner's seniority system justified respondent's discharge.

JUSTICE O'CONNOR, concurring.

I agree with portions of the opinion of the Court, but I find problematic the Court's test for determining whether the fact that a job reassignment violates a seniority system makes the reassignment an unreasonable accommodation under the Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. V). Although a seniority system plays an important role in the workplace, for the reasons I explain below, I would prefer to say that the effect of a seniority system on the reasonableness of a reassignment as an accommodation for purposes of the ADA depends on whether the seniority system is legally enforceable. "Were it possible for me to adhere to [this belief] in my vote, and for the Court at the same time to [adopt a majority rule]," I would do so. *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). "The Court, however, is divided in opinion," *ibid.*, and if each Member voted consistently with his or her beliefs, we would not agree on a resolution of the question presented in this case. Yet "[s]talemate should not prevail," *ibid.*, particularly in a case in which we are merely interpreting a statute. Accordingly, in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns. Cf. *Bragdon* v. *Abbott*, 524 U. S. 624, 655–656 (1998) (STEVENS, J., joined by BREYER, J., concurring); *Olmstead* v. *L. C.*, 527 U. S. 581, 607–608 (1999) (STEVENS, J., concurring in part and concurring in judgment).

The ADA specifically lists "reassignment to a vacant position" as one example of a "reasonable accommodation." 42

U. S. C. § 12111(9)(B) (1994 ed.). In deciding whether an otherwise reasonable accommodation involving a reassignment is unreasonable because it would require an exception to a seniority system, I think the relevant issue is whether the seniority system prevents the position in question from being vacant. The word "vacant" means "not filled or occupied by an incumbent [or] possessor." Webster's Third New International Dictionary 2527 (1976). In the context of a workplace, a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement. For example, in a workplace without a seniority system, when an employee ceases working for the employer, the employee's former position is vacant until a replacement is hired. Even if the replacement does not start work immediately, once the replacement enters into a contractual agreement with the employer, the position is no longer vacant because it has a "possessor." In contrast, when an employee ceases working in a workplace with a legally enforceable seniority system, the employee's former position does not become vacant if the seniority system entitles another employee to it. Instead, the employee entitled to the position under the seniority system immediately becomes the new "possessor" of that position. In a workplace with an unenforceable seniority policy, however, an employee expecting assignment to a position under the seniority policy would not have any type of contractual right to the position and so could not be said to be its "possessor." The position therefore would become vacant.

Given this understanding of when a position can properly be considered vacant, if a seniority system, in the absence of the ADA, would give someone other than the individual seeking the accommodation a legal entitlement or contractual right to the position to which reassignment is sought, the seniority system prevents the position from being vacant. If a position is not vacant, then reassignment to it is not a reasonable accommodation. The Act specifi-

cally says that "reassignment to a *vacant* position" is a type of "reasonable accommodation." § 12111(9)(B) (emphasis added). Indeed, the legislative history of the Act confirms that Congress did not intend reasonable accommodation to require bumping other employees. H. R. Rep. No. 101–485, pt. 2, p. 63 (1990) ("The Committee also wishes to make clear that reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required"); S. Rep. No. 101–116, p. 32 (1989) (same).

Petitioner's Personnel Policy Guide for Agents, which contains its seniority policy, specifically states that it is "*not* intended to be a contract (express or implied) or otherwise to create legally enforceable obligations," and that petitioner "reserves the right to change any and all of the stated policies and procedures in [the] Guide at any time, without advanc[e] notice." Lodging of Respondent 2 (emphasis in original). Petitioner conceded at oral argument that its seniority policy does not give employees any legally enforceable rights. Tr. of Oral Arg. 16. Because the policy did not give any other employee a right to the position respondent sought, the position could be said to have been vacant when it became open for bidding, making the requested accommodation reasonable.

In Part II of its opinion, the Court correctly explains that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, *i. e.*, ordinarily or in the run of cases." *Ante*, at 401. In other words, the plaintiff must show that the method of accommodation the employee seeks is reasonable in the run of cases. See *ante*, at 402 (quoting *Barth* v. *Gelb*, 2 F. 3d 1180, 1187 (CADC 1993)). As the Court also correctly explains, "[o]nce the plaintiff has made this showing, the defendant/employer then must show special . . . circumstances that demonstrate undue hardship" in the context of the particular employer's operations. *Ante*, at 402. These interpretations give ap-

propriate meaning to both the term "reasonable," 42 U. S. C. § 12112(b)(5)(A), and the term "undue hardship," *ibid.*, preventing the concepts from overlapping by making reasonableness a general inquiry and undue hardship a specific inquiry. When the Court turns to applying its interpretation of the Act to seniority systems, however, it seems to blend the two inquiries by suggesting that the plaintiff should have the opportunity to prove that there are special circumstances in the context of that particular seniority system that would cause an exception to the system to be reasonable despite the fact that such exceptions are unreasonable in the run of cases.

Although I am troubled by the Court's reasoning, I believe the Court's approach for evaluating seniority systems will often lead to the same outcome as the test I would have adopted. Unenforceable seniority systems are likely to involve policies in which employers "retai[n] the right to change the seniority system," *ante*, at 405, and will often "contai[n] exceptions," *ibid.* They will also often contain disclaimers that "reduc[e] employee expectations that the system will be followed." *Ibid.* Thus, under the Court's test, disabled employees seeking accommodations that would require exceptions to unenforceable seniority systems may be able to show circumstances that make the accommodation "reasonable in the[ir] particular case." *Ante*, at 406. Because I think the Court's test will often lead to the correct outcome, and because I think it important that a majority of the Court agree on a rule when interpreting statutes, I join the Court's opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The question presented asks whether the "reasonable accommodation" mandate of the Americans with Disabilities Act of 1990 (ADA or Act) requires reassignment of a disabled employee to a position that "another employee is entitled

to hold . . . under the employer's bona fide and established seniority system." Pet. for Cert. i; 532 U. S. 970 (2001). Indulging its penchant for eschewing clear rules that might avoid litigation, see, *e. g.*, *Kansas* v. *Crane*, 534 U. S. 407, 423 (2002) (SCALIA, J., dissenting); *TRW Inc.* v. *Andrews*, 534 U. S. 19, 35–36 (2001) (SCALIA, J., concurring in judgment), the Court answers "maybe." It creates a presumption that an exception to a seniority rule is an "unreasonable" accommodation, *ante*, at 403, but allows that presumption to be rebutted by showing that the exception "will not likely make a difference," *ante*, at 405.

The principal defect of today's opinion, however, goes well beyond the uncertainty it produces regarding the relationship between the ADA and the infinite variety of seniority systems. The conclusion that any seniority system can ever be overridden is merely one consequence of a mistaken interpretation of the ADA that makes all employment rules and practices—even those which (like a seniority system) pose no *distinctive* obstacle to the disabled—subject to suspension when that is (in a court's view) a "reasonable" means of enabling a disabled employee to keep his job. That is a far cry from what I believe the accommodation provision of the ADA requires: the suspension (within reason) of those employment rules and practices *that the employee's disability prevents him from observing.*

I

The Court begins its analysis by describing the ADA as declaring that an employer may not "'discriminate against a qualified individual with a disability.'" *Ante*, at 396 (quoting 42 U. S. C. § 12112(a) (1994 ed.)). In fact the Act says more: an employer may not "discriminate against a qualified individual with a disability *because of the disability* of such individual." 42 U. S. C. § 12112(a) (1994 ed.) (emphasis added). It further provides that discrimination includes "not making reasonable accommodations *to the known physi-*

cal or mental limitations of an otherwise qualified individual with a disability." § 12112(b)(5)(A) (emphasis added).

Read together, these provisions order employers to modify or remove (within reason) policies and practices that burden a disabled person "because of [his] disability." In other words, the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers *but for* the employee's disability. These include, for example, work stations that cannot accept the employee's wheelchair, or an assembly-line practice that requires long periods of standing. But they do not include rules and practices that bear no more heavily upon the disabled employee than upon others—even though an exemption from such a rule or practice might in a sense "make up for" the employee's disability. It is not a required accommodation, for example, to pay a disabled employee more than others at his grade level—even if that increment is earmarked for massage or physical therapy that would enable the employee to work with as little physical discomfort as his co-workers. That would be "accommodating" the disabled employee, but it would not be "making . . . accommodatio[n] *to the known physical or mental limitations*" of the employee, § 12112(b)(5)(A), because it would not eliminate any workplace practice that constitutes an obstacle *because of* his disability.

So also with exemption from a seniority system, which burdens the disabled and nondisabled alike. In particular cases, seniority rules may have a harsher effect upon the disabled employee than upon his co-workers. If the disabled employee is physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment. But that does not make the seniority system a disability-related obstacle, any more than harsher impact upon the more needy disabled employee renders the salary system a disability-related obstacle. When one departs from this understanding, the

ADA's accommodation provision becomes a standardless grab bag—leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed "reasonable" to "make up for" the particular employee's disability.

Some courts, including the Ninth Circuit in the present case, have accepted respondent's contention that the ADA demands accommodation even with respect to those obstacles that have nothing to do with the disability. Their principal basis for this position is that the definition of "reasonable accommodation" includes "reassignment to a vacant position." § 12111(9)(B). This accommodation would be meaningless, they contend, if it required only that the disabled employee be *considered* for a vacant position. The ADA already prohibits employers from discriminating against the disabled with respect to "hiring, advancement, or discharge . . . and other terms, conditions, and privileges of employment." § 12112(a). Surely, the argument goes, a disabled employee must be given preference over a nondisabled employee when a vacant position appears. See *Smith* v. *Midland Brake, Inc.*, 180 F. 3d 1154, 1164–1165 (CA10 1999) (en banc); *Aka* v. *Washington Hospital Center,* 156 F. 3d 1284, 1304–1305 (CADC 1998) (en banc). Accord, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 3 BNA EEOC Compliance Manual, No. 246, p. N:2479 (Mar. 1, 1999).

This argument seems to me quite mistaken. The right to be given a vacant position so long as there are no obstacles to that appointment (including another candidate who is better qualified, if "best qualified" is the workplace rule) is of considerable value. If an employee is hired to fill a position but fails miserably, he will typically be fired. Few employers will search their organization charts for vacancies

to which the low-performing employee might be suited. The ADA, however, prohibits an employer from firing a person whose disability is the cause of his poor performance without first seeking to place him in a vacant job where the disability will not affect performance. Such reassignment is an accommodation *to the disability* because it removes an obstacle (the inability to perform the functions of the assigned job) arising solely from the disability. Cf. *Bruff* v. *North Mississippi Health Services, Inc.*, 244 F. 3d 495, 502 (CA5 2001). See also 3 BNA EEOC Compliance Manual, *supra*, at N:2478 ("[A]n employer who does not normally transfer employees would still have to reassign an employee with a disability").

The phrase "reassignment to a vacant position" appears in a subsection describing a variety of potential "reasonable accommodation[s]":

> "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> "(B) job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." § 12111(9) (emphasis added).

Subsection (A) clearly addresses features of the workplace that burden the disabled *because of* their disabilities. Subsection (B) is broader in scope but equally targeted at disability-related obstacles. Thus it encompasses "modified work schedules" (which may accommodate inability to work for protracted periods), "modification of equipment and devices," and "provision of qualified readers or interpreters."

There is no reason why the phrase "reassignment to a vacant position" should be thought to have a uniquely different focus. It envisions elimination of the obstacle of the *current position* (which requires activity that the disabled employee cannot tolerate) when there is an alternate position freely available. If he is qualified for that position, and no one else is seeking it, or no one else who seeks it is better qualified, he *must* be given the position. But "reassignment to a vacant position" does *not* envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications. Cf. 29 CFR pt. 1630, App. § 1630.2(o), p. 357 (2001) (explaining "reasonable accommodation" as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy *equal employment opportunities*" (emphasis added)); *Aka* v. *Washington Hospital Center*, *supra*, at 1314–1315 (Silberman, J., dissenting) (interpreting "reassignment to a vacant position" consistently with the other accommodations listed in § 12111(9), none of which "even alludes to the possibility of a preference for the disabled over the nondisabled").

Unsurprisingly, most Courts of Appeals addressing the issue have held or assumed that the ADA does not mandate exceptions to a "legitimate, nondiscriminatory policy" such as a seniority system or a consistent policy of assigning the most qualified person to a vacant position. See, *e. g.*, *EEOC* v. *Sara Lee Corp.*, 237 F. 3d 349, 353–355 (CA4 2001) (seniority system); *EEOC* v. *Humiston-Keeling, Inc.*, 227 F. 3d 1024, 1028–1029 (CA7 2000) (policy of assigning the most qualified applicant); *Burns* v. *Coca-Cola Enterprises, Inc.*, 222 F. 3d 247, 257–258 (CA6 2000) (policy of reassigning employees only if they request a transfer to an advertised vacant position); *Cravens* v. *Blue Cross and Blue Shield of Kansas City*,

214 F. 3d 1011, 1020 (CA8 2000) (assuming reassignment is not required if it would violate legitimate, nondiscriminatory policies); *Duckett* v. *Dunlop Tire Corp.*, 120 F. 3d 1222, 1225 (CA11 1997) (policy of not reassigning salaried workers to production positions covered by a collective-bargaining unit); *Daugherty* v. *El Paso*, 56 F. 3d 695, 700 (CA5 1995) (policy of giving full-time employees priority over part-time employees in assigning vacant positions).

Even the Equal Employment Opportunity Commission, in at least some of its regulations, acknowledges that the ADA clears away only obstacles *arising from* a person's disability and nothing more. According to the agency, the term "reasonable accommodation" means

> "(i) [m]odifications or adjustments to a job application process *that enable* a qualified applicant with a disability *to be considered for* the position such qualified applicant desires; or
>
> "(ii) [m]odifications or adjustments to the work environment . . . *that enable* a qualified individual with a disability to perform the essential functions of that position; or
>
> "(iii) [m]odifications or adjustments *that enable* a covered entity's employee with a disability *to enjoy equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities." 29 CFR § 1630.2(o) (2001) (emphasis added).

See also 29 CFR pt. 1630, App. § 1630.9, at 364 ("reasonable accommodation requirement is best understood as a means by which barriers to . . . equal employment opportunity . . . are removed or alleviated").

Sadly, this analysis is lost on the Court, which mistakenly and inexplicably concludes, *ante*, at 398, that my position here is the same as that attributed to US Airways. In rejecting the argument that the ADA creates no "automatic exemption" for neutral workplace rules such as "break-

from-work" and furniture budget rules, *ante,* at 397–398, the Court rejects an argument I have not made.

II

Although, as I have said, the uncertainty cast upon bona fide seniority systems is the least of the ill consequences produced by today's decision, a few words on that subject are nonetheless in order. Since, under the Court's interpretation of the ADA, *all* workplace rules are eligible to be used as vehicles of accommodation, the one means of saving seniority systems is a judicial finding that accommodation through the suspension of *those* workplace rules would be unreasonable. The Court is unwilling, however, to make that finding categorically, with respect to all seniority systems. Instead, it creates (and "creates" is the appropriate word) a *rebuttable presumption* that exceptions to seniority rules are not "reasonable" under the ADA, but leaves it free for the disabled employee to show that *under the "special circumstances" of his case,* an exception would be "reasonable." *Ante,* at 405. The employee would be entitled to an exception, for example, if he showed that "one more departure" from the seniority rules "will not likely make a difference." *Ibid.*

I have no idea what this means. When is it possible for a departure from seniority rules to "not likely make a difference"? Even when a bona fide seniority system has multiple exceptions, employees expect that these are the *only* exceptions. One more unannounced exception will invariably undermine the values ("fair, uniform treatment," "job security," "predictable advancement," etc.) that the Court cites as its reasons for believing seniority systems so important that they merit a presumption of exemption. See *ante,* at 404.

One is tempted to impart some rationality to the scheme by speculating that the Court's burden-shifting rule is

merely intended to give the disabled employee an opportunity to show that the employer's seniority system is in fact a sham—a system so full of exceptions that it creates no meaningful employee expectations. The rule applies, however, even if the seniority system is "bona fide and established," Pet. for Cert. i. And the Court says that "to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment . . . ." *Ante,* at 404. How could deviations from a sham seniority system "undermine the employees' expectations"?

I must conclude, then, that the Court's rebuttable presumption does not merely give disabled employees the opportunity to unmask sham seniority systems; it gives them a vague and unspecified power (whenever they can show "special circumstances") to undercut *bona fide* systems. The Court claims that its new test will not require exceptions to seniority systems "in the run of cases," *ante,* at 403, but that is belied by the disposition of this case. The Court remands to give respondent an opportunity to show that an exception to petitioner's seniority system "will not likely make a difference" to employee expectations, *ante,* at 405, despite the following finding by the District Court:

> "[T]he uncontroverted evidence shows that [petitioner's] seniority system has been in place for 'decades' and governs over 14,000 . . . Agents. Moreover, seniority policies such as the one at issue in this case are common to the airline industry. Given this context, it seems clear that [petitioner's] employees were justified in relying upon the policy. As such, any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees." App. to Pet. for Cert. 96a.

* * *

Because the Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation; and because it adopts an interpretation of the ADA that incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation; I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

"[R]eassignment to a vacant position," 42 U. S. C. § 12111(9) (1994 ed.), is one way an employer may "reasonabl[y] accommodat[e]" disabled employees under the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. V). The Court today holds that a request for reassignment will nonetheless most likely be unreasonable when it would violate the terms of a seniority system imposed by an employer. Although I concur in the Court's appreciation of the value and importance of seniority systems, I do not believe my hand is free to accept the majority's result and therefore respectfully dissent.

Nothing in the ADA insulates seniority rules from the "reasonable accommodation" requirement, in marked contrast to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, each of which has an explicit protection for seniority. See 42 U. S. C. § 2000e–2(h) (1994 ed.) ("Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to [provide different benefits to employees] pursuant to a bona fide seniority . . . system . . ."); 29 U. S. C. § 623(f) (1994 ed.) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited [under previous sections] . . . to observe the terms of a bona fide seniority system [except for involuntary retirement] . . ."). Because Congress modeled several of the

ADA's provisions on Title VII,[1] its failure to replicate Title VII's exemption for seniority systems leaves the statute ambiguous, albeit with more than a hint that seniority rules do not inevitably carry the day.

In any event, the statute's legislative history resolves the ambiguity. The Committee Reports from both the House of Representatives and the Senate explain that seniority protections contained in a collective-bargaining agreement should not amount to more than "a factor" when it comes to deciding whether some accommodation at odds with the seniority rules is "reasonable" nevertheless. H. R. Rep. No. 101–485, pt. 2, p. 63 (1990) (existence of collectively bargained protections for seniority "would not be determinative" on the issue whether an accommodation was reasonable); S. Rep. No. 101–116, p. 32 (1989) (a collective-bargaining agreement assigning jobs based on seniority "may be considered as a factor in determining" whether an accommodation is reasonable). Here, of course, it does not matter whether the congressional committees were right or wrong in thinking that views of sound ADA application could reduce a collectively bargained seniority policy to the level of "a factor," in the absence of a specific statutory provision to that effect. In fact, I doubt that any interpretive clue in legislative history could trump settled law specifically making collective-bargaining agreements enforceable. See, *e. g.*, § 301(a), Labor Management Relations Act, 1947, 29 U. S. C. § 185(a) (permitting suit in federal court to enforce collective-bargaining agreements); *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448 (1957) (holding that § 301(a) expresses a federal policy in favor of the enforceability of labor contracts); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S.

[1] It is evident from the legislative history that several provisions of Title VII were copied or incorporated by reference into the ADA. See, *e. g.*, S. Rep. No. 101–116, pp. 2, 25, 43 (1989); H. R. Rep. No. 101–485, pt. 2, pp. 54, 76–77 (1990).

502, 509 (1962) ("Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of [collective-bargaining] agreements"). The point in this case, however, is simply to recognize that if Congress considered that sort of agreement no more than a factor in the analysis, surely no greater weight was meant for a seniority scheme like the one before us, unilaterally imposed by the employer, and, unlike collective-bargaining agreements, not singled out for protection by any positive federal statute.

This legislative history also specifically rules out the majority's reliance on *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), *ante,* at 403, a case involving a request for a religious accommodation under Title VII that would have broken the seniority rules of a collective-bargaining agreement. We held that such an accommodation would not be "reasonable," and said that our conclusion was "supported" by Title VII's explicit exemption for seniority systems. 432 U. S., at 79–82. The committees of both Houses of Congress dealing with the ADA were aware of this case and expressed a choice against treating it as authority under the ADA, with its lack of any provision for maintaining seniority rules. *E. g.*, H. R. Rep. No. 101–485, pt. 2, at 68 ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA* v. *Hardison* . . . are not applicable to this legislation"); S. Rep. No. 101–116, at 36 (same).[2]

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[2] The House Report singles out *Hardison*'s equation of "undue hardship" and anything more than a "de minimus *[sic]* cost" as being inapplicable to the ADA. By contrast, *Hardison* itself addressed seniority systems not only in its analysis of undue hardship, but also in its analysis of reasonable accommodation. 432 U. S., at 81, 84. Nonetheless, Congress's disavowal of *Hardison* in light of the "crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities," H. R. Rep. No. 101–485, pt. 2, at 68, renders that case singularly inappropriate to bolster the Court's holding today.

Because a unilaterally imposed seniority system enjoys no special protection under the ADA, a consideration of facts peculiar to this very case is needed to gauge whether Barnett has carried the burden of showing his proposed accommodation to be a "reasonable" one despite the policy in force at US Airways. The majority describes this as a burden to show the accommodation is "plausible" or "feasible," *ante*, at 402, and I believe Barnett has met it.

He held the mailroom job for two years before learning that employees with greater seniority planned to bid for the position, given US Airways's decision to declare the job "vacant." Thus, perhaps unlike ADA claimants who request accommodation through reassignment, Barnett was seeking not a change but a continuation of the status quo. All he asked was that US Airways refrain from declaring the position "vacant"; he did not ask to bump any other employee and no one would have lost a job on his account. There was no evidence in the District Court of any unmanageable ripple effects from Barnett's request, or showing that he would have overstepped an inordinate number of seniority levels by remaining where he was.

In fact, it is hard to see the seniority scheme here as any match for Barnett's ADA requests, since US Airways apparently took pains to ensure that its seniority rules raised no great expectations. In its policy statement, US Airways said that "[t]he Agent Personnel Policy Guide is *not* intended to be a contract" and that "USAir reserves the right to change any and all of the stated policies and procedures in this Guide at any time, without advanced notice." Lodging of Respondent 2 (emphasis in original). While I will skip any state-by-state analysis of the legal treatment of employee handbooks (a source of many lawyers' fees) it is safe to say that the contract law of a number of jurisdictions would treat this disclaimer as fatal to any claim an employee

might make to enforce the seniority policy over an employer's contrary decision.[3]

With US Airways itself insisting that its seniority system was noncontractual and modifiable at will, there is no reason to think that Barnett's accommodation would have resulted in anything more than minimal disruption to US Airways's operations, if that. Barnett has shown his requested accommodation to be "reasonable," and the burden ought to shift to US Airways if it wishes to claim that, in spite of surface appearances, violation of the seniority scheme would have worked an undue hardship. I would therefore affirm the Ninth Circuit.

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[3] The Court would allow a plaintiff to argue that a particular system was so riddled with exceptions so as not to engender expectations of consistent treatment. *Ante,* at 405–406.

Syllabus

CITY OF LOS ANGELES *v.* ALAMEDA BOOKS, INC., ET AL.

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

No. 00–799. Argued December 4, 2001—Decided May 13, 2002

Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in violation of § 12.70(C), as amended, sued under 42 U. S. C. § 1983 for declaratory and injunctive relief, alleging that the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores* v. *Edmisten,* a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establishments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41.

Held: The judgment is reversed, and the case is remanded.

222 F. 3d 719, reversed and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that Los Angeles may reasonably rely

on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 433–443.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e. g.*, robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments—not a concentration of operations within a single establishment—the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such areas are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U. S., at 51–52. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e. g.*, *Erie* v. *Pap's A. M.*, 529 U. S. 277, 298. This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is nec-

essarily correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton*'s evidentiary requirement. Pp. 433–442.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. Pp. 442–443.

JUSTICE KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 444–453.

(a) Under *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside—that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230, even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 134–135. That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e. g.*, to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 445–447.

(b) *Renton*'s description of an ordinance similar to Los Angeles' as "content neutral," 475 U. S., at 48, was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton*'s central holding is sound. Pp. 448–449.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under the same roof, an ordinance requir-

Syllabus

ing them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. The premise must be that businesses—even those that have always been under one roof—will for the most part disperse rather than shut down, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e. g.*, *Renton*, *supra*, at 51–52. Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance, most of the necessary analysis follows. To justify the ordinance at issue, the city may infer—from its study and from its own experience—that two adult businesses under the same roof are no better than two next door, and that knocking down the wall between the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 449–453.

(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. P. 453.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 443. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 444. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post*, p. 453.

Michael L. Klekner argued the cause for petitioner. With him on the briefs were *James K. Hahn*, *Rockard J. Delgadillo*, *Claudia McGee Henry*, *Anthony Saul Alperin*, and *Jeri Burge*.

John H. Weston argued the cause for respondent. With him on the briefs was *G. Randall Garrou*.*

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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, *David M. Gormley*, State Solicitor, and *Elise W. Porter*, joined by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Ala-

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, 42 U. S. C. § 1983 (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the

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bama, *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Roy Cooper* of North Carolina, *Herbert D. Soll* of the Commonwealth of the Northern Mariana Islands, *Mike Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Gay Woodhouse* of Wyoming; for the American Planning Association et al. by *Scott D. Bergthold;* for the Capitol Resource Institute et al. by *Richard D. Ackerman* and *Gary G. Kreep;* for Morality in Media, Inc., by *Paul J. McGeady* and *Robin S. Whitehead;* and for the U. S. Conference of Mayors et al. by *Richard Ruda* and *James I. Crowley.*

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger;* for the DKT Liberty Project by *Julie M. Carpenter;* and for the First Amendment Lawyers Association by *Randall D. B. Tigue* and *Bradley J. Shafer.*

prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and its precedents interpreting that case. 222 F. 3d 719, 723–728 (2000). We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

I

In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35–162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74–4521–S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure. See App. 29

(Los Angeles Dept. of City Planning, Amendment—Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82–0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term "business" to refer to certain types of goods or services sold in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes

that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no physical distinctions between the different operations within each establishment and each establishment has only one entrance. 222 F. 3d, at 721. Respondents concede they are openly operating in violation of § 12.70(C) of the city's code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of the city's adult zoning regulations, respondents joined as plaintiffs and sued under 42 U. S. C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. 222 F. 3d, at 721. At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed cross-motions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District

Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App. to Pet. for Cert. 51. It reasoned that neither the city's 1977 study nor a report cited in *Hart Book Stores* v. *Edmisten*, 612 F. 2d 821 (CA4 1979) (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34–47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling government interest, the District Court granted summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.*, at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton*, 475 U. S. 41. 222 F. 3d, at 723–724. We granted certiorari, 532 U. S. 902 (2001), to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*, *supra*.

II

In *Renton* v. *Playtime Theatres, Inc.*, *supra*, this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park,

or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id.*, at 46. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230–231 (1987). We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton*, *supra*, at 47–49. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. 475 U. S., at 50. We concluded that Renton had met this burden, and we upheld its ordinance. *Id.*, at 51–54.

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. 222 F. 3d, at 723. The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demon-

strate, as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not "'suppor[t] a reasonable belief that [the] combination [of] businesses . . . produced harmful secondary effects of the type asserted.'" 222 F. 3d, at 724. For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores*, *supra*, a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case.

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124–125.

The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against

the city, we also focus on the portion of the 1977 study drawn from the police department report.

The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the effect that a concentration of establishments—not a concentration of operations within a single establishment—had on crime rates. The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade. 222 F. 3d, at 724.

The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation. While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and "produce the harmful secondary effects identified in the Study." 222 F. 3d, at 726. It reasoned that such an inference would justify limits on the inventory of an adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory—that having many different operations in close proximity attracts crowds—with its own—that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data

because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U. S., at 51–52; see also, *e. g.*, *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 584 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the munici-

pality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e. g.*, *Erie* v. *Pap's A. M.*, 529 U. S. 277, 298 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton*.

Justice Souter faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that freestanding single-use adult establishments reduce crime. See *post*, at 460–462 (dissenting opinion). In effect, Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e. g.*, *Barnes*, *supra*, at 583–584 (Souter, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a "'reasonable opportunity to experiment with solutions'" to address the secondary effects of protected speech. *Renton*, *supra*, at 52 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because

the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-use adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison JUSTICE SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 666 (1994) (plurality opinion); see also *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843–844 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner*, *supra*, at 665–666; *Erie*, *supra*, at 297–298 (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U. S., at 48–50. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See *Erie*, *supra*, at 298–299.

JUSTICE SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." 475 U. S., at 47–54. The former requires courts to verify that the "predominate concerns" motivating the

ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id.*, at 47 (emphasis deleted). The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.*, at 50–52. Justice Souter would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post*, at 457–458.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. i. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. 222 F. 3d, at 723. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it. Finally, Justice Souter does not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence

when "common experience" or "common assumptions" are incorrect, see *post*, at 459, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie*, 529 U. S., at 297–298 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is "'reasonably believed to be relevant'" to the secondary effects that they seek to address. *Id.*, at 296.

III

The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores*, a case that upheld a North Carolina ordinance similar to that challenged here. See 612 F. 2d, at 828–829, n. 9. Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores*. Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. Therefore, the city need not present foreign studies to overcome the summary judgment against it.

Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12–13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of JUSTICE KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post*, at 449 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary judgment to respondents and remand the case for further proceedings.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pander-

ing sex. See, *e. g.*, *Erie* v. *Pap's A. M.*, 529 U. S. 277, 310 (2000) (SCALIA, J., concurring in judgment); *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 256–261 (1990) (SCALIA, J., concurring in part and dissenting in part).

JUSTICE KENNEDY, concurring in the judgment.

Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another—even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), described a similar ordinance as "content neutral," and I agree with the dissent that the designation

is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton*, the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside—that is, even if the measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 134–135 (1992). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood

for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases*, 16 Wall. 36 (1873). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 12.70(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan . . . in order to encourage the most appropriate use of land . . . and to promote the health, safety, and the general welfare . . ."). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton*.

II

In *Renton*, the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." 475 U. S., at 48 (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47. The fiction that this sort of ordinance is content neutral—or "content neutral"—is perhaps more confusing than helpful, as JUSTICE SOUTER demonstrates, see *post*, at 457 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316, 322, and n. 2 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based, and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime*

Victims Bd., 502 U. S. 105, 126–127 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

III

The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions." Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See *post*, at 457. The rationale of

the ordinance must be that it will suppress secondary effects—and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws . . . a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante*, at 436.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987); *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992). It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them

to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses—even those that have always been under one roof—will for the most part disperse rather than shut down. True, this premise has its own conundrum. As JUSTICE SOUTER writes, "[t]he city . . . claims no interest in the proliferation of adult establishments." *Post*, at 461. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e. g.*, *Renton*, 475 U. S., at 51–52 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Young*, 427 U. S., at 71 ("[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie* v. *Pap's A. M.*, 529 U. S. 277, 300–301 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton*, *supra*, at 51–52. The Los Angeles City Coun-

cil knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 665–666 (1994); *Erie, supra*, at 297–298 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation—a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to

speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer—from its study and from its own experience—that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult

establishments. I assume that the ordinance was constitutional when adopted, see, *e. g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), and assume for purposes of this case that the original ordinance remains valid today.[1]

The city subsequently amended its ordinance to forbid clusters of such businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *infra*, at 461–462, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab bag of restrictive statutes, with a corresponding variety of justifications.

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[1] Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers Association as *Amicus Curiae* 21–23, the issue is one I do not reach.

While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 536 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it, see *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000); since merely protecting listeners from offense at the message is not a legitimate interest of the government, see *Cohen* v. *California*, 403 U. S. 15, 24–25 (1971), strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see *Kovacs* v. *Cooper*, 336 U. S. 77

(1949); the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). A middle-tier standard is also applied to limits on expression through action that is otherwise subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, *United States* v. *O'Brien*, 391 U. S. 367 (1968); here a regulation passes muster "if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest," *id.*, at 377. As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining property values in the neighborhood. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 49 (1986).[2]

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, *id.*, at 46, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of

[2] Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton*, 475 U. S., at 50. Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *infra* this page and 457, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the *United States* v. *O'Brien*, 391 U. S. 367 (1968), formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. *Erie* v. *Pap's A. M.*, 529 U. S. 277, 289 (2000) (plurality opinion).

what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.*, at 47.

It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 510 (1981) ("[J]udgments . . . defying objective evaluation . . . must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young*, 427 U. S., at 84 (Powell, J., concurring) ("[C]ourts must be alert . . . to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[3]

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of mar-

[3] Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 569 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e. g.*, *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 487 (1995); *Edenfield* v. *Fane*, 507 U. S. 761 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at 770–771. For unless this "critical" requirement is met, *Rubin*, *supra*, at 487, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield*, *supra*, at 771.

ket value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e. g.*, *Renton*, *supra*, at 51; *Young*, *supra*, at 55.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. See *Erie* v. *Pap's A. M.*, 529 U. S. 277, 300–301 (2000) (plurality opinion); *id.*, at 313, and n. 2 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton*, 475 U. S., at 51; *Young*, *supra*, at 55. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e. g.*, *Schad* v. *Mount Ephraim*, 452 U. S. 61, 72–74 (1981). In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, in-

crease crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e. g.*, *Renton*, *supra*, at 50–51; *Young*, 427 U. S., at 55. Although we have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton*, *supra*, at 51–52, the city here took responsibility to make its own enquiry, App. 35–162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id.*, at 45, and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id.*, at 43, and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young*, that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the

assumption behind the amendment itself, that a conglomeration of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante*, at 436. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course, claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54.[4]

[4] Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc.* v. *Edmisten*, 612 F. 2d 821 (1979), the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id.*, at 828–829, n. 9. The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id.*, at 51–52, and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the un-

Rather, the city apparently assumes that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another.[5] But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id.*, at 81–82, and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of freestanding stores because no effects were observed. The reasonable supposition, then, is that splitting some of them up will have no consequence for secondary effects whatever.[6]

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sanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

[5] The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of adult establishments (but not isolated ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante*, at 436.

[6] In *Renton*, the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater

The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects.[7] Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales and traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante*, at 436, it provides no support for what the city proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante*, at 438, that no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with secondary effects

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in a given neighborhood." 475 U. S., at 50. The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton*, give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante*, at 438. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

[7] As already noted, n. 1, *supra*, *amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place.[8]

Nor is the plurality's position bolstered, as it seems to think, *ante*, at 439, by relying on the statement in *Renton* that courts should allow cities a "'reasonable opportunity to experiment with solutions to admittedly serious problems,'" 475 U. S., at 52. The plurality overlooks a key distinction between the zoning regulations at issue in *Renton* and

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[8] JUSTICE KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leav[e] the quantity and accessibility of speech substantially intact." *Ante*, at 449 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Erie*, 529 U. S., at 301; see also n. 2, *supra*. Nor has JUSTICE KENNEDY even shown that this ordinance leaves speech "substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante*, at 452. It does not follow, however, that a combined bookstore-arcade that draws 100 customers, when split, will yield a bookstore and arcade that together draw nearly that many customers. Given the now double outlays required to operate the businesses at different locations, see *infra*, at 466, the far more likely outcome is that the stand-alone video store will go out of business. (Of course, the bookstore owner could, consistently with the ordinance, continue to operate video booths at no charge, but if this were always commercially feasible then the city would face the separate problem that under no theory could a rule simply requiring that video booths be operated for free be said to reduce secondary effects.)

Young (and in Los Angeles as of 1978), and this new Los Angeles breakup requirement. In those two cases, the municipalities' substantial interest for purposes of intermediate scrutiny was an interest in choosing between two strategies to deal with crime or property value, each strategy tied to the businesses' location, which had been shown to have a causal connection with the secondary effects: the municipality could either concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts. The limitations on location required no further support than the factual basis tying location to secondary effects; the zoning approved in those two cases had no effect on the way the owners of the stores carried on their adult businesses beyond controlling location, and no heavier burden than the location limit was approved by this Court.

The Los Angeles ordinance, however, does impose a heavier burden, and one lacking any demonstrable connection to the interest in crime control. The city no longer accepts businesses as their owners choose to conduct them within their own four walls, but bars a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal. App. 47–51, 229–230, 242. Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right to "experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective, in this case policing crime. Since we cannot make even a best guess that the city's breakup policy will have any effect on crime

or law enforcement, we are a very far cry from any assurance against covert content-based regulation.[9]

And concern with content-based regulation targeting a viewpoint is right to the point here, as witness a fact that involves no guesswork. If we take the city's breakup policy at its face, enforcing it will mean that in every case two establishments will operate instead of the traditional one. Since the city presumably does not wish merely to multiply adult establishments, it makes sense to ask what offsetting gain the city may obtain from its new breakup policy. The answer may lie in the fact that two establishments in place of one will entail two business overheads in place of one: two monthly rents, two electricity bills, two payrolls. Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.

I respectfully dissent.

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[9] The plurality's assumption that the city's "motive" in applying secondary-effects zoning can be entirely compartmentalized from the proffer of evidence required to justify the zoning scheme, *ante,* at 440–441, is indulgent to an unrealistic degree, as the record in this case shows. When the original dispersion ordinance was enacted in 1978, the city's study showing a correlation between concentrations of adult business and higher crime rates showed that the dispersal of adult businesses was causally related to the city's law enforcement interest, and that in turn was a fair indication that the city's concern was with the secondary effect of higher crime rates. When, however, the city takes the further step of breaking up businesses with no showing that a traditionally combined business has any association with a higher crime rate that could be affected by the breakup, there is no indication that the breakup policy addresses a secondary effect, but there is reason to doubt that secondary effects are the city's concern. The plurality seems to ask us to shut our eyes to the city's failings by emphasizing that this case is merely at the stage of summary judgment, *ante,* at 439, but ignores the fact that at this summary judgment stage the city has made it plain that it relies on no evidence beyond the 1977 study, which provides no support for the city's action.

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VERIZON COMMUNICATIONS INC. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 00–511. Argued October 10, 2001—Decided May 13, 2002*

In order to foster competition between monopolistic carriers providing local telephone service and companies seeking to enter local markets, provisions of the Telecommunications Act of 1996 (Act) entitle the new entrants to lease elements of the incumbent carriers' local-exchange networks, 47 U. S. C. § 251(c), and direct the Federal Communications Commission (FCC) to prescribe methods for state utility commissions to use in setting rates for the sharing of those elements, § 252(d). Such "just and reasonable rates" must, *inter alia*, be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element." § 252(d)(1)(A)(i). Regulations appended to the FCC's First Report and Order under the Act provide, among other things, for the treatment of "cost" under § 252(d)(1)(A)(i) as "forward-looking economic cost," 47 CFR § 51.505, something distinct from the kind of historically based cost previously relied on in valuing a rate base, see, *e. g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 596–598, 605; define the "forward-looking economic cost of an element [as] the sum of (1) the total element long-run incremental cost of the element [TELRIC,] and (2) a reasonable allocation of forward-looking common costs," § 51.505(a), "incurred in providing a group of elements that "cannot be attributed directly to individual elements," § 51.505(c)(1); and, most importantly, specify that the TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers," § 51.505(b)(1). The regulations also contain so-called "combination" rules requiring an incumbent, upon request and compensation, to perform the functions necessary to combine network ele-

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*Together with No. 00–555, *WorldCom, Inc., et al.* v. *Verizon Communications Inc. et al.*, No. 00–587, *Federal Communications Commission et al.* v. *Iowa Utilities Board et al.*, No. 00–590, *AT&T Corp.* v. *Iowa Utilities Board et al.*, and No. 00–602, *General Communications, Inc.* v. *Iowa Utilities Board et al.*, also on certiorari to the same court.

ments for an entrant, unless the combination is not technically feasible. §§ 51.315(b)–(f). Challenges to the regulations, mostly by incumbent carriers and state commissions, were consolidated in the Eighth Circuit, which initially held, *inter alia*, that the FCC had no authority to control state commissions' ratesetting methodology and that the FCC misconstrued § 251(c)(3)'s plain language in implementing the combination rules. Reversing in large part in *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 384–385, this Court, among its rulings, upheld the FCC's jurisdiction to impose a new ratesetting methodology on the States and reinstated the principal combination rule, Rule 315(b), which forbids incumbents to separate currently combined network elements before leasing them to entrants who ask for them in a combined form. On remand, the incumbents' primary challenge went to the FCC's ratesetting methodology. The Eighth Circuit understood § 252(d)(1) to be ambiguous as between "forward-looking" and "historical" cost, so that a forward-looking ratesetting method would presumably be reasonable, but held that § 252(d)(1) foreclosed the use of the TELRIC methodology because the Act plainly required rates based on the actual, not hypothetical, cost of providing the network element. The court also invalidated the additional combination rules, Rules 315(c)–(f), reading § 251(c)(3)'s reference to "allow[ing] requesting carriers to combine . . . elements" as unambiguously requiring requesting carriers, not providing incumbents, to do any and all combining.

Held:

1. The FCC can require state commissions to set the rates charged by incumbents for leased elements on a forward-looking basis untied to the incumbents' investment. Because the incumbents have not met their burden of showing unreasonableness to defeat the deference due the FCC, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–845, the Eighth Circuit's judgment is reversed insofar as it invalidated TELRIC. Pp. 497–528.

(A) This Court rejects the incumbents' argument that "cost" in § 252(d)(1)'s requirement that "the . . . rate . . . be . . . based on the cost . . . of providing the . . . network element" can only mean, in plain language and in this particular technical context, the past cost to an incumbent of furnishing the specific network element actually, physically, to be provided, as distinct from its value or the price that would be paid for it on the open market. At the most basic level of common usage, "cost" has no such clear implication. A merchant asked about the "cost" of his goods may reasonably quote their current wholesale market price, not the cost of the items on his shelves, which he may have bought at higher or lower prices. When the reference shifts into

the technical realm, the incumbents are still unconvincing. "Cost" as used in calculating the rate base under the traditional cost-of-service method did not stand for all past capital expenditures, but at most for those that were prudent, while prudent investment itself could be denied recovery when unexpected events rendered investment useless. *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299, 312. And even when investment was wholly includable in the rate base, ratemakers often rejected the utilities' "embedded costs," their own book-value estimates, which typically were geared to maximize the rate base with high statements of past expenditures and working capital, combined with unduly low depreciation rates. See, *e. g.*, *Hope Natural Gas Co.*, *supra*, at 597–598. Equally important, the incumbents' plain-meaning argument ignores the statutory setting in which the mandate to use "cost" in valuing network elements occurs. First, the Act uses "cost" as an intermediate term in the calculation of "just and reasonable rates," § 252(d)(1), and it was the very point of *Hope Natural Gas* that regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology, 320 U. S., at 602. Second, it would be strange to think Congress tied "cost" to historical cost without a more specific indication, when the very same sentence that requires "cost" pricing also prohibits any reference to a "rate-of-return or other rate-based proceeding," § 252(d)(1), each of which has been identified with historical cost ever since *Hope Natural Gas* was decided. Without any better indication of meaning than the unadorned term, the word "cost" in § 252(d)(1) gives ratesetting commissions broad methodological leeway, but says little about the method to be employed. *Iowa Utilities Bd.*, *supra*, at 423. Pp. 497–501.

(B) Also rejected is the incumbents' alternative argument that, because TELRIC calculates the forward-looking cost by reference to a hypothetical, most efficient element at existing wire centers, not the actual network element being provided, the FCC's particular methodology is neither consistent with § 252(d)(1)'s plain language nor within the zone of reasonable interpretation subject to *Chevron* deference. Pp. 501–522.

(1) The term "cost" is simply too protean to support the incumbents' argument that plain language bars a definition of "cost" untethered to historical investment. What the incumbents call the "hypothetical" element is simply the element valued in terms of a piece of equipment an incumbent may not own. P. 501.

(2) Similarly, the claim that TELRIC exceeds reasonable interpretative leeway is open to the objection that responsibility for "just and reasonable" rates leaves methodology largely subject to discretion. *E. g.*, *Permian Basin Area Rate Cases*, 390 U. S. 747, 790.

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The incumbents nevertheless field three arguments, which the Court rejects. Pp. 501–522.

(a) The incumbents argue, first, that a method of calculating wholesale lease rates based on the costs of providing hypothetical, most efficient elements may simulate the competition envisioned by the Act but does not induce it. There are basically three answers to this no-stimulation unreasonableness claim. Pp. 503–517.

(i) The basic assumption of the no-stimulation argument—that in a perfectly efficient market, no one who can lease at a TELRIC rate will ever build—is contrary to fact. TELRIC does not assume a perfectly efficient wholesale market or one that is likely to resemble perfection in any foreseeable time, cf. *Iowa Utilities Bd.*, *supra*, at 389–390, but includes several features of inefficiency that undermine the incumbents' argument. First, because the FCC has qualified any assumption of efficiency by requiring ratesetters to calculate cost on the basis of the existing location of the incumbent's wire centers, § 51.505(b)(1), certain network elements will not be priced at their most efficient cost and configuration. Second, TELRIC rates in practice will differ from the products of a perfectly competitive market owing to lags in price adjustments built into the state-commission ratesetting process. Finally, because measurement of the TELRIC is based on the use of the most efficient telecommunications technology currently available, *ibid.*, the marginal cost of a most efficient element that an entrant alone has built and uses would not set a new pricing standard until it became available to competitors as an alternative to the incumbent's corresponding element. Pp. 504–507.

(ii) It cannot be said that the FCC acted unreasonably in picking TELRIC to promote the mandated competition. Comparison of TELRIC with alternatives proposed by the incumbents as more reasonable—embedded-cost methodologies, an efficient component pricing rule, and "Ramsey pricing," the most commonly proposed variant of fixed-cost recovery ratesetting—are plausibly answered by the FCC's stated reasons to reject the alternatives, § 51.505(d); First Report and Order ¶¶ 655, 696, 705, 709. Pp. 507–516.

(iii) The claim that TELRIC is unreasonable as a matter of law because it simulates, but does not produce, facilities-based competition founders on fact. The entrants say that they invested $55 billion in new facilities from 1996 through 2000, and the incumbents do not contest the figure. A regulatory scheme that can boast such substantial competitive capital spending in four years is not easily described as an unreasonable way to promote competitive investment in facilities. Pp. 516–517.

(b) Also unavailing is the incumbents' second reason for calling TELRIC an unreasonable exercise of the FCC's regulatory discretion: the supposed incapacity of this methodology to provide enough depreciation and allowance for capital costs to induce rational competition on the theory's own terms. This argument rests upon a fundamentally false premise, that the TELRIC rules limit the depreciation and capital costs that ratesetting commissions may recognize. On the contrary, First Report and Order ¶ 702 gave state commissions considerable discretion on these matters, specifically permitting more favorable allowances for costs of capital and depreciation than were generally allowed under traditional ratemaking practice. The incumbents' fallback position, that existing rates of depreciation and costs of capital are not even reasonable starting points, is unpersuasive. This attack tends to argue in highly general terms, whereas TELRIC rates are calculated on the basis of individual elements. Those rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific element to be priced. In light of the many TELRIC rates to be calculated by state commissions across the country, the FCC's prescription of a general "starting point" is reasonable enough. Pp. 517–522.

(c) Finally, the incumbents' third argument, that TELRIC is needlessly and unreasonably complicated and impracticable, is unpersuasive. The record suggests that TELRIC rate proceedings are surprisingly smooth-running affairs, with incumbents and competitors typically presenting two conflicting economic models supported by expert testimony, and state commissioners customarily assigning rates based on some predictions from one model and others from its counterpart. At bottom, battles of experts are bound to be part of any ratesetting scheme, and the FCC was reasonable to prefer TELRIC over alternative fixed-cost schemes that preserve home-field advantages for the incumbents. P. 522.

(C) The incumbents' attempt to apply the rule of constitutional avoidance does not present a serious question. They say that "cost" should be construed by reference to historical investment in order to avoid the serious constitutional question whether a methodology so divorced from actual investment will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment. However, they do not argue that any particular, actual TELRIC rate is so unjust as to be confiscatory, despite the fact that some state commissions have already put TELRIC rates in place. This want of any rate to be reviewed is significant, given that this Court has never considered a taking challenge to a ratesetting methodology without being pre-

sented with specific rate orders alleged to be confiscatory. See, *e. g.*, *Duquesne*, 488 U. S., at 303–304. Indeed, the general rule is that any question about the constitutionality of ratesetting is raised by rates, not methods. See, *e. g.*, *Hope Natural Gas Co.*, 320 U. S., at 602. Thus, the policy of construing a statute to avoid constitutional questions is presumptively out of place when construing a measure like TELRIC that prescribes a method. The incumbents argue unpersuasively that this action is placed outside the general rule by strong signs that takings will occur if the TELRIC interpretation of § 252(d)(1) is allowed. First, their comparison of historical investment in local telephone markets with the corresponding estimate of a TELRIC evaluation is spurious because their assumed numbers are clearly wrong. Second, they misplace their reliance on dicta in *Duquesne*, *supra*, at 315, to the effect that there may be a taking challenge if a ratemaking body makes opportunistic methodology changes just to minimize a utility's return on capital investment. There is no evidence that the decision to adopt TELRIC was arbitrary, opportunistic, or undertaken with a confiscatory purpose. Indeed, the indications in the record are very much to the contrary. Pp. 523–528.

2. The FCC can require incumbents to combine elements of their networks at the request of entrants who cannot combine themselves, when they lease them to the entrants. Thus, the Eighth Circuit erred in invalidating the additional combination rules, Rules 315(c)–(f). Pp. 528–539.

(A) The Court rejects the incumbents' threshold objection that the Government's and competing carriers' challenge to the rules invalidation is barred by waiver because the *Iowa Utilities Bd.* petition to review the Eighth Circuit's earlier invalidation of Rule 315(b) did not extend to its simultaneous invalidation of Rules 315(c)–(f). The incumbents argue that the Eighth Circuit exceeded the scope of this Court's mandate when it revisited the unchallenged portion of its earlier holding, and that this Court should decline to reach the validity of Rules 315(c)–(f) because doing so would encourage the sort of strategic, piecemeal litigation disapproved in *Communist Party of United States* v. *Subversive Activities Control Bd.*, 367 U. S. 1, 30–31. However, that case does not block consideration of Rules 315(c)–(f) here. Addressing the issue now would not "make waste" of years of efforts by the FCC or the Eighth Circuit, *id.*, at 32, n. 8, would not threaten to leave a constitutional ruling pointless, and would direct the Court's attention not to an isolated, "long-stale" procedural error by the agency, *ibid.*, but to the invalidation of FCC rules meant to have general and continuing applicability. There is no indication that litigation tactics

prompted the failure last time to appeal on these rules, which were reexamined on remand at the Eighth Circuit's behest, not the Government's nor the competing carriers'. Any issue pressed or passed upon by a federal court is subject to this Court's broad discretion on certiorari, and there are good reasons to look at Rules 315(c)–(f). The Eighth Circuit passed on a significant issue that has been placed in a state of flux by a split among federal cases. Pp. 528–531.

(B) The Eighth Circuit read 47 U. S. C. § 251(c)(3)'s requirement that "[a]n incumbent . . . provide . . . network elements in a manner that allows requesting carriers to combine such elements" as unambiguously excusing incumbents from any obligation to combine provided elements. But the language is not that plain. If Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal. Cf. § 251(c). And because, within the actual statutory confines, it is not self-evident that in obligating incumbents to furnish, Congress silently negated a duty to combine, the Court reads § 251(c)(3)'s language as leaving open who should do the work of combination. Under *Chevron*, that leaves the additional combination rules intact unless the incumbents can show them to be unreasonable. The Court finds, however, that those rules reflect a reasonable reading of the statute. They are meant to remove practical barriers to competitive entry into local-exchange markets while avoiding serious interference with incumbent network operations. The rules say an incumbent shall, for payment, "perform the functions necessary," Rules 315(c) and (d), to combine elements in order to put a competing carrier on an equal footing with the incumbent when the requesting carrier is unable to combine, First Report and Order ¶ 294, when it would not place the incumbent at a disadvantage in operating its own network, and when it would not place other competing carriers at a competitive disadvantage, Rule 315(c)(2). This duty is consistent with the Act's goals of competition and nondiscrimination, and imposing it is a sensible way to reach the result the Act requires. Pp. 531–538.

219 F. 3d 744, affirmed in part, reversed in part, and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, and GINSBURG, JJ., joined, in which SCALIA and THOMAS, JJ., joined as to Part III, and in which THOMAS, J., also joined as to Part IV. BREYER, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Part VI, *post*,

p. 539. O'CONNOR, J., took no part in the consideration or decision of the cases.

William P. Barr argued the cause for Verizon Communications, Inc., et al., petitioners in No. 00–511, and for BellSouth Corp. et al., respondents in Nos. 00–555, etc. With him on the briefs were *M. Edward Whelan*, *Patrick F. Philbin*, *Michael E. Glover*, *Mark L. Evans*, *Michael K. Kellogg*, *Henk Brands*, *Charles R. Morgan*, *James G. Harralson*, *Andrew G. McBride*, *Scott Delacourt*, *Roger K. Toppins*, *Gary Phillips*, *Sean A. Lev*, and *Steven G. Bradbury*.

Solicitor General Olson argued the cause for the federal parties, petitioners in Nos. 00–587, etc., and respondents in No. 00–511. With him on the briefs were *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Nannes*, *Deputy Solicitor General Wallace*, *Barbara McDowell*, *Catherine G. O'Sullivan*, *Nancy C. Garrison*, and *Laurence N. Bourne*. *David P. Murray* filed briefs for respondent Sprint Corporation in Nos. 00–511, etc., in support of petitioner federal parties and in opposition to petitioners Verizon Communications, Inc., et al.

Donald B. Verrilli, Jr., argued the cause for WorldCom, Inc., et al., petitioners in No. 00–555 and respondents in No. 00–511, and for AT&T Corp., petitioner in No. 00–590 and respondent in Nos. 00–511, etc. With him on the briefs for WorldCom, Inc., et al. were *Jodie L. Kelley*, *Ian Heath Gershengorn*, *Thomas F. O'Neil III*, *William Single IV*, *Carol Ann Bischoff*, *Robert M. McDowell*, and *Robert J. Aamoth*. *David W. Carpenter*, *Peter D. Keisler*, *Stephen B. Kinnaird*, *C. Frederick Beckner III*, and *Mark C. Rosenblum* filed briefs for AT&T.

Briefs for respondents in Nos. 00–511, etc., were filed by *Irwin A. Popowsky* for the National Association of State Utility Consumer Advocates, by *James Bradford Ramsay* and *Lawrence G. Malone* for the Public Service Commission of New York et al., and by *William T. Lake*, *John H. Har-*

wood II, and *Robert B. McKennna* for Qwest Communications International, Inc.†

JUSTICE SOUTER delivered the opinion of the Court.*

These cases arise under the Telecommunications Act of 1996. Each is about the power of the Federal Communications Commission to regulate a relationship between monopolistic companies providing local telephone service and companies entering local markets to compete with the incumbents. Under the Act, the new entrants are entitled, among other things, to lease elements of the local telephone networks from the incumbent monopolists. The issues are whether the FCC is authorized (1) to require state utility commissions to set the rates charged by the incumbents for leased elements on a forward-looking basis untied to the incumbents' investment, and (2) to require incumbents to combine such elements at the entrants' request when they lease them to the entrants. We uphold the FCC's assumption and exercise of authority on both issues.

I

The 1982 consent decree settling the Government's antitrust suit against the American Telephone and Telegraph Company (AT&T) divested AT&T of its local-exchange carriers, leaving AT&T as a long-distance and equipment company, and limiting the divested carriers to the provision of local telephone service. *United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131 (DC 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U. S. 1001 (1983). The decree did nothing, however, to increase competition in the persistently monopolistic local markets, which were thought

†*Harisha J. Bastiampillai* and *Morton J. Posner* filed a brief for Allegiance Telecom, Inc., et al. as *amici curiae* urging affirmance in No. 00–511.

*JUSTICE SCALIA joins Part III of this opinion. JUSTICE THOMAS joins Parts III and IV.

to be the root of natural monopoly in the telecommunications industry. See S. Benjamin, D. Lichtman, & H. Shelanski, Telecommunications Law and Policy 682 (2001) (hereinafter Benjamin et al.); P. Huber, M. Kellogg, & J. Thorne, Federal Telecommunications Law § 2.1.1, pp. 84–85 (2d ed. 1999) (hereinafter Huber et al.); W. Baumol & J. Sidak, Toward Competition in Local Telephony 7–10 (1994); S. Breyer, Regulation and Its Reform 291–292, 314 (1982). These markets were addressed by provisions of the Telecommunications Act of 1996 (1996 Act or Act), Pub L. 104–104, 110 Stat. 56, that were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises; this objective was considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service. See Benjamin et al. 716.

Two sets of related provisions for opening local markets concern us here. First, Congress required incumbent local-exchange carriers to share their own facilities and services on terms to be agreed upon with new entrants in their markets. 47 U. S. C. § 251(c) (1994 ed., Supp. V). Second, knowing that incumbents and prospective entrants would sometimes disagree on prices for facilities or services, Congress directed the FCC to prescribe methods for state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce. § 252(d). The particular method devised by the FCC for setting rates to be charged for interconnection and lease of network elements under the Act, § 252(d)(1),[1] and regulations the FCC imposed to implement the statutory duty to share these elements, § 251(c)(3), are the subjects of this litigation, which must be understood against the background of ratemaking for public

[1] Section 252(d) separately provides for ratesetting with respect to reciprocal compensation for interconnected facilities, § 252(d)(2), and resale, § 252(d)(3).

utilities in the United States and the structure of local exchanges made accessible by the Act.

A

Companies providing telephone service have traditionally been regulated as monopolistic public utilities.[2] See J. Bonbright, Principles of Public Utility Rates 3–5 (1st ed. 1961) (hereinafter Bonbright); I. Barnes, Economics of Public Utility Regulation 37–41 (1942) (hereinafter Barnes). At the dawn of modern utility regulation, in order to offset monopoly power and ensure affordable, stable public access to a utility's goods or services, legislatures enacted rate schedules to fix the prices a utility could charge. See *id.*, at 170–173; C. Phillips, Regulation of Public Utilities 111–112, and n. 5 (1984) (hereinafter Phillips). See, *e. g.*, *Smyth* v. *Ames*, 169 U. S. 466, 470–476 (1898) (statement of case); *Munn* v. *Illinois*, 94 U. S. 113, 134 (1877). As this job became more complicated, legislatures established specialized administrative agencies, first local or state, then federal, to set and regulate rates. Barnes 173–175; Phillips 115–117. See, *e. g.*, *Minnesota Rate Cases*, 230 U. S. 352, 433 (1913) (Interstate Commerce Commission); *Shreveport Rate Cases*, 234 U. S. 342, 354–355 (1914) (jurisdictional dispute between ICC and Texas Railroad Commission). See generally T. McCraw, Prophets of Regulation 11–65 (1984). The familiar mandate in the enabling Acts was to see that rates be "just and reasonable" and not discriminatory. Barnes 289. See, *e. g.*, Transportation Act of 1920, 49 U. S. C. § 1(5) (1934 ed.).

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[2] Nationalization, the historical policy choice for regulation of telephone service in many other countries, was rejected in the United States. Cohen, The Telephone Problem and the Road to Telephone Regulation in the United States, 1876–1917, 3 J. of Policy History 42, 46, 55–56, 65 (1991) (hereinafter Cohen); S. Vogel, Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries 26–27 (1996).

All rates were subject to regulation this way: retail rates charged directly to the public and wholesale rates charged among businesses involved in providing the goods or services offered by the retail utility. Intrastate retail rates were regulated by the States or municipalities, with those at wholesale generally the responsibility of the National Government, since the transmission or transportation involved was characteristically interstate.[3] See Phillips 143.

Historically, the classic scheme of administrative rate-setting at the federal level called for rates to be set out by the regulated utility companies in proposed tariff schedules, on the model applied to railroad carriers under the Interstate Commerce Act of 1887, 24 Stat. 379. After interested parties had had notice of the proposals and a chance to comment, the tariffs would be accepted by the controlling agency so long as they were "reasonable" (or "just and reasonable") and not "unduly discriminatory." Hale, Commissions, Rates, and Policies, 53 Harv. L. Rev. 1103, 1104–1105 (1940). See, *e. g.*, *Southern Pacific Co.* v. *ICC*, 219 U. S. 433, 445 (1911). The States generally followed this same tariff-schedule model. Barnes 297–298. See, *e. g.*, *Smyth*, *supra*, at 470–476.

[3] The first noteworthy federal rate-regulation statute was the Interstate Commerce Act of 1887, 24 Stat. 379, which was principally concerned with railroad rates but generally governed all interstate rates. It was the model for subsequent federal public-utility statutes like the Federal Power Act of 1920, 41 Stat. 1063, the Communications Act of 1934, 48 Stat. 1064, the Natural Gas Act of 1938, 52 Stat. 821, and the Civil Aeronautics Act of 1938, 52 Stat. 973. The Communications Act of 1934 created the FCC and was the first statute to address interstate telephone regulation in an independent and substantive way. Federal regulation in the area had previously been undertaken incidentally to general interstate carrier regulation under the Interstate Commerce Act. The Mann-Elkins Act of 1910, 36 Stat. 539, was the earliest federal statute prescribing rates for interstate and foreign telephone and telegraph carriers, as part of revisions to railroad rates set by the ICC. See R. Vietor, Contrived Competition: Regulation and Deregulation in America 171 (1994) (hereinafter Vietor).

The way rates were regulated as between businesses (by the National Government) was in some respects, however, different from regulation of rates as between businesses and the public (at the state or local level). In wholesale markets, the party charging the rate and the party charged were often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate as between the two of them. Accordingly, in the Federal Power Act of 1920, 41 Stat. 1063, and again in the Natural Gas Act of 1938, 52 Stat. 821, Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting, 16 U. S. C. § 824d(d) (Federal Power Act); 15 U. S. C. § 717c(c) (Natural Gas Act). See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 338–339 (1956). When commercial parties did avail themselves of rate agreements, the principal regulatory responsibility was not to relieve a contracting party of an unreasonable rate, *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355 (1956) ("its improvident bargain"), but to protect against potential discrimination by favorable contract rates between allied businesses to the detriment of other wholesale customers. See *ibid.* Cf. *New York* v. *United States*, 331 U. S. 284, 296 (1947) ("The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations"). This Court once summed up matters at the wholesale level this way:

> "[W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to

> adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Sierra Pacific Power Co.*, *supra*, at 355 (citation omitted).

See also *United Gas Pipe Line Co.*, *supra*, at 345.

Regulation of retail rates at the state and local levels was, on the other hand, focused more on the demand for "just and reasonable" rates to the public than on the perils of rate discrimination. See Barnes 298–299. Indeed, regulated local telephone markets evolved into arenas of state-sanctioned discrimination engineered by the public utility commissions themselves in the cause of "universal service." Huber et al. 80–85. See also Vietor 167–185. In order to hold down charges for telephone service in rural markets with higher marginal costs due to lower population densities and lesser volumes of use, urban and business users were charged subsidizing premiums over the marginal costs of providing their own service. See Huber et al. 84.

These cross subsidies between markets were not necessarily transfers between truly independent companies, however, thanks largely to the position attained by AT&T and its satellites. This was known as the "Bell system," which by the mid-20th century had come to possess overwhelming monopoly power in all telephone markets nationwide, supplying local-exchange and long-distance services as well as equipment. Vietor 174–175. See also R. Garnet, Telephone Enterprise: Evolution of Bell System's Horizontal Structure, 1876–1909, pp. 160–163 (1985) (Appendix A). The same pervasive market presence of Bell providers that made it simple to provide cross subsidies in aid of universal service, however, also frustrated conventional efforts to hold retail rates down. See Huber et al. 84–85. Before the Bell system's predominance, regulators might have played competing carriers against one another to get lower rates for the public, see Cohen 47–50, but the strategy became virtually

impossible once a single company had become the only provider in nearly every town and city across the country. This regulatory frustration led, in turn, to new thinking about just and reasonable retail rates and ultimately to these cases.

The traditional regulatory notion of the "just and reasonable" rate was aimed at navigating the straits between gouging utility customers and confiscating utility property. *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603 (1944). See also Barnes 289–290; Bonbright 38. More than a century ago, reviewing courts charged with determining whether utility rates were sufficiently reasonable to avoid unconstitutional confiscation took as their touchstone the revenue that would be a "fair return" on certain utility property known as a "rate base." The fair rate of return was usually set as the rate generated by similar investment property at the time of the rate proceeding, and in *Smyth* v. *Ames*, 169 U. S., at 546, the Court held that the rate base must be calculated as "the fair value of the property being used by [the utility] for the convenience of the public." In pegging the rate base at "fair value," the *Smyth* Court consciously rejected the primary alternative standard, of capital actually invested to provide the public service or good. *Id.*, at 543–546. The Court made this choice in large part to prevent "excessive valuation or fictitious capitalization" from artificially inflating the rate base, *id.*, at 544, lest "'[t]he public . . . be subjected to unreasonable rates in order simply that stockholders may earn dividends,'" *id.*, at 545 (quoting *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 596 (1896)).[4]

But *Smyth* proved to be a troublesome mandate, as Justice Brandeis, joined by Justice Holmes, famously observed

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[4] And the Court had no doubt who should make the sacrifice in that situation. "'If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.'" *Smyth* v. *Ames*, 169 U. S., at 545 (citation omitted).

25 years later. *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Serv. Comm'n of Mo.*, 262 U. S. 276, 292 (1923) (dissenting opinion). The *Smyth* Court itself had described, without irony, the mind-numbing complexity of the required enquiry into fair value, as the alternative to historical investment:

> "[I]n order to ascertain [fair] value, original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." 169 U. S., at 546–547.

To the bewildered, *Smyth* simply threw up its hands, prescribing no one method for limiting use of these numbers but declaring all such facts to be "relevant."[5] *Southwestern Bell Telephone Co.*, 262 U. S., at 294–298, and n. 6 (Brandeis, J., dissenting). What is more, the customary checks on calculations of value in other circumstances were hard to come by for a utility's property; its costly facilities rarely changed hands and so were seldom tagged with a price a buyer would actually pay and a seller accept, *id.*, at 292; *West* v. *Chesapeake & Potomac Telephone Co. of Baltimore*, 295 U. S. 662, 672 (1935). Neither could reviewing courts resort to a utility's revenue as an index of fair value, since its reve-

[5] One of the referents of value that did prove possible was current replacement or reproduction cost, a primitive version of the criterion challenged in these cases. See *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 417 (1926); Goddard, The Problem of Valuation: The Evolution of Cost of Reproduction as the Rate Base, 41 Harv. L. Rev. 564, 570–571 (1928).

nues were necessarily determined by the rates subject to review, with the rate of return applied to the very property subject to valuation. *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299, 309, n. 5 (1989); *Hope Natural Gas Co.*, *supra*, at 601.

Small wonder, then, that Justice Brandeis was able to demonstrate how basing rates on *Smyth*'s galactic notion of fair value could produce revenues grossly excessive or insufficient when gauged against the costs of capital. He gave the example (simplified) of a $1 million plant built with promised returns on the equity of $90,000 a year. *Southwestern Bell Telephone Co.*, *supra*, at 304–306. If the value were to fall to $600,000 at the time of a rate proceeding, with the rate of return on similar investments then at 6 percent, *Smyth* would say a rate was not confiscatory if it returned at least $36,000, a shortfall of $54,000 from the costs of capital. But if the value of the plant were to rise to $1,750,000 at the time of the rate proceeding, and the rate of return on comparable investments stood at 8 percent, then constitutionality under *Smyth* would require rates generating at least $140,000, $50,000 above capital costs.

The upshot of *Smyth*, then, was the specter of utilities forced into bankruptcy by rates inadequate to pay off the costs of capital, even when a drop in value resulted from general economic decline, not imprudent investment; while in a robust economy, an investment no more prescient could claim what seemed a rapacious return on equity invested. Justice Brandeis accordingly advocated replacing "fair value" with a calculation of rate base on the cost of capital prudently invested in assets used for the provision of the public good or service, and although he did not live to enjoy success, his campaign against *Smyth* came to fruition in *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944).

In *Hope Natural Gas*, this Court disavowed the position that the Natural Gas Act and the Constitution required fair value as the sole measure of a rate base on which "just and

reasonable" rates were to be calculated. *Id.*, at 601–602. See also *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 602–606 (1942) (Black, Douglas, and Murphy, JJ., concurring). In the matter under review, the Federal Power Commission had valued the rate base by using "actual legitimate cost" reflecting "sound depreciation and depletion practices," and so had calculated a value roughly 25 percent below the figure generated by the natural-gas company's fair-value methods using "estimated reproduction cost" and "trended original cost." *Hope Natural Gas*, 320 U. S., at 596–598, and nn. 4–5. The Court upheld the Commission. "Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base."[6] *Id.*, at 605. Although *Hope Natural Gas* did not repudiate everything said in *Smyth*, since fair value was still "the end product of the process of rate-making," 320 U. S., at 601, federal and state commissions setting rates in the aftermath of *Hope Natural Gas* largely abandoned the old fair-value approach and turned to methods of calculating the rate base on the basis of "cost." A. Kahn, Economics of Regulations: Principles and Institutions 40–41 (1988).

"Cost" was neither self-evident nor immune to confusion, however; witness the invocation of "reproduction cost" as a

[6] The fair-value concept survived to some degree in the "used and useful" qualification to the prudent-investment rule, that a utility can only recover prudently invested capital that is being "used and useful" in providing the public a good or service. For example, the Pennsylvania rate statute upheld in *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299 (1989), provided that capital invested with prudence at the time but rendered useless by unforeseen events would not be recoverable through regulated rates, just as it would be worthless in terms of market value. *Id.*, at 311–312, n. 7 ("The loss to utilities from prudent ultimately unsuccessful investments under such a system is greater than under a pure prudent investment rule, but less than under a fair value approach").

popular method for calculating fair value under *Smyth*, see n. 5, *supra*, and the Federal Power Commission's rejection of "trended original cost" (apparently, a straight-line derivation from the cost of capital originally invested) in favor of "actual legitimate cost," *Hope Natural Gas*, *supra*, at 596. Still, over time, general agreement developed on a method that was *primus inter pares*, and it is essentially a modern gloss on that method that the incumbent carriers say the FCC should have used to set the rates at issue here.

The method worked out is not a simple calculation of rate base as the original cost of "prudently invested" capital that Justice Brandeis assumed, presumably by reference to the utility's balance sheet at the time of the rate proceeding. *Southwestern Bell Telephone Co.*, 262 U. S., at 304–306. Rather, "cost" came to mean "cost of service," that is, the cost of prudently invested capital used to provide the service. Bonbright 173; P. Garfield & W. Lovejoy, Public Utility Economics 56 (1964). This was calculated subject to deductions for accrued depreciation and allowances for working capital,[7] see Phillips 282–283 (table 8–1) ("a typical electric utility rate base"), naturally leading utilities to minimize depreciation by using very slow depreciation rates (on the assumption of long useful lives),[8] and to maximize working capital claimed as a distinct rate-base constituent.

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[7] Operating cash, inventory, and accounts receivable constitute typical current assets. Current liabilities consist of accounts payable, such as taxes, wages, rents, interest payable, and short-term debt. Because, for example, accounts receivable may not be collected until after liabilities come due, working capital is capital needed to pay current liabilities in the interim. Z. Bodie & R. Merton, Finance 427 (prelim. ed. 1998).

[8] For example, in 1997, regulated incumbent local-exchange carriers had an average depreciation cycle of 14.4 years for their assets (an average depreciation cost of $127 per line as against gross plant investment of $1,836 per line), roughly twice as long as the average cycle of 7.4 years for unregulated competitive carriers like Worldcom. Weingarten & Stuck, Rethinking Depreciation, 28 Business Communications Review 63 (Oct. 1998).

This formula, commonly called the prudent-investment rule, addressed the natural temptations on the utilities' part to claim a return on outlays producing nothing of value to the public. It was meant, on the one hand, to discourage unnecessary investment and the "fictitious capitalization" feared in *Smyth*, 169 U. S., at 543–546, and so to protect ratepayers from supporting excessive capacity, or abandoned, destroyed, or phantom assets. Kahn, Tardiff, & Weisman, Telecommunications Act at three years: an economic evaluation of its implementation by the Federal Communications Commission, 11 Information Economics & Policy 319, 330, n. 27 (1999) (hereinafter Kahn, Telecommunications Act). At the same time, the prudent-investment rule was intended to give utilities an incentive to make smart investments deserving a "fair" return, and thus to mimic natural incentives in competitive markets[9] (though without an eye to fostering the actual competition by which such markets are defined). In theory, then, the prudent-investment qualification gave the ratepayer an important protection by mitigating the tendency of a regulated market's lack of competition to support monopolistic prices.

But the mitigation was too little, the prudent-investment rule in practice often being no match for the capacity of utilities having all the relevant information to manipulate the rate base and renegotiate the rate of return every time a rate was set. The regulatory response in some markets was adoption of a rate-based method commonly called "price caps," *United States Telephone Assn.* v. *FCC*, 188 F. 3d 521, 524 (CADC 1999), as, for example, by the FCC's setting of maximum access charges paid to large local-exchange com-

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[9] In a competitive market, a company may not simply raise prices as much as it may need to compensate for poor investments (say, in a plant that becomes unproductive) because competitors will then undersell the company's goods. See N. Mankiw, Principles of Economics 308–310 (1998) (hereinafter Mankiw).

panies by interexchange carriers, *In re Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, 6787, ¶ 1 (1990).

The price-cap scheme starts with a rate generated by the conventional cost-of-service formula, which it takes as a benchmark to be decreased at an average of some 2–3 percent a year to reflect productivity growth, Kahn, Telecommunications Act 330–332, subject to an upward adjustment if necessary to reflect inflation or certain unavoidable "exogenous costs" on which the company is authorized to recover a return. 5 FCC Rcd., at 6787, ¶ 5. Although the price caps do not eliminate gamesmanship, since there are still battles to be fought over the productivity offset and allowable exogenous costs, *United States Telephone Assn.*, *supra*, at 524, they do give companies an incentive "to improve productivity to the maximum extent possible," by entitling those that outperform the productivity offset to keep resulting profits, 5 FCC Rcd., at 6787–6788, ¶¶ 7–9. Ultimately, the goal, as under the basic prudent-investment rule, is to encourage investment in more productive equipment.

Before the passage of the 1996 Act, the price cap was, at the federal level, the final stage in a century of developing ratesetting methodology. What had changed throughout the era beginning with *Smyth* v. *Ames* was prevailing opinion on how to calculate the most useful rate base, with the disagreement between fair-value and cost advocates turning on whether invested capital was the key to the right balance between investors and ratepayers, and with the price-cap scheme simply being a rate-based offset to the utilities' advantage of superior knowledge of the facts employed in cost-of-service ratemaking. What is remarkable about this evolution of just and reasonable ratesetting, however, is what did not change. The enduring feature of ratesetting from *Smyth* v. *Ames* to the institution of price caps was the idea that calculating a rate base and then allowing a fair rate of

return on it was a sensible way to identify a range of rates that would be just and reasonable to investors and ratepayers. Equally enduring throughout the period was dissatisfaction with the successive rate-based variants. From the constancy of this dissatisfaction, one possible lesson was drawn by Congress in the 1996 Act, which was that regulation using the traditional rate-based methodologies gave monopolies too great an advantage and that the answer lay in moving away from the assumption common to all the rate-based methods, that the monopolistic structure within the discrete markets would endure.

Under the local-competition provisions of the Act, Congress called for ratemaking different from any historical practice, to achieve the entirely new objective of uprooting the monopolies that traditional rate-based methods had perpetuated. H. R. Conf. Rep. No. 104–230, p. 113 (1996). A leading backer of the Act in the Senate put the new goal this way:

> "This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out. . . .
>
> "It is kind of almost a jump-start. . . . I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything.
>
> "Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself." 141 Cong. Rec. 15572 (1995) (remarks of Sen. Breaux (La.) on Pub. L. 104–104).

For the first time, Congress passed a ratesetting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets. The approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates.

While the Act is like its predecessors in tying the methodology to the objectives of "just and reasonable" and nondiscriminatory rates, 47 U. S. C. § 252(d)(1), it is radically unlike all previous statutes in providing that rates be set "without reference to a rate-of-return or other rate-based proceeding," § 252(d)(1)(A)(i). The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales, see *In re Implementation of Local Competition in Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15857, ¶ 704 (1996) (First Report and Order), in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.

B

The physical incarnation of such a market, a "local exchange," is a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city. From terminal network interface devices, feeder wires, collectively called the "local loop," are run to local switches that aggregate traffic into common "trunks." The local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a

far lesser extent than in long-haul markets.[10] Just as the loop runs from terminals to local switches, the trunks run from the local switches to centralized, or tandem, switches, originally worked by hand but now by computer, which operate much like railway switches, directing traffic into other trunks. A signal is sent toward its destination terminal on these common ways so far as necessary, then routed back down another hierarchy of switches to the intended telephone or other equipment. A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like.

It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U. S. C. §251(h)) would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.[11] The incumbent company could also control its local-loop plant so as to connect only with terminals it manufactured or selected, and could place conditions or fees (called "access charges") on long-distance carriers seeking to con-

[10] Some loop lines employ coaxial cable and fixed wireless technologies, but these constitute less than 1 percent of the total number of reported local-exchange lines in the United States. FCC, Local Telephone Competition: Status as of June 30, 2001 (Feb. 27, 2002) (table 5).

[11] A mininetwork connecting only some of the users in the local exchange would be of minimal value to customers, and, correspondingly, any value to customers would be exponentially increased with the interconnection of more users to the network. See generally W. Arthur, Increasing Returns and Path Dependence in the Economy 1–12 (1994).

nect with its network. In an unregulated world, another telecommunications carrier would be forced to comply with these conditions, or it could never reach the customers of a local exchange.

II

The 1996 Act both prohibits state and local regulation that impedes the provision of "telecommunications service," § 253(a),[12] and obligates incumbent carriers to allow competitors to enter their local markets, § 251(c). Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market (a "requesting" carrier, § 251(c)(2)) may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§ 251(a) and (c)(2). At the other end of the spectrum, the statute permits an entrant to skip construction and instead simply to buy and resell "telecommunications service," which the incumbent has a duty to sell at wholesale. §§ 251(b)(1) and (c)(4). Between these extremes, an entering competitor may choose to lease certain of an incumbent's "network elements,"[13] which

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[12] Title 47 U. S. C. § 253(a) (1994 ed., Supp. V) provides:

"No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[13] "Network element" is defined as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." § 153(29).

the incumbent has a duty to provide "on an unbundled basis" at terms that are "just, reasonable, and nondiscriminatory." § 251(c)(3).

Since wholesale markets for companies engaged in resale, leasing, or interconnection of facilities cannot be created without addressing rates, Congress provided for rates to be set either by contracts between carriers or by state utility commission rate orders. §§ 252(a)–(b). Like other federal utility statutes that authorize contracts approved by a regulatory agency in setting rates between businesses, *e. g.*, 16 U. S. C. § 824d(d) (Federal Power Act); 15 U. S. C. § 717c(c) (Natural Gas Act), the Act permits incumbent and entering carriers to negotiate private rate agreements, 47 U. S. C. § 252(a);[14] see also § 251(c)(1) (duty to negotiate in good faith). State utility commissions are required to accept any such agreement unless it discriminates against a carrier not a party to the contract, or is otherwise shown to be contrary to the public interest. §§ 252(e)(1) and (e)(2)(A). Carriers, of course, might well not agree, in which case an entering carrier has a statutory option to request mediation by a state commission, § 252(a)(2). But the option comes with strings, for mediation subjects the parties to the duties specified in § 251 and the pricing standards set forth in § 252(d), as

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[14] Section 252(a) provides:

"(a) Agreements arrived at through negotiation

"(1) Voluntary negotiations

"Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section."

interpreted by the FCC's regulations, § 252(e)(2)(B). These regulations are at issue here.

As to pricing, the Act provides that when incumbent and requesting carriers fail to agree, state commissions will set a "just and reasonable" and "nondiscriminatory" rate for interconnection or the lease of network elements based on "the cost of providing the . . . network element," which "may include a reasonable profit."[15] § 252(d)(1). In setting these rates, the state commissions are, however, subject to that important limitation previously unknown to utility regulation: the rate must be "determined without reference to a rate-of-return or other rate-based proceeding." *Ibid.* In *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 384–385 (1999), this Court upheld the FCC's jurisdiction to impose a new methodology on the States when setting these rates. The attack today is on the legality and logic of the particular methodology the Commission chose.

As the Act required, six months after its effective date the FCC implemented the local-competition provisions in its First Report and Order, which included as an appendix the new regulations at issue. Challenges to the order, mostly by incumbent local-exchange carriers and state commissions, were consolidated in the United States Court of Appeals for the Eighth Circuit. *Iowa Utilities Bd.* v. *FCC*, 120 F. 3d 753, 792 (1997), aff'd in part and rev'd in part, 525 U. S. 366, 397 (1999). See also *California* v. *FCC*, 124 F. 3d 934, 938 (1997), rev'd in part, 525 U. S. 366, 397 (1999) (challenges to *In re Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 11 FCC Rcd. 19392 (1996) (Second Report and Order)).

So far as it bears on where we are today, the initial decision by the Eighth Circuit held that the FCC had no au-

[15] Rates for wholesale purchases of telecommunications services are covered separately, and must be based on the incumbent's retail rates. § 252(d)(3).

thority to control the methodology of state commissions setting the rates incumbent local-exchange carriers could charge entrants for network elements, 47 CFR § 51.505(b)(1) (1997). *Iowa Utilities Bd.* v. *FCC*, *supra*, at 800. The Eighth Circuit also held that the FCC misconstrued the plain language of § 251(c)(3) in implementing a set of "combination" rules, 47 CFR §§ 51.315(b)–(f) (1997), the most important of which provided that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines," § 51.315(b). 120 F. 3d, at 813. On the other hand, the Court of Appeals accepted the FCC's view that the Act required no threshold ownership of facilities by a requesting carrier, First Report and Order ¶¶ 328–340, and upheld Rule 319, 47 CFR § 51.319 (1997), which read "network elements" broadly, to require incumbent carriers to provide not only equipment but also services and functions, such as operations support systems (*e. g.*, billing databases), § 51.319(f)(1), operator services and directory assistance, § 51.319(g), and vertical switching features like call-waiting and caller I. D., First Report and Order ¶¶ 263, 413. 120 F. 3d, at 808–810.

This Court affirmed in part and in larger part reversed. *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S., at 397. We reversed in upholding the FCC's jurisdiction to "design a pricing methodology" to bind state ratemaking commissions, *id.*, at 385, as well as one of the FCC's combination rules, Rule 315(b), barring incumbents from separating currently combined network elements when furnishing them to entrants that request them in a combined form, *id.*, at 395. We also reversed in striking down Rule 319, holding that its provision for blanket access to network elements was inconsistent with the "necessary" and "impair" standards of 47 U. S. C. § 251(d)(2), 525 U. S., at 392. We affirmed the Eighth Circuit, however, in upholding the FCC's broad definition of network elements to be provided, *id.*, at 387, and

the FCC's understanding that the Act imposed no facilities-ownership requirement, *id.*, at 392–393. The case then returned to the Eighth Circuit. *Id.*, at 397.

With the FCC's general authority to establish a pricing methodology secure, the incumbent carriers' primary challenge on remand went to the method that the Commission chose. There was also renewed controversy over the combination rules (Rules 315(c)–(f)) that the Eighth Circuit had struck down along with Rule 315(b), but upon which this Court expressed no opinion when it reversed the invalidation of that latter rule. 219 F. 3d 744, 748 (2000).

As for the method to derive a "nondiscriminatory," "just and reasonable rate for network elements," the Act requires the FCC to decide how to value "the cost . . . of providing the . . . network element [which] may include a reasonable profit," although the FCC is (as already seen) forbidden to allow any "reference to a rate-of-return or other rate-based proceeding," § 252(d)(1). Within the discretion left to it after eliminating any dependence on a "rate-of-return or other rate-based proceeding," the Commission chose a way of treating "cost" as "forward-looking economic cost," 47 CFR § 51.505 (1997), something distinct from the kind of historically based cost generally relied upon in valuing a rate base after *Hope Natural Gas.* In Rule 505, the FCC defined the "forward-looking economic cost of an element [as] the sum of (1) the total element long-run incremental cost of the element [TELRIC]; [and] (2) a reasonable allocation of forward-looking common costs," § 51.505(a), common costs being "costs incurred in providing a group of elements that "cannot be attributed directly to individual elements," § 51.505(c)(1). Most important of all, the FCC decided that the TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers." § 51.505(b)(1).

"The TELRIC of an element has three components, the operating expenses, the depreciation cost, and the appropriate risk-adjusted cost of capital." First Report and Order ¶ 703 (footnote omitted). See also 47 CFR §§ 51.505(b)(2)–(3) (1997). A concrete example may help. Assume that it would cost $1 a year to operate a most efficient loop element; that it would take $10 for interest payments on the capital a carrier would have to invest to build the lowest cost loop centered upon an incumbent carrier's existing wire centers (say $100, at 10 percent per annum); and that $9 would be reasonable for depreciation on that loop (an 11-year useful life); then the annual TELRIC for the loop element would be $20.[16]

The Court of Appeals understood § 252(d)(1)'s reference to "the cost . . . of providing the . . . network element" to be ambiguous as between "forward-looking" and "historical" cost, so that a forward-looking ratesetting method would presumably be a reasonable implementation of the statute. But the Eighth Circuit thought the ambiguity afforded no leeway beyond that, and read the Act to require any forward-looking methodology to be "based on the incremental costs that an [incumbent] actually incurs or will incur in providing . . . the unbundled access to its specific network elements." 219 F. 3d, at 751–753. Hence, the Eighth Circuit held that § 252(d)(1) foreclosed the use of the TELRIC methodology. In other words, the court read the Act as plainly requiring rates based on the "actual" not "hypothetical" "cost . . . of providing the . . . network element," and reasoned that TELRIC was clearly the latter. *Id.*, at

[16] The actual TELRIC rate charged to an entrant leasing the element would be a fraction of the TELRIC figure, based on a "reasonable projection" of the entrant's use of the element (whether on a flat or per-usage basis) as divided by aggregate total use of the element by the entrant, the incumbent, and any other competitor that leases it. 47 CFR § 51.511 (1997). See also First Report and Order ¶ 682.

750–751. The Eighth Circuit added, however, that if it were wrong and TELRIC were permitted, the claim that in prescribing TELRIC the FCC had effected an unconstitutional taking would not be "ripe" until "resulting rates have been determined and applied." *Id.*, at 753–754.

The Court of Appeals also, and for the second time, invalidated Rules 315(c)–(f), 47 CFR §§ 51.315(c)–(f) (1997), the FCC's so-called "additional combination" rules, apparently for the same reason it had rejected them before, when it struck down Rule 315(b), the main combination rule. 219 F. 3d, at 758–759. In brief, the rules require an incumbent carrier, upon request and compensation, to "perform the functions necessary to combine" network elements for an entrant, unless the combination is not "technically feasible." *Id.*, at 759. The Eighth Circuit read the language of § 251(c)(3), with its reference to "allow[ing] requesting carriers to combine . . . elements," as unambiguously requiring a requesting carrier, not a providing incumbent, to do any and all combining. *Ibid.*

Before us, the incumbent local-exchange carriers claim error in the Eighth Circuit's holding that a "forward-looking cost" methodology (as opposed to the use of "historical" cost) is consistent with § 252(d)(1), and its conclusion that the use of the TELRIC forward-looking cost methodology presents no "ripe" takings claim. The FCC and the entrants, on the other side, seek review of the Eighth Circuit's invalidation of the TELRIC methodology and the additional combination rules. We granted certiorari, 531 U. S. 1124 (2001), and now affirm on the issues raised by the incumbents, and reverse on those raised by the FCC and the entrants.

III

A

The incumbent carriers' first attack charges the FCC with ignoring the plain meaning of the word "cost" as it occurs

in the provision of § 252(d)(1) that "the just and reasonable rate for network elements . . . shall be . . . based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element . . . ." The incumbents do not argue that in theory the statute precludes any forward-looking methodology, but they do claim that the cost of providing a competitor with a network element in the future must be calculated using the incumbent's past investment in the element and the means of providing it. They contend that "cost" in the statute refers to "historical" cost, which they define as "what was in fact paid" for a capital asset, as distinct from "value," or "the price that would be paid on the open market." Brief for Petitioners in No. 00–511, p. 19. They say that the technical meaning of "cost" is "past capital expenditure," *ibid.*, and they suggest an equation between "historical" and "embedded" costs, *id.*, at 20, which the FCC defines as "the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts," 47 CFR § 51.505(d)(1) (1997). The argument boils down to the proposition that "the cost of providing the network element" can only mean, in plain language and in this particular technical context, the past cost to an incumbent of furnishing the specific network element actually, physically, to be provided.

The incumbents have picked an uphill battle. At the most basic level of common usage, "cost" has no such clear implication. A merchant who is asked about "the cost of providing the goods" he sells may reasonably quote their current wholesale market price, not the cost of the particular items he happens to have on his shelves, which may have been bought at higher or lower prices.

When the reference shifts from common speech into the technical realm, the incumbents still have to attack uphill. To begin with, even when we have dealt with historical costs as a ratesetting basis, the cases have never assumed a sense

of "cost" as generous as the incumbents seem to claim.[17] "Cost" as used in calculating the rate base under the traditional cost-of-service method did not stand for all past capital expenditures, but at most for those that were prudent, while prudent investment itself could be denied recovery when unexpected events rendered investment useless, *Duquesne Light Co.* v. *Barasch*, 488 U. S., at 312. And even when investment was wholly includable in the rate base, ratemakers often rejected the utilities' "embedded costs," their own book-value estimates, which typically were geared to maximize the rate base with high statements of past expenditures and working capital, combined with unduly low rates of depreciation. See, *e. g.*, *Hope Natural Gas*, 320 U. S., at 597–598. It would also be a mistake to forget that "cost" was a term in value-based ratemaking and has figured in contemporary state and federal ratemaking untethered to historical valuation.[18]

What is equally important is that the incumbents' plain-meaning argument ignores the statutory setting in which the mandate to use "cost" in valuing network elements occurs. First, the Act uses "cost" as an intermediate term

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[17] Nor is it possible to argue that "cost" would have to mean past incurred cost if the technical context were economics. See D. Carlton & J. Perloff, Modern Industrial Organization 50–74 (2d ed. 1994) (hereinafter Carlton & Perloff). "Sunk costs" are unrecoverable past costs; practically every other sort of economic "cost" is forward looking, or can be either historical or forward looking. "Opportunity cost," for example, is "the value of the best forgone alternative use of the resources employed," *id.*, at 56, and as such is always forward looking. See Sidak & Spulber, Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996, 97 Colum. L. Rev. 1081, 1093 (1997) (hereinafter Sidak & Spulber, Telecommons) ("Opportunity costs are . . . by definition forward-looking").

[18] See, *e. g.*, *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U. S. 211, 224–225 (1991); *Potomac Elec. Power Co.* v. *ICC*, 744 F. 2d 185, 193–194 (CADC 1984); *Alabama Elec. Coop., Inc.* v. *FERC*, 684 F. 2d 20, 27 (CADC 1982). Cf. *National Assn. of Greeting Card Publishers* v. *Postal Service*, 462 U. S. 810, 832 (1983).

in the calculation of "just and reasonable rates," 47 U. S. C. § 252(d)(1), and it was the very point of *Hope Natural Gas* that regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology, 320 U. S., at 602. Second, it would have been passing strange to think Congress tied "cost" to historical cost without a more specific indication, when the very same sentence that requires "cost" pricing also prohibits any reference to a "rate-of-return or other rate-based proceeding," § 252(d)(1), each of which has been identified with historical cost ever since *Hope Natural Gas* was decided.[19]

The fact is that without any better indication of meaning than the unadorned term, the word "cost" in § 252(d)(1), as in accounting generally, is "a chameleon," *Strickland* v. *Commissioner, Maine Dept. of Human Services*, 96 F. 3d 542, 546 (CA1 1996), a "virtually meaningless" term, R. Estes, Dictionary of Accounting 32 (2d ed. 1985). As JUSTICE BREYER put it in *Iowa Utilities Bd.*, words like "cost" "give ratesetting commissions broad methodological leeway; they say little about the 'method employed' to determine a par-

[19] The incumbents make their own plain-language argument based on statutory context, relying on the part of § 252(d)(1)(B) which provides that a just and reasonable rate "may include a reasonable profit." They say that because separate provision is made in § 252(d)(1)(A) for factoring "cost" into the rate, "reasonable profit" may only be understood as income above recovery of the actual cost of an incumbent's investment. But as the FCC has noted, "profit" may also mean "normal" profit, which is "the total revenue required to cover all of the costs of a firm, including its opportunity costs." First Report and Order ¶ 699, and n. 1705 (citing D. Pearce, MIT Dictionary of Modern Economics 310 (1994)). That is to say, a "reasonable profit" may refer to a "normal" return based on "the cost of obtaining debt and equity financing" prevailing in the industry. First Report and Order ¶ 700. This latter sense of "cost" (and accordingly "reasonable profit") is fully incorporated in the FCC's provisions as to "risk-adjusted cost of capital," namely, that "States may adjust the cost of capital if a party demonstrates . . . that either a higher or a lower level of cost of capital is warranted, without . . . conducting a 'rate-of-return or other rate based proceeding.'" *Id.*, ¶ 702.

ticular rate." 525 U. S., at 423 (opinion concurring in part and dissenting in part). We accordingly reach the conclusion adopted by the Court of Appeals, that nothing in § 252(d)(1) plainly requires reference to historical investment when pegging rates to forward-looking "cost."

B

The incumbents' alternative argument is that even without a stern anchor in calculating "the cost . . . of providing the . . . network element," the particular forward-looking methodology the FCC chose is neither consistent with the plain language of § 252(d)(1) nor within the zone of reasonable interpretation subject to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843-845 (1984). This is so, they say, because TELRIC calculates the forward-looking cost by reference to a hypothetical, most efficient element at existing wire centers, not the actual network element being provided.

1

The short answer to the objection that TELRIC violates plain language is much the same as the answer to the previous plain-language argument, for what the incumbents call the "hypothetical" element is simply the element valued in terms of a piece of equipment an incumbent may not own. This claim, like the one just considered, is that plain language bars a definition of "cost" untethered to historical investment, and as explained already, the term "cost" is simply too protean to support the incumbents' argument.

2

Similarly, the claim that TELRIC exceeds reasonable interpretative leeway is open to the objection already noted, that responsibility for "just and reasonable" rates leaves methodology largely subject to discretion. *Permian Basin Area Rate Cases*, 390 U. S. 747, 790 (1968) ("We must re-

iterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties"). See generally *Chevron*, *supra*, at 843–845, 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail").[20] The incumbents nevertheless field three ar-

[20] While JUSTICE BREYER does not explicitly challenge the propriety of *Chevron* deference, he relies on our decision in *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 56 (1983), to argue that the FCC's choice of TELRIC bears no "rational connection" to the Act's deregulatory purpose. See *post*, at 542, 554 (opinion concurring in part and dissenting in part). *State Farm* involved review of an agency's "changing its course" as to the interpretation of a statute, 463 U. S., at 42; these cases, by contrast, involve the FCC's first interpretation of a new statute, and so *State Farm* is inapposite to the extent that it may be read as prescribing more searching judicial review under the circumstances of that case. (Indeed, *State Farm* may be read to suggest the obverse conclusion, that the FCC would have had some more explaining to do if it had not changed its course by favoring TELRIC over forward-looking methodologies tethered to actual costs, given Congress's clear intent to depart from past ratesetting statutes in passing the 1996 Act.)

But even on JUSTICE BREYER's own terms, FCC rules stressing low wholesale prices are by no means inconsistent with the deregulatory and competitive purposes of the Act. As we discuss below, a policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (but not the higher prices the incumbents would like to charge) in a position to build their own versions of less expensive facilities that are sensibly duplicable. See n. 27, *infra*. See also *infra*, at 515–516 (discussing FCC's objection to Ramsey pricing). And while it is true, as JUSTICE BREYER says, that the Act was "deregulatory," in the intended sense of departing from traditional "regulatory" ways that coddled monopolies, see *supra*, at 488 (remarks of Sen. Breaux), that deregulatory character does not necessarily require the FCC to employ passive pricing rules deferring to incumbents' proposed methods and

guments. They contend, first, that a method of calculating wholesale lease rates based on the costs of providing hypothetical, most efficient elements may simulate the competition envisioned by the Act but does not induce it. Second, they argue that even if rates based on hypothetical elements could induce competition in theory, TELRIC cannot do this, because it does not provide the depreciation and risk-adjusted capital costs that the theory compels. Finally, the incumbents say that even if these objections can be answered, TELRIC is needlessly, and hence unreasonably, complicated and impracticable.

a

The incumbents' (and JUSTICE BREYER's) basic critique of TELRIC is that by setting rates for leased network elements on the assumption of perfect competition, TELRIC perversely creates incentives against competition in fact. See *post*, at 548–551. The incumbents say that in purporting to set incumbents' wholesale prices at the level that would exist in a perfectly competitive market (in order to make retail prices similarly competitive), TELRIC sets rates so low that entrants will always lease and never build network elements. See *post*, at 549–550. And even if an entrant would otherwise consider building a network element more efficient than the best one then on the market (the one assumed in setting the TELRIC rate), it would likewise be deterred by the prospect that its lower cost in building and operating this new element would be immediately available to its competitors; under TELRIC, the incumbents assert, the lease rate for an incumbent's existing element would in-

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cost data. On the contrary, the statutory provisions obligating the incumbents to lease their property, § 251(c)(3), and offer their services for resale at wholesale rates, § 251(c)(4), are consistent with the promulgation of a ratesetting method leaving state commissions to do the work of setting rates without any reliance on historical-cost data provided by incumbents.

stantly drop to match the marginal cost[21] of the entrant's new element once built. See *ante*, at 550; Brief for Respondents BellSouth et al. in Nos. 00–555, etc., pp. 28–29. According to the incumbents, the result will be, not competition, but a sort of parasitic free riding, leaving TELRIC incapable of stimulating the facilities-based competition intended by Congress.

We think there are basically three answers to this no-stimulation claim of unreasonableness: (1) the TELRIC methodology does not assume that the relevant markets are perfectly competitive, and the scheme includes several features of inefficiency that undermine the plausibility of the incumbents' no-stimulation argument; (2) comparison of TELRIC with alternatives proposed by the incumbents as more reasonable are plausibly answered by the FCC's stated reasons to reject the alternatives; and (3) actual investment in competing facilities since the effective date of the Act simply belies the no-stimulation argument's conclusion.

(1)

The basic assumption of the incumbents' no-stimulation argument is contrary to fact. As we explained, the argument rests on the assumption that in a perfectly efficient market, no one who can lease at a TELRIC rate will ever build. But TELRIC does not assume a perfectly efficient wholesale market or one that is likely to resemble perfection in any foreseeable time. The incumbents thus make the same mistake we attributed in a different setting to the FCC itself. In *Iowa Utilities Bd.*, we rejected the FCC's necessary-and-impair rule, 47 CFR §51.319 (1997), which required incumbents to lease any network element that might reduce, however slightly, an entrant's marginal cost of providing a telecommunications service, as compared with providing the service using the entrant's own equivalent

[21] "Marginal cost" is "the increase in total cost [of producing goods] that arises from an extra unit of production." See Mankiw 272; see also *id.*, at 283–288, 312–313; Carlton & Perloff 51–52.

element. 525 U. S., at 389–390. "In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with 'necessity' and 'impairment' might be reasonable, but it has not established the existence of such an ideal world." *Id.*, at 390.

Not only that, but the FCC has of its own accord allowed for inefficiency in the TELRIC design in additional ways affecting the likelihood that TELRIC will squelch competition in facilities. First, the Commission has qualified any assumption of efficiency by requiring ratesetters to calculate cost on the basis of "the existing location of the incumbent['s] wire centers." 47 CFR § 51.505(b)(1) (1997). This means that certain network elements, principally local-loop elements, will not be priced at their most efficient cost and configuration to the extent, say, that a shorter loop could serve a local exchange if the incumbent's wire centers were relocated for a snugger fit with the current geography of terminal locations.

Second, TELRIC rates in practice will differ from the products of a perfectly competitive market owing to built-in lags in price adjustments. In a perfectly competitive market, retail prices drop instantly to the marginal cost of the most efficient company. See Mankiw 283–288, 312–313. As the incumbents point out, this would deter market entry because a potential entrant would know that even if it could provide a retail service at a lower marginal cost, it would instantly lose that competitive edge once it entered the market and competitors adjusted to match its price. See Brief for Respondents BellSouth et al. in Nos. 00–555, etc., at 28–29. Wholesale TELRIC rates, however, are set by state commissions, usually by arbitrated agreements with 3- or 4-year terms, see Brief for Respondent Qwest Communications International, Inc., in Nos. 00–511, etc., p. 39; Reply Brief for Petitioners Worldcom, Inc., et al. 6; Reply Brief for Respondent Sprint Corp. 7, and n. 3; Reply Brief for Peti-

tioner AT&T Corp. 11–12; and no one claims that a competitor could receive immediately on demand a TELRIC rate on a leased element at the marginal cost of the entrant who introduces a more efficient element.

But even if a competitor could call for a new TELRIC rate proceeding immediately upon the introduction of a more efficient element by a competing entrant, the competitor would not necessarily know enough to make the call; the fact of the element's greater efficiency would only become apparent when reflected in lower retail prices drawing demand away from existing competitors (including the incumbent), forcing them to look to lowering their own marginal costs. In practice, it would take some time for the innovating entrant to install the new equipment, to engage in marketing offering a lower retail price to attract business, and to steal away enough customer subscriptions (given the limited opportunity to capture untapped customers for local telephone service) for competitors to register the drop in demand.

Finally, it bears reminding that the FCC prescribes measurement of the TELRIC "based on the use of the most efficient telecommunications technology currently available," 47 CFR § 51.505(b)(1) (1997). Owing to that condition of current availability, the marginal cost of a most efficient element that an entrant alone has built and uses would not set a new pricing standard until it became available to competitors as an alternative to the incumbent's corresponding element.[22]

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[22] The Michigan state commission's September 1994 order implementing a long-run incremental cost method for leasing local-exchange network elements, which the FCC considered, see First Report and Order ¶ 631, and n. 1508, makes this limitation more explicit by specifying that rates are to be set based on the costs of elements using the most efficient technology "currently available for purchase." Michigan Pub. Serv. Comm'n, Re A Methodology to Determine Long Run Incremental Cost, 156 P. U. R. 4th 1, 7, 13 (1994).

As a reviewing Court we are, of course, in no position to assess the precise economic significance of these and other exceptions to the perfectly functioning market that the incumbents' criticism assumes. Instead, it is enough to recognize that the incumbents' assumption may well be incorrect. Inefficiencies built into the scheme may provide incentives and opportunities for competitors to build their own network elements, perhaps for reasons unrelated to pricing (such as the possibility of expansion into data-transmission markets by deploying "broadband" technologies, cf. *post,* at 552 (BREYER, J., concurring in part and dissenting in part), or the desirability of independence from an incumbent's management and maintenance of network elements). In any event, the significance of the incumbents' mistake of fact may be indicated best not by argument here, but by the evidence of actual investment in facilities-based competition since TELRIC went into effect, to be discussed at Part III–B–2–a–(3), *infra.*[23]

(2)

Perhaps sensing the futility of an unsupported theoretical attack, the incumbents make the complementary argument that the FCC's choice of TELRIC, whatever might be said about it on its own terms, was unreasonable as a matter of law because other methods of determining cost would have done a better job of inducing competition. Having consid-

[23] JUSTICE BREYER characterizes these built-in inefficiencies as well as provisions for state-commission discretion as to permitted costs of depreciation and capital, see Part III–B–2–a–(2), *infra,* as "coincidences" that have favored considerable competitive investment by sheer luck. See *post,* at 552. He thus shares the assumption of an efficient market made by the incumbents in their argument, and like the incumbents, dismisses departures from the theoretical assumption of a perfectly competitive market as inconsistencies rather than pragmatic recognitions. The FCC is, of course, under no obligation to adopt a ratesetting scheme committed to realizing perfection in economic theory, see First Report and Order ¶ 683 (rejecting pricing premised on a fully "hypothetical least-cost most efficient network").

ered the proffered alternatives and the reasons the FCC gave for rejecting them, 47 CFR § 51.505(d) (1997); First Report and Order ¶¶ 630–711, we cannot say that the FCC acted unreasonably in picking TELRIC to promote the mandated competition.

The incumbents present three principal alternatives for setting rates for network elements: embedded-cost methodologies, the efficient component pricing rule, and Ramsey pricing.[24] The arguments that one or another of these methodologies is preferable to TELRIC share a basic claim: it was unreasonable for the FCC to choose a method of setting rates that fails to include, at least in theory, some additional costs beyond what would be most efficient in the long run,[25] because lease rates that incorporate such costs will do a better job of inducing competition.[26] The theory is that once an

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[24] JUSTICE BREYER proposes a "less formal kind of 'play it by ear' system" based on recent European Community practices as yet another alternative, see *post*, at 558; but the incumbents do not appear to have advocated such an informal ratesetting scheme to the FCC, see First Report and Order ¶¶ 630–671, nor have they argued for this alternative before this Court. And to the extent that JUSTICE BREYER's proposal emphasizes state commissions' discretion to vary rates according to local circumstances and the particulars of each case, this is a feature that is already built into TELRIC. See *infra*, at 519–520.

[25] In the long run, "all of a firm's costs become variable or avoidable." First Report and Order ¶ 677. See also Kahn, Telecommunications Act 326 ("[A]ll costs are variable and minimized"). In general, the costs of producing a good include variable and fixed costs. Variable costs depend on how much of a good is produced, like the cost of copper to make a loop which rises as the loop is made longer; fixed costs, like rent, must be paid in any event without regard to how much is produced. See Carlton & Perloff 51–56. The long run is a timeframe of sufficient duration that a company has no fixed costs of production.

[26] The argument that rates incorporating fixed costs are necessary to avoid an unconstitutional taking is taken up in Part III–C, *infra*. Indeed, the expert literature the incumbents rely on to advocate fixed-cost ratesetting systems, see *infra*, at 514–515, do so almost exclusively on the premise of averting unwanted confiscation, and thus offer little support

entrant has its foot in the door, it will have a greater incentive to build and operate its own more efficient network element if the lease rates reflect something of the incumbents' actual and inefficient marginal costs. And once the entrant develops the element at its lower marginal cost and the retail price drops accordingly, the incumbent will have no choice but to innovate itself by building the most efficient element or finding ways to reduce its marginal cost to retain its market share.

The generic feature of the incumbents' proposed alternatives, in other words, is that some degree of long-run inefficiency ought to be preserved through the lease rates, in order to give an entrant a more efficient alternative to leasing. Of course, we have already seen that TELRIC itself tolerates some degree of inefficient pricing in its existing wire-center configuration requirement and through the ratemaking and development lags just described. This aside, however, there are at least two objections that generally undercut any desirability that such alternatives may seem to offer over TELRIC.

The first objection turns on the fact that a lease rate that compensates the lessor for some degree of existing inefficiency (at least from the perspective of the long run) is simply a higher rate, and the difference between such a higher rate and the TELRIC rate could be the difference that keeps a potential competitor from entering the market. See n. 27, *infra*. Cf. First Report and Order ¶ 378 ("[I]n some areas, the most efficient means of providing competing service may be through the use of unbundled loops. In such cases, preventing access to unbundled loops would either discourage a potential competitor from entering the market in that area, thereby denying those consumers the benefits of competition, or cause the competitor to construct unnecessarily du-

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for the incumbents' argument that recovery of fixed costs is a better way to spur competition (as opposed to compensating incumbents).

plicative facilities, thereby misallocating societal resources"). If the TELRIC rate for bottleneck elements is $100 and for other elements (say, switches) is $10, an entering competitor that can provide its own, more efficient switch at what amounts to a $7 rate can enter the market for $107. If the lease rate for the bottleneck elements were higher (say, $110) to reflect some of the inefficiency of bottleneck elements that actually cost the incumbent $150, then the entrant with only $107 will be kept out. Is it better to risk keeping more potential entrants out, or to induce them to compete in less capital-intensive facilities with lessened incentives to build their own bottleneck facilities? It was not obviously unreasonable for the FCC to prefer the latter.[27]

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[27] JUSTICE BREYER may be right that "firms that share existing facilities do not compete in respect to the facilities that they share," *post*, at 550 (at least in the near future), but this is fully consistent with the FCC's point that entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology). In other words, JUSTICE BREYER makes no accommodation for the practical difficulty the FCC faced, that competition as to "unshared" elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large competitive carrier such as AT&T or Worldcom) seeking to gain toeholds in local-exchange markets, see FCC, Local Telephone Competition: Status as of June 30, 2001, p. 4, n. 13. (Feb. 27, 2002) (485 firms self-identified as competitive local-exchange carriers). JUSTICE BREYER elsewhere recognizes that the Act "does not require the new entrant and incumbent to compete in respect to" elements, the "duplication of [which] would prove unnecessarily expensive," *post*, at 546. It is in just this way that the Act allows for an entrant that may have to lease some "unnecessarily expensive" elements in conjunction with building its own elements to provide a telecommunications service to consumers. In this case, low prices for the elements to be leased become crucial in inducing the competitor to enter and build. Cf. First Report and Order ¶ 630 (wholesale prices should send "appropriate signals").

The second general objection turns the incumbents' attack on TELRIC against the incumbents' own alternatives. If the problem with TELRIC is that an entrant will never build because at the instant it builds, other competitors can lease the analogous existing (but less efficient) element from an incumbent at a rate assuming the same most efficient marginal cost, then the same problem persists under the incumbents' methods. For as soon as an entrant builds a more efficient element, the incumbent will be forced to price to match,[28] and that rate will be available to all other competitors. The point, of course, is that things are not this simple. As we have said, under TELRIC, price adjustment is not instantaneous in rates for a leased element corresponding to an innovating entrant's more efficient element; the same would presumably be true under the incumbents' alternative methods, though they do not come out and say it.

Once we get into the details of the specific alternative methods, other infirmities become evident that undermine the claim that the FCC could not reasonably have preferred TELRIC. As for an embedded-cost methodology, the problem with a method that relies in any part on historical cost, the cost the incumbents say they actually incur in leasing network elements, is that it will pass on to lessees the difference between most efficient cost and embedded cost.[29] See First Report and Order ¶ 705. Any such cost difference is an inefficiency, whether caused by poor management resulting in higher operating costs or poor investment strategies

[28] That is to say, if the entrant could offer a telecommunications service at a lower retail price, competitors including the incumbent would have to match that price by looking into ways to reduce their marginal costs, and the incumbents' recalibrated costs would form the basis of new lease rates.

[29] In theory, embedded cost could be lower than efficient cost, see Brief for Respondent Federal Parties 17, n. 8 (though the incumbents, understandably, do not avail themselves of this tack); in which case the goal of efficient competition would be set back for the different reason of too much market entry.

that have inflated capital and depreciation. If leased elements were priced according to embedded costs, the incumbents could pass these inefficiencies to competitors in need of their wholesale elements, and to that extent defeat the competitive purpose of forcing efficient choices on all carriers whether incumbents or entrants. The upshot would be higher retail prices consumers would have to pay. *Id.*, ¶¶ 655 and 705.

There are, of course, objections other than inefficiency to any method of ratemaking that relies on embedded costs as allegedly reflected in incumbents' book-cost data, with the possibilities for manipulation this presents. Even if incumbents have built and are operating leased elements at economically efficient costs, the temptation would remain to overstate book costs to ratemaking commissions and so perpetuate the intractable problems that led to the price-cap innovation. See *supra*, at 486–487.

There is even an argument that the Act itself forbids embedded-cost methods, and while the FCC rejected this absolutistic reading of the statute, First Report and Order ¶ 704,[30] it seems safe to say that the statutory language places a heavy presumption against any method resembling the traditional embedded-cost-of-service model of rate-setting.[31] At the very least, proposing an embedded-cost

[30] "We find that the parenthetical, '(determined without reference to a rate-of-return or other rate-based proceeding),' does not further define the type of costs that may be considered, but rather specifies a type of proceeding that may not be employed to determine the cost of interconnection and unbundled network elements." First Report and Order ¶ 704 (footnote omitted).

[31] The parenthetical provision that "cost" for ratemaking purposes must be "determined without reference to a rate-of-return or other rate-based proceeding," 47 U. S. C. § 252(d)(1)(A)(i), was in the Senate version of the 1996 Act, but not in the House version. S. 652, 104th Cong., 1st Sess., § 251(d)(6)(A) (1995) ("[T]he charge . . . (A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the unbundled element . . ."). Both the Senate and House bills contained additional language that was not enacted to the ef-

alternative is a counterintuitive way to show that selecting TELRIC was unreasonable.

Other incumbents say the FCC was unreasonable to pick TELRIC over a method of ratesetting commonly called the efficient component pricing rule (ECPR). See Brief for Respondent Qwest Communications International, Inc., in Nos. 00–511, etc., at 40–41. ECPR would base the rate for a leased element on its most efficient long-run incremental cost (presumably, something like the TELRIC) plus the opportunity cost to the incumbent when the entrant leasing

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fect that "rate of return regulation" would be "eliminated" or prescribing its "abolition." S. 652, 104th Cong., 1st Sess., § 301(a)(3) (1995) provided:

"Rate of Return Regulation Eliminated—

"(A) In instituting the price flexibility required under paragraph (1) the Commission and the States shall establish alternative forms of regulation for Tier 1 telecommunications carriers that do not include regulation of the rate of return earned by such carrier . . . ."

H. R. 1555, 104th Cong., 1st Sess., § 248(b) (1995) stated:

"Notwithstanding any other provision of law, to the extent that a carrier has complied with sections 242 and 244 of this part, the Commission, with respect to rates for interstate or foreign communications, and State commissions, with respect to rates for intrastate communications, shall not require rate-of-return regulation."

The Commission inferred from the omission of the express prohibitions that Congress intended to forbid a "type of proceeding" not a method. This was a reasonable inference in light of the common practice of setting wholesale rates by contracts incorporating retail rates set in state rate-of-return proceedings, see, *e. g., Boston Edison Co.* v. *FERC*, 233 F. 3d 60, 62, and n. 1 (CA1 2000), though not the only one: Congress may, for example, have balked at limiting state regulation at such a level of specificity. Less plausible is JUSTICE BREYER's interpretation of the statutory language, as "reflect[ing] Congress' desire to obtain not perfect prices but speedy results," *post*, at 559; he concludes that the provision "specifies that States need not use formal methods, relying instead upon bargaining and yardstick competition," *ibid.* Section 252(d)(1), however, specifies how a state commission should set rates when an incumbent and an entrant fail to reach a bargain, § 252(a)(2); it seems strange, then, to read the statutory prohibition as affirmatively urging more bargaining and regulatory flexibility, rather than as firing a warning shot to state commissions to steer clear of entrenched practices perceived to perpetuate incumbent monopolies.

the element provides a competing telecommunications service using it. See *Iowa Utilities Bd.*, 525 U. S., at 426 (BREYER, J., concurring in part and dissenting in part); J. Sidak & D. Spulber, Deregulatory Takings and the Regulatory Contract 284–285 (1997); First Report and Order ¶ 708. The opportunity cost is pegged to the retail revenue loss suffered by the incumbent when the entrant provides the service in its stead to its former customers. *Ibid.*

The FCC rejected ECPR because its calculation of opportunity cost relied on existing retail prices in monopolistic local-exchange markets, which bore no relation to efficient marginal cost. "We conclude that ECPR is an improper method for setting prices of interconnection and unbundled network elements because the existing retail prices that would be used to compute incremental opportunity costs under ECPR are not cost-based. Moreover, the ECPR does not provide any mechanism for moving prices towards competitive levels; it simply takes prices as given." *Id.*, ¶ 709. In effect, the adjustment for opportunity cost, because it turns on pre-existing retail prices generated by embedded costs, would pass on the same inefficiencies and be vulnerable to the same asymmetries of information in ratemaking as a straightforward embedded-cost scheme.[32]

The third category of alternative methodologies proposed focuses on costs over an intermediate term where some fixed costs are unavoidable, as opposed to TELRIC's long run. See n. 25, *supra* (defining the long run). The fundamental intuition underlying this method of ratesetting is that competition is actually favored by allowing incumbents rate re-

[32] ECPR advocates have since responded that the FCC was wrong to assume a static tether to uncompetitive retail prices, because ECPR, properly employed, would dynamically readjust the opportunity-cost factor as retail prices drop. Sidak & Spulber, Telecommons 1097–1098. But this would not cure the distortions caused by passing any difference between retail price and most efficient cost back to the incumbents as a lease premium.

covery of certain fixed costs efficiently incurred in the intermediate term.

The most commonly proposed variant of fixed-cost recovery ratesetting is "Ramsey pricing." See *Iowa Utilities Bd.*, *supra*, at 426–427 (BREYER, J., concurring in part and dissenting in part). Ramsey pricing was originally theorized as a method of discriminatory taxation of commodities to generate revenue with minimal discouragement of desired consumption. Ramsey, A Contribution to the Theory of Taxation, 37 Econ. J. 47, 58–59 (1927). The underlying principle is that goods should be taxed or priced according to demand: taxes or prices should be higher as to goods for which demand is relatively inelastic. K. Train, Optimal Regulation: The Economic Theory of Natural Monopoly 122–125 (1991). As applied to the local-exchange wholesale market, Ramsey pricing would allow rate recovery of certain costs incurred by an incumbent above marginal cost, costs associated with providing an unbundled network element that are fixed and unavoidable over the intermediate run, typically the 3- or 4-year term of a rate arbitration agreement. The specific mechanism for recovery through wholesale lease rates would be to spread such costs across the different elements to be leased according to the demand for each particular element. First Report and Order ¶ 696. Cf. B. Mitchell & I. Vogelsang, Telecommunications Pricing: Theory and Practice 43–61 (1991). Thus, when demand among entrants for loop elements is high as compared with demand for switch elements, a higher proportion of fixed costs would be added as a premium to the loop-element lease rate than to the switch lease rate.

But this very feature appears to be a drawback when used as a method of setting rates for the wholesale market in unbundled network elements. Because the elements for which demand among entrants will be highest are the costly bottleneck elements, duplication of which is neither likely nor desired, high lease rates for these elements would be

the rates most likely to deter market entry, as our earlier example showed: if the rate for bottleneck elements went from $100 to $110, the $107 competitor would be kept out. This is what the FCC has said:

> "[W]e conclude that an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used. We conclude that such an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic. Such an allocation of these costs would undermine the pro-competitive objectives of the 1996 Act." First Report and Order ¶ 696 (footnote omitted).

(3)

At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it simulates but does not produce facilities-based competition founders on fact. The entrants have presented figures showing that they have invested in new facilities to the tune of $55 billion since the passage of the Act (through 2000), see Association for Local Telecommunications Services, Local Competition Policy & the New Economy 4 (Feb. 2, 2001); Hearing on H. R. 1542 before the House Committee on Energy and Commerce, Ser. No. 107–24, p. 50 (2001) (statement of James H. Henry, Managing General Partner, Greenfield Hill Capital, LLP); see also M. Glover & D. Epps, Is the Telecommunications Act of 1996 Working?, 52 Admin. L. Rev. 1013, 1015 (2000) ($30 billion invested through 1999). The FCC's statistics indicate substantial resort to pure and partial facilities-based competition among the three entry strategies: as of June 30, 2001, 33 percent of entrants were using their own facilities; 23 percent were reselling services; and 44 percent were leas-

ing network elements (26 percent of entrants leasing loops with switching; 18 percent without switching). See FCC, Local Telephone Competition: Status as of June 30, 2001, p. 2 (Feb. 27, 2002) (tables 3–4). The incumbents do not contradict these figures, but merely speculate that the investment has not been as much as it could have been under other ratemaking approaches, and they note that investment has more recently shifted to nonfacilities entry options. We, of course, have no idea whether a different forward-looking pricing scheme would have generated even greater competitive investment than the $55 billion that the entrants claim, but it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.[33]

b

The incumbents' second reason for calling TELRIC an unreasonable exercise of the FCC's regulatory discretion is the supposed incapacity of this methodology to provide enough depreciation and allowance for capital costs to induce rational competition on the theory's own terms. This challenge must be assessed against the background of utilities' customary preference for extended depreciation schedules in ratemaking (so as to preserve high rate bases), see n. 8, *supra;* we have already noted the consequence of the utilities' approach, that the "book" value or embedded costs of capital presented to traditional ratemaking bodies often bore

[33] Nor, for that matter, does the evidence support JUSTICE BREYER's assertion that TELRIC will stifle incumbents' "incentive . . . either to innovate or to invest" in new elements. *Post,* at 551. As JUSTICE BREYER himself notes, incumbents have invested "over $100 billion" during the same period. *Post,* at 552. The figure affirms the commonsense conclusion that so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base.

little resemblance to the economic value of the capital. See FCC Releases Audit Reports on RBOCs' Property Records, Report No. CC 99–3, 1999 WL 95044 (FCC, Feb. 25, 1999) ("[B]ook costs may be overstated by approximately $5 billion"); Huber et al. 116 (We now know that "[b]y the early 1980s, the Bell System had accumulated a vast library of accounting books that belonged alongside dime-store novels and other works of fiction. . . . By 1987, it was widely estimated that the book value of telephone company investments exceeded market value by $25 billion dollars"). TELRIC seeks to avoid this problem by basing its valuation on the market price for most efficient elements; when rates are figured by reference to a hypothetical element instead of an incumbent's actual element, the incumbent gets no unfair advantage from favorable depreciation rates in the traditional sense.

This, according to the incumbents, will be fatal to competition. Their argument is that TELRIC will result in constantly changing rates based on ever cheaper, more efficient technology; the incumbents will be unable to write off each new piece of technology rapidly enough to anticipate an even newer gadget portending a new and lower rate. They will be stuck, they say, with sunk costs in less efficient plant and equipment, with their investment unrecoverable through depreciation, and their increased risk unrecognized and uncompensated.[34]

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[34] The incumbents also contend that underdepreciation, *i. e.*, book values in excess of the economic value of assets, is another reason for increasing depreciation costs under TELRIC. Brief for Petitioners in No. 00–511, pp. 4–5. This argument is unpersuasive. As we have described, underdepreciation (to the extent of its continuation today, which the Government disputes, Brief for Respondent Federal Parties 38–39) was undertaken largely by the incumbents themselves, not forced upon them by regulators, as a means to keep the rate base inflated under the public-utility model of regulation. See *supra*, at 485–487, 499. For all we know, the incumbent carriers may yet be seeking low rates of depreciation in state retail-rate proceedings still conducted under that model, even as

The argument, however, rests upon a fundamentally false premise, that the TELRIC rules limit the depreciation and capital costs that ratesetting commissions may recognize. In fact, TELRIC itself prescribes no fixed percentage rate as risk-adjusted capital costs and recognizes no particular useful life as a basis for calculating depreciation costs. On the contrary, the FCC committed considerable discretion to state commissions on these matters.

> "Based on the current record, we conclude that the currently authorized rate of return at the federal or state level is a reasonable starting point for TELRIC calculations, and incumbent LECs bear the burden of demonstrating with specificity that the business risks that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate. . . . States may adjust the cost of capital if a party demonstrates to a state commission that either a higher or a lower level of cost of capital is warranted, without that commission conducting a 'rate-of-return or other rate based proceeding.' We note that the risk-adjusted cost of capital need not be uniform for all elements. We intend to re-examine the issue of the appropriate risk-adjusted cost of capital on an ongoing basis, particularly in light of the state commissions' experiences in addressing this issue in specific situations." First Report and Order ¶ 702.

The order thus treated then-current capital costs and rates of depreciation as mere starting points, to be adjusted upward if the incumbents demonstrate the need. That is, for

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they seek high depreciation rates here today to factor into the wholesale prices they may charge for the same elements they use to provide retail services. In short, the incumbents have already benefited from underdepreciation in the calculation of retail rates, and there is no reason to allow them further recovery through wholesale rates.

calculating leased element rates, the Commission specifically permits more favorable allowances for costs of capital and depreciation than were generally allowed under traditional ratemaking practice.

The incumbents' fallback position, that existing rates of depreciation and costs of capital are not even reasonable starting points, is unpersuasive. As to depreciation rates, it is well to start by asking how serious a threat there may be of galloping obsolescence requiring commensurately rising depreciation rates. The answer does not support the incumbents. The local-loop plant makes up at least 48 percent of the elements incumbents will have to provide, see *id.*, ¶ 378, n. 818 ("As of . . . 1995 . . . [l]ocal loop plant comprises approximately $109 billion of total plant in service, which represents . . . 48 percent of network plant"), and while the technology of certain other elements like switches has evolved very rapidly in recent years, loop technology generally has gone no further than copper twisted-pair wire and fiber-optic cable in the past couple of decades. See n. 10, *supra* (less than 1 percent of local-exchange telephone lines employ technologies other than copper or fiber). We have been informed of no specter of imminently obsolescent loops requiring a radical revision of currently reasonable depreciation.[35] This is significant because the FCC found as a general matter that federally prescribed rates of depreciation and counterparts in many States are fairly up to date with the current state of telecommunications technologies as to different elements. See First Report and Order ¶ 702.

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[35] JUSTICE BREYER makes much of the availability of new technologies, specifically, the use of fixed wireless and electrical conduits, see *post*, at 549; but the use of wireless technology in local-exchange markets is negligible at present (36,000 lines in the entire Nation, less than 0.02 percent of total lines, FCC, Local Telephone Competition: Status as of June 30, 2001 (Feb. 27, 2002) (table 5)), and the FCC has not reported any use whatsoever of electrical conduits to provide local telecommunications service.

As for risk-adjusted costs of capital, competition in fact has been slow to materialize in local-exchange retail markets (as of June 30, 2001, the incumbents retained a 91 percent share of the local-exchange markets, FCC, Local Telephone Competition: Status as of June 30, 2001 (Feb. 27, 2002) (table 1)), and whether the FCC's assumption about adequate risk adjustment was based on hypothetical or actual competition, it seems fair to say that the rate of 11.25 percent mentioned by the FCC, First Report and Order ¶ 702, is a "reasonable starting point" for return on equity calculations based on the current lack of significant competition in local-exchange markets.

A basic weakness of the incumbents' attack, indeed, is its tendency to argue in highly general terms, whereas TELRIC rates are calculated on the basis of individual elements. TELRIC rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific element to be priced (as between switches and loops, for example). For that matter, even the blanket assumption that on a TELRIC valuation the estimated purchase price of a most efficient element will necessarily be lower than the actual costs of current elements is suspect. The New York Public Service Commission, for example, used the cost of the more expensive fiber-optic cable as the basis for its TELRIC loop fixed rates, notwithstanding the fact that competitors argued that the cheaper copper-wire loop was more efficient for voice communications and should have been the underlying valuation for loop rates. See 2 Lodging Material for Respondents Worldcom, Inc., et al. 655–657 (Opinion No. 97–2, effective Apr. 1, 1997 (Opinion and Order Setting Rates for First Group of Network Elements)). In light of the many different TELRIC rates to be calculated by state commissions across the country, see Brief for Petitioners Worldcom, Inc., et al. in No. 00–555, p. 21 ("millions"), the Commis-

sion's prescription of a general "starting point" is reasonable enough.

c

Finally, as to the incumbents' accusation that TELRIC is too complicated to be practical, a criticism at least as telling can be leveled at traditional ratemaking methodologies and the alternatives proffered. "One important potential advantage of the T[E]LRIC approach, however is its relative ease of calculation. Rather than estimate costs reflecting the present [incumbent] network—a difficult task even if [incumbents] provided reliable data—it is possible to generate T[E]LRIC estimates based on a 'green field' approach, which assumes construction of a network from scratch." App. 182 (Reply Comments of the National Telecommunications and Information Administration 24 (May 30, 1996)). To the extent that the traditional public-utility model generally relied on embedded costs, similar sorts of complexity in reckoning were exacerbated by an asymmetry of information, much to the utilities' benefit. See *supra*, at 486–487, 499. And what we see from the record suggests that TELRIC rate proceedings are surprisingly smooth-running affairs, with incumbents and competitors typically presenting two conflicting economic models supported by expert testimony, and state commissioners customarily assigning rates based on some predictions from one model and others from its counterpart. See, *e. g.*, 1 Lodging Material for Respondents Worldcom, Inc., et al. 146–147, 367–368 (Fla. Pub. Serv. Comm'n, *In re: Determination of cost of basic local telecommunications service, pursuant to Section 364.025, Florida Statutes*, issued Jan. 7, 1999); 2 *id.*, at 589–598, 701–704 (N. Y. Pub. Serv. Comm'n, Opinion No. 97–2, *supra*). At bottom, battles of experts are bound to be part of any ratesetting scheme, and the FCC was reasonable to prefer TELRIC over alternative fixed-cost schemes that preserve home-field advantages for the incumbents.

* * *

We cannot say whether the passage of time will show competition prompted by TELRIC to be an illusion, but TELRIC appears to be a reasonable policy for now, and that is all that counts. See *Chevron*, 467 U. S., at 866. The incumbents have failed to show that TELRIC is unreasonable on its own terms, largely because they fall into the trap of mischaracterizing the FCC's departures from the assumption of a perfectly competitive market (the wire-center limitation, regulatory and development lags, or the refusal to prescribe high depreciation and capital costs) as inconsistencies rather than pragmatic features of the TELRIC plan. Nor have they shown it was unreasonable for the FCC to pick TELRIC over alternative methods, or presented evidence to rebut the entrants' figures as to the level of competitive investment in local-exchange markets. In short, the incumbents have failed to carry their burden of showing unreasonableness to defeat the deference due the Commission. We therefore reverse the Eighth Circuit's judgment insofar as it invalidated TELRIC as a method for setting rates under the Act.

C

The incumbents' claim of TELRIC's inherent inadequacy to deal with depreciation or capital costs has its counterpart in a further argument. They seek to apply the rule of constitutional avoidance in saying that "cost" ought to be construed by reference to historical investment in order to avoid a serious constitutional question, whether a methodology so divorced from investment actually made will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment. The Eighth Circuit did not think any such serious question was in the offing, 219 F. 3d, at 753–754, and neither do we.

At the outset, it is well to understand that the incumbent carriers do not present the portent of a constitutional

taking claim in the way that is usual in ratemaking cases. They do not argue that any particular, actual TELRIC rate is "so unjust as to be confiscatory," that is, as threatening an incumbent's "financial integrity." *Duquesne Light Co.*, 488 U. S., at 307, 312. Indeed, the incumbent carriers have not even presented us with an instance of TELRIC rates, which are to be set or approved by state commissions and reviewed in the first instance in the federal district courts, 47 U. S. C. §§ 252(e)(4) and (e)(6). And this, despite the fact that some States apparently have put rates in place already using TELRIC. See First Report and Order ¶ 631 and accompanying footnotes ("A number of states already employ, or have plans to utilize, some form of [long-run incremental cost] methodology in their approach to setting prices for unbundled network elements").

This want of any rate to be reviewed is significant, given that this Court has never considered a taking challenge on a ratesetting methodology without being presented with specific rate orders alleged to be confiscatory. See, *e. g.*, *Duquesne Light Co.*, *supra*, at 303–304 (denial of $3.5 million and $15.4 million increases to rate bases of electric utilities); *Smyth* v. *Ames*, 169 U. S., at 470–476 (Nebraska carrier-rate tariff schedule alleged to effect a taking). Granted, the Court has never strictly held that a utility must have rates in hand before it can claim that the adoption of a new method of setting rates will necessarily produce an unconstitutional taking, but that has been the implication of much the Court has said. See *Hope Natural Gas Co.*, 320 U. S., at 602 ("The fact that the method employed to reach [just and reasonable rates] may contain infirmities is not . . . important"); *Natural Gas Pipeline Co.*, 315 U. S., at 586 ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas"); *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm'n of Cal.*, 289 U. S. 287, 305 (1933) ("[M]indful of its distinctive function in the enforcement of constitutional rights, the Court has refused to be bound by

any artificial rule or formula which changed conditions might upset"). Undeniably, then, the general rule is that any question about the constitutionality of ratesetting is raised by rates, not methods, and this means that the policy of construing a statute to avoid constitutional questions where possible is presumptively out of place when construing statutes prescribing methods.

The incumbents say this action is one of the rare ones placed outside the general rule by signs, too strong to ignore, that takings will occur if the TELRIC interpretation of § 252(d)(1) is allowed. First, they compare, at the level of the entire network (as opposed to element-by-element), industry balance-sheet indications of historical investment in local telephone markets with the corresponding estimate of a TELRIC evaluation of the cost to build a new and efficient national system of local exchanges providing universal service. Brief for Petitioners in No. 00–511, at 10–11, and n. 6. As against an estimated $180 billion for such a new system, the incumbents juxtapose a value representing "total plant" on the industry balance sheet for 1999 of roughly $342 billion. They argue that the huge and unreasonable difference is proof that TELRIC will necessarily result in confiscatory rates. *Ibid.* (citing FCC, 1999 Statistics of Communications Common Carriers 51 (Aug. 1, 2000) (table 2.9, line no. 32)).

The comparison, however, is spurious because the numbers assumed by the incumbents are clearly wrong. On the one side, the $180 billion is supposed to be based on constructing a barebones universal-service telephone network, and so it fails to cover elements associated with more advanced telecommunications services that incumbents are required to provide by lease under 47 U. S. C. § 251(c)(3). See *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act*, 15 FCC Rcd. 3953, ¶ 245 (1999), aff'd, 220 F. 3d 607 (CADC 2000). See also *In re Federal-State Joint Bd. on Universal Serv.*, 14 FCC Rcd. 20432, ¶ 41, and n. 125 (1999) (explaining that the universal-

service model may not be "appropriate [for] determining . . . prices for unbundled network elements"). We do not know how much higher the efficient replacement figure should be, but we can reasonably assume that $180 billion is too low.

On the other side of the comparison, the "balance sheet" number is patently misstated. As explained above, any rates under the traditional public-utility model would be calculated on a rate base (whether fair value or cost of service) subject to deductions for accrued depreciation. See Phillips 310–315. The net plant investment after depreciation is not $342 billion but $166 billion, FCC, Statistics of Communications Common Carriers, at 51 (table 2.9, line no. 50), an amount less than the TELRIC figure the incumbents would like us to assume. And even after we increase the $166 billion by the amount of net current liabilities ($22 billion) on the balance sheet, *ibid.* (line no. 64 minus line no. 13), as a rough (and generous) estimate of the working-capital allowance under cost of service, the rate base would then be $188 billion, still a far cry from the $342 billion the incumbents tout, and less than 5 percent above the incumbents' $180 billion universal-service TELRIC figure. What the best numbers may be we are in no position to say: the point is only that the numbers being thrown out by the incumbents are no evidence that TELRIC lease rates would be confiscatory, sight unseen.

The incumbent carriers' second try at nonrate constitutional litigation focuses on reliance interests allegedly jeopardized by an intentional switch in ratesetting methodologies. They rely on *Duquesne*, where we held as usual that a ratesetting methodology would normally be judged only by the "overall impact of the rate orders,"[36] but went further

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[36] The Court upheld a Pennsylvania statute barring rate recovery of capital prudently invested in canceled power plants because the "overall impact of the rate orders," which allowed returns on common equity of 16 percent and overall returns of 11 to 12 percent, was not "constitutionally objectionable." 488 U. S., at 312; see also *id.*, at 314 ("'It is not

in dicta. We remarked that "a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions." 488 U. S., at 315.[37] In other words, there may be a taking challenge distinct from a plain-vanilla objection to arbitrary or capricious agency action[38] if a ratemaking body were to make opportunistic changes in ratesetting methodologies just to minimize return on capital investment in a utility enterprise.

In *Duquesne* itself, there was no need to decide whether there might be an exception to the rate-order requirement for a claim of taking by rates, and there is no reason here to decide whether the policy of constitutional avoidance should be invoked in order to anticipate a rate-order taking claim. The reason is the same in each case: the incumbent carriers here are just like the electric utilities in *Duquesne* in failing to present any evidence that the decision to adopt TELRIC

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theory, but the impact of the rate order which counts' ") (quoting *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944)). The utilities in *Duquesne*, like the incumbents here, made "[n]o argument . . . that . . . reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." 488 U. S., at 312. Nor did they show that allowed rates were "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." *Ibid.*

[37] JUSTICE SCALIA, joined by Justice White and JUSTICE O'CONNOR, concurred, and noted that "all prudently incurred investment may well have to be counted" to determine "whether the government's action is confiscatory." *Id.*, at 317.

[38] The incumbents make the additional argument that it was arbitrary or capricious for the FCC to reject historical costs, Brief for Petitioners in No. 00–511, at 44–49, but this is simply a restatement of the argument that the FCC was unreasonable in interpreting § 252(d)(1) to foreclose the use of historical cost in ratesetting, which we have already addressed, see Part III–B–2, *supra*.

was arbitrary, opportunistic, or undertaken with a confiscatory purpose. What we do know is very much to the contrary. First of all, there was no "switch" of methodologies, since the wholesale market for leasing network elements is something brand new under the 1996 Act. There was no replacement of any predecessor methods, much less an opportunistic switch "back and forth." And to the extent that the incumbents argue that there was at least an expectation that some historically anchored cost-of-service method would set wholesale lease rates, no such promise was ever made. First Report and Order ¶ 706 ("[C]ontrary to assertions by some [incumbents], regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that [the FCC] or the states have provided in the past"). Cf. *Duquesne*, *supra*, at 315. Any investor paying attention had to realize that he could not rely indefinitely on traditional ratemaking methods but would simply have to rely on the constitutional bar against confiscatory rates.[39]

IV

A

The effort by the Government and the competing carriers to overturn the Eighth Circuit's invalidation of the additional

[39] In fact, the FCC's order is more hospitable to early taking claims than any court would be under *Duquesne:* "Incumbent LECs may seek relief from the Commission's pricing methodology, if they provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory rates." First Report and Order ¶ 739. The FCC, in other words, is willing to consider a challenge to TELRIC in advance of a rate order, but any challenger needs to go beyond general criticism of a method's tendency, and to show with "specific information" that a confiscatory rate is bound to result. Additionally, as the FCC has acknowledged, the smallest, rural incumbent local-exchange carriers most likely to suffer immediately from the imposition of unduly low rates are expressly exempt from the TELRIC pricing rules under 47 U. S. C. § 252(f)(1), see First Report and Order ¶ 706, and other rural incumbents may obtain exemptions from the rules by applying to their state commissions under § 252(f)(2).

combination rules, 47 CFR §§ 51.315(c)–(f) (1997), draws the incumbents' threshold objection that the challenge is barred by waiver, since the 1999 petition to review the 1997 invalidation of Rule 315(b) did not extend to the Eighth Circuit's simultaneous invalidation of the four companion rules, Rules 315(c)–(f), 120 F. 3d, at 813, 819, n. 39.[40] The incumbents must, of course, acknowledge that the Court of Appeals *sua sponte* invited briefing on the status of Rules 315(c)–(f)[41] on remand after this Court's reinstatement of Rule 315(b), *Iowa Utilities Bd.*, 525 U. S., at 395, and specifically struck them down again, albeit on its 1997 rationale, 219 F. 3d, at 758–759. But the incumbent carriers argue that the Eighth Circuit exceeded the scope of this Court's mandate when it revisited the unchallenged portion of its earlier holding, so that this Court should decline to reach the validity of Rules 315(c)–(f) today. To do so, they say, would encourage the sort of strategic, piecemeal litigation disapproved in *Communist Party of United States* v. *Subversive Activities Control Bd.*, 367 U. S. 1, 30–31 (1961):

> "The demands not only of orderly procedure but of due procedure as the means of achieving justice according to law require that when a case is brought here for review of administrative action, all the rulings of the agency upon which the party seeks reversal, and which are then available to him, be presented. Otherwise we would be promoting the 'sporting theory' of justice, at the potential cost of substantial expenditures of agency time. To allow counsel to withhold in this Court and save for a later stage procedural error would tend to foist upon

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[40] AT&T did not raise the issue in the relevant petition for certiorari as it claims. See Pet. for Cert. in *AT&T Corp.* v. *Iowa Utilities Bd.*, O. T. 1998, No. 97–826, pp. 9–10, 13.

[41] See Order in *Iowa Utilities Bd.* v. *FCC*, No. 96–3321, etc. (CA8, June 10, 1999), pp. 2–3 ("The briefs should also address whether or not, in light of the Supreme Court's decision, this court should take any further action with respect to . . . § 315(c)–(f)").

> the Court constitutional decisions which could have been avoided had those errors been invoked earlier."

We do not think *Communist Party* blocks our consideration of Rules 315(c)–(f). The issue there was raised by the petitioner's failure on an earlier trip to this Court to pursue a procedural objection to agency action. Litigation of the procedural point would not only have obviated the Court's need to review the constitutionality of an Act of Congress when the case got here, but could have saved five years of litigation during which time "the Board and the Court of Appeals [had] each twice more reconsidered [the] steadily growing record . . . ." *Id.*, at 31–32, n. 8. After all that time, petitioner sought review of the procedural point.

Nothing like that can be said about these cases. Addressing the issue now would not "make waste" of years of efforts by the FCC or the Court of Appeals, *id.*, at 32, n. 8, would not threaten to leave a constitutional ruling pointless, and would direct the Court's attention not to an isolated, "long-stale" procedural error by the agency, *ibid.*, but to the invalidation of FCC rules meant to have general and continuing applicability. There is no indication of litigation tactics behind the failure last time to appeal on these rules, which were reexamined on remand at the behest of the court, not the Government or the competing carriers.

Any issue "pressed or passed upon below" by a federal court, *United States* v. *Williams*, 504 U. S. 36, 41 (1992) (internal quotation marks omitted), is subject to this Court's broad discretion over the questions it chooses to take on certiorari, and there are good reasons to look at Rules 315(c)–(f). The Court of Appeals passed on a significant issue, and one placed in a state of flux, see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1099, n. 8 (1991) (citations omitted), by the split between these cases and *US West Communications* v. *MFS Intelenet, Inc.*, 193 F. 3d 1112, 1121 (CA9 1999), (affirming identical state-commission rules), cert. denied, 530 U. S. 1284 (2000). We accordingly rejected the incumbents'

claim of waiver when they raised it in opposition to the petition for certiorari, and we reject it again today. See *Stevens* v. *Department of Treasury*, 500 U. S. 1, 8 (1991).

B

The Eighth Circuit found the four additional combination rules at odds with the plain language of the final sentence of 47 U. S. C. §251(c)(3), which we quote more fully:

> "[E]ach incumbent local exchange carrier has . . .
>
> . . . . .
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> "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

"Bundling" and "combination" are related but distinct concepts. Bundling is about lease pricing. To provide a network element "on an unbundled basis" is to lease the element, however described, to a requesting carrier at a stated price specific to that element. *Iowa Utilities Bd.*, *supra*, at 394. The FCC's regulations identify in advance a certain number of elements for separate pricing, 47 CFR §51.319 (1997), but the regulations do not limit the elements subject to specific rates. A separately priced element need not be the simplest possible configuration of equipment or function, and a predesignated unbundled element might actually comprise items that could be considered separate elements themselves. For example, "if the states require incumbent LECs to provision subloop elements [which together constitute a local loop], incumbent LECs must still provision a local loop

as a single, combined element when so requested, because we identify local loops as a single element in this proceeding." First Report and Order ¶ 295. The "combination" provided for in Rules 315(b)–(f), on the other hand, refers to a mechanical connection of physical elements within an incumbent's network, or the connection of a competitive carrier's element with the incumbent's network "in a manner that would allow a requesting carrier to offer the telecommunications service." *Id.*, ¶ 294, n. 620.

The additional combination rules are best understood as meant to ensure that the statutory duty to provide unbundled elements gets a practical result. A separate rate for an unbundled element is not much good if an incumbent refuses to lease the element except in combination with others that competing carriers have no need of; or if the incumbents refuse to allow the leased elements to be combined with a competitor's own equipment. And this is just what was happening before the FCC devised its combination rules. Incumbents, according to the FCC's findings, were refusing to give competitors' technicians access to their physical plants to make necessary connections. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, 3910, ¶ 482 (1999) (Third Report and Order), petitions for review pending *sub nom. United States Telecom Assn.* v. *FCC*, Nos. 00–1015, etc. (CADC).

The challenged additional combination rules, issued under § 251(c)(3), include two that are substantive and two that are procedural, the latter having no independent significance here. Rule 315(c) requires an incumbent to "perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined" in the incumbent's own network, so long as the combination is "[t]echnically feasible" and "[w]ould not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect" with the

incumbent's network. The companion Rule 315(d) likewise requires the incumbent to do the combining between the network elements it leases and a requesting carrier's own elements, so long as technically feasible.[42]

The rules are challenged alternatively as inconsistent with statutory plain language and as unreasonable interpretations. The plain language in question is the sentence that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U. S. C. § 251(c)(3). The Eighth Circuit read this as unambiguously excusing incumbents from any obligation to combine provided elements, 219 F. 3d, at 759. The ruling has a familiar ring, for this is the same reason that the Court of Appeals invalidated these rules in 1997 along with Rule 315(b), as being inconsistent with a plain limit on incumbents' obligation under § 251(c)(3) to provide elements "on an unbundled basis." 120 F. 3d, at 813.

But the language is not that plain. Of course, it is true that the statute would not be violated literally by an incumbent that provided elements so that a requesting carrier could combine them, and thereafter sat on its hands while any combining was done. But whether it is plain that the incumbents have a right to sit is a question of context as much as grammar. If Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal, cf. § 251(c) ("Additional obligations of incumbent local exchange carriers"), and within the actual statutory confines it is not self-evident that in obligating

[42] Under Rules 315(e)–(f), an incumbent that denies a requested combination has the burden to prove technical infeasibility or to show how the combination would impede others' access.

incumbents to furnish, Congress negated a duty to combine that is not inconsistent with the obligation to furnish, but not expressly mentioned. Thus, it takes a stretch to get from permissive statutory silence to a statutory right on the part of the incumbents to refuse to combine for a requesting carrier, say, that is unable to make the combination, First Report and Order ¶ 294, or may even be unaware that it needs to combine certain elements to provide a telecommunications service. *Id.*, ¶ 293. And these are the only instances in which the additional combination rules obligate the incumbents according to the FCC's clarification in the First Report and Order.

The conclusion that the language is open is certainly in harmony with, if not required by, our holding in *Iowa Utilities Bd.*, dealing with Rule 315(b). In reinstating that rule, we rejected the argument that furnishing elements "on an unbundled basis," § 251(c)(3), must mean "physically separated," 525 U. S., at 394, and expressly noted that "§ 251(c)(3) is ambiguous on whether leased network elements may or must be separated," *id.*, at 395. We relied on that ambiguity in holding that an incumbent has no statutory right to separate elements when a competitor asks to lease them in the combined form employed by the incumbent in its own network. *Ibid.* That holding would make a very odd partner with a ruling that an ambiguous § 251(c)(3) plainly empowers incumbent carriers to refuse to combine elements even when requesting carriers cannot. We accordingly read the language of § 251(c)(3) as leaving open who should do the work of combination, and under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), that leaves the FCC's rules intact unless the incumbents can show them to be unreasonable.

For the decision whether Rules 315(c)–(f) survive *Chevron* step two, *Iowa Utilities Bd.* is, to be sure, less immediate help, since in that case we found Rule 315(b) reasonable because it prevented incumbents from dismantling exist-

ing combinations to sabotage competitors, 525 U. S., at 395, whereas here we deal not with splitting up but with joining together. We think, nonetheless, that the additional combination rules reflect a reasonable reading of the statute, meant to remove practical barriers to competitive entry into local-exchange markets while avoiding serious interference with incumbent network operations.

At the outset, it is well to repeat that the duties imposed under the rules are subject to restrictions limiting the burdens placed on the incumbents. An obligation on the part of an incumbent to combine elements for an entrant under Rules 315(c) and (d) only arises when the entrant is unable to do the job itself. First Report and Order ¶ 294 ("If the carrier is unable to combine the elements, the incumbent must do so"). When an incumbent does have an obligation, the rules specify a duty to "perform the functions necessary to combine," not necessarily to complete the actual combination. 47 CFR §§ 51.315(c)–(d) (1997). And the entrant must pay "a reasonable cost-based fee" for whatever the incumbent does. Brief for Petitioner Federal Parties in Nos. 00–587, etc., p. 34. See also *id.*, at 10, 34, n. 14.

The force of the objections is limited further by the FCC's implementation in the rules of the statutory conditions that the incumbents' duty arises only if the requested combination does not discriminate against other carriers by impeding their access, and only if the requested combination is "technically feasible," § 251(c)(3). As to the latter restriction, the Commission "decline[d] to adopt the view proffered by some parties that incumbents must combine network elements in any technically feasible manner requested." First Report and Order ¶ 296. The concern was that such a rule "could potentially affect the reliability and security of the incumbent's network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements." *Ibid.*

Thus, the incumbents are wrong to claim that the restriction to "technical feasibility" places only minimal limits on the duty to combine, since the First Report and Order makes it clear that what is "technically feasible" does not mean merely what is "economically reasonable," *id.*, ¶ 199, or what is simply practical or possible in an engineering sense, see *id.*, ¶¶ 196–198. The limitation is meant to preserve "network reliability and security," *id.*, ¶ 296, n. 622, and a combination is not technically feasible if it impedes an incumbent carrier's ability "to retain responsibility for the management, control, and performance of its own network," *id.*, ¶ 203.

This demanding sense of "technical feasibility," as a condition protecting the incumbent's ability to control the performance of its own network, is in accord with what we said in *Iowa Utilities Bd.* There, for example, we reinstated the Commission's "pick and choose" rule[43] in part because the duty to provide network elements on matching terms to all comers did not arise when it was "not technically feasible," § 51.809(b)(2). 525 U. S., at 396. If "technically feasible" meant what is merely possible, it would have been no limitation at all.

The two substantive rules each have additional features that are consistent with the purposes of § 251(c)(3). Rule 315(c), to the extent that it raises a duty to combine what is "ordinarily combined," neatly complements the facially similar Rule 315(b), upheld in *Iowa Utilities Bd.*, *id.*, at 395, forbidding incumbents to separate currently combined network elements when the entrant requests them in a combined form. If the latter were the only rule, an incumbent

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[43] "An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." 47 CFR § 51.809(a) (1997).

might well be within its rights to insist, for example, on providing a loop and a switch in a combined form when a naive entrant asked just for them, while refusing later to combine them with a network interface device, which is also ordinarily combined with the loop and the switch, and which is necessary to set up a telecommunications link. But under Rule 315(c), when the entrant later requires the element it missed the first time, the incumbent's obligation is to "perform the functions necessary," 47 CFR § 51.315(c) (1997), for a combination of what the entrant cannot combine alone, First Report and Order ¶ 294, and would not have needed to combine if it had known enough to request the elements together in a combined form in the first place. Cf. *id.*, ¶ 297 ("[I]ncumbent[s] must work with new entrants to identify the elements the new entrants will need to offer a particular service in the manner the new entrants intend").

Of course, it is not this aspect of Rule 315(c), requiring the combination of what is ordinarily combined, that draws the incumbents' (or JUSTICE BREYER's, see *post*, at 563) principal objection; they focus their attack, rather, on the additional requirement of Rule 315(c), that incumbents combine unbundled network elements "even if those elements are not ordinarily combined in the incumbent['s] network." 47 CFR § 51.315(c) (1997). To build upon our previous example, this would seemingly require an incumbent to combine the loop, switch, and interface (ordinarily combined in its network) with a second loop and network interface (provided by the incumbent as a separate unbundled element), so that the competitive carrier could charge for a second-line connection, as for a fax or modem. See Brief for Petitioners Worldcom, Inc., et al. in No. 00–555, at 48 (providing the example).

But this provision of Rule 315(c) is justified by the statutory requirement of "nondiscriminatory access." § 251(c)(3). As we have said, the FCC has interpreted the rule as obli-

gating the incumbent to combine "[i]f the carrier is unable to combine the elements." First Report and Order ¶ 294. There is no dispute that the incumbent could make the combination more efficiently than the entrant; nor is it contested that the incumbent would provide the combination itself if a customer wanted it or the combination otherwise served a business purpose. See Third Report and Order ¶ 481. It hardly seems unreasonable, then, to require the incumbent to make the combination, for which it will be entitled to a reasonable fee; otherwise, an entrant would not enjoy true "nondiscriminatory access" notwithstanding the bare provision on an unbundled basis of the network elements it needs to provide a service.

As to Rule 315(d), it is hard to see how this rule is any less reasonable than § 251(c)(2), which imposes a statutory duty to interconnect. The rule simply requires the incumbent to perform functions necessary to combine the unbundled elements it provides with elements owned by the requesting carrier "in any technically feasible manner." Essentially, it appears to be nothing more than an element-to-element version of the incumbents' statutory duty "to provide, for the facilities and equipment of any requesting . . . carrier, interconnection with the local exchange carrier's network," in § 251(c)(2).

In sum, what we have are rules that say an incumbent shall, for payment, "perform the functions necessary," 47 CFR §§ 51.315(c) and (d) (1997), to combine network elements to put a competing carrier on an equal footing with the incumbent when the requesting carrier is unable to combine, First Report and Order ¶ 294, when it would not place the incumbent at a disadvantage in operating its own network, and when it would not place other competing carriers at a competitive disadvantage, 47 CFR § 51.315(c)(2) (1997). This duty is consistent with the Act's goals of competition and nondiscrimination, and imposing it is a sensible way to reach the result the statute requires.

* * *

The 1996 Act sought to bring competition to local-exchange markets, in part by requiring incumbent local-exchange carriers to lease elements of their networks at rates that would attract new entrants when it would be more efficient to lease than to build or resell. Whether the FCC picked the best way to set these rates is the stuff of debate for economists and regulators versed in the technology of telecommunications and microeconomic pricing theory. The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them. The FCC's pricing and additional combination rules survive that scrutiny.

The judgment of the Court of Appeals is reversed in part and affirmed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE BREYER, with whom JUSTICE SCALIA joins as to Part VI, concurring in part and dissenting in part.

I agree with the majority that the Telecommunications Act of 1996 (Act or Telecommunications Act), 47 U. S. C. § 251 *et seq.* (1994 ed. and Supp. V), does not require a historical cost pricing system. I also agree that, at the present time, no taking of the incumbent firms' property in violation of the Fifth Amendment has occurred. I disagree, however, with the Court's conclusion that the specific pricing and unbundling rules at issue here are authorized by the Act.

I

The primary goal of the Telecommunications Act is to "promote competition and reduce regulation" in both local

and long-distance telecommunications markets. Preamble, 110 Stat. 56; see also H. R. Conf. Rep. No. 104–458, p. 1 (1996). As part of that effort, the Act requires incumbent local telecommunications firms to make certain "elements" of their local systems available to new competitors seeking to enter those local markets. 47 U. S. C. § 251(c)(3) (1994 ed., Supp. V). If the incumbents and competitors cannot agree on the price that an incumbent can charge a new entrant, local regulators will determine the price. § 252. The regulated price will depend upon the element's "cost." § 252(d)(1)(A). In *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366 (1999), this Court held that the Act authorizes the Federal Communications Commission (FCC or Commission) to set rules for determining those prices.

These cases require the Court to review the Commission's rules. Those rules create a "start-from-scratch" version of what the Commission calls a "Total Element Long-Run Incremental Cost" system (TELRIC). See Kahn, Tardiff, & Weisman, The Telecommunications Act at three years: an economic evaluation of its implementation by the Federal Communications Commission, 11 Info. Econ. & Policy 319, 326 (1999) (hereinafter Kahn) (referring to the FCC's system as "TELRIC-Blank Slate"). In essence, the Commission requires local regulators to determine the cost of supplying a particular incumbent network "element" to a new entrant, not by looking at what it has cost *that incumbent* to supply the element in the past, nor by looking at what it will cost *that incumbent* to supply that element in the future. Rather, the regulator must look to what it would cost *a hypothetical perfectly efficient firm* to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network. The only concession to the incumbent's actual network is the presumption that presently existing wire centers—which hold the switching equipment for a local area—will remain in their current locations.

See *In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15848–15849, ¶ 685 (1996) (hereinafter Order) (describing TELRIC as "based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements").

An example will help explain the system as I understand it. Imagine an incumbent local telephone company's major switching center, say, in downtown Chicago, from which cables and wires run through conduits or along poles to subsidiary switching equipment, other electronic equipment, and eventually to end-user equipment, such as telephone handsets, computer modems, or fax machines located in office buildings or private residences. A new competitor, whom the law entitles to use an "element" of the incumbent firm's system, asks for use of such an "element," say, a single five-block portion of this system, thereby obtaining access to 20 downtown office buildings. Under the Commission's TELRIC, the incumbent's "cost" (upon which "rates" must be based) equals not the real resources that the Chicago incumbent must spend to provide the five-block "element" demanded, but the resources that a hypothetical perfectly efficient new supplier would spend were that supplier rebuilding the entire downtown Chicago system, other than the local wire center, from scratch. This latter figure, of course, might be very different from any incumbent's actual costs.

As a reviewing Court, we must determine, among other things, whether the Commission has "'abuse[d]'" its statutorily delegated "'discretion'" to create implementing rules. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41 (1983) (quoting Administrative Procedure Act, 5 U. S. C. § 706(2)(A)). In doing so, we must assume that Congress intended to grant

the Commission broad legal leeway in respect to the substantive content of the rules, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944), particularly since the subject matter is a highly technical one, namely, ratemaking, where the agency possesses expert knowledge. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984).

Nonetheless, that leeway is not unlimited. It is bounded, for example, by the scope of the statute that grants authority and by the need for the agency to show a "rational connection" between the regulations and the statute's purposes. *State Farm*, 463 U. S., at 56. We must determine whether, despite the leeway given experts on technical subject matter, agency regulations exceed these legal limits. See *id.*, at 43; *Overton Park*, *supra*, at 416; Administrative Procedure Act, 5 U. S. C. § 706(2)(A) (requiring agency action to be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). And, reluctantly, I have come to the conclusion that they do. After considering the incumbents' objections and the Commission's responses, I cannot find that "rational connection" between statutory purpose and implementing regulation that the law demands. *State Farm*, *supra*, at 56.

II

Because the critical legal problem concerns the relation of the Commission's regulations to the statute's purpose, I must ask at the outset, what is that purpose? The relevant statutory provision says only that the agency shall set "rate[s]" (for "elements") "based on . . . cost." 47 U. S. C. § 252(d)(1). At first blush the word "cost" calls to mind traditional cost-based ratesetting. See Natural Gas Act, 15 U. S. C. § 717c; Natural Gas Act of 1938, §§ 4a, 5, 52 Stat. 824; Interstate Commerce Act, 49 U. S. C. § 10701 (1994 ed., Supp. V); Federal Aviation Act of 1958, 49 U. S. C. § 1302(c) (1976 ed., Supp. II) (repealed 1980); see also *ante*, at 478

(discussing traditional ratesetting); J. Bonbright, A. Danielsen, & D. Kamerschen, Principles of Public Utility Rates 109–110, 388 (2d ed. 1988) (hereinafter Bonbright); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 9 FCC Rcd. 4527, 4555, ¶ 55 (1994) (Commission rules referring to "[o]riginal cost" as traditional basis "for public utility valuation").

An agency engaged in traditional ratemaking will seek to protect consumers by mandating low prices as the end result. In doing so, the agency will sometimes try to mimic the prices that it believes (hypothetically) the regulated firm (often a legal monopoly) would have set had it been an unregulated firm in a competitively structured industry. See *ante*, at 486; Bonbright 89 ("[M]any economists have declared that . . . the prices that would result without regulation but under pure or perfect competition would be the 'ideal' prices"); 1 A. Kahn, Economics of Regulation: Principles and Institutions 63 (1988) (hereinafter Economics of Regulation) ("The traditional legal criteria of proper public utility rates have always borne a strong resemblance to the criteria of the competitive market in long-run equilibrium"). And the Commission's regulations are at least arguably consistent with an agency effort to find prices that replicate the end results of theoretically perfect competition. See Order ¶¶ 679, 738.

But that regulatory objective—low, competition-mimicking prices—is not the objective of the relevant statutory provision here. The Telecommunications Act is not a ratemaking statute seeking better regulation. It is a deregulatory statute seeking competition. It assumes that, given modern technology, local telecommunications markets may now prove large enough for several firms to compete in the provision of some services—but not necessarily all services—without serious economic waste. It finds the competitive process an indirect but more effective way to bring

about the common objectives of competition and regulation alike, namely, low prices, better products, and more efficient production methods. But it authorizes the Commission to promulgate rules that will help achieve that procedural goal—the substitution of competition for regulation in local markets—where that transformation is economically feasible. See *ante*, at 539 (accepting this rationale). The Act does not authorize the Commission to promulgate rules that would hinder the transition from a regulated to a competitive marketplace—whether or not those rules directly mandate lower "element" prices along the way.

Five considerations, taken together, convince me that the description of the statutory goal I have just given is an accurate one. First, the Act itself says that its objective is to substitute competition for regulation. Preamble, 110 Stat. 56 (stating that the goal of the Act is to "promote competition and reduce regulation" in both local and long-distance telecommunications markets); see also H. R. Conf. Rep. No. 104–458, at 1; *ante*, at 489.

Second, the Act's history suggests the Congress would have thought that goal a reasonable one. The 20th century's history of telecommunications markets is primarily one of regulation. For decades experts justified regulation on the ground that telecommunications providers were "natural monopolists," *i. e.*, telecommunications markets would not support more than one firm of efficient size. See *ante*, at 475–476. But beginning in the 1970's, technological developments led to a change of expert opinion by undermining the "natural monopoly" rationale. Long-distance telecommunications markets seemed newly capable of supporting several competing firms without significant economic waste. See R. Vietor, Contrived Competition: Regulation and Deregulation in America 185–190 (1994). And opinion began to change similarly in respect to local markets. In the case of local markets, however, the change was marked by hesitation and lingering uncertainty. See P. Huber, M. Kellogg, &

J. Thorne, Federal Telecommunications Law 53, 86–87 (2d ed. 1999) (hereinafter Huber); P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II: 1993 Report on Competition in the Telephone Industry 2.1–2.5 (1992). That is because local telecommunications service had long demanded expensive fixed investment, for example, digging up streets to lay cables or stringing wires on overhead poles. See *ante*, at 489–491. And whether, or the extent to which, a new competitor could replicate, or avoid, that kind of investment without significantly wasting resources remained unclear. See Huber 34, 206. Thus, at the time Congress wrote the new Act, technological development seemed to permit nonwasteful competition in respect to some aspects of local service; but in respect to other aspects an incumbent local telecommunications provider might continue to possess "natural monopoly" advantages. *Id.*, at 206–207. And these circumstances made it reasonable for Congress to try to secure local competition insofar as that competition would prove economically feasible, *i. e.*, where competition would not prove seriously wasteful. See Order ¶ 1. See also 47 U. S. C. §§ 271(c)(1)(A), 271(c)(1)(B) (recognizing that some local markets will not support more than one firm).

Third, the Act's structure and language indicate a congressional effort to secure that very end. The Act dismantles artificial legal barriers to new entry in local markets, thereby *permitting* new firms to enter if they wish. § 253(a); see *ante*, at 491, and n. 12. But the Act recognizes that simple permission may not prove sufficient—perhaps because the incumbent will retain a "natural monopoly" form of control over certain necessary elements of service. It consequently goes on to *promote* new entry in three ways. See *ante*, at 491–492. First, it requires incumbents to "interconnect" with new entrants (at a price determined by the regulations before us), thereby allowing a new entrant's small set of subscribers to connect with the incumbent firm's likely larger customer base. § 251(c)(2). Second, it requires

incumbents to sell retail services to new entrants at wholesale rates, thereby allowing newly entering firms automatically to compete in retailing if they so desire. § 251(c)(4). Third, it requires incumbents to provide new entrants "access to network elements," say, telephone lines connecting homes or offices with switching centers, "on an unbundled basis." § 251(c)(3). This third requirement permits a new entrant to compete selectively without replicating (or substituting) all of the elements the incumbent uses to offer the service in question.

Suppose, for example, the incumbent's control of certain existing cables, lines, or switching equipment would put the new entrant at an economic disadvantage because duplication of those "elements" would prove unnecessarily expensive. The new Act does not require the new entrant and incumbent to compete in respect to *those* elements, say, through wasteful duplication. Rather, the Act permits the new entrant to offer, and to compete with respect to, a related service by obtaining "access" to (and therefore using) *those* "elements" of the incumbent's network, while finding on its own other elements necessary to the service. It is as if a railroad regulator, anxious to promote railroad competition between City A and City B but aware that it would prove wasteful to duplicate a certain railroad bridge across the Mississippi River, ordered the bridge's owner to share the bridge with new competitors. The sharing would avoid wasteful duplication of the hard-to-duplicate resource—namely, the bridge. But at the same time it would facilitate competition in the remaining aspects of the A-to-B railroad service. That, I assume, is why the Act says that the "elements" that must be shared are those for which access is "necessary" and in respect to which "failure to provide access" would "impair" the ability of the new entrant "to provide the services that it seeks to offer." § 251(d)(2). See *Iowa Utilities Bd.*, 525 U. S., at 392 (Commission must give "substance to the 'necessary' and 'impair' require-

ments"); cf. *id.*, at 416–417 (BREYER, J., concurring in part and dissenting in part) (stating that the "necessary" and "impair" provision's object is to require access to, and thereby force sharing of, those elements of an incumbent's system that would prove, to a significant degree, economically wasteful to duplicate).

To put the matter more concretely, imagine that a communications firm—a potential new entrant—wishes to sell voice, data, text, pictures, entertainment, or other communications services, perhaps in competition with the incumbent. That firm must decide how its service will reach a customer inside a house or office. Should the firm (1) run its own new cable into the house? (2) run wires through an already-existing electricity conduit? (3) communicate without wires, say, by wireless or one-way or two-way satellite? (4) or use the incumbent's pair of twisted copper telephone service wires already in place? If the potential new entrant claims that all but the last of these possibilities are impractical or far too expensive—that using existing telephone wires is far cheaper (in terms of real resources expended) than the alternatives—then the new entrant is claiming that the incumbent's wires are a kind of "bridge" to which it must have access. And it may ask the regulator to make its new entry feasible by requiring the incumbent to permit it to use that "element" at a reasonable price.

Fourth, the Commission has described the Act's goals as including promotion of nonwasteful competition. The preamble to the Commission's price regulations describes their statutorily based aim as "giv[ing] appropriate signals to producers and consumers and ensur[ing] *efficient* entry and utilization of the telecommunications infrastructure." Order ¶ 630 (emphasis added). The Commission also says that "the prices that potential entrants pay for these elements should reflect forward-looking economic costs in order to encourage *efficient* levels of investment and entry." *Id.*, ¶ 672 (emphasis added). And it adds that "Congress spe-

cifically determined that input prices should be based on costs because this would foster competition in the retail market." *Id.*, ¶ 710; see also *id.*, ¶ 1.

Fifth, the Solicitor General confirmed this view at oral argument when he said that the rates in question should be set in order to "encourage new entrants to come into the market," Tr. of Oral Arg. 60, to "allow them to enter the market at competitive rates," *ibid.*, and to "encourage them to develop new technologies," *id.*, at 61.

The statute, then, seeks new local market competition insofar as local markets can support that competition without serious waste. And we must read the relevant ratesetting provision—including the critical word "cost"—with that goal in mind.

III

The Commission's critics—Verizon, other incumbents, and experts whose published articles Verizon has lodged with the Court—concede that the statute grants the Commission broad authority to define "cost[s]." They also concede that every ratesetting system has flaws. Cf., *e. g.*, *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Serv. Comm'n of Mo.*, 262 U. S. 276, 311–312 (1923) (Brandeis, J., joined by Holmes, J., dissenting) (criticizing "reproduction cost" systems because of the administrative difficulty of determining costs); Economics of Regulation 109–111 (criticizing "historical cost" systems because of their failure to provide proper incentives).

Nonetheless, the critics argue, the Commission cannot lawfully choose a system that thwarts a basic statutory purpose without offering any significant compensating advantage. They take the relevant purpose as furthering local competition where feasible. See Part II, *supra.* They add that rates will further that purpose (1) if they discourage new firms from using the incumbent's facilities or "elements" when it is significantly less expensive, economically speaking, for the entrant to build or to buy elsewhere, and (2) if

they encourage new firms to use the incumbent's facilities when it is significantly less expensive, economically speaking, for the entrant to do so. They point out that prices that approximately reflect an *actual* incumbent's *actual* additional costs of supplying the services (or "element") demanded will come close to doing both these things. See Kahn 330 (prices set at "incremental cost," the cost of supplying an added "increment," will give challengers the "proper target at which to shoot" only if that cost reflects "the cost that society will *actually* incur if they purchase more" or the resources that it would save if they purchase less); Knieps, Interconnection and Network Access, 23 Ford. Int'l L. J. 90 (2000); see also J. Sidak & D. Spulber, Deregulatory Takings and the Regulatory Contract (1998) (arguing that a market-determined efficient component pricing rule (M–ECPR) satisfies these objectives and that the FCC has misunderstood the M–ECPR system). But prices like the Commission's, based on the costs that a *hypothetical* "most efficient" firm would incur if *hypothetically* building largely from scratch, Order ¶ 685, would do neither. Indeed, they would do exactly the opposite, creating incentives that hinder rather than further the statute's basic objective.

First, the critics ask, why, given such a system, would a new entrant ever build or buy a new element? After all, the Commission's ratesetting system sets the incumbent's compulsory leasing rate at a level that would rarely exceed the price of building or buying elsewhere. That is because the Commission's ratesetting system chooses as its basis the hypothetical cost of the most efficient method of providing the relevant service—*i. e.*, the cost of entering a house through the use of electrical conduits or of using wireless (if cheaper in general), and it then applies those costs (based on, say, hypothetical wireless) *as if* they were the cost of the system in place (the twisted pair of wires). Why then would the new entrant use an electrical conduit, or a wireless system, to enter a house when, by definition, the Commis-

sion will require the incumbent to lease its pair of twisted wires at an equivalent price or lower—whether or not the incumbent will have to spend more, in fact, to provide the twisted wires? The rules further discourage independent building or buying by assessing a special penalty upon the new entrant that does so, for that entrant will have to worry that soon another newer new entrant will insist upon sharing the incumbent's equivalent of that very element at a still lower regulation-determined price based on subsequent technological developments.

The Commission's system will tend to create instances in which (1) the incumbent's *actual* future cost of maintaining an element (say, a set of wires) will exceed (2) the new entrant's cost of building or buying elsewhere (say, through wireless or wires in electrical conduits) which, in turn, will equal (or even exceed) (3) the *hypothetical* future "best practice" cost (namely, what the experts decide will, in general, be cheapest). In such a case (or in related cases, where technological improvements, actual or predicted, tend to offset various cost differences), the new entrant will uneconomically share the incumbent's facilities by leasing rather than building or buying elsewhere. And that result, in the assumed circumstances, is wasteful. It undermines the efficiency goal that the majority itself claims the Act seeks to achieve. Cf. *ante,* at 509–510, 539.

Nor is the "sharing" of facilities (*e. g.,* the wire pairs) that this result embodies consistent with the competition that the Act was written to promote. That is because firms that share existing facilities do not compete in respect to the facilities that they share, any more than several grain producers who auction their grain at a single jointly owned market compete in respect to *auction services.* Cf. *Iowa Utilities Bd.,* 525 U. S., at 429 (BREYER, J., concurring in part and dissenting in part) ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge"). Yet rules that combine a

strong monetary incentive to share with a broad definition of "network element," see 47 CFR §§ 51.319(f)–(g) (1997); Order ¶ 413, will tend to produce widespread sharing of entire incumbent systems under regulatory supervision—a result very different from the competitive market that the statute seeks to create. See *Iowa Utilities Bd.*, *supra*, at 386–387 (affirming the Commission's broad definition of "network element"). At the least, those rules are inconsistent with the Commission's own view that they will sometimes "serve as a transitional arrangement until fledgling competitors could develop a customer base and complete the construction of their own networks." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, 3700, ¶ 6 (1999) (Third Report and Order). Why, given the pricing rules, would those "fledgling competitors" ever try to fly on their own?

Second, what incentive would the Commission's rules leave the incumbents either to innovate or to invest in a new "element?" The rules seem to say that the incumbent will share with competitors the cost-reducing benefits of a successful innovation, while leaving the incumbent to bear the costs of most unsuccessful investments on its own. But see *infra*, at 552. Why would investment not then stagnate? See, *e. g.*, Jorde, Sidak, & Teece, Innovation, Investment, and Unbundling, 17 Yale J. Reg. 1, 8 (2000) ("It makes no economic sense for the [incumbent] to invest in technologies that lower its own marginal costs, so long as competitors can achieve the identical cost savings by regulatory fiat"); Sidak & Spulber, Deregulation and Managed Competition in Network Industries, 15 Yale J. Reg. 117, 124–125 (1998) ("If deprived of a return to capital facilities after capital has been sunk in irreversible investments, or if faced with reduced returns to investments already made, any economically rational company will eliminate or reduce similar capital investments in the future"); Armstrong, AT&T Scoffs at Possible Common Carrier Status, Telecommunications Reports,

Nov. 9, 1998 (Chief Executive Officer of AT&T, which here supports the Commission's regulations), cited in Huber 206, n. 611 ("'No company will invest billions of dollars . . . if competitors who have not invested a penny of capital, nor taken an ounce of risk, can come along and get a free ride on the investments and risks of others'").

I recognize that no regulator is likely to enforce the Commission's rules so strictly that investment literally slows to a trickle. Indeed, the majority cites figures showing that in the past several years new firms have invested $30 to $60 billion in local communications markets. See *ante*, at 516. We do not know how much of this investment represents facilities, say, broadband, for which an incumbent's historical network offers no substitute. Nor do we know whether this number is small or large compared with what might have been. Cf. FCC, Statistics of Communications Common Carriers 51 (table 2.7); FCC, Statistics of Communications Common Carriers 42 (table 2.7); FCC, Statistics of Communications Common Carriers 29 (table 2.7); FCC, Statistics of Communications Common Carriers 1 (table 2.7) (incumbents' similar investment over the same period amounts to over $100 billion); cf. FCC, 2000/2001 Statistics of Communications Common Carriers 51 (table 2.9) (total depreciated investment plus working capital equals $220 billion); *ante*, at 516, 521 (new entrants' market share provided by entrants' own facilities alone is 33%). Regardless, given the incentives, this independent investment would seem to have been made despite the "start from scratch" rules, not because of them. At best, such statistics do no more than show that at least some of the coincidences I describe below have, happily for the Commission and the public alike, come to pass. See *infra*, at 554, 556, 560–561.

The critics mention several other problems as well. They say, for example, that the Commission's regulations will exacerbate the problem of "stranded costs"—*i. e.*, the need for a once-regulated incumbent to recover its reasonable, but now

technologically outdated, historical investment. See Part III–C, *ante*. They add that the regulations will make nearly redundant the statute's provisions for "element" rates set through negotiation. See 47 U. S. C. § 252(a)(1). After all, given the Commission's regulations, how much is there to negotiate about? The regulations entitle the new entrant to a price equal to, or lower than, the price to which any rational incumbent could agree. See Brief for United States in *Mathias* v. *Worldcom Technologies, Inc.*, O. T. 2001, No. 00–878, p. 18, n. 5 ("[A]s a practical matter" carriers have little incentive to negotiate).

Nor, in the critics' view, do the regulations possess any offsetting advantages. They lack that ease of administration that led Justices Holmes and Brandeis to favor use (for ratesetting purposes) of an incumbent's historic costs despite their economic inaccuracy. See *Southwestern Bell Telephone Co.*, 262 U. S., at 292–296 (dissenting opinion); see also *ante*, at 481–483. The hypothetical nature of the Commission's system means that experts must estimate how imaginary firms would rebuild their systems from scratch—whether, for example, they (hypothetically) would receive permission to dig up streets, to maintain unsightly telephone poles, or to share their pole costs with other users, say, cable operators—and they must then estimate what would turn out to be most "efficient" in such (hypothetical) future circumstances. The speculative nature of this enterprise, the critics say, will lead to a battle of experts, each asking a commission to favor what can amount to little more than a guess. See Kahn 333, 334, n. 36, 335 (describing three models introduced in regulatory proceedings, one of which reduced all actual expenses by 27% because railroad regulation had brought similar efficiency gains, another of which assumed that all utilities, including electricity producers, would rebuild entire systems from scratch at the same time, and the third of which assumed New Hampshire's telecommunications system was administratively most efficient but then reduced its actual administrative expenses by 25%).

These administrative difficulties seem far greater than any difficulty likely involved in an effort to determine an actual incumbent's actual (past or likely future) costs. See Affidavits of W. Baumol, J. Ordover, & R. Willig, Comments of AT&T Corp., CC Docket 96–98: In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, ¶ 25 (May 16, 1996), App. 67 (TELRIC's estimates "do not simply accept the architecture, sizing, technology, or operating decisions" of the incumbents "as bases for calculating" costs). Assumptions are inevitable. And the resulting uncertainties mean a somewhat random sort of rate that can either exacerbate the incentive problems previously mentioned or alleviate those problems by a kind of regulatory coincidence. See *ante*, at 522 (describing how state commissioners "customarily assig[n] rates based on some predictions from one model and others from its counterpart").

IV

The criticisms described in Part III are serious, potentially severing any rational relation between the Commission's regulations and the statutory provision's basic purposes. *State Farm*, 463 U. S., at 56. Hence, the Commission's responses are important. Do those responses reduce the force of the criticisms, blunt their edges, or suggest offsetting virtues? I have found six major responses. But none of them is convincing.

First, the FCC points out that rates will include not only a charge reflecting hypothetical "most-efficient-firm" costs but also a depreciation charge—a charge that can reconcile a firm's initial historic investment, say, in equipment, and the equipment's current value, which diminishes over time. See Order ¶ 686 ("[P]roperly designed depreciation schedules should account for expected declines in the value of capital goods"). If, for example, an incumbent's reasonable investment, measured actually and historically, came to $50 million, but FCC experts predict a "most-efficient-

firm-building-from-scratch" future replication cost of $30 million, a depreciation charge could permit the incumbent to recoup the otherwise missing $20 million. And, in theory, a state commission might structure a potentially complex depreciation charge so as both to permit recovery of historic investment and also to offset many of the improper investment incentives described in Part II, *supra.*

This response, however, does not reflect what the Commission's regulations actually say. Those regulations say nothing about permitting recovery of reasonable historic investment nor about varying the charge to offset perverse investment incentives. Rather, they strongly indicate the opposite. They clearly require state commissions to use *current* depreciation rates right alongside the Commission's new and different "most-efficient-firm-building-from-scratch" charges. See Order ¶ 702. They do create an exception from "current" rates. But to take advantage of that exception "incumbent LECs" have to bear the "burden of demonstrating with specificity that the *business risks* that they face in providing unbundled network elements and interconnection services would justify a different . . . depreciation rate." *Ibid.* Unless the exception is to swallow the rule, the term "business risks" must refer to some special situation—not to the ordinary circumstance in which a new entrant simply asks to share an "element" at rates determined under Commission "most-efficient-firm" rules. In any event, that is how 24 state commissions have read the language. See *1998 Biennial Regulatory Review—Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242, ¶ 69 (1999). And the FCC nowhere explicitly says to the contrary. Hence the FCC depreciation rules as written do not respond to the critics' claims in the ordinary case, nor do they otherwise transform its "most-efficient-firm-building-from-scratch" system into a system that reflects historic costs.

Second, the FCC points out that a state commission can adjust permissible profit rates. In theory, such an adjustment could offset many of the improper investment incentives described in Part II, *supra.* But, like the depreciation regulations, the profit regulations say nothing about the matter. Indeed, like the depreciation regulations, they suggest the opposite. The relevant FCC regulations say that "the *currently authorized rate of return at the federal or state level is a reasonable starting point.*" Order ¶ 702 (emphasis added). They, too, add an exception, available to "incumbent LEC's" that successfully "bear the burden of demonstrating with specificity that the *business risks* that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital." *Ibid.* But this exception, like the depreciation exception, cannot respond to the critics' claims in the ordinary case for similar reasons.

The FCC adds that it did not have "time" to offer more than "tentative guidance," Reply Brief for Federal Parties 11–12, that profits now may be too high, Order ¶ 702, and that the incumbents may find other ways to lower their capital costs, *id.*, ¶ 687. These additions, however, concede the critics' basic point—that the "profit" rules as written do not provide an answer to Part III's claims. Rather, *considered as a response to those claims*, they must rest upon no more than hope for a regulatory coincidence. Most significantly, they hope that current market conditions mean that current profit rates somehow magically offset the adverse effects of the Commission's other regulations, see Part III, *supra.* See Reply Affidavit of J. Hausman ¶ 9, n. 8, submitted with Reply Comments of the United States Telcom Association, CC Docket No. 96–98 (FCC filed May 30, 1996), App. 197 (testifying for critics that profit rates would have to double or triple to secure investment). Cf. G. Hubbard & W. Lehr, Capital Recovery Issues in TELRIC Pricing: Response to Professor Jerry A. Hausman (July 18, 1996), App. 216, 221

(arguing for FCC defenders that Hausman overstates the need for change, but stating that "if any adjustments . . . are required . . . such adjustments would be modest"). And the majority relies on its belief that that hope has been realized. *Ante*, at 521 (stating that in light of the fact that "competition in fact has been slow to materialize," "it seems fair to say" that the current rate is a "'reasonable starting point'"). Of course, one must sympathize with the FCC's time problem. But the statute did not require the FCC so quickly to create so complex a system. Rather, the statute seems to foresee rates set, not by FCC regulations primarily or in detail, but by negotiations among the parties, 47 U. S. C. § 252(a)(1), if not by state commissions. See *Iowa Utilities Bd.*, 525 U. S., at 412–420 (BREYER, J., concurring in part and dissenting in part).

Third, the Commission supports the reasonableness and practicality of its system with the claim that "a number of states" have used it successfully, as have several European nations. Order ¶ 681. As to domestic experience, I can find no evidence that, prior to the promulgation of the rules at issue here, any State had successfully implemented the FCC's version of TELRIC. It is hardly surprising that since then several States have tried to apply it. Nor is it surprising that their implementation has produced criticisms similar to those made here. See, *e. g.*, *MCI Telecommunications Corp.* v. *GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1168–1169, and n. 7 (Ore. 1999) (discussing problems with the FCC's TELRIC).

And the "foreign nation" part of the Commission's claim rests only upon a 1997 European Community paper referring to a "best current practice" approach as a future goal. See Commission of European Communities, Recommendation on Interconnection in a liberalised telecommunications market, C(97) 3148, §§ 3.3, 3.5 (Oct. 15, 1997), http://europa.eu.int/ISPO/infosoc/telecompolicy/en/r3148-en.htm (Apr. 17, 2002). Indeed, Britain's FCC counterpart has said that, in the

absence of a showing of inefficiency, the incumbent's *actual* current expenditures on capacity additions should be used "as the starting point." See Office of Telecommunications (Oftel), Access to Bandwidth: Indicative prices and pricing principles ¶ 9 (May 2000), http://www.oftel.gov.uk/publications/broadband/llu/llu0500.htm (Apr. 17, 2002).

In fact, as I understand the European system, it may turn out in practice to work roughly as follows: The relevant European regulatory agency, seeking competition, encourages new firms to enter local markets in order to provide new voice, data, text, picture, entertainment, or other communications service. Like the Commission, the agency normally has the authority to insist that an incumbent firm "unbundle," *e. g.*, that it permit a new entrant to use its pair of twisted wires running from switching center to the inside of a house. It also has the authority to set prices. But in exercising that authority, it has neither required, nor is it likely to rely upon, any one ratesetting method. Rather, it may encourage negotiation among the parties in order to reach agreed-upon prices low enough to prevent the incumbent from blocking entry but high enough to encourage the new firm to consider other entry methods, such as use of electricity conduits, or new cables, where economically feasible. If no agreement can be reached, the regulator, in determining the price, can use formulas, modified to take proper account of depreciation and historical cost, or it can look to prices set in other European nations as a yardstick to help produce competition.

This less formal kind of "play it by ear" system, in my view, is what the statute before us intended. The Act provides for price negotiation among the parties, it brings in state regulators where necessary to break deadlocks, and it permits the States to use a variety of different ratesetting approaches, looking to experience in other States as appropriate, in order to determine proper prices. The mysterious statutory parenthetical phrase "(determined without ref-

erence to a rate-of-return or other rate-based proceeding)," § 252(d)(1), makes sense from this point of view. It reflects Congress' desire to obtain not perfect prices but speedy results. It specifies that States need not use formal methods, relying instead upon bargaining and yardstick competition. See *Iowa Utilities*, *supra*, at 424–425 (BREYER, J., concurring in part and dissenting in part); cf. Order ¶ 631 (describing how the New York Commission "se[t] prices on a case-by-case basis"). I recognize, however, that the FCC has rejected this approach in favor of extraordinarily complex national ratesetting standards, which we review only to determine whether they will further, or serve as obstacles to, the competitive marketplace that the statute seeks.

Fourth, the FCC adds that its system seeks to base rates on the costs a hypothetical "most efficient firm" hypothetically would incur were it "building from scratch." And such a system, in its view, will "simulate" or "best replicat[e], to the extent possible, the conditions of a competitive market." Order ¶ 679; see also *id.*, ¶ 738. This response, however, does not do more than describe that very feature of the system upon which the critics focus their attack.

As I have previously said, *supra,* at 543, such an objective is perhaps consistent with an ordinary ratesetting statute that seeks only low prices. But the problem before us—that of a lack of "rational connection" between the regulations and the statute—grows out of the fact that the Telecommunications Act is not a typical regulatory statute asking regulators simply to seek low prices, perhaps by trying to replicate those of a hypothetical competitive market. Rather, this statute is a deregulatory statute, and it asks regulators to create prices that will induce appropriate new entry. See Part II, *supra.* That being so, we may assume, purely for argument's sake, that the FCC rules could successfully "replicate" the prices toward which perfectly efficient, perfectly competitive markets would tend. But see Kahn 326–327 (stating that such prices are never achieved in any actual

market); A. Kahn, Whom the Gods Would Destroy, or How Not to Deregulate 4 (2001) (stating that a firm in an actual market would determine efficient investment in light of its actual system, not a hypothetical system built from scratch). Still, those rules, if successful, would produce the strong incentives to demand sharing, and the strong disincentives to build independently, that Part II describes—for they would create a "sharing" or "interconnection" price equal to or lower than any price associated with the creation of independent facilities. They would thereby tend toward a system in which regulatory price setting would *supplant*, not *promote*, competition. And however congenial institutional regulators might find such a system, it differs dramatically from the system that the statute seeks to bring about. See Part II, *supra*. Cf. *Iowa Utilities Bd.*, 525 U. S., at 387–392 (setting aside Commission rules granting new entrants power to obtain access to virtually any existing element). At least that is the claim that underlies much of the criticism set forth in Part III, *supra*. And the Commission's response that its system simulates the conditions of a competitive market does not respond to that basic criticism.

Fifth, the Commission says that its regulations are simply suggestive, leaving States free to depart. Reply Brief for Federal Parties 11–12. The short but conclusive answer to this response is that the Commission considered a "suggestive" approach and rejected it. See Order ¶ 66 (refusing to characterize rules as setting forth, not "requirements," but "'preferred outcomes,'" because the latter approach "would fail to establish explicit national standards for arbitration, and would fail to provide sufficient guidance to the parties' options in negotiations").

Sixth, the majority (but not the Commission) points out that local commissions are likely to leave any given set of rates in effect for some period of time. And this "regulatory lag" will solve the problem. See *ante*, at 505–506. I do not understand how it could solve the main problem—that of

leading new entrants to lease a more costly incumbent "element" where building or buying independently could prove less costly. See *supra*, at 548–550. Nor, given any new entrant's legal right to obtain a regulator's decision, am I certain that lags will prove significant. But, in any event, lags will differ, depending upon regulator, time, and circumstance, thereby introducing a near random element that might, or might not, ameliorate the system's otherwise adverse effects.

In sum, neither the Commission's nor the majority's responses are convincing.

V

Judges have long recognized the difficulty of reviewing the substance of highly technical agency decisionmaking. Compare *Ethyl Corp.* v. *EPA*, 541 F. 2d 1, 66 (CADC 1976) (en banc) (Bazelon, C. J., concurring) ("[T]he best way for courts to guard against unreasonable . . . administrative decisions is not . . . themselves to scrutinize the technical merits . . . [but to] establish a decision-making process that assures a reasoned decision" (internal quotation marks omitted)), with *id.*, at 69 (Leventhal, J., concurring) (stating that judges must assure, on substantive review, "conformance to statutory standards and requirements of rationality," acquiring "whatever technical background is necessary"). This Court has emphasized the limitations the law imposes upon judges' authority to insist upon special agency procedures. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 543–548 (1978). But it has also made clear that judges nonetheless must review for rationality the substance of agency decisions, including technical decisions. *State Farm*, 463 U. S., at 56. That review requires agencies to undertake the difficult task of translating technical matters into language that judges can understand and preparing technical responses to challenges of the sort found here. But, despite the difficulty, review by generalist judges is important, both

because technical agency decisions are often of great importance to the general public and because the law forbids agencies, in the name of technical expertise, to wrest themselves free of public control.

Agencies are, of course, expert in technical areas. That is why Judge Leventhal wrote that "the judges," when reviewing the rationality of substantive decisions, "must act with restraint." *Ethyl Corp.*, 541 F. 2d, at 69. And I agree. But, he added, judges may not "abstain from any substantive review." *Id.*, at 68. And again I agree. In these cases, the critics' claims are strong. They suggest that the FCC's pricing rule, together with its original "forced leasing" twin, see *Iowa Utilities Bd.*, *supra*, at 388–392 (finding original leasing rule unlawful), would bring about, not the competitive marketplace that the statute demands, but a highly regulated marketplace characterized by widespread sharing of facilities with innovation and technological change reflecting mandarin decisionmaking through regulation rather than decentralized decisionmaking based on the interaction of freely competitive market forces. And the Commission's replies are unsatisfactory. The majority nonetheless finds the Commission's pricing rules reasonable. As a regulatory theory, that conclusion might be supportable. But under this *deregulatory* statute, it is not. Under these circumstances, it would amount to abstention from, indeed abdication of, "rational basis" review, were I to agree that the record here demonstrates the "rational connection" between regulations and statutory purpose upon which the law insists. *State Farm*, *supra*, at 56; Administrative Procedure Act, 5 U. S. C. § 706(2)(A); see also *State Farm*, *supra*, at 43 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given"). As Judge Leventhal properly put it, "Restraint, yes, abdication, no." *Ethyl Corp.*, *supra*, at 69. The Court, of course, with 65 pages of careful analysis, does not abdicate its reviewing responsibility; but for the reasons stated here I cannot agree with

its substantive conclusion. Consequently, I would affirm the Eighth Circuit's determination that the regulations are unlawful.

VI

I disagree with the majority about one further legal issue. The statute imposes upon an incumbent the

> "duty to provide . . . for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U. S. C. §251(c)(3) (emphasis added).

The FCC, pointing to this provision, has said that (upon request) incumbents must themselves combine, among other things, elements that are ordinarily not combined. Rules 315(c)–(f), 47 CFR §§51.315(c)–(f) (1997). How, the incumbents ask, can a statute that speaks of the *requesting carriers* combining elements grant the FCC authority to insist that *they*, the incumbents, combine the elements?

In *Iowa Utilities Bd.*, the Court found authority for a somewhat similar rule—a rule that forbids incumbents to *un*combine elements ordinarily found in combination. But, as the majority recognizes, *ante*, at 534–535, that different rule rests upon a rationale absent here. If an incumbent takes apart elements that it ordinarily keeps together, it is normally discriminating against the requesting carriers. And the statutory provision forbids discrimination. But here the incumbent simply keeps apart elements that it ordinarily keeps apart in the absence of a new entrant's demand. How does that discriminate? And if it does not discriminate, where does this statutory provision give the FCC authority to forbid it?

I cannot find the statutory authority. And I consequently would affirm the lower court on the point.

For these reasons, I dissent.

Syllabus

ASHCROFT, ATTORNEY GENERAL *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

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

No. 00–1293. Argued November 28, 2001—Decided May 13, 2002

In *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, this Court found that the Communications Decency Act of 1996 (CDA)—Congress' first attempt to protect children from exposure to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA's breadth was wholly unprecedented. After the Court's decision in *Reno*, Congress attempted to address this concern in the Child Online Protection Act (COPA). Unlike the CDA, COPA applies only to material displayed on the World Wide Web, covers only communications made for commercial purposes, and restricts only "material that is harmful to minors," 47 U. S. C. § 231(a)(1). In defining "material that is harmful to minors," COPA draws on the three-part obscenity test set forth in *Miller* v. *California*, 413 U. S. 15, see § 231(e)(6), and thus requires jurors to apply "contemporary community standards" in assessing material, see § 231(e)(6)(A). Respondents—who post or have members that post sexually oriented material on the Web—filed a facial challenge before COPA went into effect, claiming, *inter alia*, that the statute violated adults' First Amendment rights because it effectively banned constitutionally protected speech, was not the least restrictive means of accomplishing a compelling governmental purpose, and was substantially overbroad. The District Court issued a preliminary injunction barring the enforcement of COPA because it concluded that the statute was unlikely to survive strict scrutiny. The Third Circuit affirmed but based its decision on a ground not relied upon by the District Court: that COPA's use of "contemporary community standards," § 231(e)(6)(A), to identify material that is harmful to minors rendered the statute substantially overbroad.

Held: COPA's reliance on "community standards" to identify what material "is harmful to minors" does not by itself render the statute substantially overbroad for First Amendment purposes. The Court, however, expresses no view as to whether COPA suffers from substantial overbreadth for reasons other than its use of community standards, whether the statute is unconstitutionally vague, or whether the statute survives

Syllabus

strict scrutiny. Prudence dictates allowing the Third Circuit to first examine these difficult issues. Because petitioner did not ask to have the preliminary injunction vacated, and because this Court could not do so without addressing matters the Third Circuit has yet to consider, the Government remains enjoined from enforcing COPA absent further action by the lower courts. Pp. 585–586.

217 F. 3d 162, vacated and remanded.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and BREYER, JJ., joined, an opinion with respect to Part III–B, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, and an opinion with respect to Parts III–A, III–C, and III–D, in which REHNQUIST, C. J., and SCALIA, J., joined. O'CONNOR, J., *post,* p. 586, and BREYER, J., *post,* p. 589, filed opinions concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment, in which SOUTER and GINSBURG, JJ., joined, *post,* p. 591. STEVENS, J., filed a dissenting opinion, *post,* p. 602.

Solicitor General Olson argued the cause for petitioner. With him on the briefs were *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Irving L. Gornstein*, *Barbara L. Herwig*, *Jacob M. Lewis*, and *Charles Scarborough.*

Ann E. Beeson argued the cause for respondents. With her on the briefs were *Christopher A. Hansen*, *Steven R. Shapiro*, *Stefan Presser*, *David L. Sobel*, *Alexandra A. E. Shapiro*, and *Christopher R. Harris.**

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*Briefs of *amici curiae* urging reversal were filed for the County of DuPage by *Richard Hodyl, Jr.*, *Joseph E. Birkett*, and *Nancy J. Wolfe;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *James M. Henderson, Sr.*, *Colby M. May*, and *Walter M. Weber;* for Morality in Media, Inc., et al. by *Paul J. McGeady*, *Robin S. Whitehead*, and *Janet M. LaRue;* for Wallbuilders, Inc., by *Barry C. Hodge;* for Senator John S. McCain et al. by *Bruce A. Taylor;* and for Senator Raymond N. Haynes et al. by *Richard D. Ackerman* and *Gary G. Kreep.*

Briefs of *amici curiae* urging affirmance were filed for the American Society of Journalists and Authors et al. by *Carl A. Solano*, *Theresa E. Loscalzo*, *Jennifer DuFault James*, *Joseph T. Lukens*, and *Dionna K. Litvin;* for the Association of National Advertisers, Inc., by *Steven G. Brody*

JUSTICE THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, an opinion with respect to Parts III–A, III–C, and III–D, in which THE CHIEF JUSTICE and JUSTICE SCALIA join, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join.

This case presents the narrow question whether the Child Online Protection Act's (COPA or Act) use of "community standards" to identify "material that is harmful to minors" violates the First Amendment. We hold that this aspect of COPA does not render the statute facially unconstitutional.

I

"The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U. S. C. § 230(a)(3) (1994 ed., Supp. V). While "surfing" the World Wide Web, the primary method of remote information retrieval on the Internet today,[1] see App. in No. 99–1324 (CA3), p. 180 (hereinafter App.), individuals can access material about topics ranging from aardvarks to Zoroastrianism. One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis.

The Web also contains a wide array of sexually explicit material, including hardcore pornography. See, *e. g.*, *Amer-*

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and *Gilbert H. Weil;* for the Association of American Publishers, Inc., et al. by *R. Bruce Rich* and *Jonathan Bloom;* for the Chamber of Commerce of the United States by *Jodie L. Kelley*, *Paul M. Smith*, and *Robert Corn-Revere;* for the Society for the Scientific Study of Sexuality et al. by *Marjorie Heins* and *Joan E. Bertin;* and for Volunteer Lawyers for the Arts et al. by *Charles L. Kerr*, *Elliot M. Mincberg*, and *Lawrence S. Ottinger.*

[1] For a thorough explanation of the history, structure, and operation of the Internet and World Wide Web, see *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 849–853 (1997).

ican Civil Liberties Union v. *Reno*, 31 F. Supp. 2d 473, 484 (ED Pa. 1999). In 1998, for instance, there were approximately 28,000 adult sites promoting pornography on the Web. See H. R. Rep. No. 105–775, p. 7 (1998). Because "[n]avigating the Web is relatively straightforward," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 852 (1997), and access to the Internet is widely available in homes, schools, and libraries across the country,[2] see App. 177–178, children may discover this pornographic material either by deliberately accessing pornographic Web sites or by stumbling upon them. See 31 F. Supp. 2d, at 476 ("A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web").

Congress first attempted to protect children from exposure to pornographic material on the Internet by enacting the Communications Decency Act of 1996 (CDA), 110 Stat. 133. The CDA prohibited the knowing transmission over the Internet of obscene or indecent messages to any recipient under 18 years of age. See 47 U. S. C. § 223(a). It also forbade any individual from knowingly sending over or displaying on the Internet certain "patently offensive" material in a manner available to persons under 18 years of age. See § 223(d). The prohibition specifically extended to "any comment, request, suggestion, proposal, image, or other communication that, in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." § 223(d)(1).

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[2] When this litigation commenced in 1998, "[a]pproximately 70.2 million people of all ages use[d] the Internet in the United States." App. 171. It is now estimated that 115.2 million Americans use the Internet at least once a month and 176.5 million Americans have Internet access either at home or at work. See More Americans Online, New York Times, Nov. 19, 2001, p. C7.

The CDA provided two affirmative defenses to those prosecuted under the statute. The first protected individuals who took "good faith, reasonable, effective, and appropriate actions" to restrict minors from accessing obscene, indecent, and patently offensive material over the Internet. See § 223(e)(5)(A). The second shielded those who restricted minors from accessing such material "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." § 223(e)(5)(B).

Notwithstanding these affirmative defenses, in *Reno* v. *American Civil Liberties Union*, we held that the CDA's regulation of indecent transmissions, see § 223(a), and the display of patently offensive material, see § 223(d), ran afoul of the First Amendment. We concluded that "the CDA lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech" because, "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppress[ed] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another." 521 U. S., at 874.

Our holding was based on three crucial considerations. First, "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." *Id.*, at 876. Second, "[t]he breadth of the CDA's coverage [was] wholly unprecedented." *Id.*, at 877. "Its open-ended prohibitions embrace[d]," not only commercial speech or commercial entities, but also "all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors." *Ibid.* In addition, because the CDA did not define the terms "indecent" and "patently offensive," the statute "cover[ed] large amounts of nonpornographic material with serious educational or other value." *Ibid.* As a result, regulated subject matter under the CDA extended to "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card

catalog of the Carnegie Library." *Id.*, at 878. Third, we found that neither affirmative defense set forth in the CDA "constitute[d] the sort of 'narrow tailoring' that [would] save an otherwise patently invalid unconstitutional provision." *Id.*, at 882. Consequently, only the CDA's ban on the knowing transmission of obscene messages survived scrutiny because obscene speech enjoys no First Amendment protection. See *id.*, at 883.

After our decision in *Reno* v. *American Civil Liberties Union*, Congress explored other avenues for restricting minors' access to pornographic material on the Internet. In particular, Congress passed and the President signed into law the Child Online Protection Act, 112 Stat. 2681–736 (codified in 47 U. S. C. § 231 (1994 ed., Supp. V)). COPA prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U. S. C. § 231(a)(1).

Apparently responding to our objections to the breadth of the CDA's coverage, Congress limited the scope of COPA's coverage in at least three ways. First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made "for commercial purposes."[3] *Ibid.* And third, while the CDA pro-

[3] The statute provides that "[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." 47 U. S. C. § 231(e)(2)(A) (1994 ed., Supp. V). COPA then defines the term "engaged in the business" to mean a person:

"who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the

hibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors." *Ibid.*

Drawing on the three-part test for obscenity set forth in *Miller* v. *California*, 413 U. S. 15 (1973), COPA defines "material that is harmful to minors" as

> "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> "(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> "(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> "(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U. S. C. § 231(e)(6).

Like the CDA, COPA also provides affirmative defenses to those subject to prosecution under the statute. An individual may qualify for a defense if he, "in good faith, has restricted access by minors to material that is harmful to minors—(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." § 231(c)(1). Persons violating COPA are subject to both civil and criminal sanctions. A civil penalty of up to $50,000 may be imposed for each violation of

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person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." § 231(e)(2)(B).

the statute. Criminal penalties consist of up to six months in prison and/or a maximum fine of $50,000. An additional fine of $50,000 may be imposed for any intentional violation of the statute. § 231(a).

One month before COPA was scheduled to go into effect, respondents filed a lawsuit challenging the constitutionality of the statute in the United States District Court for the Eastern District of Pennsylvania. Respondents are a diverse group of organizations,[4] most of which maintain their own Web sites. While the vast majority of content on their Web sites is available for free, respondents all derive income from their sites. Some, for example, sell advertising that is displayed on their Web sites, while others either sell goods directly over their sites or charge artists for the privilege of posting material. 31 F. Supp. 2d, at 487. All respondents either post or have members that post sexually oriented material on the Web. *Id.*, at 480. Respondents' Web sites contain "resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines." *Id.*, at 484.

In their complaint, respondents alleged that, although they believed that the material on their Web sites was valuable for adults, they feared that they would be prosecuted under COPA because some of that material "could be construed as 'harmful to minors' in some communities." App. 63. Respondents' facial challenge claimed, *inter alia*, that COPA violated adults' rights under the First and Fifth Amend-

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[4] Respondents include the American Civil Liberties Union, Androgony Books, Inc., d/b/a A Different Light Bookstores, the American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, BlackStripe, Addazi Inc. d/b/a Condomania, the Electronic Frontier Foundation, the Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc., now known as ImageState North America, Inc.

ments because it (1) "create[d] an effective ban on constitutionally protected speech by and to adults"; (2) "[was] not the least restrictive means of accomplishing any compelling governmental purpose"; and (3) "[was] substantially overbroad."[5] *Id.*, at 100–101.

The District Court granted respondents' motion for a preliminary injunction, barring the Government from enforcing the Act until the merits of respondents' claims could be adjudicated. 31 F. Supp. 2d, at 499. Focusing on respondents' claim that COPA abridged the free speech rights of adults, the District Court concluded that respondents had established a likelihood of success on the merits. *Id.*, at 498. The District Court reasoned that because COPA constitutes content-based regulation of sexual expression protected by the First Amendment, the statute, under this Court's precedents, was "presumptively invalid" and "subject to strict scrutiny." *Id.*, at 493. The District Court then held that respondents were likely to establish at trial that COPA could not withstand such scrutiny because, among other reasons, it was not apparent that COPA was the least restrictive means of preventing minors from accessing "harmful to minors" material. *Id.*, at 497.

The Attorney General of the United States appealed the District Court's ruling. *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162 (CA3 2000). The United States Court of Appeals for the Third Circuit affirmed. Rather than reviewing the District Court's "holding that COPA was not likely to succeed in surviving strict scrutiny analysis," the Court of Appeals based its decision entirely on a ground that was not relied upon below and that was "virtually ignored by the parties and the amicus in their respective briefs." *Id.*, at 173–174. The Court of Appeals concluded that

[5] In three other claims, which are not relevant to resolving the dispute at hand, respondents alleged that COPA infringed the free speech rights of older minors, violated the right to "communicate and access information anonymously," and was "unconstitutionally vague." App. 101–102.

COPA's use of "contemporary community standards" to identify material that is harmful to minors rendered the statute substantially overbroad. Because "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users," the Court of Appeals reasoned that COPA would require "any material that might be deemed harmful by the most puritan of communities in any state" to be placed behind an age or credit card verification system. *Id.*, at 175. Hypothesizing that this step would require Web publishers to shield "vast amounts of material," *ibid.*, the Court of Appeals was "persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute," *id.*, at 174.

We granted the Attorney General's petition for certiorari, 532 U. S. 1037 (2001), to review the Court of Appeals' determination that COPA likely violates the First Amendment because it relies, in part, on community standards to identify material that is harmful to minors, and now vacate the Court of Appeals' judgment.

II

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." This provision embodies "[o]ur profound national commitment to the free exchange of ideas." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 686 (1989). "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983) (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972)). However, this principle, like other First Amendment principles, is not absolute. Cf. *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 56 (1988).

Obscene speech, for example, has long been held to fall outside the purview of the First Amendment. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957). But this Court struggled in the past to define obscenity in a manner that did not impose an impermissible burden on protected speech. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to the "intractable obscenity problem"); see also *Miller* v. *California*, 413 U. S., at 20–23 (reviewing "the somewhat tortured history of th[is] Court's obscenity decisions"). The difficulty resulted from the belief that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Id.*, at 22–23.

Ending over a decade of turmoil, this Court in *Miller* set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment: "(a) [W]hether 'the average person, *applying contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24 (citations omitted; emphasis added).

Miller adopted the use of "community standards" from *Roth*, which repudiated an earlier approach for assessing objectionable material. Beginning in the 19th century, English courts and some American courts allowed material to be evaluated from the perspective of particularly sensitive persons. See, *e. g.*, *Queen* v. *Hicklin* [1868] L. R. 3 Q. B. 360; see also *Roth*, 354 U. S., at 488–489, and n. 25 (listing relevant cases). But in *Roth*, this Court held that this sensitive person standard was "unconstitutionally restrictive of

the freedoms of speech and press" and approved a standard requiring that material be judged from the perspective of "the average person, applying contemporary community standards." *Id.*, at 489. The Court preserved the use of community standards in formulating the *Miller* test, explaining that they furnish a valuable First Amendment safeguard: "[T]he primary concern . . . is to be certain that . . . [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Miller*, *supra*, at 33 (internal quotation marks omitted); see also *Hamling* v. *United States*, 418 U. S. 87, 107 (1974) (emphasizing that the principal purpose of the community standards criterion "is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group").

III

The Court of Appeals, however, concluded that this Court's prior community standards jurisprudence "has no applicability to the Internet and the Web" because "Web publishers are currently without the ability to control the geographic scope of the recipients of their communications." 217 F. 3d, at 180. We therefore must decide whether this technological limitation renders COPA's reliance on community standards constitutionally infirm.[6]

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[6] While petitioner contends that a speaker on the Web possesses the ability to communicate only with individuals located in targeted geographic communities, Brief for Petitioner 29, n. 3, he stipulated below that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community." App. 187. The District Court adopted this stipulation as a finding of fact, see *American Civil Liberties Union* v. *Reno*, 31 F. Supp. 2d 473, 484 (ED Pa. 1999), and petitioner points to no evidence in the record suggesting that this finding is clearly erroneous.

A

In addressing this question, the parties first dispute the nature of the community standards that jurors will be instructed to apply when assessing, in prosecutions under COPA, whether works appeal to the prurient interest of minors and are patently offensive with respect to minors.[7] Respondents contend that jurors will evaluate material using "local community standards," Brief for Respondents 40, while petitioner maintains that jurors will not consider the community standards of any particular geographic area, but rather will be "instructed to consider the standards of the adult community as a whole, without geographic specification." Brief for Petitioner 38.

In the context of this case, which involves a facial challenge to a statute that has never been enforced, we do not think it prudent to engage in speculation as to whether certain hypothetical jury instructions would or would not be consistent with COPA, and deciding this case does not require us to do so. It is sufficient to note that community standards need not be defined by reference to a precise geographic area. See *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974) ("A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification . . . or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*"). Absent geographic

[7] Although the phrase "contemporary community standards" appears only in the "prurient interest" prong of the *Miller* test, see *Miller* v. *California*, 413 U. S. 15, 24 (1973), this Court has indicated that the "patently offensive" prong of the test is also a question of fact to be decided by a jury applying contemporary community standards. See, *e. g.*, *Pope* v. *Illinois*, 481 U. S. 497, 500 (1987). The parties here therefore agree that even though "contemporary community standards" are similarly mentioned only in the "prurient interest" prong of COPA's harmful-to-minors definition, see 47 U. S. C. § 231(e)(6)(A), jurors will apply "contemporary community standards" as well in evaluating whether material is "patently offensive with respect to minors," § 231(e)(6)(B).

specification, a juror applying community standards will inevitably draw upon personal "knowledge of the community or vicinage from which he comes." *Hamling*, *supra*, at 105. Petitioner concedes the latter point, see Reply Brief for Petitioner 3–4, and admits that, even if jurors were instructed under COPA to apply the standards of the adult population as a whole, the variance in community standards across the country could still cause juries in different locations to reach inconsistent conclusions as to whether a particular work is "harmful to minors." Brief for Petitioner 39.

B

Because juries would apply different standards across the country, and Web publishers currently lack the ability to limit access to their sites on a geographic basis, the Court of Appeals feared that COPA's "community standards" component would effectively force all speakers on the Web to abide by the "most puritan" community's standards. 217 F. 3d, at 175. And such a requirement, the Court of Appeals concluded, "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.*, at 177.

In evaluating the constitutionality of the CDA, this Court expressed a similar concern over that statute's use of community standards to identify patently offensive material on the Internet. We noted that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno*, 521 U. S., at 877–878. The Court of Appeals below relied heavily on this observation, stating that it was "not persuaded that the Supreme Court's concern with respect to the 'community standards' criterion has been sufficiently remedied by Congress in COPA." 217 F. 3d, at 174.

The CDA's use of community standards to identify patently offensive material, however, was particularly problem-

atic in light of that statute's unprecedented breadth and vagueness. The statute covered communications depicting or describing "sexual or excretory activities or organs" that were "patently offensive as measured by contemporary community standards"—a standard somewhat similar to the second prong of *Miller*'s three-prong test. But the CDA did not include any limiting terms resembling *Miller*'s additional two prongs. See *Reno*, 521 U. S., at 873. It neither contained any requirement that restricted material appeal to the prurient interest nor excluded from the scope of its coverage works with serious literary, artistic, political, or scientific value. *Ibid.* The tremendous breadth of the CDA magnified the impact caused by differences in community standards across the country, restricting Web publishers from openly displaying a significant amount of material that would have constituted protected speech in some communities across the country but run afoul of community standards in others.

COPA, by contrast, does not appear to suffer from the same flaw because it applies to significantly less material than did the CDA and defines the harmful-to-minors material restricted by the statute in a manner parallel to the *Miller* definition of obscenity. See *supra*, at 569–570, 574–575. To fall within the scope of COPA, works must not only "depic[t], describ[e], or represen[t], in a manner patently offensive with respect to minors," particular sexual acts or parts of the anatomy,[8] they must also be designed to appeal to the prurient interest of minors and, "taken as a whole, lac[k] serious

[8] While the CDA allowed juries to find material to be patently offensive so long as it depicted or described "sexual or excretory activities or organs," COPA specifically delineates the sexual activities and anatomical features, the depictions of which may be found to be patently offensive: "an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast." 47 U. S. C. § 231(e)(6)(B).

literary, artistic, political, or scientific value for minors." 47 U. S. C. § 231(e)(6).

These additional two restrictions substantially limit the amount of material covered by the statute. Material appeals to the prurient interest, for instance, only if it is in some sense erotic. Cf. *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 213, and n. 10 (1975).[9] Of even more significance, however, is COPA's exclusion of material with serious value for minors. See 47 U. S. C. § 231(e)(6)(C). In *Reno*, we emphasized that the serious value "requirement is particularly important because, unlike the 'patently offensive' and 'prurient interest' criteria, it is not judged by contemporary community standards." 521 U. S., at 873 (citing *Pope* v. *Illinois*, 481 U. S. 497, 500 (1987)). This is because "the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won." *Ibid.* Rather, the relevant question is "whether a reasonable person would find . . . value in the material, taken as a whole." *Id.*, at 501. Thus, the serious value requirement "allows appellate courts to impose some limitations and regularity on the definition by setting, *as a matter of law*, a national floor for socially redeeming value." *Reno*, *supra*, at 873 (emphasis added), a safeguard nowhere present in the CDA.[10]

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[9] JUSTICE STEVENS argues that the "prurient interest" prong does not "substantially narrow the category of images covered" by COPA because "[a]rguably every depiction of nudity—partial or full—is in some sense erotic *with respect to minors*," *post*, at 607–608 (dissenting opinion) (emphasis in original). We do not agree. For example, we have great difficulty understanding how pictures of a war victim's wounded nude body could reasonably be described under the vast majority of circumstances as erotic, especially when evaluated from the perspective of minors. See Webster's Ninth New Collegiate Dictionary 422 (1991) (defining erotic as "of, devoted to, or tending to arouse sexual love or desire").

[10] JUSTICE STEVENS contends that COPA's serious value prong only marginally limits the sweep of the statute because it does not protect all material with serious value but just those works with serious value *for minors*. See *post*, at 608. His dissenting opinion, however, does not refer to any evidence supporting this counterintuitive assertion, and there

C

When the scope of an obscenity statute's coverage is sufficiently narrowed by a "serious value" prong and a "prurient interest" prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment. In *Hamling* v. *United States*, 418 U. S. 87 (1974), this Court considered the constitutionality of applying community standards to the determination of whether material is obscene under 18 U. S. C. § 1461, the federal statute prohibiting the mailing of obscene material. Although this statute does not define obscenity, the petitioners in *Hamling* were tried and convicted under the definition of obscenity set forth in *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966), which included both a "prurient interest" requirement and a requirement that prohibited material be "'utterly without redeeming social value.'" *Hamling*, *supra*, at 99 (quoting *Memoirs*, *supra*, at 418).

Like respondents here, the dissenting opinion in *Hamling* argued that it was unconstitutional for a federal statute to rely on community standards to regulate speech. Justice Brennan maintained that "[n]ational distributors choosing to send their products in interstate travels [would] be forced to cope with the community standards of every hamlet into which their goods [might] wander." 418 U. S., at 144. As a result, he claimed that the inevitable result of this situation would be "debilitating self-censorship that abridges the First Amendment rights of the people." *Ibid.*

This Court, however, rejected Justice Brennan's argument that the federal mail statute unconstitutionally compelled

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is certainly none in the record suggesting that COPA restricts about the same amount of material as did the CDA. Moreover, JUSTICE STEVENS does not dispute that COPA's "serious value" prong serves the important purpose of allowing appellate courts to set "as a matter of law, a national floor for socially redeeming value." *Reno*, 521 U. S., at 873.

speakers choosing to distribute materials on a national basis to tailor their messages to the least tolerant community: "The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional." *Id.*, at 106.

Fifteen years later, *Hamling*'s holding was reaffirmed in *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989). *Sable* addressed the constitutionality of 47 U. S. C. § 223(b) (1982 ed., Supp. V), a statutory provision prohibiting the use of telephones to make obscene or indecent communications for commercial purposes. The petitioner in that case, a "dial-a-porn" operator, challenged, in part, that portion of the statute banning obscene phone messages. Like respondents here, the "dial-a-porn" operator argued that reliance on community standards to identify obscene material impermissibly compelled "message senders . . . to tailor all their messages to the least tolerant community." 492 U. S., at 124.[11] Relying on *Hamling*, however, this Court once again rebuffed this attack on the use of community standards in a federal statute of national scope: "There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. *If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.*" 492 U. S., at 125–126 (emphasis added).

The Court of Appeals below concluded that *Hamling* and *Sable* "are easily distinguished from the present case" because in both of those cases "the defendants had the ability

[11] Although nowhere mentioned in the relevant statutory text, this Court has held that the *Miller* test defines regulated speech for purposes of federal obscenity statutes such as 47 U. S. C. § 223(b) (1994 ed.). See, *e. g.*, *Smith* v. *United States*, 431 U. S. 291, 299 (1977).

to control the distribution of controversial material with respect to the geographic communities into which they released it" whereas "Web publishers have no such comparable control." 217 F. 3d, at 175–176. In neither *Hamling* nor *Sable*, however, was the speaker's ability to target the release of material into particular geographic areas integral to the legal analysis. In *Hamling*, the ability to limit the distribution of material to targeted communities was not mentioned, let alone relied upon,[12] and in *Sable*, a dial-a-porn operator's ability to screen incoming calls from particular areas was referenced only as a supplemental point, see 492 U. S., at 125.[13] In the latter case, this Court made no effort to evaluate how burdensome it would have been for dial-a-porn operators to tailor their messages to callers from thousands of different communities across the Nation, instead concluding that the burden of complying with the statute rested with those companies. See *id.*, at 126.

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[12] This fact was perhaps omitted because under the federal statute at issue in *Hamling* v. *United States*, 418 U. S. 87 (1974), a defendant could be prosecuted in any district through which obscene mail passed while it was on route to its destination, see *id.*, at 143–144 (Brennan, J., dissenting), and a postal customer obviously lacked the ability to control the path his letter traveled as it made its way to its intended recipient.

[13] JUSTICE STEVENS' contention that this Court "upheld the application of community standards to a nationwide medium" in *Sable* due to the fact that "[it] was at least possible" for dial-a-porn operators to tailor their messages to particular communities is inaccurate. See *post*, at 605 (dissenting opinion). This Court's conclusion clearly did not hinge either on the fact that dial-a-porn operators could prevent callers in particular communities from accessing their messages or on an assessment of how burdensome it would have been for dial-a-porn operators to take that step. Rather, these companies were required to abide by the standards of various communities for the sole reason that they transmitted their material into those communities. See *Sable*, 492 U. S., at 126 ("If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages").

While JUSTICE KENNEDY and JUSTICE STEVENS question the applicability of this Court's community standards jurisprudence to the Internet, we do not believe that the medium's "unique characteristics" justify adopting a different approach than that set forth in *Hamling* and *Sable*. See *post*, at 594–595 (KENNEDY, J., concurring in judgment). If a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation. See *Sable*, *supra*, at 125–126. Nor does it change because the publisher may wish to speak only to those in a "community where avant garde culture is the norm," *post*, at 595 (KENNEDY, J., concurring in judgment), but nonetheless utilizes a medium that transmits its speech from coast to coast. If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.[14]

Respondents offer no other grounds upon which to distinguish this case from *Hamling* and *Sable*. While those cases involved obscenity rather than material that is harmful to minors, we have no reason to believe that the practical effect of varying community standards under COPA, given the statute's definition of "material that is harmful to minors," is significantly greater than the practical effect of varying

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[14] In addition, COPA does not, as JUSTICE KENNEDY suggests, "'foreclose an entire medium of expression.'" *Post*, at 596 (quoting *City of Ladue* v. *Gilleo*, 512 U. S. 43, 55 (1994)). While JUSTICE KENNEDY and JUSTICE STEVENS repeatedly imply that COPA banishes from the Web material deemed harmful to minors by reference to community standards, see, *e. g.*, *post*, at 596 (opinion concurring in judgment); *post*, at 608–609, 612 (dissenting opinion), the statute does no such thing. It only requires that such material be placed behind adult identification screens.

community standards under federal obscenity statutes. It is noteworthy, for example, that respondents fail to point out even a single exhibit in the record as to which coverage under COPA would depend upon which community in the country evaluated the material. As a result, if we were to hold COPA unconstitutional *because of* its use of community standards, federal obscenity statutes would likely also be unconstitutional as applied to the Web,[15] a result in substantial tension with our prior suggestion that the application of the CDA to obscene speech was constitutional. See *Reno*, 521 U. S., at 877, n. 44, 882–883.

D

Respondents argue that COPA is "unconstitutionally overbroad" because it will require Web publishers to shield some material behind age verification screens that could be displayed openly in many communities across the Nation if Web speakers were able to limit access to their sites on a geographic basis. Brief for Respondents 33–34. "[T]o prevail in a facial challenge," however, "it is not enough for a plaintiff to show 'some' overbreadth." *Reno*, *supra*, at 896 (O'CONNOR, J., concurring in judgment in part and dissenting in part). Rather, "the overbreadth of a statute must not only be real, but substantial as well." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973). At this stage of the litigation, respondents have failed to satisfy this burden, at least solely as a result of COPA's reliance on community standards.[16] Because Congress has narrowed the range of con-

[15] Obscene material, for instance, explicitly falls within the coverage of COPA. See 47 U. S. C. § 231(e)(6) (1994 ed., Supp. V).

[16] JUSTICE STEVENS' conclusion to the contrary is based on little more than "speculation." See, *e. g.*, *post*, at 598 (KENNEDY, J., concurring in judgment). The only objective evidence cited in the dissenting opinion for the proposition that COPA "will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities" are various anecdotes compiled in an *amici* brief. See *post*, at 611, and n. 7 (citing Brief for Volunteer Lawyers for the Arts et al. as *Amici*

tent restricted by COPA in a manner analogous to *Miller*'s definition of obscenity, we conclude, consistent with our holdings in *Hamling* and *Sable*, that any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment.

IV

The scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify "material that is harmful to minors" does not *by itself* render the statute substantially overbroad for purposes of the First Amendment. We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analy-

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Curiae 4–10). JUSTICE STEVENS, however, is not even willing to represent that these anecdotes relate to material restricted under COPA, see *post*, at 611, and we understand his reluctance for the vast majority of the works cited in that brief, if not all of them, are likely unaffected by the statute. See Brief for Volunteer Lawyer for the Arts et al. as *Amici Curiae* 4–10 (describing, among other incidents, controversies in various communities regarding Maya Angelou's I Know Why The Caged Bird Sings, Judy Blume's Are You There God? It's Me, Margaret, Aldous Huxley's Brave New World, J. D. Salinger's Catcher in the Rye, 1993 Academy Award Best Picture nominee The Piano, the American Broadcasting Corporation television network's NYPD Blue, and songs of the "popular folk-rock duo" the Indigo Girls). These anecdotes are therefore of questionable relevance to the matter at hand and certainly do not constitute a sufficient basis for invalidating a federal statute.

Moreover, we do not agree with JUSTICE KENNEDY's suggestion that it is necessary for the Court of Appeals to revisit this question upon remand. See *post*, at 597–599. The lack of evidence in the record relevant to the question presented does not indicate that "we should vacate for further consideration." *Post*, at 599. Rather, it indicates that respondents, by offering little more than "speculation," have failed to meet their burden of demonstrating in this facial challenge that COPA's reliance on community standards renders the statute substantially overbroad.

sis once adjudication of the case is completed below. While respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.

Petitioner does not ask us to vacate the preliminary injunction entered by the District Court, and in any event, we could not do so without addressing matters yet to be considered by the Court of Appeals. As a result, the Government remains enjoined from enforcing COPA absent further action by the Court of Appeals or the District Court.

For the foregoing reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I agree with the plurality that even if obscenity on the Internet is defined in terms of local community standards, respondents have not shown that the Child Online Protection Act (COPA) is overbroad solely on the basis of the variation in the standards of different communities. See *ante*, at 577–579. Like JUSTICE BREYER, however, see *post*, at 589 (opinion concurring in part and concurring in judgment), I write separately to express my views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet.

The plurality's opinion argues that, even under local community standards, the variation between the most and least restrictive communities is not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad. See *ante*, at 577–579. I agree, given respondents' failure to provide examples of materials that lack literary, artistic, political, and scientific value for minors, which would nonetheless result in variation among communities judging the other elements of the test. Respondents' examples of material for which com-

munity standards would vary include such things as the appropriateness of sex education and the desirability of adoption by same-sex couples. Brief for Respondents 43. Material addressing the latter topic, however, seems highly unlikely to be seen to appeal to the prurient interest in any community, and educational material like the former must, on any objective inquiry, see *ante*, at 579, have scientific value for minors.

But respondents' failure to prove substantial overbreadth on a facial challenge in this case still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases. In an as-applied challenge, for instance, individual litigants may still dispute that the standards of a community more restrictive than theirs should apply to them. And in future facial challenges to regulation of obscenity on the Internet, litigants may make a more convincing case for substantial overbreadth. Where adult speech is concerned, for instance, there may in fact be a greater degree of disagreement about what is patently offensive or appeals to the prurient interest.

Nor do I think such future cases can be resolved by application of the approach we took in *Hamling* v. *United States*, 418 U. S. 87 (1974), and *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989). I agree with Justice Kennedy that, given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable*, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression. See *post*, at 594–596 (opinion concurring in judgment); contra, *ante*, at 580–584. For these reasons, adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity.

Our precedents do not forbid adoption of a national standard. Local community-based standards originated with

Miller v. *California*, 413 U. S. 15 (1973). In that case, we approved jury instructions that based the relevant "community standards" on those of the State of California rather than on the Nation as a whole. In doing so, we held that "[n]othing in the First Amendment requires" that a jury consider national standards when determining if something is obscene as a matter of fact. *Id.*, at 31. The First Amendment, we held, did not require that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.*, at 32. But we said nothing about the constitutionality of jury instructions that would contemplate a national standard—*i. e.*, requiring that the people who live in all of these places hold themselves to what the nationwide community of adults would find was patently offensive and appealed to the prurient interest.

Later, in *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974), we confirmed that "*Miller* approved the use of [instructions based on local standards]; it did not mandate their use." The instructions we approved in that case charged the jury with applying "community standards" without designating any particular "community." In holding that a State may define the obscenity standard by stating the *Miller* standard without further specification, 418 U. S., at 157, *Jenkins* left open the possibility that jurors would apply any number of standards, including a national standard, in evaluating material's obscenity.

To be sure, the Court in *Miller* also stated that a national standard might be "unascertainable," 413 U. S., at 31, and "[un]realistic," *id.*, at 32. But where speech on the Internet is concerned, I do not share that skepticism. It is true that our Nation is diverse, but many local communities encompass a similar diversity. For instance, in *Miller* itself, the jury was instructed to consider the standards of the entire State of California, a large (today, it has a population of greater than 33 million people, see U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 23 (120th

ed. 2000) (Table 20)) and diverse State that includes both Berkeley and Bakersfield. If the *Miller* Court believed generalizations about the standards of the people of California were possible, and that jurors would be capable of assessing them, it is difficult to believe that similar generalizations are not also possible for the Nation as a whole. Moreover, the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the views of adults in other parts of the United States. Although jurors asked to evaluate the obscenity of speech based on a national standard will inevitably base their assessments to some extent on their experience of their local communities, I agree with JUSTICE BREYER that the lesser degree of variation that would result is inherent in the jury system and does not necessarily pose a First Amendment problem. See *post*, at 591. In my view, a national standard is not only constitutionally permissible, but also reasonable.

While I would prefer that the Court resolve the issue before it by explicitly adopting a national standard for defining obscenity on the Internet, given respondents' failure to demonstrate substantial overbreadth due solely to the variation between local communities, I join Parts I, II, III–B, and IV of JUSTICE THOMAS' opinion and the judgment.

JUSTICE BREYER, concurring in part and concurring in the judgment.

I write separately because I believe that Congress intended the statutory word "community" to refer to the Nation's adult community taken as a whole, not to geographically separate local areas. The statutory language does not explicitly describe the specific "community" to which it refers. It says only that the "average person, applying contemporary community standards," must find that the "material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest . . . ." 47 U. S. C. § 231(e)(6) (1994 ed., Supp. V).

In the statute's legislative history, however, Congress made clear that it did not intend this ambiguous statutory phrase to refer to separate standards that might differ significantly among different communities. The relevant House of Representatives Report says:

> "The Committee recognizes that the applicability of community standards in the context of the Web is controversial, *but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.*" H. R. Rep. No. 105–775, p. 28 (1998) (emphasis added).

This statement, reflecting what apparently was a uniform view within Congress, makes clear that the standard, and the relevant community, is national and adult.

At the same time, this view of the statute avoids the need to examine the serious First Amendment problem that would otherwise exist. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 237–238 (1998); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'"). To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious. See *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162, 175–176 (CA3 2000). And these special difficulties also potentially weaken the authority of prior cases in which they were not present. Cf. *Sable*

Communications of Cal., Inc. v. *FCC*, 492 U. S. 115 (1989); *Hamling* v. *United States*, 418 U. S. 87 (1974). A nationally uniform adult-based standard—which Congress, in its Committee Report, said that it intended—significantly alleviates any special need for First Amendment protection. Of course some regional variation may remain, but any such variations are inherent in a system that draws jurors from a local geographic area and they are not, from the perspective of the First Amendment, problematic. See *id.*, at 105–106.

For these reasons I do not join Part III of JUSTICE THOMAS' opinion, although I agree with much of the reasoning set forth in Parts III–B and III–D, insofar as it explains the conclusion to which I just referred, namely, that variation reflecting application of the same national standard by different local juries does not violate the First Amendment.

JUSTICE KENNEDY, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in the judgment.

I

If a law restricts substantially more speech than is justified, it may be subject to a facial challenge. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973). There is a very real likelihood that the Child Online Protection Act (COPA or Act) is overbroad and cannot survive such a challenge. Indeed, content-based regulations like this one are presumptively invalid abridgments of the freedom of speech. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992). Yet COPA is a major federal statute, enacted in the wake of our previous determination that its predecessor violated the First Amendment. See *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997). Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. For these reasons, even if this facial challenge appears to have consider-

able merit, the Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act.

In this case, the District Court issued a preliminary injunction against enforcement of COPA, finding it too broad across several dimensions. The Court of Appeals affirmed, but on a different ground. COPA defines "material that is harmful to minors" by reference to "contemporary community standards," 47 U. S. C. § 231(e)(6) (1994 ed., Supp. V); and on the theory that these vary from place to place, the Court of Appeals held that the definition dooms the statute "without reference to its other provisions." *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162, 174 (CA3 2000). The Court of Appeals found it unnecessary to construe the rest of the Act or address the District Court's reasoning.

This single, broad proposition, stated and applied at such a high level of generality, cannot suffice to sustain the Court of Appeals' ruling. To observe only that community standards vary across the country is to ignore the antecedent question: community standards as to what? Whether the national variation in community standards produces overbreadth requiring invalidation of COPA, see *Broadrick*, *supra*, depends on the breadth of COPA's coverage and on what community standards are being invoked. Only by identifying the universe of speech burdened by COPA is it possible to discern whether national variation in community standards renders the speech restriction overbroad. In short, the ground on which the Court of Appeals relied cannot be separated from those that it overlooked.

The statute, for instance, applies only to "communication for commercial purposes." 47 U. S. C. § 231(e)(2)(A). The Court of Appeals, however, did not consider the amount of commercial communication, the number of commercial speakers, or the character of commercial speech covered by the Act. Likewise, the statute's definition of "harmful to minors" requires material to be judged "as a whole." § 231(e)(6)(C). The notion of judging work as a whole is

familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites. Some examination of the group of covered speakers and the categories of covered speech is necessary in order to comprehend the extent of the alleged overbreadth.

The Court of Appeals found that COPA in effect subjects every Internet speaker to the standards of the most puritanical community in the United States. This concern is a real one, but it alone cannot suffice to invalidate COPA without careful examination of the speech and the speakers within the ambit of the Act. For this reason, I join the judgment of the Court vacating the opinion of the Court of Appeals and remanding for consideration of the statute as a whole. Unlike JUSTICE THOMAS, however, I would not assume that the Act is narrow enough to render the national variation in community standards unproblematic. Indeed, if the District Court correctly construed the statute across its other dimensions, then the variation in community standards might well justify enjoining enforcement of the Act. I would leave that question to the Court of Appeals in the first instance.

II

COPA provides a three-part conjunctive definition of "material that is harmful to minors." The first part of the definition is that "the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, [that it] is designed to appeal to, or is designed to pander to, the prurient interest." 47 U. S. C. § 231(e)(6)(A). (The parties agree that the second part of the definition, § 231(e)(6)(B), likewise invokes contemporary community standards, though only implicitly. See *ante,* at 576, n. 7.) The nub of the problem is, as the Court has said, that "the 'community standards' criterion as applied to the Internet means that any communication available to

a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno*, 521 U. S., at 877–878. If material might be considered harmful to minors in any community in the United States, then the material is covered by COPA, at least when viewed in that place. This observation was the linchpin of the Court of Appeals' analysis, and we must now consider whether it alone suffices to support the holding below.

The quoted sentence from *Reno* was not casual dicta; rather, it was one rationale for the holding of the case. In *Reno*, the Court found "[t]he breadth of [COPA's predecessor] . . . wholly unprecedented," *id.*, at 877, in part because of variation in community standards. The Court also relied on that variation to assess the strength of the Government's interest, which it found "not equally strong throughout the coverage of this broad statute." *Id.*, at 878. The Court illustrated the point with an example: A parent who e-mailed birth control information to his 17-year-old child at college might violate the Act, "even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." *Ibid.* Variation in community standards rendered the statute broader than the scope of the Government's own expressed compelling interest.

It is true, as JUSTICE THOMAS points out, *ante*, at 580–583, that requiring a speaker addressing a national audience to meet varying community standards does not always violate the First Amendment. See *Hamling* v. *United States*, 418 U. S. 87, 106 (1974) (obscene mailings); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 125–126 (1989) (obscene phone messages). These cases, however, are of limited utility in analyzing the one before us, because each mode of expression has its own unique characteristics, and each "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd.* v. *Con-*

rad, 420 U. S. 546, 557 (1975). Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386 (1969). The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.

In this case the District Court found as a fact that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community." *American Civil Liberties Union* v. *Reno*, 31 F. Supp. 2d 473, 484 (ED Pa. 1999). By contrast, in upholding a ban on obscene phone messages, we emphasized that the speaker could "hire operators to determine the source of the calls or engag[e] with the telephone company to arrange for the screening and blocking of out-of-area calls or fin[d] another means for providing messages compatible with community standards." *Sable*, *supra*, at 125. And if we did not make the same point in *Hamling*, that is likely because it is so obvious that mailing lends itself to geographic restriction. (The Court has had no occasion to consider whether venue would be proper in "every hamlet into which [obscene mailings] may wander," *Hamling*, *supra*, at 144 (dissenting opinion), for the petitioners in *Hamling* did not challenge the statute as overbroad on its face.) A publisher who uses the mails can choose the location of his audience.

The economics and technology of Internet communication differ in important ways from those of telephones and mail. Paradoxically, as the District Court found, it is easy and cheap to reach a worldwide audience on the Internet, see 31 F. Supp. 2d, at 482, but expensive if not impossible to reach a geographic subset, *id.*, at 484. A Web publisher in a community where avant garde culture is the norm may have no

desire to reach a national market; he may wish only to speak to his neighbors; nevertheless, if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web. And it is no answer to say that the speaker should "take the simple step of utilizing a [different] medium." *Ante*, at 583 (principal opinion of THOMAS, J.). "Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . . [T]he danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 55 (1994).

JUSTICE BREYER would alleviate the problem of local variation in community standards by construing the statute to comprehend the "Nation's adult community taken as a whole," rather than the local community from which the jury is drawn. *Ante*, at 589 (opinion concurring in part and concurring in judgment); see also *ante*, at 586–589 (O'CONNOR, J., concurring in part and concurring in judgment). There is one statement in a House Committee Report to this effect, "reflecting," JUSTICE BREYER writes, "what apparently was a uniform view within Congress." *Ante*, at 590. The statement, perhaps, reflects the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the "uniform view within Congress." *Ibid.*

In any event, we need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order. If the statute does incorporate some concept of national community standards, the actual standard applied is bound to vary by community nevertheless, as the Attorney General concedes. See *ante*, at 577 (principal opinion of THOMAS, J.); Brief for Petitioner 39.

For this reason the Court of Appeals was correct to focus on COPA's incorporation of varying community standards; and it may have been correct as well to conclude that in practical effect COPA imposes the most puritanical community standard on the entire country. We have observed that it is "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller* v. *California*, 413 U. S. 15, 32 (1973). On the other hand, it is neither realistic nor beyond constitutional doubt for Congress, in effect, to impose the community standards of Maine or Mississippi on Las Vegas and New York. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.*, at 33. In striking down COPA's predecessor, the *Reno* Court identified this precise problem, and if the *Hamling* and *Sable* Courts did not find the problem fatal, that is because those cases involved quite different media. The national variation in community standards constitutes a particular burden on Internet speech.

III

The question that remains is whether this observation "*by itself*" suffices to enjoin the Act. See *ante*, at 585. I agree with the Court that it does not. *Ibid.* We cannot know whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.

First, the breadth of the Act itself will dictate the degree of overbreadth caused by varying community standards. Indeed, JUSTICE THOMAS sees this point and uses it in an attempt to distinguish the Communications Decency Act of 1996, which was at issue in *Reno*. See *ante*, at 577–578 ("The CDA's use of community standards to identify patently

offensive material, however, was particularly problematic in light of that statute's unprecedented breadth and vagueness"); *ante,* at 578 ("The tremendous breadth of the CDA magnified the impact caused by differences in community standards across the country"). To explain the ways in which COPA is narrower than the CDA, JUSTICE THOMAS finds that he must construe sections of COPA elided by the Court of Appeals. Though I agree with the necessity for doing so, JUSTICE THOMAS' interpretation—undertaken without substantial arguments or briefing—is not altogether persuasive, and I would leave this task to the Court of Appeals in the first instance. As this case comes to us, once it is accepted that we cannot strike down the Act based merely on the phrase "contemporary community standards," we should go no further than to vacate and remand for a more comprehensive analysis of the Act.

Second, community standards may have different degrees of variation depending on the question posed to the community. Defining the scope of the Act, therefore, is not relevant merely to the absolute number of Web pages covered, as JUSTICE STEVENS suggests, *post,* at 609–610 (dissenting opinion); it is also relevant to the proportion of overbreadth, "judged in relation to the statute's plainly legitimate sweep," *Broadrick,* 413 U. S., at 615. Because this issue was "virtually ignored by the parties and the amicus" in the Court of Appeals, 217 F. 3d, at 173, we have no information on the question. Instead, speculation meets speculation. On the one hand, the Court of Appeals found "no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors." *Id.,* at 178. On the other hand, JUSTICE THOMAS finds "no reason to believe that the practical effect of varying community standards under COPA . . . is significantly greater than the practical effect of varying community standards under federal obscenity statutes." *Ante,* at 583–584. When a key issue has "no evidence" on one side and "no reason to be-

lieve" the other, it is a good indication that we should vacate for further consideration.

The District Court attempted a comprehensive analysis of COPA and its various dimensions of potential overbreadth. The Court of Appeals, however, believed that its own analysis of "contemporary community standards" obviated all other concerns. It dismissed the District Court's analysis in a footnote:

> "[W]e do not find it necessary to address the District Court's analysis of the definition of 'commercial purposes'; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken 'as a whole' should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic." 217 F. 3d, at 174, n. 19.

As I have explained, however, any problem caused by variation in community standards cannot be evaluated in a vacuum. In order to discern whether the variation creates substantial overbreadth, it is necessary to know what speech COPA regulates and what community standards it invokes.

It is crucial, for example, to know how limiting is the Act's limitation to "communication for commercial purposes." 47 U. S. C. § 231(e)(2)(A). In *Reno*, we remarked that COPA's

predecessor was so broad in part because it had no such limitation. 521 U. S., at 877. COPA, by contrast, covers a speaker only if:

> "the person who makes a communication or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." 47 U. S. C. § 231(e)(2)(B).

So COPA is narrower across this dimension than its predecessor; but how much narrower is a matter of debate. In the District Court, the Attorney General contended that the Act applied only to professional panderers, but the court rejected that contention, finding "nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers only." 31 F. Supp. 2d, at 480. Indeed, the plain text of the Act does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result. The statute might be susceptible of some limiting construction here, but again the Court of Appeals did not address itself to this question. The answer affects the breadth of the Act and hence the significance of any variation in community standards.

Likewise, it is essential to answer the vexing question of what it means to evaluate Internet material "as a whole," 47 U. S. C. §§ 231(e)(6)(A), (C), when everything on the Web is connected to everything else. As a general matter, "[t]he artistic merit of a work does not depend on the presence of a single explicit scene. . . . [T]he First Amendment requires

that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Ashcroft* v. *Free Speech Coalition*, *ante*, at 248. COPA appears to respect this principle by requiring that the material be judged "as a whole," both as to its prurient appeal, § 231(e)(6)(A), and as to its social value, § 231(e)(6)(C). It is unclear, however, what constitutes the denominator—that is, the material to be taken as a whole—in the context of the World Wide Web. See 31 F. Supp. 2d, at 483 ("Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge"); *id.*, at 484 ("From a user's perspective, [the World Wide Web] may appear to be a single, integrated system"). Several of the respondents operate extensive Web sites, some of which include only a small amount of material that might run afoul of the Act. The Attorney General contended that these respondents had nothing to fear from COPA, but the District Court disagreed, noting that the Act prohibits communication that "includes" any material harmful to minors. § 231(a)(1). In the District Court's view, "it logically follows that [COPA] would apply to any Web site that contains only some harmful to minors material." *Id.*, at 480. The denominator question is of crucial significance to the coverage of the Act.

Another issue is worthy of mention, because it too may inform whether the variation in community standards renders the Act substantially overbroad. The parties and the Court of Appeals did not address the question of venue, though it would seem to be bound up with the issue of varying community standards. COPA does not address venue in explicit terms, so prosecution may be proper "in any district in which [an] offense was begun, continued, or completed." 18 U. S. C. § 3237(a). The Act's prohibition includes an inter-

state commerce element, 47 U. S. C. §231(a)(1), and "[a]ny offense involving . . . interstate . . . commerce . . . may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." 18 U. S. C. §3237(a). In the context of COPA, it seems likely that venue would be proper where the material originates or where it is viewed. Whether it may be said that a Web site moves "through" other venues in between is less certain. And since, as discussed above, juries will inevitably apply their own community standards, the choice of venue may be determinative of the choice of standard. The more venues the Government has to choose from, the more speech will be chilled by variation across communities.

IV

In summary, the breadth of the Act depends on the issues discussed above, and the significance of varying community standards depends, in turn, on the breadth of the Act. The Court of Appeals was correct to focus on the national variation in community standards, which can constitute a substantial burden on Internet communication; and its ultimate conclusion may prove correct. There may be grave doubts that COPA is consistent with the First Amendment; but we should not make that determination with so many questions unanswered. The Court of Appeals should undertake a comprehensive analysis in the first instance.

JUSTICE STEVENS, dissenting.

Appeals to prurient interests are commonplace on the Internet, as in older media. Many of those appeals lack serious value for minors as well as adults. Some are offensive to certain viewers but welcomed by others. For decades, our cases have recognized that the standards for judging their acceptability vary from viewer to viewer and from community to community. Those cases developed the requirement that communications should be protected if they do not violate contemporary community standards. In its original

form, the community standard provided a shield for communications that are offensive only to the least tolerant members of society. Thus, the Court "has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling* v. *United States*, 418 U. S. 87, 107 (1974). In the context of the Internet, however, community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web.

The Child Online Protection Act (COPA) restricts access by adults as well as children to materials that are "harmful to minors." 47 U. S. C. § 231(a)(1) (1994 ed., Supp. V). COPA is a substantial improvement over its predecessor, the Communications Decency Act of 1996 (CDA), which we held unconstitutional five years ago in *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997) *(ACLU I)*. Congress has thoughtfully addressed several of the First Amendment problems that we identified in that case. Nevertheless, COPA preserves the use of contemporary community standards to define which materials are harmful to minors. As we explained in *ACLU I*, 521 U. S., at 877–878, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."

We have recognized that the State has a compelling interest in protecting minors from harmful speech, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989), and on one occasion we upheld a restriction on indecent speech that was made available to the general public, because it could be accessed by minors, *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). Our decision in that case was influ-

enced by the distinctive characteristics of the broadcast medium, as well as the expertise of the agency, and the narrow scope of its order. *Id.*, at 748–750; see also *ACLU I*, 521 U. S., at 867. On the other hand, we have repeatedly rejected the position that the free speech rights of adults can be limited to what is acceptable for children. See *id.*, at 875 (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 74–75 (1983) ("[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox" (internal quotation marks omitted))); *Sable*, 492 U. S., at 128; *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).

Petitioner relies on our decision in *Ginsberg* v. *New York*, 390 U. S. 629 (1968), for the proposition that Congress can prohibit the *display* of materials that are harmful to minors. But the statute upheld in *Ginsberg* prohibited *selling* indecent materials directly to children, *id.*, at 633 (describing N. Y. Penal Law § 484–h, making it unlawful "'knowingly to sell . . . to a minor . . .'"), whereas the speech implicated here is simply posted on a medium that is accessible to both adults and children, 47 U. S. C. § 231(a)(1) (prohibiting anyone from "knowingly . . . mak[ing] any communication for commercial purposes that is available to any minor . . ."). Like the restriction on indecent "dial-a-porn" numbers invalidated in *Sable*, the prohibition against mailing advertisements for contraceptives invalidated in *Bolger*, and the ban against selling adult books found impermissible in *Butler*, COPA seeks to limit protected speech that is not targeted at children, simply because it can be obtained by them while surfing the Web.[1] In evaluating the overbreadth of such a

[1] Petitioner cites examples of display statutes in 23 States that require magazine racks to shield minors from the covers of pornographic magazines. Brief for Petitioner 22, 3a. This Court has yet to rule on the constitutionality of any of these statutes, which are in any event of little relevance to regulation of speech on the Internet. As we recognized in

statute, we should be mindful of Justice Frankfurter's admonition not to "burn the house to roast the pig," *Butler*, 352 U. S., at 383.

COPA not only restricts speech that is made available to the general public, it also covers a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors. The Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once. The speaker cannot control access based on the location of the listener, nor can it choose the pathways through which its speech is transmitted. By approving the use of community standards in this context, JUSTICE THOMAS endorses a construction of COPA that has "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 488 (1962).

If the material were forwarded through the mails, as in *Hamling*, or over the telephone, as in *Sable*, the sender could avoid destinations with the most restrictive standards. Indeed, in *Sable*, we upheld the application of community standards to a nationwide medium because the speaker was "free to tailor its messages . . . to the communities it *chooses* to serve," by either "hir[ing] operators to determine the source of the calls . . . [or] arrang[ing] for the screening and blocking of out-of-area calls." 492 U. S., at 125 (emphasis added). Our conclusion that it was permissible for the speaker to bear the ultimate burden of compliance, *id.*, at 126, assumed that such compliance was at least possible without requiring the speaker to choose another medium or to limit its speech to what all would find acceptable. Given the

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ACLU I, 521 U. S. 844, 854 (1997), "'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial'"—or scanning a magazine rack.

undisputed fact that a provider who posts material on the Internet cannot prevent it from entering any geographic community, see *ante*, at 575, n. 6 (opinion of THOMAS, J.), a law that criminalizes a particular communication in just a handful of destinations effectively prohibits transmission of that message to all of the 176.5 million Americans that have access to the Internet, see *ante*, at 567, n. 2 (majority opinion). In light of this fundamental difference in technologies, the rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web.[2]

In his attempt to fit this case within the framework of *Hamling* and *Sable*, JUSTICE THOMAS overlooks the more obvious comparison—namely, the CDA invalidated in *ACLU I*. When we confronted a similar attempt by Congress to limit speech on the Internet based on community standards, we explained that because Web publishers cannot control who accesses their Web sites, using community standards to regulate speech on the Internet creates an overbreadth problem. "[T]he 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." 521 U. S., at 877–878. Although our holding in *ACLU I* did not turn on that factor alone, we did not adopt the position relied on by JUSTICE THOMAS—that applying community standards to the Internet is constitutional based on *Hamling* and

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[2] It is hardly a solution to say, as JUSTICE THOMAS suggests, *ante*, at 583, that a speaker need only choose a different medium in order to avoid having its speech judged by the least tolerant community. Our overbreadth doctrine would quickly become a toothless protection if we were to hold that substituting a more limited forum for expression is an acceptable price to pay. Since a content-based restriction is presumptively invalid, I would place the burden on parents to "take the simple step of utilizing a medium that enables," *ibid.*, them to avoid this material before requiring the speaker to find another forum.

Sable. See Reply Brief for Appellants in *Reno* v. *ACLU*, O. T. 1996, No. 96–511, p. 19.[3]

JUSTICE THOMAS points to several other provisions in COPA to argue that any overbreadth will be rendered insubstantial by the rest of the statute. *Ante*, at 578–579. These provisions afford little reassurance, however, as they only marginally limit the sweep of the statute. It is true that, in addition to COPA's "appeals to the prurient interest of minors" prong, the material must be "patently offensive with respect to minors" and it must lack "serious literary, artistic, political, or scientific value for minors." 47 U. S. C. § 231(e)(6). Nonetheless, the "patently offensive" prong is judged according to contemporary community standards as well, *ante*, at 576, n. 7 (opinion of THOMAS, J.). Whatever disparity exists between various communities' assessment of the content that appeals to the prurient interest of minors will surely be matched by their differing opinions as to

[3] JUSTICE BREYER seeks to avoid the problem by effectively reading the phrase "contemporary national standards" into the statute, *ante*, at 589 (opinion concurring in part and concurring in judgment). While the legislative history of COPA provides some support for this reading, it is contradicted by the clear text of the statute, which directs jurors to consider "community" standards. This phrase is a term of art that has taken on a particular meaning in light of our precedent. Although we have never held that applying a national standard would be constitutionally impermissible, we have said that asking a jury to do so is "an exercise in futility," *Miller* v. *California*, 413 U. S. 15, 30 (1973), and that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination," *Hamling* v. *United States*, 418 U. S. 87, 104 (1974). Any lingering doubts about the meaning of the phrase were certainly dispelled by our discussion of the issue in *ACLU I*, 521 U. S., at 874, n. 39, and we presume that Congress legislates against the backdrop of our decisions. Therefore, JUSTICE THOMAS has correctly refused to rewrite the statute to substitute a standard that Congress clearly did not choose. And even if the plurality were willing to do so, we would still have to acknowledge, as petitioner does, that jurors instructed to apply a national, or adult, standard will reach widely different conclusions throughout the country, see *ante*, at 577; Brief for Petitioner 39.

whether descriptions of sexual acts or depictions of nudity are patently offensive with respect to minors. Nor does the requirement that the material be "in some sense erotic," see *ante*, at 579 (citing *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 213, and n. 10 (1975)), substantially narrow the category of images covered. Arguably every depiction of nudity—partial or full—is in some sense erotic *with respect to minors.*[4]

Petitioner's argument that the "serious value" prong minimizes the statute's overbreadth is also unpersuasive. Although we have recognized that the serious value determination in obscenity cases should be based on an objective, reasonable person standard, *Pope* v. *Illinois*, 481 U. S. 497, 500 (1987), this criterion is inadequate to cure COPA's overbreadth because COPA adds an important qualifying phrase to the standard *Miller* v. *California*, 413 U. S. 15 (1973), formulation of the serious value prong. The question for the jury is not whether a reasonable person would conclude that the materials have serious value; instead, the jury must determine whether the materials have serious value *for minors.* Congress reasonably concluded that a substantial number of works, which have serious value for adults, do not have serious value for minors. Cf. *ACLU I*, 521 U. S., at 896 (O'CONNOR, J., concurring in judgment in part and dissenting in part) ("While discussions about prison rape or nude art . . . may have some redeeming educational value for *adults*, they do not necessarily have any such value for *minors*"). Thus, even though the serious value prong limits the total amount of speech covered by the statute, it remains true that there is a significant amount of protected speech within the category of materials that have no serious value for minors. That speech is effectively prohibited whenever

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[4] Of course, JUSTICE THOMAS' example of the image "of a war victim's wounded nude body," *ante*, at 579, n. 9, would not be covered by the statute unless it depicted "a lewd exhibition of the genitals or post-pubescent female breast" and lacked serious political value for minors, 47 U. S. C. §§ 231(e)(6)(B)–(C) (1994 ed., Supp. V).

the least tolerant communities find it harmful to minors.[5] While the objective nature of the inquiry may eliminate any worry that the serious value determination will be made by the least tolerant community, it does not change the fact that, within the subset of images deemed to have no serious value for minors, the decision whether minors and adults throughout the country will have access to that speech will still be made by the most restrictive community.

JUSTICE KENNEDY makes a similar misstep, *ante,* at 592 (opinion concurring in judgment), when he ties the overbreadth inquiry to questions about the scope of the other provisions of the statute. According to his view, we cannot determine whether the statute is substantially overbroad based on its use of community standards without first determining how much of the speech on the Internet is saved by the other restrictions in the statute. But this represents a fundamental misconception of our overbreadth doctrine. As Justice White explained in *Broadrick* v. *Oklahoma*, 413 U. S.

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[5] The Court also notes that the limitation to communications made for commercial purposes narrows the category of speech as compared to the CDA, *ante,* at 569. While it is certainly true that this condition limits the scope of the statute, the phrase "commercial purposes" is somewhat misleading. The definition of commercial purposes, 47 U. S. C. § 231(e)(2)(B), covers anyone who generates revenue from advertisements or merchandise, regardless of the amount of advertising or whether the advertisements or products are related to the images that allegedly are harmful to minors. As the District Court noted: "There is nothing in the text of the COPA, however, that limits its applicability to so-called commercial pornographers only; indeed, the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that *includes any material* that is harmful to minors,'" App. to Pet. for Cert. 52a. In the context of the Internet, this is hardly a serious limitation. A 1998 study, for example, found that 83 percent of Web sites contain commercial content. Lawrence & Giles, Accessibility of information of the web, 400 Nature 107–109 (1999); Guernsey, Seek—but on the Web, You Might Not Find, N. Y. Times, July 8, 1999, p. G3. Interestingly, this same study found that only 1.5 percent of the 2.8 million sites cataloged contained pornographic content.

601, 615 (1973), "the overbreadth of a statute must not only be real, but substantial as well, *judged in relation to the statute's plainly legitimate sweep.*" (Emphasis added.) Regardless of how the Court of Appeals interprets the "commercial purposes" or "as a whole" provisions on remand, the question we must answer is whether the statute restricts a substantial amount of protected speech relative to its legitimate sweep by virtue of the fact that it uses community standards.[6] These other provisions may reduce the absolute number of Web pages covered by the statute, but even the narrowest version of the statute abridges a substantial amount of protected speech that many communities would not find harmful to minors. Because Web speakers cannot limit access to those specific communities, the statute is substantially overbroad regardless of how its other provisions are construed.

JUSTICE THOMAS acknowledges, and petitioner concedes, that juries across the country will apply different standards and reach different conclusions about whether particular works are harmful to minors. See *ante*, at 577; Brief for Petitioner 3–4, 39. We recognized as much in *ACLU I* when we noted that "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library" might offend some community's standards and not others, 521 U. S., at 878. In fact, our own division on that question provides further evidence of the range of attitudes about such material. See, *e. g.*, *id.*, at 896 (O'CONNOR, J., concurring in judg-

[6] JUSTICE KENNEDY accuses the Court of Appeals of evaluating overbreadth in a vacuum by dismissing most of the concerns raised by the District Court, *ante*, at 599. But most of those concerns went to whether COPA survives strict scrutiny, not overbreadth. Even under JUSTICE KENNEDY's formulation, it is unclear why it is relevant to an overbreadth analysis, for example, whether COPA could have been more narrowly tailored, whether the affirmative defenses impose too great a burden, or whether inclusion of criminal as well as civil penalties was excessive.

ment in part and dissenting in part). Moreover, *amici* for respondents describe studies showing substantial variation among communities in their attitudes toward works involving homosexuality, masturbation, and nudity.[7]

Even if most, if not all, of these works would be excluded from COPA's coverage by the serious value prong, they illustrate the diversity of public opinion on the underlying themes depicted. This diversity of views surely extends to whether materials with the same themes, that do not have serious value for minors, appeal to their prurient interests and are patently offensive. There is no reason to think the differences between communities' standards will disappear once the image or description is no longer within the context of a work that has serious value for minors.[8] Because communities differ widely in their attitudes toward sex, particularly when minors are concerned, the Court of Appeals was correct to conclude that, regardless of how COPA's other provisions are construed, applying community standards to the Internet will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities.

Whether that consequence is appropriate depends, of course, on the content of the message. The kind of hardcore pornography involved in *Hamling*, which I assume would be obscene under any community's standard, does not belong on the Internet. Perhaps "teasers" that serve no function except to invite viewers to examine hardcore materials, or the hidden terms written into a Web site's "metatags" in order to dupe unwitting Web surfers into visiting pornographic sites, deserve the same fate. But COPA ex-

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[7] Brief for Volunteer Lawyers for the Arts et al. as *Amici Curiae* 4–10 (describing findings of the People for the American Way Foundation Annual Freedom to Learn Reports).

[8] Nor is there any reason to expect that a particular community's view of the material will change based on how the Court of Appeals construes the statute's "for commercial purposes" or "as a whole" provisions.

tends to a wide range of prurient appeals in advertisements, online magazines, Web-based bulletin boards and chat rooms, stock photo galleries, Web diaries, and a variety of illustrations encompassing a vast number of messages that are unobjectionable in most of the country and yet provide no "serious value" for minors. It is quite wrong to allow the standards of a minority consisting of the least tolerant communities to regulate access to relatively harmless messages in this burgeoning market.

In the context of most other media, using community standards to differentiate between permissible and impermissible speech has two virtues. As mentioned above, community standards originally served as a shield to protect speakers from the least tolerant members of society. By aggregating values at the community level, the *Miller* test eliminated the outliers at both ends of the spectrum and provided some predictability as to what constitutes obscene speech. But community standards also serve as a shield to protect audience members, by allowing people to self-sort based on their preferences. Those who abhor and those who tolerate sexually explicit speech can seek out like-minded people and settle in communities that share their views on what is acceptable for themselves and their children. This sorting mechanism, however, does not exist in cyberspace; the audience cannot self-segregate. As a result, in the context of the Internet this shield also becomes a sword, because the community that wishes to live without certain material rids not only itself, but the entire Internet, of the offending speech.

In sum, I would affirm the judgment of the Court of Appeals and therefore respectfully dissent.

Syllabus

LAPIDES *v.* BOARD OF REGENTS OF UNIVERSITY SYSTEM OF GEORGIA ET AL.

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

No. 01–298. Argued February 25, 2002—Decided May 13, 2002

Petitioner, a professor in the Georgia state university system, filed a state-court suit against respondents—the system's board of regents (hereinafter Georgia or State) and university officials in their personal capacities and as state agents—alleging that the officials had violated state tort law and 42 U. S. C. § 1983 when they placed sexual harassment allegations in his personnel files. The defendants removed the case to Federal District Court and then sought dismissal. Conceding that a state statute had waived Georgia's sovereign immunity from state-law suits in state court, the State claimed Eleventh Amendment immunity from suit in the federal court. The District Court held that Georgia had waived such immunity when it removed the case to federal court. In reversing, the Eleventh Circuit found that, because state law was unclear as to whether the state attorney general had the legal authority to waive Georgia's Eleventh Amendment immunity, the State retained the legal right to assert immunity, even after removal.

Held: A State waives its Eleventh Amendment immunity when it removes a case from state court to federal court. Pp. 617–624.

(a) Because this case does not present a valid federal claim against Georgia, see *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 66, the answer to the question presented is limited to the context of state-law claims where the State has waived immunity from state-court proceedings. Although absent a federal claim, the Federal District Court might remand the state claims against the State to state court, those claims remain pending in the federal court, which has the discretion to decide the remand question in the first instance. Thus, the question presented is not moot. Pp. 617–618.

(b) This Court has established the general principle that a State's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity, *Clark* v. *Barnard*, 108 U. S. 436, 447; *Gardner* v. *New Jersey*, 329 U. S. 565, 574; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284, and has often cited with approval the cases embodying that principle, see, *e. g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 681, n. 3. Here, Georgia was brought involuntarily into the case as a defendant in state

court, but it then voluntarily removed the case to federal court, thus voluntarily invoking that court's jurisdiction. Unless this Court is to abandon the general principle requiring waiver or there is something special about removal in this case, the general principle should apply. Pp. 618–620.

(c) Contrary to respondents' arguments, there is no reason to abandon the general principle. The principle enunciated in *Gunter*, *Gardner*, and *Clark* did not turn on the nature of the relief and is sound as applied to money damages cases such as this. And more recent cases requiring a clear indication of a State's intent to waive its immunity, *e. g.*, *College Savings Bank*, 527 U. S., at 675–681, distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct, *id.*, at 681, n. 3. Nor have respondents pointed to a special feature of removal or of this case that would justify taking the case out from the general rule. That Georgia claims a benign motive for removal—not to obtain litigating advantages for itself but to provide the officials sued in their personal capacities with the interlocutory appeal provisions available in federal court—cannot make a critical difference. Motives are difficult to evaluate, while jurisdictional rules should be clear. Because adopting respondents' position would permit States to achieve unfair tactical advantages, if not in this case, then in others, see *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U. S. 381, 393–394, the rationale for applying the general principle is as strong here as elsewhere. Respondents also argue that Georgia is entitled to immunity because state law does not authorize its attorney general to waive Eleventh Amendment immunity and because, in *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, a State regained immunity by showing such lack of authority—even after the State had litigated the case against it. Here, however, Georgia *voluntarily* invoked the federal court's jurisdiction, while the State in *Ford* had *involuntarily* been made a federal-court defendant. This Court has consistently found waiver when a state attorney general, authorized to bring a case in federal court, has voluntarily invoked that court's jurisdiction. More importantly, in large part the rule governing voluntary invocations of federal jurisdiction has rested upon the inconsistency and unfairness that a contrary rule would create. A rule that finds waiver through a state attorney general's invocation of federal-court jurisdiction avoids inconsistency and unfairness, but a rule that, as in *Ford*, denies waiver despite the attorney general's state-authorized litigating decision does the opposite. For these reasons, *Clark*, *Gunter*, and *Gardner* represent the sounder line of authority, and *Ford*, which is inconsistent with the basic rationale of those cases, is overruled insofar as it would

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otherwise apply. Respondents' remaining arguments are unconvincing. Pp. 620–624.

251 F. 3d 1372, reversed.

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

David J. Bederman argued the cause for petitioner. With him on the briefs were *Michael J. Bowers* and *Patrick W. McKee.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Clement*, *Mark B. Stern*, and *Alisa B. Klein.*

Devon Orland, Assistant Attorney General of Georgia, argued the cause for respondents. With her on the brief were *Thurbert E. Baker*, Attorney General, *Kathleen Pacious*, Deputy Attorney General, and *John C. Jones* and *Patricia Downing*, Senior Assistant Attorneys General.

Julie Caruthers Parsley, Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging affirmance. With her on the brief were *John Cornyn*, Attorney General, *Jeffrey S. Boyd*, Deputy Attorney General, and *Lisa R. Eskow*, Assistant Solicitor General, and the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *David Samson* of New Jersey, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Paul G. Summers* of Ten-

nessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Jerry W. Kilgore* of Virginia.*

JUSTICE BREYER delivered the opinion of the Court.

The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, U. S. Const., Amdt. 11, and by its own citizens as well, *Hans* v. *Louisiana*, 134 U. S. 1 (1890). The question before us is whether the State's act of removing a lawsuit from state court to federal court waives this immunity. We hold that it does.

I

Paul Lapides, a professor employed by the Georgia state university system, brought this lawsuit in a Georgia state court. He sued respondents, the Board of Regents of the University System of Georgia (hereinafter Georgia or State) and university officials acting in both their personal capacities and as agents of the State. Lapides' lawsuit alleged that university officials placed allegations of sexual harassment in his personnel files. And Lapides claimed that their doing so violated both Georgia law, see Georgia Tort Claims Act, Ga. Code Ann. § 50–21–23 (1994), and federal law, see Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983 (1994 ed., Supp. V).

All defendants joined in removing the case to Federal District Court, 28 U. S. C. § 1441, where they sought dismissal. Those individuals whom Lapides had sued in their personal capacities argued that the doctrine of "qualified immunity" barred Lapides' federal-law claims against them. And the District Court agreed. The State, while conceding that a state statute had waived sovereign immunity from state-law suits in state court, argued that, by virtue of the Eleventh Amendment, it remained immune from suit in federal court.

**John Townsend Rich* filed a brief for Ceres Marine Terminals, Inc., as *amicus curiae* urging reversal.

See U. S. Const., Amdt. 11 (limiting scope of "Judicial power of the *United States*" (emphasis added)). But the District Court did not agree. Rather, in its view, by removing the case from state to federal court, the State had waived its Eleventh Amendment immunity. See *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 238 (1985) (State may waive Eleventh Amendment immunity).

The State appealed the District Court's Eleventh Amendment ruling. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 144–145 (1993) (allowing interlocutory appeal). And the Court of Appeals for the Eleventh Circuit reversed. 251 F. 3d 1372 (2001). In its view, state law was, at the least, unclear as to whether the State's attorney general possessed the legal authority to waive the State's Eleventh Amendment immunity. And, that being so, the State retained the legal right to assert its immunity, even after removal. See *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459 (1945).

Lapides sought certiorari. We agreed to decide whether "a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court . . . ." Pet. for Cert. (i).

It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings. That is because Lapides' only federal claim against the State arises under 42 U. S. C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 66 (1989). Compare Tr. of Oral Arg. 57–58 (asserting that complaint also sought declaratory judgment on the federal claim), with complaint, App. 9–19 (failing, implicitly or explicitly, to seek any such relief). Hence this case does not present a valid federal claim against the State. Nor need we address the scope of waiver by removal in a

situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court.

It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U. S. C. § 1367(c)(3). Nonetheless, Lapides' state-law tort claims against the State remain pending in Federal District Court, § 1367(a), and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance. *Moor* v. *County of Alameda*, 411 U. S. 693, 712 (1973). Hence, the question presented is not moot. We possess the legal power here to answer that question as limited to the state-law context just described. And, in light of differences of view among the lower courts, we shall do so. Compare *McLaughlin* v. *Board of Trustees of State Colleges of Colo.*, 215 F. 3d 1168, 1171 (CA10 2000) (removal waives immunity regardless of attorney general's state-law waiver authority); and *Newfield House, Inc.* v. *Massachusetts Dept. of Public Welfare*, 651 F. 2d 32, 36, n. 3 (CA1 1981) (similar); with *Estate of Porter ex rel. Nelson* v. *Illinois*, 36 F. 3d 684, 690–691 (CA7 1994) (removal does not waive immunity); *Silver* v. *Baggiano*, 804 F. 2d 1211, 1214 (CA11 1986) (similar); and *Gwinn Area Community Schools* v. *Michigan*, 741 F. 2d 840, 846–847 (CA6 1984) (similar).

II

The Eleventh Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the . . . States" by citizens of another State, U. S. Const., Amdt. 11, and (as interpreted) by its own citizens. *Hans* v. *Louisiana*, 134 U. S. 1 (1890). A State remains free to waive its Eleventh Amendment immunity from suit in a federal court. See, *e. g.*, *Atascadero*, *supra*, at 238. And the question before us now is whether a State waives that im-

munity when it removes a case from state court to federal court.

It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity. *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883) (State's "voluntary appearance" in federal court as an intervenor avoids Eleventh Amendment inquiry). The Court subsequently held, in the context of a bankruptcy claim, that a State "waives any immunity . . . respecting the adjudication of" a "claim" that it voluntarily files in federal court. *Gardner* v. *New Jersey*, 329 U. S. 565, 574 (1947). And the Court has made clear in general that "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." *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906) (emphasis added). The Court has long accepted this statement of the law as valid, often citing with approval the cases embodying that principle. See, *e. g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 681, n. 3 (1999) (citing *Gardner*); *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 294, and n. 10 (1973) (Marshall, J., concurring in result) (citing *Clark*); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276 (1959) (citing *Clark*).

In this case, the State was brought involuntarily into the case as a defendant in the original state-court proceedings. But the State then voluntarily agreed to remove the case to federal court. See 28 U. S. C. § 1446(a); *Chicago, R. I. & P. R. Co.* v. *Martin*, 178 U. S. 245, 248 (1900) (removal requires the consent of all defendants). In doing so, it voluntarily invoked the federal court's jurisdiction. And unless we are to abandon the general principle just stated, or unless there is something special about removal or about this case, the general legal principle requiring waiver ought to apply.

We see no reason to abandon the general principle. Georgia points out that the cases that stand for the principle, *Gunter*, *Gardner*, and *Clark*, did not involve suits for money damages against the State—the heart of the Eleventh Amendment's concern. But the principle enunciated in those cases did not turn upon the nature of the relief sought. And that principle remains sound as applied to suits for money damages.

Georgia adds that this Court decided *Gunter*, *Gardner*, and *Clark* before it decided more recent cases, which have required a "clear" indication of the State's intent to waive its immunity. *College Savings Bank*, 527 U. S., at 675–681. But *College Savings Bank* distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. *Id.*, at 681, n. 3. And this makes sense because an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity" to achieve litigation advantages. See *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U. S. 381, 393 (1998) (KENNEDY, J., concurring). The relevant "clarity" here must focus on the litigation act the State takes that creates the waiver. And that act—removal—is clear.

Nor has Georgia pointed to any special feature, either of removal or of this case, that would justify taking the case out from under the general rule. Georgia argues that its motive for removal was benign. It agreed to remove, not in order to obtain litigating advantages for itself, but to provide its codefendants, the officials sued in their personal capacities, with the generous interlocutory appeal provisions available in federal, but not in state, court. Compare *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–530 (1985) (authorizing interlocutory appeal of adverse qualified immunity determination), with *Turner* v. *Giles*, 264 Ga. 812, 813, 450 S. E. 2d 421, 424 (1994) (limiting interlocutory appeals to those certified by trial court). And it intended, from the beginning, to return to state court, when and if its codefendants had achieved their own legal victory.

A benign motive, however, cannot make the critical difference for which Georgia hopes. Motives are difficult to evaluate, while jurisdictional rules should be clear. See *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 426 (1916) (Holmes, J., concurring). To adopt the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others. See *Schacht*, *supra*, at 393–394, 398 (KENNEDY, J., concurring); cf. ALI, Study of the Division of Jurisdiction Between State and Federal Courts 366–367 (1968) (discussing the unfairness of allowing one who has invoked federal jurisdiction subsequently to challenge that jurisdiction). And that being so, the rationale for applying the general "voluntary invocation" principle is as strong here, in the context of removal, as elsewhere.

More importantly, Georgia argues that state law, while authorizing its attorney general "[t]o represent the state in all civil actions tried in any court," Ga. Code Ann. § 45–15–3(6) (1990); see Ga. Const., Art. 5, § 3, ¶ 4, does not authorize the attorney general to waive the State's Eleventh Amendment immunity, *id.*, Art. 1, § 2, ¶¶ 9(e), (f), reprinted in 2 Ga. Code

Ann. (Supp. 1996). Georgia adds that in *Ford*, this Court unanimously interpreted roughly similar state laws similarly, that the Court held that "no properly authorized executive or administrative officer of the state has waived the state's immunity," 328 U. S., at 469, and that it sustained an Eleventh Amendment defense raised for the first time after a State had litigated a claim brought against it in federal court. That is to say, in *Ford* a State regained immunity by showing the attorney general's lack of statutory authority to waive—even after the State litigated a case brought against it in federal court. Why, then, asks Georgia, can it not regain immunity in the same way, even after it removed its case to federal court?

The short answer to this question is that this case involves a State that *voluntarily* invoked the jurisdiction of the federal court, while *Ford* involved a State that a private plaintiff had *involuntarily* made a defendant in federal court. This Court consistently has found a waiver when a State's attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction. See *Gardner*, 329 U. S., at 574–575; *Gunter*, 200 U. S., at 285–289, 292; cf. *Clark*, 108 U. S., at 447–448 (not inquiring into attorney general's authority). And the Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary. See *Hans* v. *Louisiana*, 134 U. S. 1 (1890); cf. U. S. Const., Amdt. 11 (discussing suits "commenced or prosecuted against" a State).

But there is a more important answer. In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create. *Gunter*, *supra*, at 284. And that determination reflects a belief that neither those who wrote the Eleventh Amendment nor the States themselves (insofar as they authorize litigation in federal courts) would intend to create that unfairness. As in analogous contexts, in which such matters are questions of federal

law, cf., *e. g.*, *Regents of Univ. of Cal.* v. *Doe*, 519 U. S. 425, 429, n. 5 (1997), whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law. A rule of federal law that finds waiver through a state attorney general's invocation of federal-court jurisdiction avoids inconsistency and unfairness. A rule of federal law that, as in *Ford*, denies waiver despite the state attorney general's state-authorized litigating decision, does the opposite. For these reasons one Member of this Court has called for *Ford*'s reexamination. *Schacht*, 524 U. S., at 394, 397 (KENNEDY, J., concurring). And for these same reasons, we conclude that *Clark*, *Gunter*, and *Gardner* represent the sounder line of authority. Finding *Ford* inconsistent with the basic rationale of that line of cases, we consequently overrule *Ford* insofar as it would otherwise apply.

The State makes several other arguments, none of which we find convincing. It points to cases in which this Court has permitted *the United States* to enter into a case voluntarily without giving up immunity or to assert immunity despite a previous effort to waive. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940); *United States* v. *Shaw*, 309 U. S. 495 (1940); see also *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991). Those cases, however, do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (*i. e.*, the United States) to seek the protection of its own courts (*i. e.*, the federal courts), or an effort to protect an Indian tribe.

Finally, Georgia says that our conclusion will prove confusing, for States will have to guess what conduct might be deemed a waiver in order to avoid accidental waivers. But we believe the rule is a clear one, easily applied by both

federal courts and the States themselves. It says that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum. As JUSTICE KENNEDY has pointed out, once "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." See *Schacht*, *supra*, at 397 (concurring opinion).

We conclude that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity—though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination. 28 U. S. C. § 1367(c)(3).

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

UNITED STATES *v.* COTTON ET AL.

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

No. 01–687. Argued April 15, 2002—Decided May 20, 2002

A federal grand jury returned an indictment charging respondents with conspiracy to distribute and to possess with intent to distribute a "detectable amount" of cocaine and cocaine base. Respondents were convicted and received a sentence based on the District Court's finding of drug quantity—at least 50 grams of cocaine base—that implicated the enhanced penalties of 21 U. S. C. § 841(b). They did not object in the District Court to the fact that the sentences were based on a quantity not alleged in the indictment. While their appeal was pending, this Court decided, in *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In federal prosecutions, such facts must also be charged in the indictment. *Id.*, at 476. Respondents then argued in the Fourth Circuit that their sentences were invalid under *Apprendi*, because the drug quantity issue was neither alleged in the indictment nor submitted to the petit jury. That court vacated the sentences on the ground that it had no jurisdiction to impose a sentence for an offense not charged in the indictment.

Held:

1. A defective indictment does not deprive a court of jurisdiction. *Ex parte Bain*, 121 U. S. 1, the progenitor of the Fourth Circuit's view that the indictment errors are "jurisdictional," is a product of an era in which this Court's authority to review criminal convictions was greatly circumscribed. It could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error "jurisdictional." The Court's desire to correct obvious constitutional violations led to a "somewhat expansive notion of 'jurisdiction,'" *Custis* v. *United States*, 511 U. S. 485, 494, which is not what the term means today, *i. e.*, "the courts' statutory or constitutional *power* to adjudicate the case," *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89. Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. Thus, defects require correction regardless of whether the error was raised in district court. But a grand jury right can be waived. Post-*Bain* cases confirm that

indictment defects do not deprive a court of its power to adjudicate a case. See, *e. g.*, *Lamar* v. *United States*, 240 U. S. 60. Thus, this Court some time ago departed from *Bain*'s view that indictment defects are "jurisdictional." *Stirone* v. *United States*, 361 U. S. 212; *Russell* v. *United States*, 369 U. S. 749, distinguished. Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled. Pp. 629–631.

2. The omission from a federal indictment of a fact that enhances the statutory maximum sentence does not justify a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court. Under Federal Rule of Criminal Procedure 52(b)'s plain-error test, where there is an "(1) error, (2) that is plain, and (3) that affects substantial rights," an appellate court may correct an error not raised at trial, "but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U. S. 461, 466–467 (internal quotation marks omitted). The Government concedes that the indictment's failure to allege a fact that increased the sentences was plain error. But, even assuming the error affected respondents' substantial rights, it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. The evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted." It is true that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power, but that is no less true of the Sixth Amendment right to a petit jury, which must find guilt beyond a reasonable doubt. The petit jury's important role did not, however, prevent the *Johnson* Court from applying the longstanding rule "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Yakus* v. *United States*, 321 U. S. 414, 444. The real threat to the "fairness, integrity, or public reputation of judicial proceedings" would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial. Pp. 631–634.

261 F. 3d 397, reversed and remanded.

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

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor*

General Olson, Assistant Attorney General Chertoff, Barbara McDowell, and *Nina Goodman.*

Timothy J. Sullivan argued the cause for respondents. With him on the brief were *Arthur S. Cheslock, James E. McCollum, Jr., Carter G. Phillips, Jeffrey T. Green, Paul J. Zidlicky,* and *Stanley H. Needleman.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), we held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490. In federal prosecutions, such facts must also be charged in the indictment. *Id.*, at 476 (quoting *Jones* v. *United States*, 526 U. S. 227, 243, n. 6 (1999)). In this case, we address whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court.

Respondent Stanley Hall, Jr., led a "vast drug organization" in Baltimore. 261 F. 3d 397, 401 (CA4 2001). The six other respondents helped run the operation. In October 1997, a federal grand jury returned an indictment charging respondents with conspiring to distribute and to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U. S. C. §§ 846 and 841(a)(1). A superseding indictment returned in March 1998, which extended the time period of the conspiracy and added five more defendants, charged a conspiracy to

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**Clayton A. Sweeney, Jr., Mary Price, Peter Goldberger, David Porter, Joshua L. Dratel,* and *Lisa Bondareff Kemler* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

distribute and to possess with intent to distribute a "detectable amount" of cocaine and cocaine base. The superseding indictment did not allege any of the threshold levels of drug quantity that lead to enhanced penalties under § 841(b).

In accord with the superseding indictment, the District Court instructed the jury that "as long as you find that a defendant conspired to distribute or posses[s] with intent to distribute these controlled substances, the amounts involved are not important." App. to Pet. for Cert. 6a (emphasis deleted). The jury found respondents guilty.

Congress established "a term of imprisonment of not more than 20 years" for drug offenses involving a detectable quantity of cocaine or cocaine base. § 841(b)(1)(C). But the District Court did not sentence respondents under this provision. Consistent with the practice in federal courts at the time, at sentencing the District Court made a finding of drug quantity that implicated the enhanced penalties of § 841(b)(1)(A), which prescribes "a term of imprisonment which may not be . . . more than life" for drug offenses involving at least 50 grams of cocaine base. The District Court found, based on the trial testimony, respondent Hall responsible for at least 500 grams of cocaine base, and the other respondents responsible for at least 1.5 kilograms of cocaine base. The court sentenced respondents Hall and Powell to 30 years' imprisonment and the other respondents to life imprisonment. Respondents did not object in the District Court to the fact that these sentences were based on an amount of drug quantity not alleged in the indictment.

While respondents' appeal was pending in the United States Court of Appeals for the Fourth Circuit, we decided *Apprendi* v. *New Jersey*, *supra*. Respondents then argued in the Court of Appeals that their sentences were invalid under *Apprendi*, because the issue of drug quantity was neither alleged in the indictment nor submitted to the petit

jury. The Court of Appeals noted that respondents "failed to raise this argument before the district court" and thus reviewed the argument for plain error. 261 F. 3d, at 403 (citing Fed. Rule Crim. Proc. 52(b)). A divided court nonetheless vacated respondents' sentences on the ground that "because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, . . . a court is without jurisdiction to . . . *impose a sentence* for an offense not charged in the indictment." 261 F. 3d, at 404–405 (internal quotation marks omitted). Such an error, the Court of Appeals concluded, "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*, at 406. We granted certiorari, 534 U. S. 1074 (2002), and now reverse.

We first address the Court of Appeals' conclusion that the omission from the indictment was a "jurisdictional" defect and thus required vacating respondents' sentences. *Ex parte Bain*, 121 U. S. 1 (1887), is the progenitor of this view. In *Bain*, the indictment charged that Bain, the cashier and director of a bank, made false statements "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs" of the bank. *Id.*, at 4. Before trial, the court struck the words "the Comptroller of the Currency and," on the ground that they were superfluous. The jury found Bain guilty. *Id.*, at 4–5. Bain challenged the amendment to the indictment in a petition for a writ of habeas corpus. The Court concluded that the amendment was improper and that therefore "the jurisdiction of the offence [was] gone, and the court [had] no right to proceed any further in the progress of the case for want of an indictment." *Id.*, at 13.

Bain, however, is a product of an era in which this Court's authority to review criminal convictions was greatly circumscribed. At the time it was decided, a defendant could not obtain direct review of his criminal conviction in the Su-

preme Court.[1] See generally *United States* v. *Sanges*, 144 U. S. 310, 319–322 (1892); L. Orfield, Criminal Appeals in America 244–246 (1939). The Court's authority to issue a writ of habeas corpus was limited to cases in which the convicting "court had no jurisdiction to render the judgment which it gave." *Bain*, *supra*, at 3; see also *Preiser* v. *Rodriguez*, 411 U. S. 475, 485 (1973). In 1887, therefore, this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error "jurisdictional." The Court's desire to correct obvious constitutional violations led to a "somewhat expansive notion of 'jurisdiction,'" *Custis* v. *United States*, 511 U. S. 485, 494 (1994), which was "more a fiction than anything else," *Wainwright* v. *Sykes*, 433 U. S. 72, 79 (1977).

Bain's elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i. e.*, "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. See, *e. g.*, *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908). In contrast, the grand jury right can be waived. See Fed. Rule Crim. Proc. 7(b); *Smith* v. *United States*, 360 U. S. 1, 6 (1959).

Post-*Bain* cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case. In *Lamar* v. *United States*, 240 U. S. 60 (1916), the Court rejected the claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." *Id.*, at 64. Justice Holmes explained that a dis-

[1] In 1889, Congress authorized direct review of capital cases in the Supreme Court. See 25 Stat. 655. In 1891, this right was extended to defendants in all cases involving "infamous crime[s]." 26 Stat. 827; see *In re Claasen*, 140 U. S. 200 (1891).

trict court "has jurisdiction of all crimes cognizable under the authority of the United States . . . [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.*, at 65. Similarly, *United States* v. *Williams*, 341 U. S. 58, 66 (1951), held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment."

Thus, this Court some time ago departed from *Bain*'s view that indictment defects are "jurisdictional." *Bain* has been cited in later cases such as *Stirone* v. *United States*, 361 U. S. 212 (1960), and *Russell* v. *United States*, 369 U. S. 749 (1962), for the proposition that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form," *id.*, at 770 (citing *Bain*, *supra*). But in each of these cases proper objection had been made in the District Court to the sufficiency of the indictment. We need not retreat from this settled proposition of law decided in *Bain* to say that the analysis of that issue in terms of "jurisdiction" was mistaken in the light of later cases such as *Lamar* and *Williams*. Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.

Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim. See *United States* v. *Olano*, 507 U. S. 725, 731 (1993). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U. S. 461, 466–467 (1997) (quoting *Olano*, *supra*, at 732). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial pro-

ceedings." 520 U. S., at 467 (internal quotation marks omitted) (quoting *Olano*, *supra*, at 732).

The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*. The Government also concedes that such error was plain. See *Johnson*, *supra*, at 468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration").

The third inquiry is whether the plain error "affect[ed] substantial rights." This usually means that the error "must have affected the outcome of the district court proceedings." *Olano*, *supra*, at 734. Respondents argue that an indictment error falls within the "limited class" of "structural errors," *Johnson*, *supra*, at 468–469, that "can be corrected regardless of their effect on the outcome," *Olano*, *supra*, at 735. Respondents cite *Silber* v. *United States*, 370 U. S. 717 (1962) *(per curiam)*, and *Stirone* v. *United States*, *supra*, in support of this position.[2] The Government counters by noting that *Johnson*'s list of structural errors did not include *Stirone* or *Silber*, see 520 U. S., at 468–469, and that the defendants in both of these cases preserved their claims at trial.

As in *Johnson* (see *id.*, at 469), we need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the

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[2] Respondents also argue that even if the indictment defect is not structural error, it did affect their substantial rights because they were sentenced to more than the 20-year maximum that § 841(b) authorizes without regard to drug quantity. The Government responds that the defendants had notice that their sentences could exceed 20 years, and that the grand jury would have found that the conspiracy involved at least 50 grams of cocaine base had the Government sought such an allegation.

fairness, integrity, or public reputation of judicial proceedings. The error in *Johnson* was the District Court's failure to submit an element of the false statement offense, materiality, to the petit jury. The evidence of materiality, however, was "overwhelming" and "essentially uncontroverted." *Id.*, at 470. We thus held that there was "no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.*

The same analysis applies in this case to the omission of drug quantity from the indictment. The evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted."[3] Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base. Baltimore police officers made numerous state arrests and seizures between February 1996 and April 1997 that resulted in the seizure of 795 ziplock bags and clear bags containing approximately 380 grams of cocaine base. 20 Record 179–244. A federal search of respondent Jovan Powell's residence resulted in the seizure of 51.3 grams of cocaine base. 32 *id.*, at 18–30. A cooperating co-conspirator testified at trial that he witnessed respondent Hall cook one-quarter of a kilogram of cocaine powder into cocaine base. 22 *id.*, at 208. Another cooperating co-conspirator testified at trial that she was present in a hotel room where the drug operation bagged one kilogram of cocaine base into ziplock bags. 27 *id.*, at 107–108. Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.

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[3] Respondents challenged the presentence reports' assignment of a base offense level of 38, which is applicable to 1.5 kilograms or more of cocaine base. But they never argued that the conspiracy involved less than 50 grams of cocaine base, which is the relevant quantity for purposes of *Apprendi*, as that is the threshold quantity for the penalty of life imprisonment in 21 U. S. C. § 841(b)(1)(A).

Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. See, *e. g.,* 3 Story, Commentaries on the Constitution § 1779 (1883), reprinted in 5 The Founders' Constitution 295 (P. Kurland & R. Lerner eds. 1987). But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt. The important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ." *Yakus* v. *United States,* 321 U. S. 414, 444 (1944).

In providing for graduated penalties in 21 U. S. C. § 841(b), Congress intended that defendants, like respondents, involved in large-scale drug operations receive more severe punishment than those committing drug offenses involving lesser quantities. Indeed, the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the "fairness, integrity, and public reputation of judicial proceedings" would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial. Cf. *Johnson, supra,* at 470 (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

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.

Syllabus

VERIZON MARYLAND INC. *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL.

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

No. 00–1531. Argued December 5, 2001—Decided May 20, 2002*

The Telecommunications Act of 1996 (Act) requires that incumbent local-exchange carriers (LECs) "provide . . . interconnection with" their existing networks when a new entrant seeks access to a market, 47 U. S. C. § 251(c)(2); that the carriers then establish "reciprocal compensation arrangements" for transporting and terminating the calls of each others' customers, § 251(b)(5); and that their interconnection agreements be submitted to a state utility commission for approval, § 252(e)(1). Petitioner Verizon Maryland Inc., the incumbent LEC in Maryland, negotiated an interconnection agreement with a competitor later acquired by respondent MCI WorldCom, Inc. After the Maryland Public Service Commission (Commission) approved the agreement, Verizon informed WorldCom that it would no longer pay reciprocal compensation for calls made by Verizon's customers to the local access numbers of Internet Service Providers (ISPs) because ISP traffic was not "local traffic" subject to the reciprocal compensation agreement. WorldCom filed a complaint with the Commission, which ordered Verizon to make the payments for past and future ISP-bound calls. Verizon then filed an action in Federal District Court, citing § 252(e)(6) and 28 U. S. C. § 1331 as the basis for jurisdiction, and naming as defendants the Commission, its individual members in their official capacities, WorldCom, and other competing LECs. Verizon sought a declaratory judgment that the order was unlawful and an injunction prohibiting its enforcement, alleging that the determination that Verizon must pay reciprocal compensation for ISP traffic violated the 1996 Act and a Federal Communications Commission ruling. The District Court dismissed the action. The Fourth Circuit affirmed, holding that the Commission had not waived its Eleventh Amendment immunity from suit; that the doctrine of *Ex parte Young*, 209 U. S. 123, does not permit suit against the individual commissioners in their official capacities; and that neither § 252(e)(6) nor § 1331 provides a basis for jurisdiction over Verizon's claims against the private defendants.

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*Together with No. 00–1711, *United States* v. *Public Service Commission of Maryland et al.*, also on certiorari to the same court.

Syllabus

Held:

1. Section 1331 provides a basis for jurisdiction over Verizon's claim that the Commission's order requiring reciprocal compensation for ISP-bound calls is pre-empted by federal law. Federal courts have jurisdiction under § 1331 where the petitioner's right to recover will be sustained if federal law is given one construction and will be defeated if it is given another, unless the claim clearly appears to be immaterial and made solely to obtain jurisdiction, or is wholly insubstantial and frivolous. *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89. Here, resolution of Verizon's claim turns on whether the Act, or an FCC ruling, precludes the Commission from ordering payment of reciprocal compensation, and there is no suggestion that the claim is immaterial or insubstantial and frivolous. Even if § 252(e)(6) (which provides that a party aggrieved by a state commission's determination under § 252 may bring a federal action to determine whether an interconnection agreement meets the requirements of §§ 251 and 252) does not confer jurisdiction, it does not divest the district courts of their authority under § 1331. Cf. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141. Section 252 does not establish a distinctive review mechanism for the commission actions that it covers, and it does not distinctively limit the substantive relief available. Finally, none of the Act's other provisions evince any intent to preclude federal review of a commission determination. Pp. 641–644.

2. The doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities. The Court thus need not decide whether the Commission waived its immunity from suit by voluntarily participating in the regulatory regime established by the Act. In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296, 298–299. Here, Verizon's prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our "straightforward inquiry." As for Verizon's prayer for declaratory relief, even though Verizon seeks a declaration of the past, as well as the future, ineffectiveness of the Commission's action, so that the private parties' past financial liability may be affected, no past liability of the State, or of any of its commissioners, is at issue, see *Edelman* v. *Jordan*, 415 U. S. 651, 668. The Fourth Circuit's suggestion that the doctrine of *Ex parte Young* is inapplicable because the Commission's order was probably not inconsistent with federal law is unavailing: The inquiry into whether suit lies

Syllabus

under *Ex parte Young* does not include an analysis of the merits of the claim, see *Coeur d'Alene*, *supra*, at 281. Nor is there any merit to the Commission's argument that § 252(e)(6) constitutes a detailed and exclusive remedial scheme like the one held in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 75, to implicitly exclude *Ex parte Young* actions. Pp. 645–648.

240 F. 3d 279, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except O'CONNOR, J., who took no part in the consideration or decision of the cases. KENNEDY, J., filed a concurring opinion, *post*, p. 648. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 649.

Mark L. Evans argued the cause for petitioner Verizon Maryland Inc. With him on the briefs were *Michael K. Kellogg*, *Sean A. Lev*, *Aaron M. Panner*, *William P. Barr*, *Mark J. Mathis*, *Michael D. Lowe*, and *David A. Hill*. *Barbara McDowell* argued the cause for the United States. With her on the briefs were *Solicitor General Olson*, *Acting Assistant Attorney General Katsas*, *Deputy Solicitor General Wallace*, *Mark B. Stern*, *Charles W. Scarborough*, and *John A. Rogovin*.

Susan Stevens Miller argued the cause and filed a brief for respondent Public Service Commission of Maryland. *Paul M. Smith*, *William M. Hohengarten*, *Michael B. DeSanctis*, *Darryl M. Bradford*, *John J. Hamill*, *Thomas F. O'Neil III*, *William Single IV*, and *Brian J. Leske* filed briefs for respondent MCI WorldCom, Inc., et al.†

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†*Lesley Szanto Friedman*, *Aidan Synnott*, *Martha F. Davis*, *Isabelle Katz Pinzler*, *Steven R. Shapiro*, *Karen K. Narasaki*, *Vincent A. Eng*, *Herbert Semmel*, *Marcia D. Greenberger*, *Dina R. Lassow*, and *Elliot M. Mincberg* filed a brief for the NOW Legal Defense and Education Fund et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *James E. Ryan*, Attorney General, *Joel D. Bertocchi*, Solicitor General, *A. Benjamin Goldgar* and *Michael P. Doyle*, Assistant Attorneys General, *Myra L. Karegianes*, *John P. Kelliher*, and *Thomas R. Stan-*

JUSTICE SCALIA delivered the opinion of the Court.

These cases present the question whether federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates federal law.

I

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104–104, 110 Stat. 56, created a new telecommunications regime designed to foster competition in local telephone markets. Toward that end, the Act imposed various obligations on incumbent local-exchange carriers (LECs), including a duty to share their networks with competitors. See 47 U. S. C. § 251(c) (1994 ed., Supp. V). When a new entrant seeks access to a market, the incumbent LEC must "provide . . . interconnection with" the incumbent's existing network, § 251(c)(2), and the carriers must then establish "reciprocal compensation arrangements" for transporting and terminating the calls placed by each others' customers, § 251(b)(5). As we have previously described, see *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371–373 (1999), an incumbent LEC "may negotiate and enter into a binding agreement" with the new entrant "to fulfill the duties" imposed by §§ 251(b) and (c), but "without regard to the standards set forth" in those provisions. §§ 252(a)(1),

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ton; and for the Virginia State Corporation Commission by *William H. Chambliss.*

[REPORTER'S NOTE: On January 22, 2002, 534 U. S. 1110, the Court granted the motion of TCG Maryland, Inc., to treat the brief for AT&T Communications of Illinois, Inc., et al., in *Mathis* v. *WorldCom Technologies, Inc.*, *post*, p. 682, as the brief for respondent TCG Maryland, Inc., in these cases.

On January 7, 2002, 534 U. S. 1076, and February 19, 2002, 534 U. S. 1124, the Court granted the motions of *amici curiae* filers in *Mathis* v. *WorldCom Technologies, Inc.*, *supra*, to have their *amici curiae* briefs considered as briefs *amici curiae* in these cases.]

251(c)(1). That agreement must be submitted to the state commission for approval, § 252(e)(1), which may reject it if it discriminates against a carrier not a party or is not consistent with "the public interest, convenience, and necessity," § 252(e)(2)(A).

As required by the Act, the incumbent LEC in Maryland, petitioner Verizon Maryland Inc., formerly known as Bell Atlantic Maryland, Inc., negotiated an interconnection agreement with competitors, including MFS Intelenet of Maryland, later acquired by respondent MCI WorldCom, Inc. The Maryland Public Service Commission (Commission) approved the agreement. Six months later, Verizon informed WorldCom that it would no longer pay reciprocal compensation for telephone calls made by Verizon's customers to the local access numbers of Internet Service Providers (ISPs), claiming that ISP traffic was not "local traffic"[1] subject to the reciprocal compensation agreement because ISPs connect customers to distant Web sites. WorldCom disputed Verizon's claim and filed a complaint with the Commission. The Commission found in favor of WorldCom, ordering Verizon "to timely forward all future interconnection payments owed [WorldCom] for telephone calls placed to an ISP" and to pay WorldCom any reciprocal compensation that it had withheld pending resolution of the dispute. Verizon appealed to a Maryland state court, which affirmed the order.

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[1] Section 1.61 of the interconnection agreement provides: "'Reciprocal Compensation' is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network." In turn, § 1.44 defines "'Local Traffic'" as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in [Bell Atlantic's] effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier."

Subsequently, the Federal Communications Commission (FCC) issued a ruling—later vacated by the Court of Appeals for the District of Columbia Circuit, see *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F. 3d 1 (2000)—which categorized ISP-bound calls as nonlocal for purposes of reciprocal compensation but concluded that, absent a federal compensation mechanism for those calls, state commissions could construe interconnection agreements as requiring reciprocal compensation. Verizon filed a new complaint with the Commission, arguing that the FCC ruling established that Verizon was no longer required to provide reciprocal compensation for ISP traffic. In a 3-to-2 decision, the Commission rejected this contention, concluding that, as a matter of state contract law, WorldCom and Verizon had agreed to treat ISP-bound calls as local traffic subject to reciprocal compensation.

Verizon filed an action in the United States District Court for the District of Maryland, citing 47 U. S. C. § 252(e)(6) and 28 U. S. C. § 1331 as the basis for jurisdiction, and naming as defendants the Commission, its individual members in their official capacities, WorldCom, and other competing LECs. In its complaint, Verizon sought declaratory and injunctive relief from the Commission's order, alleging that the determination that Verizon must pay reciprocal compensation to WorldCom for ISP traffic violated the 1996 Act and the FCC ruling.

The District Court dismissed the action, and a divided panel of the Court of Appeals for the Fourth Circuit affirmed. 240 F. 3d 279 (2001). The Fourth Circuit held that the Commission had not waived its immunity from suit by voluntarily participating in the regulatory scheme set up under the 1996 Act, and that the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), does not permit suit against the individual commissioners in their official capacities. It then held that neither 47 U. S. C. § 252(e)(6) nor 28 U. S. C. § 1331 provides a basis for jurisdiction over Verizon's claims against the private defendants. Both Verizon and the United

States, an intervenor below, petitioned this Court for review of the four questions resolved by the Fourth Circuit. Because we had previously granted certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, 532 U. S. 903 (2001), which raised all but the question whether § 1331 provides a basis for jurisdiction, we granted certiorari only on the § 1331 question and set the case for oral argument in tandem with *Mathias*. 533 U. S. 928 (2001). After oral argument, for reasons explained in our decision in *Mathias* released today, *post*, p. 682, we granted certiorari on the remaining three questions presented in these cases. 534 U. S. 1072 (2001).

II

WorldCom, Verizon, and the United States contend that 47 U. S. C. § 252(e)(6) and 28 U. S. C. § 1331 independently grant federal courts subject-matter jurisdiction to determine whether the Commission's order requiring that Verizon pay WorldCom reciprocal compensation for ISP-bound calls violates the 1996 Act. Section 252 sets forth procedures relating to formation and commission approval of interconnection agreements, and commission approval and continuing review of interconnection terms and conditions (called "[s]tatements of generally available terms," § 252(f)) filed by LECs. Section 252(e)(6) provides, in relevant part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." The determination at issue here is neither the approval or disapproval of a negotiated agreement nor the approval or disapproval of a statement of generally available terms. WorldCom, Verizon, and the United States argue, however, that a state commission's authority under § 252 implicitly encompasses the authority to interpret and enforce an interconnection agreement that the commission has ap-

proved,[2] and that an interpretation or enforcement decision is therefore a "determination under [§ 252]" subject to federal review. Whether the text of § 252(e)(6) can be so construed is a question we need not decide. For we agree with the parties' alternative contention, that even if § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. § 1331 to review the Commission's order for compliance with federal law.

Verizon alleged in its complaint that the Commission violated the Act and the FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls. Verizon sought a declaratory judgment that the Commission's order was unlawful, and an injunction prohibiting its enforcement. We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit. Verizon seeks relief from the Commission's order "on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail," and its claim "thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. § 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96, n. 14 (1983).

The Commission contends that since the Act does not create a private cause of action to challenge the Commission's order, there is no jurisdiction to entertain such a suit. We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a

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[2] The Fourth Circuit suggested that both Maryland law and the Federal Communications Act of 1934 grant the Commission authority to interpret and enforce interconnection agreements that it approves under § 252. 240 F. 3d 279, 304 (2001) (citing 47 U. S. C. § 152(b), and Md. Pub. Util. Cos. Code Ann. § 2–113 (1998)). The parties dispute whether it is in fact federal or state law that confers this authority, but no party contends that the Commission lacked jurisdiction to interpret and enforce the agreement.

valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i. e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). As we have said, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Ibid.* (citations omitted). Here, resolution of Verizon's claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from ordering payment of reciprocal compensation, and there is no suggestion that Verizon's claim is "'immaterial'" or "'wholly insubstantial and frivolous.'" *Ibid.*

Verizon's claim thus falls within 28 U. S. C. § 1331's general grant of jurisdiction, and contrary to the Fourth Circuit's conclusion, nothing in 47 U. S. C. § 252(e)(6) purports to strip this jurisdiction. Section 252(e)(6) provides for federal review of an agreement when a state commission "makes a determination under [§ 252]." If this does not include (as WorldCom, Verizon, and the United States claim it does) the interpretation or enforcement of an interconnection agreement, then § 252(e)(6) merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under § 1331. Although the situation is not precisely parallel (in that here the elimination of federal district-court review would not amount to the elimination of all review), we think what we said in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967), is nonetheless apt: "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." (Internal quotation marks and citation omitted.) And here there is nothing more than that

mere fact. Section 252 does not establish a distinctive review mechanism for the commission actions that it covers (the mechanism is the same as § 1331: district-court review), and it does not distinctively limit the substantive relief available. Cf. *United States* v. *Fausto*, 484 U. S. 439, 448–449 (1988). Indeed, it does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action ("[A]ny party aggrieved by such determination may bring an action in an appropriate Federal district court," § 252(e)(6)). Cf. *Steel Co.*, *supra*, at 90–91 (even a statutory provision that uses the word "jurisdiction" may not relate to "subject-matter jurisdiction"); see also *Davis* v. *Passman*, 442 U. S. 228, 239, n. 18 (1979).

And finally, none of the other provisions of the Act evince any intent to preclude federal review of a commission determination. If anything, they reinforce the conclusion that § 252(e)(6)'s silence on the subject leaves the jurisdictional grant of § 1331 untouched. For where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly. Section 252(e)(4) provides: "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies.[3]

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[3] The Commission also suggests that the *Rooker-Feldman* doctrine precludes a federal district court from exercising jurisdiction over Verizon's claim. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923). The *Rooker-Feldman* doctrine merely recognizes that 28 U. S. C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, see § 1257(a). The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency.

III

The Commission nonetheless contends that the Eleventh Amendment bars Verizon's claim against it and its individual commissioners. WorldCom, Verizon, and the United States counter that the Commission is subject to suit because it voluntarily participated in the regulatory regime established by the Act. Whether the Commission waived its immunity is another question we need not decide, because—as the same parties also argue—even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U. S. 123 (1908).

In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment); see also *id.*, at 298–299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). Here Verizon sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was preempted by the 1996 Act and an FCC ruling. The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our "straightforward inquiry." We have approved injunction suits against state regulatory commissioners in like contexts. See, *e. g.*, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 230 (1908) ("[W]hen the rate is fixed a bill against the commission to restrain the members from enforcing it will not be bad . . . as a suit against a State, and will be the proper form of remedy"); *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 344, n. 4

(1951); *McNeill* v. *Southern R. Co.*, 202 U. S. 543 (1906); *Smyth* v. *Ames*, 169 U. S. 466 (1898); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894). Indeed, *Ex parte Young* itself was a suit against state officials (including state utility commissioners, though only the state attorney general appealed) to enjoin enforcement of a railroad commission's order requiring a reduction in rates. 209 U. S., at 129. As for Verizon's prayer for declaratory relief: That, to be sure, seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission's action, so that the past financial liability of private parties may be affected. But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman* v. *Jordan*, 415 U. S. 651, 668 (1974). Insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.

The Fourth Circuit suggested that Verizon's claim could not be brought under *Ex parte Young*, because the Commission's order was probably *not* inconsistent with federal law after all. 240 F. 3d, at 295–297. The court noted that the FCC ruling relied upon by Verizon does not seem to require compensation for ISP traffic; that the Court of Appeals for the District of Columbia Circuit has vacated the ruling; and that the Commission interpreted the interconnection agreement under state contract-law principles. It may (or may not) be true that the FCC's since-vacated ruling does not support Verizon's claim; it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's agreement. But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. See *Coeur d'Alene*, *supra*, at 281 ("An *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient" (emphasis added)).

Nor does the 1996 Act display any intent to foreclose jurisdiction under *Ex parte Young*—as we concluded the Indian Gaming Regulatory Act did in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). There an Indian Tribe sued the State of Florida for violating a duty to negotiate imposed under that Act, 25 U. S. C. § 2710(d)(3). Congress had specified the means to enforce that duty in § 2710(d)(7), a provision "intended . . . not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." 517 U. S., at 74. The "intricate procedures set forth in that provision" prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order that the Secretary of the Interior be notified. *Id.*, at 74–75. We concluded that "this quite modest set of sanctions" displayed an intent not to provide the "more complete and more immediate relief" that would otherwise be available under *Ex parte Young.* 517 U. S., at 75. Permitting suit under *Ex parte Young* was thus inconsistent with the "detailed remedial scheme," 517 U. S., at 74—and the limited one—that Congress had prescribed to enforce the State's statutory duty to negotiate. The Commission's argument that § 252(e)(6) constitutes a detailed and exclusive remedial scheme like the one in *Seminole Tribe*, implicitly excluding *Ex parte Young* actions, is without merit. That section provides only that when state commissions make certain "determinations," an aggrieved party may bring suit in federal court to establish compliance with the requirements of §§ 251 and 252. Even with regard to the "determinations" that it covers, it places no restriction on the relief a court can award. And it does not even say whom the suit is to be brought against—the state commission, the individual commissioners, or the carriers benefiting from the state commission's order. The mere fact that Congress has authorized federal courts to review whether the Commission's action complies with §§ 251 and 252 does not without more "impose upon the State a liabil-

ity that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young.*" *Seminole Tribe, supra,* at 75–76.

* * *

We conclude that 28 U. S. C. § 1331 provides a basis for jurisdiction over Verizon's claim that the Commission's order requiring reciprocal compensation for ISP-bound calls is pre-empted by federal law. We also conclude that the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities. We vacate the judgment of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE KENNEDY, concurring.

For the reasons well stated by the Court, I agree Verizon Maryland Inc. may proceed against the state commissioners in their official capacity under the doctrine of *Ex parte Young,* 209 U. S. 123 (1908). When the plaintiff seeks to enjoin a state utility commissioner from enforcing an order alleged to violate federal law, the Eleventh Amendment poses no bar. See *Idaho* v. *Coeur d'Alene Tribe of Idaho,* 521 U. S. 261, 271 (1997) (principal opinion of KENNEDY, J., joined by REHNQUIST, C. J.).

This is unlike the case in *Idaho* v. *Coeur d'Alene Tribe of Idaho, supra,* where the plaintiffs tried to use *Ex parte Young* to divest a State of sovereignty over territory within its boundaries. In such a case, a " 'straightforward inquiry,' " which the Court endorses here, *ante,* at 645, proves more complex. In *Coeur d'Alene* seven Members of this Court described *Ex parte Young* as requiring nothing more than an allegation of an ongoing violation of federal law and a

request for prospective relief; they divided four to three, however, over whether that deceptively simple test had been met.

In my view, our *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law. See *Coeur d'Alene*, *supra*, at 267–280 (principal opinion of KENNEDY, J., joined by REHNQUIST, C. J.). I believe this approach, whether stated in express terms or not, is the path followed in *Coeur d'Alene* as well as in the many cases preceding it. I also believe it necessary. Were it otherwise, the Eleventh Amendment, and not *Ex parte Young*, would become the legal fiction.

The complaint in this litigation, however, parallels the very suit permitted by *Ex parte Young* itself. With this brief explanation, I join the opinion of the Court.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion, Part III of which rests on a ground all of us can agree upon:[1] on the assumption of an Eleventh Amendment[2] bar, relief is available under the doctrine of *Ex parte Young*, 209 U. S. 123 (1908). Although that assumption apparently has been made from the start of the litigation, I think it is open to some doubt and so write separately to question whether these cases even implicate the Eleventh Amendment.

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[1] In so doing, I set aside for the moment my continuing conviction that the interpretation of the Eleventh Amendment that a majority of this Court has embraced is fundamentally mistaken. See *Alden* v. *Maine*, 527 U. S. 706, 760 (1999) (dissenting opinion); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 100 (1996) (dissenting opinion).

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amdt. 11.

While the State of Maryland is the named defendant, it is only a nominal one. Verizon Maryland Inc., the private party "suing" it, does not seek money damages, or the sort of declaratory or injunctive relief that could be had against a private litigant.[3] Nor does Verizon seek an order enjoining the State from enforcing purely state-law rate orders of dubious constitutionality, the relief requested in *Ex parte Young* itself, *id.*, at 129–131. Instead, Verizon claims that the Maryland Public Service Commission has wrongly decided a question of federal law[4] under a decisional power conferred by the Telecommunications Act of 1996 (Act), a power that no person may wield. Verizon accordingly seeks not a simple order of relief running against the state commission, but a different adjudication of a federal question

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[3] Cf. *e. g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 360 (2001) (money damages from the State as employer under Title I of the Americans with Disabilities Act of 1990); *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 66 (2000) (money damages from the State as employer under the Age Discrimination in Employment Act of 1967); *Alden* v. *Maine*, *supra*, at 712 (money damages from the State as employer under the Fair Labor Standards Act of 1938 in state court); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 633 (1999) (money damages and injunctive and declaratory relief against a State for patent infringement); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 671 (1999) (same for trademark violations); *Seminole Tribe*, *supra*, at 47 (suit to compel State to negotiate in good faith); *Hans* v. *Louisiana*, 134 U. S. 1 (1890) (money damages for failure to honor state securities). In *Seminole Tribe*, a majority of this Court observed "that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment," 517 U. S., at 58, but this was said in the context of a suit for injunctive relief (to enforce a duty to negotiate) as opposed to money damages. My point is that conventional relief of both sorts (and declaratory relief) is different in kind from the judicial review of agency action sought in these cases.

[4] Whether the interpretation of a reciprocal-compensation provision in a privately negotiated interconnection agreement presents a federal issue is a different question which neither the Court nor I address at the present.

by means of appellate review in Federal District Court,[5] whose jurisdiction to entertain the claim of error the Court today has affirmed. If the District Court should see things Verizon's way and reverse the state commission *qua* federal regulator, what dishonor would be done to the dignity of the State, which has accepted congressionally conferred power to decide matters of federal law in the first instance?

One answer might be that even naming the state commission as a defendant in a suit for declaratory and injunctive relief in federal court is an unconstitutional indignity. But I do not see how this could be right. At least where the suit does not seek to bar a state authority from applying and enforcing state law, a request for declaratory or injunctive relief is simply a formality for obtaining a process of review. Cf. 4 K. Davis, Administrative Law Treatise 206 (2d ed. 1983) ("[T]he suit for injunction and declaratory judgment in a district court under 28 U. S. C. § 1331 . . . is now always available to reach reviewable [federal] administrative action in absence of a specific statute making some other remedy exclusive"). And as for the nominal position of a State as defendant, "[i]t must be regarded as a settled doctrine of this court . . . 'that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record.'" *In re Ayers*, 123 U. S. 443, 487 (1887) (alteration in original) (quoting *Poindexter* v. *Greenhow*, 114 U. S. 270, 287 (1885)). If the applicability of the Eleventh Amendment pivots on the formalism that a State is found on the wrong side of the "v." in the case name of a regulatory appeal, constitutional immunity becomes nothing more than an accident of captioning practice in utility cases reviewed by courts. For that matter, the formal and nominal position of a governmental body in these circumstances is not even

[5] Judicial review of Federal Communications Commission determinations under the Act is committed directly to the Courts of Appeal. 28 U. S. C. § 2342(1); 47 U. S. C. § 402(a) (1994 ed.).

the universal practice. While the regulatory commission is generally a nominal defendant when a party appeals in the federal system,[6] this is not the uniform practice among the States, several of which caption utility cases on judicial review in terms of the appealing utility.[7]

The only credible response, which Maryland to its credit advances, is that the State has a strong interest in any case where its adjudication of a federal question is challenged.[8] See Supplemental Brief for Respondents MCI WorldCom, Inc., et al. 21–24. An adverse ruling in one appeal can no doubt affect the state commission's ruling in future cases. But this is true any time a state court decides a federal question and a successful appeal is made to this Court, and no one thinks that the Eleventh Amendment applies in that instance. See *Cohens* v. *Virginia*, 6 Wheat. 264, 412 (1821) (a writ of error from a state-court decision is not a "suit" under

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[6] See 5 U. S. C. §§ 702–703; Fed. Rule App. Proc. 15(a)(2)(B).

[7] See, *e. g.*, *In re Hawaiian Elec. Co.*, 81 Haw. 459, 918 P. 2d 561 (1996); *In re Petition of Interstate Power Co.*, 416 N. W. 2d 800 (Minn. Ct. App. 1987); *Appeal of Campaign for Ratepayers Rights*, 145 N. H. 671, 766 A. 2d 702 (2001); *In re Petition for Declaratory Ruling of Northwestern Public Serv. Co.*, 560 N. W. 2d 925 (S. D. 1997); *In re Citizens Util. Co.*, 171 Vt. 447, 769 A. 2d 19 (2000).

[8] The Fourth Circuit obliquely questioned the strength of the State's interest, noting that "under Maryland law, it is not necessary for the State commission, much less the individual commissioners, to be a party to an appeal for State-court review of its determinations." *Bell Atlantic Md., Inc.* v. *MCI Worldcom, Inc.*, 240 F. 3d 279, 295 (2001). But while the Maryland statute which the Fourth Circuit cited, Md. Pub. Util. Cos. Code Ann. § 3–204(d) (1998), does provide that "[t]he Commission may," not must, "be a party to an appeal," the Maryland courts have specified that the Public Service Commission is one of certain agencies "'the functions of which are so identified with the execution of some definite public policy as the representative of the State, that their participation in litigation affecting their decisions is regarded by the Legislature as essential to the adequate protection of the State's interests.'" *Calvert County Planning Comm'n* v. *Howlin Realty Management, Inc.*, 364 Md. 301, 315, 772 A. 2d 1209, 1216–1217 (2001) (quoting *Zoning Appeals Board* v. *McKinney*, 174 Md. 551, 561, 199 A. 540, 545 (1938)).

the Eleventh Amendment); *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 31 (1990) ("The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts") (unanimous Court); cf. U. S. Const., Art. VI ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land").[9] Whether an issue comes from a state-agency or a state-court decision, the federal court is reviewing the State's determination of a question of federal law, and it is neither prudent nor natural to see such review as impugning the dignity of the State or implicating the States' sovereign immunity in the federal system.

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[9] A possible ground for distinction is that the Supreme Court reviews state-court decisions while a federal district court initially reviews state-commission decisions under the Act. The argument would be that the Constitution requires any controversy in which a State's dignitary interests are implicated to be decided by this Court, and no other federal court, as a sign of respect for the State's sovereignty. See *Farquhar* v. *Georgia* (C. C. D. Ga. 1791) (Iredell, J.), reprinted in 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 148–154 (M. Marcus ed. 1994) ("It may also fairly be presumed that the several States thought it important to stipulate that so awful [and] important a Trial [to which a State is party] should not be cognizable by any Court but the Supreme"). But this position has long been rejected and is inconsistent with the doctrine of congressional abrogation, which presumes that States may be sued in federal district court in the first instance when Congress properly so provides, see *Seminole Tribe*, 517 U. S., at 55.

Syllabus

ALABAMA *v.* SHELTON

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 00–1214. Argued February 19, 2002—Decided May 20, 2002

Defendant-respondent Shelton represented himself in an Alabama Circuit Court criminal trial. The court repeatedly warned Shelton about the problems self-representation entailed, but at no time offered him assistance of counsel at state expense. He was convicted of misdemeanor assault and sentenced to a 30-day jail term, which the trial court immediately suspended, placing Shelton on two years' unsupervised probation. The Alabama Supreme Court reversed Shelton's suspended jail sentence, reasoning that this Court's decisions in *Argersinger* v. *Hamlin*, 407 U. S. 25, and *Scott* v. *Illinois*, 440 U. S. 367, require provision of counsel in any petty offense, misdemeanor, or felony prosecution, *Argersinger*, 407 U. S., at 37, "that actually leads to imprisonment even for a brief period," *id.*, at 33. The State Supreme Court concluded, *inter alia*, that because a defendant may not be imprisoned absent provision of counsel, Shelton's suspended sentence could never be activated and was therefore invalid.

Held: A suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged. *Argersinger*, 407 U. S., at 40. Pp. 660–674.

(a) The controlling rule is that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." *Argersinger*, 407 U. S., at 37. Pp. 661–662.

(b) Applying this "actual imprisonment" rule, the Court rejects the argument of its invited *amicus curiae* that failure to appoint counsel to an indigent defendant does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked. Pp. 662–672.

(1) The Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled

conviction at that point "result[s] in imprisonment," *Nichols* v. *United States*, 511 U. S. 738, 746; it "end[s] up in the actual deprivation of a person's liberty," *Argersinger*, 407 U. S., at 40. This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow. P. 662.

(2) The Court rejects the first of two grounds on which *amicus* resists this reasoning, *i. e.*, *amicus'* attempt to align this case with *Nichols* and with *Gagnon* v. *Scarpelli*, 411 U. S. 778. Those decisions do not stand for the broad proposition that sequential proceedings must be analyzed separately for Sixth Amendment purposes, with the right to state-appointed counsel triggered only in proceedings that result in *immediate* actual imprisonment. The dispositive factor in *Gagnon* and *Nichols* was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony for which he was imprisoned. See *Nichols*, 511 U. S., at 743, n. 9. Here, revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, not for a felony conviction for which the right to counsel is unquestioned. See *id.*, at 747; *Gagnon*, 411 U. S., at 789. Far from supporting *amicus*' position, *Gagnon* and *Nichols* simply highlight that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined. *Nichols* is further distinguishable because the Court there applied a less exacting standard allowing a trial court, once guilt has been established, to increase the defendant's sentence based simply on *evidence* of the underlying conduct that gave rise to his previous conviction, 511 U. S., at 748, even if he had never been charged with that conduct, *Williams* v. *New York*, 337 U. S. 241, and even if he had been acquitted of a misdemeanor with the aid of appointed counsel, *United States* v. *Watts*, 519 U. S. 148, 157. That relaxed standard has no application here, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to counsel. Pp. 662–665.

(3) Also unpersuasive is *amicus*' contention that practical considerations weigh against extension of the Sixth Amendment appointed-counsel right to a defendant in Shelton's situation. Based on figures suggesting that conditional sentences are commonly imposed but rarely activated, *amicus* argues that the appropriate rule would permit imposition of a suspended sentence on an uncounseled defendant and require appointment of counsel, if at all, only at the probation revocation stage, when incarceration is imminent. That regime would unduly reduce the

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Sixth Amendment's domain. In Alabama, the probation revocation hearing is an informal proceeding, at which the defendant has no right to counsel, and the court no obligation to observe customary rules of evidence. More significant, the defendant may not challenge the validity or reliability of the underlying conviction. A hearing so timed and structured cannot compensate for the absence of trial counsel and thereby bring Shelton's sentence within constitutional bounds. Nor does this Court agree with *amicus* that its holding will substantially limit the States' ability to impose probation. Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution, while simultaneously preserving the option of probationary punishment. See 511 U. S., at 748–749, n. 12. Even if *amicus* is correct that some States cannot afford the costs of the Court's rule, those jurisdictions have recourse to the option of pretrial probation, whereby the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program, which includes conditions typical of post-trial probation, and the adjudication of guilt and imposition of sentence for the underlying offense occur only if the defendant breaches those conditions. This system reserves the appointed-counsel requirement for the few cases in which incarceration proves necessary, see *Gagnon*, 411 U. S., at 784, while respecting the constitutional imperative that no person be imprisoned unless he was represented by counsel, *Argersinger*, 407 U. S., at 37. Pp. 665–672.

(c) The Court does not rule on Alabama's argument that, although the Sixth Amendment bars *activation* of a suspended sentence for an uncounseled conviction, the Constitution does not prohibit, as a method of effectuating probationary punishment, the *imposition* of a suspended sentence that can never be enforced. There is not so much as a hint in the Alabama Supreme Court's decision that Shelton's probation term is separable from the prison term to which it was tethered. Absent any prior presentation of the novel position the State now takes, this Court resists passing on it in the first instance. It is for the State Supreme Court to consider before this Court does whether the suspended sentence alone is invalid, leaving Shelton's probation term freestanding and independently effective. See *Hortonville Joint School Dist. No. 1* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 488. Pp. 672–674.

Affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 674.

Bill Pryor, Attorney General of Alabama, argued the cause for petitioner. With him on the briefs were *Sandra Jean Stewart* and *Stephanie N. Morman*, Assistant Attorneys General.

Charles Fried, by invitation of the Court, 534 U. S. 987 (2001), argued the cause and filed a brief as *amicus curiae* in opposition to the judgment below.

William H. Mills argued the cause and filed a brief for respondent.

Steven Duke argued the cause for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance. With him on the brief were *Thomas F. Liotti* and *David M. Porter*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the Sixth Amendment right of an indigent defendant charged with a misdemeanor punishable by imprisonment, fine, or both, to the assistance of court-appointed counsel. Two prior decisions control the Court's judgment. First, in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), this Court held that defense counsel must be appointed in any criminal prosecution, "whether classified as petty, misdemeanor, or felony," *id.*, at 37, "that actually leads to imprisonment even for a brief period," *id.*, at 33. Later, in *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979), the Court drew the line at "actual imprisonment," holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.

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*A brief of *amici curiae* urging reversal was filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, *Gregory S. Coleman*, Solicitor General, *S. Kyle Duncan*, Assistant Solicitor General, *Carter G. Phillips*, *Gene C. Schaerr*, *Paul J. Zidlicky*, and *Rebecca K. Smith*, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Richard P. Ieyoub* of Louisiana, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Betty D. Montgomery* of Ohio, and *Randolph A. Beales* of Virginia.

Defendant-respondent LeReed Shelton, convicted of third-degree assault, was sentenced to a jail term of 30 days, which the trial court immediately suspended, placing Shelton on probation for two years. The question presented is whether the Sixth Amendment right to appointed counsel, as delineated in *Argersinger* and *Scott*, applies to a defendant in Shelton's situation. We hold that a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged. *Argersinger*, 407 U. S., at 40 (internal quotation marks omitted).

I

After representing himself at a bench trial in the District Court of Etowah County, Alabama, Shelton was convicted of third-degree assault, a class A misdemeanor carrying a maximum punishment of one year imprisonment and a $2,000 fine, Ala. Code §§ 13A–6–22, 13A–5–7(a)(1), 13A–5–12(a)(1) (1994). He invoked his right to a new trial before a jury in Circuit Court, Ala. Code § 12–12–71 (1995), where he again appeared without a lawyer and was again convicted. The court repeatedly warned Shelton about the problems self-representation entailed, see App. 9, but at no time offered him assistance of counsel at state expense.

The Circuit Court sentenced Shelton to serve 30 days in the county prison. As authorized by Alabama law, however, Ala. Code § 15–22–50 (1995), the court suspended that sentence and placed Shelton on two years' unsupervised probation, conditioned on his payment of court costs, a $500 fine, reparations of $25, and restitution in the amount of $516.69.

Shelton appealed his conviction and sentence on Sixth Amendment grounds, and the Alabama Court of Criminal

Appeals affirmed.[1] That court initially held that an indigent defendant who receives a suspended prison sentence has a constitutional right to state-appointed counsel and remanded for a determination whether Shelton had "made a knowing, intelligent, and voluntary waiver of his right." App. 7. When the case returned from remand, however, the appeals court reversed course: A suspended sentence, the court concluded, does not trigger the Sixth Amendment right to appointed counsel unless there is "evidence in the record that the [defendant] has actually been deprived of liberty." *Id.*, at 13. Because Shelton remained on probation, the court held that he had not been denied any Sixth Amendment right at trial. *Id.*, at 14.

The Supreme Court of Alabama reversed the Court of Criminal Appeals in relevant part. Referring to this Court's decisions in *Argersinger* and *Scott*, the Alabama Supreme Court reasoned that a defendant may not be "sentenced to a term of imprisonment" absent provision of counsel. App. 37. In the Alabama high court's view, a suspended sentence constitutes a "term of imprisonment" within the meaning of *Argersinger* and *Scott* even though incarceration is not immediate or inevitable. And because the State is constitutionally barred from activating the conditional sentence, the Alabama court concluded, "'the threat itself is hollow and should be considered a nullity.'" App. 37 (quoting *United States* v. *Reilley*, 948 F. 2d 648, 654 (CA10 1991)). Accordingly, the court affirmed Shelton's conviction and the monetary portion of his punishment, but invalidated "that aspect of his sentence imposing 30 days of

[1] Shelton also appealed on a number of state-law grounds. The Court of Criminal Appeals rejected all but one of those challenges, concluding that most had been procedurally defaulted in the trial court. See App. 14–25. On one such challenge, the court remanded for further proceedings, *id.*, at 23, but affirmed after the trial court ruled against Shelton on remand, *id.*, at 29.

suspended jail time." App. 40. By reversing Shelton's suspended sentence, the State informs us, the court also vacated the two-year term of probation. See Brief for Petitioner 6.[2]

Courts have divided on the Sixth Amendment question presented in this case. Some have agreed with the decision below that appointment of counsel is a constitutional prerequisite to imposition of a conditional or suspended prison sentence. See, *e. g.*, *Reilley*, 948 F. 2d, at 654; *United* States v. *Foster*, 904 F. 2d 20, 21 (CA9 1990); *United States* v. *White*, 529 F. 2d 1390, 1394 (CA8 1976). Others have rejected that proposition. See, *e. g.*, *Cottle* v. *Wainwright*, 477 F. 2d 269, 274 (CA5), vacated on other grounds, 414 U. S. 895 (1973); *Griswold* v. *Commonwealth*, 252 Va. 113, 116–117, 472 S. E. 2d 789, 791 (1996); *State* v. *Hansen*, 273 Mont. 321, 325, 903 P. 2d 194, 197 (1995). We granted certiorari to resolve the conflict. 532 U. S. 1018 (2001).

II

Three positions are before us in this case. In line with the decision of the Supreme Court of Alabama, Shelton argues that an indigent defendant may not receive a suspended sentence unless he is offered or waives the assistance of state-appointed counsel. Brief for Respondent 5–27.[3] Ala-

[2] Justice Maddox dissented, stating that Shelton was not constitutionally entitled to counsel because he "received only a suspended sentence and was not incarcerated." App. 41. Justice Maddox also construed the trial record as establishing Shelton's waiver of any right to appointed counsel he might have enjoyed. *Ibid.*

[3] Shelton also urges this Court to overrule *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), and *Scott* v. *Illinois*, 440 U. S. 367 (1979), to the extent those cases do not guarantee a right to counsel "in all cases where imprisonment is an authorized penalty." Brief for Respondent 27–31. We do not entertain this contention, for Shelton first raised it in his brief on the merits. "We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate." *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999).

bama now concedes that the Sixth Amendment bars *activation* of a suspended sentence for an uncounseled conviction, but maintains that the Constitution does not prohibit *imposition* of such a sentence as a method of effectuating probationary punishment. Reply Brief 4–13. To assure full airing of the question presented, we invited an *amicus curiae (amicus)* to argue in support of a third position, one Alabama has abandoned: Failure to appoint counsel to an indigent defendant "does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked." 534 U. S. 987 (2001).[4]

A

In *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), we held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), applies to state criminal prosecutions through the Fourteenth Amendment. We clarified the scope of that right in *Argersinger*, holding that an indigent defendant must be offered counsel in any misdemeanor case "that actually leads to imprisonment." 407 U. S., at 33. Seven Terms later, *Scott* confirmed *Argersinger*'s "delimit[ation]," 440 U. S., at 373. Although the governing statute in *Scott* authorized a jail sentence of up to one year, see *id.*, at 368, we held that the defendant had no right to state-appointed counsel because the sole sentence actually imposed on him was a $50 fine, *id.*, at 373. "Even were the matter *res nova*," we stated, "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel" in nonfelony cases. *Ibid.*

[4] Charles Fried, a member of the Bar of this Court, accepted our invitation and has well fulfilled his assigned responsibility.

Subsequent decisions have reiterated the *Argersinger-Scott* "actual imprisonment" standard. See, *e. g.*, *Glover* v. *United States*, 531 U. S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance"); *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 113 (1996); *Nichols* v. *United States*, 511 U. S. 738, 746 (1994) (constitutional line is "between criminal proceedings that resulted in imprisonment, and those that did not"); *id.*, at 750 (SOUTER, J., concurring in judgment) ("The Court in *Scott*, relying on *Argersinger*[,] drew a bright line between imprisonment and lesser criminal penalties."); *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18, 26 (1981). It is thus the controlling rule that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." *Argersinger*, 407 U. S., at 37.

B

Applying the "actual imprisonment" rule to the case before us, we take up first the question we asked *amicus* to address: Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "result[s] in imprisonment," *Nichols*, 511 U. S., at 746; it "end[s] up in the actual deprivation of a person's liberty," *Argersinger*, 407 U. S., at 40. This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow.

Amicus resists this reasoning primarily on two grounds. First, he attempts to align this case with our decisions in *Nichols* and *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). See Brief for *Amicus Curiae* by Invitation of the Court 11–18

(hereinafter Fried Brief). We conclude that Shelton's case is not properly bracketed with those dispositions.

Nichols presented the question whether the Sixth Amendment barred consideration of a defendant's prior uncounseled misdemeanor conviction in determining his sentence for a subsequent felony offense. 511 U. S., at 740. Nichols pleaded guilty to federal felony drug charges. Several years earlier, unrepresented by counsel, he was fined but not incarcerated for the state misdemeanor of driving under the influence (DUI). Including the DUI conviction in the federal Sentencing Guidelines calculation allowed the trial court to impose a sentence for the felony drug conviction "25 months longer than if the misdemeanor conviction had not been considered." *Id.*, at 741. We upheld this result, concluding that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.*, at 749. In *Gagnon*, the question was whether the defendant, who was placed on probation pursuant to a suspended sentence for armed robbery, had a due process right to representation by appointed counsel at a probation revocation hearing. 411 U. S., at 783. We held that counsel was not invariably required in parole or probation revocation proceedings; we directed, instead, a "case-by-case approach" turning on the character of the issues involved. *Id.*, at 788–791.

Considered together, *amicus* contends, *Nichols* and *Gagnon* establish this principle: Sequential proceedings must be analyzed separately for Sixth Amendment purposes, Fried Brief 11–18, and only those proceedings "result[ing] in *immediate* actual imprisonment" trigger the right to state-appointed counsel, *id.*, at 13 (emphasis added). Thus, the defendant in *Nichols* had no right to appointed counsel in the DUI proceeding because he was not immediately imprisoned at the conclusion of that proceeding. The uncounseled DUI, valid when imposed, did not later become invalid be-

cause it was used to enhance the length of imprisonment that followed a separate and subsequent felony proceeding. Just so here, *amicus* contends: Shelton had no right to appointed counsel in the Circuit Court because he was not incarcerated immediately after trial; his conviction and suspended sentence were thus valid and could serve as proper predicates for actual imprisonment at a later hearing to revoke his probation. See Fried Brief 14, 23–24.

Gagnon and *Nichols* do not stand for the broad proposition *amicus* would extract from them. The dispositive factor in those cases was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned. See *Nichols*, 511 U. S., at 743, n. 9 (absent waiver, right to appointed counsel in felony cases is absolute). Unlike this case, in which revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, the sentences imposed in *Nichols* and *Gagnon* were for felony convictions—a federal drug conviction in *Nichols*, and a state armed robbery conviction in *Gagnon*—for which the right to counsel is unquestioned. See *Nichols*, 511 U. S., at 747 (relevant sentencing provisions punished only "the last offense committed by the defendant," and did not constitute or "change the penalty imposed for the earlier" uncounseled misdemeanor); *Gagnon*, 411 U. S., at 789 (distinguishing "the right of an accused to counsel in a criminal prosecution" from "the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime").

Thus, neither *Nichols* nor *Gagnon* altered or diminished *Argersinger*'s command that "no person may be imprisoned *for any offense* . . . unless he was represented by counsel at his trial," 407 U. S., at 37 (emphasis added). Far from

supporting *amicus*' position, *Gagnon* and *Nichols* simply highlight that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibity for imprisonment established, and prison sentence determined.

Nichols is further distinguishable for the related reason that the Court there applied a "less exacting" standard "consistent with the traditional understanding of the sentencing process." 511 U. S., at 747. Once guilt has been established, we noted in *Nichols*, sentencing courts may take into account not only "a defendant's prior convictions, but . . . also [his] past criminal behavior, even if no conviction resulted from that behavior." *Ibid.* Thus, in accord with due process, Nichols "could have been sentenced more severely based simply on *evidence* of the underlying conduct that gave rise" to his previous conviction, *id.*, at 748 (emphasis added), even if he had never been charged with that conduct, *Williams* v. *New York*, 337 U. S. 241 (1949), and even if he had been acquitted of the misdemeanor with the aid of appointed counsel, *United States* v. *Watts*, 519 U. S. 148, 157 (1997) *(per curiam)*. That relaxed standard has no application in this case, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to "the guiding hand of counsel," *Argersinger*, 407 U. S., at 40 (internal quotation marks omitted).

Amicus also contends that "practical considerations clearly weigh against" the extension of the Sixth Amendment appointed-counsel right to a defendant in Shelton's situation. Fried Brief 23. He cites figures suggesting that although conditional sentences are commonly imposed, they are rarely activated. *Id.*, at 20–22; Tr. of Oral Arg. 20–21 (speculating that "hundreds of thousands" of uncounseled defendants receive suspended sentences, but only "thousands" of that large number are incarcerated upon violating the terms of their probation). Based on these estimations, *ami-*

cus argues that a rule requiring appointed counsel in every case involving a suspended sentence would unduly hamper the States' attempts to impose effective probationary punishment. A more "workable solution," he contends, would permit imposition of a suspended sentence on an uncounseled defendant and require appointment of counsel, if at all, only at the probation revocation stage, when incarceration is imminent. Fried Brief 18, 23–24.

Amicus observes that probation is "now a critical tool of law enforcement in low level cases." *Id.*, at 22. Even so, it does not follow that preservation of that tool warrants the reduction of the Sixth Amendment's domain that would result from the regime *amicus* hypothesizes. *Amicus* does not describe the contours of the hearing that, he suggests, might precede revocation of a term of probation imposed on an uncounseled defendant. See *id.*, at 24 (raising, but not endeavoring to answer, several potential questions about the nature of the revocation hearing *amicus* contemplates). In Alabama, however, the character of the probation revocation hearing currently afforded is not in doubt. The proceeding is an "informal" one, *Buckelew* v. *State*, 48 Ala. App. 418, 421, 265 So. 2d 202, 205 (Crim. App. 1972), at which the defendant has no right to counsel, and the court no obligation to observe customary rules of evidence, *Martin* v. *State*, 46 Ala. App. 310, 311, 241 So. 2d 339, 340 (Crim. App. 1970).

More significant, the sole issue at the hearing—apart from determinations about the necessity of confinement, see Ala. Code § 15–22–54(d)(4) (1975)—is whether the defendant breached the terms of probation. See *Martin*, 46 Ala. App., at 312, 241 So. 2d, at 341 ("All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." (internal quotation marks omitted)). The validity or reliability of the underlying conviction is beyond attack. See *Buckelew*, 48 Ala. App., at 421,

265 So. 2d, at 205 ("a probation hearing cannot entertain a collateral attack on a judgment of another circuit").

We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration. Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to "the crucible of meaningful adversarial testing," *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). The Sixth Amendment does not countenance this result.

In a variation on *amicus'* position, the dissent would limit review in this case to the question whether the *imposition* of Shelton's suspended sentence required appointment of counsel, answering that question "plainly no" because such a step "does not deprive a defendant of his personal liberty." *Post*, at 676. Only if the sentence is later activated, the dissent contends, need the Court "ask whether the procedural safeguards attending the imposition of [Shelton's] sentence comply with the Constitution." *Ibid.*

Severing the analysis in this manner makes little sense. One cannot assess the constitutionality of imposing a suspended sentence while simultaneously walling off the procedures that will precede its activation. The dissent imagines a set of safeguards Alabama might provide at the probation revocation stage sufficient to cure its failure to appoint counsel prior to sentencing, including, perhaps, "complete retrial of the misdemeanor violation with assistance of counsel," *post*, at 677. But there is no cause for speculation about Alabama's procedures; they are established by Alabama statute and decisional law, see *supra*, at 666 and this page, and they bear no resemblance to those the dissent invents in its effort to sanction the prospect of Shelton's imprisonment on

an uncounseled conviction.[5] Assessing the issue before us in light of actual circumstances, we do not comprehend how the procedures Alabama in fact provides at the probation revocation hearing could bring Shelton's sentence within constitutional bounds.[6]

Nor do we agree with *amicus* or the dissent that our holding will "substantially limit the states' ability" to impose probation, Fried Brief 22, or encumber them with a "large, new burden," *post*, at 680. Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution. See

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[5] In any event, the dissent is simply incorrect that our decision today effectively "deprive[s] the State of th[e] option" of placing an uncounseled defendant on probation, with incarceration conditioned on a guilty verdict following a trial *de novo*. *Post*, at 677. That option is the functional equivalent of pretrial probation, as to which we entertain no constitutional doubt. See *infra*, at 670–672, and n. 12.

Regarding the dissent's suggestion that other "means of retesting (with assistance of counsel) the validity of the original conviction" might suffice, *post*, at 678, n. 3, we doubt that providing counsel after the critical guilt adjudication stage "[would] be of much help to a defendant," for "the die is usually cast when judgment is entered on an uncounseled trial record." *Argersinger*, 407 U. S., at 41 (Burger, C. J., concurring in result). "[A] large number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way" for the defendant to demonstrate error in the original proceeding or reconstruct evidence lost in the intervening period. *Nichols* v. *United States*, 511 U. S. 738, 748 (1994). But we need not here decide whether or what procedural safeguards "short of complete retrial" at the probation revocation stage could satisfy the Sixth Amendment, *post*, at 678; the minimal procedures Alabama *does* provide are plainly insufficient.

[6] Charging that we have "miraculously divined how the Alabama justices would resolve a constitutional question," *post*, at 676, the dissent forgets that this case is here on writ of certiorari to the Alabama Supreme Court. That court ruled in the decision under review that Shelton's sentence violates the Sixth Amendment. The Alabama Supreme Court has thus *already* spoken on the issue we now address, and in doing so expressed not the slightest hint that revocation-stage procedures—real or imaginary—would affect the constitutional calculus.

Nichols, 511 U. S., at 748–749, n. 12. All but 16 States, for example, would provide counsel to a defendant in Shelton's circumstances, either because he received a substantial fine[7] or because state law authorized incarceration for the charged offense[8] or provided for a maximum prison term of one year.[9] See Ala. Code §§ 13A–6–22, 13A–5–7(a)(1), 13A–5–12(a)(1) (1994). There is thus scant reason to believe that a rule conditioning imposition of a suspended sentence on provision of appointed counsel would affect existing practice

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[7] See N. J. Stat. Ann. § 2A:158A–5.2 (1985); *State* v. *Hermanns*, 278 N. J. Super. 19, 29, 650 A. 2d 360, 366 (1994); N. C. Gen. Stat. § 7A–451(a)(1) (1999); Vt. Stat. Ann., Tit. 13, § 5201 (1998).

[8] See *Alexander* v. *Anchorage*, 490 P. 2d 910, 913 (Alaska 1971) (interpreting Alaska Const., Art. I, § 11, to provide counsel when punishment may involve incarceration); *Tracy* v. *Municipal Court for Glendale Judicial Dist.*, 22 Cal. 3d 760, 766, 587 P. 2d 227, 230 (1978) (Cal. Penal Code Ann. § 686 (West 1985) affords counsel to misdemeanor defendants); Del. Code Ann., Tit. 29, § 4602 (1997); D. C. Code Ann. § 11–2602 (West 2001); Haw. Rev. Stat. § 802–1 (1999); Ill. Comp. Stat., ch. 725, § 113–3 (1992); *Brunson* v. *State*, 182 Ind. App. 146, 149, 394 N. E. 2d 229, 231 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, § 13); Ky. Rev. Stat. Ann. §§ 31.100(4)(b), 31.110(1) (West 1999); La. Const., Art. I, § 13; Mass. Rule Crim. Proc. 8 (2001); Minn. Rule Crim. Proc. 5.02(1) (2001); Neb. Rev. Stat. § 29–3902 (1995); N. Y. Crim. Proc. Law § 170.10(3)(c) (West 1993); Okla. Stat., Tit. 22, § 1355.6.A (West Supp. 2002); Ore. Rev. Stat. Ann. § 135.050(4) (Supp. 1998); Tenn. Sup. Ct. Rule 13(d)(1) (2001); Tex. Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp. 2002); Va. Code Ann. §§ 19.2–159, 19.2–160 (2000); Wash. Super. Ct. Crim. Rule 3.1(a) (2002); W. Va. Code § 50–4–3 (2000); Wis. Stat. § 967.06 (1998); Wyo. Stat. Ann. § 7–6–102 (2001).

[9] See Idaho Code §§ 19–851(d)(2), 19–852(a)(1) (1997); Iowa Rule Crim. Proc. 26 (2002); *Wright* v. *Denato*, 178 N. W. 2d 339, 341–342 (Iowa 1970); Md. Ann. Code, Art. 27A, §§ 2(h)(2), 4(b)(2) (1997 and Supp. 2000); Nev. Rev. Stat. §§ 178.397, 193.120 (2001); N. H. Stat. Ann. §§ 604–A:2(I), 625:9(IV)(a)(1) (West Supp. 2001); N. M. Stat. Ann. §§ 31–16–2(D), 31–16–3(A) (2000); Ohio Rules Crim. Proc. 2(C), 44(A) (2002); Pa. Rule Crim. Proc. 122(A) (2002); 18 Pa. Cons. Stat. § 106(c)(2) (1998); S. D. Codified Laws §§ 23A–40–6, 23–40–6.1, 22–6–2(1) (1998); see also Conn. Gen. Stat. § 51–296(a) (Supp. 2001) (imposition of a "suspended sentence of incarceration with a period of probation" necessitates appointment of counsel).

in the large majority of the States.[10] And given the current commitment of most jurisdictions to affording court-appointed counsel to indigent misdemeanants while simultaneously preserving the option of probationary punishment, we do not share *amicus*' concern that other States may lack the capacity and resources to do the same.

Moreover, even if *amicus* is correct that "some courts and jurisdictions at least [can]not bear" the costs of the rule we confirm today, Fried Brief 23, those States need not abandon probation or equivalent measures as viable forms of punish-

[10] That ten States in this majority do not provide counsel to every defendant who receives a suspended sentence hardly supports the dissent's dire predictions about the practical consequences of today's decision, see *post*, at 679–681, and n. 4. The circumstances in which those States currently allow prosecution of misdemeanors without appointed counsel are quite narrow. In Pennsylvania, for example, all defendants charged with misdemeanors enjoy a right to counsel regardless of the sentence imposed, Pa. Rule Crim. Proc. 122(B) (2002); only those charged with "summary offenses" (violations not technically considered crimes and punishable by no more than 90 days' imprisonment, 18 Pa. Cons. Stat. § 106(c)(2) (1998)) may receive a suspended sentence uncounseled. Pa. Rule Crim. Proc. 122(A) (2002); *Commonwealth* v. *Thomas*, 510 Pa. 106, 111, n. 7, 507 A. 2d 57, 59, n. 7 (1986). (Typical "summary offenses" in Pennsylvania include the failure to return a library book within 30 days, 18 Pa. Cons. Stat. § 6708 (1998), and fishing on a Sunday, 30 Pa. Cons. Stat. § 2104 (1998).) Gaps in the misdemeanor defendant's right to appointed counsel in other States that extend protection beyond the Sixth Amendment are similarly slight. See, *e. g.*, S. D. Codified Laws §§ 23A–40–6.1, 22–6–2(2) (1998) (defendant charged with misdemeanor enjoys absolute right to appointed counsel unless offense punishable by no more than 30 days' imprisonment); Tex. Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp. 2002) (counsel must be appointed to all misdemeanor defendants except those tried before a judge who knows sentence will not include imprisonment).

More typical of the situation that results in a suspended sentence, we think, is a case like Shelton's—a prosecution before a jury for third-degree assault, arising out of a fistfight that followed a minor traffic accident, see App. 15, n. 2. Far from "quite irrelevant," *post*, at 679, that 34 States already provide an attorney in this situation strongly suggests that the added requirement of providing counsel routinely in suspended sentence cases will not prove unduly onerous.

ment. Although they may not attach probation to an imposed and suspended prison sentence, States unable or unwilling routinely to provide appointed counsel to misdemeanants in Shelton's situation are not without recourse to another option capable of yielding a similar result.

That option is pretrial probation, employed in some form by at least 23 States. See App. to Reply Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 1a–2a (collecting state statutes). Under such an arrangement, the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program,[11] which includes conditions typical of post-trial probation. The adjudication of guilt and imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions. *Ibid.;* see, *e. g.*, Conn. Gen. Stat. § 54–56e (2001); Pa. Rules Crim. Proc. 310–320, 316 (2002) ("The conditions of the [pretrial rehabilitation] program may be such as may be imposed with respect to probation after conviction of a crime."); N. Y. Crim. Proc. Law § 170.55(3) (McKinney Supp. 2001) (pretrial "adjournment in contemplation of dismissal" may require defendant "to observe certain specified conditions of conduct").[12]

Like the regime urged by *amicus*, this system reserves the appointed-counsel requirement for the "small percent-

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[11] Because this device is conditioned on the defendant's consent, it does not raise the question whether imposition of probation alone so restrains a defendant's liberty as to require provision of appointed counsel. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 8; cf. Brief for Respondent 13–16.

[12] There is thus only one significant difference between pretrial probation and the "sensible option" urged by the dissent, *i. e.*, "complete retrial of the misdemeanor violation with assistance of counsel" upon a defendant's violation of probation terms, *post*, at 677. Pretrial probation is substantially less expensive: It permits incarceration after a single trial, whereas the dissent's regime requires two—one (without counsel) to place the defendant on probation, and a second (with counsel) to trigger imprisonment.

age" of cases in which incarceration proves necessary, Fried Brief 21, thus allowing a State to "supervise a course of rehabilitation" without providing a lawyer every time it wishes to pursue such a course, *Gagnon*, 411 U. S., at 784. Unlike *amicus*' position, however, pretrial probation also respects the constitutional imperative that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial," *Argersinger*, 407 U. S., at 37.

C

Alabama concedes that activation of a suspended sentence results in the imprisonment of an uncounseled defendant "for a term that relates to the original offense" and therefore "crosses the line of 'actual imprisonment'" established in *Argersinger* and *Scott*. Reply Brief to *Amicus Curiae* Professor Charles Fried 8. Shelton cannot be imprisoned, Alabama thus acknowledges, "unless the State has afforded him the right to assistance of appointed counsel in his defense," *Scott*, 440 U. S., at 374; see Reply Brief 9. Alabama maintains, however, that there is no constitutional barrier to *imposition* of a suspended sentence that can never be enforced; the State therefore urges reversal of the Alabama Supreme Court's judgment insofar as it vacated the term of probation Shelton was ordered to serve.

In effect, Alabama invites us to regard two years' probation for Shelton as a separate and independent sentence, which "the State would have the same power to enforce [as] a judgment of a mere fine." Tr. of Oral Arg. 6. *Scott*, Alabama emphasizes, squarely held that a fine-only sentence does not trigger a right to court-appointed counsel, Tr. of Oral Arg. 6; similarly, Alabama maintains, probation uncoupled from a prison sentence should trigger no immediate right to appointed counsel. Seen as a freestanding sentence, Alabama further asserts, probation could be enforced, as a criminal fine or restitution order could, in a contempt pro-

ceeding. See Reply Brief 11–12; Reply Brief to *Amicus Curiae* Professor Charles Fried 10–13; Tr. of Oral Arg. 7.

Alabama describes the contempt proceeding it envisions as one in which Shelton would receive "the full panoply of due process," including the assistance of counsel. Reply Brief 12. Any sanction imposed would be for "post-conviction wrongdoing," not for the offense of conviction. Reply Brief to *Amicus Curiae* Professor Charles Fried 11. "The maximum penalty faced would be a $100 fine and five days' imprisonment," Reply Brief 12 (citing Ala. Code § 12–11–30(5) (1995)), not the 30 days ordered and suspended by the Alabama Circuit Court, see *supra*, at 658.

There is not so much as a hint, however, in the decision of the Supreme Court of Alabama, that Shelton's probation term is separable from the prison term to which it was tethered. Absent any prior presentation of the position the State now takes,[13] we resist passing on it in the first instance. Our resistance to acting as a court of first view instead of one of review is heightened by the Alabama Attorney General's acknowledgment at oral argument that he did not know of any State that imposes, postconviction, on a par with a fine, a term of probation unattached to a suspended sentence. Tr. of Oral Arg. 8. The novelty of the State's current position is further marked by the unqualified statement in Alabama's opening brief that, "[b]y reversing Shelton's suspended sentence, the [Supreme Court of Alabama] correspondingly vacated the two-year probationary term." Brief for Petitioner 6.

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[13] Not until its reply brief did the State convey that, as it comprehends *Argersinger* and *Scott*, "there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation." Reply Brief 9. Before the Supreme Court of Alabama, the State's position coincided with the position now argued by *amicus*. See State's Brief and Argument on Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals, p. 31, and State's Brief and Argument in Support of its Application for Rehearing, in No. 1990031 (Ala. Sup. Ct.), p. 32.

In short, Alabama has developed its position late in this litigation and before the wrong forum. It is for the Alabama Supreme Court to consider before this Court does whether the suspended sentence alone is invalid, leaving Shelton's probation term freestanding and independently effective. See *Hortonville Joint School Dist. No. 1* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State."). We confine our review to the ruling the Alabama Supreme Court made in the case as presented to it: "[A] defendant who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel." App. 40 (emphasis added); see Brief for Petitioner 6. We find no infirmity in that holding.

* * *

Satisfied that Shelton is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined, we affirm the judgment of the Supreme Court of Alabama.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972), we held that "absent a knowing and intelligent waiver, *no person may be imprisoned* for any offense . . . unless he was represented by counsel at his trial." (Emphasis added.) Although, we said, the "run of misdemeanors will not be affected" by this rule, "in those *that end up in the actual deprivation of a person's liberty*, the accused will receive the benefit" of appointed counsel. *Id.*, at 40 (emphasis added). We affirmed this rule in *Scott* v. *Illinois*, 440 U. S. 367 (1979), drawing a bright line between imprisonment and

the mere threat of imprisonment: "[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines *or the mere threat of imprisonment*—is eminently sound and warrants adoption of *actual imprisonment* as the line defining the constitutional right to appointment of counsel." *Id.*, at 373 (emphasis added). We have repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel. See, *e. g.*, *Glover* v. *United States*, 531 U. S. 198, 203 (2001) ("any amount of *actual jail time* has Sixth Amendment significance" (emphasis added)); *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 113 (1996) ("right [to appointed counsel] does not extend to nonfelony trials if no term of imprisonment is *actually imposed*" (emphasis added)); *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18, 26 (1981) (the Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, *do not result in* the defendant's *loss of personal liberty*" (emphasis added)).

Today's decision ignores this long and consistent jurisprudence, extending the misdemeanor right to counsel to cases bearing the mere threat of imprisonment. Respondent's 30-day suspended sentence, and the accompanying 2-year term of probation, are invalidated for lack of appointed counsel even though respondent has not suffered, and may never suffer, a deprivation of liberty. The Court holds that the suspended sentence violates respondent's Sixth Amendment right to counsel because it "*may* 'end up in the actual deprivation of [respondent's] liberty,'" *ante*, at 658 (emphasis added), *if* he someday violates the terms of probation, *if* a court determines that the violation merits revocation of probation, Ala. Code §15–22–54(d)(1) (1995), and *if* the court determines that no other punishment will "adequately protect the community from further criminal activity" or "avoid depreciating the seriousness of the violation," §15–22–54(d)(4). And to all of these contingencies there must yet

be added, before the Court's decision makes sense, an element of rank speculation. Should all these contingencies occur, the Court speculates, the Alabama Supreme Court would mechanically apply its decisional law applicable to routine probation revocation (which establishes procedures that the Court finds inadequate) rather than adopt special procedures for situations that raise constitutional questions in light of *Argersinger* and *Scott*. *Ante*, at 666–668. The Court has miraculously divined how the Alabama justices would resolve a constitutional question.[1]

But that question is not the one before us, and the Court has no business offering an advisory opinion on its answer. We are asked to decide whether "imposition of a suspended or conditional sentence in a misdemeanor case invoke[s] a defendant's Sixth Amendment right to counsel." Pet. for Cert. i. Since *imposition* of a suspended sentence does not deprive a defendant of his personal liberty, the answer to *that* question is plainly no. In the future, *if and when* the State of Alabama seeks to imprison respondent on the previously suspended sentence, we can ask whether the procedural safeguards attending the imposition of that sentence comply with the Constitution. But that question is *not* before us now. Given our longstanding refusal to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), particularly with respect to constitutional questions (as to which we seek to avoid even *non*-advisory opinions, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring)), I am amazed by the Court's conclusion that it "makes little

[1] The Court says that the Alabama Supreme Court has already resolved this question, since, in finding that respondent's sentence violated the Sixth Amendment, it "expressed not the slightest hint that revocation-stage procedures . . . would affect the constitutional calculus." *Ante*, at 668, n. 6. Indeed it did not, and that was precisely its error. It did not answer (because it did not consider) the question whether procedures attending the probation revocation proceeding could cure the absence of counsel at trial.

sense" to limit today's decision to the question presented (the constitutionality of imposing a suspended sentence on uncounseled misdemeanants) and to avoid a question *not* presented (the constitutionality of the "procedures that will precede its activation"). *Ante*, at 667.

Although the Court at one point purports to limit its decision to suspended sentences imposed on uncounseled misdemeanants in States, like Alabama, that offer only "minimal procedures" during probation revocation hearings, see *ante*, at 668, n. 5, the text of today's opinion repudiates that limitation. In answering the question we asked *amicus* to address—whether "the Sixth Amendment permit[s] activation of a suspended sentence upon the defendant's violation of the terms of probation"—the Court states without qualification that "it does not." *Ante*, at 662. Thus, when the Court says it "doubt[s]" that any procedures attending the reimposition of the suspended sentence "could satisfy the Sixth Amendment," *ante*, at 668, n. 5, it must be using doubt as a euphemism for certitude.

The Court has no basis, moreover, for its "doubt." Surely the procedures attending reimposition of a suspended sentence would be adequate if they required, upon the defendant's request, complete retrial of the misdemeanor violation with assistance of counsel. By what right does the Court deprive the State of that option?[2] It may well be a sensible

[2] The Court asserts that pretrial probation, which its opinion permits, is the "functional equivalent" of post-trial probation with later retrial if the suspended sentence is to be activated. Even if that were so, I see no basis for forcing the State to employ one "functional equivalent" rather than the other. But in fact there is nothing but the Court's implausible speculation to support the proposition that pretrial probation will "yiel[d] a similar result," *ante*, at 671. That would certainly be a curious coincidence, inasmuch as pretrial probation has the quite different purpose of conserving prosecutorial and judicial resources by forgoing trial. See, *e. g.*, 3a U. S. Dept. of Justice, United States Attorneys' Manual § 9–22.000 (1988); H. Abadinsky, Probation and Parole: Theory and Practice 348–349 (3d ed. 1987) (pretrial probation programs "use the fact that an arrest has

option, since most defendants will be induced to comply with the terms of their probation by the mere threat of a retrial that could send them to jail, and since the expense of those rare, counseled retrials may be much less than the expense of providing counsel initially in all misdemeanor cases that bear a possible sentence of imprisonment. And it may well be that, in some cases, even procedures short of complete retrial will suffice.[3]

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occurred as a means of identifying defendants in need of treatment or, at least, not in need of criminal prosecution"). Moreover, pretrial probation is generally available only for minor offenses, App. to Reply Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 1a, and is available in States (*e. g.*, Alabama) that also employ post-trial probation, *id.*, at 3a. If the thesis that it is the "functional equivalent" of post-trial probation were true, we would expect to see pretrial probation used for both major and minor crimes and to see it used in place of, not in addition to, post-trial probation.

[3] The Court quotes Chief Justice Burger's concurrence in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), to support its "doubt that providing counsel after the critical guilt adjudication stage '[would] be of much help to a defendant,' for 'the die is usually cast when judgment is entered on an uncounseled trial record.' *Argersinger*, 407 U. S., at 41." *Ante*, at 668, n. 5. But that passage was addressing the limited benefits of "*[a]ppeal* from a conviction after an uncounseled trial," *Argersinger*, *supra*, at 41 (emphasis added), and was doubtless correct in light of the uniformly restricted scope of appellate review. But it makes no sense to transfer the Chief Justice's concerns to unknown and unknowable forms of probation revocation proceedings, which may provide various means of retesting (with assistance of counsel) the validity of the original conviction. The Court notes that a "large number of misdemeanor convictions take place in police or justice courts which are not courts of record," making it quite difficult for a defendant "to demonstrate error in the original proceeding." *Ante*, at 668, n. 5 (internal quotation marks omitted). But it is entirely irrelevant whether a "*large number of misdemeanor convictions*" take place in police or justice courts. What matters is whether a record is available in misdemeanor convictions *that result in a suspended prison sentence* (a presumably small fraction of all misdemeanor convictions). We have no reliable information on that point other than the experience of the present case—which shows that Alabama does provide a record which counsel can comb for substantive and procedural inadequacy. Re-

Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment. See, *e. g.*, *Scott*, 440 U. S., at 373 (any extension of *Argersinger* would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States"); see also *Argersinger*, 407 U. S., at 56–62 (Powell, J., concurring in result) (same). Today, the Court gives this consideration the back of its hand. Its observation that "[a]ll but 16 States" already appoint counsel for defendants like respondent, *ante*, at 669, is interesting but quite irrelevant, since today's holding is not confined to *defendants like respondent.* Appointed counsel must henceforth be offered before *any* defendant can be awarded a suspended sentence, no matter how short. Only 24 States have announced a rule of this scope.[4] Thus, the Court's deci-

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spondent was tried before a judge in State District Court, a court of record; he subsequently exercised his right, under Ala. Code § 12–12–71 (1995), to trial *de novo* before a jury in State Circuit Court, a higher court of record. See *Ex parte Maye*, 799 So. 2d 944, 947 (Ala. 2001).

[4] Ten of the thirty-four States cited by the Court do not offer appointed counsel in all cases where a misdemeanor defendant might suffer a suspended sentence. Six States guarantee counsel only when the authorized penalty is *at least* three or six months' imprisonment. See Idaho Code §§ 19–851(d)(2), 19–852(a) (1948–1997); *State* v. *Hardman*, 120 Idaho 667, 669–670, 818 P. 2d 782, 784–785 (App. 1991); Md. Ann. Code, Art. 27A, §§ 2(h)(2), 4(b)(2) (1957–1997); Nev. Rev. Stat. §§ 178.397, 193.120 (1996); N. M. Stat. Ann. §§ 31–16–2, 31–16–3 (2000); *State* v. *Woodruff*, 124 N. M. 388, 396, n. 3, 951 P. 2d 605, 613, n. 3 (1997); Ohio Rules Crim. Proc. 2(C), 44(A) (2002); 18 Pa. Cons. Stat. § 106(c) (1998); Pa. Rules Crim. Proc. 122(A), (B) (2002); *Commonwealth* v. *Thomas*, 510 Pa. 106, 111, n. 7, 507 A. 2d 57, 59, n. 7 (1986). South Dakota does not provide counsel where the maximum permissible sentence is 30 days' imprisonment, S. D. Codified Laws § 22–6–2 (1998), if "the court has concluded that [the defendant] will not be deprived of his liberty if he is convicted," §§ 23A–40–6, 23A–40–6.1. Texas's statute declares that appointed counsel should be offered to any defendant "charged with a misdemeanor punishable by confinement," Tex. Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp. 2002), but the state courts have construed this provision to require appointment only "when the court *knows* that the punishment it will assess includes

sion imposes a large, new burden on a majority of the States, including some of the poorest (*e. g.*, Alabama, Arkansas, and Mississippi, see U. S. Dept. of Commerce, Bureau of Census,

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imprisonment or when the trial is before the jury and the possible punishment includes imprisonment." *Fortner* v. *State*, 764 S. W. 2d 934, 935 (Tex. App. 1989) (emphasis added). Thus, nothing in Texas law assures counsel in a misdemeanor bench trial resulting in a suspended sentence. Finally, in two of the States that appoint counsel when imprisonment is "likely" to be imposed, the courts have not yet decided whether the likelihood of a *suspended* sentence qualifies, but the answer—as has been held with respect to the similarly phrased Pennsylvania statutes cited *supra*—is probably no. N. J. Stat. Ann. § 2A:158A–5.2 (1985); *Rodriguez* v. *Rosenblatt*, 58 N. J. 281, 295, 277 A. 2d 216, 223 (1971); N. C. Gen. Stat. § 7A–451(a)(1) (1999); *State* v. *McCoy*, 304 N. C. 363, 370, 283 S. E. 2d 788, 791–792 (1981).

The District of Columbia must also be numbered among the jurisdictions whose law is altered by today's decision. District of Columbia Code Ann. § 11–2602 (West 2001) guarantees counsel in "all cases where a person faces a loss of liberty *and* the Constitution or any other law requires the appointment of counsel." (Emphasis added.) Today's decision, discarding the rule of *Argersinger*, brings suspended sentences within this prescription.

The Court asserts that the burden of today's decision on these jurisdictions is small because the "circumstances in which [they] currently allow prosecution of misdemeanors without appointed counsel are quite *narrow*." *Ante*, at 670, n. 10 (emphasis added). But the narrowness of the range of circumstances covered says nothing about the number of suspended-sentence cases covered. Misdemeanors punishable by less than six months' imprisonment may be a narrow category, but it may well include the vast majority of cases in which (precisely *because* of the minor nature of the offense) a suspended sentence is imposed. There is simply nothing to support the Court's belief that few offenders are prosecuted for crimes in which counsel is not already provided. The Court minimizes the burden on Pennsylvania by observing that the "summary offenses" for which it permits uncounseled suspended sentences include such rarely prosecuted crimes as failing to return a library book within 30 days and fishing on Sunday. *Ibid.* But they also include first-offense minor retail theft, driving with a suspended license, and harassment (which includes minor assault). See *Thomas*, *supra*, at 109, 507 A. 2d, at 58; 75 Pa. Cons. Stat. § 1543(b)(1) (Supp. 2002); 18 Pa. Cons. Stat. §§ 2709(a), (c)(1) (2000). Over against the Court's uninformed intuition, there is an *amicus* brief

Statistical Abstract of the United States 426 (2001)). That burden consists not only of the cost of providing state-paid counsel in cases of such insignificance that even financially prosperous defendants sometimes forgo the expense of hired counsel; but also the cost of enabling courts and prosecutors to respond to the "over-lawyering" of minor cases. See *Argersinger*, *supra*, at 58–59 (Powell, J., concurring in result). Nor should we discount the burden placed on the minority 24 States that currently provide counsel: that they keep their current disposition forever in place, however imprudent experience proves it to be.

Today's imposition upon the States finds justification neither in the text of the Constitution, nor in the settled practices of our people, nor in the prior jurisprudence of this Court. I respectfully dissent.

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filed by States that include 2 of the 10 with exceptions that the Court calls "narrow," affirming that the rule the Court has adopted today will impose "significant burdens on States." Brief for Texas, Ohio, Montana, Nebraska, Delaware, Louisiana, and Virginia as *Amici Curiae* 22.

Syllabus

MATHIAS ET AL. *v.* WORLDCOM TECHNOLOGIES, INC., ET AL.

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

No. 00–878. Argued December 5, 2001—Decided May 20, 2002

Because, after full briefing and oral argument, it is clear that petitioners were the prevailing parties below and seek review of uncongenial findings not essential to the judgment and not binding upon them in future litigation, certiorari is dismissed as improvidently granted. See *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 *(per curiam)*.

Certiorari dismissed. Reported below: 179 F. 3d 566.

Joel D. Bertocchi, Solicitor General of Illinois, argued the cause for petitioners. With him on the briefs were *James E. Ryan*, Attorney General, *A. Benjamin Goldgar* and *Michael P. Doyle*, Assistant Attorneys General, *Myra L. Karegianes*, *John P. Kelliher*, and *Thomas R. Stanton*.

Barbara McDowell argued the cause for the United States as respondent under this Court's Rule 12.6 urging affirmance. With her on the brief were *Solicitor General Olson*, *Acting Assistant Attorney General Katsas*, *Deputy Solicitor General Wallace*, *Mark B. Stern*, *Charles W. Scarborough*, and *John A. Rogovin*.

Paul M. Smith argued the cause for respondents. With him on the brief for respondents WorldCom Technologies, Inc., et al. were *William M. Hohengarten*, *Michael B. DeSanctis*, *Darryl M. Bradford*, *John J. Hamill*, *William Single IV*, *Brian J. Leske*, and *Richard Metzger*. *David W. Carpenter*, *Stephen B. Kinnaird*, and *Marc C. Rosenblum* filed a brief for respondent AT&T Communications of Illinois, Inc., et al. *Stephen M. Shapiro*, *John E. Muench*, *Theodore A. Livingston*, *Robert M. Dow, Jr.*, *Michael W. McConnell*, *Martin H. Redish*, and *William M. Schur* filed a brief

for respondent Illinois Bell Telephone Co., dba Ameritech Illinois.*

PER CURIAM.

We granted certiorari to consider three questions: (1) whether a state commission's action relating to the enforcement of an interconnection agreement is reviewable in federal court under 47 U. S. C. § 252(e)(6) (1994 ed., Supp. IV); (2) whether a state commission waives its Eleventh Amendment immunity by voluntarily participating in the regulatory scheme established by the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56; and (3) whether the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), permits suit for prospective relief against state public utility commissioners in their official capacities for alleged

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*Briefs of *amici curiae* urging reversal were filed for the State of New Jersey et al. by *John J. Farmer, Jr.*, Attorney General of New Jersey, *Andrea Silkowitz* and *Nancy Kaplen*, Assistant Attorneys General, and *Stefanie A. Brand*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *Steve Carter* of Indiana, *Thomas F. Reilly* of Massachusetts, *Carla J. Stovall* of Kansas, *Jennifer M. Granholm* of Michigan, *Ray Cooper* of North Carolina, *Herbert D. Soll* of the Northern Mariana Islands, *Betty D. Montgomery* of Ohio, *Mark Barnett* of South Dakota, and *Mark L. Shurtleff* of Utah; for the Coalition for Local Sovereignty by *Kenneth B. Clark;* for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* and for the Pennsylvania Public Utility Commission by *Maryanne Reynolds Martin* and *Bohdan R. Pankiw.*

Briefs of *amici curiae* urging affirmance were filed for BellSouth Corp. et al. by *Mark L. Evans, Michael K. Kellogg, Sean A. Lev, Aaron M. Panner, William P. Barr, Mark J. Mathis, Michael D. Lowe, Charles R. Morgan,* and *John W. Hunter;* and for the NOW Legal Defense and Education Fund by *Lesley Szanto Friedman, Aidan Synnott, Martha F. Davis,* and *Isabelle Katz Pinzler.*

Briefs of *amici curiae* were filed for the National Association of Regulatory Utility Commissioners et al. by *James Bradford Ramsay, Carl F. Patka,* and *Neil T. Erwin;* and for Sprint Corp. by *David P. Murray.*

ongoing violations of that Act. 532 U. S. 903 (2001). After full briefing and oral argument, it is now clear that petitioners were the prevailing parties below, and seek review of uncongenial findings not essential to the judgment and not binding upon them in future litigation. As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous. See *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 (1934) *(per curiam)*.

We have since granted certiorari to the United States Court of Appeals for the Fourth Circuit to review the same questions, arising in the same factual context. *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, and *United States* v. *Public Serv. Comm'n of Md.*, 534 U. S. 1072 (2001). Our decision in those cases is released today. See *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, *ante*, p. 635. The writ in this case is dismissed as improvidently granted.

It is so ordered.

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

Syllabus

BELL, WARDEN *v.* CONE

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

No. 01–400. Argued March 25, 2002—Decided May 28, 2002

Respondent was tried in a Tennessee court for the murder of an elderly couple, whose killings culminated a 2-day crime rampage in which respondent also committed robbery and shot a police officer and another citizen. At his trial, the prosecution adduced overwhelming evidence that respondent perpetrated the crimes and killed the couple in a brutal and callous fashion. His defense that he was not guilty by reason of insanity due to substance abuse and posttraumatic stress disorders related to his Vietnam military service was supported by expert testimony about his drug use and by his mother's testimony that he returned from Vietnam a changed person. The jury found him guilty on all charges. The next day, during opening statements at the sentencing hearing for the murders, the prosecution said that it would prove four aggravating factors warranting the death penalty, and the defense called the jury's attention to the mitigating evidence already before it. Defense counsel cross-examined prosecution witnesses, but called no witnesses. After the junior prosecutor gave a low-key closing, defense counsel waived final argument, which prevented the lead prosecutor, by all accounts an extremely effective advocate, from arguing in rebuttal. The jury found four aggravating factors and no mitigating circumstances, which, under Tennessee law, required a death sentence. The State Supreme Court affirmed. After a hearing in which respondent's trial counsel testified, the State Criminal Court denied his petition for postconviction relief, rejecting his contention that his counsel rendered ineffective assistance during the sentencing phase by failing to present mitigating evidence and waiving final argument. In affirming, the State Court of Criminal Appeals found counsel's performance within the permissible range of competency under the attorney-performance standard of *Strickland* v. *Washington*, 466 U. S. 668. Subsequently, the Federal District Court denied respondent's federal habeas petition, ruling that he did not meet 28 U. S. C. § 2254(d)(1)'s requirement that a state decision be "contrary to," or involve "an unreasonable application of, clearly established Federal law." The Sixth Circuit reversed with respect to the sentence, finding that respondent suffered a Sixth Amendment violation for which prejudice should be presumed under *United States* v. *Cronic*, 466 U. S. 648, because his counsel, by not asking for mercy after the prosecutor's

final argument, did not subject the State's death penalty call to meaningful adversarial testing; and that the state court's adjudication of respondent's claim was therefore an unreasonable application of the clearly established law announced in *Strickland*.

Held: Respondent's claim was governed by *Strickland*, and the state court's decision neither was "contrary to," nor involved "an unreasonable application of, clearly established Federal law" under § 2254(d)(1). Pp. 693–702.

(a) Section 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. A federal habeas court may grant relief under the former clause if the state court applies a rule different from the governing law set forth in this Court's cases, or if it decides a case differently than this Court has done on a set of materially indistinguishable facts. *Williams* v. *Taylor*, 529 U. S. 362, 405–406. The federal court may grant relief under the latter clause if the state court correctly identifies the governing legal principle from this Court's decisions but unreasonably applies it in the particular case. *Id.*, at 407–410. Such application must be objectively unreasonable, which is different from incorrect. To satisfy *Strickland*'s two-part test for evaluating claims that counsel performed so incompetently that a defendant's sentence or conviction should be reversed, the defendant must prove that counsel's representation fell below an objective reasonableness standard and that there is a reasonable probability that, but for counsel's unprofessional error, the proceeding's result would have been different. In *Cronic*, this Court identified three situations in which it is possible to presume prejudice to the defense. Respondent argues that his claim fits within the exception for cases where "counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing," 466 U. S., at 659 (emphasis added), because his counsel failed to mount a case for life imprisonment after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. Under *Cronic*, the attorney's failure to test the prosecutor's case must be complete. Here, respondent argues not that his counsel failed to oppose the prosecution throughout the sentencing proceeding, but that he failed to do so at specific points. The challenged aspects of counsel's performance—failing to adduce mitigating evidence and waiving closing argument—are plainly of the same ilk as other specific attorney errors subject to *Strickland*'s performance and prejudice components. See, *e. g.*, *Darden* v. *Wainwright*, 477 U. S. 168, 184. Because the state court correctly identified *Strickland*'s principles as those governing the analysis of respondent's claim, there is no merit in his contention that the state

court's adjudication was contrary to this Court's clearly established law. Pp. 693–698.

(b) Nor was the state court's decision "an unreasonable application" of *Strickland*. *Strickland* requires a defendant to overcome the "presumption that . . . the challenged action 'might be considered sound trial strategy.'" 466 U. S., at 689. Section 2254(d)(1) requires respondent to do more, *i. e.*, show that the state court applied *Strickland* to his case in an objectively unreasonable manner. This he cannot do. Counsel was faced with the onerous task of defending a client who had committed a brutal and senseless crime and who, despite a relatively normal upbringing, had become a drug addict and robber. Counsel reasonably could have concluded that the substance of the medical experts' testimony during the guilt phase was still fresh to the jury during the sentencing phase, and that respondent's mother had not made a good witness at the guilt stage and should not be subjected to further cross-examination. Respondent's sister refused to testify, and counsel had sound tactical reasons for not calling respondent himself. Counsel also feared that the prosecution might elicit information about respondent's criminal history from other witnesses that he could have called, and that testimony about respondent's normal youth might cut the other way in the jury's eyes. Counsel's final-argument options were to make a closing argument and reprise for the jury the primary mitigating evidence, plead for his client's life, and impress upon the jury other, less significant facts, knowing that it would give the persuasive lead prosecutor the chance to depict his client as a heartless killer just before the jurors began deliberation; or to prevent the lead prosecutor from arguing by waiving his own summation and relying on the jurors' familiarity with the case and his opening plea for life made just a few hours before. Neither option so clearly outweighs the other that it was objectively unreasonable for the state court to deem his choice a tactical decision about which competent lawyers might disagree. Pp. 698–702.

243 F. 3d 961, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 702.

Michael E. Moore, Solicitor General of Tennessee, argued the cause for petitioner. With him on the briefs were *Gordon W. Smith*, Associate Solicitor General, and *Jennifer L. Smith*, Assistant Attorney General.

Lisa Schiavo Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, and *Deputy Solicitor General Dreeben*.

Robert L. Hutton, by appointment of the Court, 534 U. S. 1111, argued the cause for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Tennessee Court of Appeals rejected respondent's claim that his counsel rendered ineffective assistance during his sentencing hearing under principles announced in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The Court of Appeals for the Sixth Circuit concluded that *United States* v. *Cronic*, 466 U. S. 648 (1984), should have controlled the state court's analysis and granted him a conditional writ of habeas corpus. We hold that respondent's claim was governed by *Strickland*, and that the state court's decision neither was

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*Briefs of *amicus curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *David M. Gormley*, State Solicitor, and *Matthew Hellman*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Steve Carter* of Indiana, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *David Samson* of New Jersey, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *Iver A. Stridiron* of the Virgin Islands, *Jerry Kilgore* of Virginia, *Christine O. Gregoire* of Washington, and *Hoke MacMillan* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Walter Dellinger, *Pamela Harris*, and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Larry W. Yackle and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union et al. as *amicus curiae*.

"contrary to," nor involved "an unreasonable application of, clearly established Federal law" under the provisions of 28 U. S. C. § 2254(d)(1).

I

In 1982, respondent was convicted of, and sentenced to death for, the murder of an elderly couple in Memphis, Tennessee. The killings culminated a 2-day crime rampage that began when respondent robbed a Memphis jewelry store of approximately $112,000 in merchandise on a Saturday in August 1980. Shortly after the 12:45 p.m. robbery, a police officer in an unmarked vehicle spotted respondent driving at a normal speed and began to follow him. After a few blocks, respondent accelerated, prompting a high-speed chase through midtown Memphis and into a residential neighborhood where respondent abandoned his vehicle. Attempting to flee, respondent shot an officer who tried to apprehend him, shot a citizen who confronted him, and, at gunpoint, demanded that another hand over his car keys. As a police helicopter hovered overhead, respondent tried to shoot the fleeing car owner, but was frustrated because his gun was out of ammunition.

Throughout the afternoon and into the next morning, respondent managed to elude detection as police combed the surrounding area. In the meantime, officers inventorying his car found an array of illegal and prescription drugs, the stolen merchandise, and more than $2,400 in cash. Respondent reappeared early Sunday morning when he drew a gun on an elderly resident who refused to let him in to use her telephone. Later that afternoon, respondent broke into the home of Shipley and Cleopatra Todd, aged 93 and 79 years old, and killed them by repeatedly beating them about the head with a blunt instrument. He moved their bodies so that they would not be visible from the front and rear doors and ransacked the first floor of their home. After shaving his beard, respondent traveled to Florida. He was arrested

there for robbing a drugstore in Pompano Beach. He admitted killing the Todds and shooting the police officer.

A Tennessee grand jury charged respondent with two counts of first-degree murder in the perpetration of a burglary in connection with the Todds' deaths, three counts of assault with intent to murder in connection with the shootings and attempted shooting of the car owner, and one count of robbery with a deadly weapon for the jewelry store theft. At a jury trial in the Criminal Court of Shelby County, the prosecution adduced overwhelming physical and testimonial evidence showing that respondent perpetrated the crimes and that he killed the Todds in a brutal and callous fashion.

The defense conceded that respondent committed most of the acts in question, but sought to prove that he was not guilty by reason of insanity. A clinical psychologist testified that respondent suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam. A neuropharmacologist recounted at length respondent's history of illicit drug use, which began after he joined the Army and escalated to the point where he was daily consuming "rather horrific" quantities. Tr. 1722–1763. That drug use, according to the expert, caused chronic amphetamine psychosis, hallucinations, and ongoing paranoia, which affected respondent's mental capacity and ability to obey the law. Defense counsel also called respondent's mother, who spoke of her son coming back from Vietnam in 1969 a changed person, his honorable discharge from service, his graduation with honors from college, and the deaths of his father and fiancée while he was in prison from 1972–1979 for robbery. Although respondent did not take the stand, defense counsel was able to elicit through other testimony that he had expressed remorse for the killings. Rejecting his insanity defense, the jury found him guilty on all charges.

Punishment for the first-degree murder counts was fixed in a separate sentencing hearing that took place the next day and lasted about three hours. Under then-applicable Ten-

nessee law, a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one statutory aggravating circumstance that was not outweighed by any mitigating circumstance. Tenn. Code Ann. § 39–2–203 (1982). In making these determinations, the jury could (and was instructed that it could) consider evidence from both the guilt and punishment phases. *Ibid.;* Tr. 2219.

During its opening statement, the State said it would prove four aggravating factors: that (1) respondent had previously been convicted of one or more felonies involving the use or threat of violence to a person; (2) he knowingly created a great risk of death to two or more persons other than the victim during the act of murder; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed for the purpose of avoiding lawful arrest. In his opening statement, defense counsel called the jury's attention to the mitigating evidence already before them. He suggested that respondent was under the influence of extreme mental disturbance or duress, that he was an addict whose drug and other problems stemmed from the stress of his military service, and that he felt remorse. Counsel urged the jury that there was a good reason for preserving his client's life if one looked at "the whole man." App. 26. He asked for mercy, calling it a blessing that would raise them above the State to the level of God.

The prosecution then called a records custodian and fingerprint examiner to establish that respondent had three armed robbery convictions and two officers who said they tried unsuccessfully to arrest respondent for armed robbery after the jewelry store heist. Through cross-examination of the records custodian, respondent's attorney brought out that his client had been awarded the Bronze Star in Vietnam. After defense counsel successfully objected to the State's proffer of photos of the Todds' decomposing bodies, both sides rested. The junior prosecuting attorney on the case

gave what the state courts described as a "low-key" closing.[1] Defense counsel waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal. The jury found in both murder cases four aggravating factors and no mitigating circumstances substantial enough to outweigh them. The Tennessee Supreme Court affirmed respondent's convictions and sentence on appeal, *State* v. *Cone*, 665 S. W. 2d 87, and we denied certiorari, 467 U. S. 1210 (1984).

Respondent then petitioned for state postconviction relief, contending that his counsel rendered ineffective assistance during the sentencing phase by failing to present mitigating evidence and by waiving final argument. After a hearing in which respondent's trial counsel testified, a division of the Tennessee Criminal Court rejected this contention. The Tennessee Court of Criminal Appeals affirmed. *Cone* v. *State*, 747 S. W. 2d 353 (1987). The appellate court reviewed counsel's explanations for his decisions concerning the calling of witnesses and the waiving of final argument. *Id.*, at 356–357. Describing counsel's representation as "very conscientious," the court concluded that his performance was within the permissible range of competency, citing *Baxter* v. *Rose*, 523 S. W. 2d 930 (Tenn. 1975), a decision the Tennessee Supreme Court deems to have announced the same attorney performance standard as *Strickland* v. *Washington*, 466 U. S. 668 (1984). See, *e. g.*, *State* v. *Burns*, 6 S. W. 3d 453, 461 (1999). The court also expressed its view that respondent received the death penalty based on the law and facts, not on the shortcomings of counsel. 747 S. W. 2d, at 357–358. The Tennessee Supreme Court denied respondent permission to appeal, and we denied further review, *Cone* v. *Tennessee*, 488 U. S. 871 (1988).

In 1997, after his second application for state postconviction relief was dismissed, respondent sought a federal writ

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[1] See *Cone* v. *State*, 747 S. W. 2d 353, 357 (Tenn. Crim. App. 1987).

of habeas corpus under 28 U. S. C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996. His petition alleged numerous grounds for relief including ineffective assistance at the sentencing phase. The District Court ruled that respondent did not meet § 2254(d)'s requirements and denied the petition.

The Court of Appeals affirmed the refusal to issue a writ with respect to respondent's conviction, but reversed with respect to his sentence. 243 F. 3d 961, 979 (CA6 2001). It held that respondent suffered a Sixth Amendment violation for which prejudice should be presumed under *United States* v. *Cronic*, 466 U. S. 648 (1984), because his counsel, by not asking for mercy after the prosecutor's final argument, did not subject the State's call for the death penalty to meaningful adversarial testing. 243 F. 3d, at 979. The state court's adjudication of respondent's Sixth Amendment claim, in the Court of Appeals' analysis, was therefore an unreasonable application of the clearly established law announced in *Strickland*. 243 F. 3d, at 979. We granted certiorari, 534 U. S. 1064 (2001), and now reverse the Court of Appeals.

II

The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. See *Williams* v. *Taylor*, 529 U. S. 362, 403–404 (2000). To these ends, § 2254(d)(1) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

lished Federal law, as determined by the Supreme Court of the United States."[2]

As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U. S., at 404–405. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.*, at 405–406. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407–408. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409–410. See also *id.*, at 411 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Petitioner contends that the Court of Appeals exceeded its statutory authority to grant relief under § 2254(d)(1) because the decision of the Tennessee courts was neither contrary to nor an unreasonable application of the clearly established law of *Strickland*. Respondent counters that he is entitled to relief under § 2254(d)(1)'s "contrary to" clause because the state court applied the wrong legal rule. In his view, *Cronic*, not *Strickland*, governs the analysis of his claim that

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[2] JUSTICE STEVENS' dissent does not cite this statutory provision governing respondent's ability to obtain federal habeas relief, much less explain how his claim meets its standards.

his counsel rendered ineffective assistance at the sentencing hearing. We address this issue first.

In *Strickland*, which was decided the same day as *Cronic*, we announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed. We reasoned that there would be a sufficient indication that counsel's assistance was defective enough to undermine confidence in a proceeding's result if the defendant proved two things: first, that counsel's "representation fell below an objective standard of reasonableness," 466 U. S., at 688; and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. Without proof of both deficient performance and prejudice to the defense, we concluded, it could not be said that the sentence or conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable," *id.*, at 687, and the sentence or conviction should stand.

In *Cronic*, we considered whether the Court of Appeals was correct in reversing a defendant's conviction under the Sixth Amendment without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial. 466 U. S., at 650, 658. We determined that the court had erred and remanded to allow the claim to be considered under *Strickland*'s test. 466 U. S., at 666–667, and n. 41. In the course of deciding this question, we identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.*, at 658–659.

First and "[m]ost obvious" was the "complete denial of counsel." *Id.*, at 659. A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at "a critical stage," *id.*, at 659, 662, a phrase we used

in *Hamilton* v. *Alabama*, 368 U. S. 52, 54 (1961), and *White* v. *Maryland*, 373 U. S. 59, 60 (1963) *(per curiam)*, to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.[3] Second, we posited that a similar presumption was warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, *supra*, at 659. Finally, we said that in cases like *Powell* v. *Alabama*, 287 U. S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected. *Cronic*, *supra*, at 659–662.

Respondent argues that his claim fits within the second exception identified in *Cronic* because his counsel failed to "mount some case for life" after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. Brief for Respondent 26. We disagree. When we

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[3] In a footnote, we also cited other cases besides *Hamilton* v. *Alabama* and *White* v. *Maryland* where we found a Sixth Amendment error without requiring a showing of prejudice. Each involved criminal defendants who had actually or constructively been denied counsel by government action. See *United States* v. *Cronic*, 466 U. S. 648, 659, n. 25 (1984) (citing *Geders* v. *United States*, 425 U. S. 80, 91 (1976) (order preventing defendant from consulting his counsel "about anything" during a 17-hour overnight recess impinged upon his Sixth Amendment right to the assistance of counsel); *Herring* v. *New York*, 422 U. S. 853, 865 (1975) (trial judge's order denying counsel the opportunity to make a summation at close of bench trial denied defendant assistance of counsel); *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972) (law requiring defendant to testify first at trial or not at all deprived accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense," *i. e.*, when and whether to take the stand); *Ferguson* v. *Georgia*, 365 U. S. 570, 596 (1961) (statute retaining common-law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to elicit his statements before the jury, was inconsistent with Fourteenth Amendment); *Williams* v. *Kaiser*, 323 U. S. 471 (1945) (allegation that petitioner requested counsel but did not receive one at the time he was convicted and sentenced stated case for denial of due process)).

spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, *supra*, at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.[4]

The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strick-*

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[4] In concluding that *Cronic* applies to respondent's ineffective-assistance claim, the dissent relies in part on inferences it draws from evidence that his attorney sought treatment for a mental illness four years after respondent's trial. See *post*, at 715–716 (opinion of STEVENS, J.). While the dissent admits that counsel's mental health problems "may have onset after [respondent's] trial," it speculates that counsel's mental health problems began earlier based on its "complete reading of the trial transcript and an assessment of [counsel's] actions at trial." *Post*, at 716. But, as the dissent concedes, respondent did not present *any* evidence regarding his counsel's mental health in the state-court proceedings. Before us, respondent does not argue that we could consider his attorney's medical records obtained in the federal habeas proceedings in assessing his Sixth Amendment claim, nor does he suggest that his counsel suffered from mental health problems at the time of his trial. Furthermore, any implication that trial counsel was impaired during his representation is contradicted by the testimony of the two experts called during the state postconviction hearing. Both had extensive experience in prosecuting and defending criminal cases and were familiar with trial counsel's abilities. Wayne Emmons said that counsel was "not only fully capable, but one of the most conscientious lawyers [he] knew." State Postconviction Tr. 73. And Stephen Shankman said he considered respondent's counsel "to be one of the finest practitioners in [the] community in the area of criminal defense work," *id.*, at 182, and "an extremely experienced lawyer" whom he would be "hardpressed to second guess," *id.*, at 190.

land's performance and prejudice components. In *Darden* v. *Wainwright*, 477 U. S. 168, 184 (1986), for example, we evaluated under *Strickland* a claim that counsel was ineffective for failing to put on any mitigating evidence at a capital sentencing hearing. In *Burger* v. *Kemp*, 483 U. S. 776, 788 (1987), we did the same when presented with a challenge to counsel's decision at a capital sentencing hearing not to offer any mitigating evidence at all.

We hold, therefore, that the state court correctly identified the principles announced in *Strickland* as those governing the analysis of respondent's claim. Consequently, we find no merit in respondent's contention that the state court's adjudication was contrary to our clearly established law. Cf. *Williams*, 529 U. S., at 405 ("The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed' " (quoting Webster's Third New International Dictionary 495 (1976))).

III

The remaining issue, then, is whether respondent can obtain relief on the ground that the state court's adjudication of his claim involved an "unreasonable application" of *Strickland*. In *Strickland* we said that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Thus, even when a court is presented with an ineffective-assistance claim not subject to § 2254(d)(1) deference, a defendant must overcome the "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Ibid.* (quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955)).

For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland*'s test if his

claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. See *Williams*, *supra*, at 411. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.

Respondent's counsel was faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime against two elderly persons in their home. He had just the day before shot a police officer and an unarmed civilian, attempted to shoot another person, and committed a robbery. The State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings. Making the situation more onerous were the facts that respondent, despite his high intelligence and relatively normal upbringing, had turned into a drug addict and had a history of robbery convictions.

Because the defense's theory at the guilt phase was not guilty by reason of insanity, counsel was able to put before the jury extensive testimony about what he believed to be the most compelling mitigating evidence in the case—evidence regarding the change his client underwent after serving in Vietnam; his drug dependency, which apparently drove him to commit the robbery in the first place; and its effects. Before the state courts, respondent faulted his counsel for not recalling his medical experts during the sentencing hearing. But we think counsel reasonably could have concluded that the substance of their testimony was still fresh to the jury. Each had taken the stand not long before, and counsel focused on their testimony in his guilt phase closing argument, which took place the day before the sentencing hearing was held. Respondent's suggestion that the jury could not fully consider the mental health proof as

potentially mitigating because it was adduced during the guilt phase finds no support in the record. Defense counsel advised the jury that the testimony of the experts established the existence of mitigating circumstances, and the trial court specifically instructed the jury that evidence of a mental disease or defect insufficient to establish a criminal defense could be considered in mitigation. Tr. 2221.

Respondent also assigned error in his counsel's decision not to recall his mother. While counsel recognized that respondent's mother could have provided further information about respondent's childhood and spoken of her love for him, he concluded that she had not made a good witness at the guilt stage, and he did not wish to subject her to further cross-examination. Respondent advances no argument that would call his attorney's assessment into question.

In his trial preparations, counsel investigated the possibility of calling other witnesses. He thought respondent's sister, who was closest to him, might make a good witness, but she did not want to testify. And even if she had agreed, putting her on the stand would have allowed the prosecutor to question her about the fact that respondent called her from the Todds' house just after the killings. After consulting with his client, counsel opted not to call respondent himself as a witness. And we think counsel had sound tactical reasons for deciding against it. Respondent said he was very angry with the prosecutor and thought he might lash out if pressed on cross-examination, which could have only alienated him in the eyes of the jury. There was also the possibility of calling other witnesses from his childhood or days in the Army. But counsel feared that the prosecution might elicit information about respondent's criminal history.[5]

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[5] Respondent cites *Cozzolino* v. *State*, 584 S. W. 2d 765 (Tenn. 1979), to argue that calling additional witnesses would not have opened the door to evidence about his prior bad acts. We need not express any view as to Tennessee law on this issue except to point out that *Cozzolino* does not state such a broad, categorical rule. *Cozzolino* held that a trial court

He further feared that testimony about respondent's normal youth might, in the jury's eyes, cut the other way.

Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "reject[ed] out of hand" the idea that waiving summation could ever be considered sound trial strategy. 243 F. 3d, at 979. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable." After respondent's counsel gave his opening statement discussing the mitigating evidence before them and urging that they choose life for his client, the prosecution did not put on any particularly dramatic or impressive testimony. The State's witnesses testified rather briefly about the undisputed facts that respondent had prior convictions and was evading arrest.

When the junior prosecutor delivered a very matter-of-fact closing that did not dwell on any of the brutal aspects of the crime, counsel was faced with a choice. He could make a closing argument and reprise for the jury, perhaps in greater detail than his opening, the primary mitigating evidence concerning his client's drug dependency and posttraumatic stress from Vietnam. And he could plead again for life for his client and impress upon the jurors the importance of what he believed were less significant facts, such as the Bronze Star decoration or his client's expression of remorse. But he knew that if he took this opportunity, he would give the lead prosecutor, who all agreed was very persuasive, the

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erred in admitting evidence that the defendant committed crimes *after* the murder because that evidence was not relevant to any aggravating factors or mitigating factors raised by the defense. *Id.,* at 767–768. In this case, at a minimum, any evidence about respondent's *prior* robbery convictions would have been relevant because the State relied on those convictions to prove an aggravating circumstance.

chance to depict his client as a heartless killer just before the jurors began deliberation. Alternatively, counsel could prevent the lead prosecutor from arguing by waiving his own summation and relying on the jurors' familiarity with the case and his opening plea for life made just a few hours before. Neither option, it seems to us, so clearly outweighs the other that it was objectively unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a tactical decision about which competent lawyers might disagree.

We cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. 466 U. S., at 689. Given the choices available to respondent's counsel and the reasons we have identified, we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objectively unreasonable. 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, dissenting.

In my judgment, the Court of Appeals correctly concluded that during the penalty phase of respondent's capital murder trial, his counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 659 (1984). Counsel's shortcomings included a failure to interview witnesses who could have provided mitigating evidence; a failure to introduce available mitigating evidence; and the failure to make any closing argument or plea for his client's life at the conclusion of the penalty phase. Furthermore, respondent's counsel was, subsequent to trial, diagnosed with a mental illness that ren-

dered him unqualified to practice law, and that apparently led to his suicide. See App. 88–89. These circumstances "justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." *Cronic*, 466 U. S., at 662.

I

Certain facts about respondent, Gary Cone, are not in dispute. Cone was a "gentle child," of exceptional intelligence, with an outstanding academic record in high school. App. 62–63. His father was an officer in the United States Army and a firm disciplinarian. He apparently enjoyed a loving relationship with his older brother and with both of his sisters. At age 8 or 9, however, Cone witnessed the drowning of his older brother. In 1966, at age 18, Cone enlisted in the Army and was sent to Germany. He was eventually transferred to Vietnam, where he served as a supply clerk until 1969. His service in Vietnam involved, among other things, transporting corpses and performing long hours of guard duty. He was awarded the Bronze Star, and he received an honorable discharge.

After returning to the States, Cone graduated from college and, although accepted into law school for August/September 1980, never enrolled. According to Cone, he began to use drugs—mainly amphetamines—while in Vietnam, in order to perform extended guard duties, and he continued to do so after his discharge from the Army. In an apparent effort to fund this growing drug habit, he committed robberies, and, in 1972, after college, he was convicted of armed robbery and incarcerated in Oklahoma until 1979. While he was in prison, his father died and his fiancée, whom he met while in college, was raped and murdered. After his release from prison, he kept in touch with his mother (who lived in Arkansas) and his sister (who lived in Chicago), but did not stay in one place. The lack of evidence of gainful employment post-1979, coupled with evidence of travels to

Florida and Hawaii, suggests that Cone supported himself and his drug habit by criminal activity.

The Court has fairly described the facts of respondent's crime. *Ante*, at 689–690. However, in order to understand both why *Cronic* applies in the present case, and how counsel completely failed respondent at the penalty phase, I describe the events at trial in more detail. In his opening statement at the guilt phase of the trial, respondent's counsel, John Dice, admitted to the jury that Cone had committed the crimes for which he was charged, but explained that he was not guilty by reason of insanity—a condition brought on by excessive drug use that resulted from "Vietnam Veterans Syndrome." See, *e. g.*, Tr. 956–957.[1] Dice explained to the jury that Cone's time in Vietnam had transformed him, leading to his insanity, and Dice promised several witnesses in aid of this insanity defense, including Cone's sister Susan, Cone's mother, and his two aunts, all of whom would "testify about the Gary Cone that they knew," *id.*, at 953, that is, the

[1] Dice claims credit for developing this defense, but these claims are unsubstantiated and appear exaggerated from Dice's testimony. See State Postconviction Tr. 92. Nonetheless, such a defense was in its early stages at the time of respondent's 1982 trial, and has become more widely asserted. See generally Levin, Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder, 46 Am. Jur. Trials 441 (1993 and Supp. 2001). Furthermore, as of 1980, the American Psychiatric Association began formally to recognize posttraumatic stress disorder (PTSD), which can derive from disturbing war experiences. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 463–468 (rev. 4th ed. 2000).

The PTSD from which respondent allegedly suffered would sensibly have been used by Dice as mitigation in the penalty phase. See Levin, 46 Am. Jur. Trials § 37. However, its viability as the guilt phase defense in this case was unlikely at best, because insanity in this context applies when "[t]he veteran who believes he is again in combat . . . attacks one whom he believes to be an enemy soldier." Davidson, Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War, 29 Wm. & Mary L. Rev. 415, 424 (1988). Cone was not in combat and his crime did not fit this description.

pre-Vietnam Cone. Dice also advised the jury that he would prove that the victim's sister had written a letter of forgiveness to Cone's mother—"one of the most loving letters I've ever read in my life," in Dice's words. *Id.*, at 965–966.[2]

Despite these promises, after the State's affirmative case in the guilt phase, Dice presented only three witnesses in support of the insanity defense: Cone's mother testified about his behavior after his return from Vietnam, but the court largely precluded her from discussing Cone's pre-Vietnam life; a clinical psychologist testified about posttraumatic stress resulting from Cone's Vietnam service; and a neuropharmacologist testified about Cone's drug use and its effects. Through these witnesses, Dice attempted to paint a picture of a normal person who fell victim to "amphetamine psychosis" and became a "junkie of such unbelievable proportions that it would have been impossible for him to form any intent." *Id.*, at 957. Cone was not a witness at the guilt phase, though he did take the stand outside the presence of the jury to waive his right to testify.

In its rebuttal case, the State adduced the testimony of Aileen Blankman, whom Cone visited in Florida approximately one day after the murders. She testified that respondent neither used drugs while visiting her, nor appeared to have recently used drugs, thereby calling into question his claim of drug addiction. According to Dice's co-counsel, Blankman's testimony "utterly destroyed our defense. We were totally unprepared for that." State Postconviction Tr. 42. Dice knew of Blankman's contact with Cone after the murders, and was "absolutely" aware that Blankman was

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[2] This letter's mitigating effect would have been significant. It read, in part: "Even tho I am still in shock over the tragic death of my dear brother and his wife, I want you to know that you and your family have my prayers and deepest sympathy. I am also praying for Gary. We know he must have been out of his mind to have done the things he did. May God forgive him." Record, Exh. 29. See Tr. 1280–1281 (referencing letter, marked as Exhibit 29, which was never submitted to the jury).

a possible prosecution witness, but Dice failed to interview her before the trial. *Id.*, at 138.[3] In guilt phase rebuttal, the State also introduced its own medical experts to challenge the defense experts' testimony concerning Cone's alleged insanity. Although the State's experts questioned Cone's claim of Vietnam Veterans Syndrome, their testimony focused on Cone's failure to satisfy the insanity standard. See Tr. 1957, 1983. It took less than two hours for the jury to return a guilty verdict on all counts.

Dice's stated attitude toward the penalty phase must frame our consideration of the constitutional standard applicable to this case. Once his "Vietnam Veterans Syndrome" defense was rejected in the guilt phase, it appears that Dice approached the penalty phase with a sense of hopelessness because his "basic tactic was to try to convince the jury that Gary Cone was insane at the time of the commission of these acts, and the jury rejected that." State Postconviction Tr. 109. Dice perceived that the guilt phase evidence concerning Cone's mental health "made absolutely no difference to the jury," *id.*, at 159, and that the jurors "weren't buying any of it," *id.*, at 156, even though that evidence had been introduced to the jury through the lens of the insanity defense, not as mitigation for the death penalty.[4] Dice's co-

[3] With respect to this failure, Dice explained: "So, we could have interviewed her, but we didn't. I don't know, maybe she was devastating and maybe she wasn't, but let's say that we had interviewed her, you know, what would it have changed? If she'd come up here and she'd testified, she would have testified the same way I assume." State Postconviction Tr. 140.

[4] It is true that the jury was instructed to consider mitigation from the guilt phase, and also true that Dice's brief penalty phase opening referenced the mental health evidence from the guilt phase, *ante*, at 691, but the jury's whole view of that testimony was influenced by its relation to the debunked insanity defense. Although the State's experts may have been successful in undermining Cone's claim to insanity, they did not necessarily undermine the potential mitigating effect of Cone's mental health evidence.

counsel echoed the sentiment that death was a foregone conclusion: "I don't recall too much on any discussion, really, about the penalty stage, mainly because my own feeling about the case law as it was then, and I guess as it still is, is that when a jury is [*Witherspoon*ed] in,[5] it's a fixed jury. They're going to find a death penalty. . . . It was almost a hopeless feeling that the way the problem was going to be solved was through the Court of Appeals, not through any jury verdict." *Id.*, at 39. Indeed, Dice expressed this hopelessness even before the trial began; he testified that he told Cone's mother "the first day I met her, that if [the prosecutor] does not elect to offer life in this case, your boy is going to the chair and there's not going to be a darn thing . . . I'm going to be able to do to stop it except to maybe screw up the prosecution." *Id.*, at 108. Moreover, Dice's testimony in state postconviction reveals his "radical" view of the penalty phase. *Id.*, at 122. When asked if the purpose of the penalty phase was to "individualize the defendant," Dice replied "[t]hat's your view of it as a lawyer, not mine," *id.*, at 124, and when asked why a capital proceeding is bifurcated, Dice replied "God only knows," *id.*, at 125.[6] His co-counsel's postconviction testimony confirms Dice's misguided views. Discussing the penalty phase, co-counsel stated: "I don't believe I understood the separate nature of it. I don't believe that I understood the necessity . . . of perhaps producing

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[5] Her comments refer to *Witherspoon* v. *Illinois*, 391 U. S. 510, 518 (1968) (finding no general constitutional bar to a State's "exclusion of jurors opposed to capital punishment," *i. e.*, "death-qualification" of a jury, because of no proof that such a bar "results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction").

[6] Dice's comments concerning the penalty phase are not only erroneous in content, but inappropriate in tone. For example, when asked about capital sentencing, he rejected the notion that the Constitution requires an individualized death penalty decision: "The reason's political as far as I'm concerned. The method is insanity . . . . I don't care whether it's legal or not. When you kill people who kill people to show that killing people is wrong, it's insane." State Postconviction Tr. 124.

more evidence in mitigating circumstances, in that phase also." *Id.*, at 49.

The parties agree that Dice did four things in the penalty phase. See Brief for Respondent 36. First, he made a brief opening argument in the penalty phase asking for mercy. Second, in this opening, he referenced the evidence concerning Vietnam Veterans Syndrome that had been presented in the guilt phase. Third, he brought out on cross-examination of the State's witness who presented court records of respondent's prior convictions that Cone had been awarded the Bronze Star in Vietnam, though he did not explain the significance of that decoration to the jury because he made no closing remarks after the cross-examination. And, fourth, outside of the jury's presence, he successfully objected to the State's introduction of two photographs of the murder victims. Aside from doing these things, however, Dice did nothing before or during the penalty phase—he did not interview witnesses aside from those relevant to the guilt phase; he did not present testimony relevant to mitigation from the witnesses who were available; and he made no plea for Cone's life or closing remarks after the State's case.

Dice conceded that he did not interview various people from Cone's past, such as his high school teachers and classmates, who could have testified that Cone was a good person who did not engage in criminal behavior pre-Vietnam. Dice agreed that such witnesses would likely have been available if Dice had, in his words, "been stupid enough to put them on." State Postconviction Tr. 104. Apparently, Dice did not interview these individuals in preparation for the penalty phase, because he assumed that the State's cross-examination of those witnesses would emphasize the seriousness of Cone's post-Vietnam criminal behavior. *Id.*, at 104–105, 137. Dice's reasoning is doubtful to say the least because, regardless of the state of Tennessee law, see *ante*, at 696, n. 3, these post-Vietnam crimes were already known to the jury through the State's penalty phase evidence of

respondent's prior convictions. Further, it is hard to imagine how evidence of Cone's post-Vietnam behavior would change their assessments—indeed, Dice's whole case was that Cone had changed.[7]

Dice also failed to present to the jury mitigation evidence that he did have on hand. He admitted that other witnesses—including those whose testimony he promised to the jury in the guilt phase opening, such as Cone's mother, sister, and aunts—had been interviewed and were available to testify at the penalty phase. Dice had ready access to other mitigation evidence as well: testimony from Cone himself (in which he could have, among other things, expressed remorse and discussed his brother's drowning and his fiancée's murder), the letter of forgiveness from the victim's sister, the Bronze Star, and the medical experts. Dice's *post hoc* reasons for not putting on these additional witnesses and evidence are puzzling, but appear to rest largely on his incorrect assumption that the guilt phase record already included "what little mitigating circumstances we had," State Postconviction Tr. 133, and his fear of the prosecutor, "who by all accounts was an extremely effective advocate," *ante*, at 692; see, *e. g.*, State Postconviction Tr. 105, 107–108, 123, 136, 137.

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[7] The Court's brief descriptions of Dice's reasoning for his choices, see *ante*, at 699–702, gives this reasoning more legitimacy than it merits. Only by reading Dice's lengthy answers from the postconviction hearing is it clear how confused and misguided Dice was. For example, with respect to the supposed damage that these mitigation witnesses could do, Dice speaks in generalities about unsubstantiated fears: "Picture this scenario. You've got them on the stand; once you've put on this trial for life, as we call it, you and I, and the burden is what now? It's only preponderance of the evidence. Comes now the skilled prosecutor, Mr. Strother, over there, and says, oh, he was a good student in high school; right? And Vietnam affected his mind; right? What about all the robberies he pulled? They have him in prison in Oklahoma. I mean, he was in prison once. Did you know about those things? And how about this and that, you know, and other things Mr. Cone told me about? " State Postconviction Tr. 104–105.

Although the guilt phase evidence included information about Cone's post-Vietnam behavior, it told the jury little about Cone's earlier life.[8] During the guilt phase, Dice had a difficult enough time convincing the court to allow him to present evidence of respondent's post-Vietnam behavior and drug addiction as an insanity defense, that he did not seriously attempt to introduce evidence of respondent's childhood. However, such evidence would have been permissible mitigation in the penalty phase. This evidence would have revealed Cone to be "a quiet, studious child," with "absolutely no suggestion of any behavioral disturbance, even in adolescence." App. 93. Indeed, his mother could have described him as a "perfect" child, *ibid.*, and she "absolutely" wanted to testify at the penalty hearing to make a plea for Cone's life, but Dice "wouldn't put her on even if she'd wanted to," because he "did not feel that she did well on the stand," and because of "the cross-examination skills of the District Attorney involved." State Postconviction Tr. 97–98, 193. Dice's claim that she had not made a good witness at the guilt phase, see *ante*, at 700, is contradicted by the transcript of her straightforward trial testimony, Tr. 1631–1656, and his desire not to subject her to cross-examination is surely an insufficient reason, absent more, to prevent her from asking the jury to spare her son's life.

Dice also did not call as witnesses in mitigation either of Cone's sisters or his aunt, all of whom were promised in Dice's opening statement. Dice's statement that Cone's sister Sue "did not want to testify," *ante*, at 700, is contradicted by his opening statement. And his fear that she might have been questioned "about the fact that [Cone] called her from the [victims'] house just after the killings," *ibid.*, is unfounded: Evidence of this call was already in the record, and further reference to the call could do no conceivable additional harm to Cone's case. Indeed, Dice's justification for

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[8] Cf. Levin, 46 Am. Jur. Trials § 37 ("Counsel needs to clearly draw the contrast in the client from before and after Vietnam").

not calling Sue merely illustrates Dice's extraordinary fear of his adversaries. Dice's explanation for his failure to call Cone's other sister, Rita, is even more unsatisfying: "I think that we had a letter exchange or a phone call. My tactics do not necessarily involve putting the family on down here because, again, . . . I thought that we were in a position which we should say was tenuous from the outset." State Postconviction Tr. 136. His failure to call Cone's aunt is unexplained. His failure to offer into evidence the letter written by the victim's sister, offering her prayers for Cone, is also unexplained. See n. 2, *supra.*

Dice did not put Cone on the stand during the penalty phase, forfeiting the opportunity for him to express the remorse he apparently felt, see Tr. 1675. Dice testified that he discussed with Cone the possibility of testifying, but opted not to call him at the penalty phase because of fear that respondent might "lash out if pressed on cross-examination." *Ante,* at 700. He also claimed that Cone made the decision not to testify at the penalty phase because Cone feared the prosecutor. In Dice's words, Cone "realized that [the prosecutor] was a very intelligent and skilled cross-examiner and [Cone] felt that he would go off if he took the stand." State Postconviction Tr. 103. However, this explanation conspicuously echoes Dice's *own* fears about the prosecutor's prowess. Furthermore, respondent testified that Dice never "urged [him] as to the importance of testifying at the penalty stage," *id.*, at 204, and Dice testified that his duties did not include urging Cone to testify, *id.*, at 119. Given the undisputed evidence of Cone's intelligence and no indication that his behavior in the courtroom was anything but exemplary, it is difficult to imagine why any competent lawyer would so readily abandon any effort to persuade his client to take the stand when his life was at stake. Dice's claim that he did no more than permit Cone to reach his own decision about testifying in the penalty phase is simply not credible. Rather, it appears that Dice, fearful of the prosecutor, did not specifically discuss testifying in the penalty

phase with Cone, but rather discussed with him the possibility of taking the stand on only one occasion—during the guilt phase of the trial.[9]

Dice's failure to recall the medical experts who testified in the guilt phase is a closer question, and may have been justified by his belief that they could not add anything that had not already been presented to the jury.[10] Nevertheless, had they been called, Dice could have made the point, likely lost on the jury as a result of Dice's "strategy," that the experts' appraisal of Cone had mitigating significance, even if it did not establish his insanity. For there is a vast difference between insanity—which the defense utterly failed to prove—and the possible mitigating effect of drug addiction incurred as a result of honorable service in the military. By not emphasizing this distinction, Dice made it far less likely that the jury would treat either the trauma resulting from Cone's tour of duty in Vietnam[11] or other traumatic events in his

[9] This conclusion follows from Cone's testimony that he was only consulted once, in a three-person conference, about testifying, before he got on the stand to state that he would not be testifying. State Postconviction Tr. 203–204. Cone initially recalled that this meeting occurred in the penalty stage, though he then expressed uncertainty on this point; however, he remained certain that there had been only one meeting. See *ibid.* The conference must have concerned the guilt phase, because it was during the guilt phase that Cone waived his right to testify. See Tr. 1865–1866. Furthermore, Dice's co-counsel does not remember a discussion concerning Cone's possible testimony at the penalty phase, State Postconviction Tr. 35, 48; Dice himself testified repeatedly that Cone does not lie, *id.*, at 117, 120, 139, 141; and Dice himself was unable to state for certain that Cone was consulted about penalty phase testimony, *id.*, at 118.

[10] Indeed, had counsel's performance not been so completely deficient, this would be the sort of strategic choice about which counsel would be owed deference under *Strickland* v. *Washington*, 466 U. S. 668, 689 (1984). In this case, however, because of Dice's total failure in the penalty phase, it is difficult to credit even arguably reasonable choices as the result of "reasonable professional judgment," *id.*, at 690. See *infra*, at 717–718.

[11] "Although not a combat soldier in Vietnam, Gary described disturbing and traumatic experiences while there. For example, the stench from the corpses, and the way in which they were stored in refrigerators alongside

life [12] as mitigating. And, again, the reason for Dice's failure is that Dice himself failed to appreciate this distinction, for he believed that the "jury had completely rejected" the experts' testimony after losing at the guilt phase. *Id.*, at 156.

In addition to performing no penalty phase investigation and failing to introduce available mitigation, Dice made no closing statement after the State's affirmative case for death. Rather, Dice's "strategy" was to rely on his brief penalty phase opening statement. This opening statement did refer to the evidence of drug addiction and the expert testimony already in the record, though it is unclear to what end, as Dice believed that the jury had "completely rejected" this testimony, *ibid.* Dice's statement also explained that respondent's drug abuse began under the "stress and strain of combat service," Tr. 2118, even though the jurors knew that Cone had not been in combat. Otherwise, Dice failed to describe the substantial mitigating evidence of which he was aware: Cone's Bronze Star; his good character before entering the military; the deaths in his family; the rape and murder of his fiancée; and his loving relationships with his mother, his sisters, and his aunt. At best, Dice's opening statement and plea for Cone's life was perfunctory; indeed, it occupies only 4½ of the total 2,158 trial transcript pages.

Dice's decision not to make a closing argument was most strongly motivated by his fear that his adversary would make a persuasive argument depicting Cone as a heartless

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food; witnessing death; being required, even on occasion to fire a weapon; the long hours of guard duty; and the escalating drug abuse, often ostensibly sanctioned by superior officers." App. 96.

[12] According to a defense psychologist's report about Cone, the major traumas in his life have been: "witnessing his brother's body being removed from the lake"; "[h]is grandmother's death, just after high school graduation. Gary lived with her, and clearly viewed her as a safe haven from his father"; "[d]uty in Vietnam, 1968–1969. Although not a combat soldier, experiences were beyond the realm of normal experiences for a 20-year-old"; and the "[r]ape and murder of his fiancée in December 1972." *Id.*, at 102.

killer. At all costs, Dice wanted to avoid the prosecutor "slash[ing] me to pieces on rebuttal," as "[h]e's done . . . a hundred times." State Postconviction Tr. 123. Dice hoped that by not making a closing statement, the prosecutor would "kind of follo[w] me right down the primrose path." *Id.*, at 107. Of course, at the time Dice waived closing argument, the aggravating circumstances had already been proved, and Dice knew that the judge would instruct the jury to return a verdict of death unless the jurors were persuaded that the aggravating circumstances were outweighed by mitigating evidence. Perhaps that burden was insurmountable, but the jury must have viewed the absence of any argument in response to the State's case for death as Dice's concession that no case for life could be made. A closing argument provided the only chance to avoid the inevitable outcome of the "primrose path"—a death sentence.[13]

Both of the experienced criminal lawyers who testified as expert witnesses in the state postconviction proceedings refused to state categorically that it would never be appropriate to waive closing argument, to fail to put the defendant on the stand during the penalty phase of the trial, or to offer no mitigating evidence in the penalty phase. Both witnesses agreed, however, that Dice's tactical decisions were

[13] In his postconviction testimony, Dice offered another reason for waiving closing argument. He claimed that the State, in its penalty phase case, had "screw[ed] up the aggravated circumstances" by arguing to the jury an aggravating factor that was unsupported by the evidence—that the lives of two or more people other than the victims were endangered by the defendant. State Postconviction Tr. 108. Dice testified that he was concerned that if he made a closing argument, the State might realize its mistake and correct the error in its rebuttal closing argument. See *id.*, at 103–104. Not only is Dice's explanation incredible, but, unsurprisingly, Dice's "strategy" did not work "perfectly," as Dice claimed it did, *id.*, at 103, because the State Supreme Court found any error concerning the aggravators to be harmless, *State* v. *Cone*, 665 S. W. 2d 87, 95 (Tenn. 1984). More importantly, such a "strategy" is never appropriate; counsel's hope for an appellate victory concerning one trial error cannot justify abdication of his duty as advocate for the remainder of the proceeding.

highly abnormal, and perhaps unprecedented in a capital case.

II

On these facts, and as a result of Dice's overwhelming failure at the penalty phase, the Court of Appeals properly concluded that *Cronic* controls the Sixth Amendment claim in this case, and that prejudice to respondent should be presumed. Given Dice's repeated and unequivocal testimony about Cone's truthfulness, together with Cone's apparent feelings of remorse, see Tr. 1675, Dice's decision not to offer Cone's testimony in the penalty phase is simply bewildering. And his decisions to present no mitigation case in the penalty phase,[14] and to offer no closing argument in the face of the prosecution's request for death,[15] are nothing short of incredible. Moreover, Dice's explanations for his decisions not only were uncorroborated, but were, in my judgment, patently unsatisfactory. Indeed, his rambling and often incoherent descriptions of his unusual trial strategy lend strong support to the Court of Appeals' evaluation of this case and its decision not to defer to Dice's lack of meaningful participation in the penalty phase as "strategy."[16]

Although the state courts did not have the benefit of evidence concerning Dice's mental health, it appears from Dice's

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[14] Cf. *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse'" (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring))).

[15] Cf. *Herring* v. *New York*, 422 U. S. 853, 862 (1975) ("In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment").

[16] Dice's main explanation of his decision to waive closing argument at the close of the penalty hearing is quoted in an appendix to this opinion.

medical records that he suffered from a severe mental impairment. He began treatment for this illness a couple of years after trial, and he committed suicide approximately six months after the postconviction hearing in this case. See App. 88–89. The symptoms of his disorder included "confused thinking, impaired memory, inability to concentrate for more than a short period of time, paranoia, grandiosity, [and] inappropriate behavior." *Id.*, at 88. While these mental health problems may have onset after Cone's trial, a complete reading of the trial transcript and an assessment of Dice's actions at trial suggest this not to be the case.

A theme of fear of possible counterthrusts by his adversaries permeates Dice's loquacious explanations of his tactical decisions. But fear of the opponent cannot justify such absolute dereliction of a lawyer's duty to the client—especially a client facing death. For "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). There may be cases in which such timidity is consistent with a "meaningful adversarial testing" of the prosecution's case, *Cronic*, 466 U. S., at 659, but my examination of the record has produced a firm conviction that this is not such a case.

The Court claims that *Cronic*'s second prong only applies when "counsel failed to oppose the prosecution throughout the sentencing proceeding *as a whole*." *Ante*, at 697 (emphasis added). But that is exactly what Dice did. It is true, as the Court claims, that respondent's complaints about Dice's performance can be framed as complaints about what Dice failed to do "at specific points," *ibid.* However, when those complaints concern "points" that encompass all of counsel's fundamental duties at a capital sentencing proceeding—performing a mitigation investigation, putting on available mitigation evidence, and making a plea for the defendant's life after the State has asked for death—counsel *has* failed

"entirely," *ibid.* (quoting *Cronic*, 466 U. S., at 659 (emphasis omitted)). The Court of Appeals' conclusion in this regard exemplifies a court's proper use of its judgment to recognize when failures "at specific points" amount to an "entir[e] fail-[ure]" within the meaning of *Cronic*. We recognized the importance of the exercise of such judgment in *Strickland* v. *Washington*, 466 U. S. 668 (1984), in which we explained that Sixth Amendment principles are "not . . . mechanical rules," and that "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*, at 698.

The majority also claims that *Cronic*'s second prong does not apply because this Court has previously analyzed claims "of the same ilk," *ante*, at 697, under *Strickland*, not *Cronic*. However, in none of our previous cases applying *Strickland* to a penalty phase ineffectiveness claim did the challenged attorney not only fail to conduct a penalty phase investigation, but also fail to put on available mitigation evidence and fail to make a closing argument asking to spare the defendant's life. See *Williams* v. *Taylor*, 529 U. S. 362 (2000); *Burger* v. *Kemp*, 483 U. S. 776 (1987); and *Darden* v. *Wainwright*, 477 U. S. 168 (1986). Furthermore, in none of these cases was there evidence that counsel had as "radical" a view of the penalty phase as Dice's, and in none of these cases was the lawyer's own mental health called into question, as it has been here. It is, of course, true that a "total" failure claim, which we confront here, could theoretically be analyzed under *Strickland*. However, as *Cronic* makes clear, see *ante*, at 695–696, although *Strickland could* apply in all Sixth Amendment right to counsel cases, it does not.

Moreover, presuming prejudice when counsel has entirely failed to function as an adversary makes sense, for three reasons. First, counsel's complete failure to advocate, coupled here with his likely mental illness, undermines *Strickland*'s

basic assumption: that counsel has "made all significant decisions in the exercise of reasonable professional judgment." 466 U. S., at 690. Second, a proper *Strickland* inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct. Finally, counsel's total failure as an adversary renders "the likelihood that the verdict is unreliable" to be "so high that a case-by-case inquiry is unnecessary." *Mickens* v. *Taylor*, *ante*, at 166.

The Court's holding today is entirely consistent with its recent decision in *Mickens*. In both cases, according to the Court, a presumption that every lawyer in every capital case has performed ethically, diligently, and competently is appropriate because such performance generally characterizes the members of an honorable profession. It is nevertheless true that there are rare cases in which blind reliance on that presumption, or uncritical analysis of a lawyer's proffered explanations for aberrant behavior in the courtroom, may result in the denial of the constitutional "right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The importance of protecting this right in capital cases cannot be overstated.[17] Effective representa-

[17] A recent, comprehensive report issued by the Governor's Commission reviewing Illinois' capital punishment system concluded: "'Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored.'" Report of the Governor's Commission on Capital Punishment 105 (2002) (quoting Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 6 (2001)).

Members of this Court have similarly recognized both the importance of qualified counsel in death cases, and the frequent lack thereof. See, *e. g.*, *McFarland* v. *Scott*, 512 U. S. 1256 (1994) (Blackmun, J., dissenting from denial of certiorari) (describing the "crisis in trial and state postconviction legal representation for capital defendants"); Lane, O'Connor Ex-

tion provides "the means through which the other rights of the person on trial are secured." *Cronic*, 466 U. S., at 653. For that reason, there is "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable" whenever defense counsel "entirely fails to subject the prosecution's case to meaningful adversary testing." *Id.*, at 659. That is exactly what happened in the penalty phase of Gary Cone's trial.

I respectfully dissent.

APPENDIX TO OPINION OF STEVENS, J.

Excerpt from Dice's postconviction testimony in which he explains his reasons for waiving closing argument:

"Q: While we're on that subject, will you summarize for us all the reasons that you had at that time, and not at this time, but at that time, for waiver of final argument in the penalty phase of the Cone matter?

"A: Okay. Number one; I thought that we had put on almost every mitigating circumstance that we had. Okay? In the first phase of the trial.

"Number two; I managed to sucker Mr. Patterson and Mr. Strother into putting on my Bronze Star decoration without having my defendant testify, which I felt was pretty good trial tactics. I know when I asked Mr. Blackwell that question, one of the two of them over there became unglued. Okay.

"Number three; I thought the trial judge had lost control of the case. He allowed Mr. Strother to call me unethical twice in front of the jury, and he did several things in there

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presses Death Penalty Doubt; Justice Says Innocent May Be Killed, Washington Post, July 4, 2001, p. A1 (reporting JUSTICE O'CONNOR's comment that "Perhaps it's time to look at minimum standards for appointed counsel in death cases" and JUSTICE GINSBURG's comment that "I have yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was well represented at trial").

which had made my client extremely angry. I forgive Mr. Strother for that. I don't think he really believes it, but he's a trial lawyer and he took the position.

"Okay. I'm saying the general feeling of that was going—the trial was not being conducted neutrally by the judge. Okay.

"The other thing that got to me about the aspects of why to waive, I knew again that they were so much out for blood that they'd screw up their own trial in terms of what the jury was going to find.

"Okay. Another factor is that my defendant told me that he would probably explode on the stand with anger if General Strother cross-examined him, and I know Don Strother to be an extremely competent cross-examiner.

"Q: Just so we'll be clear now. I've asked you to name the reasons for waiving final argument. Was whether or not what you just said about Mr. Cone possibly exploding, did that have anything to do with waiving final argument?

"A: Absolutely it did. I didn't make that decision at the last moment at all, Mr. Kopernak. That decision was carefully planned out. When the jury was only out for an hour, when they were only out for an hour, and I think it was close to that, and long before the trial I considered that as a trial tactic. Now, all these factors were being considered, not just one.

"Q: Okay. Go ahead, please.

"A: Okay.

"Q: Do you want me to go over those so you'll—(Interrupted)

"A: No, because I recall most of them pretty clearly. You know, we'd had all those things go on, and some of the things which had happened in the trial, and when Ural Adams had done that in the Groseclose case and he and I had spent so much time talking about whether or not to do it, I considered

that perhaps because of the nature of the opposition in this particular case, that it might be an effective tactic. And I'll tell you this much. Let's say that when we'd gotten down there that Mr. Strother had gotten up and made the first argument, I might not have waived at all if I knew that Patterson was going to make the kill argument. I might not have made it. But once Patterson made the first argument, and then those statements that were reported in the press where Mr. Patterson said, well, we're here because it's wrong to kill people. I'll never forget that one as long as I live. Okay. When he made that portion in another portion of the trial. So, what I chose to do is to make my closing argument in my opening argument and then suckered them along because they'd already made that mistake, as far as I was concerned. Okay? And see whether or not the jury would take what little mitigating circumstances we had and give us a verdict and keep him alive." State Postconviction Tr. 130–133.

Syllabus

FESTO CORP. *v.* SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD., ET AL.

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

No. 00–1543. Argued January 8, 2002—Decided May 28, 2002

Petitioner Festo Corporation owns two patents for an industrial device. When the patent examiner rejected the initial application for the first patent because of defects in description, 35 U. S. C. § 112, the application was amended to add the new limitations that the device would contain a pair of one-way sealing rings and that its outer sleeve would be made of a magnetizable material. The second patent was also amended during a reexamination proceeding to add the sealing rings limitation. After Festo began selling its device, respondents (hereinafter SMC) entered the market with a similar device that uses one two-way sealing ring and a nonmagnetizable sleeve. Festo filed suit, claiming that SMC's device is so similar that it infringes Festo's patents under the doctrine of equivalents. The District Court ruled for Festo, rejecting SMC's argument that the prosecution history estopped Festo from saying that SMC's device is equivalent. A Federal Circuit panel initially affirmed, but this Court granted certiorari, vacated, and remanded in light of *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17, 29, which had acknowledged that competitors may rely on the prosecution history to estop the patentee from recapturing subject matter surrendered by amendment as a condition of obtaining the patent. On remand, the en banc Federal Circuit reversed, holding that prosecution history estoppel applied. The court ruled that estoppel arises from any amendment that narrows a claim to comply with the Patent Act, not only from amendments made to avoid the prior art, as the District Court had held. The Federal Circuit also held that, when estoppel applies, it bars any claim of equivalence for the element that was amended. The court acknowledged that, under its prior cases, prosecution history estoppel constituted a flexible bar, foreclosing some, but not all, claims of equivalence, depending on the purpose of the amendment and the alterations in the text. However, the court overruled its precedents on the ground that their case-by-case approach had proved unworkable.

Held: Prosecution history estoppel may apply to any claim amendment made to satisfy the Patent Act's requirements, not just to amendments made to avoid the prior art, but estoppel need not bar suit against every equivalent to the amended claim element. Pp. 730–742.

Syllabus

(a) To enable a patent holder to know what he owns, and the public to know what he does not, the inventor must describe his work in "full, clear, concise, and exact terms." § 112. However, patent claim language may not describe with complete precision the range of an invention's novelty. If patents were always interpreted by their literal terms, their value would be greatly diminished. Insubstantial substitutes for certain elements could defeat the patent, and its value to inventors could be destroyed by simple acts of copying. Thus, a patent's scope is not limited to its literal terms, but embraces all equivalents to the claims described. See *Winans* v. *Denmead*, 15 How. 330, 347. Nevertheless, because it may be difficult to determine what is, or is not, an equivalent, competitors may be deterred from engaging in legitimate manufactures outside the patent's limits, or lulled into developing competing products that the patent secures, thereby prompting wasteful litigation. Each time the Court has considered the doctrine of equivalents, it has acknowledged this uncertainty as the price of ensuring the appropriate incentives for innovation, and it has affirmed the doctrine over dissents that urged a more certain rule. See, *e. g.*, *id.*, at 343, 347. Most recently, *Warner-Jenkinson*, *supra*, at 28, reaffirmed the doctrine. Pp. 730–733.

(b) Prosecution history estoppel requires that patent claims be interpreted in light of the proceedings before the Patent and Trademark Office (PTO). When the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised an unforeseen equivalent. See *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136–137. The rejection indicates that the patent examiner does not believe the original claim could be patented. While the patentee has the right to appeal, his decision to forgo an appeal and submit an amended claim is taken as a concession that the invention as patented does not reach as far as the original claim. See, *e. g.*, *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222, 228. Were it otherwise, the inventor might avoid the PTO's gatekeeping role and seek to recapture in an infringement action the very subject matter surrendered as a condition of receiving the patent. Pp. 733–735.

(c) Prosecution history estoppel is not limited to amendments intended to narrow the patented invention's subject matter, *e. g.*, to avoid prior art, but may apply to a narrowing amendment made to satisfy any Patent Act requirement, including § 112's requirements concerning the patent application's form. In *Warner-Jenkinson*, the Court made clear that estoppel applies to amendments made for a "substantial reason related to patentability," 520 U. S., at 33, but did not purport to catalog every reason that might raise an estoppel. Indeed, it stated that even

if the amendment's purpose were unrelated to patentability, the court might consider whether it was the kind of reason that nonetheless might require estoppel. *Id.*, at 40–41. Simply because estoppel has been discussed most often in the context of amendments made to avoid the prior art, see, *e. g.*, *id.*, at 30, it does not follow that amendments made for other purposes will not give rise to estoppel. Section 112 requires that the application describe, enable, and set forth the best mode of carrying out the invention. The patent should not issue if these requirements are not satisfied, and an applicant's failure to meet them could lead to the issued patent being held invalid in later litigation. Festo's argument that amendments made to comply with § 112 concern the application's form and not the invention's subject matter conflates the patentee's reason for making the amendment with the impact the amendment has on the subject matter. Estoppel arises when an amendment is made to secure the patent and the amendment narrows the patent's scope. If a § 112 amendment is truly cosmetic, it would not narrow the patent's scope or raise an estoppel. But if a § 112 amendment is necessary and narrows the patent's scope—even if only for better description—estoppel may apply. Pp. 735–737.

(d) Prosecution history estoppel does not bar the inventor from asserting infringement against every equivalent to the narrowed element. Though estoppel can bar challenges to a wide range of equivalents, its reach requires an examination of the subject matter surrendered by the narrowing amendment. The Federal Circuit's complete bar rule is inconsistent with the purpose of applying the estoppel in the first place—to hold the inventor to the representations made during the application process and the inferences that may be reasonably drawn from the amendment. By amending the application, the inventor is deemed to concede that the patent does not extend as far as the original claim, not that the amended claim is so perfect in its description that no one could devise an equivalent. The Court's view is consistent with precedent and PTO practice. The Court has consistently applied the doctrine in a flexible way, considering what equivalents were surrendered during a patent's prosecution, rather than imposing a complete bar that resorts to the very literalism the equivalents rule is designed to overcome. *E. g.*, *Goodyear Dental*, *supra*, at 230. The Federal Circuit ignored *Warner-Jenkinson*'s instruction that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community. See 520 U. S., at 28. Inventors who amended their claims under the previous case law had no reason to believe they were conceding all equivalents. Had they known, they might have appealed the rejection instead. *Warner-Jenkinson* struck the appropriate balance by placing the burden on the patentee to prove that an

amendment was not made for a reason that would give rise to estoppel. *Id.*, at 33. Similarly, the patentee should bear the burden of showing that the amendment does not surrender the particular equivalent in question. As the author of the claim language, his decision to narrow his claims through amendment may be presumed to be a general disclaimer of the territory between the original claim and the amended claim. *Exhibit Supply*, *supra*, at 136–137. However, in cases in which the amendment cannot reasonably be viewed as surrendering a particular equivalent—*e. g.*, where the equivalent was unforeseeable at the time of the application or the rationale underlying the amendment bears but a tangential relation to the equivalent—the patentee can rebut the presumption that prosecution history estoppel bars a finding of equivalence by showing that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent. Pp. 737–741.

(e) Whether Festo has rebutted the presumptions that estoppel applies and that the equivalents at issue have been surrendered should be determined in the first instance by further proceedings below. Pp. 741–742.

234 F. 3d 558, vacated and remanded.

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

Robert H. Bork argued the cause for petitioner. With him on the briefs were *Charles R. Hoffmann*, *Gerald T. Bodner*, *Glenn T. Henneberger*, *Anthony E. Bennett*, *Andrew L. Frey*, *Donald M. Falk*, and *Robert L. Bronston.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Olson*, *Acting Assistant Attorney General Schiffer*, *Jeffrey P. Minear*, *Vito J. DiPietro*, *Anthony J. Steinmeyer*, *Howard S. Scher*, and *Linda Moncys Isacson.*

Arthur I. Neustadt argued the cause for respondents. With him on the brief were *Charles L. Gholz*, *Robert T. Pous*, and *James B. Lampert.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert E. Hirshon, E. Anthony Figg, Minaksi Bhatt*, and *Robert H. Cameron;* for the American Intellectual Property Law Association by *Lawrence M. Sung* and *Janice M. Mueller;* for ASTA Medica

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to address once again the relation between two patent law concepts, the doctrine of equivalents and the rule of prosecution history estoppel. The Court considered the same concepts in *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17 (1997), and reaf-

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Aktiengesellschaft by *Steven B. Kelber;* for Bose Corp. by *Charles Hieken* and *Frank P. Porcelli;* for Celltech Group plc. by *Donald S. Chisum;* for Chiron Corp. by *Mr. Chisum;* for the Federal Circuit Bar Association by *Claire Laporte, Mitchell J. Matorin,* and *George E. Hutchinson;* for Fédération Internationale des Conseils en Propriété Industrielle by *Maxim H. Waldbaum, Raymond C. Stewart, John P. Sutton,* and *Tipton D. Jennings IV;* for the Houston Intellectual Property Law Association by *Sharon A. Israel;* for Intellectual Property Creators et al. by *Steven L. Winter;* for Litton Systems, Inc., by *John G. Roberts, Jr., Catherine E. Stetson, Rory J. Radding,* and *Stanton T. Lawrence III;* for the Minnesota Mining and Manufacturing Co. et al. by *Carter G. Phillips, Joseph R. Guerra, Mark E. Haddad, Gary L. Griswold, Robert A. Armitage, Philip S. Johnson, Wayne C. Jaeschke, Peter C. Richardson,* and *Kenneth Olson;* for the National Bar Association by *Edward W. Gray, Jr., Kendrew H. Colton,* and *John Moses;* for the National Intellectual Property Law Institute by *James Phillip Chandler;* for the Wisconsin Alumni Research Foundation et al. by *Susan G. Braden, Kevin M. O'Brien,* and *Michael E. Murphy;* and for Vincent P. Tassinari by *Mr. Tassinari, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Consumer Project on Technology by *Joshua D. Sarnoff;* for Genentech, Inc., by *Jeffrey P. Kushan* and *Marinn F. Carlson;* for Intel Corp. et al. by *Terry E. Fenzl, Alan H. Blankenheimer,* and *Howard Ross Cabot;* and for International Business Machines Corp. et al. by *Christopher A. Hughes, Mark J. Abate, Frederick T. Boehm, Mark F. Chadurjian, William J. Coughlin, Barry Estrin,* and *Richard Whiting.*

Briefs of *amici curiae* were filed for Applera Corp. et al. by *Matthew D. Powers* and *Edward R. Reines;* for the Institute of Electrical and Electronics Engineers-United States of America by *Andrew C. Greenberg* and *Matthew J. Conigliaro;* for Medimmune, Inc., by *Harvey Kurzweil* and *Henry J. Ricardo;* for the Patent, Trademark, & Copyright Section of the Bar Association of the District of Columbia by *William P. Atkins;* for the Philadelphia Intellectual Property Law Association by *Joan Taft Kluger* and *Manny D. Pokotilow;* and for Sean Patrick Suiter by *Mr. Suiter, pro se.*

firmed that a patent protects its holder against efforts of copyists to evade liability for infringement by making only insubstantial changes to a patented invention. At the same time, we appreciated that by extending protection beyond the literal terms in a patent the doctrine of equivalents can create substantial uncertainty about where the patent monopoly ends. *Id.*, at 29. If the range of equivalents is unclear, competitors may be unable to determine what is a permitted alternative to a patented invention and what is an infringing equivalent.

To reduce the uncertainty, *Warner-Jenkinson* acknowledged that competitors may rely on the prosecution history, the public record of the patent proceedings. In some cases the Patent and Trademark Office (PTO) may have rejected an earlier version of the patent application on the ground that a claim does not meet a statutory requirement for patentability. 35 U. S. C. § 132 (1994 ed., Supp. V). When the patentee responds to the rejection by narrowing his claims, this prosecution history estops him from later arguing that the subject matter covered by the original, broader claim was nothing more than an equivalent. Competitors may rely on the estoppel to ensure that their own devices will not be found to infringe by equivalence.

In the decision now under review the Court of Appeals for the Federal Circuit held that by narrowing a claim to obtain a patent, the patentee surrenders all equivalents to the amended claim element. Petitioner asserts this holding departs from past precedent in two respects. First, it applies estoppel to every amendment made to satisfy the requirements of the Patent Act and not just to amendments made to avoid pre-emption by an earlier invention, *i. e.*, the prior art. Second, it holds that when estoppel arises, it bars suit against every equivalent to the amended claim element. The Court of Appeals acknowledged that this holding departed from its own cases, which applied a flexible bar when considering what claims of equivalence were estopped by the

prosecution history. Petitioner argues that by replacing the flexible bar with a complete bar the Court of Appeals cast doubt on many existing patents that were amended during the application process when the law, as it then stood, did not apply so rigorous a standard.

We granted certiorari to consider these questions.

I

Petitioner Festo Corporation owns two patents for an improved magnetic rodless cylinder, a piston-driven device that relies on magnets to move objects in a conveying system. The device has many industrial uses and has been employed in machinery as diverse as sewing equipment and the Thunder Mountain ride at Disney World. Although the precise details of the cylinder's operation are not essential here, the prosecution history must be considered.

Petitioner's patent applications, as often occurs, were amended during the prosecution proceedings. The application for the first patent, the Stoll Patent (U. S. Patent No. 4,354,125), was amended after the patent examiner rejected the initial application because the exact method of operation was unclear and some claims were made in an impermissible way. (They were multiply dependent.) 35 U. S. C. § 112 (1994 ed.). The inventor, Dr. Stoll, submitted a new application designed to meet the examiner's objections and also added certain references to prior art. 37 CFR § 1.56 (2000). The second patent, the Carroll Patent (U. S. Patent No. 3,779,401), was also amended during a reexamination proceeding. The prior art references were added to this amended application as well. Both amended patents added a new limitation—that the inventions contain a pair of sealing rings, each having a lip on one side, which would prevent impurities from getting on the piston assembly. The amended Stoll Patent added the further limitation that the outer shell of the device, the sleeve, be made of a magnetizable material.

After Festo began selling its rodless cylinder, respondents (whom we refer to as SMC) entered the market with a device similar, but not identical, to the ones disclosed by Festo's patents. SMC's cylinder, rather than using two one-way sealing rings, employs a single sealing ring with a two-way lip. Furthermore, SMC's sleeve is made of a nonmagnetizable alloy. SMC's device does not fall within the literal claims of either patent, but petitioner contends that it is so similar that it infringes under the doctrine of equivalents.

SMC contends that Festo is estopped from making this argument because of the prosecution history of its patents. The sealing rings and the magnetized alloy in the Festo product were both disclosed for the first time in the amended applications. In SMC's view, these amendments narrowed the earlier applications, surrendering alternatives that are the very points of difference in the competing devices—the sealing rings and the type of alloy used to make the sleeve. As Festo narrowed its claims in these ways in order to obtain the patents, says SMC, Festo is now estopped from saying that these features are immaterial and that SMC's device is an equivalent of its own.

The United States District Court for the District of Massachusetts disagreed. It held that Festo's amendments were not made to avoid prior art, and therefore the amendments were not the kind that give rise to estoppel. A panel of the Court of Appeals for the Federal Circuit affirmed. 72 F. 3d 857 (1995). We granted certiorari, vacated, and remanded in light of our intervening decision in *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17 (1997). After a decision by the original panel on remand, 172 F. 3d 1361 (1999), the Court of Appeals ordered rehearing en banc to address questions that had divided its judges since our decision in *Warner-Jenkinson*. 187 F. 3d 1381 (1999).

The en banc court reversed, holding that prosecution history estoppel barred Festo from asserting that the accused device infringed its patents under the doctrine of equiva-

lents. 234 F. 3d 558 (2000). The court held, with only one judge dissenting, that estoppel arises from any amendment that narrows a claim to comply with the Patent Act, not only from amendments made to avoid prior art. *Id.*, at 566. More controversial in the Court of Appeals was its further holding: When estoppel applies, it stands as a complete bar against any claim of equivalence for the element that was amended. *Id.*, at 574–575. The court acknowledged that its own prior case law did not go so far. Previous decisions had held that prosecution history estoppel constituted a flexible bar, foreclosing some, but not all, claims of equivalence, depending on the purpose of the amendment and the alterations in the text. The court concluded, however, that its precedents applying the flexible-bar rule should be overruled because this case-by-case approach has proved unworkable. In the court's view a complete-bar rule, under which estoppel bars all claims of equivalence to the narrowed element, would promote certainty in the determination of infringement cases.

Four judges dissented from the decision to adopt a complete bar. *Id.*, at 562. In four separate opinions, the dissenters argued that the majority's decision to overrule precedent was contrary to *Warner-Jenkinson* and would unsettle the expectations of many existing patentees. Judge Michel, in his dissent, described in detail how the complete bar required the Court of Appeals to disregard 8 older decisions of this Court, as well as more than 50 of its own cases. 234 F. 3d, at 601–616.

We granted certiorari. 533 U. S. 915 (2001).

II

The patent laws "promote the Progress of Science and useful Arts" by rewarding innovation with a temporary monopoly. U. S. Const., Art. I, § 8, cl. 8. The monopoly is a property right; and like any property right, its boundaries should be clear. This clarity is essential to promote progress, be-

cause it enables efficient investment in innovation. A patent holder should know what he owns, and the public should know what he does not. For this reason, the patent laws require inventors to describe their work in "full, clear, concise, and exact terms," 35 U. S. C. § 112, as part of the delicate balance the law attempts to maintain between inventors, who rely on the promise of the law to bring the invention forth, and the public, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor's exclusive rights. *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 150 (1989).

Unfortunately, the nature of language makes it impossible to capture the essence of a thing in a patent application. The inventor who chooses to patent an invention and disclose it to the public, rather than exploit it in secret, bears the risk that others will devote their efforts toward exploiting the limits of the patent's language:

> "An invention exists most importantly as a tangible structure or a series of drawings. A verbal portrayal is usually an afterthought written to satisfy the requirements of patent law. This conversion of machine to words allows for unintended idea gaps which cannot be satisfactorily filled. Often the invention is novel and words do not exist to describe it. The dictionary does not always keep abreast of the inventor. It cannot. Things are not made for the sake of words, but words for things." *Autogiro Co. of America* v. *United States*, 384 F. 2d 391, 397 (Ct. Cl. 1967).

The language in the patent claims may not capture every nuance of the invention or describe with complete precision the range of its novelty. If patents were always interpreted by their literal terms, their value would be greatly diminished. Unimportant and insubstantial substitutes for certain elements could defeat the patent, and its value to inventors could be destroyed by simple acts of copying. For this

reason, the clearest rule of patent interpretation, literalism, may conserve judicial resources but is not necessarily the most efficient rule. The scope of a patent is not limited to its literal terms but instead embraces all equivalents to the claims described. See *Winans* v. *Denmead*, 15 How. 330, 347 (1854).

It is true that the doctrine of equivalents renders the scope of patents less certain. It may be difficult to determine what is, or is not, an equivalent to a particular element of an invention. If competitors cannot be certain about a patent's extent, they may be deterred from engaging in legitimate manufactures outside its limits, or they may invest by mistake in competing products that the patent secures. In addition the uncertainty may lead to wasteful litigation between competitors, suits that a rule of literalism might avoid. These concerns with the doctrine of equivalents, however, are not new. Each time the Court has considered the doctrine, it has acknowledged this uncertainty as the price of ensuring the appropriate incentives for innovation, and it has affirmed the doctrine over dissents that urged a more certain rule. When the Court in *Winans* v. *Denmead*, *supra*, first adopted what has become the doctrine of equivalents, it stated that "[t]he exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions." *Id.*, at 343. The dissent argued that the Court had sacrificed the objective of "[f]ul[l]ness, clearness, exactness, preciseness, and particularity, in the description of the invention." *Id.*, at 347 (opinion of Campbell, J.).

The debate continued in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605 (1950), where the Court reaffirmed the doctrine. *Graver Tank* held that patent claims must protect the inventor not only from those who produce devices falling within the literal claims of the patent but also from copyists who "make unimportant and insubstantial changes and substitutions in the patent which, though adding

nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law." *Id.*, at 607. Justice Black, in dissent, objected that under the doctrine of equivalents a competitor "cannot rely on what the language of a patent claims. He must be able, at the peril of heavy infringement damages, to forecast how far a court relatively unversed in a particular technological field will expand the claim's language . . . ." *Id.*, at 617.

Most recently, in *Warner-Jenkinson*, the Court reaffirmed that equivalents remain a firmly entrenched part of the settled rights protected by the patent. A unanimous opinion concluded that if the doctrine is to be discarded, it is Congress and not the Court that should do so:

> "[T]he lengthy history of the doctrine of equivalents strongly supports adherence to our refusal in *Graver Tank* to find that the Patent Act conflicts with that doctrine. Congress can legislate the doctrine of equivalents out of existence any time it chooses. The various policy arguments now made by both sides are thus best addressed to Congress, not this Court." 520 U. S., at 28.

III

Prosecution history estoppel requires that the claims of a patent be interpreted in light of the proceedings in the PTO during the application process. Estoppel is a "rule of patent construction" that ensures that claims are interpreted by reference to those "that have been cancelled or rejected." *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211, 220–221 (1940). The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes. When, however, the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory com-

prised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent. On the contrary, "[b]y the amendment [the patentee] recognized and emphasized the difference between the two phrases[,] . . . and [t]he difference which [the patentee] thus disclaimed must be regarded as material." *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136–137 (1942).

A rejection indicates that the patent examiner does not believe the original claim could be patented. While the patentee has the right to appeal, his decision to forgo an appeal and submit an amended claim is taken as a concession that the invention as patented does not reach as far as the original claim. See *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222, 228 (1880) ("In view of [the amendment] there can be no doubt of what [the patentee] understood he had patented, and that both he and the commissioner regarded the patent to be for a manufacture made exclusively of vulcanites by the detailed process"); *Wang Laboratories, Inc.* v. *Mitsubishi Electronics America, Inc.*, 103 F. 3d 1571, 1577–1578 (CA Fed. 1997) ("Prosecution history estoppel . . . preclud[es] a patentee from regaining, through litigation, coverage of subject matter relinquished during prosecution of the application for the patent"). Were it otherwise, the inventor might avoid the PTO's gatekeeping role and seek to recapture in an infringement action the very subject matter surrendered as a condition of receiving the patent.

Prosecution history estoppel ensures that the doctrine of equivalents remains tied to its underlying purpose. Where the original application once embraced the purported equivalent but the patentee narrowed his claims to obtain the patent or to protect its validity, the patentee cannot assert that he lacked the words to describe the subject matter in question. The doctrine of equivalents is premised on language's inability to capture the essence of innovation, but a prior application describing the precise element at issue undercuts that premise. In that instance the prosecution history has

established that the inventor turned his attention to the subject matter in question, knew the words for both the broader and narrower claim, and affirmatively chose the latter.

A

The first question in this case concerns the kinds of amendments that may give rise to estoppel. Petitioner argues that estoppel should arise when amendments are intended to narrow the subject matter of the patented invention, for instance, amendments to avoid prior art, but not when the amendments are made to comply with requirements concerning the form of the patent application. In *Warner-Jenkinson* we recognized that prosecution history estoppel does not arise in every instance when a patent application is amended. Our "prior cases have consistently applied prosecution history estoppel only where claims have been amended for a limited set of reasons," such as "to avoid the prior art, or otherwise to address a specific concern—such as obviousness—that arguably would have rendered the claimed subject matter unpatentable." 520 U. S., at 30–32. While we made clear that estoppel applies to amendments made for a "substantial reason related to patentability," *id.*, at 33, we did not purport to define that term or to catalog every reason that might raise an estoppel. Indeed, we stated that even if the amendment's purpose were unrelated to patentability, the court might consider whether it was the kind of reason that nonetheless might require resort to the estoppel doctrine. *Id.*, at 40–41.

Petitioner is correct that estoppel has been discussed most often in the context of amendments made to avoid the prior art. See *Exhibit Supply Co.*, *supra*, at 137; *Keystone Driller Co.* v. *Northwest Engineering Corp.*, 294 U. S. 42, 48 (1935). Amendment to accommodate prior art was the emphasis, too, of our decision in *Warner-Jenkinson*, *supra*, at 30. It does not follow, however, that amendments for other purposes will not give rise to estoppel. Prosecution

history may rebut the inference that a thing not described was indescribable. That rationale does not cease simply because the narrowing amendment, submitted to secure a patent, was for some purpose other than avoiding prior art.

We agree with the Court of Appeals that a narrowing amendment made to satisfy any requirement of the Patent Act may give rise to an estoppel. As that court explained, a number of statutory requirements must be satisfied before a patent can issue. The claimed subject matter must be useful, novel, and not obvious. 35 U. S. C. §§ 101–103 (1994 ed. and Supp. V). In addition, the patent application must describe, enable, and set forth the best mode of carrying out the invention. § 112 (1994 ed.). These latter requirements must be satisfied before issuance of the patent, for exclusive patent rights are given in exchange for disclosing the invention to the public. See *Bonito Boats*, 489 U. S., at 150–151. What is claimed by the patent application must be the same as what is disclosed in the specification; otherwise the patent should not issue. The patent also should not issue if the other requirements of § 112 are not satisfied, and an applicant's failure to meet these requirements could lead to the issued patent being held invalid in later litigation.

Petitioner contends that amendments made to comply with § 112 concern the form of the application and not the subject matter of the invention. The PTO might require the applicant to clarify an ambiguous term, to improve the translation of a foreign word, or to rewrite a dependent claim as an independent one. In these cases, petitioner argues, the applicant has no intention of surrendering subject matter and should not be estopped from challenging equivalent devices. While this may be true in some cases, petitioner's argument conflates the patentee's reason for making the amendment with the impact the amendment has on the subject matter.

Estoppel arises when an amendment is made to secure the patent and the amendment narrows the patent's scope. If a § 112 amendment is truly cosmetic, then it would not narrow

the patent's scope or raise an estoppel. On the other hand, if a § 112 amendment is necessary and narrows the patent's scope—even if only for the purpose of better description—estoppel may apply. A patentee who narrows a claim as a condition for obtaining a patent disavows his claim to the broader subject matter, whether the amendment was made to avoid the prior art or to comply with § 112. We must regard the patentee as having conceded an inability to claim the broader subject matter or at least as having abandoned his right to appeal a rejection. In either case estoppel may apply.

B

Petitioner concedes that the limitations at issue—the sealing rings and the composition of the sleeve—were made for reasons related to § 112, if not also to avoid the prior art. Our conclusion that prosecution history estoppel arises when a claim is narrowed to comply with § 112 gives rise to the second question presented: Does the estoppel bar the inventor from asserting infringement against any equivalent to the narrowed element or might some equivalents still infringe? The Court of Appeals held that prosecution history estoppel is a complete bar, and so the narrowed element must be limited to its strict literal terms. Based upon its experience the Court of Appeals decided that the flexible-bar rule is unworkable because it leads to excessive uncertainty and burdens legitimate innovation. For the reasons that follow, we disagree with the decision to adopt the complete bar.

Though prosecution history estoppel can bar a patentee from challenging a wide range of alleged equivalents made or distributed by competitors, its reach requires an examination of the subject matter surrendered by the narrowing amendment. The complete bar avoids this inquiry by establishing a *per se* rule; but that approach is inconsistent with the purpose of applying the estoppel in the first place—to hold the inventor to the representations made during the application process and to the inferences that may reason-

ably be drawn from the amendment. By amending the application, the inventor is deemed to concede that the patent does not extend as far as the original claim. It does not follow, however, that the amended claim becomes so perfect in its description that no one could devise an equivalent. After amendment, as before, language remains an imperfect fit for invention. The narrowing amendment may demonstrate what the claim is not; but it may still fail to capture precisely what the claim is. There is no reason why a narrowing amendment should be deemed to relinquish equivalents unforeseeable at the time of the amendment and beyond a fair interpretation of what was surrendered. Nor is there any call to foreclose claims of equivalence for aspects of the invention that have only a peripheral relation to the reason the amendment was submitted. The amendment does not show that the inventor suddenly had more foresight in the drafting of claims than an inventor whose application was granted without amendments having been submitted. It shows only that he was familiar with the broader text and with the difference between the two. As a result, there is no more reason for holding the patentee to the literal terms of an amended claim than there is for abolishing the doctrine of equivalents altogether and holding every patentee to the literal terms of the patent.

This view of prosecution history estoppel is consistent with our precedents and respectful of the real practice before the PTO. While this Court has not weighed the merits of the complete bar against the flexible bar in its prior cases, we have consistently applied the doctrine in a flexible way, not a rigid one. We have considered what equivalents were surrendered during the prosecution of the patent, rather than imposing a complete bar that resorts to the very literalism the equivalents rule is designed to overcome. *E. g.*, *Goodyear Dental Vulcanite Co.*, 102 U. S., at 230; *Hurlbut* v. *Schillinger*, 130 U. S. 456, 465 (1889).

The Court of Appeals ignored the guidance of *Warner-Jenkinson*, which instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community. See 520 U. S., at 28. In that case we made it clear that the doctrine of equivalents and the rule of prosecution history estoppel are settled law. The responsibility for changing them rests with Congress. *Ibid.* Fundamental alterations in these rules risk destroying the legitimate expectations of inventors in their property. The petitioner in *Warner-Jenkinson* requested another bright-line rule that would have provided more certainty in determining when estoppel applies but at the cost of disrupting the expectations of countless existing patent holders. We rejected that approach: "To change so substantially the rules of the game now could very well subvert the various balances the PTO sought to strike when issuing the numerous patents which have not yet expired and which would be affected by our decision." *Id.*, at 32, n. 6; see also *id.*, at 41 (GINSBURG, J., concurring) ("The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time of patent prosecution that such a presumption would apply"). As *Warner-Jenkinson* recognized, patent prosecution occurs in the light of our case law. Inventors who amended their claims under the previous regime had no reason to believe they were conceding all equivalents. If they had known, they might have appealed the rejection instead. There is no justification for applying a new and more robust estoppel to those who relied on prior doctrine.

In *Warner-Jenkinson* we struck the appropriate balance by placing the burden on the patentee to show that an amendment was not for purposes of patentability:

> "Where no explanation is established, however, the court should presume that the patent application had a substantial reason related to patentability for including the limiting element added by amendment. In those

> circumstances, prosecution history estoppel would bar the application of the doctrine of equivalents as to that element." *Id.*, at 33.

When the patentee is unable to explain the reason for amendment, estoppel not only applies but also "bar[s] the application of the doctrine of equivalents as to that element." *Ibid.* These words do not mandate a complete bar; they are limited to the circumstance where "no explanation is established." They do provide, however, that when the court is unable to determine the purpose underlying a narrowing amendment—and hence a rationale for limiting the estoppel to the surrender of particular equivalents—the court should presume that the patentee surrendered all subject matter between the broader and the narrower language.

Just as *Warner-Jenkinson* held that the patentee bears the burden of proving that an amendment was not made for a reason that would give rise to estoppel, we hold here that the patentee should bear the burden of showing that the amendment does not surrender the particular equivalent in question. This is the approach advocated by the United States, see Brief for United States as *Amicus Curiae* 22–28, and we regard it to be sound. The patentee, as the author of the claim language, may be expected to draft claims encompassing readily known equivalents. A patentee's decision to narrow his claims through amendment may be presumed to be a general disclaimer of the territory between the original claim and the amended claim. *Exhibit Supply*, 315 U. S., at 136–137 ("By the amendment [the patentee] recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference"). There are some cases, however, where the amendment cannot reasonably be viewed as surrendering a particular equivalent. The equivalent may have been unforeseeable at the time of the application; the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question; or there

may be some other reason suggesting that the patentee could not reasonably be expected to have described the insubstantial substitute in question. In those cases the patentee can overcome the presumption that prosecution history estoppel bars a finding of equivalence.

This presumption is not, then, just the complete bar by another name. Rather, it reflects the fact that the interpretation of the patent must begin with its literal claims, and the prosecution history is relevant to construing those claims. When the patentee has chosen to narrow a claim, courts may presume the amended text was composed with awareness of this rule and that the territory surrendered is not an equivalent of the territory claimed. In those instances, however, the patentee still might rebut the presumption that estoppel bars a claim of equivalence. The patentee must show that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent.

IV

On the record before us, we cannot say petitioner has rebutted the presumptions that estoppel applies and that the equivalents at issue have been surrendered. Petitioner concedes that the limitations at issue—the sealing rings and the composition of the sleeve—were made in response to a rejection for reasons under § 112, if not also because of the prior art references. As the amendments were made for a reason relating to patentability, the question is not whether estoppel applies but what territory the amendments surrendered. While estoppel does not effect a complete bar, the question remains whether petitioner can demonstrate that the narrowing amendments did not surrender the particular equivalents at issue. On these questions, SMC may well prevail, for the sealing rings and the composition of the sleeve both were noted expressly in the prosecution history. These matters, however, should be determined in the first instance

by further proceedings in the Court of Appeals or the District Court.

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

It is so ordered.

Syllabus

FEDERAL MARITIME COMMISSION *v.* SOUTH CAROLINA STATE PORTS AUTHORITY ET AL.

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

No. 01–46. Argued February 25, 2002—Decided May 28, 2002

South Carolina Maritime Services, Inc. (Maritime Services), filed a complaint with petitioner Federal Maritime Commission (FMC), contending that respondent South Carolina State Ports Authority (SCSPA) violated the Shipping Act of 1984 when it denied Maritime Services permission to berth a cruise ship at the SCSPA's port facilities in Charleston, South Carolina; and praying that the FMC, *inter alia*, direct the SCSPA to pay reparations to Maritime Services, order the SCSPA to cease and desist from violating the Shipping Act, and ask the United States District Court for the District of South Carolina to enjoin the SCSPA from refusing berthing space and passenger services to Maritime Services. The complaint was referred to an Administrative Law Judge (ALJ), who found that the SCSPA, as an arm of the State of South Carolina, was entitled to sovereign immunity and thus dismissed the complaint. Reversing on its own motion, the FMC concluded that state sovereign immunity covers proceedings before judicial tribunals, not Executive Branch agencies. The Fourth Circuit reversed.

Held: State sovereign immunity bars the FMC from adjudicating a private party's complaint against a nonconsenting State. Pp. 751–769.

(a) Dual sovereignty is a defining feature of the Nation's constitutional blueprint, and an integral component of the sovereignty retained by the States when they entered the Union is their immunity from private suits. While States, in ratifying the Constitution, consented to suits brought by sister States or the Federal Government, they maintained their traditional immunity from suits brought by private parties. Although the Eleventh Amendment provides that the "judicial Power of the United States" does not "extend to any suit, in law or equity," brought by citizens of one State against another State, U. S. Const., Amdt. 11, that provision does not define the scope of the States' sovereign immunity; it is instead only one particular exemplification of that immunity. As a result, this Court's assumption that the FMC does not exercise the judicial power of the United States in adjudicating Shipping Act complaints filed by private parties does not end the inquiry whether sovereign immunity applies to such adjudications. Pp. 751–754.

(b) Formalized administrative adjudications were all but unheard of in the late 18th and early 19th centuries, so it is unsurprising that there is no specific evidence indicating whether the Framers believed that sovereign immunity would apply to such proceedings. However, because of the presumption that the Constitution was not intended to "rais[e] up" any proceedings against the States that were "anomalous and unheard of when the Constitution was adopted," *Hans* v. *Louisiana*, 134 U. S. 1, 18, this Court attributes great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter. Pp. 754–756.

(c) To decide whether the *Hans* presumption applies here, this Court must determine whether FMC adjudications are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union. This Court previously has noted that ALJs and trial judges play similar roles in adjudicative proceedings and that administrative adjudications and judicial proceedings generally share numerous common features. *Butz* v. *Economou*, 438 U. S. 478, 513, 514. Turning to FMC adjudications specifically, neither the FMC nor the United States disputes the Fourth Circuit's characterization that such a proceeding walks, talks, and squawks like a lawsuit or denies that the similarities identified in *Butz* between administrative adjudications and trial court proceedings are present here. FMC administrative proceedings bear a remarkably strong resemblance to federal civil litigation. The rules governing pleadings in both types of proceedings are quite similar; discovery in FMC adjudications largely mirrors that in federal civil litigation; the role of the ALJ is similar to that of an Article III judge; and, in situations not covered by an FMC rule, the FMC's own Rules of Practice and Procedure provide that Federal Rules of Civil Procedure are to be used if consistent with sound administrative practice. Pp. 756–759.

(d) State sovereign immunity's preeminent purpose—to accord States the dignity that is consistent with their status as sovereign entities—and the overwhelming similarities between FMC adjudicative proceedings and civil litigation lead to the conclusion that the FMC is barred from adjudicating a private party's complaint against a nonconsenting State. If the Framers thought it an impermissible affront to a State's dignity to be required to answer private parties' complaints in federal court, they would not have found it acceptable to compel a State to do the same thing before a federal administrative tribunal. And it would be quite strange were Congress prohibited from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permitted to use those same powers to create court-

like administrative tribunals where sovereign immunity would not apply. Pp. 760–761.

(e) Two arguments made by the United States to support its claim that sovereign immunity does not apply to FMC proceedings are unavailing. That the FMC's orders are not self-executing does not mean that a State is not coerced into participating in an FMC adjudicative proceeding. A State charged in a private party's complaint with violating the Shipping Act has the option of appearing before the FMC in a bid to persuade that body of the strength of its position or substantially compromising its ability to defend itself because a sanctioned party cannot litigate the merits of its position later in a federal-court action brought by the Attorney General to enforce an FMC nonreparation order or civil penalty assessment. This choice clearly serves to coerce States to participate in FMC adjudications. And the argument that sovereign immunity should not apply because FMC proceedings do not present the same threat to the States' financial integrity as do private judicial suits reflects a fundamental misunderstanding of sovereign immunity's primary purpose, which is not to shield state treasuries but to accord States the respect owed them as joint sovereigns. In any event, an FMC reparation order may very well result in the withdrawal of funds from a State's treasury because the FMC might be able to assess a civil penalty against a State that refused to obey a reparation order, and if the Attorney General, at the FMC's request, then sought to recover the penalty in federal court, the State's sovereign immunity would not extend to that suit brought by the Federal Government. Pp. 761–767.

(f) The Court rejects the FMC's argument that it should not be barred from adjudicating Maritime Services' complaint because the constitutional necessity of uniformity in maritime commerce regulation limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce. This Court has already held that state sovereign immunity extends to maritime commerce cases, and *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 72, precludes the Court from creating a new maritime commerce exception to state sovereign immunity. Also rejected is the United States' argument that, even if the FMC is barred from issuing a reparation order, it should not be precluded from considering a private party's request for nonmonetary relief. The type of relief sought by a plaintiff suing a State in court is irrelevant to the question whether a suit is barred by the Eleventh Amendment, *id.*, at 58, and the Court sees no reason why that principle should not also apply in the realm of administrative adjudications. Pp. 767–769.

243 F. 3d 165, affirmed.

Syllabus

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. 770. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 772.

Phillip Christopher Hughey argued the cause for petitioner. With him on the briefs were *David R. Miles*, *Amy Wright Larson*, and *Carol J. Neustadt.*

Deputy Solicitor General Clement argued the cause for the United States, respondent under this Court's Rule 12.6, urging reversal. On the briefs were *Solicitor General Olson*, *Assistant Attorney General McCallum*, *Deputy Solicitor General Wallace*, *Malcolm L. Stewart*, *Mark B. Stern*, and *Alisa B. Klein.* *Warren L. Dean, Jr.*, argued the cause for respondent South Carolina State Ports Authority. With him on the brief were *David Seidman*, *Jordan B. Cherrick*, *Elizabeth Herlong Campbell*, and *Susan Taylor Wall.**

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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, Laurence Gold,* and *David L. Shapiro;* for the National Association of Waterfront Employers by *Charles T. Carroll, Jr.*, and *Carl Larsen Taylor;* for the United States Maritime Alliance Limited et al. by *C. Peter Lambos* and *Donato Caruso;* and for Senator Edward M. Kennedy et al. by *Lloyd N. Cutler, A. Stephen Hut, Jr.*, and *Christopher J. Meade.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida,* Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Robert H. Kono* of Guam, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.*, of New Jersey, *Roy*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether state sovereign immunity precludes petitioner Federal Maritime Commission (FMC or Commission) from adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984, 46 U. S. C. App. § 1701 *et seq.* (1994 ed. and Supp. V). We hold that state sovereign immunity bars such an adjudicative proceeding.

I

On five occasions, South Carolina Maritime Services, Inc. (Maritime Services), asked respondent South Carolina State Ports Authority (SCSPA) for permission to berth a cruise ship, the M/V *Tropic Sea*, at the SCSPA's port facilities in Charleston, South Carolina. Maritime Services intended to offer cruises on the M/V *Tropic Sea* originating from the Port of Charleston. Some of these cruises would stop in the Bahamas while others would merely travel in international waters before returning to Charleston with no intervening ports of call. On all of these trips, passengers would be permitted to participate in gambling activities while on board.

The SCSPA repeatedly denied Maritime Services' requests, contending that it had an established policy of denying berths in the Port of Charleston to vessels whose primary purpose was gambling. As a result, Maritime Serv-

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Cooper of North Carolina, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Randolph A. Beales* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw* of West Virginia, and *Hoke MacMillan* of Wyoming; for the Charleston Naval Complex Redevelopment Authority by *C. Jonathan Benner;* and for the National Governors Association et al. by *Richard Ruda* and *James I. Crowley.*

ices filed a complaint with the FMC,[1] contending that the SCSPA's refusal to provide berthing space to the M/V *Tropic Sea* violated the Shipping Act. Maritime Services alleged in its complaint that the SCSPA had implemented its anti-gambling policy in a discriminatory fashion by providing berthing space in Charleston to two Carnival Cruise Lines vessels even though Carnival offered gambling activities on these ships. Maritime Services therefore complained that the SCSPA had unduly and unreasonably preferred Carnival over Maritime Services in violation of 46 U. S. C. App. § 1709(d)(4) (1994 ed., Supp. V),[2] and unreasonably refused to deal or negotiate with Maritime Services in violation of § 1709(b)(10).[3] App. 14–15. It further alleged that the SCSPA's unlawful actions had inflicted upon Maritime Services a "loss of profits, loss of earnings, loss of sales, and loss of business opportunities." *Id.*, at 15.

To remedy its injuries, Maritime Services prayed that the FMC: (1) seek a temporary restraining order and preliminary injunction in the United States District Court for the District of South Carolina "enjoining [the SCSPA] from utilizing its discriminatory practice to refuse to provide berthing space and passenger services to Maritime Services;"[4]

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[1] See 46 U. S. C. App. § 1710(a) (1994 ed.) ("Any person may file with the Commission a sworn complaint alleging a violation of this chapter . . . and may seek reparation for any injury caused to the complainant by that violation").

[2] Section 1709(d)(4) provides that "[n]o marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person."

[3] Section 1709(b)(10) prohibits a common carrier from "unreasonably refus[ing] to deal or negotiate."

[4] See § 1710(h)(1) (1994 ed.) ("In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to

(2) direct the SCSPA to pay reparations to Maritime Services as well as interest and reasonable attorneys' fees;[5] (3) issue an order commanding, among other things, the SCSPA to cease and desist from violating the Shipping Act; and (4) award Maritime Services "such other and further relief as is just and proper." *Id.*, at 16.

Consistent with the FMC's Rules of Practice and Procedure, Maritime Services' complaint was referred to an Administrative Law Judge (ALJ). See 46 CFR § 502.223 (2001). The SCSPA then filed an answer, maintaining, *inter alia*, that it had adhered to its antigambling policy in a nondiscriminatory manner. It also filed a motion to dismiss, asserting, as relevant, that the SCSPA, as an arm of the State of South Carolina, was "entitled to Eleventh Amendment immunity" from Maritime Services' suit. App. 41. The SCSPA argued that "the Constitution prohibits Congress from passing a statute authorizing Maritime Services to file [this] Complaint before the Commission and, thereby, sue the State of South Carolina for damages and injunctive relief." *Id.*, at 44.

The ALJ agreed, concluding that recent decisions of this Court "interpreting the 11th Amendment and State sovereign immunity from *private* suits . . . require[d] that [Maritime Services'] complaint be dismissed." App. to Pet. for Cert. 49a (emphasis in original). Relying on *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), in which we held that Congress, pursuant to its Article I powers, cannot abrogate

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exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business").

[5] See § 1710(g) (1994 ed., Supp. V) ("For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees").

state sovereign immunity, the ALJ reasoned that "[i]f federal courts that are established under Article III of the Constitution must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits." App. to Pet. for Cert. 59a (emphasis in original). The ALJ noted, however, that his decision did not deprive the FMC of its "authority to look into [Maritime Services'] allegations of Shipping Act violations and enforce the Shipping Act." *Id.*, at 60a. For example, the FMC could institute its own formal investigatory proceeding, see 46 CFR § 502.282 (2001), or refer Maritime Services' allegations to its Bureau of Enforcement, App. to Pet. for Cert. 60a–61a.

While Maritime Services did not appeal the ALJ's dismissal of its complaint, the FMC on its own motion decided to review the ALJ's ruling to consider whether state sovereign immunity from private suits extends to proceedings before the Commission. *Id.*, at 29a–30a. It concluded that "[t]he doctrine of state sovereign immunity . . . is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission." *Id.*, at 33a. As a result, the FMC held that sovereign immunity did not bar the Commission from adjudicating private complaints against state-run ports and reversed the ALJ's decision dismissing Maritime Services' complaint. *Id.*, at 35a.

The SCSPA filed a petition for review, and the United States Court of Appeals for the Fourth Circuit reversed. Observing that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment," the Court of Appeals reasoned that "[s]uch an

adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency." 243 F. 3d 165, 173 (2001). Reviewing the "precise nature" of the procedures employed by the FMC for resolving private complaints, the Court of Appeals concluded that the proceeding "walks, talks, and squawks very much like a lawsuit" and that "[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." *Id.*, at 174. The Court of Appeals therefore held that because the SCSPA is an arm of the State of South Carolina,[6] sovereign immunity precluded the FMC from adjudicating Maritime Services' complaint, and remanded the case with instructions that it be dismissed. *Id.*, at 179.

We granted the FMC's petition for certiorari, 534 U. S. 971 (2001), and now affirm.

II

Dual sovereignty is a defining feature of our Nation's constitutional blueprint. See *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991). States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991). An integral component of that "residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison), retained by

[6] The SCSPA was created by the State of South Carolina "as an instrumentality of the State," for, among other purposes, "develop[ing] and improv[ing] the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of [South Carolina] and other states and foreign countries." S. C. Code Ann. §54–3–130 (1992). The United States Court of Appeals for the Fourth Circuit has ruled that the SCSPA is protected by South Carolina's sovereign immunity because it is an arm of the State, see, *e. g.*, *Ristow* v. *South Carolina Ports Authority*, 58 F. 3d 1051 (1995), and no party to this case contests that determination.

the States is their immunity from private suits. Reflecting the widespread understanding at the time the Constitution was drafted, Alexander Hamilton explained:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." *Id.,* No. 81, at 487–488 (emphasis in original).

States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. See *Alden* v. *Maine,* 527 U. S. 706, 755 (1999). Nevertheless, the Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Id.,* at 716.

The States' sovereign immunity, however, fell into peril in the early days of our Nation's history when this Court held in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), that Article III authorized citizens of one State to sue another State in federal court. The "decision 'fell upon the country with a profound shock.'" *Alden, supra,* at 720 (quoting 1 C. Warren, The Supreme Court in United States History 96 (rev. ed. 1926)). In order to overturn *Chisholm,* Congress quickly passed the Eleventh Amendment and the States ratified it speedily. The Amendment clarified that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,

or by Citizens or Subjects of any Foreign State." We have since acknowledged that the *Chisholm* decision was erroneous. See, *e. g.*, *Alden*, 527 U. S., at 721–722.

Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Id.*, at 723. As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity. Cf. *Blatchford*, *supra*, at 779 ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms").

III

We now consider whether the sovereign immunity enjoyed by States as part of our constitutional framework applies to adjudications conducted by the FMC. Petitioner FMC and respondent United States[7] initially maintain that the Court of Appeals erred because sovereign immunity only shields States from exercises of "judicial power" and FMC adjudications are not judicial proceedings. As support for their position, they point to the text of the Eleventh Amendment and contend that "[t]he Amendment's reference to 'judicial Power' and to 'any suit in law or equity' clearly mark it as an immunity from judicial process." Brief for United States 15.

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[7] While the United States is a party to this case and agrees with the FMC that state sovereign immunity does not preclude the Commission from adjudicating Maritime Services' complaint against the SCSPA, it is nonetheless a respondent because it did not seek review of the Court of Appeals' decision below. See this Court's Rule 12.6. The United States instead opposed the FMC's petition for certiorari. See Brief for United States in Opposition.

For purposes of this case, we will assume, *arguendo*, that in adjudicating complaints filed by private parties under the Shipping Act, the FMC does not exercise the judicial power of the United States. Such an assumption, however, does not end our inquiry as this Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.[8] See, *e. g.*, *Alden*, *supra* (holding that sovereign immunity shields States from private suits in state courts pursuant to federal causes of action); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991) (applying state sovereign immunity to suits by Indian tribes); *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934) (applying state sovereign immunity to suits by foreign nations); *Ex parte New York*, 256 U. S. 490 (1921) (applying state sovereign immunity to admiralty proceedings); *Smith* v. *Reeves*, 178 U. S. 436 (1900) (applying state sovereign immunity to suits by federal corporations); *Hans* v. *Louisiana*, 134 U. S. 1 (1890) (applying state sovereign immunity to suits by a State's own citizens under federal-question jurisdiction). Adhering to that well-reasoned precedent, see Part II, *supra*, we must determine whether the sovereign immunity embedded in our constitutional structure and retained by the States when they joined the Union extends to FMC adjudicative proceedings.

A

"[L]ook[ing] first to evidence of the original understanding of the Constitution," *Alden*, 527 U. S., at 741, as well as

[8] To the extent that JUSTICE BREYER, looking to the text of the Eleventh Amendment, suggests that sovereign immunity only shields States from "the '[j]udicial power of the United States,'" *post*, at 777 (dissenting opinion), he "engage[s] in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*," *Alden* v. *Maine*, 527 U. S. 706, 730 (1999). Furthermore, it is ironic that JUSTICE BREYER adopts such a textual approach in defending the conduct of an independent agency that itself lacks any textual basis in the Constitution.

early congressional practice, see *id.*, at 743–744, we find a relatively barren historical record, from which the parties draw radically different conclusions. Petitioner FMC, for instance, argues that state sovereign immunity should not extend to administrative adjudications because "[t]here is no evidence that state immunity from the adjudication of complaints by *executive officers* was an established principle at the time of the adoption of the Constitution." Brief for Petitioner 28 (emphasis in original). The SCSPA, on the other hand, asserts that it is more relevant that "Congress did not attempt to subject the States to private suits before federal administrative tribunals" during the early days of our Republic. Brief for Respondent SCSPA 19.

In truth, the relevant history does not provide direct guidance for our inquiry. The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state. See *Alden*, *supra*, at 807 (SOUTER, J., dissenting) ("The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes"). Because formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century, the dearth of specific evidence indicating whether the Framers believed that the States' sovereign immunity would apply in such proceedings is unsurprising.

This Court, however, has applied a presumption—first explicitly stated in *Hans* v. *Louisiana*, *supra*—that the Constitution was not intended to "rais[e] up" any proceedings against the States that were "anomalous and unheard of when the Constitution was adopted." *Id.*, at 18. We therefore attribute great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter. For instance, while the United States asserts that "state entities have long been subject to similar administrative

enforcement proceedings," Reply Brief for United States 12, the earliest example it provides did not occur until 1918, see *id.*, at 14 (citing *California Canneries Co.* v. *Southern Pacific Co.*, 51 I. C. C. 500 (1918)).

B

To decide whether the *Hans* presumption applies here, however, we must examine FMC adjudications to determine whether they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.

In another case asking whether an immunity present in the judicial context also applied to administrative adjudications, this Court considered whether ALJs share the same absolute immunity from suit as do Article III judges. See *Butz* v. *Economou*, 438 U. S. 478 (1978). Examining in that case the duties performed by an ALJ, this Court observed:

> "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.*, at 513 (citation omitted).

Beyond the similarities between the role of an ALJ and that of a trial judge, this Court also noted the numerous common features shared by administrative adjudications and judicial proceedings:

> "[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are

> available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record." *Ibid.* (citations omitted).

This Court therefore concluded in *Butz* that ALJs were "entitled to absolute immunity from damages liability for their judicial acts." *Id.*, at 514.

Turning to FMC adjudications specifically, neither the Commission nor the United States disputes the Court of Appeals' characterization below that such a proceeding "walks, talks, and squawks very much like a lawsuit." 243 F. 3d, at 174. Nor do they deny that the similarities identified in *Butz* between administrative adjudications and trial court proceedings are present here. See 46 CFR § 502.142 (2001).

A review of the FMC's Rules of Practice and Procedure confirms that FMC administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts. For example, the FMC's Rules governing pleadings are quite similar to those found in the Federal Rules of Civil Procedure. A case is commenced by the filing of a complaint. See 46 CFR § 502.61 (2001); Fed. Rule Civ. Proc. 3. The defendant then must file an answer, generally within 20 days of the date of service of the complaint, see § 502.64(a); Rule 12(a)(1), and may also file a motion to dismiss, see § 502.227(b)(1); Rule 12(b). A defendant is also allowed to file counterclaims against the plaintiff. See § 502.64(d); Rule 13. If a defendant fails to respond to a complaint, default judgment may be entered on behalf of the plaintiff. See § 502.64(b); Rule 55. Intervention is also allowed. See § 502.72; Rule 24.

Likewise, discovery in FMC adjudications largely mirrors discovery in federal civil litigation. See 46 U. S. C. App. § 1711(a)(1) (1994 ed.) (instructing that in FMC adjudicatory proceedings "discovery procedures . . . , to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States"). In both types of proceedings, parties may conduct depositions, see, *e. g.,* 46 CFR § 502.202 (2001); Fed. Rule Civ. Proc. 28, which are governed by similar requirements. Compare §§ 502.202, 502.203, and 502.204, with Rules 28, 29, 30, and 31. Parties may also discover evidence by: (1) serving written interrogatories, see § 502.205; Rule 33; (2) requesting that another party either produce documents, see § 502.206(a)(1); Rule 34(a)(1), or allow entry on that party's property for the purpose of inspecting the property or designated objects thereon, § 502.206(a)(2); Rule 34(a)(2); and (3) submitting requests for admissions, § 502.207; Rule 36. And a party failing to obey discovery orders in either type of proceeding is subject to a variety of sanctions, including the entry of default judgment. See § 502.210(a); Rule 37(b)(2).

Not only are discovery procedures virtually indistinguishable, but the role of the ALJ, the impartial officer[9] designated to hear a case, see § 502.147, is similar to that of an Article III judge. An ALJ has the authority to "arrange and give notice of hearing." *Ibid.* At that hearing, he may

> "prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and rule upon motions; administer oaths and affirmations; examine witnesses; direct witnesses to testify or produce evidence available to them which will aid in the determination of any question of fact in issue; rule

[9] See 46 CFR § 502.224 (2001) (requiring that ALJs be shielded from political influence in a manner consistent with the Administrative Procedure Act).

upon offers of proof . . . and dispose of any other matter that normally and properly arises in the course of proceedings." *Ibid.*

The ALJ also fixes "the time and manner of filing briefs," § 502.221(a), which contain findings of fact as well as legal argument, see § 502.221(d)(1). After the submission of these briefs, the ALJ issues a decision that includes "a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues presented on the record, and the appropriate rule, order, section, relief, or denial thereof." § 502.223. Such relief may include an order directing the payment of reparations to an aggrieved party. See 46 U. S. C. App. § 1710(g) (1994 ed., Supp. V); 46 CFR § 502.251 (2001). The ALJ's ruling subsequently becomes the final decision of the FMC unless a party, by filing exceptions, appeals to the Commission or the Commission decides to review the ALJ's decision "on its own initiative." § 502.227(a)(3). In cases where a complainant obtains reparations, an ALJ may also require the losing party to pay the prevailing party's attorney's fees. See 46 U. S. C. App. § 1710(g); 46 CFR § 502.254 (2001).

In short, the similarities between FMC proceedings and civil litigation are overwhelming. In fact, to the extent that situations arise in the course of FMC adjudications "which are not covered by a specific Commission rule," the FMC's own Rules of Practice and Procedure specifically provide that "the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice."[10] § 502.12.

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[10] In addition, "[u]nless inconsistent with the requirements of the Administrative Procedure Act and [the FMC's Rules of Practice and Procedure], the Federal Rules of Evidence [are] applicable" in FMC adjudicative proceedings. § 502.156.

C

The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. See *In re Ayers*, 123 U. S. 443, 505 (1887). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.' " *Alden*, 527 U. S., at 748 (quoting *In re Ayers*, *supra*, at 505).

Given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State. Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. Cf. *Alden*, *supra*, at 749 ("Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' *regardless of the forum*" (quoting *In re Ayers*, *supra*, at 505) (citations omitted; emphasis added)). The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.[11] In both instances, a State is required to defend itself in an adversarial proceeding

[11] One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.

against a private party before an impartial federal officer.[12] Moreover, it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, see *Seminole Tribe*, 517 U. S., at 72, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.[13]

D

The United States suggests two reasons why we should distinguish FMC administrative adjudications from judicial proceedings for purposes of state sovereign immunity. Both of these arguments are unavailing.

1

The United States first contends that sovereign immunity should not apply to FMC adjudications because the Commission's orders are not self-executing. See Brief for United States 18–21. Whereas a court may enforce a judgment through the exercise of its contempt power, the FMC cannot enforce its own orders. Rather, the Commission's orders

[12] Contrary to the suggestion contained in JUSTICE BREYER's dissenting opinion, our "basic analogy" is not "between a federal administrative proceeding triggered by a private citizen and a private citizen's lawsuit against a State" in a State's own courts. *Post*, at 779. Rather, as our discussion above makes clear, the more apt comparison is between a complaint filed by a private party against a State with the FMC and a lawsuit brought by a private party against a State in federal court.

[13] While JUSTICE BREYER asserts by use of analogy that this case implicates the First Amendment right of citizens to petition the Federal Government for a redress of grievances, see *ibid.*, the Constitution no more protects a citizen's right to litigate against a State in front of a federal administrative tribunal than it does a citizen's right to sue a State in federal court. Both types of proceedings were "anomalous and unheard of when the Constitution was adopted," *Hans* v. *Louisiana*, 134 U. S. 1, 18 (1890), and a private party plainly has no First Amendment right to haul a State in front of either an Article III court or a federal administrative tribunal.

can only be enforced by a federal district court. See, *e. g.*, 46 U. S. C. App. § 1712(e) (1994 ed.) (enforcement of civil penalties); §§ 1713(c) and (d) (enforcement of nonreparation and reparation orders).

The United States presents a valid distinction between the authority possessed by the FMC and that of a court. For purposes of this case, however, it is a distinction without a meaningful difference. To the extent that the United States highlights this fact in order to suggest that a party alleged to have violated the Shipping Act is not coerced to participate in FMC proceedings, it is mistaken. The relevant statutory scheme makes it quite clear that, absent sovereign immunity, States would effectively be required to defend themselves against private parties in front of the FMC.

A State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the FMC or substantially compromise its ability to defend itself at all. For example, once the FMC issues a nonreparation order, and either the Attorney General or the injured private party seeks enforcement of that order in a federal district court,[14] the sanctioned party is *not* permitted to litigate the merits of its position in that court. See § 1713(c) (limiting district court review to whether the relevant order "was properly made and duly issued"). Moreover, if a party fails to appear before the FMC, it may not then argue the merits of its position in an appeal of the Commission's determination filed under 28 U. S. C. § 2342(3)(B)(iv). See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but

[14] A reparation order issued by the FMC, by contrast, may be enforced in a United States district court only in an action brought by the injured private party. See Part IV–B, *infra.* 46 U. S. C. App. § 1713(d) (1994 ed.).

has erred against objection made at the time appropriate under its practice").

Should a party choose to ignore an order issued by the FMC, the Commission may impose monetary penalties for each day of noncompliance. See 46 U. S. C. App. § 1712(a) (1994 ed., Supp. V). The Commission may then request that the Attorney General of the United States seek to recover the amount assessed by the Commission in federal district court, see § 1712(e) (1994 ed.), and a State's sovereign immunity would not extend to that action, as it is one brought by the United States. Furthermore, once the FMC issues an order assessing a civil penalty, a sanctioned party may not later contest the merits of that order in an enforcement action brought by the Attorney General in federal district court. See *ibid.* (limiting review to whether the assessment of the civil penalty was "regularly made and duly issued"); *United States* v. *Interlink Systems, Inc.*, 984 F. 2d 79, 83 (CA2 1993) (holding that review of whether an order was "regularly made and duly issued" does not include review of the merits of the FMC's order).

Thus, any party, including a State, charged in a complaint by a private party with violating the Shipping Act is faced with the following options: appear before the Commission in a bid to persuade the FMC of the strength of its position or stand defenseless once enforcement of the Commission's nonreparation order or assessment of civil penalties is sought in federal district court.[15] To conclude that this choice does

[15] While JUSTICE BREYER argues that States' access to "full judicial review" of the Commission's orders mitigates any coercion to participate in FMC adjudicative proceedings, *post*, at 784, he earlier concedes that a State must appear before the Commission in order "to obtain full judicial review of an adverse agency decision in a court of appeals," *post*, at 783. This case therefore does not involve a situation where Congress has allowed a party to obtain full *de novo* judicial review of Commission orders without first appearing before the Commission, and we express no opinion as to whether sovereign immunity would apply to FMC adjudicative proceedings under such circumstances.

not coerce a State to participate in an FMC adjudication would be to blind ourselves to reality.[16]

The United States and JUSTICE BREYER maintain that any such coercion to participate in FMC proceedings is permissible because the States have consented to actions brought by the Federal Government. See *Alden*, 527 U. S., at 755–756 ("In ratifying the Constitution, the States consented to suits brought by . . . the Federal Government"). The Attorney General's decision to bring an enforcement action against a State after the conclusion of the Commission's proceedings, however, does not retroactively convert an FMC adjudication initiated and pursued by a private party into one initiated and pursued by the Federal Government. The prosecution of a complaint filed by a private party with the FMC is plainly not controlled by the United States, but rather is controlled by that private party; the only duty assumed by the FMC, and hence the United States, in conjunction with a private complaint is to assess its merits in an impartial manner. Indeed, the FMC does not even have the discretion to refuse to adjudicate complaints brought by private parties. See, *e. g.*, 243 F. 3d, at 176 ("The FMC had no choice but to adjudicate this dispute"). As a result, the United States plainly does not "exercise . . . political responsibility" for such complaints, but instead has impermissibly effected "a broad delegation to private persons to sue nonconsenting States."[17] *Alden*, *supra*, at 756.

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[16] JUSTICE BREYER's observation that private citizens may pressure the Federal Government in a variety of ways to take *other* actions that affect States is beside the point. See *post*, at 783–784. Sovereign immunity concerns are not implicated, for example, when the Federal Government enacts a rule opposed by a State. See *post*, at 784. It is an entirely different matter, however, when the Federal Government attempts to coerce States into answering the complaints of private parties in an adjudicative proceeding. See Part III–C, *supra*.

[17] Moreover, a State obviously will not know *ex ante* whether the Attorney General will choose to bring an enforcement action. Therefore, it is

The United States next suggests that sovereign immunity should not apply to FMC proceedings because they do not present the same threat to the financial integrity of States as do private judicial suits. See Brief for United States 21. The Government highlights the fact that, in contrast to a nonreparation order, for which the Attorney General may seek enforcement at the request of the Commission, a reparation order may be enforced in a United States district court only in an action brought by the private party to whom the award was made. See 46 U. S. C. App. § 1713(d)(1). The United States then points out that a State's sovereign immunity would extend to such a suit brought by a private party. Brief for United States 21.

This argument, however, reflects a fundamental misunderstanding of the purposes of sovereign immunity. While state sovereign immunity serves the important function of shielding state treasuries and thus preserving "the States' ability to govern in accordance with the will of their citizens," *Alden*, *supra*, at 750–751, the doctrine's central purpose is to "accord the States the respect owed them as" joint sovereigns. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 146 (1993); see Part III–C, *supra*. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief. See *Seminole Tribe*, 517 U. S., at 58 ("[W]e have often made it clear that the relief sought by a plaintiff suing

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the mere prospect that he may do so that coerces a State to participate in FMC proceedings. For if a State does not present its arguments to the Commission, it will have all but lost any opportunity to defend itself in the event that the Attorney General later decides to seek enforcement of a Commission order or the Commission's assessment of civil penalties. See *supra*, at 762–764.

a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").

Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit. The statutory scheme, as interpreted by the United States, is thus no more permissible than if Congress had allowed private parties to sue States in federal court for violations of the Shipping Act but precluded a court from awarding them any relief.

It is also worth noting that an FMC order that a State pay reparations to a private party may very well result in the withdrawal of funds from that State's treasury. A State subject to such an order at the conclusion of an FMC adjudicatory proceeding would either have to make the required payment to the injured private party or stand in violation of the Commission's order. If the State were willfully and knowingly to choose noncompliance, the Commission could assess a civil penalty of up to $25,000 a day against the State. See 46 U. S. C. App. § 1712(a) (1994 ed., Supp. V). And if the State then refused to pay that penalty, the Attorney General, at the request of the Commission, could seek to recover that amount in a federal district court; because that action would be one brought by the Federal Government, the State's sovereign immunity would not extend to it.

To be sure, the United States suggests that the FMC's statutory authority to impose civil penalties for violations of reparation orders is "doubtful." Reply Brief for United States 7. The relevant statutory provisions, however, appear on their face to confer such authority. For while reparation orders and nonreparation orders are distinguished in other parts of the statutory scheme, see, *e. g.*, 46 U. S. C. App. §§ 1713(c) and (d) (1994 ed.), the provision addressing civil penalties makes no such distinction. See § 1712(a) (1994 ed., Supp. V) ("Whoever violates . . . a Commission order is liable to the United States for a civil penalty"). The United

States, moreover, does not even dispute that the FMC could impose a civil penalty on a State for failing to obey a nonreparation order, which, if enforced by the Attorney General, would also result in a levy upon that State's treasury.

IV

Two final arguments raised by the FMC and the United States remain to be addressed. Each is answered in part by reference to our decision in *Seminole Tribe.*

A

The FMC maintains that sovereign immunity should not bar the Commission from adjudicating Maritime Services' complaint because "[t]he constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce." Brief for Petitioner 29. This Court, however, has already held that the States' sovereign immunity extends to cases concerning maritime commerce. See, *e. g.*, *Ex parte New York*, 256 U. S. 490 (1921). Moreover, *Seminole Tribe* precludes us from creating a new "maritime commerce" exception to state sovereign immunity. Although the Federal Government undoubtedly possesses an important interest in regulating maritime commerce, see U. S. Const., Art. I, § 8, cl. 3, we noted in *Seminole Tribe* that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government,"[18] 517 U. S., at 72. Thus, "[e]ven when the Constitu-

[18] JUSTICE BREYER apparently does not accept this proposition, see *post*, at 776–778, maintaining that it is not supported by the text of the Tenth Amendment. The principle of state sovereign immunity enshrined in our constitutional framework, however, is not rooted in the Tenth Amendment. See Part II, *supra.* Moreover, to the extent that JUSTICE BREYER ar-

tion vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Ibid.* Of course, the Federal Government retains ample means of ensuring that state-run ports comply with the Shipping Act and other valid federal rules governing ocean-borne commerce. The FMC, for example, remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party, see, *e. g.*, 46 CFR § 502.282 (2001), and to institute its own administrative proceeding against a state-run port, see 46 U. S. C. App. § 1710(c) (1994 ed.); 46 CFR § 502.61(a) (2001). Additionally, the Commission "may bring suit in a district court of the United States to enjoin conduct in violation of [the Act]." 46 U. S. C. App. § 1710(h)(1).[19] Indeed, the United States has advised us that the Court of Appeals' ruling below "should have little practical effect on the FMC's enforcement of the Shipping Act," Brief for United States in Opposition 20, and we have no reason to believe that our decision to affirm that judgment will lead to the parade of horribles envisioned by the FMC.

B

Finally, the United States maintains that even if sovereign immunity were to bar the FMC from adjudicating a private

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gues that the Federal Government's Article I power "[t]o regulate Commerce with foreign Nations, and among the several States," U. S. Const., Art. I, § 8, cl. 3, allows it to authorize private parties to sue nonconsenting States, see *post*, at 777–778, his quarrel is not with our decision today but with our decision in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). See *id.*, at 72.

[19] For these reasons, private parties remain "perfectly free to complain to the Federal Government about unlawful state activity" and "the Federal Government [remains] free to take subsequent legal action." *Post*, at 776 (BREYER, J., dissenting). The only step the FMC may not take, consistent with this Court's sovereign immunity jurisprudence, is to adjudicate a dispute between a private party and a nonconsenting State.

party's complaint against a state-run port for purposes of issuing a reparation order, the FMC should not be precluded from considering a private party's request for other forms of relief, such as a cease-and-desist order. See Brief for United States 32–34. As we have previously noted, however, the primary function of sovereign immunity is not to protect state treasuries, see Part III–C, *supra*, but to afford the States the dignity and respect due sovereign entities. As a result, we explained in *Seminole Tribe* that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 517 U. S., at 58. We see no reason why a different principle should apply in the realm of administrative adjudications.

* * *

While some might complain that our system of dual sovereignty is not a model of administrative convenience, see, *e. g.*, *post*, at 785–786 (BREYER, J., dissenting), that is not its purpose. Rather, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985) (quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 572 (1985) (Powell, J., dissenting)). By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to "reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U. S., at 458. Although the Framers likely did not envision the intrusion on state sovereignty at issue in today's case, we are nonetheless confident that it is contrary to their constitutional design, and therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, dissenting.

JUSTICE BREYER has explained why the Court's recent sovereign immunity jurisprudence does not support today's decision. I join his opinion without reservation, but add these words to emphasize the weakness of the two predicates for the majority's holding. Those predicates are, first, the Court's recent decision in *Alden* v. *Maine*, 527 U. S. 706 (1999), and second, the "preeminent" interest in according States the "dignity" that is their due. *Ante*, at 760.

JUSTICE SOUTER has already demonstrated that *Alden*'s creative "conception of state sovereign immunity . . . is true neither to history nor to the structure of the Constitution." 527 U. S., at 814 (dissenting opinion). And I have previously explained that the "dignity" rationale is "'embarrassingly insufficient,'" *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 97 (1996) (dissenting opinion; citation omitted), in part because "Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity," *id.*, at 96–97 (citing *Cohens* v. *Virginia*, 6 Wheat. 264, 406–407 (1821)).

This latter point is reinforced by the legislative history of the Eleventh Amendment. It is familiar learning that the Amendment was a response to this Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). Less recognized, however, is that *Chisholm* necessarily decided two jurisdictional issues: that the Court had personal jurisdiction over the state defendant, and that it had subject-matter jurisdiction over the case.[1] The first proposed draft of a constitutional amendment responding to *Chisholm*—introduced in the House of Representatives in February 1793, on the day after *Chisholm* was decided—would have overruled the first

[1] See Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1561, 1565–1566 (2002).

holding, but not the second.[2] That proposal was not adopted. Rather, a proposal introduced the following day in the Senate,[3] which was "cast in terms that we associate with subject matter jurisdiction,"[4] provided the basis for the present text of the Eleventh Amendment.

This legislative history suggests that the Eleventh Amendment is best understood as having overruled *Chisholm*'s subject-matter jurisdiction holding, thereby restricting the federal courts' diversity jurisdiction. However, the Amendment left intact *Chisholm*'s personal jurisdiction holding: that the Constitution does not immunize States from a federal court's process. If the paramount concern of the Eleventh Amendment's framers had been protecting the so-called "dignity" interest of the States, surely Congress would have endorsed the first proposed amend-

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[2] The House proposal read: "[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States." *Id.*, at 1602, and n. 211 (quoting Proceedings of the United States House of Representatives (Feb. 19, 1793), Gazette of the United States, Feb. 20, 1793, reprinted in 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 605–606 (M. Marcus ed. 1994)) (internal quotation marks omitted).

[3] The Senate proposal read: "The Judicial Power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State." Nelson, *supra*, at 1603, and n. 212 (quoting Resolution in the United States Senate (Feb. 20, 1793), reprinted in 5 Documentary History of the Supreme Court, *supra*, at 607–608) (internal quotation marks omitted). The Senate version closely tracked the ultimate language of the Eleventh Amendment. See U. S. Const., Amdt. 11 ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

[4] Nelson, *supra*, at 1603.

ment granting the States immunity from process, rather than the later proposal that merely delineates the subject-matter jurisdiction of courts. Moreover, as Chief Justice Marshall recognized, a subject-matter reading of the Amendment makes sense, considering the States' interest in avoiding their creditors. See *Cohens* v. *Virginia*, 6 Wheat., at 406–407.

The reasons why the majority in *Chisholm* concluded that the "dignity" interests underlying the sovereign immunity of English Monarchs had not been inherited by the original 13 States remain valid today. See, *e. g.*, *Seminole Tribe of Fla.*, 517 U. S., at 95–97 (STEVENS, J., dissenting). By extending the untethered "dignity" rationale to the context of routine federal administrative proceedings, today's decision is even more anachronistic than *Alden.*

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

The Court holds that a private person cannot bring a complaint against a State to a federal administrative agency where the agency (1) will use an internal adjudicative process to decide if the complaint is well founded, and (2) if so, proceed to court to enforce the law. Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose. In saying this, I do not simply reiterate the dissenting views set forth in many of the Court's recent sovereign immunity decisions. See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000); *Alden* v. *Maine*, 527 U. S. 706 (1999); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666 (1999); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court's conclusion here.

I

At the outset one must understand the constitutional nature of the legal proceeding before us. The legal body conducting the proceeding, the Federal Maritime Commission, is an "independent" federal agency. Constitutionally speaking, an "independent" agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a "fourth branch" of Government, *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J., dissenting), the agencies, even "independent" agencies, are more appropriately considered to be part of the Executive Branch. See *Freytag* v. *Commissioner*, 501 U. S. 868, 910 (1991) (SCALIA, J., concurring in part and concurring in judgment). The President appoints their chief administrators, typically a Chairman and Commissioners, subject to confirmation by the Senate. Cf. *Bowsher* v. *Synar*, 478 U. S. 714, 723 (1986). The agencies derive their legal powers from congressionally enacted statutes. And the agencies enforce those statutes, *i. e.*, they "execute" them, in part by making rules or by adjudicating matters in dispute. Cf. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428–429 (1935).

The Court long ago laid to rest any constitutional doubts about whether the Constitution permitted Congress to delegate rulemaking and adjudicative powers to agencies. *E. g.*, *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494–495 (1897) (permitting rulemaking); *Crowell* v. *Benson*, 285 U. S. 22, 46 (1932) (permitting adjudication); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 852 (1986) (same). That, in part, is because the Court established certain safeguards surrounding the exercise of these powers. See, *e. g.*, *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935) (nondelegation doctrine); *Crowell*, *supra* (requiring judicial review). And the Court denied that those activities as safeguarded, however much they might *resemble* the activities of a legislature or court, fell within the

scope of Article I or Article III of the Constitution. *Schechter Poultry*, *supra*, at 529–530; *Crowell*, *supra*, at 50–53; see also *INS* v. *Chadha*, 462 U. S. 919, 953, n. 16 (1983) (agency's use of rulemaking "resemble[s]," but is not, lawmaking). Consequently, in exercising those powers, the agency is engaging in an Article II, Executive Branch activity. And the powers it is exercising are powers that the Executive Branch of Government must possess if it is to enforce modern law through administration.

This constitutional understanding explains why both commentators and courts have often attached the prefix "quasi" to descriptions of an agency's rulemaking or adjudicative functions. *E. g.*, *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935); 3 C. Koch, Administrative Law and Practice § 12.13 (2d ed. 1997); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 954–958 (1965); Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 869–870 (1962). The terms "*quasi* legislative" and "*quasi* adjudicative" indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472–473 (2001); *Freytag*, *supra*, at 910 (SCALIA, J., concurring in part and concurring in judgment).

The case before us presents a fairly typical example of a federal administrative agency's use of agency adjudication. Congress has enacted a statute, the Shipping Act of 1984 (Act or Shipping Act), 46 U. S. C. App. § 1701 *et seq.* (1994 ed. and Supp. V), which, among other things, forbids marine terminal operators to discriminate against terminal users. § 1709(d)(4) (1994 ed., Supp. V). The Act grants the Federal Maritime Commission the authority to administer the Act. The law grants the Commission the authority to enforce the Act in a variety of ways, for example, by making rules and

regulations, § 1716 (1994 ed.), by issuing or revoking licenses, § 1718 (1994 ed., Supp. V), and by conducting investigations and issuing reports, see generally § 1710 (1994 ed. and Supp. V). It also permits a private person to file a complaint, which the Commission is to consider. § 1710(a) (1994 ed.). Interestingly enough, it does not say that the Commission must determine the merits of the complaint through agency adjudication, see § 1710(g) (1994 ed., Supp. V)—though, for present purposes, I do not see that this statutory lacuna matters.

Regardless, the Federal Maritime Commission has decided to evaluate complaints through an adjudicative process. That process involves assignment to an administrative law judge, 46 CFR § 502.146(a) (2001), a hearing, an initial decision, §§ 502.147, 502.223, Commission review, and a final Commission decision, § 502.227, followed by federal appellate court review, 28 U. S. C. § 2342(3)(B). The initial hearing, like a typical court hearing, involves a neutral decisionmaker, an opportunity to present a case or defense through oral or documentary evidence, a right to cross-examination, and a written record that typically constitutes the basis for decision. 46 CFR § 502.154 (2001). But unlike a typical court proceeding, the agency process also may involve considerable hearsay, resolution of factual disputes through the use of "official notice," § 502.156; see also 5 U. S. C. § 556, and final decisionmaking by a Commission that remains free to disregard the initial decision and decide the matter on its own—indeed through the application of substantive as well as procedural rules, that it, the Commission, itself has created. See 46 CFR §§ 502.226, 502.227, 502.230 (2001); see also 46 U. S. C. App. § 1716 (1994 ed.) (rulemaking authority); 46 CFR §§ 502.51–502.56 (2001) (same).

The outcome of this process is often a Commission order, say, an order that tells a party to cease and desist from certain activity or that tells one party to pay money damages (called "reparations") to another. The Commission cannot

itself enforce such an order. See 46 U. S. C. App. § 1712(e). Rather, the Shipping Act says that, to obtain enforcement of an order providing for money damages, the private party beneficiary of the order must obtain a court order. § 1713(d). It adds that, to obtain enforcement of other commission orders, either the private party or the Attorney General must go to court. § 1713(c). It also permits the Commission to seek a court injunction prohibiting any person from violating the Shipping Act. § 1710(g) (1994 ed., Supp. V). And it authorizes the Commission to assess civil penalties (payable to the United States) against a person who fails to obey a Commission order; but to collect the penalties, the Commission, again, must go to court. §§ 1712(a), (c) (1994 ed. and Supp. V).

The upshot is that this case involves a typical Executive Branch agency exercising typical Executive Branch powers seeking to determine whether a particular person has violated federal law. Cf. 2 K. Davis & R. Pierce, Administrative Law Treatise 37–38 (1994) (describing typical agency characteristics); cf. also *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). The particular person in this instance is a state entity, the South Carolina State Ports Authority, and the agency is acting in response to the request of a private individual. But at first blush it is difficult to see why these special circumstances matter. After all, the Constitution created a Federal Government empowered to enact laws that would bind the States and it empowered that Federal Government to enforce those laws against the States. See *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160 (1920). It also left private individuals perfectly free to complain to the Federal Government about unlawful state activity, and it left the Federal Government free to take subsequent legal action. Where then can the Court find its constitutional principle—the principle that the Constitution forbids an Executive Branch agency to determine through ordinary adjudicative processes whether such a private complaint is

justified? As I have said, I cannot find that principle anywhere in the Constitution.

II

The Court's principle lacks any firm anchor in the Constitution's text. The Eleventh Amendment cannot help. It says:

> "The *Judicial* power of the United States shall not . . . extend to any suit . . . commenced or prosecuted against one of the . . . States by Citizens of another State." (Emphasis added.)

Federal administrative agencies do not exercise the "[j]udicial power of the United States." Compare *Crowell* v. *Benson*, 285 U. S. 22 (1932) (explaining why ordinary agency adjudication, with safeguards, is not an exercise of Article III power), with *Freytag* v. *Commissioner*, 501 U. S., at 890–891 (Tax Court, a special Article I court, exercises Article III power), and *Williams* v. *United States*, 289 U. S. 553, 565–566 (1933) (same as to Court of Claims). Of course, this Court has read the words "Citizens of another State" as if they also said "citizen of the same State." *Hans* v. *Louisiana*, 134 U. S. 1 (1890). But it has never said that the words "[j]udicial power of the United States" mean "the executive power of the United States." Nor should it.

The Tenth Amendment cannot help. It says:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Constitution has "delegated to the United States" the power here in question, the power "[t]o regulate Commerce with foreign Nations, and among the several States." U. S. Const., Art. I, §8, cl. 3; see *California* v. *United States*, 320 U. S. 577, 586 (1944). The Court finds within this delegation a hidden reservation, a reservation that, due to sovereign immunity, embodies the legal principle the Court enunciates.

But the text of the Tenth Amendment says nothing about any such hidden reservation, one way or the other.

Indeed, the Court refers for textual support only to an earlier case, namely, *Alden* v. *Maine*, 527 U. S. 706 (1999) (holding that sovereign immunity prohibits a private citizen from suing a State in state court), and, through *Alden*, to the texts that *Alden* mentioned. These textual references include: (1) what Alexander Hamilton described as a constitutional "postulate," namely, that the States retain their immunity from "suits, without their consent," unless there has been a "surrender" of that immunity "in the plan of the convention," *id.*, at 730 (internal quotation marks omitted); (2) what the *Alden* majority called "the system of federalism established by the Constitution," *ibid.;* and (3) what the *Alden* majority called "the constitutional design," *id.*, at 731. See also *id.*, at 760–762 (SOUTER, J., dissenting) (noting that the Court's opinion nowhere relied on constitutional text).

Considered purely as constitutional text, these words—"constitutional design," "system of federalism," and "plan of the convention"—suffer several defects. Their language is highly abstract, making them difficult to apply. They invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases, such as "due process of law" or the word "liberty" itself. And compared to these latter phrases, they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution. Cf. generally *Harmelin* v. *Michigan*, 501 U. S. 957, 985–986 (1991). Regardless, unless supported by considerations of history, of constitutional purpose, or of related consequence, those abstract phrases cannot support today's result.

III

Conceding that its conception of sovereign immunity is ungrounded in the Constitution's text, see *ante*, at 751–753, 767–768, n. 18, the Court attempts to support its holding with history. But this effort is similarly destined to fail, because

the very history to which the majority turned in *Alden* here argues against the Court's basic analogy—between a federal administrative proceeding triggered by a private citizen and a private citizen's lawsuit against a State.

In *Alden* the Court said that feudal law had created an 18th-century legal norm to the effect that "'no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord.'" 527 U. S., at 741. It added that the Framers' silence about the matter had woven that feudal "norm" into the "constitutional design," *i. e.*, had made it part of our "system of federalism" unchanged by the "'plan of the convention.'" *Id.*, at 714–717, 730, 740–743. And that norm, said the *Alden* Court, by analogy forbids a citizen ("vassal") to sue a State ("lord") in the "lord's" own courts. Here that same norm argues against immunity, for the forum at issue is federal—belonging by analogy to the "higher lord." And total 18th-century silence about state immunity in Article I proceedings would argue against, not in favor of, immunity.

In any event, the 18th century was not totally silent. The Framers enunciated in the "plan of the convention" the principle that the Federal Government may sue a State without its consent. See, *e. g.*, *West Virginia* v. *United States*, 479 U. S. 305, 311 (1987). They also described in the First Amendment the right of a citizen to petition the Federal Government for a redress of grievances. See also *United States* v. *Cruikshank*, 92 U. S. 542, 552–553 (1876); cf. generally Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford. L. Rev. 2153, 2227 (1998). The first principle applies here because only the Federal Government, not the private party, can—in light of this Court's recent sovereign immunity jurisprudence, see *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996)—bring the ultimate court action necessary legally to force a State to comply with the relevant federal law. See *id.*, at 71, n. 14. The second principle applies here be-

cause a private citizen has asked the Federal Government to determine whether the State has complied with federal law and, if not, to take appropriate legal action in court.

Of course these two principles apply only through analogy. (The Court's decision also relies on analogy—one that jumps the separation-of-powers boundary that the Constitution establishes.) Yet the analogy seems apt. A private citizen, believing that a State has violated federal law, seeks a determination by an Executive Branch agency that he is right; the agency will make that determination through use of its own adjudicatory agency processes; and, if the State fails to comply, the Federal Government may bring an action against the State in federal court to enforce the federal law.

Twentieth-century legal history reinforces the appropriateness of this description. The growth of the administrative state has led this Court to determine that administrative agencies are not Article III courts, see *Crowell* v. *Benson*, 285 U. S., at 49–53, that they have broad discretion to proceed either through agency adjudication or through rulemaking, *SEC* v. *Chenery Corp.*, 332 U. S., at 203 ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency"), and that they may bring administrative enforcement proceedings against States. At a minimum these historically established legal principles argue strongly against any effort to analogize the present proceedings to a lawsuit brought by a private individual against a State in a state court or to an Eleventh Amendment type lawsuit brought by a private individual against a State in a federal court.

This is not to say that the analogy (with a citizen petitioning for federal intervention) is, historically speaking, a perfect one. As the Court points out, the Framers may not have "anticipated the vast growth of the administrative state," and the history of their debates "does not provide direct guidance." *Ante*, at 755. But the Court is wrong to

ignore the relevance and importance of what the Framers did say. And it is doubly wrong to attach "great" legal "significance" to the absence of 18th- and 19th-century administrative agency experience. See *ibid.* Even if those alive in the 18th century did not "anticipat[e] the vast growth of the administrative state," *ibid.*, they did write a Constitution designed to provide a framework for Government across the centuries, a framework that is flexible enough to meet modern needs. And we cannot read their silence about particular means as if it were an instruction to forbid their use.

IV

The Court argues that the basic purpose of "sovereign immunity" doctrine—namely, preservation of a State's "dignity"—requires application of that doctrine here. It rests this argument upon (1) its efforts to analogize agency proceedings to court proceedings, and (2) its claim that the agency proceedings constitute a form of "compulsion" exercised by a private individual against the State. As I have just explained, I believe its efforts to analogize agencies to courts are, constitutionally speaking, too frail to support its conclusion. Neither can its claim of "compulsion" provide the necessary support.

Viewed from a purely legal perspective, the "compulsion" claim is far too weak. That is because the private individual lacks the legal authority to compel the State to comply with the law. For as I have noted, in light of the Court's recent sovereign immunity decisions, if an individual does bring suit to enforce the Commission's order, see 46 U. S. C. App. § 1713 (1994 ed.), the State would arguably be free to claim sovereign immunity. See *Seminole Tribe of Fla.*, *supra.* Only the Federal Government, acting through the Commission or the Attorney General, has the authority to compel the State to act.

In a typical instance, the private individual will file a complaint, the agency will adjudicate the complaint, and the

agency will reach a decision. The State subsequently may take the matter to court in order to obtain judicial review of any adverse agency ruling, but, if it does so, its opponent in that court proceeding is *not* a private party, but the agency itself. 28 U. S. C. § 2344. (And unlike some other administrative schemes, see, *e. g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, *ante*, at 651–653 (SOUTER, J., concurring), the Commission would not be a party in name only.) Alternatively, the State may do nothing, in which case either the Commission or the Attorney General must seek a court order compelling the State to obey. 46 U. S. C. App. §§ 1710, 1713 (1994 ed. and Supp. V). The Commission, but not a private party, may assess a penalty against the State for noncompliance, § 1712; and only a court acting at the Commission's request can compel compliance with a penalty order. In sum, no one can legally compel the State's obedience to the Shipping Act's requirements without a court order, and in no case would a court issue such an order (absent a State's voluntary waiver of sovereign immunity, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 238 (1985)) absent the request of a federal agency or other federal instrumentality.

In *Alden* this Court distinguished for sovereign immunity purposes between (a) a lawsuit brought by the Federal Government and (b) a lawsuit brought by a private person. It held that principles of "sovereign immunity" barred suit in the latter instance but not the former, because the former—a suit by the Federal Government—"require[s] the exercise of political responsibility for each suit prosecuted against a State." 527 U. S., at 756. That same "exercise of political responsibility" must take place here in every instance prior to the issuance of an order that, from a legal perspective, will compel the State to obey. To repeat: Without a court proceeding the private individual cannot legally force the State to act, to pay, or to desist; only the Federal Government may institute a court proceeding; and, in deciding

whether to do so, the Federal Government will exercise appropriate political responsibility. Cf. *ibid.*

Viewed from a practical perspective, the Court's "compulsion" claim proves far too much. Certainly, a private citizen's decision to file a complaint with the Commission can produce practical pressures upon the State to respond and eventually to comply with a Commission decision. By appearing before the Commission, the State will be able to obtain full judicial review of an adverse agency decision in a court of appeals (where it will face in opposition the Commission itself, not the private party). By appearing, the State will avoid any potential Commission-assessed monetary penalty. And by complying, it will avoid the adverse political, practical, and symbolic implications of being labeled a federal "lawbreaker."

Practical pressures such as these, however, cannot sufficiently "affront" a State's "dignity" as to warrant constitutional "sovereign immunity" protections, for it is easy to imagine comparable instances of clearly lawful private citizen complaints to Government that place a State under far greater practical pressures to comply. No one doubts, for example, that a private citizen can complain to Congress, which may threaten (should the State fail to respond) to enact a new law that the State opposes. Nor does anyone deny that a private citizen, in complaining to a federal agency, may seek a rulemaking proceeding, which may lead the agency (should the State fail to respond) to enact a new agency rule that the State opposes. A private citizen may ask an agency formally to declare that a State is not in compliance with a statute or federal rule, even though from that formal declaration may flow a host of legal consequences adverse to a State's interests. See, *e. g.*, 42 U. S. C. § 300g–3 (Environmental Protection Agency may declare that a State is in noncompliance with federal water quality regulations). And one can easily imagine a legal scheme in which a private individual files a complaint like the one before us, but asks

an agency staff member to investigate the matter, which investigation would lead to an order similar to the order at issue here with similar legal and practical consequences.

Viewed solely in terms of practical pressures, the pressures upon a State to respond before Congress or the agency, to answer the private citizen's accusations, to oppose his requests for legally adverse agency or congressional action, would seem no less powerful than those at issue here. Once one avoids the temptation to think (mistakenly) of an agency as a court, it is difficult to see why the practical pressures at issue here would "affront" a State's "dignity" any more than those just mentioned. And if the latter create no constitutional "dignity" problem, why should the former? The Court's answer—that "[s]overeign immunity concerns are not implicated" unless the "Federal Government attempts to coerce States into answering the complaints of private parties in an adjudicative proceeding," *ante*, at 764, n. 16—simply begs the question of *when* and *why* States should be entitled to special constitutional protection.

The Court's more direct response lies in its claim that the practical pressures here are special, arising from a set of statutes that deprive a nonresponding State of any meaningful judicial review of the agency's determinations. See *ante*, at 760–764. The Court does not explain just what makes this kind of pressure constitutionally special. But in any event, the Court's response is inadequate. The statutes clearly provide the State with full judicial review of the initial agency decision should the State choose to seek that review. 28 U. S. C. § 2342(3)(B)(iv). That review cannot "affront" the State's "dignity, for it takes place in a court proceeding in which the Commission, not the private party, will oppose the State. § 2344.

Even were that not so, Congress could easily resolve the resulting problem by making clear that the relevant statutes authorize full judicial review in an enforcement action brought against a State. For that matter, one might in-

terpret existing statutes as permitting in such actions whatever form of judicial review the Constitution demands. Cf. *Crowell* v. *Benson*, 285 U. S., at 45–47. Statutory language that authorizes review of whether an order was "properly made and duly issued," 46 U. S. C. App. § 1713(c), does not *forbid* review that the Constitution *requires*. But even were I to make the heroic assumption (which I do not believe) that this case implicates a reviewing court's statutory inability to apply constitutionally requisite standards of judicial review, I should still conclude that the Constitution permits the agency to consider the complaint here before us. The "review standards" problem concerns the later enforceability of the agency decision, and the Court must consider any such problem later in the context of a court order granting or denying review. *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case'").

V

The Court cannot justify today's decision in terms of its practical consequences. The decision, while permitting an agency to bring enforcement actions against States, forbids it to use agency adjudication in order to help decide whether to do so. Consequently the agency must rely more heavily upon its own informal staff investigations in order to decide whether a citizen's complaint has merit. The natural result is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 654–656 (1990); cf. also Shapiro, 78 Harv. L. Rev., at 921 ("One of the most distinctive aspects of the administrative process is the flexibility it affords in the selection of methods for policy formulation"). And at least one of these consequences, the forced growth of unnecessary federal bureaucracy, undermines the very constitutional objec-

tives the Court's decision claims to serve. Cf. *Printz* v. *United States*, 521 U. S. 898, 959 (1997) (STEVENS, J., dissenting) ("In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies"); *id.*, at 976–978 (BREYER, J., dissenting).

These consequences are not purely theoretical. The Court's decision may undermine enforcement against state employers of many laws designed to protect worker health and safety. See, *e. g.*, 42 U. S. C. § 7622 (1994 ed.) (Clean Air Act); 33 U. S. C. § 1367 (Clean Water Act); 15 U. S. C. § 2622 (Toxic Substances Control Act); 42 U. S. C. § 6971 (1994 ed.) (Solid Waste Disposal Act); see also *Rhode Island Dept. of Environmental Management* v. *United States*, 286 F. 3d 27, 36–40 (CA1 2002). And it may inhibit the development of federal fair, rapid, and efficient informal nonjudicial responses to complaints, for example, of improper medical care (involving state hospitals). Cf. generally Macchiaroli, Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills, 58 Geo. Wash. L. Rev. 181 (1990).

* * *

The Court's decision threatens to deny the Executive and Legislative Branches of Government the structural flexibility that the Constitution permits and which modern government demands. The Court derives from the abstract notion of state "dignity" a structural principle that limits the powers of both Congress and the President. Its reasoning rests almost exclusively upon the use of a formal analogy, which, as I have said, jumps ordinary separation-of-powers bounds. It places "great significance" upon the 18th-century absence of 20th-century administrative proceedings. See *ante*, at 755. And its conclusion draws little support from considerations of constitutional purpose or related consequence. In its readiness to rest a structural limitation on so little evidence and in its willingness to interpret that limitation so

broadly, the majority ignores a historical lesson, reflected in a constitutional understanding that the Court adopted long ago: An overly restrictive judicial interpretation of the Constitution's structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution's own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people's will into effective public action.

This understanding, underlying constitutional interpretation since the New Deal, reflects the Constitution's demands for structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions. It reflects the comparative inability of the Judiciary to understand either those conditions or the need for new laws and new administrative forms they may create. It reflects the Framers' own aspiration to write a document that would "constitute" a democratic, liberty-protecting form of government that would endure through centuries of change. This understanding led the New Deal Court to reject overly restrictive formalistic interpretations of the Constitution's structural provisions, thereby permitting Congress to enact social and economic legislation that circumstances had led the public to demand. And it led that Court to find in the Constitution authorization for new forms of administration, including independent administrative agencies, with the legal authority flexibly to implement, *i. e.*, to "execute," through adjudication, through rulemaking, and in other ways, the legislation that Congress subsequently enacted. See, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414 (1944); *Crowell* v. *Benson*, *supra*, at 45–47.

Where I believe the Court has departed from this basic understanding I have consistently dissented. See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S., at 92 (STEVENS, J., dissenting in part and concurring in part); *Alden* v. *Maine*, 527 U. S., at 760 (SOUTER, J., dissenting); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*,

527 U. S., at 693 (BREYER, J., dissenting); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 648 (1999) (STEVENS, J., dissenting); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S., at 100 (SOUTER, J., dissenting). These decisions set loose an interpretive principle that restricts far too severely the authority of the Federal Government to regulate innumerable relationships between State and citizen. Just as this principle has no logical starting place, I fear that neither does it have any logical stopping point.

Today's decision reaffirms the need for continued dissent—unless the consequences of the Court's approach prove anodyne, as I hope, rather than randomly destructive, as I fear.

Syllabus

GISBRECHT ET AL. *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY

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

No. 01–131. Argued March 20, 2002—Decided May 28, 2002

An attorney who successfully represents a Social Security benefits claimant in court may be awarded as part of the judgment "a reasonable fee . . . not in excess of 25 percent of the . . . past-due benefits" awarded to the claimant. 42 U. S. C. § 406(b)(1)(A). The fee is payable "out of, and not in addition to, the amount of [the] past-due benefits." *Ibid.* In many cases, as in the instant case, the Equal Access to Justice Act (EAJA) effectively increases the portion of past-due benefits the successful Social Security claimant may pocket. Under EAJA, a party prevailing against the United States in court may be awarded fees payable by the United States if the Government's position in the litigation was not "substantially justified." 28 U. S. C. § 2412(d)(1)(A). Congress harmonized fees payable by the Government under EAJA with fees payable under § 406(b) out of the Social Security claimant's past-due benefits: Fee awards may be made under both prescriptions, but the claimant's attorney must refund to the claimant the amount of the smaller fee, up to the point the claimant receives 100 percent of the past-due benefits.

Petitioners Gisbrecht, Miller, and Sandine brought separate actions in the District Court seeking Social Security disability benefits under Title II of the Social Security Act. All three were represented by the same attorneys and prevailed on the merits of their claims. Each petitioner then successfully sought attorneys' fees under EAJA. Pursuant to contingent-fee agreements standard for Social Security claimant representation, each petitioner had agreed to pay counsel 25 percent of all past-due benefits recovered. Their attorneys accordingly requested $7,091.50 from Gisbrecht's recovery, $7,514 from Miller's, and $13,988 from Sandine's. Given the EAJA offsets, the amounts in fact payable from each client's past-due benefits recovery would have been $3,752.39 from Gisbrecht's recovery, $2,349.25 from Miller's, and $7,151.90 from Sandine's. Following Ninth Circuit precedent, the District Court in each case declined to give effect to the attorney-client fee agreement, instead employing a "lodestar" method, under which the number of hours reasonably devoted to each case was multiplied by the reasonable hourly fee. This method yielded as § 406(b) fees $3,135 from Gisbrecht's

recovery, $5,461.50 from Miller's, and $6,550 from Sandine's. Offsetting the EAJA awards against the lodestar determinations, the court determined that no portion of Gisbrecht's or Sandine's past-due benefits was payable to counsel, and that only $296.75 of Miller's recovery was payable to her counsel. The Ninth Circuit consolidated the cases and affirmed.

Held: Section 406(b) does not displace contingent-fee agreements within the statutory ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those agreements. Pp. 799–809.

(a) Section 406(b)'s words, read in isolation, could be construed to allow either the Ninth Circuit's lodestar approach or petitioners' position that the attorney-client fee agreement should control, if not "in excess of 25 percent of . . . the past-due benefits." Because the statute's text is inconclusive, this Court takes into account, as interpretive guides, the origin and standard application of the proffered approaches. Pp. 799–800.

(b) The lodestar method, though rooted in accounting practices adopted in the 1940's, did not gain a firm foothold in the federal courts until the mid-1970's. The lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation. Fees shifted to the losing party, however, are not at issue here. Pp. 800–802.

(c) Section 406(b) authorizes fees payable from the successful party's recovery. Characteristically in Social Security benefits cases, attorneys and clients enter into contingent-fee agreements specifying that the attorney's fee will be 25 percent of any past-due benefits to which the claimant becomes entitled. Contingent-fee arrangements, though problematic, particularly when not exposed to court review, are common in the United States in many settings, and Social Security representation operates largely on a contingent-fee basis. Before 1965, the Social Security Act imposed no limits on contingent-fee agreements drawn by counsel and signed by benefits claimants. Arrangements yielding exorbitant fees reserved for lawyers one-third to one-half of the accrued benefits; the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed. Attending to these realities, Congress provided for a reasonable fee, not in excess of 25 percent of accrued benefits, as part of the court's judgment, and specified that no other fee would be payable. Violation of these limitations was made a criminal offense. In addition to protecting claimants against inordinately large fees, Congress sought to ensure that attorneys successfully representing Social Security claimants would not risk nonpayment by

Syllabus

their clients. Congress therefore authorized agency payment of fees directly to counsel from funds withheld from the claimant's past-due benefits. But nothing in § 406(b)'s text or history reveals a design to prohibit or discourage attorneys and claimants from entering into contingent-fee agreements. Given the prevalence of such agreements between attorneys and Social Security benefits claimants, it is unlikely that Congress, simply by prescribing "reasonable fees," meant to outlaw, rather than to contain, the fee agreements. Pp. 802–805.

(d) This conclusion is bolstered by Congress' 1990 authorization of contingent-fee agreements under § 406(a), which governs fees for agency-level representation. It would be anomalous if contract-based fees expressly authorized by § 406(a)(2) at the administrative level were disallowed for court representation under § 406(b). It is also unlikely that Congress, legislating in 1965, intended to install a lodestar method that courts did not develop and employ until years later. Furthermore, the lodestar method was designed to govern imposition of fees on the losing party. In such cases, nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client. But § 406(b) governs the total fee a successful Social Security claimant's attorney may receive for court representation. Nothing more may be demanded or received from the benefits claimant. Pp. 805–807.

(e) Most plausibly read, § 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements to assure that they yield reasonable results in particular cases. Within the 25 percent boundary Congress provided, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered. Courts have reduced the attorney's recovery based on the character of the representation and the results the representative achieved. If the attorney is responsible for delay, for example, a reduction is in order so that the attorney will not profit from the accumulation of benefits during the pendency of the case in court. And if the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order. Pp. 807–808.

238 F. 3d 1196, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post,* p. 809.

Eric Schnaufer argued the cause for petitioners. With him on the briefs were *Eric Schnapper* and *Tim Wilborn.*

David B. Salmons argued the cause *pro hac vice* for respondent. With him on the brief were *Solicitor General Olson, Assistant Attorney General McCallum, Deputy Solicitor General Clement, William Kanter,* and *Frank A. Rosenfeld.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the fees that may be awarded attorneys who successfully represent Social Security benefits claimants in court. Under 42 U. S. C. § 406(b) (1994 ed. and Supp. V),[1] a prevailing claimant's fees are payable only out of the benefits recovered; in amount, such fees may not exceed 25 percent of past-due benefits. At issue is a question that has sharply divided the Federal Courts of Appeals: What is the appropriate starting point for judicial determinations of "a reasonable fee for [representation before the court]"? See *ibid.* Is the contingent-fee agreement between claimant and counsel, if not in excess of 25 percent of past-due benefits, presumptively reasonable? Or should courts begin with a lodestar calculation (hours reasonably spent on the case times reasonable hourly rate) of the kind we have approved under statutes that shift the obligation to pay to the loser in the litigation? See *Hensley* v. *Eckerhart,* 461 U. S. 424, 426 (1983) (interpreting Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which allows a "prevailing party" to recover from his adversary "a reasonable attor-

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**Jeffrey Robert White* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

Daniel J. Popeo and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

Nancy G. Shor, Kirk B. Roose, Joel F. Friedman, Robert E. Rains, and *Eric Buchanan* filed a brief for the National Organization of Social Security Claimants' Representatives as *amicus curiae.*

[1] 49 Stat. 624, as amended.

ney's fee as part of the costs" (internal quotation marks omitted)).

Congress, we conclude, designed § 406(b) to control, not to displace, fee agreements between Social Security benefits claimants and their counsel. Because the decision before us for review rests on lodestar calculations and rejects the primacy of lawful attorney-client fee agreements, we reverse the judgment below and remand for recalculation of counsel fees payable from the claimants' past-due benefits.

I

A

Fees for representation of individuals claiming Social Security old-age, survivor, or disability benefits, both at the administrative level and in court, are governed by prescriptions Congress originated in 1965. Social Security Amendments of 1965, 79 Stat. 403, as amended, 42 U. S. C. § 406.[2]

[2] Before 1965, Congress did not explicitly authorize attorney's fees for in-court representation of Social Security benefits claimants. At least two Courts of Appeals, however, concluded that 42 U. S. C. § 405(g) implicitly authorized such fees. See *Bowen* v. *Galbreath*, 485 U. S. 74, 75–76 (1988) (citing *Celebrezze* v. *Sparks*, 342 F. 2d 286 (CA5 1965)) ("Under 42 U. S. C. § 405(g), a court reviewing [a Social Security benefits decision] has the power to enter 'a judgment affirming, modifying, or reversing the decision . . . .' The court in *Sparks* reasoned that where a statute gives a court jurisdiction, it must be presumed, absent any indication to the contrary, that the court was intended to exercise all the powers of a court, including the power to provide for payment of attorney's fees out of any recovery. 342 F. 2d, at 288–289 [citing *Folsom* v. *McDonald*, 237 F. 2d 380, 382–383 (CA4 1956)].").

As to administrative proceedings, the Social Security Act originally made no provision for attorney's fees. 49 Stat. 620 (1935). Four years later, Congress amended the Act to permit the Social Security Board to prescribe maximum fees attorneys could charge for representation of claimants before the agency. Social Security Act Amendments of 1939, 53 Stat. 1360. Congress expected the need for counsel in agency proceedings to be slim. H. R. Rep. No. 728, 76th Cong., 1st Sess., 44–45 (1939); S. Rep. No. 734, 76th Cong., 1st Sess., 53 (1939). The Board subsequently established a maximum fee of $10, permitting a higher fee only by petition

The statute deals with the administrative and judicial review stages discretely: § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court. See also 20 CFR § 404.1728(a) (2001).

For representation of a benefits claimant at the administrative level, an attorney may file a fee petition or a fee agreement. 42 U. S. C. § 406(a). In response to a petition, the agency may allow fees "for services performed in connection with any claim before" it; if a determination favorable to the benefits claimant has been made, however, the Commissioner of Social Security "*shall* . . . fix . . . a reasonable fee" for an attorney's services. § 406(a)(1) (1994 ed.) (emphasis added). In setting fees under this method, the agency takes into account, in addition to any benefits award, several other factors. See 20 CFR § 404.1725(b) (2001).[3] Fees may

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to the agency. 20 CFR § 403.713(d) (1949). The agency later prescribed separate fees for representation at the initial and appellate levels of the administrative process. 20 CFR § 404.976 (1961).

[3] Title 20 CFR § 404.1725(b) provides:

"*Evaluating a request for approval of a fee.*

"(1) When we evaluate a representative's request for approval of a fee, we consider the purpose of the social security program, which is to provide a measure of economic security for the beneficiaries of the program, together with—

"(i) The extent and type of services the representative performed;

"(ii) The complexity of the case;

"(iii) The level of skill and competence required of the representative in giving the services;

"(iv) The amount of time the representative spent on the case;

"(v) The results the representative achieved;

"(vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and

"(vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

"(2) Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit alone, but on a consideration of all the factors listed in this section. The benefits payable in any claim are determined by specific provisions

be authorized, on petition, even if the benefits claimant was unsuccessful. § 404.1725(b)(2).

As an alternative to fee petitions, the Social Security Act, as amended in 1990, accommodates contingent-fee agreements filed with the agency in advance of a ruling on the claim for benefits. Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388–266 to 1388–267, as amended, 42 U. S. C. §§ 406(a)(2)–(4) (1994 ed. and Supp. V). If the ruling on the benefits claim is favorable to the claimant, the agency will generally approve the fee agreement, subject to this limitation: Fees may not exceed the lesser of 25 percent of past-due benefits or $4,000 (increased to $5,300 effective February 2002). §§ 406(a)(2)(A)(ii), (iii) (1994 ed.); 67 Fed. Reg. 2477 (2002); see Social Security Administration, Office of Hearings and Appeals, Litigation Law Manual (HALLEX) I–5–109 III.A (Feb. 5, 1999).

For proceedings in court, Congress provided for fees on rendition of "a judgment favorable to a claimant." 42 U. S. C. § 406(b)(1)(A) (1994 ed., Supp. V). The Commissioner has interpreted § 406(b) to "prohibi[t] a lawyer from charging fees when there is no award of back benefits." Tr. of Oral Arg. 37–38; see Brief in Opposition 12, n. 12 (reading § 406(b) to "prohibi[t] other [fee] arrangements such as non-contingent hourly fees").

As part of its judgment, a court may allow "a reasonable fee . . . not in excess of 25 percent of the . . . past-due benefits" awarded to the claimant. § 406(b)(1)(A). The fee is payable "out of, and not in addition to, the amount of [the] past-due benefits." *Ibid.* Because benefits amounts figuring in the fee calculation are limited to those past due, attorneys may not gain additional fees based on a claimant's continuing entitlement to benefits.

The prescriptions set out in §§ 406(a) and (b) establish the exclusive regime for obtaining fees for successful represen-

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of law and are unrelated to the efforts of the representative. We may authorize a fee even if no benefits are payable."

tation of Social Security benefits claimants. Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense. §§ 406(a)(5), (b)(2) (1994 ed.); 20 CFR §§ 404.1740–1799 (2001).

In many cases, as in the instant case, the Equal Access to Justice Act (EAJA), enacted in 1980, effectively increases the portion of past-due benefits the successful Social Security claimant may pocket. 94 Stat. 2329, as amended, 28 U. S. C. § 2412. Under EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees payable by the United States if the Government's position in the litigation was not "substantially justified." § 2412(d)(1)(A). EAJA fees are determined not by a percent of the amount recovered, but by the "time expended" and the attorney's "[hourly] rate," § 2412(d)(1)(B), capped in the mine run of cases at $125 per hour, § 2412(d)(2)(A).[4] Cf. 5 U. S. C. § 504 (authorizing payment of attorney's fees by the Government when a party prevails in a federal agency adjudication).

Congress harmonized fees payable by the Government under EAJA with fees payable under § 406(b) out of the claimant's past-due Social Security benefits in this manner: Fee awards may be made under both prescriptions, but the claimant's attorney must "refun[d] to the claimant the amount of the smaller fee." Act of Aug. 5, 1985, Pub. L. 99–80, § 3, 99 Stat. 186. "Thus, an EAJA award offsets an award under Section 406(b), so that the [amount of the total past-due benefits the claimant actually receives] will be increased by the . . . EAJA award up to the point the claimant receives 100 percent of the past-due benefits." Brief for United States 3.

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[4] A higher fee may be awarded if "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee." 28 U. S. C. § 2412(d)(2)(A)(ii).

B

Petitioners Gary Gisbrecht, Barbara Miller, and Nancy Sandine brought three separate actions in the District Court for the District of Oregon under 42 U. S. C. § 405(g) (1994 ed.),[5] seeking Social Security disability benefits under Title II of the Social Security Act. All three petitioners were represented by the same attorneys, and all three prevailed on the merits of their claims. Gisbrecht was awarded $28,366 in past-due benefits; Miller, $30,056; and Sandine, $55,952. Each petitioner then successfully sought attorneys' fees payable by the United States under EAJA: Gisbrecht was awarded $3,339.11, Miller, $5,164.75, and Sandine, $6,836.10.

Pursuant to contingent-fee agreements standard for Social Security claimant representation, see 1 B. Samuels, Social Security Disability Claims § 21:10 (2d ed. 1994), Gisbrecht, Miller, and Sandine had each agreed to pay counsel 25 percent of all past-due benefits recovered, App. to Pet. for Cert. 72–86. Their attorneys accordingly requested § 406(b) fees of $7,091.50 from Gisbrecht's recovery, $7,514 from Miller's, and $13,988 from Sandine's. Given the EAJA offsets, the amounts in fact payable from each client's past-due benefits recovery would have been $3,752.39 from Gisbrecht's recovery, $2,349.25 from Miller's, and $7,151.90 from Sandine's.

Following Circuit precedent, see *Allen* v. *Shalala*, 48 F. 3d 456, 458–459 (CA9 1995), the District Court in each case declined to give effect to the attorney-client fee agreement. *Gisbrecht* v. *Apfel*, No. CV–98–0437–RE (Ore., Apr. 14, 1999); *Miller* v. *Apfel*, No. CV–96–6164–AS (Ore., Mar. 30, 1999); *Sandine* v. *Apfel*, No. CV–97–6197–ST (Ore., June 18, 1999). Instead, the court employed for the § 406(b) fee calculation a "lodestar" method, under which the number of hours reasonably devoted to each case was multiplied by a reasonable

[5] Section 405(g) authorizes judicial review of administrative denials of applications for Social Security benefits.

hourly fee. This method yielded as § 406(b) fees $3,135 from Gisbrecht's recovery, $5,461.50 from Miller's, and $6,550 from Sandine's. Offsetting the EAJA awards, the court determined that no portion of Gisbrecht's or Sandine's past-due benefits was payable to counsel, and that only $296.75 of Miller's recovery was payable to her counsel as a § 406(b) fee. The three claimants appealed.[6]

Adhering to Circuit precedent applying the lodestar method to calculate fees under § 406(b), the Court of Appeals for the Ninth Circuit consolidated the cases[7] and affirmed the District Court's fee dispositions. *Gisbrecht* v. *Apfel*, 238 F. 3d 1196 (2000). The Appeals Court noted that fees determined under the lodestar method could be adjusted by applying 12 further factors, one of them, "whether the fee is fixed or contingent." *Id.*, at 1198 (quoting *Kerr* v. *Screen Extras Guild, Inc.*, 526 F. 2d 67, 70 (CA9 1975)).[8] While "a district

[6] Although the claimants were named as the appellants below, and are named as petitioners here, the real parties in interest are their attorneys, who seek to obtain higher fee awards under § 406(b). For convenience, we nonetheless refer to claimants as petitioners. See *Hopkins* v. *Cohen*, 390 U. S. 530, 531, n. 2 (1968). We also note that the Commissioner of Social Security here, as in the Ninth Circuit, has no direct financial stake in the answer to the § 406(b) question; instead, she plays a part in the fee determination resembling that of a trustee for the claimants. See, *e. g.*, *Lewis* v. *Secretary of Health and Human Servs.*, 707 F. 2d 246, 248 (CA6 1983).

[7] A fourth case, *Anderson* v. *Apfel*, No. CV–96–6311–HO (Ore., Sept. 29, 1999), was also consolidated with petitioners' cases; we denied certiorari in *Anderson* in the order granting certiorari on petitioners' question. See 534 U. S. 1039 (2001).

[8] *Kerr* directed consideration of "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the pro-

court must *consider* a plaintiff's request to increase a fee [based on a contingent-fee agreement]," the Ninth Circuit stated, "a court 'is not required to articulate its reasons' for accepting or rejecting such a request." 238 F. 3d, at 1199 (quoting *Widrig* v. *Apfel*, 140 F. 3d 1207, 1211 (CA9 1998)) (emphasis in original).

We granted certiorari, 534 U. S. 1039 (2001), in view of the division among the Circuits on the appropriate method of calculating fees under § 406(b). Compare *Coup* v. *Heckler*, 834 F. 2d 313 (CA3 1987); *Craig* v. *Secretary, Dept. of Health and Human Servs.*, 864 F. 2d 324 (CA4 1989); *Brown* v. *Sullivan*, 917 F. 2d 189 (CA5 1990); *Cotter* v. *Bowen*, 879 F. 2d 359 (CA8 1989); *Hubbard* v. *Shalala*, 12 F. 3d 946 (CA10 1993); and *Kay* v. *Apfel*, 176 F. 3d 1322 (CA11 1999) (all following, in accord with the Ninth Circuit, a lodestar method), with *Wells* v. *Sullivan*, 907 F. 2d 367 (CA2 1990); *Rodriguez* v. *Bowen*, 865 F. 2d 739 (CA6 1989) (en banc); and *McGuire* v. *Sullivan*, 873 F. 2d 974 (CA7 1989) (all giving effect to attorney-client contingent-fee agreement, if resulting fee is reasonable).[9] We now reverse the Ninth Circuit's judgment.

II

Beginning with the text, § 406(b)'s words, "a reasonable fee . . . not in excess of 25 percent of . . . the past-due benefits," read in isolation, could be construed to allow either the Ninth Circuit's lodestar approach or petitioners' position that the attorney-client fee agreement ordinarily should control, if not "in excess of 25 percent." The provision

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fessional relationship with the client, and (12) awards in similar cases." 526 F. 2d, at 69–70 (citing *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717–719 (CA5 1974)).

[9] Cf. *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F. 2d 24, 26 (CA1 1988) *(per curiam)* ("a court is not required to give blind deference to . . . a contractual fee agreement, and must ultimately be responsible for fixing a reasonable fee for the judicial phase of the proceedings" (internal quotation marks omitted)).

instructs "a reasonable fee," which could be measured by a lodestar calculation. But § 406(b)'s language does not exclude contingent-fee contracts that produce fees no higher than the 25 percent ceiling. Such contracts are the most common fee arrangement between attorneys and Social Security claimants. See Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Report to Congress: Attorney Fees Under Title II of the Social Security Act 15, 66, 70 (July 1988) (hereinafter SSA Report); Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* 1–2. Looking outside the statute's inconclusive text, we next take into account, as interpretive guides, the origin and standard application of the proffered approaches.

The lodestar method has its roots in accounting practices adopted in the 1940's to allow attorneys and firms to determine whether fees charged were sufficient to cover overhead and generate suitable profits. W. Ross, The Honest Hour: The Ethics of Time-Based Billing by Attorneys 16 (1996) (hereinafter Honest Hour). An American Bar Association (ABA) report, published in 1958, observed that attorneys' earnings had failed to keep pace with the rate of inflation; the report urged attorneys to record the hours spent on each case in order to ensure that fees ultimately charged afforded reasonable compensation for counsels' efforts. See Special Committee on Economics of Law Practice, The 1958 Lawyer and His 1938 Dollar 9–10 (reprint 1959).

Hourly records initially provided only an internal accounting check. See Honest Hour 19. The fees actually charged might be determined under any number of methods: the annual retainer; the fee-for-service method; the "eyeball" method, under which the attorney estimated an annual fee for regular clients; or the contingent-fee method, recognized by this Court in *Stanton* v. *Embrey*, 93 U. S. 548, 556 (1877), and formally approved by the ABA in 1908. See Honest Hour 13–19. As it became standard accounting practice to

record hours spent on a client's matter, attorneys increasingly realized that billing by hours devoted to a case was administratively convenient; moreover, as an objective measure of a lawyer's labor, hourly billing was readily impartable to the client. *Id.*, at 18. By the early 1970's, the practice of hourly billing had become widespread. See *id.*, at 19, 21.

The federal courts did not swiftly settle on hourly rates as the overriding criterion for attorney's fee awards. In 1974, for example, the Fifth Circuit issued an influential opinion holding that, in setting fees under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k) (1970 ed.), courts should consider not only the number of hours devoted to a case but also 11 other factors. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717–719 (1974).[10] The lodestar method did not gain a firm foothold until the mid-1970's, see *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (CA3 1973), appeal after remand, 540 F. 2d 102 (1976), and achieved dominance in the federal courts only after this Court's decisions in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), *Blum* v. *Stenson*, 465 U. S. 886 (1984), and *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546 (1986).

Since that time, "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." *Burlington* v. *Dague*, 505 U. S. 557, 562 (1992) (relying on *Hensley*, *Blum*, and *Delaware Valley* to apply lodestar method to fee determination under Solid Waste Disposal Act, § 7002(e), 42 U. S. C. § 6972(e) (1988 ed.), and Clean Water Act, § 505(d), 33 U. S. C. § 1365(d) (1988 ed.), and noting prior application of lodestar method to Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1988 ed., Supp. III); Title VII of Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k) (1988 ed., Supp. III); and Clean Air Act, 42 U. S. C. § 7604(d) (1988 ed.)). As we recognized in *Hensley*,

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[10] See *supra*, at 798–799, n. 8.

"[i]deally, . . . litigants will settle the amount of a fee." 461 U. S., at 437.[11] But where settlement between the parties is not possible, "[t]he most useful starting point for [court determination of] the amount of a reasonable fee [payable by the loser] is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, at 433. Thus, the lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation. See *id.*, at 440 (Burger, C. J., concurring) (decision addresses statute under which "a lawyer seeks to have his adversary pay the fees of the prevailing party").

Fees shifted to the losing party, however, are not at issue here. Unlike 42 U. S. C. § 1988 (1994 ed. and Supp. V) and EAJA, 42 U. S. C. § 406(b) (1994 ed., Supp. V) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre: It authorizes fees payable from the successful party's recovery. Several statutes governing suits against the United States similarly provide that fees may be paid from the plaintiff's recovery. See, *e. g.*, Federal Tort Claims Act (FTCA), 28 U. S. C. § 2678 ("No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any [court] judgment rendered [in an FTCA suit], or in excess of 20 per centum of any award, compromise, or settlement made [by a federal agency to settle an FTCA claim]."); Veterans' Benefits Act, 38 U. S. C. § 5904(d)(1) (1994 ed.) ("When a claimant [for veterans' benefits] and an attorney have entered into a [contingent-]fee agreement [under which fees are paid by withholding from the claimant's benefits award], the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded

[11] See also, *e. g.*, 31 U. S. C. § 3554(c)(4) (1994 ed.) ("[T]he Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs [including attorneys' fees] to be paid.").

on the basis of the claim.").[12] Characteristically in cases of the kind we confront, attorneys and clients enter into contingent-fee agreements "specifying that the fee will be 25 percent of any past-due benefits to which the claimant becomes entitled." Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* 2; see Brief for Washington Legal Foundation et al. as *Amici Curiae* 9, n. 6 ("There is no serious dispute among the parties that virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits awarded by the courts.").

Contingent fees, though problematic, particularly when not exposed to court review, are common in the United States in many settings. Such fees, perhaps most visible in

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[12] See also Servicemembers' Group Life Insurance Act, 38 U. S. C. § 1984(g) (1994 ed.) ("[T]he court . . . shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the Department out of the payments to be made under the judgment or decree."); International Claims Settlement Act of 1949 (ICSA), 22 U. S. C. § 1623(f) ("No remuneration on account of services rendered on behalf of any claimant in connection with any claim filed with the Commission under [the ICSA] shall exceed 10 per centum of the total amount paid pursuant to any award certified under the [ICSA] on account of such claim. Any agreement to the contrary shall be unlawful and void."); Trading with the Enemy Act, 50 U. S. C. App. § 20 (1994 ed.) ("No property or interest or proceeds shall be returned under this Act . . . unless satisfactory evidence is furnished . . . that the aggregate of the fees to be paid to all agents, attorneys . . . , or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment."); War Claims Act, 50 U. S. C. App. § 2017m ("No remuneration on account of services rendered on behalf of any claimant in connection with any claim filed with the Commission under this [Act] shall exceed 10 per centum (or such lesser per centum as may be fixed by the Commission with respect to any class of claims) of the total amount paid pursuant to any award certified under the provisions of this title . . . on account of such claim.").

tort litigation, are also used in, *e. g.*, patent litigation, real estate tax appeals, mergers and acquisitions, and public offerings. See ABA Formal Opinion 94–389, ABA/BNA Lawyers' Manual On Professional Conduct 1001:248, 1001:250 (1994). But see *id.*, at 1001:248, n. 3 (quoting observation that controls on contingent fees are needed to "reduce financial incentives that encourage lawyers to file unnecessary, unwarranted[,] and unmeritorious suits" (internal quotation marks omitted)). Traditionally and today, "the marketplace for Social Security representation operates largely on a contingency fee basis." SSA Report 3; see also *id.*, at 15, 66, 70; App. to Pet. for Cert. 56, 60, 88, 89, 91 (affidavits of practitioners).

Before 1965, the Social Security Act imposed no limits on contingent-fee agreements drawn by counsel and signed by benefits claimants. In formulating the 1965 Social Security Act amendments that included § 406(b), Congress recognized that "attorneys have upon occasion charged . . . inordinately large fees for representing claimants [in court]." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 122 (1965). Arrangements yielding exorbitant fees, the Senate Report observed, reserved for the lawyer one-third to one-half of the accrued benefits. *Ibid.* Congress was mindful, too, that the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed. *Ibid.*[13]

Attending to these realities, Congress provided for "a reasonable fee, not in excess of 25 percent of accrued bene-

[13] Congress also adopted a proposal recommended by the Social Security Administration that attorneys be paid directly with funds withheld from their clients' benefits awards; the Commissioner testified to the Senate Committee on Finance that "[a]ttorneys have complained that . . . awards are sometimes made to the claimant without the attorney's knowledge and that some claimants on occasion have not notified the attorney of the receipt of the money, nor have they paid his fee." Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, pp. 512–513 (1965).

fits," as part of the court's judgment, and further specified that "no other fee would be payable." *Ibid.* Violation of the "reasonable fee" or "25 percent of accrued benefits" limitation was made subject to the same penalties as those applicable for charging a fee larger than the amount approved by the Commissioner for services at the administrative level—a fine of up to $500, one year's imprisonment, or both. *Ibid.* "[T]o assure the payment of the fee allowed by the court," Congress authorized the agency "to certify the amount of the fee to the attorney out of the amount of the accrued benefits." *Ibid.;* see *supra,* at 804, n. 13.

Congress thus sought to protect claimants against "inordinately large fees" and also to ensure that attorneys representing successful claimants would not risk "nonpayment of [appropriate] fees." SSA Report 66 (internal quotation marks omitted). But nothing in the text or history of § 406(b) reveals a "desig[n] to prohibit or discourage attorneys and claimants from entering into contingent fee agreements." *Ibid.* Given the prevalence of contingent-fee agreements between attorneys and Social Security claimants, it is unlikely that Congress, simply by prescribing "reasonable fees," meant to outlaw, rather than to contain, such agreements.[14]

This conclusion is bolstered by Congress' 1990 authorization of contingent-fee agreements under § 406(a), the provision governing fees for agency-level representation. Before enacting this express authorization, Congress instructed the Social Security Administration to prepare a report on attor-

[14] Cf., *e. g.,* Act of Mar. 3, 1891, § 9, 26 Stat. 851–854 (regulating fees for claims by Native Americans before the Court of Claims and providing: "all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void . . . and the allowances to the claimant's attorneys shall be regulated and fixed by the court"); Alaska Native Claims Settlement Act of 1971, 43 U. S. C. § 1621(a) (1994 ed.) ("None of the revenues granted by [the Act] shall be subject to any contract which is based on a percentage fee of the value of all or some portion of the settlement granted by this [Act].").

ney's fees under Title II of the Social Security Act. Pub. L. 100–203, § 9021(b), 101 Stat. 1330–295. The report, presented to Congress in 1988, reviewed several methods of determining attorney's fees, including the lodestar method. See SSA Report 10–11. This review led the agency to inform Congress that, although the contingency method was hardly flawless, the agency could "identify no more effective means of ensuring claimant access to attorney representation." *Id.*, at 25.

Congress subsequently altered § 406(a) to validate contingent-fee agreements filed with the agency prior to disposition of the claim for benefits. See 42 U. S. C. § 406(a)(2) (1994 ed.); *supra*, at 795. As petitioners observe, Brief for Petitioners 24, it would be anomalous if contract-based fees expressly authorized by § 406(a)(2) at the administrative level were disallowed for court representation under § 406(b).

It is also unlikely that Congress, legislating in 1965, and providing for a contingent fee tied to a 25 percent of past-due benefits boundary, intended to install a lodestar method courts did not develop until some years later. See *supra*, at 801–802. Furthermore, we again emphasize, the lodestar method was designed to govern imposition of fees on the losing party. See, *e. g.*, *Dague*, 505 U. S., at 562. In such cases, nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client. See *Venegas* v. *Mitchell*, 495 U. S. 82, 89–90 (1990) ("[None] of our cases has indicated that [42 U. S. C.] § 1988 . . . protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such plaintiffs . . . to secure competent counsel."). By contrast, § 406(b) governs the total fee a claimant's attorney may receive for court representation; any endeavor by the claimant's attorney to

gain more than that fee, or to charge the claimant a noncontingent fee, is a criminal offense. 42 U. S. C. § 406(b)(2); 20 CFR § 404.1740(c)(2) (2001).

Most plausibly read, we conclude, § 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases.[15] Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due benefits. § 406(b)(1)(A) (1994 ed., Supp. V).[16] Within the 25 percent boundary, as petitioners in this case acknowledge, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered. See Brief for Petitioners 40.[17]

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[15] The dissent observes that "fee agreements in . . . Social-Security cases are hardly negotiated; they are akin to adherence contracts." *Post*, at 812. Exposure to court review, plus the statute's 25 percent limitation, however, provide checks absent from arbitration adherence provisions this Court has upheld over objections that they are not "freely negotiated," see *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 556 (1995) (STEVENS, J., dissenting), but are the product of "disparate bargaining power" between the contracting parties, *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585, 598 (1991) (STEVENS, J., dissenting). See also *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 138–139, and n. 3 (2001) (SOUTER, J., dissenting) (observing that many employees "lack the bargaining power to resist an arbitration clause if their prospective employers insist on one").

[16] Statement of the limitation in terms of a percent of the recovery tellingly contrasts with EAJA, which authorizes fee shifting and, correspondingly, places a specific dollar limit on the hourly rate that ordinarily can be charged to the losing party. 28 U. S. C. § 2412(d)(2)(A); see *supra*, at 796, and n. 4.

[17] Specifically, petitioners maintain that "[a]lthough section 406(b) permits an attorney to base a fee application on a contingent fee agreement with the claimant, the statute does not create any presumption in favor of the agreed upon amount. To the contrary, because section 406(b) requires an affirmative judicial finding that the fee allowed is 'reasonable,' the

Courts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved. See, *e. g.*, *McGuire*, 873 F. 2d, at 983 ("Although the contingency agreement should be given significant weight in fixing a fee, a district judge must independently assess the reasonableness of its terms."); *Lewis* v. *Secretary of Health and Human Servs.*, 707 F. 2d 246, 249–250 (CA6 1983) (instructing reduced fee when representation is substandard). If the attorney is responsible for delay, for example, a reduction is in order so that the attorney will not profit from the accumulation of benefits during the pendency of the case in court. See *Rodriquez*, 865 F. 2d, at 746–747. If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order. See *id.*, at 747 (reviewing court should disallow "windfalls for lawyers"); *Wells*, 907 F. 2d, at 372 (same). In this regard, the court may require the claimant's attorney to submit, not as a basis for satellite litigation, but as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases. See *Rodriquez*, 865 F. 2d, at 741. Judges of our district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters, in the event of an appeal, ordinarily qualify for highly respectful review.

* * *

The courts below erroneously read § 406(b) to override customary attorney-client contingent-fee agreements. We hold that § 406(b) does not displace contingent-fee agree-

attorney bears the burden of persuasion that the statutory requirement has been satisfied." Brief for Petitioners 40.

ments within the statutory ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those agreements. Accordingly, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, dissenting.

I do not know what the judges of our district courts and courts of appeals are to make of today's opinion. I have no idea what the trial judge is to do if he finds the fee produced by the ("presumptively reasonable," *ante*, at 792) contingent-fee agreement to be 25% above the lodestar amount; or 40%; or 65%. Or what the appellate court is to do in an appeal from a district judge's reduction of the contingent fee to 300% of the lodestar amount; or 200%; or to the lodestar amount itself. While today's opinion gets this case out of our "in" box, it does nothing whatever to subject these fees to anything approximating a uniform rule of law. That is, I think, the inevitable consequence of trying to combine the incompatible. The Court tells the judge to commence his analysis with the contingent-fee agreement, but then to adjust the figure that agreement produces on the basis of factors (most notably, the actual time spent multiplied by a reasonable hourly rate, *ante*, at 808) that are, in a sense, the precise antithesis of the contingent-fee agreement, since it was the very *purpose* of that agreement to eliminate them from the fee calculation. In my view, the only possible way to give uniform meaning to the statute's "reasonable fee" provision is to understand it as referring to the fair value of the work actually performed, which we have held is best reflected by the lodestar.[1] See *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983).

[1] The Court finds it "unlikely," *ante*, at 806, that 42 U. S. C. § 406(b) (1994 ed.), enacted in 1965, contemplated application of the lodestar method that the courts had not yet even developed. Of course it did not. But it *did*

I think it obvious that the reasonableness of a contingent-fee arrangement *has to be* determined by viewing the matter *ex ante*, before the outcome of the lawsuit and the hours of work expended on the outcome are definitively known. For it is in the nature of a contingent-fee agreement to *gamble* on outcome and hours of work—assigning the risk of an unsuccessful outcome to the attorney, in exchange for a percentage of the recovery from a successful outcome that will (because of the risk of loss the attorney has borne) be higher, and perhaps much higher, than what the attorney would receive in hourly billing for the same case. That is why, in days when obtaining justice in the law courts was thought to be less of a sporting enterprise, contingent fees were unlawful. See, *e. g.*, *Butler* v. *Legro*, 62 N. H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

It is one thing to say that a contingent-fee arrangement is, *ex ante*, unreasonable because it gives the attorney a percentage of the recovery so high that no self-respecting legal system can tolerate it; the statute itself has made this determination for Social-Security-benefit cases, prescribing a maximum contingent fee of 25%. And one can also say that a contingent-fee arrangement is, *ex ante*, unreasonable because the chances of success in the particular case are so high, and the anticipated legal work so negligible, that the percentage of the recovery assured to the lawyer is exorbitant; but neither I nor the Court thinks that the "reasonable

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contemplate an *ex post* determination of a reasonable fee for an attorney's work—which our post-1965 cases have held is best achieved by using the lodestar. We have not hesitated to apply the lodestar method to other fee statutes enacted before the method was developed. See, *e. g.*, *Burlington* v. *Dague*, 505 U. S. 557, 561–562 (1992) (explaining that "our case law construing what is a 'reasonable' fee applies uniformly" to fee-shifting statutes that use similar language, including, *inter alia*, 42 U. S. C. § 1988 and 42 U. S. C. § 2000e–5(k) (Civil Rights Act of 1964)).

fee" provision of the statute anticipates such a case-by-case *ex post* assessment of *ex ante* predictions in the thousands of (mostly small recovery) Social-Security-benefit cases. It is something quite different, however—and something quite irrational—to look at the *consequences* of a contingent-fee agreement *after the contingencies have been resolved*, and proclaim those consequences unreasonable because the attorney has received too much money for too little work. That is rather like declaring the purchase of the winning lottery ticket void because of the gross disparity between the $2 ticket price and the million-dollar payout.[2]

I think, in other words, that the "reasonable fee" provision must require *either* an assessment of the reasonableness of the contingent-fee agreement when it was concluded, *or* an assessment of the reasonableness of the fee charged after the outcome and work committed to it are known; it cannot combine the two. And since an *ex post* assessment of the *ex ante* reasonableness of the contingent-fee agreement (already limited by statute to a maximum 25% of the recovery) is not what the statute could conceivably have contemplated, I conclude that a "reasonable fee" means not the reasonableness of the agreed-upon contingent fee, but a reasonable recompense for the work actually done. We have held that this is best calculated by applying the lodestar,

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[2] There is one *ex post* element prominent in Social-Security-benefit cases that assuredly should reduce the amount of an otherwise reasonable (that is to say, an *ex ante* reasonable) contingent-fee award: Since the award is based upon past-due benefits, and since the amount of those benefits increases with the duration of the litigation, a lawyer can increase his contingent-fee award by dragging his feet. It is unreasonable to be rewarded for dilatoriness. But *that* element need not be made part of an overall *ex post* reasonableness assessment, as the Court would do, see *ante*, at 808. For it is not only unreasonable; it is a breach of contract. Surely the representation agreement contains as an implicit term that the lawyer will bring the matter to a conclusion as quickly as practicable—or at least will not intentionally delay its conclusion. Any breach of that condition justifies a reduction of the contracted contingent-fee award.

which focuses on the quality and amount of the legal work performed, and "provides an objective basis on which to . . . estimate . . . the value of a lawyer's services." *Hensley,* 461 U. S., at 433.

This is less of a departure than the Court suggests from the normal practice of enforcing privately negotiated fee agreements. The fee agreements in these Social-Security cases are hardly negotiated; they are akin to adherence contracts. It is uncontested that the specialized Social-Security bar charges uniform contingent fees (the statutory maximum of 25%), which are presumably presented to the typically unsophisticated client on a take-it-or-leave-it basis. Nor does the statute's explicit approval of contingency-fee agreements at the agency stage, see 42 U. S. C. § 406(a) (1994 ed. and Supp. V), imply that contingency-fee agreements at the judicial-review stage should be regarded as presumptively reasonable. The agreements approved at the agency stage are limited not merely by a 25% maximum percentage of recovery, but also by a firm $5,300 maximum. With the latter limitation, there is no need to impose a reasonableness requirement. Once a reasonableness requirement is imposed, however, I think it can only refer to the reasonableness of the actual compensation.

* * *

Because I think there is no middle course between, on the one hand, determining the reasonableness of a contingent-fee agreement and, on the other hand, determining the reasonableness of the actual fee; because I think the statute's reference to a "reasonable fee" must connote the latter; and because I think the Court's hybrid approach establishes no clear criteria and hence will generate needless satellite litigation; I respectfully dissent.

Syllabus

SECURITIES AND EXCHANGE COMMISSION *v.* ZANDFORD

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

No. 01–147. Argued March 18, 2002—Decided June 3, 2002

Respondent broker persuaded William Wood, an elderly man, to open a joint investment account for himself and his mentally retarded daughter. The Woods gave respondent discretion to manage the account and a general power of attorney to engage in securities transactions without their prior approval. When Mr. Wood died a few years later, all of the money he had entrusted to respondent was gone. Respondent was subsequently indicted on federal wire fraud charges for, *inter alia*, selling securities in the Woods' account and making personal use of the proceeds. The Securities and Exchange Commission (SEC) then filed a civil complaint in the same District Court, alleging that respondent had violated § 10 of the Securities Exchange Act of 1934 (Act) and the SEC's Rule 10b–5 by engaging in a scheme to defraud the Woods and misappropriating their securities without their knowledge or consent. After respondent's conviction in the criminal case, the District Court granted the SEC summary judgment in the civil case. The Fourth Circuit reversed and directed the District Court to dismiss the complaint, holding that neither the criminal conviction nor the allegations in the complaint established that respondent's fraud was "in connection with the purchase or sale of any security." Because the scheme was to steal the Woods' assets, not to manipulate a particular security, and it had no relationship to market integrity or investor understanding, the court held that there was no § 10(b) violation.

Held: Assuming that the complaint's allegations are true, respondent's conduct was "in connection with the purchase or sale of any security." Among Congress' objectives in passing the Act was to ensure honest securities markets and thereby promote investor confidence after the 1929 market crash. Congress sought "'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 151. To effectuate its remedial purposes, the Act should be construed flexibly, not technically and restrictively. The SEC has consistently adopted a broad reading of "in connection with the purchase or sale of any secu-

Syllabus

rity," maintaining that a broker who accepts payment for securities that he never intends to deliver, or who sells securities with intent to misappropriate the proceeds, violates § 10(b) and Rule 10(b)–5. This interpretation of the statute's ambiguous text in the context of formal adjudication is entitled to deference. See *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230. Neither the SEC nor this Court has ever held that there must be a misrepresentation about a particular security's value in order to run afoul of the Act. This Court disagrees with respondent's claim that his misappropriation of the proceeds, though fraudulent, does not have the requisite connection with the sales, which were perfectly lawful. The securities sales and respondent's practices were not independent events. Taking the complaint's allegations as true, each sale was made to further his fraudulent scheme; and each was deceptive because it was neither authorized by, nor disclosed to, the Woods. In the aggregate, the sales are properly viewed as a course of business that operated as a fraud or deceit on a stockbroker's customer. As in *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6; *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U. S. 588; and *United States* v. *O'Hagan*, 521 U. S. 642, all cases in which this Court found a § 10(b) violation, the SEC complaint here describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore "in connection with" securities sales within § 10(b)'s meaning. Pp. 819–825.

238 F. 3d 559, reversed and remanded.

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

Matthew D. Roberts argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Clement*, *Deputy Solicitor General Kneedler*, *David M. Becker*, *Jacob H. Stillman*, *Richard M. Humes*, *Katharine B. Gresham*, and *Susan S. McDonald.*

Steven H. Goldblatt argued the cause for respondent. With him on the brief was *Roy T. Englert, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Deborah M. Zuckerman*, *Stacy J. Canan*, *Michael R. Schuster*, and *Kevin Roddy;* and for NASD Regulation, Inc., by *F. Joseph Warin*, *Douglas R. Cox*, *Andrew S. Tulumello*, and *Elisse B. Walter.*

JUSTICE STEVENS delivered the opinion of the Court.

The Securities and Exchange Commission (SEC) filed a civil complaint alleging that a stockbroker violated both § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. § 78j(b), and the SEC's Rule 10b–5, by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent. The question presented is whether the alleged fraudulent conduct was "in connection with the purchase or sale of any security" within the meaning of the statute and the Rule.

I

Between 1987 and 1991, respondent was employed as a securities broker in the Maryland branch of a New York brokerage firm. In 1987, he persuaded William Wood, an elderly man in poor health, to open a joint investment account for himself and his mentally retarded daughter. According to the SEC's complaint, the "stated investment objectives for the account were 'safety of principal and income.'" App. to Pet. for Cert. 27a. The Woods granted respondent discretion to manage their account and a general power of attorney to engage in securities transactions for their benefit without prior approval. Relying on respondent's promise to "conservatively invest" their money, the Woods entrusted him with $419,255. Before Mr. Wood's death in 1991, all of that money was gone.

In 1991, the National Association of Securities Dealers (NASD) conducted a routine examination of respondent's firm and discovered that on over 25 separate occasions, money had been transferred from the Woods' account to accounts controlled by respondent. In due course, respondent was indicted in the United States District Court for the District of Maryland on 13 counts of wire fraud in violation of 18 U. S. C. § 1343. App. to Pet. for Cert. 40a. The first count alleged that respondent sold securities in the Woods' account and then made personal use of the proceeds. *Id.*, at

42a. Each of the other counts alleged that he made wire transfers between Maryland and New York that enabled him to withdraw specified sums from the Woods' accounts. *Id.*, at 42a–50a. Some of those transfers involved respondent writing checks to himself from a mutual fund account held by the Woods, which required liquidating securities in order to redeem the checks. Respondent was convicted on all counts, sentenced to prison for 52 months, and ordered to pay $10,800 in restitution.

After respondent was indicted, the SEC filed a civil complaint in the same District Court alleging that respondent violated § 10(b) and Rule 10b–5 by engaging in a scheme to defraud the Woods and by misappropriating approximately $343,000 of the Woods' securities without their knowledge or consent. *Id.*, at 27a. The SEC moved for partial summary judgment after respondent's criminal conviction, arguing that the judgment in the criminal case estopped respondent from contesting facts that established a violation of § 10(b).[1] Respondent filed a motion seeking discovery on the question whether his fraud had the requisite "connection with" the purchase or sale of a security. The District Court refused to allow discovery and entered summary judgment against respondent. It enjoined him from engaging in future violations of the securities laws and ordered him to disgorge $343,000 in ill-gotten gains.

The Court of Appeals for the Fourth Circuit reversed the summary judgment and remanded with directions for the District Court to dismiss the complaint. 238 F. 3d 559

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[1] The scope of Rule 10b–5 is coextensive with the coverage of § 10(b), see *United States* v. *O'Hagan*, 521 U. S. 642, 651 (1997); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214 (1976); therefore, we use § 10(b) to refer to both the statutory provision and the Rule.

The complaint also contained allegations that respondent had engaged in excessive trading, or "churning," to generate commission income. App. to Pet. for Cert. 30a. That claim was originally excluded from the summary judgment motion, and later abandoned by the SEC.

(2001). It first held that the wire fraud conviction, which only required two findings—(1) that respondent engaged in a scheme to defraud and (2) that he used interstate wire communications in executing the scheme—did not establish all the elements of a § 10(b) violation. Specifically, the conviction did not necessarily establish that his fraud was "in connection with" the sale of a security. *Id.*, at 562.[2] The court then held that the civil complaint did not sufficiently allege the necessary connection because the sales of the Woods' securities were merely incidental to a fraud that "lay in absconding with the proceeds" of sales that were conducted in "a routine and customary fashion," *id.*, at 564. Respondent's "scheme was simply to steal the Woods' assets" rather than to engage "in manipulation of a particular secu-

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[2] A summary of the evidence in the Court of Appeals' opinion affirming the judgment in respondent's criminal case supports the conclusion that the verdict did not necessarily determine that the fraud was connected with the sale of a security:

"The Government presented ample direct and circumstantial evidence showing that Zandford had engaged in a scheme to defraud the Woods. It showed that: (1) Zandford had systematically transferred large sums of money from the Woods' account to his own accounts over a nineteen month period; (2) prior to November 1987, the Woods had no relationship with Zandford; (3) Zandford, and not the Woods, benefited from the money transfers; (4) the Woods were vulnerable victims due to their physical and mental limitations; (5) the personal services agreement, the loan, and the vintage car restoration business were not only contrary to the Woods' stated investment objectives, but they violated the rules of NASD and those of Zandford's employer that prohibited brokers from engaging in such arrangements; and (6) vehicles owned as part of the vintage car restoration business were titled in the name of Zandford's girlfriend as opposed to the Woods' names. Additional evidence showing a scheme to defraud included Zandford's failure to disclose to his employer the existence of the agreements and personal loans; his failure to report on his taxes or bank loan applications that he received income from acting as the personal representative; and his failure to disclose on his taxes his involvement in a vintage car restoration business. Zandford's contention that there is insufficient evidence supporting that he had engaged in a scheme to defraud the Woods is meritless." *Id.*, at 36a–37a.

rity." *Id.*, at 565. Ultimately, the court refused "to stretch the language of the securities fraud provisions to encompass every conversion or theft that happens to involve securities." *Id.*, at 566. Adopting what amounts to a "fraud on the market" theory of the statute's coverage, the court held that without some "relationship to market integrity or investor understanding," there is no violation of § 10(b). *Id.*, at 563.

We granted the SEC's petition for a writ of certiorari, 534 U. S. 1015 (2001), to review the Court of Appeals' construction of the phrase "in connection with the purchase or sale of any security." Because the Court of Appeals ordered the complaint dismissed rather than remanding for reconsideration, we assume the allegations contained therein are true and affirm that disposition only if no set of facts would entitle petitioner to relief. See *Hartford Fire Ins. Co.* v. *California,* 509 U. S. 764, 811 (1993). We do not reach the question whether the record supports the District Court's grant of summary judgment in the SEC's favor—a question that requires all potential factual disputes to be resolved in respondent's favor.[3] We merely hold that the allegations of the complaint, if true, entitle the SEC to relief; therefore, the Court of Appeals should not have directed that the complaint be dismissed.

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[3] Nor do we review the District Court's decision denying respondent discovery—a decision that may have been influenced by respondent's frequent filings while incarcerated. The District Court noted that respondent "has been an active litigant before and during his incarceration." *Id.*, at 16a, n. 1 (citing *Zandford* v. *NASD,* 30 F. Supp. 2d 1 (DC 1998); *Zandford* v. *NASD,* 19 F. Supp. 2d 1 (DC 1998); *Zandford* v. *NASD,* 19 F. Supp. 2d 4 (DC 1998); *Zandford* v. *Prudential-Bache Securities, Inc.*, 112 F. 3d 723 (CA4 1997); *Zandford* v. *Prudential-Bache Securities, Inc.*, 111 F. 3d 963 (DC 1998) (judgt. order); *Zandford* v. *Prudential-Bache Securities, Inc.*, Civ. Action No. 94–0036, 1995 WL 507169 (D. D. C., Aug. 15, 1995); *Zandford* v. *Prudential-Bache Securities, Inc.*, Civ. Action No. HAR–90–2568, 1994 WL 150918 (D. Md., Feb. 22, 1994); *Zandford* v. *NASD,* Civ. Action No. 93–1274, 1993 WL 580761 (D. D. C., Nov. 5, 1993)).

II

Section 10(b) of the Securities Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U. S. C. § 78j. Rule 10b–5, which implements this provision, forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 CFR § 240.10b–5 (2000). Among Congress' objectives in passing the Act was "to insure honest securities markets and thereby promote investor confidence" after the market crash of 1929. *United States* v. *O'Hagan*, 521 U. S. 642, 658 (1997); see also *United States* v. *Naftalin*, 441 U. S. 768, 775 (1979). More generally, Congress sought "'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 151 (1972) (quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963)).

Consequently, we have explained that the statute should be "construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" 406 U. S., at 151 (quoting *Capital Gains Research Bureau, Inc.*, 375 U. S., at 195). In its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase "in connection with the purchase or sale of any security." It has maintained that a broker who accepts payment for securities that he never intends to deliver, or who sells customer securities with intent to misappropriate the proceeds, violates § 10(b) and Rule 10b–5. See, *e. g.*, *In re Bauer*, 26 S. E. C. 770 (1947); *In re Southeastern Securities Corp.*, 29 S. E. C. 609 (1949). This interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference

if it is reasonable, see *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230, and n. 12 (2001). For the reasons set forth below, we think it is. While the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b), *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud"), neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act.

The SEC claims respondent engaged in a fraudulent scheme in which he made sales of his customer's securities for his own benefit. Respondent submits that the sales themselves were perfectly lawful and that the subsequent misappropriation of the proceeds, though fraudulent, is not properly viewed as having the requisite connection with the sales; in his view, the alleged scheme is not materially different from a simple theft of cash or securities in an investment account. We disagree.

According to the complaint, respondent "engaged in a scheme to defraud" the Woods beginning in 1988, shortly after they opened their account, and that scheme continued throughout the 2-year period during which respondent made a series of transactions that enabled him to convert the proceeds of the sales of the Woods' securities to his own use. App. to Pet. for Cert. 27a–29a. The securities sales and respondent's fraudulent practices were not independent events. This is not a case in which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so. Nor is it a case in which a thief simply invested the proceeds of a routine conversion in the stock market. Rather, respondent's fraud coincided with the sales themselves.

Taking the allegations in the complaint as true, each sale was made to further respondent's fraudulent scheme; each

was deceptive because it was neither authorized by, nor disclosed to, the Woods. With regard to the sales of shares in the Woods' mutual fund, respondent initiated these transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities. Indeed, each time respondent "exercised his power of disposition for his own benefit," that conduct, "without more," was a fraud. *United States* v. *Dunn*, 268 U. S. 121, 131 (1925). In the aggregate, the sales are properly viewed as a "course of business" that operated as a fraud or deceit on a stockbroker's customer.

Insofar as the connection between respondent's deceptive practices and his sale of the Woods' securities is concerned, the case is remarkably similar to *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6 (1971). In that case the directors of Manhattan Casualty Company authorized the sale of the company's portfolio of treasury bonds because they had been "duped" into believing that the company would receive the proceeds of the sale. *Id.*, at 9. We held that "Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities." *Id.*, at 10. In reaching this conclusion, we did not ask, as the Fourth Circuit did in this case, whether the directors were misled about the value of a security or whether the fraud involved "manipulation of a particular security." 238 F. 3d, at 565. In fact, we rejected the Second Circuit's position in *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 430 F. 2d 355, 361 (1970), that because the fraud against Manhattan did not take place within the context of a securities exchange it was not prohibited by § 10(b). 404 U. S., at 10. We refused to read the statute so narrowly, noting that it "must be read flexibly, not technically and restrictively." *Id.*, at 12. Although we recognized that the interest in "'preserving the integrity of the securities markets'" was one of the purposes animating the statute, we rejected the notion that § 10(b) is

limited to serving that objective alone. *Ibid.* ("We agree that Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement. But we read § 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securities whether conducted in the organized markets or face to face").

Like the company directors in *Bankers Life*, the Woods were injured as investors through respondent's deceptions, which deprived them of any compensation for the sale of their valuable securities. They were duped into believing respondent would "conservatively invest" their assets in the stock market and that any transactions made on their behalf would be for their benefit for the "'safety of principal and income.'" App. to Pet. for Cert. 27a. The fact that respondent misappropriated the proceeds of the sales provides persuasive evidence that he had violated § 10(b) when he made the sales, but misappropriation is not an essential element of the offense. Indeed, in *Bankers Life*, we flatly stated that it was "irrelevant" that "the proceeds of the sale that were due the seller were misappropriated." 404 U. S., at 10. It is enough that the scheme to defraud and the sale of securities coincide.

The Court of Appeals below distinguished *Bankers Life* on the ground that it involved an affirmative misrepresentation, whereas respondent simply failed to inform the Woods of his intent to misappropriate their securities. 238 F. 3d, at 566. We are not persuaded by this distinction. Respondent was only able to carry out his fraudulent scheme without making an affirmative misrepresentation because the Woods had trusted him to make transactions in their best interest without prior approval. Under these circumstances, respondent's fraud represents an even greater threat to investor confidence in the securities industry than the misrepresentation in *Bankers Life*. Not only does such a fraud prevent investors from trusting that their brokers are executing

transactions for their benefit, but it undermines the value of a discretionary account like that held by the Woods. The benefit of a discretionary account is that it enables individuals, like the Woods, who lack the time, capacity, or know-how to supervise investment decisions, to delegate authority to a broker who will make decisions in their best interests without prior approval. If such individuals cannot rely on a broker to exercise that discretion for their benefit, then the account loses its added value. Moreover, any distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients. See *Chiarella* v. *United States*, 445 U. S. 222, 230 (1980) (noting that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)" when there is "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction"); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S., at 153.

More recently, in *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U. S. 588 (2001), our decision that the seller of a security had violated § 10(b) focused on the secret intent of the seller when the sale occurred. The purchaser claimed "that Wharf sold it a security (the option) while secretly intending from the very beginning not to honor the option." *Id.*, at 597. Although Wharf did not specifically argue that the breach of contract underlying the complaint lacked the requisite connection with a sale of securities, it did assert that the case was merely a dispute over ownership of the option, and that interpreting § 10(b) to include such a claim would convert every breach of contract that happened to involve a security into a violation of the federal securities laws. *Id.*, at 596. We rejected that argument because the purchaser's claim was not that the defendant failed to carry out a promise to sell securities; rather, the claim was that the defendant sold a security while never intending to honor its agreement in the first place. *Id.*, at 596–597. Similarly,

in this case the SEC claims respondent sold the Woods' securities while secretly intending from the very beginning to keep the proceeds. In *Wharf*, the fraudulent intent deprived the purchaser of the benefit of the sale whereas here the fraudulent intent deprived the seller of that benefit, but the connection between the deception and the sale in each case is identical.

In *United States* v. *O'Hagan*, 521 U. S. 642 (1997), we held that the defendant had committed fraud "in connection with" a securities transaction when he used misappropriated confidential information for trading purposes. We reasoned that "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide. This is so even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information." *Id.*, at 656. The Court of Appeals distinguished *O'Hagan* by reading it to require that the misappropriated information or assets not have independent value to the client outside the securities market, 238 F. 3d, at 565. We do not read *O'Hagan* as so limited. In the chief passage cited by the Court of Appeals for this proposition, we discussed the Government's position that "[t]he misappropriation theory would not . . . apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities," because in that situation "the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained." 521 U. S., at 656 (internal quotation marks omitted). Even if this passage could be read to introduce a new requirement into § 10(b), it would not affect our analysis of this case, because the Woods' securities did not have value for respondent apart from their use in a secu-

rities transaction and the fraud was not complete before the sale of securities occurred.

As in *Bankers Life*, *Wharf*, and *O'Hagan*, the SEC complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore "in connection with" securities sales within the meaning of § 10(b).[4] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[4] Contrary to the Court of Appeals' prediction, 238 F. 3d 559, 566 (CA4 2001), our analysis does not transform every breach of fiduciary duty into a federal securities violation. If, for example, a broker embezzles cash from a client's account or takes advantage of the fiduciary relationship to induce his client into a fraudulent real estate transaction, then the fraud would not include the requisite connection to a purchase or sale of securities. Tr. of Oral Arg. 16. Likewise, if the broker told his client he was stealing the client's assets, that breach of fiduciary duty might be in connection with a sale of securities, but it would not involve a deceptive device or fraud. Cf. *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 474–476 (1977).

Syllabus

HOLMES GROUP, INC. *v.* VORNADO AIR CIRCULATION SYSTEMS, INC.

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

No. 01–408. Argued March 19, 2002—Decided June 3, 2002

Petitioner filed a federal-court action, seeking, *inter alia*, a declaratory judgment that its products did not infringe respondent's trade dress and an injunction restraining respondent from accusing it of such infringement. Respondent's answer asserted a compulsory patent-infringement counterclaim. The District Court ruled in petitioner's favor. Respondent appealed to the Federal Circuit, which, notwithstanding petitioner's challenge to its jurisdiction, vacated the District Court's judgment and remanded the case.

Held: The Federal Circuit cannot assert jurisdiction over a case in which the complaint does not allege a patent-law claim, but the answer contains a patent-law counterclaim. Pp. 829–834.

(a) The Federal Circuit's jurisdiction is fixed with reference to that of the district court, 28 U. S. C. § 1295(a)(1), and turns on whether the action is one "arising under" federal patent law, § 1338(a). Because § 1338(a) uses the same operative language as § 1331, which confers general federal-question jurisdiction, the well-pleaded-complaint rule governing whether a case arises under § 1331 also governs whether a case arises under § 1338(a). As adapted to § 1338(a), the rule provides that whether a case arises under patent law is determined by what appears in the plaintiff's well-pleaded complaint. *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 809. Because petitioner's well-pleaded complaint asserted no claim arising under patent law, the Federal Circuit erred in asserting jurisdiction over this appeal. Pp. 829–830.

(b) The well-pleaded-complaint rule does not allow a counterclaim to serve as the basis for a district court's "arising under" jurisdiction. To rule otherwise would contravene the face-of-the-complaint principle set forth in this Court's prior cases, see, *e. g.*, *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 392, and the longstanding policies furthered by that principle: It would leave acceptance or rejection of a state forum to the master of the counterclaim rather than to the plaintiff; it would radically expand the class of removable cases; and it would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine. Pp. 830–832.

(c) As for respondent's alternative argument, that reading §§ 1295(a)(1) and 1338(a) to confer appellate jurisdiction on the Federal Circuit whenever a patent-law counterclaim is raised is necessary to effectuate Congress's goal of promoting patent-law uniformity: This Court's task is not to determine what would further Congress's goal, but to determine what the statute's words must fairly be understood to mean. It would be impossible to say that § 1338(a)'s "arising under" language means the well-pleaded-complaint rule when read on its own, but respondent's complaint-or-counterclaim rule when referred to by § 1295(a)(1). Pp. 832–834.

13 Fed. Appx. 961, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined, and in which STEVENS, J., joined as to Parts I and II–A. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 834. GINSBURG, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 839.

James W. Dabney argued the cause for petitioner. With him on the brief were *Paul Izzo*, *Timothy P. Gallogly*, *Arthur R. Miller*, *Marcia H. Sundeen*, and *Carol M. Wilhelm.*

Peter W. Gowdey argued the cause for respondent. With him on the brief were *Christopher P. Murphy*, *Janine A. Carlan*, *Kenneth W. Starr*, and *Daryl L. Joseffer.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we address whether the Court of Appeals for the Federal Circuit has appellate jurisdiction over a case in which the complaint does not allege a claim arising under federal patent law, but the answer contains a patent-law counterclaim.

I

Respondent, Vornado Air Circulation Systems, Inc., is a manufacturer of patented fans and heaters. In late 1992,

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**David W. Long* filed a brief for the Patent, Trademark, and Copyright Section of the Bar Association of the District of Columbia as *amicus curiae.*

respondent sued a competitor, Duracraft Corp., claiming that Duracraft's use of a "spiral grill design" in its fans infringed respondent's trade dress. The Court of Appeals for the Tenth Circuit found for Duracraft, holding that Vornado had no protectable trade-dress rights in the grill design. See *Vornado Air Circulation Systems, Inc.* v. *Duracraft Corp.*, 58 F. 3d 1498 (1995) *(Vornado I)*.

Nevertheless, on November 26, 1999, respondent lodged a complaint with the United States International Trade Commission against petitioner, The Holmes Group, Inc., claiming that petitioner's sale of fans and heaters with a spiral grill design infringed respondent's patent and the same trade dress held unprotectable in *Vornado I*. Several weeks later, petitioner filed this action against respondent in the United States District Court for the District of Kansas, seeking, *inter alia*, a declaratory judgment that its products did not infringe respondent's trade dress and an injunction restraining respondent from accusing it of trade-dress infringement in promotional materials. Respondent's answer asserted a compulsory counterclaim alleging patent infringement.

The District Court granted petitioner the declaratory judgment and injunction it sought. 93 F. Supp. 2d 1140 (Kan. 2000). The court explained that the collateral-estoppel effect of *Vornado I* precluded respondent from relitigating its claim of trade-dress rights in the spiral grill design. It rejected respondent's contention that an intervening Federal Circuit case, *Midwest Industries, Inc.* v. *Karavan Trailers, Inc.*, 175 F. 3d 1356 (1999), which disagreed with the Tenth Circuit's reasoning in *Vornado I*, constituted a change in the law of trade dress that warranted relitigation of respondent's trade-dress claim. The court also stayed all proceedings related to respondent's counterclaim, adding that the counterclaim would be dismissed if the declaratory judgment and injunction entered in favor of petitioner were affirmed on appeal.

Respondent appealed to the Court of Appeals for the Federal Circuit. Notwithstanding petitioner's challenge to its jurisdiction, the Federal Circuit vacated the District Court's judgment, 13 Fed. Appx. 961 (2001), and remanded for consideration of whether the "change in the law" exception to collateral estoppel applied in light of *TrafFix Devices, Inc.* v. *Marketing Displays, Inc.*, 532 U. S. 23 (2001), a case decided after the District Court's judgment which resolved a Circuit split involving *Vornado I* and *Midwest Industries.* We granted certiorari to consider whether the Federal Circuit properly asserted jurisdiction over the appeal. 534 U. S. 1016 (2001).

II

Congress vested the Federal Circuit with exclusive jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction *of that court* was based, in whole or in part, on [28 U. S. C. §] 1338 . . . ." 28 U. S. C. § 1295(a)(1) (emphasis added). Section 1338(a), in turn, provides in relevant part that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . ." Thus, the Federal Circuit's jurisdiction is fixed with reference to that of the district court, and turns on whether the action arises under federal patent law.[1]

Section 1338(a) uses the same operative language as 28 U. S. C. § 1331, the statute conferring general federal-question jurisdiction, which gives the district courts "original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States." (Emphasis added.) We said in *Christianson* v. *Colt Industries Operat-*

[1] Like *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 814–815 (1988), this case does not call upon us to decide whether the Federal Circuit's jurisdiction is fixed with reference to the complaint as initially filed or whether an actual or constructive amendment to the complaint raising a patent-law claim can provide the foundation for the Federal Circuit's jurisdiction.

ing Corp., 486 U. S. 800, 808 (1988), that "[l]inguistic consistency" requires us to apply the same test to determine whether a case arises under § 1338(a) as under § 1331.

The well-pleaded-complaint rule has long governed whether a case "arises under" federal law for purposes of § 1331.[2] See, *e. g.*, *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125, 127–128 (1974) *(per curiam)*. As "appropriately adapted to § 1338(a)," the well-pleaded-complaint rule provides that whether a case "arises under" patent law "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration . . . ." *Christianson*, 486 U. S., at 809 (internal quotation marks omitted). The plaintiff's well-pleaded complaint must "establis[h] either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law . . . ." *Ibid.* Here, it is undisputed that petitioner's well-pleaded complaint did not assert any claim arising under federal patent law. The Federal Circuit therefore erred in asserting jurisdiction over this appeal.

A

Respondent argues that the well-pleaded-complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court's "arising under" jurisdiction. We disagree.

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[2] The well-pleaded-complaint rule also governs whether a case is removable from state to federal court pursuant to 28 U. S. C. § 1441(a), which provides in relevant part:

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

See *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1 (1983).

Admittedly, our prior cases have only required us to address whether a federal defense, rather than a federal counterclaim, can establish "arising under" jurisdiction. Nevertheless, those cases were decided on the principle that federal jurisdiction generally exists "only when a federal question is presented on the face of the *plaintiff's* properly pleaded complaint." *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 392 (1987) (emphasis added). As we said in *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913), whether a case arises under federal patent law "cannot depend upon the answer." Moreover, we have declined to adopt proposals that "the answer as well as the complaint . . . be consulted before a determination [is] made whether the case 'ar[ises] under' federal law . . . ." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10–11, n. 9 (1983) (citing American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1312, pp. 188–194 (1969)). It follows that a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for "arising under" jurisdiction. See, *e. g.*, *In re Adams*, 809 F. 2d 1187, 1188, n. 1 (CA5 1987); *FDIC* v. *Elefant*, 790 F. 2d 661, 667 (CA7 1986); *Takeda* v. *Northwestern National Life Ins. Co.*, 765 F. 2d 815, 822 (CA9 1985); 14B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 402–414 (3d ed. 1998).

Allowing a counterclaim to establish "arising under" jurisdiction would also contravene the longstanding policies underlying our precedents. First, since the plaintiff is "the master of the complaint," the well-pleaded-complaint rule enables him, "by eschewing claims based on federal law, . . . to have the cause heard in state court." *Caterpillar Inc.*, *supra*, at 398–399. The rule proposed by respondent, in contrast, would leave acceptance or rejection of a state forum to the master of the counterclaim. It would allow a

defendant to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim. Second, conferring this power upon the defendant would radically expand the class of removable cases, contrary to the "[d]ue regard for the rightful independence of state governments" that our cases addressing removal require. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 109 (1941) (internal quotation marks omitted). And finally, allowing responsive pleadings by the defendant to establish "arising under" jurisdiction would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a "quick rule of thumb" for resolving jurisdictional conflicts. See *Franchise Tax Bd.*, *supra*, at 11.

For these reasons, we decline to transform the long-standing well-pleaded-complaint rule into the "well-pleaded-complaint-*or-counterclaim* rule" urged by respondent.

B

Respondent argues, in the alternative, that even if a counterclaim generally cannot establish the original "arising under" jurisdiction of a district court, we should interpret the phrase "arising under" differently in ascertaining the Federal Circuit's jurisdiction. In respondent's view, effectuating Congress's goal of "promoting the uniformity of patent law," Brief for Respondent 21, requires us to interpret §§ 1295(a)(1) and 1338(a) to confer exclusive appellate jurisdiction on the Federal Circuit whenever a patent-law counterclaim is raised.[3]

[3] Echoing a variant of this argument, JUSTICE GINSBURG contends that "giv[ing] effect" to Congress's intention "to eliminate forum shopping and to advance uniformity in . . . patent law" requires that the Federal Circuit have exclusive jurisdiction whenever a patent claim was "actually adjudicated." *Post*, at 840 (opinion concurring in judgment). We rejected precisely this argument in *Christianson*, viz., the suggestion that the Federal

We do not think this option is available. Our task here is not to determine what would further Congress's goal of ensuring patent-law uniformity, but to determine what the words of the statute must fairly be understood to mean. It would be difficult enough to give "arising under" the meaning urged by respondent if that phrase appeared in § 1295(a)(1)—the jurisdiction-conferring statute—*itself*. Cf. Economic Stabilization Act of 1970, § 211(b)(2), 85 Stat. 749 (providing the Temporary Emergency Court of Appeals with exclusive jurisdiction over appeals "in cases and controversies arising under this title"). Even then the phrase would not be some neologism that might justify our adverting to the general purpose of the legislation, but rather a term familiar to all law students as invoking the well-pleaded-complaint rule. Cf. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F. 2d 179, 183 (CA2 1979) ("The use of the phrase 'cases and controversies arising under' . . . is strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U. S. C. § 1331 and other grants of jurisdiction to the district courts over cases 'arising under' various regulatory statutes"). But the present case is even weaker than that, since § 1295(a)(1) does not itself *use* the term, but rather refers to jurisdiction under § 1338, where it is well established that "arising under any Act of Congress relating to patents" invokes, specifically, the well-pleaded-complaint rule. It would be an unprecedented feat of interpretive necromancy to say that § 1338(a)'s "arising under" language means one thing (the well-pleaded-complaint rule) in its own right,

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Circuit's jurisdiction is "fixed 'by reference to the case actually litigated.'" 486 U. S., at 813 (quoting Brief for Respondent in *Christianson* v. *Colt Industries Operating Corp.*, O. T. 1987, No. 87–499, p. 31). We held that the Federal Circuit's jurisdiction, like that of the district court, "is determined by reference to the well-pleaded complaint, not the well-tried case." 486 U. S., at 814.

but something quite different (respondent's complaint-or-counterclaim rule) when referred to by § 1295(a)(1).[4]

* * *

Not all cases involving a patent-law claim fall within the Federal Circuit's jurisdiction. By limiting the Federal Circuit's jurisdiction to cases in which district courts would have jurisdiction under § 1338, Congress referred to a well-established body of law that requires courts to consider whether a patent-law claim appears on the face of the plaintiff's well-pleaded complaint. Because petitioner's complaint did not include any claim based on patent law, we vacate the judgment of the Federal Circuit and remand the case with instructions to transfer the case to the Court of Appeals for the Tenth Circuit. See 28 U. S. C. § 1631.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The Court correctly holds that the exclusive jurisdiction of the Court of Appeals for the Federal Circuit in patent

[4] Although JUSTICE STEVENS agrees that a correct interpretation of § 1295(a)(1) does not allow a patent-law counterclaim to serve as the basis for the Federal Circuit's jurisdiction, he nevertheless quibbles that "there is well-reasoned precedent" supporting the contrary conclusion. See *post*, at 835 (opinion concurring in part and concurring in judgment). There is not. The cases relied upon by JUSTICE STEVENS and by the court in *Aerojet-General Corp.* v. *Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F. 2d 736 (CA Fed. 1990), simply address whether a district court can retain jurisdiction over a counterclaim if the complaint (or a claim therein) is dismissed or if a jurisdictional defect in the complaint is identified. They do not even mention the well-pleaded-complaint rule that the statutory phrase "arising under" invokes. Nor do any of these cases interpret § 1295(a)(1) or another statute conferring appellate jurisdiction with reference to the jurisdiction of the district court. Thus, the cases relied upon by JUSTICE STEVENS have no bearing on whether the phrase "arising under" can be interpreted differently in ascertaining the jurisdiction of the Federal Circuit than that of the district court.

cases is "fixed with reference to that of the district court," *ante*, at 829. It is important to note the general rule, however, that the jurisdiction of the court of appeals is not "fixed" until the notice of appeal is filed. See *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58–59 (1982) *(per curiam)* ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").

Thus, if a case began as an antitrust case, but an amendment to the complaint added a patent claim that was pending or was decided when the appeal is taken, the jurisdiction of the district court would have been based "in part" on 28 U. S. C. § 1338(a), and therefore § 1295(a)(1) would grant the Federal Circuit jurisdiction over the appeal. Conversely, if the only patent count in a multicount complaint was voluntarily dismissed in advance of trial, it would seem equally clear that the appeal should be taken to the appropriate regional court of appeals rather than to the Federal Circuit. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 823–824 (1988) (STEVENS, J., concurring). Any other approach "would enable an unscrupulous plaintiff to manipulate appellate court jurisdiction by the timing of the amendments to its complaint." *Id.*, at 824. To the extent that the Court's opinion might be read as endorsing a contrary result by reason of its reliance on cases involving the removal jurisdiction of the district court, I do not agree with it.

I also do not agree with the Court's statement that an interpretation of the "in whole or in part" language of § 1295(a)(1) to encompass patent claims alleged in a compulsory counterclaim providing an independent basis for the district court's jurisdiction would be a "neologism" that would involve "an unprecedented feat of interpretive necromancy," *ante*, at 833. For there is well-reasoned precedent supporting precisely that conclusion. See *Aerojet-General Corp.* v.

Machine Tool Works, Oerlikon-Buehrle Ltd., 895 F. 2d 736, 742–743 (CA Fed. 1990) (en banc) (opinion of Markey, C. J., for a unanimous court) (citing, *e. g.*, *Rengo Co.* v. *Molins Machine Co.*, 657 F. 2d 535, 539 (CA3 1981); *Dale Electronics, Inc.* v. *R. C. L. Electronics, Inc.*, 488 F. 2d 382, 390 (CA1 1973); *Pioche Mines Consol., Inc.* v. *Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336, 336–337 (CA9 1953); *Lion Mfg. Corp.* v. *Chicago Flexible Shaft Co.*, 106 F. 2d 930, 933 (CA7 1939)).[1] I am nevertheless persuaded that a correct interpretation of § 1295(a)(1) limits the Federal Circuit's exclusive jurisdiction to those cases in which the patent claim is alleged in either the original complaint or an amended pleading filed by the

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[1] The Court dismisses the cases cited in *Aerojet*, a unanimous opinion for an en banc Federal Circuit, as having "no bearing" on this case because they do not parse the term "arising under" or interpret 28 U. S. C. § 1295(a)(1). *Ante*, at 834, n. 4. But surely it is not a "quibbl[e]" to acknowledge them as supporting the *Aerojet* court's conclusion that the jurisdiction of the district court can be based on a patent counterclaim, thereby satisfying the "in whole or in part" requirement of § 1295(a)(1).

In any event, the assertion that only the power of black magic could give "arising under" a different meaning with respect to appellate jurisdiction is belied by case law involving the Temporary Emergency Court of Appeals (TECA), which had exclusive jurisdiction over appeals in cases "arising under" the Economic Stabilization Act of 1970 (ESA), § 211(b)(2), 85 Stat. 749. Most courts departed from the traditional understanding of "arising under" and interpreted the statute to grant TECA appellate jurisdiction over ESA issues, including those raised as a defense. Courts nevertheless interpreted the statute's identical language respecting the district courts to grant traditional "arising under" jurisdiction. See *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F. 2d 179, 185–186 (CA2 1979) ("It must be candidly recognized that according the TECA some form of 'issue' jurisdiction places on the phrase, 'cases and controversies arising under,' . . . a construction that differs from the meaning associated with these words in other jurisdictional statutes, and differs even from the grant of jurisdiction to the district courts in [the ESA]"). Thus, although I am in agreement with the Court's ultimate decision not to determine appellate jurisdiction by reference to the defendant's patent counterclaim, I find it unnecessary and inappropriate to slight the contrary reasoning of the Court of Appeals.

plaintiff. In my judgment, each of the three policies that the Court has identified as supporting the "well-pleaded-complaint" rule governing district court jurisdiction, *ante*, at 831–832, points in the same direction with respect to appellate jurisdiction.

First, the interest in preserving the plaintiff's choice of forum includes not only the court that will conduct the trial but the appellate court as well. A plaintiff who has a legitimate interest in litigating in a circuit whose precedents support its theory of the case might omit a patent claim in order to avoid review in the Federal Circuit. In some cases that interest would be defeated by a rule that allowed a patent counterclaim to determine the appellate forum.

Second, although I doubt that a rule that enabled the counterclaimant to be the occasional master of the appellate forum "would radically expand" the number of cases heard by the Federal Circuit, *ante*, at 832, we must recognize that the exclusive jurisdiction of the Federal Circuit defined in § 1295(a)(1) does not comprise claims arising under the trademark and copyright laws, which are included in the district court's grant of jurisdiction under § 1338(a).[2] As the instant litigation demonstrates, claims sounding in these other areas of intellectual property law are not infrequently bound up with patent counterclaims. The potential number of cases in which a counterclaim might direct to the Federal Circuit appeals that Congress specifically chose not to place within its exclusive jurisdiction is therefore significant.

Third, the interest in maintaining clarity and simplicity in rules governing appellate jurisdiction will be served by lim-

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[2] The statute grants the Federal Circuit "exclusive jurisdiction . . . if the jurisdiction of [the district] court was based, in whole or in part, on [28 U. S. C.] section 1338 . . . , except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed" by provisions relating to appeals to the regional courts of appeals. 28 U. S. C. § 1295(a)(1).

iting the number of pleadings that will mandate review in the Federal Circuit. In his opinion in *Aerojet*, Chief Judge Markey merely held that a counterclaim for patent infringement that was "compulsory" and not "frivolous" or "insubstantial" sufficed to establish jurisdiction; he made a point of noting that there was no assertion in the case that the patent counterclaim at issue had been filed "to manipulate the jurisdiction of [the Federal Circuit]." 895 F. 2d, at 738. The text of the statute, however, would not seem to distinguish between that counterclaim and those that are permissive, insubstantial, or manipulative, and there is very good reason not to make the choice of appellate forum turn on such distinctions. Requiring assessment of a defendant's motive in raising a patent counterclaim or the counterclaim's relative strength wastes judicial resources by inviting "unhappy interactions between jurisdiction and the merits." *Kennedy* v. *Wright*, 851 F. 2d 963, 968 (CA7 1988).

There is, of course, a countervailing interest in directing appeals in patent cases to the specialized court that was created, in part, to promote uniformity in the development of this area of the law. But we have already decided that the Federal Circuit does not have exclusive jurisdiction over all cases raising patent issues.[3] *Christianson*, 486 U. S., at

[3] In explicit contrast with the TECA, see n. 1, *supra*, the Federal Circuit was granted appellate jurisdiction over cases involving patent law claims, not issues. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 820–821, n. 1 (1988) (STEVENS, J., concurring) (quoting H. R. Rep. No. 97–312, p. 41 (1981)) ("Cases will be within the jurisdiction of the Court of Appeals for the Federal Circuit in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction. *Contrast, Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F. 2d 179 (2d Cir., 1979) [Temporary Emergency Court of Appeals properly has jurisdiction over *issues*, not *claims*, arising under the Economic Stabilization Act]" (internal quotation marks omitted)).

Considerations of convenience to the parties and the courts support Congress' decision to determine the Federal Circuit's appellate jurisdiction based on the claims alleged in the well-pleaded complaint rather than the issues resolved by the district court's judgment. If, for example, the dis-

811–812. Necessarily, therefore, other circuits will have some role to play in the development of this area of the law. An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.[4]

In sum, I concur in the Court's judgment and join Parts I and II–A of its opinion.

JUSTICE GINSBURG, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

For reasons stated by Chief Judge Markey, writing for a unanimous en banc Federal Circuit in *Aerojet-General Corp.* v. *Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F. 2d 736 (1990), I conclude that, when the claim stated in a compulsory counterclaim "aris[es] under" federal patent law and is adjudicated on the merits by a federal district court, the Federal Circuit has exclusive appellate jurisdiction over that adjudication and other determinations made in the same case. See *id.*, at 741–744 (distinguishing *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800 (1988), in which this Court *affirmed* the jurisdictional decision of the Federal Circuit; in discussing the "well-pleaded complaint rule," the Federal Circuit observed that a patent infringe-

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trict court's judgment rests on multiple grounds, directing the appeal is a relatively straightforward matter by reference to the complaint. As Judge Easterbrook explains in *Kennedy* v. *Wright*, 851 F. 2d 963 (CA7 1988), fixing appellate jurisdiction with respect to the complaint also ensures that a case that has been appealed and remanded will return to the same appellate court if there is a subsequent appeal. *Id.*, at 968 (describing the risk of "a game of jurisdictional ping-pong" if subsequent appeals are directed based on the grounds for decision rather than the pleadings).

[4] See Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N. Y. U. L. Rev. 1, 25–30, 54 (1989) (evaluating criticism that the Federal Circuit demonstrates a greater pro-patent bias than regional circuits).

ment counterclaim, unlike a patent issue raised only as a defense, has as its own, independent jurisdictional base 28 U. S. C. § 1338, *i. e.*, such a claim discretely "arises under the patent laws").

The question now before this Court bears not at all on a plaintiff's choice of trial forum. The sole question presented here concerns Congress' allocation of adjudicatory authority among the federal courts of appeals. At that appellate level, Congress sought to eliminate forum shopping and to advance uniformity in the interpretation and application of federal patent law. See generally Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N. Y. U. L. Rev. 1, 30–37 (1989).

The Court's opinion dwells on district court authority. See *ante*, at 829–832. But, all agree, Congress left that authority entirely untouched. I would attend, instead, to the unique context at issue, and give effect to Congress' endeavor to grant the Federal Circuit exclusive appellate jurisdiction at least over district court adjudications of patent claims. See Dreyfuss, *supra*, at 36.

In the instant case, however, no patent claim was actually adjudicated. For that sole reason, I join the Court's judgment.

Reporter's Note

The next page is purposely numbered 901. The numbers between 840 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 MARCH 4 THROUGH JUNE 3, 2002

MARCH 4, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1619. GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. *v.* LAWRENCE. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Porter* v. *Nussle*, 534 U. S. 516 (2002). Reported below: 238 F. 3d 182.

No. 01–100. STERNER ET AL. *v.* ROYSTER. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Porter* v. *Nussle*, 534 U. S. 516 (2002). Reported below: 8 Fed. Appx. 33.

Certiorari Dismissed

No. 01–7124. TROBAUGH *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 19 Fed. Appx. 461.

No. 01–7526. SINDRAM *v.* RUBIN. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 01A434. MOORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Applica-

tion for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–2286. IN RE DISCIPLINE OF MARKS. Martin Eric Marks, of Great Neck, 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–2287. IN RE DISCIPLINE OF BUSHLOW. Theodore William Bushlow, of Brooklyn, 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–2288. IN RE DISCIPLINE OF FRIESEN. Michael J. Friesen, of Garden City, Kan., 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–2289. IN RE DISCIPLINE OF TUCKER. James Guy Tucker, Jr., of Little Rock, Ark., 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–2290. IN RE DISCIPLINE OF GRIDER. Murrey L. Grider, of Pocahontas, Ark., 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. 01–131. GISBRECHT ET AL. *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. [Certiorari granted, 534 U. S. 1039.] Motion of the Solicitor General to permit David B. Salmons, Esq., to present oral argument *pro hac vice* granted.

No. 01–394. CHRISTOPHER, FORMER SECRETARY OF STATE, ET AL. *v.* HARBURY. C. A. D. C. Cir. [Certiorari granted, 534 U. S. 1064.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–400. BELL, WARDEN *v.* CONE. C. A. 6th Cir. [Certiorari granted, 534 U. S. 1064.] Motion of the Solicitor General for

leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–417. DEVLIN *v.* SCARDELLETTI ET AL. C. A. 4th Cir. [Certiorari granted, 534 U. S. 1064.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–631. UNITED STATES *v.* DRAYTON ET AL. C. A. 11th Cir. [Certiorari granted, 534 U. S. 1074.] Motion for appointment of counsel granted, and it is ordered that Steven L. Seliger, Esq., of Quincy, Fla., be apointed to serve as counsel for respondent Clifton Brown, Jr., in this case. Motion for appointment of counsel granted, and it is ordered that Gwendolyn Spivey, Esq., of Tallahassee, Fla., be appointed to serve as counsel for respondent Christopher Drayton in this case. Motion of counsel Spivey to strike and objection to attempted substitution of counsel granted. Motion of counsel Seliger to strike and objection to attempted substitution of counsel granted.

No. 01–714. UTAH ET AL. *v.* EVANS, SECRETARY OF COMMERCE, ET AL. D. C. Utah. [Probable jurisdiction postponed, 534 U. S. 1112.] Motion of the Solicitor General and the North Carolina appellees for additional time for oral argument and for divided argument granted, and 10 additional minutes allotted for that purpose to be divided as follows: 35 minutes for appellants, 20 minutes for the Solicitor General, and 15 minutes for the North Carolina appellees.

No. 01–5404. HEMMERLE *v.* LAUDERDALE REPORTING SERVICE. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [534 U. S. 803] denied.

No. 01–6785. MCDONALD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [534 U. S. 1063] denied.

No. 01–7662. MILLER-EL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. [Certiorari granted, 534 U. S. 1122.] Order granting petition for writ of certiorari amended to read as follows:

Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson* v. *Kentucky*, 476 U. S. 79 (1986)?"

No. 01–8167. IN RE JOHNSON;
No. 01–8174. IN RE COX;
No. 01–8175. IN RE CLIFTON;
No. 01–8181. IN RE BECERRA; and
No. 01–8229. IN RE TROBAUGH. Petitions for writs of habeas corpus denied.

No. 01–7525. IN RE RAPOSO. Petition for writ of mandamus denied.

Certiorari Granted

No. 01–653. FEDERAL COMMUNICATIONS COMMISSION *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL.; and
No. 01–657. ARCTIC SLOPE REGIONAL CORP. ET AL. *v.* NEXTWAVE PERSONAL COMMUNICATIONS INC. ET AL. C. A. D. C. Cir. Motion of Urban Comm-North Carolina, Inc., for leave to file a brief as *amicus curiae* in No. 01–653 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 254 F. 3d 130.

Certiorari Denied

No. 00–9686. BAEZ *v.* HALL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 244 F. 3d 140.

No. 01–734. WASHINGTON STATE MEDICAL QUALITY ASSURANCE COMMISSION *v.* NGUYEN. Sup. Ct. Wash. Certiorari denied. Reported below: 144 Wash. 2d 516, 29 P. 3d 689.

No. 01–758. UNITED PARCEL SERVICE, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 249 F. 3d 557.

No. 01–791. CITY OF SAINT PAUL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 258 F. 3d 750.

No. 01–808. MURPHY, SECRETARY OF NATURAL RESOURCES OF VIRGINIA, ET AL. *v.* WASTE MANAGEMENT HOLDINGS, INC.,

ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 252 F. 3d 316.

No. 01–827. PHILLIPS, INDIVIDUALLY AND AS NEXT OF KIN TO PHILLIPS, ET AL. *v.* HILLCREST MEDICAL CENTER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 244 F. 3d 790.

No. 01–916. MILLER *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 51 S. W. 3d 676.

No. 01–918. VENETIAN CASINO RESORT, L. L. C. *v.* LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 257 F. 3d 937.

No. 01–924. JOHNSON *v.* CITY OF SAN ANTONIO. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1094.

No. 01–925. ABGN SALES, INC. *v.* HURT. C. A. 9th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 623.

No. 01–926. BURCHER *v.* QUINCY HILL TOWNHOUSE ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 789.

No. 01–934. CHEATWOOD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 01–937. VAN SLYKE *v.* NORTHROP GRUMMAN CORP. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 154.

No. 01–938. SCHMIDT *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 771 So. 2d 131.

No. 01–944. SPRADLEY ET AL. *v.* OLD HARMONY BAPTIST CHURCH ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 793 So. 2d 938.

No. 01–951. FORNER ET AL. *v.* ALLENDALE CHARTER TOWNSHIP. Ct. App. Mich. Certiorari denied.

No. 01–956. UNITED STATES EX REL. KING *v.* HILLCREST HEALTH CENTER, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 264 F. 3d 1271.

No. 01–957. WARE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 323 Ill. App. 3d 47, 751 N. E. 2d 81.

No. 01–959. CHILDS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 01–988. PRYOR, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF VOUZAINAS ET AL. *v.* READY & PONTISAKOS. C. A. 2d Cir. Certiorari denied. Reported below: 259 F. 3d 103.

No. 01–1007. GROSS *v.* IRTZ. Ct. App. Ky. Certiorari denied.

No. 01–1008. KERSEY *v.* DEHART ET AL. Sup. Ct. N. H. Certiorari denied.

No. 01–1012. ASHTON *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 81.

No. 01–1052. RAVET ET AL. *v.* ENTERTAINMENT PUBLICATIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 7 Fed. Appx. 807.

No. 01–1095. SCOTT *v.* MORGAN, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 196.

No. 01–1140. SYMANTEC CORP. *v.* HILGRAEVE CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 265 F. 3d 1336.

No. 01–6586. SMITH *v.* ZACHARY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 255 F. 3d 446.

No. 01–7062. FISHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 564 Pa. 505, 769 A. 2d 1116.

No. 01–7109. ROCHA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1098.

No. 01–7137. ACOSTA-MARTINEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 252 F. 3d 13.

No. 01–7158. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 779 A. 2d 277.

No. 01–7426. OLIVER *v.* FALLA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 258 F. 3d 1277.

No. 01–7464. FERGUSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 814 So. 2d 970.

No. 01–7484. WARD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 814 So. 2d 899.

No. 01–7486. REYES *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 631.

No. 01–7491. BULLARD *v.* BARKER, SUPERINTENDENT, SAMPSON COUNTY PRISON UNIT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 134.

No. 01–7500. TIDIK *v.* WAYNE COUNTY FRIEND OF THE COURT ET AL. C. A. 6th Cir. Certiorari denied.

No. 01–7508. SHELBY *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 273.

No. 01–7510. ROGERS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7511. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–7512. FOSTER *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 403.

No. 01–7514. FLYNN *v.* THOMAS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 319 Ill. App. 3d 1108, 791 N. E. 2d 735.

No. 01–7515. HARRIS *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 01–7516. WILLIAMS *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 499.

No. 01–7518. AZIZ *v.* TRI-STATE UNIVERSITY. C. A. 7th Cir. Certiorari denied.

No. 01–7523. TWEH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–7528. DUMONT *v.* UBC, INC. App. Ct. Conn. Certiorari denied. Reported below: 64 Conn. App. 903, 777 A. 2d 213.

No. 01–7529. THOMAS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7591. DUNSTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 262 Neb. 329, 631 N. W. 2d 879.

No. 01–7651. RASTEN *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. C. A. 1st Cir. Certiorari denied.

No. 01–7695. LAMPLEY *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 243 Wis. 2d 114, 627 N. W. 2d 547.

No. 01–7724. FULTS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 82, 548 S. E. 2d 315.

No. 01–7801. MASON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 768 A. 2d 591.

No. 01–7815. PATTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 55.

No. 01–7934. REDMOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–7955. MATHIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 264 F. 3d 321.

No. 01–7971. OWEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 218.

No. 01–7974. LOPEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 472.

No. 01–7975. LETTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 264 F. 3d 787.

No. 01–7976. ZUNIGA-HERNANDEZ *v.* GILKEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–7977. TOBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 22 Fed. Appx. 75.

No. 01–7996. GOODALE *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 257 F. 3d 771.

No. 01–7997. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 285 F. 3d 759 and 18 Fed. Appx. 486.

No. 01–8002. COPELAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 640.

No. 01–8003. PAZ-ZAMORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 108.

No. 01–8005. ZALAZAR-TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 707.

No. 01–8007. MENDOZA-MEDINA, AKA MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8009. MOSLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 560.

No. 01–8011. KANESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–8015. MCCLEAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 589.

No. 01–8020. ENCARNACION-MENDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 271 F. 3d 80.

No. 01–8022. HUNTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 Fed. Appx. 335.

No. 01–8029. EVANS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 131 F. 3d 1192.

No. 01–8032. COLVIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 249.

No. 01–8038. RAMSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 185.

No. 01–8041. LIRA-ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8045. RANGEL-MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 676.

No. 01–8046. ARCE SERRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 623.

No. 01–8047. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1076.

No. 01–8048. ROJAS-FRANCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 56.

No. 01–8050. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 Fed. Appx. 733.

No. 01–8051. CLINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 116.

No. 01–8053. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1096.

No. 01–8054. PATRICK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 11.

No. 01–8056. CHAVEZ-MAGANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8059. COVINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 117.

No. 01–8065. KEMP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 251.

No. 01–8066. MATEO-MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 579.

No. 01–8068. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8071. DUQUE DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1064.

No. 01–8075. PEREZ-ESPINOZA, AKA ESPINOZA, AKA ESPINOZA-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8076. PAUL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–8082. HAYS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8083. HINDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 100.

No. 01–8125. CLEMENTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–8132. RIGDON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–175. WILLIAMS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 240 F. 3d 1019.

JUSTICE BREYER, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

The Ethics Reform Act of 1989 provides for automatic annual adjustments in judicial pay to take account of inflation. In each of fiscal years 1995, 1996, 1997, and 1999, Congress included language in appropriations legislation that prevented the Ethics Act adjustments from taking effect for that fiscal year. The petitioners in this case, federal judges sitting when the Ethics Act became law, claim that the latter legislation violates the Constitution's Compensation Clause. In my view the Compensation Clause question is both difficult and important. I would grant certiorari and hear this case.

I

On January 1, 1990, the Ethics Reform Act (Ethics Act or Act) took effect as law. Pub. L. 101–194, 103 Stat. 1716. Insofar as that statute applied to federal judges it accomplished two important objectives. First, it strictly limited the amount of outside income that any judge could earn. It forbade the receipt of honoraria, speaking or lecture fees, payments for articles, or other income earned other than by teaching or writing books. And it imposed a dollar limit (now just over $21,000) on the income a judge could earn through classroom teaching. 5 U. S. C. App. §§ 501–502.

Second, the Act sought to maintain real judicial compensation at a nearly constant level. The Quadrennial Commission on Executive, Legislative, and Judicial Salaries had told Congress that a continuous inflation-driven reduction in the real level of judicial salaries, at a time when most other real salaries in America had

remained constant or increased, was "threatening to diminish the quality of justice in this country . . . ." Report of 1989 Commission on Executive, Legislative and Judicial Salaries, Fairness for our Public Servants 27 (1988). And the Congressional Bipartisan Task Force on Ethics had added that "[f]ederal judges are resigning at a higher rate than ever before." 135 Cong. Rec. 30752 (1989). Failure to protect against the negative impact of inflation, the task force stated, was "the single, most important explanation" for the increasing disparity between the salaries of high-level Government officials and comparable positions in the private sector. *Id.*, at 30753. Hence, the Act focused on inflation, assuring federal judges (as well as Members of Congress and high-level Executive Branch officials) that their real salaries, compared to those of the average worker, would decline only slightly, if at all.

The Act provided this assurance as follows: First, it said that each year "each [judicial] salary rate . . . shall be adjusted by an amount . . . as determined under section 704(a)(1) . . . ." 28 U. S. C. § 461(a)(1) (1994 ed.). Second, it provided in § 704(a)(1) that the adjustment amount would equal the quarterly percentage set forth in the Employment Cost Index (a measurement of change in private sector salaries published by the Bureau of Labor Statistics) minus one-half of one percent with a ceiling of five percent. *Ibid.* Third, it said that this adjustment "shall" take place whenever there was a similar adjustment in the salary of federal civil servants under "section 5303 of [Title 5]." 5 U. S. C. § 5318. Fourth, it made clear that this latter adjustment would take place annually and automatically unless the President determined that there was either (1) a "national emergency" or (2) "serious economic conditions affecting the general welfare." § 5303(b)(1).

The Act mandates adjustments to judicial salaries; the adjustments are mechanical and precise; and they are to take place automatically, for they are tied to the adjustments provided to General Schedule employees which themselves are automatic but for the two possible exceptions. These features of the law assured federal judges, as I have said, that their real salaries would stay approximately level unless the real salaries of the average private sector worker or those of the typical civil servant declined significantly as well.

The adjustments for which the Ethics Act provided took effect as required by the Act in fiscal years 1991, 1992, 1993, and 1998. In fiscal year 1994, the President applied the special circumstance exception, invoking "serious economic conditions" (namely, huge budget deficits) as a basis for denying General Schedule employees an adjustment, and, consequently, federal judges received no adjustment in their salaries either. In each of fiscal years 1995, 1996, 1997, and 1999, however, the adjustment in the salaries of General Schedule employees took effect. But the related adjustment in the salaries of federal judges did not take effect. That is because, in each year, Congress included in its appropriations legislation language specifying that, other laws to the contrary notwithstanding, the salaries of Members of Congress, certain high-level Executive Branch employees, and federal judges would not be adjusted. Pub. L. 103–329, § 630(a)(2), 108 Stat. 2424; Pub. L. 104–52, § 632, 109 Stat. 507; Pub. L. 104–208, § 637, 110 Stat. 3009–364; Pub. L. 105–277, § 621, 112 Stat. 2681–518.

In 1997, a group of federal judges, all members of the Federal Judiciary prior to 1989, filed this lawsuit against the United States. The judges argued that the first three special "blocking laws" diminished their compensation in violation of Article III's command. The District Court agreed and granted summary judgment in the judges' favor. The same judges then filed a similar suit based on the fourth blocking law, which had now taken effect, and the District Court granted them summary judgment on this suit as well. The United States appealed, and the cases were consolidated. The Court of Appeals reversed in a 2-to-1 panel decision. 240 F. 3d 1019 (CA Fed. 2001). The judges now seek certiorari.

II

The judges argue that the appropriations legislation blocking the Ethics Act adjustments violates the literal language of the Compensation Clause and runs contrary to its basic purposes. In respect to the language, they point out that the Clause says that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U. S. Const., Art. III, § 1. The Ethics Act, they say, sets forth the level of "compensation" that judges "shall . . . receive" at a "stated time," *i. e.,* each year. The subsequent appropriations legislation "diminished" that fixed

"compensation" by removing the previously legislated adjustment. And it did so during the plaintiff judges' "continuance in office."

Moreover, the judges argue, the blocking statutes represent precisely the kind of legislation that the Compensation Clause was designed to prohibit. The Founders wrote the Compensation Clause in order to help ensure "complete independence of the courts of justice." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton explicitly stated: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.*, No. 79, at 472. A "power over a man's subsistence," Hamilton added, "amounts to a power over his will." *Ibid.* (emphasis deleted).

Moreover, when the Founders considered the Constitution's specific provisions, they took inflation into account. Hamilton, fully aware of then-prevalent inflation, wrote that "fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible." *Id.*, at 473. For that reason, he insisted that the Constitution "leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances." *Ibid.* But once the legislature has chosen to vary a provision, he added, the Compensation Clause "put[s] it out of the power of that body to change the condition of the individual for the worse." *Ibid.* The reason is that a judge must "be sure of the ground upon which he stands, and . . . never be deterred from his duty by the apprehension of being placed in a less eligible situation." *Ibid.* In a nutshell, the Founders created a one-way compensation ratchet because they believed that permitting the legislature to diminish judicial compensation would allow the legislature to threaten judicial independence.

Three examples will help illustrate how, in the judges' view, the appropriations legislation undermines these basic Compensation Clause objectives:

Example One assumes that Congress has enacted a statute taking effect on January 1, 2000, specifying that federal district court salaries for the next five years shall be paid according to the following schedule:

2000	$150,000
2001	$150,000
2002	$150,000
2003	$150,000
2004	$150,000

Example Two assumes that Congress, believing that inflation is likely to occur, has enacted a statute taking effect on January 1, 2000, specifying that federal district court salaries for the next five years shall be paid according to the following schedule:

2000	$150,000
2001	$160,000
2002	$170,000
2003	$180,000
2004	$190,000

Example Three is a simplified version of the present case. It assumes a statute that specifies a mechanically determined adjustment for inflation (yielding a, b, c, and d dollars) added on to the fiscal year 2000 salary each year according to the following table:

2000	$150,000
2001	$150,000 + a
2002	$150,000 + a + b
2003	$150,000 + a + b + c
2004	$150,000 + a + b + c + d

Example One presents circumstances where Congress could not subsequently (say, in 2003) reduce the pay of previously sitting federal judges below the amount previously specified for that year ($150,000). But what about Example Two and Example Three? It is difficult to see any difference between a later statute, enacted, say, in 2003, that removes Example Two's $10,000 increase due in 2004, and a similar statute that removes Example Three's increase of mechanically determined amount "d." Those two examples would seem virtually identical from a constitutional point of view.

But does the Compensation Clause distinguish Example One from Examples Two and Three? The lower court answered this question affirmatively. Its answer assumes that the Constitution forbids only a reduction in the nominal dollar rate of pay that

a judge actually has earned for at least some minimal period of time.

The judges concede that such a reading is possible logically. But they point out that that reading, in significantly restricting the protective scope of the Compensation Clause, would mock Hamilton's claim that the Constitution (while granting to Congress the power to decide when to *increase* a judge's nominal pay) "put[s] it out of the power" of Congress "to change the condition of the individual for the worse." *Ibid.* That is because the three examples are virtually identical in terms of the Compensation Clause's basic purposive focus: a judge's reasonable expectations. A sitting judge has no greater, and no lesser, reason to believe he will receive the amounts provided in Examples Two and Three than the amount provided in Example One. Assuming in each case that a statute already in effect has similarly determined, fixed, and mandated the figures listed in the schedule, a judge similarly will expect to receive the salary that the statute mandates. And any subsequent reduction in the amounts contained in any of the three statutes would similarly diminish the judge's compensation below the level that the law had previously entitled that judge to expect. Cf. *United States* v. *Hatter*, 532 U. S. 557, 585 (2001) (SCALIA, J., concurring in part and dissenting in part) (arguing that repeal of judges' exemption from Medicare tax constituted diminishment in compensation because judges "had an employment expectation of a preferential exemption from taxation . . ."); *ibid.* ("This benefit Congress took away, much as a private employer might terminate a contractual commitment to pay Medicare taxes on behalf of its employees"). Moreover, the expected level here is a level that does not increase a judge's real salary; it simply keeps that real salary from being reduced.

The federal appeals court majority did not reject this argument directly on the merits. Rather, it wrote that this Court had rejected the argument in *United States* v. *Will*, 449 U. S. 200 (1980), a unanimous decision, and it did not believe it could reopen the issue. 240 F. 3d, at 1035. In *Will*, the Court considered "when, if ever, . . . the Compensation Clause prohibit[s] the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted." 449 U. S., at 221. The Court held that Congress could block a "cost-of-living" increase due judges (under pre-existing law) because the blocking legislation took effect in the fiscal year prior to the year

in which the increase would become payable. And the Court wrote that "a salary increase 'vests' . . . only when it takes effect as part of the compensation due and payable to Article III judges." *Id.*, at 229. This language and holding, in the Court of Appeals' view, distinguishes Example One from Examples Two and Three, offering protection in Example One, but not in either of the latter two examples.

The judges, however, offer a strong argument distinguishing *Will* in terms of the Compensation Clause's basic, expectations-related purpose. *Will* involved a set of interlocking statutes which, in respect to future cost-of-living adjustments, were neither definite nor precise. The statute providing for judicial cost-of-living adjustments, like the statute now before us, tied those adjustments to adjustments provided others in the civil service. But the civil service statute, unlike the comparable statute here before us, was imprecise as to amount and uncertain as to effect. The *Will* statutes required the President to appoint an adjustment agent. The agent was to compare salaries in the civil service with those in the private sector and then recommend an adjustment to an Advisory Committee. Subsequently, the Committee would make its own recommendation to the President, accepting, rejecting, or modifying the agent's recommendation as the Committee thought desirable. The President would have to accept the Committee's recommendation—unless he determined that national emergency or special economic conditions warranted its rejection. But that recommendation would not take effect as law if either House of Congress rejected it. See *id.*, at 203–204.

Put in terms of the Compensation Clause's basic purpose, the judges argue that the *Will* statutes created a series of hurdles that prevented those statutes from creating a firm judicial expectation that the statutes' potential beneficiaries, *e. g.*, sitting judges, would in fact receive any inflation-compensating adjustment. Neither did the statutes provide for calculation of any such adjustment in a mechanical way.

The judges add two further subsidiary distinctions: (1) The Ethics Act, unlike the statutes in *Will*, simultaneously eliminated other (outside) income that judges had previously received, 5 U. S. C. App. §§ 501–502; and (2) the Ethics Act, unlike the statutes in *Will*, was directly intended to protect judges from "riders to appropriations bills to deny them COLAs when other Federal employees receive theirs." 135 Cong. Rec., at 30753.

The judges recognize that the Ethics Act does not fix salaries quite as definitively as hypothetical Example Three suggests. That is because the Act's adjustment will not take place if the President determines that there exists either a "national emergency" or "serious economic conditions affecting the general welfare," and then reduces or eliminates General Schedule salary adjustments accordingly. But these circumstances, they argue, are defined precisely enough and are uncommon enough not to affect expectations significantly. In any event, that, according to the judges, is the question that this Court must decide—whether the 1989 statute is sufficiently precise and definite to have created an "expectation" that the Compensation Clause protects. Cf. *Boehner* v. *Anderson*, 30 F. 3d 156 (CADC 1994) (finding equivalent of such "vesting" for purposes of the Twenty-seventh Amendment in Ethics Act's adjustment provision as it applied to Members of Congress).

In my view, the Court in *Will* did not focus on this question. To read that opinion as the lower court read it would render ineffectual any congressional effort to protect judges' real compensation, even from the most malignant hyperinflation, Hamilton's views to the contrary notwithstanding. Indeed, that reading would permit legislative repeal of even the most precise and definite salary statute—any time before the operative fiscal year in which the new nominal salary rate is to be paid. I very much doubt that the Court in *Will* intended these consequences.

The Government alternatively claims that § 140 of a fiscal year 1982 appropriations bill, Pub. L. 97–92, 95 Stat. 1200, provides a separate basis for rejecting the judges' claim. I do not see how that is so. Section 140 provides in relevant part:

> "Notwithstanding any other provision of law . . . none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted."

This provision refers specifically to federal judges, and it imposes a special legislative burden upon their salaries alone. The singling out of judges must throw the constitutionality of the provision into doubt. *Hatter*, *supra*, at 564 (striking down as un-

constitutionally discriminatory the imposition of a Social Security payroll tax upon a small group of federal employees consisting "almost exclusively of federal judges"). Regardless, the Government fails to explain how, in light of the fact that the Ethics Act "specifically authorized" (indeed mandated) future adjustments in judicial pay, the language of § 140 (enacted in 1981) could make a legal difference. The Government adds that Congress reenacted this 1982 provision in 2001. But it does not explain how that reenactment could affect the years here at issue.

For these reasons, I believe the judges have raised an important constitutional question, the answer to which at present is uncertain.

III

I recognize that not every petition raising a difficult constitutional question warrants review in this Court. And there are prudential considerations that some might believe warrant denying certiorari here. For one thing, we face the serious embarrassment of deciding a matter that would directly affect our own pocketbooks; and, in doing so, we may risk the public's high opinion of the Court insofar as that opinion rests upon a belief that its judges are not self-interested. But the law requires judges to decide cases in which they have a self-interest where, as here, "'no provision is made for calling another in, or where no one else can take his place.'" *Will*, 449 U. S., at 214 (quoting *Philadelphia* v. *Fox*, 64 Pa. 169, 185 (1870)). Nor should judges, who are called upon to protect the least popular cause and the least popular person where the Constitution demands it, be moved by potential personal embarrassment. Whenever a court considers a matter where public sentiment is strong, it risks public alienation. But the American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity.

One might also argue that the matter is not important enough to consider now, because over time Congress will deal with the decline in judicial compensation, making good on the 1989 Act's inflation-adjustment promise—that real judicial salaries will not fall significantly unless those of the typical American worker or the typical civil servant decline significantly as well. The implementation of the Ethics Act, however, does not support this view. Since 1989, Congress has refused to follow the Act's mandate about half the time. The real salaries of district court judges

have declined about 25 percent in the past several decades. The American Bar Association, the Federal Bar Association, and the American College of Trial Lawyers, in support of the petitioner judges, tell us that, while real judicial compensation fell below that of typical mid-level (and a few first-year) law firm associates and many law school teachers and administrators, the real compensation earned by the average private sector worker has increased, as has that in nearly all employment categories outside high levels of Government. See Appendix, *infra.* See also Fisk, What Lawyers Earn, National Law Journal, Oct. 2, 2000, p. A31; 2001 Society of American Law Teachers Equalizer, Issue 1, p. 2 (Apr. 2001). The consequence, in the professional organizations' view, is that compensation-related judicial resignations have reached an all time high, a particularly serious matter given rapidly rising caseloads. Cf. The Federalist No. 78, at 471–472 (stressing importance of professional experience).

The Compensation Clause, of course, is not concerned with the absolute level of judicial compensation. Judges are paid significantly more than most Americans and no less than Members of Congress and many other high-level Government workers. It is up to Congress to decide what that level of pay ought to be. But this case is not about what judges' labor should be worth. It is about a congressional decision in 1989 to protect federal judges against undue *diminishment* in real pay by providing cost-of-living adjustments to guarantee that their salaries would not fall too far behind inflation. Cf. REHNQUIST, C. J., 2001 Year-End Report on the Federal Judiciary 2 (Jan. 1, 2002) ("But a COLA only keeps judges from falling further behind the median income of the profession"). This congressional decision was tempered only with the caveat that judges would not be protected against salary diminishment if such protection would give judges a benefit that the average American worker and the average federal employee had been denied. The Compensation Clause assures judges that, once Congress has made such a decision, a later Congress cannot overturn it. This is not a novel concept; it has been engrained since the Founders drafted the Clause to protect against the risk that Congress would attempt to change the conditions of judges "for the worse." The Federalist No. 79, at 473 (A. Hamilton).

Congress, of course, has treated judges no worse than it has treated itself. It has cut its own real salaries just as it has cut

those of the judges. And its doing so may well work similar harm upon all Federal Government institutions. The Compensation Clause, however, protects judicial compensation, not because of the comparative importance of the Judiciary, but because of the special nature of the judicial enterprise. That enterprise, Chief Justice Marshall explained, may call upon a judge to decide "between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular." Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). Independence of conscience, freedom from subservience to other Government authorities, is necessary to the enterprise. The Compensation Clause helps to secure that judicial independence. When a case presents a serious Compensation Clause question, as this case does, we should hear and decide it.

IV

To summarize: this case focuses upon monetary inflation—a phenomenon familiar to the Nation's founders, but absent during much of the 19th century. By reducing the purchasing power of salaries specified in fixed dollar amounts, inflation leaves it to Congress to determine whether a judge's standard of living will be reduced or maintained. The judges concede that the Compensation Clause *itself* does not require periodic readjustment of judicial salaries in order to maintain their real value. The question in the present case is whether that Clause offers protection when Congress *chooses* to promise a stable purchasing power.

Here, Congress, not the Constitution, wrote the guarantee at issue. It enacted a statute promising that real federal judicial salaries will be essentially maintained, but only if, and insofar as, *both* (1) the average worker *and* (2) the average civil servant also have seen their own real salaries maintained. The constitutional question is whether the Compensation Clause permits a later Congress to renege on that commitment. The court below held, in effect, that there is no way in which Congress can assure prospective judges that the purchasing power of their promised salary will be maintained: Any commitment by one Congress (even one accompanied by a reduction in judges' permissible outside income) can be repudiated by a later Congress, no matter how serious the inflation-produced erosion of real compensation. For the reasons set forth, I believe that holding may well be wrong. And because

I believe the question an important one, I would grant the writ of certiorari.

[Appendixes to opinion of BREYER, J., follow this page.]

No. 01–931. FLORIDA *v.* SCARLET. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 800 So. 2d 220.

Rehearing Denied

No. 00–9741. BAYOUD *v.* MIMS ET AL., 534 U. S. 832;

No. 00–10890. GUSS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 534 U. S. 885;

No. 01–310. HILL *v.* CLINTON, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 534 U. S. 973;

No. 01–850. MILLS *v.* WISER OIL CO., 534 U. S. 1084;

No. 01–6630. CHRISTEN *v.* R. J. REYNOLDS TOBACCO CO. ET AL., 534 U. S. 1059;

No. 01–6710. BUTTS *v.* GEORGIA, 534 U. S. 1086;

No. 01–6840. JACOBS *v.* LOUISIANA, 534 U. S. 1087;

No. 01–6859. WILLIAMS *v.* FLORIDA ET AL., 534 U. S. 1087;

No. 01–6934. BAYOUD *v.* MIMS ET AL., 534 U. S. 1091;

No. 01–7019. SCHMITT *v.* VIRGINIA, 534 U. S. 1094; and

No. 01–7187. CUEVAS-AQUINO *v.* UNITED STATES, 534 U. S. 1098. Petitions for rehearing denied.

MARCH 5, 2002

Miscellaneous Order

No. 01–8708 (01A667). IN RE TOKAR. 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.

MARCH 7, 2002

Dismissal Under Rule 46

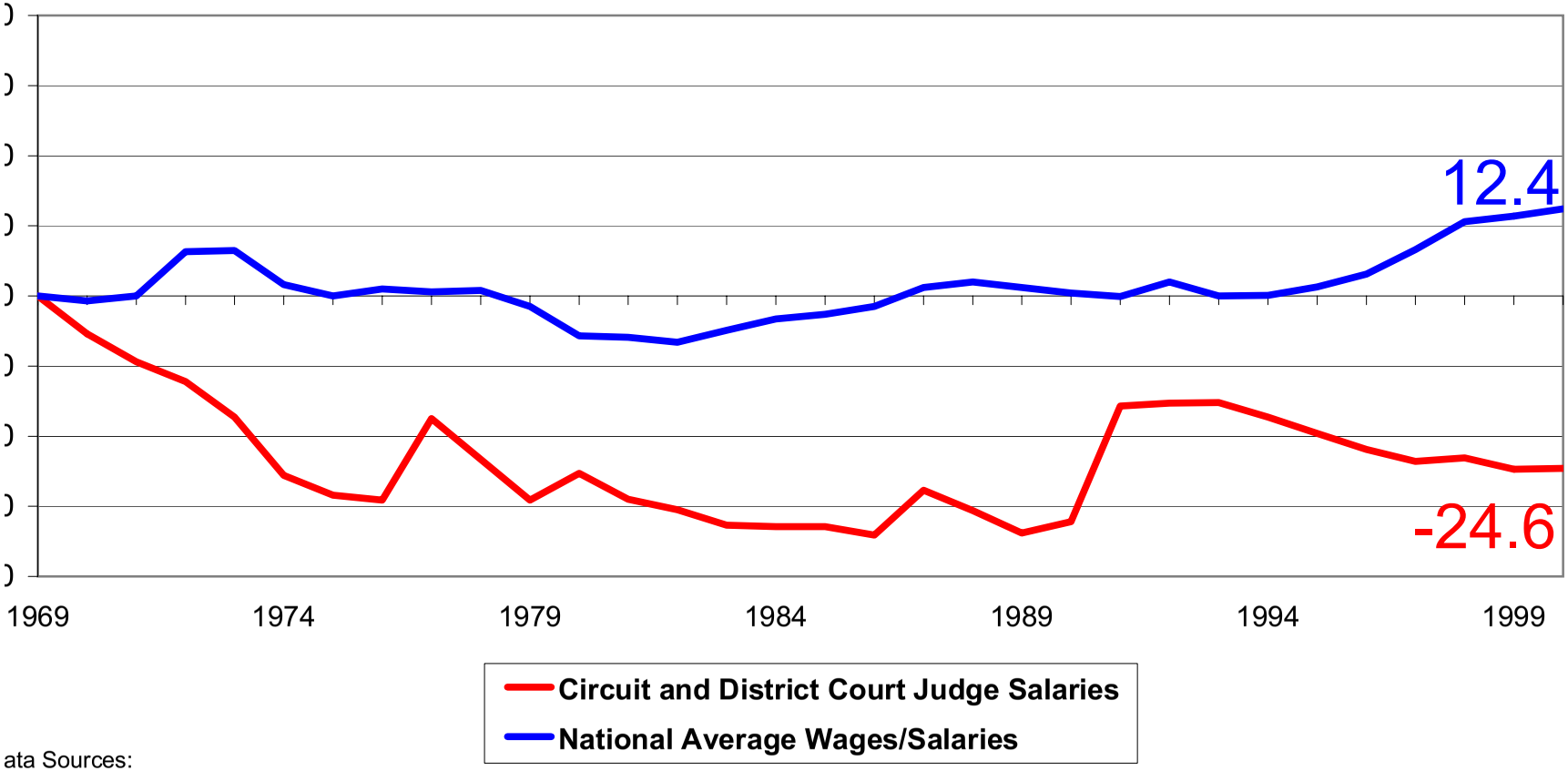
No. 01–8638. DE LA CRUZ *v.* TEXAS VISITING NURSE SERVICE, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 275 F. 3d 42.

MARCH 12, 2002

Certiorari Denied

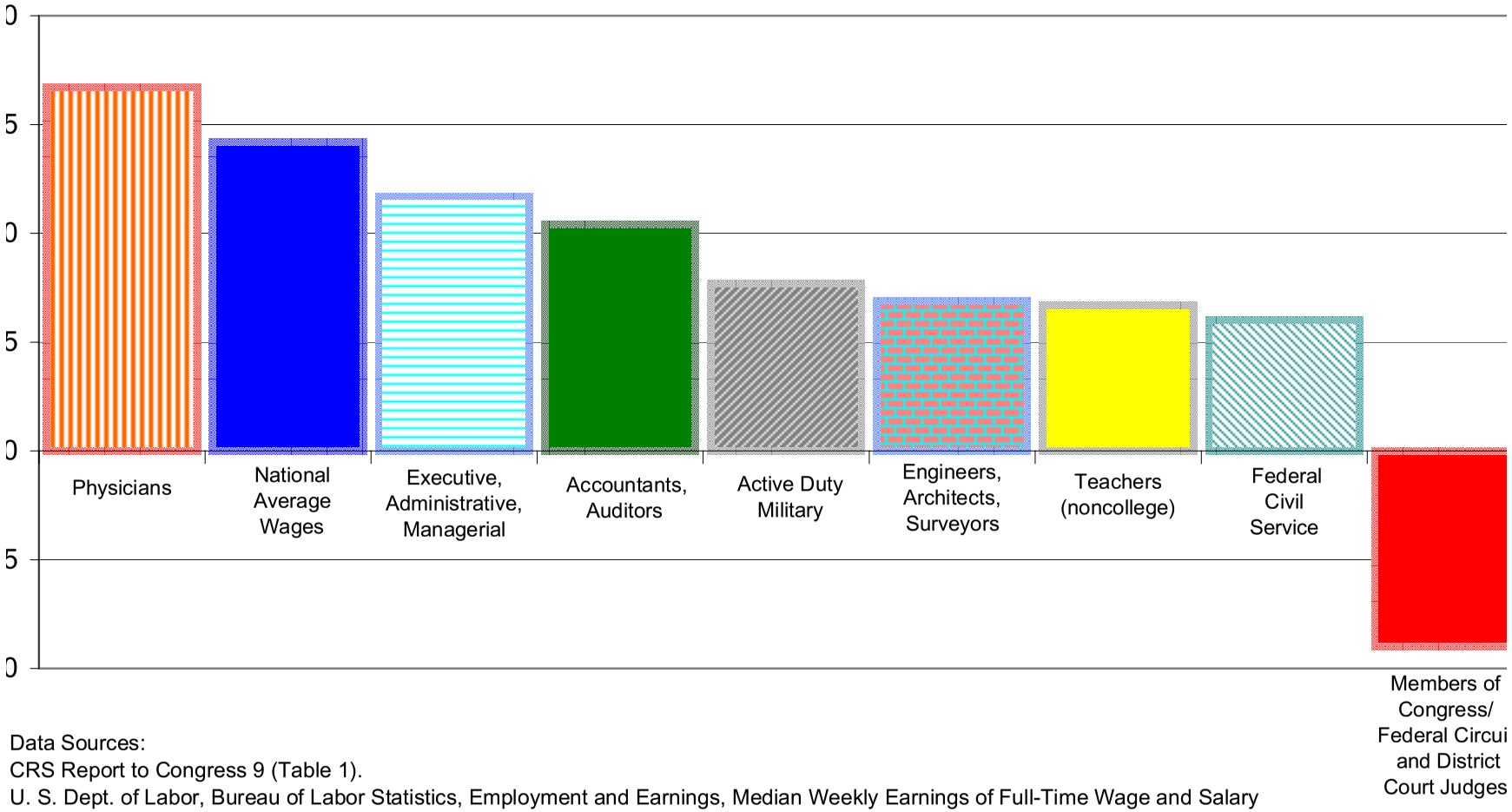
No. 01–8889 (01A689). HOUSEL *v.* HEAD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, pre-

DECLINE IN JUDGES' SALARIES COMPARED TO PRIVATE SECTOR WAGE GAINS
ADJUSTED FOR INFLATION
Annual % Change Since 1969



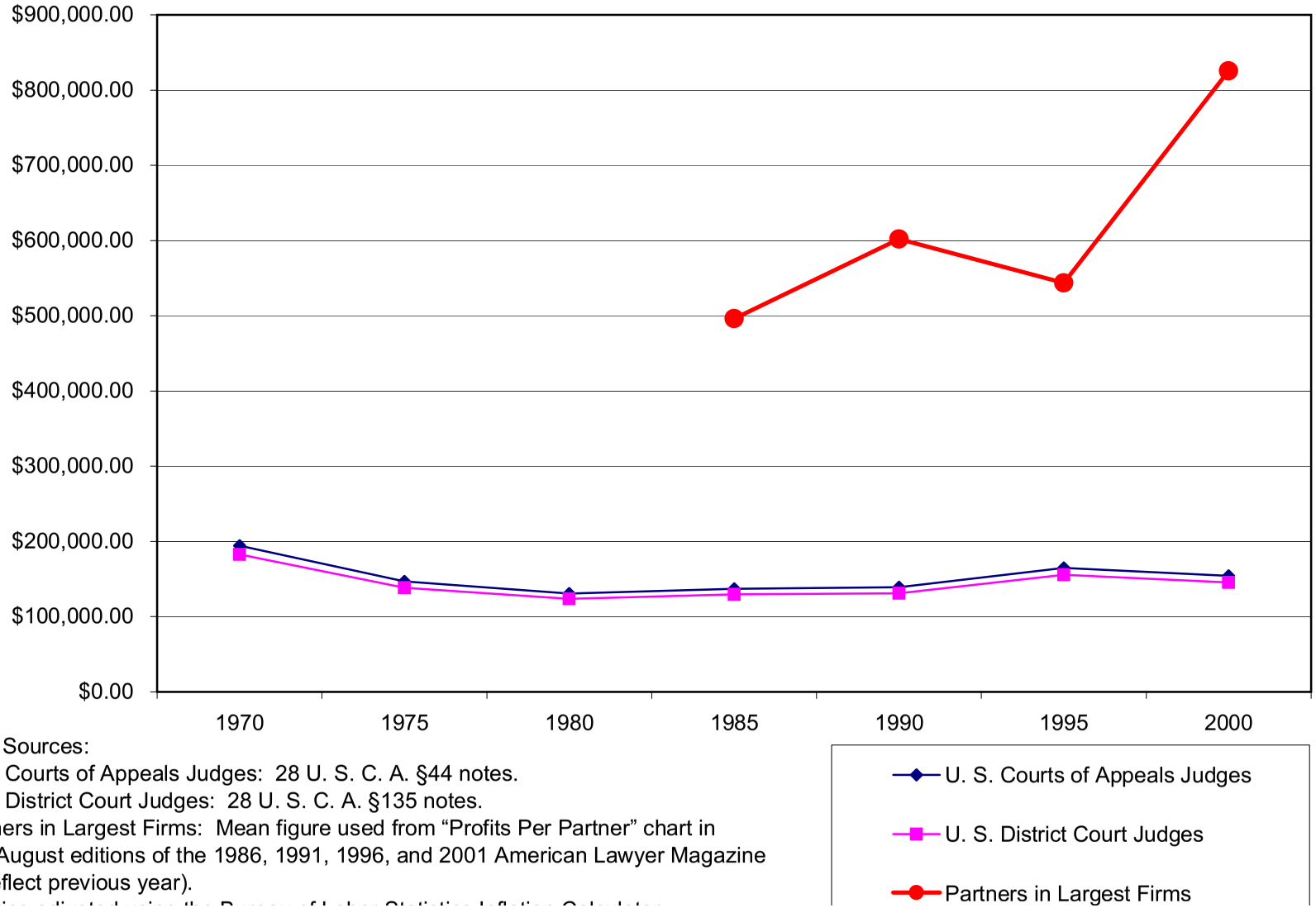
ata Sources:
flation based on the CPI-U Index from the Bureau of Labor Statistics.
ircuit and District Court Judge Salaries: American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for eform 9 (Feb. 2001) (Chart A).
ational Average Wages/Salaries: P. Purcell, CRS Report to Congress: Pay and Retirement Benefits for Federal Civil Service and Military Personnel: creases from 1969 to 2000, p. 9 (Mar. 20, 2000) (Table 1) (CRS Report to Congress).

COMPARATIVE GAINS/LOSSES IN PAY RELATIVE TO INFLATION
FROM 1993 TO 2000
Total % Gain/Loss To Inflation (14.8% for Period)



Data Sources:
CRS Report to Congress 9 (Table 1).
U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, p. 243 (Jan. 1994) (Table 56), and, p. 213 (Jan. 2001) (Table 39).

SALARIES OF JUDGES AND LAW PARTNERS
Adjusted to 2001 Dollars Using BLS Inflation Calculator



Data Sources:
U. S. Courts of Appeals Judges: 28 U. S. C. A. §44 notes.
U. S. District Court Judges: 28 U. S. C. A. §135 notes.
Partners in Largest Firms: Mean figure used from "Profits Per Partner" chart in July/August editions of the 1986, 1991, 1996, and 2001 American Lawyer Magazine (to reflect previous year).

sented to JUSTICE KENNEDY, and by him referred to the Court, denied. Motion of Parliamentary Supporters of Tracy Housel et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

MARCH 13, 2002

Miscellaneous Order

No. 01A557. WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES ET AL. *v.* GUARDIANSHIP ESTATE OF KEFFELER ET AL. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the stay granted by JUSTICE O'CONNOR on January 29, 2002, shall continue, and the mandate of the Supreme Court of Washington, case No. 67680–1, issued on December 14, 2001, is stayed pending the timely filing and 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 terminate upon issuance of the mandate of this Court.

MARCH 15, 2002

Miscellaneous Orders

No. 01–394. CHRISTOPHER, FORMER SECRETARY OF STATE, ET AL. *v.* HARBURY. C. A. D. C. Cir. [Certiorari granted, 534 U. S. 1064.] Motion of Brennan Center for Justice for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 01–521. REPUBLICAN PARTY OF MINNESOTA ET AL. *v.* WHITE, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANDARDS, ET AL. C. A. 8th Cir. [Certiorari granted *sub nom. Republican Party of Minn.* v. *Kelly*, 534 U. S. 1054.] Motion of petitioners for divided argument denied.

MARCH 18, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1643. UNITED STATES *v.* JONES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Vonn*, *ante*, p. 55. Reported below: 2 Fed. Appx. 870.

Certiorari Dismissed

No. 01–7652. ADAMS *v.* GROOSE ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–7751. WASHINGTON *v.* PUBLIC SERVICE COMMISSION ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 275 F. 3d 1080.

Miscellaneous Orders

No. D–2268. IN RE DISBARMENT OF KASZYNSKI. Disbarment entered. [For earlier order herein, see 534 U. S. 806.]

No. D–2269. IN RE DISBARMENT OF HALLER. Disbarment entered. [For earlier order herein, see 534 U. S. 806.]

No. D–2275. IN RE DISBARMENT OF WRIGHT. Disbarment entered. [For earlier order herein, see 534 U. S. 989.]

No. D–2276. IN RE DISBARMENT OF MERRIWETHER. Disbarment entered. [For earlier order herein, see 534 U. S. 989.]

No. D–2277. IN RE DISBARMENT OF DONOVAN. Disbarment entered. [For earlier order herein, see 534 U. S. 989.]

No. D–2279. IN RE DISBARMENT OF GADYE. Disbarment entered. [For earlier order herein, see 534 U. S. 989.]

No. D–2281. IN RE DISBARMENT OF HYDE. Disbarment entered. [For earlier order herein, see 534 U. S. 990.]

No. D–2284. IN RE DISBARMENT OF GRISWOLD. Disbarment entered. [For earlier order herein, see 534 U. S. 1016.]

No. D–2291. IN RE DISCIPLINE OF BAILEY. F. Lee Bailey, of West Palm 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. 01M38. GRAYTON *v.* CALIFORNIA; and

No. 01M40. DOBSON MEDICAL GROUP, INC., ET AL. *v.* MIDLAND RISK INSURANCE CO. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01M41. GREEN *v.* HUNTLEIGH CORP. 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. 00–1406. CHEVRON U. S. A. INC. *v.* ECHAZABAL. C. A. 9th Cir. [Certiorari granted, 534 U. S. 991.] Motion of Mark Cullen et al. for leave to file a brief as *amici curiae* out of time denied.

No. 01–455. FRANCONIA ASSOCIATES ET AL. *v.* UNITED STATES; and GRASS VALLEY TERRACE ET AL. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 534 U. S. 1073.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 01–7736. GOKTEPE *v.* GOKTEPE. Ct. Sp. App. Md.; and

No. 01–7835. M. C. *v.* E. E. Ct. Civ. App. Ala. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 8, 2002, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 01–8372. IN RE WAUQUA;

No. 01–8386. IN RE PARKER;

No. 01–8397. IN RE NEWLAND;

No. 01–8436. IN RE VISINTINE; and

No. 01–8525. IN RE BIXLER. Petitions for writs of habeas corpus denied.

No. 01–8377. IN RE JONES. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 01–8371. IN RE TRAVIESO. Petition for writ of mandamus denied.

Certiorari Granted

No. 01–7574. SATTAZAHN *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 563 Pa. 533, 763 A. 2d 359.

Certiorari Denied

No. 00–5231. CALDERON NOGALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 F. 3d 1350.

No. 00–10033. DRIVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 242 F. 3d 767.

No. 00–10220. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 01–625. JOHNSON *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 01–722. PHOTOGRAMMETRIC DATA SERVICES, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 F. 3d 229.

No. 01–760. HURDLE *v.* VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 197.

No. 01–817. DINO'S VICTORY ROAD HOUSE, INC., ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–868. BRADLEY *v.* DONER ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 777 So. 2d 1189.

No. 01–875. CURTIS *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 345 S. C. 557, 549 S. E. 2d 591.

No. 01–885. JOHNSON *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 256 F. 3d 1156.

No. 01–887. WSOL ET AL. *v.* FIDUCIARY MANAGEMENT ASSOCIATES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 266 F. 3d 654.

No. 01–889. CRAVEN *v.* UNIVERSITY OF COLORADO HOSPITAL AUTHORITY. C. A. 10th Cir. Certiorari denied. Reported below: 260 F. 3d 1218.

No. 01–900. BUGENIG *v.* HOOPA VALLEY TRIBE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 266 F. 3d 1201.

No. 01–909. BALTIA AIR LINES, INC. *v.* CIBC OPPENHEIMER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 6 Fed. Appx. 106.

No. 01–928. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF BRANSON, DECEASED, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 264 F. 3d 904.

No. 01–940. VENTURA GROUP VENTURES, INC. *v.* VENTURA PORT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 676.

No. 01–945. T. S. *v.* INDEPENDENT SCHOOL DISTRICT NO. 54, STROUD, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 265 F. 3d 1090.

No. 01–949. FRIENDS OF RICHARDS-GEBAUR AIRPORT *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 251 F. 3d 1178.

No. 01–961. ELECTRIC MOTOR & SUPPLY, INC., ET AL. *v.* POTOMAC ELECTRIC POWER CO. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 260.

No. 01–962. TOKYO ELECTRON AMERICA, INC. *v.* TEGAL CORP.; and

No. 01–993. TEGAL CORP. *v.* TOKYO ELECTRON AMERICA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 257 F. 3d 1331.

No. 01–964. PENNZOIL CO. ET AL. *v.* OREGON DEPARTMENT OF REVENUE. Sup. Ct. Ore. Certiorari denied. Reported below: 332 Ore. 542, 33 P. 3d 314.

No. 01–965. MOLINARI *v.* ILLINOIS DEPARTMENT OF INSURANCE. C. A. 7th Cir. Certiorari denied.

No. 01–969. ALFRED *v.* CATERPILLAR, INC. C. A. 10th Cir. Certiorari denied. Reported below: 262 F. 3d 1083.

No. 01–974. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, ET AL. *v.* OVERNITE TRANSPORTATION CO. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 01–975. GARZA *v.* PRESTIGE FORD GARLAND. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 42.

No. 01–976. HATHCOCK *v.* ACME TRUCK LINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 262 F. 3d 522.

No. 01–977. HELFRICH *v.* PNC BANK, KENTUCKY, INC. C. A. 6th Cir. Certiorari denied. Reported below: 267 F. 3d 477.

No. 01–979. GIBBS *v.* MORGANITE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 247.

No. 01–981. LARKIN *v.* JOHNSON ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 44 S. W. 3d 188.

No. 01–984. LEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* AMERICAN NATIONAL INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 260 F. 3d 997.

No. 01–986. JOHNSON *v.* NORDSTROM, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 260 F. 3d 727.

No. 01–987. LANGLEY *v.* ILLINOIS SECRETARY OF STATE ET AL. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 01–990. YEAGER *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 265 F. 3d 389.

No. 01–991. DANA *v.* CHEMICAL BANK. C. A. 2d Cir. Certiorari denied. Reported below: 4 Fed. Appx. 1.

No. 01–992. GUSTON RECORDS, INC., ET AL. *v.* DAILY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 579.

No. 01–994. Wyoming Outfitters Assn. et al. *v.* Wyoming Game and Fish Commission et al. C. A. 10th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 794.

No. 01–995. University of Minnesota et al. *v.* Maitland. C. A. 8th Cir. Certiorari denied. Reported below: 260 F. 3d 959.

No. 01–997. Mark *v.* California Public Employees' Retirement System et al. C. A. 3d Cir. Certiorari denied. Reported below: 264 F. 3d 201.

No. 01–998. Tobin for Governor et al. *v.* Illinois State Board of Elections et al. C. A. 7th Cir. Certiorari denied. Reported below: 268 F. 3d 517.

No. 01–999. Dubay Enterprises, dba Chateau Theater *v.* City of North Charleston Board of Zoning Adjustment et al. Sup. Ct. S. C. Certiorari denied.

No. 01–1000. Maurey *v.* University of Southern California et al. C. A. 9th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 529.

No. 01–1001. Stuart *v.* Ohio. Ct. App. Ohio, Summit County. Certiorari denied.

No. 01–1002. Scott *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 153, 549 S. E. 2d 338.

No. 01–1003. United States ex rel. McAllan *v.* City of New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 248 F. 3d 48.

No. 01–1004. Rich *v.* City of Ontario. C. A. 9th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 583.

No. 01–1005. Jones, dba Melder Publishing Co. *v.* Tuff N Rumble Management, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 701.

No. 01–1006. Garnet *v.* General Motors Corp. C. A. 6th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 363.

No. 01–1009. May *v.* Douglass. Ct. App. Wash. Certiorari denied.

No. 01–1010. BURTON *v.* FAIRMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 792.

No. 01–1014. STUMBO *v.* DYNCORP PROCUREMENT SYSTEMS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 202.

No. 01–1016. KERR *v.* COHEN. Ct. App. Ga. Certiorari denied. Reported below: 249 Ga. App. 392, 548 S. E. 2d 17.

No. 01–1017. LUTHER *v.* THORSEN. Ct. App. Mich. Certiorari denied.

No. 01–1019. RAY *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 797 So. 2d 556.

No. 01–1021. SILVER SPUR RESERVE, DBA SILVER SPUR MANOR *v.* CITY OF PALM DESERT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–1022. OAKES ET AL. *v.* HORIZON FINANCIAL CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 259 F. 3d 1315.

No. 01–1023. ZAHN *v.* MICHIGAN. Cir. Ct. Genesee County, Mich. Certiorari denied.

No. 01–1029. URBAN *v.* HURLEY. C. A. 2d Cir. Certiorari denied.

No. 01–1033. BORLAWSKY *v.* TOWN OF WINDHAM ET AL. C. A. 1st Cir. Certiorari denied.

No. 01–1035. BURKHART *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 58 S. W. 3d 694.

No. 01–1036. BAY MILLS INDIAN COMMUNITY *v.* MICHIGAN ET AL. Ct. App. Mich. Certiorari denied. Reported below: 244 Mich. App. 739, 626 N. W. 2d 169.

No. 01–1037. JEFFERSON ET AL. *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 631 N. W. 2d 391.

No. 01–1038. LYNCH *v.* FLAHERTY ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 279 App. Div. 2d 578, 719 N. Y. S. 2d 605.

No. 01–1039. MOLNAR *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–1040. TO-RO TRADE SHOWS, DBA O'LOUGHLIN TRADE SHOWS *v.* COLLINS ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 144 Wash. 2d 403, 27 P. 3d 1149.

No. 01–1041. WERES *v.* WERES. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–1045. LONG ET UX. *v.* COTTRELL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 265 F. 3d 663.

No. 01–1046. DIALYSIS CLINIC, INC. *v.* FRY. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 34.

No. 01–1047. OWNER-OPERATOR INDEPENDENT DRIVERS ASSN. ET AL. *v.* URBACH, TAX COMMISSIONER, NEW YORK DEPARTMENT OF TAXATION AND FINANCE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 279 App. Div. 2d 171, 718 N. Y. S. 2d 282.

No. 01–1049. ABRAMOV *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 319 Ill. App. 3d 1120, 791 N. E. 2d 741.

No. 01–1050. ANDRX PHARMACEUTICALS, INC. *v.* BIOVAIL CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 256 F. 3d 799.

No. 01–1051. SAUNDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 51.

No. 01–1056. BLOUNT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–1057. CAHILL *v.* CAHILL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 792 So. 2d 452.

No. 01–1061. PROGRAMMED LAND, INC., ET AL. *v.* O'CONNOR, TREASURER AND AUDITOR, HENNEPIN COUNTY, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 633 N. W. 2d 517.

No. 01–1063. EDDINS *v.* SUMMERS, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 221.

No. 01–1064. KELLOGG *v.* STRACK. C. A. 2d Cir. Certiorari denied. Reported below: 269 F. 3d 100.

No. 01–1076. FERNANDES *v.* SPARTA TOWNSHIP COUNCIL ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–1093. MCMANUS *v.* CRAWFORD. Ct. App. Ariz. Certiorari denied.

No. 01–1105. LOCASCIO *v.* HUNTINGTON EYE ASSOCIATES, INC. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 210 W. Va. 76, 553 S. E. 2d 773.

No. 01–1123. OLICK *v.* NATIONAL ASSOCIATION OF SECURITY DEALERS. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 37.

No. 01–1143. ROCKEFELLER *v.* ABRAHAM, SECRETARY OF ENERGY. C. A. 10th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 893.

No. 01–1153. THURNER ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 477.

No. 01–1161. CLUCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–1170. BENNETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 252 F. 3d 559.

No. 01–1198. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 163.

No. 01–1203. EQBAL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 728.

No. 01–5359. DOE *v.* NOE ET AL. (two judgments). App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 317 Ill. App. 3d 419, 739 N. E. 2d 1036 (first judgment); 317 Ill. App. 3d 445, 739 N. E. 2d 1043 (second judgment).

No. 01–6151. REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 260 F. 3d 622.

No. 01–6475. MCDOWELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 789 So. 2d 956.

No. 01–7064. HUSS *v.* GRAVES, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 252 F. 3d 952.

No. 01–7073. OREYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 263 F. 3d 669.

No. 01–7212. MITCHELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 792 So. 2d 192.

No. 01–7219. MITCHELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 17 Fed. Appx. 39.

No. 01–7238. KENTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 251 F. 3d 835.

No. 01–7251. KACZYNSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 262 F. 3d 1034.

No. 01–7292. RHOADS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 257 F. 3d 373.

No. 01–7338. COULSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–7378. BIDGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 145.

No. 01–7533. NEWBY *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 01–7540. CHEESEBORO *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 346 S. C. 526, 552 S. E. 2d 300.

No. 01–7541. DAVIS *v.* STONE. C. A. 4th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 227.

No. 01–7542. DAVIS *v.* WALKER, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, RANDOLPH COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 168.

No. 01–7545. MACK *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1111.

No. 01–7547. JAYNES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 353 N. C. 534, 549 S. E. 2d 179.

No. 01–7548. KING *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 266 F. 3d 816.

No. 01–7554. MORRIS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 770 So. 2d 908.

No. 01–7557. SMITH *v.* BECKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 265 F. 3d 1059.

No. 01–7558. SOAPES *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 01–7567. SIMMONS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–7568. SLAPPY ET AL. *v.* DIEHL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 229.

No. 01–7571. HOLMES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7572. STAPLETON *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–7576. JONES *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–7579. MOORE *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 01–7581. PERRY *v.* KILGORE, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 174.

No. 01–7588. TAYLOR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 28, 550 S. E. 2d 141.

No. 01–7589. TRUESDALE *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 263 F. 3d 160.

No. 01–7590. JONES *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–7593. CHERRY *v.* CITY OF WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 179.

No. 01–7598. MURRAY *v.* HVASS, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 269 F. 3d 896.

No. 01–7600. TAYLOR *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7602. MURTISHAW *v.* WOODFORD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 3d 926.

No. 01–7603. MYERS *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7609. CATANZARO *v.* CARBONDALE HOUSING AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 262 F. 3d 403.

No. 01–7610. COLEN *v.* GLOBAL INVESTMENTS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–7612. DOERR *v.* PROTECTIVE LIFE INSURANCE CO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–7614. LAWRENCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 797 So. 2d 586.

No. 01–7617. EVANS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–7625. THOMAS *v.* CITY OF BELDING. Ct. App. Mich. Certiorari denied.

No. 01–7626. VAN REED *v.* DEES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7627. WILLIAMS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7629. CHANDLER *v.* HOWELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 473.

No. 01–7630. TRICARICO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 779 A. 2d 1224.

No. 01–7632. TWILLIE *v.* BRENNAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–7633. WATKINS *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7634. MURPHY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 166.

No. 01–7635. NOLAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7636. LINDSEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7637. MANCANO *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 01–7644. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7645. NASTU *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 01–7647. SEBULSKI *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 793 So. 2d 972.

No. 01–7648. RAMIREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–7653. BOLDEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 197 Ill. 2d 166, 756 N. E. 2d 812.

No. 01–7656. MARTINEZ-RODRIGUEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 131 N. M. 47, 33 P. 3d 267.

No. 01–7657. MARBLY *v.* CITY OF SOUTHFIELD ET AL. C. A. 6th Cir. Certiorari denied.

No. 01–7658. MARBLY *v.* MAYOR, CITY OF SOUTHFIELD, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 558.

No. 01–7659. MARBLY *v.* CITY OF SOUTHFIELD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 561.

No. 01–7661. BYRD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 788 So. 2d 981.

No. 01–7665. SMITH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 793 So. 2d 1199.

No. 01–7667. JOHNSON *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 265 F. 3d 559.

No. 01–7676. NEGRETE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7677. ACEVES *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–7678. AYERS *v.* FATKIN, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 01–7680. BARTLETT *v.* RYAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 199.

No. 01–7681. ROBINSON *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–7682. SCOTT *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 835.

No. 01–7685. ATKINS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7687. ACKLEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 105 Wash. App. 1010.

No. 01–7688. BRIGGS *v.* CHERRY ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–7689. MORGAN *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. Sup. Ct. N. Y., Dutchess County. Certiorari denied.

No. 01–7696. LEWIS *v.* CHILDS, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 01–7697. LARSON *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 254 F. 3d 71.

No. 01–7703. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 91 Cal. App. 4th 212, 110 Cal. Rptr. 2d 571.

No. 01–7704. VANN *v.* SPAK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 668.

No. 01–7709. WRIGHT *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–7712. CLARK *v.* O'DEA, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 257 F. 3d 498.

No. 01–7713. DORSEY *v.* CONROY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 411.

No. 01–7714. CORLEY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–7715. TERRELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7718. MCCALVIN *v.* LEIBACH, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 01–7729. MANSFIELD *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7734. HIGGINS *v.* CITY OF WELLSTON. C. A. 8th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 461.

No. 01–7739. HOLMES *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 257 Conn. 248, 777 A. 2d 627.

No. 01–7741. SHAMBURGER *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 523.

No. 01–7746. VASQUEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–7747. TAYLOR *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–7748. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–7749. YOUNG *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7750. MORELL *v.* GUNJA, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–7756. NELSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 01–7757. NAUSS *v.* MORGAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–7760. COLLAZO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7764. WADE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–7766. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 353 N. C. 599, 548 S. E. 2d 684.

No. 01–7767. OCEQUEDO GARCIA *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–7768. ISMAIL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 776 A. 2d 1005.

No. 01–7770. SPINOZA *v.* MANCUSI ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–7771. RICH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–7772. NEAL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 796 So. 2d 649.

No. 01–7773. GREER *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 264 F. 3d 663.

No. 01–7774. LUGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–7777. BONE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 1, 550 S. E. 2d 482.

No. 01–7778. WILLIAMSON *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 733.

No. 01–7779. ZIMMERMAN *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash. Certiorari denied.

No. 01–7788. SCOTT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 366 Md. 121, 782 A. 2d 862.

No. 01–7822. KELLAM *v.* BRIDDLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 913.

No. 01–7824. KIMBROUGH *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–7848. COATS *v.* HENNEPIN COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Sup. Ct. Minn. Certiorari denied. Reported below: 633 N. W. 2d 505.

No. 01–7879. SACK *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 841.

No. 01–7881. PETTIES *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 22 Fed. Appx. 74.

No. 01–7885. WEBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 182.

No. 01–7917. BURTON *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 319, 553 S. E. 2d 579.

No. 01–7970. STUART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–7982. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 57.

No. 01–7999. CLARK *v.* CHUANG ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8000. CROSBY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 366 Md. 518, 784 A. 2d 1102.

No. 01–8018. DAWKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 220.

No. 01–8027. ALCALA-RODRIGUEZ, AKA SANCHEZ-VILLADARES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 778.

No. 01–8033. STRINGER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 796 So. 2d 538.

No. 01–8034. QUINONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8062. CASTRO RODRIGUEZ *v.* UNITED STATES; GARCIA LOREDO *v.* UNITED STATES; GUEVARA MARISCAL *v.* UNITED STATES; GUTIERREZ HERNANDEZ *v.* UNITED STATES; LOPEZ GUERRERO *v.* UNITED STATES; and VEGA DEL TORO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8073. HETH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 482.

No. 01–8078. HAYES *v.* POTTER, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 173.

No. 01–8081. FAIR *v.* CONROY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 147.

No. 01–8089. EARLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8096. MCFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 268 F. 3d 1066.

No. 01–8097. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8100. MALDENALDO SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 269 F. 3d 1250.

No. 01–8101. REGALADO-RAMIREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 781.

No. 01–8104. SANDATE-LOZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8108. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–8109. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8117. JAUREQUI-RUBALCABA, AKA PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8118. JIMENEZ-VILLAREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8123. CISNEROS-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8127. BAILEY *v.* UNITED STATES; and BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079 (first judgment) and 1080 (second judgment).

No. 01–8128. ARBELAEZ-AGUDELO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 203.

No. 01–8129. BARNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1094.

No. 01–8130. ARGUETA-VENTURA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 46.

No. 01–8131. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8134. CATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–8143. BONILLA-CASTANEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8144. BOLDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 900.

No. 01–8147. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 431.

No. 01–8151. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1285.

No. 01–8154. SALAS-VELOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8164. TAPPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8169. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 125.

No. 01–8171. OLIVIO-MIER, AKA MIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–8178. GRAVELY *v.* THOMS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 583.

No. 01–8179. GAUTHIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 315.

No. 01–8184. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 212.

No. 01–8187. SEGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 271 F. 3d 181.

No. 01–8189. MACARENA-ROBLES *v.* UNITED STATES; ALVAREZ-LUNZ *v.* UNITED STATES; BRIONES-MACIAS *v.* UNITED STATES; CAMPOS-SEGURA *v.* UNITED STATES; DIAZ-ANGELES *v.* UNITED STATES; LOPEZ-ACOSTA *v.* UNITED STATES; LOPEZ-GONZALEZ *v.* UNITED STATES; MEDINA-MENDOZA, AKA MEN-

DOZA *v.* UNITED STATES; RAMOS-LOPEZ *v.* UNITED STATES; RODRIGUEZ-BURGARA *v.* UNITED STATES; and SUAZO-VALDOVINOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8190. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 454.

No. 01–8194. JIMENEZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8195. LAZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8196. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 51.

No. 01–8197. MAYNIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 257 F. 3d 908.

No. 01–8199. SCHILD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 269 F. 3d 1198.

No. 01–8200. ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 478.

No. 01–8202. DOUGLAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1121.

No. 01–8205. SHERRER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 651.

No. 01–8206. SANDOVAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 826.

No. 01–8207. MILES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 197.

No. 01–8209. TARIN-MORALES, AKA GARDEA-TARIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8212. SALAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 24 Fed. Appx. 54.

No. 01–8213. SENE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 380.

No. 01–8216. SNOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 218.

No. 01–8218. ELEM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 269 F. 3d 877.

No. 01–8219. BETHLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1099.

No. 01–8223. HERNANDEZ-CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–8225. FLORES-MONTOYA, AKA FLORES, AKA MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 727.

No. 01–8231. MONTGOMERY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 643.

No. 01–8232. CERVANTES-CHAVEZ *v.* UNITED STATES; CHICO-NAJERA *v.* UNITED STATES; DE LA ROSA-VARGAS *v.* UNITED STATES; HERNANDEZ-SALAZAR *v.* UNITED STATES; OLIVARES-AGUIRRE *v.* UNITED STATES; OROZCO-TARIN *v.* UNITED STATES; PONCE-AVILLAS *v.* UNITED STATES; and RAMIREZ-ALVARADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8233. BASHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 268 F. 3d 1199.

No. 01–8234. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 38.

No. 01–8237. PEREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 737.

No. 01–8238. AYALA-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 47.

No. 01–8239. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8241. LIBRETTI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 754.

No. 01–8243. MEJIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8244. SALAZAR-GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8245. RODGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 278 F. 3d 599.

No. 01–8246. SUAREZ-BACA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8247. REYES-ESPINOSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8248. JOHNSON *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 345 S. C. 389, 548 S. E. 2d 587.

No. 01–8249. PLUNKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 134.

No. 01–8250. MOKDAD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 271 F. 3d 962.

No. 01–8254. ZLATOGUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 271 F. 3d 1025.

No. 01–8255. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 46.

No. 01–8265. CRAWFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1144.

No. 01–8266. CABRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1121.

No. 01–8267. CAMPBELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 702.

No. 01–8271. HOWICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 263 F. 3d 1056.

No. 01–8276. CONLEY *v.* GHEE, CHAIR, OHIO ADULT PAROLE BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 506.

No. 01–8277. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8278. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 845.

No. 01–8279. HARRIS, AKA SULUKI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8280. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 225.

No. 01–8281. BORGESANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 268 F. 3d 1066.

No. 01–8282. BETTIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 28 Fed. Appx. 44.

No. 01–8284. HUGHES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8287. CRUZ-MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 836.

No. 01–8297. RIVERA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 24 Fed. Appx. 2.

No. 01–8298. SUMMERLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–8301. BENITES-RODRIGUEZ *v.* UNITED STATES; GARCIA-URBINA, AKA GAICA-URBINA *v.* UNITED STATES; and VIERO-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8306. BRICENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8308. O'BRIEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 882.

No. 01–8309. WATTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8310. MORENO-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–8311. MARTINEZ-ARRAMBIDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8312. LOPEZ-MONTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8316. MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 3d 1169.

No. 01–8318. SANTANA-HUERTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8320. MYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8321. STEVENSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8322. WOODS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 728.

No. 01–8323. TORRES-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8324. VISE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 827.

No. 01–8325. URIBE-HERNANDEZ *v.* UNITED STATES; GARCIA-CARRERA *v.* UNITED STATES; RAPALO-FAJARDO *v.* UNITED STATES; MARTINEZ-GUEVARA *v.* UNITED STATES; and GONZALES-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080 (first judgment), 1081 (second, fourth, and fifth judgments), and 1082 (third judgment).

No. 01–8326. ARMANDO CANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1083.

No. 01–8327. TOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8333. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 91.

No. 01–8337. VASQUEZ-VILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1115.

No. 01–8339. PREACHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 765.

No. 01–8340. PETTY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 169.

No. 01–8341. LOPEZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 825.

No. 01–8342. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 273 F. 3d 91.

No. 01–8343. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–8349. GENERAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 170.

No. 01–8350. GARZA-CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8351. GONZALEZ HUITRON, AKA ESPINOZA GUITERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8353. FOX *v.* HOBBS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 748.

No. 01–8355. ALCANTAR-VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8357. HICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 111.

No. 01–8359. HATCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 51.

No. 01–8360. GALVEZ *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 01–8362. EARLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–8363. ESCOBAR-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8364. COFFEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 198.

No. 01–8365. CABEZAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8370. WILKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 574.

No. 01–8375. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 155.

No. 01–8376. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1102.

No. 01–8380. CARDENAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8381. DORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1083.

No. 01–8384. VAN BUSKIRK *v.* BALDWIN, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 265 F. 3d 1080.

No. 01–8387. PALMIERI *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 263 F. 3d 159.

No. 01–8388. BRANUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 618.

No. 01–8389. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 F. 3d 1077.

No. 01–8392. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1109.

No. 01–8393. CASTRO-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 759.

No. 01–8401. MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 25 Fed. Appx. 27.

No. 01–8402. DIPLAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 22 Fed. Appx. 19.

No. 01–8409. BANKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8411. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 21 Fed. Appx. 1.

No. 01–8414. MOSQUEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–908. METRO-NORTH COMMUTER RAILROAD CO. *v.* ROBINSON ET AL. C. A. 2d Cir. Motion of United States Chamber of Commerce for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 267 F. 3d 147.

No. 01–972. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* CITY OF CHESTER ET AL. Commw. Ct. Pa. Motion of National Railroad Passenger Corporation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 773 A. 2d 1280.

No. 01–973. GRAVES, WARDEN *v.* HUSS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 252 F. 3d 952.

No. 01–1054. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY ET AL. *v.* LABOR/COMMUNITY STRATEGY CENTER ET AL. C. A. 9th Cir. Motion of Foothill Transit et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 263 F. 3d 1041.

No. 01–7229. ROSE *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner to consolidate this case with No. 01–488, *Ring* v. *Arizona* [certiorari granted, 534 U. S. 1103], denied. Certiorari denied. Reported below: 787 So. 2d 786.

Rehearing Denied

No. 00–7994. COVILLION *v.* COVILLION, 531 U. S. 1199;

No. 00–9805. HART *v.* KITZHABER, GOVERNOR OF OREGON, ET AL., 534 U. S. 834;

No. 00–10050. WILLIAMS *v.* CITY OF COLORADO SPRINGS ET AL., 534 U. S. 840;

No. 00–10387. CAMBRELEN *v.* UNITED STATES, 534 U. S. 855;

No. 00–10547. WILLIAMS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL., 534 U. S. 864;

No. 00–10619. DUKES *v.* UNITED STATES POSTAL SERVICE, 534 U. S. 869;

No. 00–10859. HINTON *v.* GENERAL MOTORS CORP., 534 U. S. 883;

No. 01–80. BRYANT *v.* UNITED STATES, 534 U. S. 889;

No. 01–296. STOIANOFF *v.* COMMISSIONER OF MOTOR VEHICLES OF NEW YORK, 534 U. S. 954;

No. 01–489. IN RE STEPHENS, 534 U. S. 1017;

No. 01–647. LIZZI *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL., 534 U. S. 1081;

No. 01–890. IN RE BALL, 534 U. S. 1112;

No. 01–5219. HAPPEL *v.* UNITED STATES, 534 U. S. 1104;

No. 01–5321. PENIGAR *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 916;

No. 01–5632. CHAMBERLAIN *v.* SHANKS, WARDEN, ET AL., 534 U. S. 960;

No. 01–6246. COLE *v.* UNITED STATES, 534 U. S. 980;

No. 01–6496. SLEZAK *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, 534 U. S. 1047;

No. 01–6558. DAWSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1048;

No. 01–6702. JOHNSON *v.* JOHNSON ET AL., 534 U. S. 1067;

No. 01–6837. WILLIAMS *v.* MANHATTAN EAST SUITES HOTELS ET AL., 534 U. S. 1087;

No. 01–6843. NAMAZI *v.* UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE ET AL., 534 U. S. 1087;

No. 01–6982. FLOYD *v.* NORTH CAROLINA, 534 U. S. 1092;

No. 01–6983. DAKER *v.* GEORGIA, 534 U. S. 1093;

No. 01–6984. DAKER *v.* GEORGIA, 534 U. S. 1093;

No. 01–7188. CAMPBELL *v.* UNITED STATES, 534 U. S. 1098; and

No. 01–7290. MARIN, AKA VALDEZ *v.* UNITED STATES, 534 U. S. 1108. Petitions for rehearing denied.

No. 00–10011. KING *v.* LAPPIN, WARDEN, 534 U. S. 840;

No. 01–6040. SMOOT *v.* UNITED TRANSPORTATION UNION ET AL., 534 U. S. 1001; and

No. 01–6451. THOMAS *v.* UNITED STATES, 534 U. S. 1009. Motions for leave to file petitions for rehearing denied.

No. 01–219. ROBINSON *v.* UNITED STATES, 534 U. S. 895. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 25, 2002

Certiorari Dismissed

No. 01–7785. LAWSON *v.* MISSISSIPPI ET AL. Ct. App. Miss. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 784 So. 2d 983.

No. 01–7889. SAFOUANE ET UX. *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash. Motion of petitioners for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–7924. AGUILAR, AKA OZMAN *v.* NEW MEXICO. Dist. Ct. N. M., Bernalillo County. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–7929. GYADU *v.* D'ADDARIO INDUSTRIES, INC., ET AL. Sup. Ct. Conn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1 See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 254 Conn. 936, 761 A. 2d 761.

Miscellaneous Orders

No. 01M42. HEASER *v.* TORO CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 01–8623. IN RE SMITH;
No. 01–8669. IN RE CROWLEY;
No. 01–8682. IN RE GLOVER;
No. 01–8693. IN RE OWENS-EL; and
No. 01–8779. IN RE MILLER. Petitions for writs of habeas corpus denied.

No. 01–8681. IN RE HOWARD. Petition for writ of mandamus denied.

No. 01–7918. IN RE COTHRUM. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 01–788. COOPER, AKA WADUD *v.* HVASS, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 7 Fed. Appx. 539.

No. 01–893. HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA *v.* CITY OF NAPA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 90 Cal. App. 4th 188, 108 Cal. Rptr. 2d 60.

No. 01–933. CHAPIN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–955. BAYNARD *v.* ALEXANDRIA CITY SCHOOL BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 268 F. 3d 228.

No. 01–1059. MATZ *v.* HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN. C. A. 7th Cir. Certiorari denied. Reported below: 265 F. 3d 572.

No. 01–1062. ROBERTS ET UX. *v.* CARDINAL SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 266 F. 3d 368.

No. 01–1065. PATEL *v.* CITY OF EVERMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 46.

No. 01–1066. BAILLON CO. *v.* PORT AUTHORITY OF THE CITY OF ST. PAUL. Ct. App. Minn. Certiorari denied.

No. 01–1071. BOOTH *v.* MINDEN BANK & TRUST CO. ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 796 So. 2d 931.

No. 01–1073. FORD ET AL. *v.* GACS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 265 F. 3d 670.

No. 01–1085. DEMARCO *v.* UNIVERSITY OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 131.

No. 01–1092. COLT INDUSTRIES OPERATING CORP. *v.* HENGLEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 260 F. 3d 201.

No. 01–1097. TRIPPETT, WARDEN *v.* NORTHROP. C. A. 6th Cir. Certiorari denied. Reported below: 265 F. 3d 372.

No. 01–1102. APPOLO FUELS, INC. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 270 F. 3d 333.

No. 01–1124. CLAUDE P. BAMBERGER INTERNATIONAL, INC. *v.* ROHM & HAAS CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 34.

No. 01–1141. EHLINGER *v.* GRANGER. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 1077.

No. 01–1152. GREAT LAKES DREDGE & DOCK CO. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 259 F. 3d 1300.

No. 01–1173. SCHWEITZER *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 23 Fed. Appx. 57.

No. 01–1197. PRESSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 331.

No. 01–1207. WEAVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 265 F. 3d 1074.

No. 01–1218. DIGREGORIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 580.

No. 01–1219. IN SUK CHANG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 25 Fed. Appx. 20.

No. 01–7051. MCCALISTER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1084.

No. 01–7110. RIVERA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 565 Pa. 289, 773 A. 2d 131.

No. 01–7444. CHUBBUCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1300.

No. 01–7775. AYALA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7784. MAYES *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7789. RENWICK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7791. NABELEK *v.* SCOTT, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 392.

No. 01–7794. MADDEN *v.* REISH. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 578.

No. 01–7798. RODGERS *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 01–7800. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–7803. DUNCAN *v.* COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 730.

No. 01–7806. MERCK *v.* MEDICAL COLLEGE OF GEORGIA ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7807. BROOKS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 228.

No. 01–7810. PEHOWIC *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 147 N. H. 52, 780 A. 2d 1289.

No. 01–7813. BURGINS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 836 So. 2d 1008.

No. 01–7814. TINKER *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 255 F. 3d 444.

No. 01–7818. THIAM *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–7820. JONES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 42.

No. 01–7823. MACK ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 01–7825. MCELROY *v.* CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY. C. A. 9th Cir. Certiorari denied.

No. 01–7831. CAMPBELL, AKA LEE *v.* PETERS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 256 F. 3d 695.

No. 01–7843. THOMAS *v.* COMSTOCK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 251 F. 3d 157.

No. 01–7844. MORENO *v.* METHODIST HOSPITALS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 2 Fed. Appx. 574.

No. 01–7845. JONES *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–7852. WENGER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 266 F. 3d 218.

No. 01–7853. KOSSIE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7859. FLANNIGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–7865. PETRUS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7866. HINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 01–7867. HILL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7868. HARRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–7869. HEARD *v.* GEORGIA BOARD OF PARDONS AND PAROLES. C. A. 11th Cir. Certiorari denied.

No. 01–7870. GRAY *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 01–7875. GRAVES *v.* SUPREME COURT OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 157.

No. 01–7877. FELIX *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–7878. GREENFIELD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1064.

No. 01–7882. PERRY *v.* CHILDS, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 01–7891. LOGGINS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–7892. JAMES *v.* GEORGIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 53.

No. 01–7893. FEASTER *v.* PULLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 318.

No. 01–7894. GREEN *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied. Reported below: 55 S. W. 3d 633.

No. 01–7895. HARVEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 196 Ill. 2d 444, 753 N. E. 2d 293.

No. 01–7902. HARRELL *v.* BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 251 F. 3d 926.

No. 01–7903. GOWING *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 01–7906. McCollum *v.* Kemna, Superintendent, Crossroads Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 01–7910. Fisher *v.* Miller, Superintendent, Pendleton Correctional Facility. C. A. 7th Cir. Certiorari denied.

No. 01–7911. Gowan *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 01–7912. Berkson *v.* DelMonte Corp. et al. C. A. 1st Cir. Certiorari denied.

No. 01–7913. Baker *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 47.

No. 01–7915. Bertone *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 796 So. 2d 1176.

No. 01–7920. Daniel *v.* Scott, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 3 Fed. Appx. 933.

No. 01–7921. Benson *v.* Calbone, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 8 Fed. Appx. 927.

No. 01–7922. Edwards *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 01–7925. Reeder *v.* City of Paris et al. C. A. 5th Cir. Certiorari denied.

No. 01–7926. Hedrick *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 01–7927. Britt *v.* Campbell, Warden, et al. Ct. App. Tenn. Certiorari denied.

No. 01–7933. Bell *v.* Larkins, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 01–7937. Bright *v.* Phillips, Warden. C. A. 6th Cir. Certiorari denied.

No. 01–7940. WOODCOCK *v.* WEBB, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–7941. THOMPSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 795 So. 2d 74.

No. 01–7942. PORTER *v.* DIECAST CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 01–7943. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7945. DUDLEY *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–7946. EGAN *v.* GORCZYK; and EGAN *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 172 Vt. 641, 777 A. 2d 1284 (first judgment); 172 Vt. 642, 785 A. 2d 190 (second judgment).

No. 01–7949. PARKER *v.* PRINCE WILLIAM COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 01–7950. THOMAS *v.* OWEN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7951. WASHINGTON *v.* STATE STREET BANK & TRUST CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 14 Fed. Appx. 12.

No. 01–7952. WILLIAMS *v.* UNITED STATES;
No. 01–7956. MARSHALL *v.* UNITED STATES;
No. 01–8203. MONTGOMERY *v.* UNITED STATES; and
No. 01–8477. JETT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 224.

No. 01–7981. ENRIQUEZ *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 576.

No. 01–7986. WISHNEFSKY *v.* KURTZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 259 F. 3d 718.

No. 01–8010. KIBBE *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 269 F. 3d 26.

No. 01–8052. BROWN *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 267 F. 3d 36.

No. 01–8057. ENRIQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 46.

No. 01–8058. HUMPHREY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 565.

No. 01–8095. DELGADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8140. CASTANO *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8240. MARTIN *v.* CAIN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 809 So. 2d 972.

No. 01–8264. ROBINSON *v.* PORTUONDO, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–8345. SMITH *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 9 Fed. Appx. 720.

No. 01–8379. CONNER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 803 So. 2d 723.

No. 01–8413. PODOPRIGORA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied.

No. 01–8416. PEELER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 21 Fed. Appx. 82.

No. 01–8417. PEREZ-MONCADA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 198.

No. 01–8418. PINEDA-BONILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8420. MAYORGA-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8422. SOTO-CASTELLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8423. SALING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1083.

No. 01–8424. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–8425. REED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 264 F. 3d 640.

No. 01–8429. WADE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 01–8433. ESTRADA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8434. ESCOBAR-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 788.

No. 01–8435. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 491.

No. 01–8437. PEREDA-LARQUIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8438. PABON-PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8440. BARRIENTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–8441. CASSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 201.

No. 01–8445. OSAYANDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1101.

No. 01–8452. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 01–8455. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 258 F. 3d 1053.

No. 01–8456. NAVARRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 472.

No. 01–8464. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–8467. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 360.

No. 01–8476. ACOSTA-LAO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8479. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 196.

No. 01–8480. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 01–8481. GUEVARA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8482. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8484. MIRANDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8488. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8491. GONZALEZ-RODRIGUEZ, AKA AVINA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8492. HERNANDEZ-CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8495. JENNINGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 269 F. 3d 877.

No. 01–8503. FLEMING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8505. GALLOWAY *v.* HUFFMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8507. MCKINNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8517. BUCULEI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 322.

No. 01–8518. BEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–8527. ESTRADA-OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–8528. CASTILLO-OROPEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8529. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 584.

No. 01–8538. AVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 739.

No. 01–8539. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–8541. ZEBROWSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 267.

No. 01–8546. ARANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–8547. ALCANTAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 271 F. 3d 731.

No. 01–8549. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8553. SOLORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8556. DE JESUS-BONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–8557. BAUTISTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8564. BRIAND *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8565. OCHOA-PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–8566. WADE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 266 F. 3d 574.

No. 01–8567. REVELO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 52.

No. 01–8568. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 22 Fed. Appx. 55.

No. 01–8572. KUNHART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 670.

No. 01–8576. CONYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 99.

No. 01–8577. ESPINOZA-ARMENTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 780.

No. 01–8578. COPE *v.* OLSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 464.

No. 01–8579. VELASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 271 F. 3d 364.

No. 01–8593. ROBBINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8597. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–8598. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 348.

No. 01–8605. MARIA-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 268 F. 3d 664.

No. 01–8610. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 123.

No. 01–8612. NOLBERTO PENA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 229.

No. 01–8613. SIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1120.

No. 01–8614. SUAREZ-ROCHA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 812.

No. 01–8616. ST. JUSTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 53.

No. 01–8618. OLSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8621. WESTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153.

No. 01–8624. SELLMEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 202.

No. 01–8626. MCPHILOMY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 270 F. 3d 1302.

No. 01–8627. O'NEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1278.

No. 01–8628. MITZEL *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 267 F. 3d 524.

No. 01–8629. COWO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 22 Fed. Appx. 25.

No. 01–8631. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–1103. BOSWELL *v.* BOARD OF TRUSTEES OF TEXAS CHRISTIAN UNIVERSITY ET AL.; and BOSWELL *v.* TEXAS CHRISTIAN UNIVERSITY ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 263 F. 3d 162 (first judgment) and 163 (second judgment).

No. 01–1246. ANGWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 271 F. 3d 786.

No. 01–8031. COTTRELL *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 10 Fed. Appx. 162.

Rehearing Denied

No. 00–10482. REDMAN *v.* MARYLAND, 534 U. S. 860;
No. 00–10534. WALDEN *v.* RADIGAN, 534 U. S. 863;
No. 01–5255. MALDONADO SEGURA *v.* TEXAS, 534 U. S. 911;
No. 01–5322. MILLINES *v.* HATCHER ET AL., 534 U. S. 916;
No. 01–5870. BAEZ *v.* KNOWLES ET AL., 534 U. S. 976;
No. 01–6068. MCGUIRE *v.* COWLEY, WARDEN, ET AL., 534 U. S. 1002;
No. 01–6187. THOMPSON *v.* GIBSON, WARDEN, 534 U. S. 1003;
No. 01–6617. SUMLAR *v.* FLORIDA, 534 U. S. 1058; and

No. 01–6996. In re Clark, 534 U. S. 1039. Petitions for rehearing denied.

No. 01–6321. Byrd *v.* Meyers, Superintendent, State Correctional Institute at Rockview, 534 U. S. 1027. Motion for leave to file petition for rehearing denied.

March 28, 2002

Dismissal Under Rule 46

No. 01–1200. Southern Co. et al. *v.* Alderson et al. App. Ct. Ill., 1st Dist. Certiorari dismissed as to David Arcuri under this Court's Rule 46.1. Reported below: 321 Ill. App. 3d 832, 747 N. E. 2d 926.

March 29, 2002

Dismissal Under Rule 46

No. 01–980. Weinberger *v.* United States. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 268 F. 3d 346.

April 1, 2002

Affirmed on Appeal

No. 01–1114. Winters et al. *v.* Illinois State Board of Elections et al. Affirmed on appeal from D. C. N. D. Ill.

Certiorari Granted—Reversed and Remanded. (See No. 01–835, *ante*, p. 229.)

Certiorari Granted—Vacated and Remanded

No. 01–948. Dormire, Superintendent, Jefferson City Correctional Center *v.* Koste. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mickens* v. *Taylor*, *ante*, p. 162. Reported below: 260 F. 3d 872.

Certiorari Dismissed. (See also No. 01–584, *ante*, p. 228.)

No. 01–8036. McBride *v.* Hall, Warden. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2272. IN RE DISBARMENT OF PEES. Disbarment entered. [For earlier order herein, see 534 U. S. 806.]

No. 01M43. DENNIS *v.* MEADOWS, WARDEN; and

No. 01M44. GENTERY *v.* ROE, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01–309. HOPE *v.* PELZER ET AL. C. A. 11th Cir. [Certiorari granted, 534 U. S. 1073 and 1120.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–651. JPMORGAN CHASE BANK *v.* TRAFFIC STREAM (BVI) INFRASTRUCTURE LTD. C. A. 2d Cir. [Certiorari granted *sum nom. Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 534 U. S. 1074.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–679. GONZAGA UNIVERSITY ET AL. *v.* DOE. Sup. Ct. Wash. [Certiorari granted, 534 U. S. 1103.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–682. BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL. *v.* GORMAN. C. A. 8th Cir. [Certiorari granted, 534 U. S. 1103.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 01–419. CITY OF COLUMBUS ET AL. *v.* OURS GARAGE AND WRECKER SERVICE, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 534 U. S. 1073.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Kansas et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 01–8831. IN RE THURSTON. Petition for writ of habeas corpus denied.

No. 01–8880. IN RE THOMPSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of

habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–1116. IN RE RODRIGUEZ; and

No. 01–8019. IN RE CAMPITELLI. Petitions for writs of mandamus denied.

No. 01–8661. IN RE BONTKOWSKI. Petition for writ of mandamus denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 01–8703. IN RE ENGLE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 01–963. NORFOLK & WESTERN RAILWAY CO. *v.* AYERS ET AL. Cir. Ct. Kanawha County, W. Va. Certiorari granted.

No. 01–1127. LOCKYER, ATTORNEY GENERAL OF CALIFORNIA *v.* ANDRADE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, and case set for oral argument in tandem with No. 01–6978, *Ewing* v. *California*, immediately *infra*. Reported below: 270 F. 3d 743.

No. 01–6978. EWING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, and case set for oral argument in tandem with No. 01–1127, *Lockyer, Attorney General of California* v. *Andrade*, immediately *supra*.

Certiorari Denied

No. 00–8686. MCGEE ET AL. *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 757 So. 2d 50.

No. 00–10683. MOUNTJOY *v.* CUNNINGHAM, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 245 F. 3d 31.

No. 01–583. FOWLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 877.

No. 01–692. TOPEKA STATE HOSPITAL ET AL. *v.* TURNBULL. C. A. 10th Cir. Certiorari denied. Reported below: 255 F. 3d 1238.

No. 01–816. PEGG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 253 F. 3d 1274.

No. 01–823. TRIOLA *v.* VIERA. C. A. 3d Cir. Certiorari denied. Reported below: 265 F. 3d 1056.

No. 01–858. ESTATE OF GLADDEN, BY AND THROUGH ITS PERSONAL REPRESENTATIVE, GLADDEN, ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 756.

No. 01–917. BROWN *v.* 3M ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 265 F. 3d 1349.

No. 01–936. BESSER ET AL. *v.* HARDY. C. A. 6th Cir. Certiorari denied. Reported below: 260 F. 3d 671.

No. 01–1078. BURDEN ET AL. *v.* CHECK INTO CASH OF KENTUCKY, LLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 267 F. 3d 483.

No. 01–1081. UBINAS-BRACHE *v.* DALLAS COUNTY MEDICAL SOCIETY ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 68 S. W. 3d 31.

No. 01–1082. THREADGILL *v.* MOORE U. S. A., INC. C. A. 7th Cir. Certiorari denied. Reported below: 269 F. 3d 848.

No. 01–1084. DESMOND ET AL. *v.* BANKAMERICA CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 263 F. 3d 795.

No. 01–1086. JACKSON *v.* MORGAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 97.

No. 01–1089. DODDS ET AL. *v.* HALLIBURTON ENERGY SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1094.

No. 01–1090. CARLSON ET AL. *v.* UNITED ACADEMICS-AAUP/AFT/APEA AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 265 F. 3d 778.

No. 01–1091. CARSON HARBOR VILLAGE, LTD. *v.* BRALEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 3d 863.

No. 01–1096. URBINE *v.* PIEDMONT TRIAD AIRPORT AUTHORITY. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 336, 554 S. E. 2d 331.

No. 01–1099. ERIKSON *v.* PAWNEE COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 263 F. 3d 1151.

No. 01–1101. ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS ET AL. *v.* COMSTOCK OIL & GAS INC., SUCCESSOR BY MERGER TO BLACK STONE OIL CO., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 261 F. 3d 567.

No. 01–1106. CITY OF PARMA *v.* CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 263 F. 3d 513.

No. 01–1110. ROZMAN, DBA LYNDE INVESTMENT CO. *v.* CITY OF COLUMBIA HEIGHTS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 268 F. 3d 588.

No. 01–1115. JENSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied.

No. 01–1117. BRENTWOOD ACADEMY *v.* TENNESSEE SECONDARY SCHOOL ATHLETIC ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 262 F. 3d 543.

No. 01–1121. BLACK ET AL. *v.* TARGET STORES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 520.

No. 01–1138. SCOTT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 01–1178. OTTO *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied.

No. 01–1215. BURGESON ET AL. *v.* RICHMAN, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF RICHMAN, DECEASED. C. A. 7th Cir. Certiorari denied. Reported below: 270 F. 3d 430.

No. 01–1237. McMURTRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 594.

No. 01–1255. MEZA-LOPEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 260 F. 3d 863.

No. 01–1260. GIRAUD-PINEIRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 269 F. 3d 23.

No. 01–1262. GARBER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–1265. WARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–6162. WYNN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 804 So. 2d 1122.

No. 01–7573. SANCHEZ-RONQUILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1108.

No. 01–7954. MANGAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–7957. MILLS *v.* BELL, CORRECTIONAL ADMINISTRATOR I, PENDER CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 178.

No. 01–7959. KEENAN *v.* CURTIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–7960. KEENAN *v.* CURTIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–7964. WHITCHARD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–7965. TRICARICO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 779 A. 2d 1224.

No. 01–7966. SIMS *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1278.

No. 01–7967. STEVENSON *v.* FRENCH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 174.

No. 01–7968. SHOEMAKE *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 01–7969. STELLY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–7973. PONZO *v.* LEFTRIDGE BYRD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CHESTER. C. A. 3d Cir. Certiorari denied.

No. 01–7978. WOODWARD *v.* WILLIAMS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 263 F. 3d 1135.

No. 01–7979. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–7983. KARIMALIS *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–7984. JACKSON *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–7985. WATERBURY *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 01–7989. POCHE *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–7990. SPENCER *v.* BRYSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–7991. RICHARDS *v.* HARRIS. Cir. Ct. Henrico County, Va. Certiorari denied.

No. 01–7992. SHAW *v.* PERRY, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 01–7993. SWIGGETT *v.* OGLE ET AL. Ct. App. Tenn. Certiorari denied.

No. 01–7995. SESSIONS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 800 So. 2d 616.

No. 01–8001. CHAMBERS *v.* FEWS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–8004. ALEXANDER *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 01–8006. BROOKS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 92 Ohio St. 3d 537, 751 N. E. 2d 1040.

No. 01–8016. MCCURRY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8017. MORKE *v.* MERRITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 174.

No. 01–8021. ISSA *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 93 Ohio St. 3d 49, 752 N. E. 2d 904.

No. 01–8023. ROGER G. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–8024. GAINES *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8025. GRIFFIN *v.* EIDSON. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 393.

No. 01–8026. ARNOLD *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 01–8028. EDENS *v.* TAGUE. Sup. Ct. Pa. Certiorari denied.

No. 01–8030. CONLON *v.* WHITE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 908.

No. 01–8035. RUDD *v.* GRAVES, GOVERNOR OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 954.

No. 01–8037. SACCO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 01–8039. SLATON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8040. NOEL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 01–8042. CLEMENTS *v.* SPOONER ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8043. EURY *v.* MORRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 84.

No. 01–8044. EURY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 139.

No. 01–8055. LIFCHITS *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 01–8061. STROUD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8063. ROSS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1086.

No. 01–8064. CARPENTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8067. AHLDEN *v.* SNYDER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 693.

No. 01–8069. MURRAY *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 01–8070. YOUNG *v.* HERBERT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–8072. EURY *v.* KNIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 117.

No. 01–8074. STEVENS *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 29 P. 3d 305.

No. 01–8113. CAMPBELL *v.* COYLE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 260 F. 3d 531.

No. 01–8146. FULLICK *v.* UNITED STATES BEEF CORP., DBA ARBY'S. C. A. 10th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 791.

No. 01–8176. CHANCE *v.* PAINTER, WARDEN. Cir. Ct. Preston County, W. Va. Certiorari denied.

No. 01–8235. EVANS *v.* UNITED STATES (two judgments). C. A. 11th Cir. Certiorari denied.

No. 01–8274. CARROLL ET AL. *v.* NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 248.

No. 01–8410. BURNS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 46.

No. 01–8463. CATLIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 81, 26 P. 3d 357.

No. 01–8468. VANDERBERG *v.* DONALDSON. C. A. 11th Cir. Certiorari denied. Reported below: 259 F. 3d 1321.

No. 01–8509. PUENTES-HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 01–8510. PIPKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–8512. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–8513. RILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 139.

No. 01–8514. SINGLETARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 268 F. 3d 196.

No. 01–8515. RODRIGUEZ-NUNEZ *v.* UNITED STATES; and HERNANDEZ-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082 (first judgment) and 1083 (second judgment).

No. 01–8516. ARELLANO-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 244 F. 3d 1119.

No. 01–8521. RUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 139.

No. 01–8531. EMUEGBUNAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 263 F. 3d 377.

No. 01–8532. DELESTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 206.

No. 01–8534. CONGHAU HUU TO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8536. VIOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–8555. LIVINGSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 256 F. 3d 231.

No. 01–8573. KEMP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–8587. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 253 F. 3d 443.

No. 01–8604. DEAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 929.

No. 01–8607. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1020.

No. 01–8608. MADRIGAL-TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 F. 3d 276.

No. 01–8630. MIKELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8632. DELGADO-ACEVES, AKA HERNANDEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 805.

No. 01–8633. MORENO *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 F. 3d 622.

No. 01–8634. MORTIMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 173.

No. 01–8636. BARRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 47.

No. 01–8637. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–8641. RIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–8642. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8646. BARBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 1067.

No. 01–8655. JARVIS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 109.

No. 01–8657. CHRISTOPHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 52.

No. 01–8658. ADAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 271 F. 3d 1236.

No. 01–8659. MCCLAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 260 F. 3d 625.

No. 01–8660. OGUNBAYO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8665. VALLEJO-OCAMPO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1278.

No. 01–8667. SWINT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 01–8671. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 47.

No. 01–8675. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8676. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8680. GALVAN-JUAREZ *v.* UNITED STATES; and MORENO TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–8683. HOWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 24 Fed. Appx. 39.

No. 01–8684. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 123.

No. 01–8686. JURADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 640.

No. 01–8687. PEREZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–8688. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 336.

No. 01–8689. CORRAL-CARAVEO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 851.

No. 01–8690. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 407.

No. 01–8692. OLSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 260 F. 3d 626.

No. 01–8698. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 404.

No. 01–8699. BOCHICCHIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 751.

No. 01–8714. ARDLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 242 F. 3d 989.

No. 01–8718. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 185.

No. 01–8721. PAZ-AGUIRRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 464.

No. 01–8725. GARRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–8726. FLEMING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 682.

No. 01–8727. HUTCHINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 260 F. 3d 160.

No. 01–8728. CRUZ-AGUILAR *v.* UNITED STATES; BELTRAN-ANGULO *v.* UNITED STATES; and BISHOP *v.* UNITED STATES.

C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 863 (first judgment) and 882 (third judgment).

No. 01–8734. SUTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 651.

No. 01–8735. TORRES RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 590.

No. 01–8736. SHABBAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 394.

No. 01–8738. COHEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–8741. BREWER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 526.

No. 01–8743. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 250 F. 3d 596.

No. 01–914. ABX AIR, INC. *v.* AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL–CIO. C. A. 6th Cir. Motion of Air Transport Association of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 266 F. 3d 392.

No. 01–958. WOODALL ET AL. *v.* SKAMANIA COUNTY, WASHINGTON. Ct. App. Wash. Motions of Delaware River Port Authority and Mark O. Hatfield et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 104 Wash. App. 525, 16 P. 3d 701.

Rehearing Denied

No. 00–10360. HADDOCK *v.* GALAZA, WARDEN, 534 U. S. 853;
No. 00–10792. WASHINGTON *v.* ELO, WARDEN, 534 U. S. 879;
No. 00–10823. WALKER *v.* MONTCALM CENTER FOR BEHAVIORAL HEALTH ET AL., 534 U. S. 881;
No. 01–5220. HALL *v.* CALIFORNIA ET AL., 534 U. S. 909;
No. 01–5505. ANTONIO LUNA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 956;
No. 01–5629. KONTAKIS *v.* MORTON ET AL., 534 U. S. 959;

No. 01–5956. EAGLE *v.* WELLS, SHERIFF, MANATEE COUNTY, FLORIDA, ET AL., 534 U. S. 977;

No. 01–6237. BROOKS *v.* GARCIA, WARDEN, 534 U. S. 1026;

No. 01–6645. HARRISON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 534 U. S. 1059;

No. 01–6652. GRIFFIN *v.* CITY OF COLUMBUS ET AL., 534 U. S. 1060;

No. 01–6691. TAYLOR *v.* HOWARDS ET AL., 534 U. S. 1061;

No. 01–6839. TIBBS *v.* ISLAND CREEK COAL CO., 534 U. S. 1087;

No. 01–6894. GAY *v.* FURLONG, ATTORNEY GENERAL OF COLORADO, 534 U. S. 1089; and

No. 01–7086. IN RE BROCKINGTON, 534 U. S. 1077. Petitions for rehearing denied.

APRIL 4, 2002

Miscellaneous Order

No. 01A745 (01–9454). BROWN *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, 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 terminate upon the issuance of the mandate of this Court.

APRIL 8, 2002

Miscellaneous Orders

No. 01A702 (01–9094). ABDUR'RAHMAN *v.* BELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, 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 terminate upon the sending down of the judgment of this Court.

No. 01–9095. IN RE ABDUR'RAHMAN. Petition for writ of habeas corpus denied.

APRIL 9, 2002

Miscellaneous Order

No. 01–9526 (01A755). IN RE KREUTZER. 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.

April 10, 2002

Certiorari Denied

No. 01–8552 (01A715). Santellan *v.* Cockrell, 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: 271 F. 3d 190.

No. 01–9243 (01A719). Santellan *v.* Cockrell, 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.

April 12, 2002

Miscellaneous Order

No. 01–309. Hope *v.* Pelzer et al. C. A. 11th Cir. [Certiorari granted, 534 U. S. 1073 and 1120.] Motion of Missouri et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

April 15, 2002

Certiorari Granted—Vacated and Remanded

No. 01–8107. Glick et al. *v.* Arizona. Sup. Ct. Ariz. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kansas* v. *Crane*, 534 U. S. 407 (2002). Reported below: 200 Ariz. 298, 26 P. 3d 481.

Certiorari Dismissed

No. 01–8161. Baez *v.* Nike Inc. et al. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal mat-

ters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–8519. JOHNSON *v.* SERELSON ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 23 Fed. Appx. 949.

No. 01–8796. WESTINE *v.* STEPP, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–8283. GREEN *v.* COLORADO. Ct. App. Colo. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2104. IN RE DISBARMENT OF PONZINI. Disbarment entered. [For earlier order herein, see 528 U. S. 802.]

No. D–2278. IN RE DISBARMENT OF NAPOLITANO. Disbarment entered. [For earlier order herein, see 534 U. S. 989.]

No. D–2280. IN RE DISBARMENT OF LIGHT. Disbarment entered. [For earlier order herein, see 534 U. S. 990.]

No. D–2292. IN RE DISCIPLINE OF ALTSCHULER. Milo J. Altschuler, of Seymour, 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–2293. IN RE DISCIPLINE OF WILCOX. Dianne E. H. Wilcox, of Moneta, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2294. IN RE DISCIPLINE OF ELLIOTT. Forriss Dugas Elliott, of St. Louis, 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–2295. IN RE DISCIPLINE OF WITTENBERG. Malcolm Bruce Wittenberg, of Oakland, 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–2296. IN RE DISCIPLINE OF MAGNOTTI. Anthony M. Magnotti, of Staten Island, 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–2297. IN RE DISCIPLINE OF RODRIGUEZ. George Rodriguez, of Bronx, 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. 01M45. TAYLOR *v.* GOLDEN AGE PROPERTIES ET AL.; and No. 01M47. JEFFERSON *v.* MISSOURI DEPARTMENT OF SOCIAL SERVICES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01M46. IN RE CLANCY ET AL. Motion to direct the Clerk to file petition for writ of mandamus and/or prohibition and for other relief denied.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Owen Olpin, Esq., of Los Angeles, Cal., the Special Master in this case, is

hereby discharged with the thanks of the Court. [For earlier order herein, see, *e. g.,* 534 U. S. 1076.]

No. 01–950. HILLSIDE DAIRY INC. ET AL. *v.* LYONS, SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.; and

No. 01–1018. PONDEROSA DAIRY ET AL. *v.* LYONS, SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 01–7247. KOWALSKI *v.* BALDWIN, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [534 U. S. 1122] denied.

No. 01–1268. IN RE RETTIG. C. A. 6th Cir. Petition for writ of common-law certiorari denied.

No. 01–8256. IN RE MARTIN;

No. 01–8981. IN RE FOSTER;

No. 01–9106. IN RE PHILLIPS; and

No. 01–9235. IN RE MACON. Petitions for writs of habeas corpus denied.

No. 01–8990. IN RE GREEN. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 01–8008. IN RE MITCHELL; and

No. 01–8993. IN RE GRIER. Petitions for writs of mandamus denied.

No. 01–1156. IN RE KALLEMBACH;

No. 01–8087. IN RE SHERRILL; and

No. 01–8102. IN RE RAFAELI. Petitions for writs of mandamus and/or prohibition denied.

No. 01–1240. IN RE KELLY. Petition for writ of prohibition denied.

Certiorari Granted

No. 01–1015. MOSELEY ET AL., DBA VICTOR'S LITTLE SECRET *v.* V SECRET CATALOGUE, INC., ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 259 F. 3d 464.

Certiorari Denied

No. 01–732. DECKER ET AL. *v.* BRADBURY, SECRETARY OF STATE OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 259 F. 3d 1169.

No. 01–802. FISCHER, DIRECTOR OF REVENUE OF MISSOURI *v.* LEWIS. C. A. 8th Cir. Certiorari denied. Reported below: 253 F. 3d 1077.

No. 01–960. CAVALIER MANUFACTURING, INC., DBA BUCCANEER HOMES OF ALABAMA, INC. *v.* JACKSON ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 823 So. 2d 1237.

No. 01–968. NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 265 F. 3d 313.

No. 01–978. HENDERSON ET AL. *v.* MAINELLA, DIRECTOR, NATIONAL PARK SERVICE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 F. 3d 12.

No. 01–1030. WINN-DIXIE STORES, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1313.

No. 01–1083. TEXTRON INC. ET AL. *v.* MASSACHUSETTS COMMISSIONER OF REVENUE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 435 Mass. 297, 756 N. E. 2d 1142.

No. 01–1087. KUSTOM SIGNALS, INC. *v.* APPLIED CONCEPTS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 264 F. 3d 1326.

No. 01–1094. CAPACCHIONE ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.; and

No. 01–1122. BELK ET AL., ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 269 F. 3d 305.

No. 01–1109. HOLLIS *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 259 F. 3d 410.

No. 01–1130. ZARAGOZA ET UX. *v.* DAVIS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–1131. LIDMAN *v.* SMITH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 263 F. 3d 158.

No. 01–1137. BANDUSKY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 01–1142. GARDNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 482.

No. 01–1147. TAL TECHNOLOGIES, INC. *v.* CITY OF OKLAHOMA CITY. Ct. Civ. App. Okla. Certiorari denied.

No. 01–1148. WOLF ET AL. *v.* COLEMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 582.

No. 01–1150. LEON C. BAKER P. C. ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. Sup. Ct. Ala. Certiorari denied. Reported below: 821 So. 2d 158.

No. 01–1151. RICCITELLI *v.* GREEN MOUNTAIN POWER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 14 Fed. Appx. 57.

No. 01–1154. REALTY ONE, INC. *v.* RE/MAX INTERNATIONAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 271 F. 3d 633.

No. 01–1162. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 555.

No. 01–1163. MOSER, ADMINISTRATRIX OF THE ESTATE OF MOSER, DECEASED *v.* FORD MOTOR CO. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 168.

No. 01–1164. PHANEUF *v.* GOVERNMENT OF INDONESIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 648.

No. 01–1166. ATTORNEY GENERAL OF PENNSYLVANIA *v.* BLASI; and

No. 01–7621. BLASI *v.* ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 33.

No. 01–1167. WOOLDRIDGE *v.* HAMILTON COUNTY DEPARTMENT OF HUMAN SERVICES. Sup. Ct. Ohio. Certiorari denied. Reported below: 93 Ohio St. 3d 1460, 756 N. E. 2d 1236.

No. 01–1168. TINDALL *v.* WAYNE COUNTY FRIEND OF THE COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 269 F. 3d 533.

No. 01–1169. ARUNDEL ENGINEERING CORP. *v.* MARYLAND MASS TRANSIT ADMINISTRATION. Ct. Sp. App. Md. Certiorari denied. Reported below: 139 Md. App. 738.

No. 01–1174. TULI *v.* SPRECHER ENERGIE A. G. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 567.

No. 01–1175. MYERS *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 682.

No. 01–1176. CLARK, SECRETARY OF STATE OF MISSISSIPPI *v.* LIPSCOMB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 269 F. 3d 494.

No. 01–1177. CATERINA ET AL. *v.* UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 265 F. 3d 1054.

No. 01–1185. SPIRIT LAKE TRIBE *v.* NORTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 262 F. 3d 732.

No. 01–1189. BRANDENBURG *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 01–1190. WYATT *v.* ALABAMA DEPARTMENT OF HUMAN RESOURCES ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 815 So. 2d 527.

No. 01–1199. RALEIGH ET UX. *v.* TRISCHAN ET AL. Ct. App. Colo. Certiorari denied.

No. 01–1213. CARR *v.* FORBES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 259 F. 3d 273.

No. 01–1214. EPIC EDUCATIONAL PROJECTS & INFORMATION CONSULTANT CENTER, INC. *v.* DWELLING HOUSE SAVINGS AND

Loan Assn. Super. Ct. Pa. Certiorari denied. Reported below: 778 A. 2d 1251.

No. 01–1216. Bavouset *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 784 A. 2d 27.

No. 01–1227. Elliott *v.* Federal Deposit Insurance Corporation. C. A. 4th Cir. Certiorari denied.

No. 01–1248. De La Mata et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 266 F. 3d 1275.

No. 01–1250. Donner *v.* Donner et al. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 442.

No. 01–1256. McLaughlin et al. *v.* Watson, Assistant Secretary of State, et al. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 566.

No. 01–1270. Jones *v.* Department of Health and Human Services. C. A. Fed. Cir. Certiorari denied. Reported below: 15 Fed. Appx. 896.

No. 01–1285. Groom *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 240.

No. 01–1300. Rivera *v.* Lamarque, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 857.

No. 01–1304. Gormley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 264 F. 3d 391.

No. 01–1305. Grace *v.* Rumsfeld, Secretary of Defense. C. A. 2d Cir. Certiorari denied.

No. 01–1310. Meneilly *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 28 Fed. Appx. 26.

No. 01–1313. Nater *v.* Paige, Secretary of Education. C. A. 1st Cir. Certiorari denied. Reported below: 15 Fed. Appx. 11.

No. 01–1321. McDougal *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 01–1323. Dow Chemical Co. *v.* Astro-Valcour, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 267 F. 3d 1334.

No. 01–1327. BROOKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 666.

No. 01–1330. ANDERSON *v.* OHIO STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 412.

No. 01–1334. BOSWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 1200.

No. 01–1342. JENKINS *v.* NORTON, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 2 Fed. Appx. 816.

No. 01–1343. KNISKERN ET AL. *v.* AMSTUTZ ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 144 Ohio App. 3d 495, 760 N. E. 2d 876.

No. 01–1361. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 422.

No. 01–5756. SHEA *v.* BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–5869. OLANREWAJU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 6 Fed. Appx. 88.

No. 01–7032. CROSLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 4.

No. 01–7095. GARVIN *v.* FARMON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 258 F. 3d 951.

No. 01–7266. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 180.

No. 01–7296. STOKES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 F. 3d 496.

No. 01–7315. JACKSON *v.* OKLAHOMA DEPARTMENT OF CORRECTIONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 678.

No. 01–7471. GALLOWAY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 365 Md. 599, 781 A. 2d 851.

No. 01–7473. GONZALEZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 01–7509. SUAREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 263 F. 3d 468.

No. 01–7534. HEARN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–7544. ESPARAZA-GONZALEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 268 F. 3d 272.

No. 01–7582. SIMPSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 204 Ill. 2d 536, —— N. E. 2d ——.

No. 01–7660. ABSHIER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 28 P. 3d 579.

No. 01–7692. ZAPATA-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1100.

No. 01–7700. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–7733. ROBERTS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 286.

No. 01–7752. THOMAS *v.* GLAXO WELLCOME, INC. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 478.

No. 01–7953. BUTLER *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–7980. ALLEY *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8077. HARRELL *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 365 Md. 267, 778 A. 2d 382.

No. 01–8079. HANSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8080. FLEMMING *v.* DIEHL. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 211.

No. 01–8084. HUNT *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8085. FISHER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8086. GUSTIN *v.* WARD. C. A. 10th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 822.

No. 01–8090. DAVIS *v.* COFFEE COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1087.

No. 01–8091. COCHRAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 01–8093. COBB *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 260 F. 3d 626.

No. 01–8098. MCCULLOUGH *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 292.

No. 01–8103. BELL *v.* JACKSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8105. BREWER *v.* WISCONSIN DIVISION OF VOCATIONAL REHABILITATION SERVICES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 457.

No. 01–8106. CLARK *v.* FATKIN, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 01–8110. WILLIAMS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 801 So. 2d 1077.

No. 01–8111. WARNER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8112. BROCK *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 145 N. C. App. 204, 550 S. E. 2d 49.

No. 01–8116. LARKIN *v.* GALLOWAY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 266 F. 3d 718.

No. 01–8120. LUGO *v.* HORSELEY. C. A. 9th Cir. Certiorari denied.

No. 01–8121. McKire *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 01–8122. Emory *v.* Memphis City Schools et al. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 355.

No. 01–8124. Carter *v.* Vaughn, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied.

No. 01–8126. Elder *v.* California Department of Corrections et al. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 540.

No. 01–8136. Collier *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 01–8137. Robinson *v.* Walter et al. C. A. 7th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 505.

No. 01–8138. Smith *v.* Snyder. Ct. App. Kan. Certiorari denied. Reported below: 29 Kan. App. 2d ——, 28 P. 3d 1066.

No. 01–8139. Chamberlain *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–8141. Erdman *v.* Kapture, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 324.

No. 01–8142. Egbert *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 01–8145. Earls *v.* Cockrell, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 01–8149. Green *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 313 Ill. App. 3d 1090, 775 N. E. 2d 1068.

No. 01–8150. Fredrick *v.* Latson et al. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1065.

No. 01–8152. Nickleberry *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 01–8153. MOTLEY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1103.

No. 01–8155. SKINNER *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 33 P. 3d 758.

No. 01–8156. CHRISTOPH *v.* RAINES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1102.

No. 01–8157. DELEON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8158. COLWICK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8159. TETERS *v.* AGUIRRE ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8160. TIDIK *v.* APPEALS JUDGES OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 01–8162. PEOPLES-HALL *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8163. DEAN *v.* ODOM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 327.

No. 01–8166. MARCELLO ET UX. *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied.

No. 01–8168. CARNET *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 54.

No. 01–8170. WELLS *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8172. KALINOWSKI *v.* RYAN, GOVERNOR OF ILLINOIS; COOP *v.* HOLMES ET AL.; HALE *v.* SNYDER; and JAMES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 01–8173. TURNBOE *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8177. ADAMS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 792 So. 2d 451.

No. 01–8180. BAILEY *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 263 F. 3d 1022.

No. 01–8182. HISTON *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8183. BUNKER *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–8185. DRAEGER *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 01–8186. MOORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8188. JONES *v.* CITY OF AKRON DEPARTMENT OF PUBLIC HEALTH HOUSING APPEALS BOARD. Ct. App. Ohio, Summit County. Certiorari denied.

No. 01–8191. PERKINS *v.* THOMS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 256.

No. 01–8192. MCCARTER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 801 So. 2d 944.

No. 01–8193. LOWDEN *v.* LAMBERT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 603.

No. 01–8198. KULAS *v.* FLORES. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 3d 780.

No. 01–8201. CARPENTER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 69 S. W. 3d 568.

No. 01–8204. JACOBS *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–8211. SMITH *v.* TURNER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–8214. BRADY *v.* PRICE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 575.

No. 01–8215. CAMPBELL *v.* GEMOLOGICAL INSTITUTE OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 694.

No. 01–8217. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 01–8220. MCATEE *v.* ROBINSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–8221. GOODIN, AKA GOODEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 787 So. 2d 639.

No. 01–8222. CONSTANTINO HERNANDEZ *v.* ORTIZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8224. FOLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 55 S. W. 3d 809.

No. 01–8226. SWEED *v.* WICHITA COUNTY 30TH JUDICIAL DISTRICT COURT. C. A. 5th Cir. Certiorari denied.

No. 01–8227. TYLER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–8228. WIGGINS *v.* SERIO. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–8230. YIZAR *v.* SIKES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 251 F. 3d 161.

No. 01–8236. PRATT *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 141 N. C. App. 352, 541 S. E. 2d 810.

No. 01–8251. KNOX *v.* SICKLES ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–8253. WHEELER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 145 Wash. 2d 116, 34 P. 3d 799.

No. 01–8257. TUNSIL *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 799 So. 2d 220.

No. 01–8258. TILLI *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 38.

No. 01–8259. JONES *v.* CARTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–8260. JAMES *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 191.

No. 01–8261. KASSEM *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–8262. MARKHAM *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 323.

No. 01–8273. HOPKINS *v.* TARASCIO, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 01–8275. ARTHUR *v.* LINDSEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8285. MUELLER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 28 Kan. App. 2d 760, 24 P. 3d 149.

No. 01–8286. BARNEY *v.* CITY OF EUGENE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 683.

No. 01–8288. EDWARDS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8289. OBADELE, AKA BEN-YAHWEH *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1099.

No. 01–8290. BOLER *v.* SPARKMAN, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 01–8291. BEDELL *v.* GORCZYK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 268.

No. 01–8292. THOMAS-WALKER *v.* GEMALA TRAILER CORP. C. A. 8th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 488.

No. 01–8293. YOUNG-BEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 136 Md. App. 731.

No. 01–8294. WORSHAM *v.* MINYARD FOOD STORES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–8295. CUNNINGHAM *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–8296. POLLARD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–8299. MERRILL *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8302. BELSER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 702.

No. 01–8303. RAINEY *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 01–8304. SMITH *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–8307. BAIN *v.* DUGGER ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8314. JOHNSON *v.* ROBINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 298.

No. 01–8315. MANLEY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 756 N. E. 2d 1092.

No. 01–8319. SANDERS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 799 So. 2d 1029.

No. 01–8328. TAYLOR *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8329. WOODFORD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 752 N. E. 2d 1278.

No. 01–8330. THACKER *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 01–8331. GEFFKEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 800 So. 2d 613.

No. 01–8332. CORTHRON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 43.

No. 01–8334. BELL *v.* PIERSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 267 F. 3d 544.

No. 01–8335. LAKE *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 14 Fed. Appx. 126.

No. 01–8338. ALLEN *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1063.

No. 01–8344. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 779 So. 2d 459.

No. 01–8347. HANCOCK *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 01–8348. HAYNES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8358. HOLM *v.* WASHINGTON STATE PENITENTIARY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 704.

No. 01–8361. CARTER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 265 F. 3d 705.

No. 01–8366. ROSS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 146.

No. 01–8367. MOOTS *v.* FOLSOM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8368. SMITH *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 135.

No. 01–8369. MCCLOM *v.* GRAMLEY. C. A. 7th Cir. Certiorari denied.

No. 01–8373. TAYLOR *v.* WADDLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153.

No. 01–8374. VARGAS *v.* JORGENSEN. Sup. Ct. Iowa. Certiorari denied. Reported below: 627 N. W. 2d 550.

No. 01–8378. JONES *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–8382. TOLBERT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8383. DORSEY *v.* CHAPMAN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 262 F. 3d 1181.

No. 01–8385. COX *v.* LINDSEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8390. SCOTT *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 858.

No. 01–8391. JACKSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8394. SIMS *v.* WARD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–8395. MONTOYA *v.* SHEARIN, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 578.

No. 01–8396. CRIM *v.* CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL. Sup. Ct. Conn. Certiorari denied.

No. 01–8398. BASILIO *v.* CAMRAY DEVELOPMENT & CONSTRUCTION CO., INC., ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 01–8399. CASEY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1107.

No. 01–8400. BOWMAN *v.* BEASLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 Fed. Appx. 175.

No. 01–8403. JACKSON *v.* LOBUE. Sup. Ct. Del. Certiorari denied. Reported below: 788 A. 2d 528.

No. 01–8404. BEN YISRAYL, AKA CANNON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 744.

No. 01–8407. BORSELLINO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–8442. DOOSE *v.* FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 470.

No. 01–8444. SHABAZZ *v.* MATESANZ, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 01–8447. ENGBERG *v.* WYOMING ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 265 F. 3d 1109.

No. 01–8449. BYRAM *v.* SOUTH CAROLINA. Ct. Common Pleas of Richland County, S. C. Certiorari denied.

No. 01–8457. MUELLER *v.* KANSAS; and MUELLER *v.* ROBERTS, WARDEN, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 271 Kan. 897, 27 P. 3d 884 (first judgment).

No. 01–8470. THOMAS *v.* RICE. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 58 S. W. 3d 562.

No. 01–8490. FLYNN *v.* BERLAND, JUDGE, CIRCUIT COURT OF ILLINOIS, COOK COUNTY. C. A. 7th Cir. Certiorari denied.

No. 01–8506. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–8542. DANNESKJOLD *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 17 Fed. Appx. 963.

No. 01–8548. ALVES *v.* MATESANZ, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 01–8590. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–8648. FISH *v.* MURPHY, CLERK, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 480.

No. 01–8653. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–8691. PAUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 274 F. 3d 155.

No. 01–8697. GONZALEZ-BUSTAMANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 546.

No. 01–8719. ZARRILLI *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 14 Fed. Appx. 7.

No. 01–8723. HENDERSON *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 262 F. 3d 615.

No. 01–8744. SERAFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8745. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8749. OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8750. PETERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8751. BRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8756. CLARK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 28 Fed. Appx. 34.

No. 01–8757. DILALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8759. BONILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–8760. DURAN-GARRIDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 904.

No. 01–8761. CHILDRESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 139.

No. 01–8762. AGUILAR CASTANEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8765. CHAMBERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1285.

No. 01–8766. KUBINSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 101.

No. 01–8770. MCDONALD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 265 F. 3d 337.

No. 01–8771. PEREZ-RUELAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–8773. LAWSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 686.

No. 01–8774. MOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–8776. HOLTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 574.

No. 01–8777. HARPER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–8786. DECARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–8787. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 67.

No. 01–8788. BRACKETT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 270 F. 3d 60.

No. 01–8789. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8790. HUTCHINS *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1278.

No. 01–8792. GRAHAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 634.

No. 01–8795. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 510.

No. 01–8797. WHITNEY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 55 M. J. 413.

No. 01–8799. FINNEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 225.

No. 01–8801. BROWN *v.* LITSCHER, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 01–8802. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 182.

No. 01–8804. SANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 150.

No. 01–8807. NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 151.

No. 01–8812. SOTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 269 F. 3d 761.

No. 01–8814. LACHNER *v.* OHIO. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 01–8817. CALLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 434.

No. 01–8818. LICHTMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–8823. ABDULLAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–8826. BARBER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8827. TORRES ARROYO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8829. TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8835. LORA *v.* WINN, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 01–8837. SUDDY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8839. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 263 F. 3d 160.

No. 01–8841. LONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 158.

No. 01–8842. LOPEZ, AKA GARCIA, AKA QUIONONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 127.

No. 01–8844. BURTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8845. RAINWATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–8846. BILLUPS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8848. MONIGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8849. MEDRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–8851. GONZALEZ CARDENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 890.

No. 01–8854. MOODY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 123.

No. 01–8856. GARCIA-BALCAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–8857. GROOMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 165.

No. 01–8863. PACHECO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 89.

No. 01–8866. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 15 Fed. Appx. 37.

No. 01–8867. MANUEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 451.

No. 01–8869. ABRAHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8870. BARTELHO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 13 Fed. Appx. 12.

No. 01–8871. SHIVERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1088.

No. 01–8872. MOBLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 208.

No. 01–8873. ORTIZ ALVEAR *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 21 Fed. Appx. 27.

No. 01–8878. BELL *v.* OHIO ADULT PAROLE AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 478.

No. 01–8879. OCHOA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 883.

No. 01–8881. STAFFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 258 F. 3d 465.

No. 01–8883. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 275 F. 3d 371.

No. 01–8884. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–8885. SALAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8886. BLACKWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8896. JARRETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 266 F. 3d 789.

No. 01–8898. NGUYEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 855.

No. 01–8899. PUSKAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8901. OUNIGIAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 225.

No. 01–8902. SULUKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 120.

No. 01–8903. SCOTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 270 F. 3d 30.

No. 01–8904. RODRIGUEZ-MONTOYA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 249.

No. 01–8907. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–8908. MARMOLEJO-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–8912. SERRATO-BELMONTEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–8913. RODRIGUEZ-MARTINEZ *v.* UNITED STATES; and CASILLAS-OROSCO, AKA CASILLAS-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–8921. HAMILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 263 F. 3d 645.

No. 01–8926. HARDY, AKA HARDIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 8 Fed. Appx. 601.

No. 01–8927. CHAVEZ-CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–8929. COVER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 22 Fed. Appx. 72.

No. 01–8932. CORIA-VIEYRA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 185.

No. 01–8933. GAINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–8938. MAYFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8940. PERRY *v.* LAMANNA, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 422.

No. 01–8946. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8949. BURRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 777.

No. 01–8952. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–8954. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 198.

No. 01–8958. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1284.

No. 01–8960. BUSHYHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 3d 905.

No. 01–8961. KRIENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 597.

No. 01–8963. SKELTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 443.

No. 01–8965. CORTEZ-IBARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 151.

No. 01–8966. TRUESDALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–8967. WELLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–8974. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–8976. SNYDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 212.

No. 01–8977. GAMBLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 225.

No. 01–8978. HERNANDEZ-JAIMEZ *v.* UNITED STATES; and HERNANDEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–8979. GRAVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 860.

No. 01–8980. GREENFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 1 Fed. Appx. 225.

No. 01–8984. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 161.

No. 01–8992. GARCIA-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1082.

No. 01–9003. DEAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 929.

No. 01–9008. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9019. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153.

No. 01–9021. EADDY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9022. MCCABE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 588.

No. 01–9023. NEWSOME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 56.

No. 01–9026. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–9030. MOODY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 264 F. 3d 1142.

No. 01–9031. SALINAS-CALDERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–9032. SOLIS-NAVARRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 930.

No. 01–9033. SPEARS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 396.

No. 01–9034. BURTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 152.

No. 01–9035. PATTERSON *v.* KONTEH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9042. BLOOME *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 20 Fed. Appx. 24.

No. 01–9047. ALVAREZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 156.

No. 01–9049. VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 23 Fed. Appx. 21.

No. 01–9052. CLOUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1283.

No. 01–9053. ESTRADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 814.

No. 01–9054. CONDE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 01–9059. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 574.

No. 01–9066. GURRUSQUIETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–9067. CAMPOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9068. CHRISTOFERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9073. SOLOMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1108.

No. 01–9076. WARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 502.

No. 01–9078. WYCKHOUSE *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9079. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 255 F. 3d 540.

No. 01–9082. BRIGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 547.

No. 01–9084. MARTINEZ-ALCARAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–9085. PARKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 267 F. 3d 839.

No. 01–9086. CALIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9212. MILLER *v.* FRANCIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 269 F. 3d 609.

No. 00–1860. MEMORIAL HOSPITALS ASSN. *v.* HUMPHREY. C. A. 9th Cir. Motion of respondent to strike supplemental brief of petitioner denied. Certiorari denied. Reported below: 239 F. 3d 1128.

No. 01–798. HEAD, WARDEN *v.* ROMINE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 253 F. 3d 1349.

No. 01–942. DELAWARE *v.* ATKINSON. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 778 A. 2d 1058.

No. 01–1354. OHIO *v.* WASHINGTON. Ct. App. Ohio, Cuyahoga County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 144 Ohio App. 3d 482, 760 N. E. 2d 866.

No. 01–983. LEGGETT *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to file sealed order under seal granted. Certiorari denied.

No. 01–1125. GREAT LAKES DREDGE & DOCK CO. ET AL. *v.* COMMERCIAL UNION INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 260 F. 3d 789.

No. 01–1136. CAMP *v.* WAL-MART STORES, INC. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 01–1326. KRIVACSKA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Motion of Scientists Concerned for Reliability of Children's Reports for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 341 N. J. Super. 1, 775 A. 2d 6.

No. 01–1355. PALMER *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to file presentence investigation report under seal granted. Certiorari denied. Reported below: 248 F. 3d 569.

No. 01–8775. COLEMAN *v.* BAGLEY, WARDEN. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 00–1842. STATOIL ASA *v.* HEEREMAC V. O. F. ET AL., 534 U. S. 1127;

No. 00–10432. WHITE *v.* FLORIDA, 534 U. S. 857;

No. 00–10506. SHELTON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 862;

No. 00–10570. HOGAN *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., 534 U. S. 866;

No. 00–10671. FACUNDO *v.* HOLDER, WARDEN, ET AL.; FACUNDO *v.* UNITED STATES PAROLE COMMISSION; and FACUNDO *v.* DRUG ENFORCEMENT ADMINISTRATIVE AGENCY, 534 U. S. 872;

No. 00–10805. ROGERS *v.* TEXAS, 534 U. S. 880;

No. 01–175. WILLIAMS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL. *v.* UNITED STATES, *ante*, p. 911;

No. 01–844. JACKSON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL., 534 U. S. 1156;

No. 01–913. JACOBS *v.* RICE COUNTY, MINNESOTA, 534 U. S. 1134;

No. 01–1055. ROSANO *v.* UNITED STATES, 534 U. S. 1135;

No. 01–5178. SHERMAN *v.* ILLINOIS, 534 U. S. 907;

No. 01–5862. SILVERA *v.* ORANGE COUNTY SCHOOL BOARD, 534 U. S. 976;

No. 01–6838. WEST *v.* UTAH NON-PROFIT HOUSING CORP., 534 U. S. 1087;

No. 01–6909. HOLT *v.* UNITED STATES, 534 U. S. 1050;

No. 01–6952. NEWMAN *v.* ALLSTATE INSURANCE CO. ET AL., 534 U. S. 1092;

No. 01–6995. CHANEY *v.* CHICAGO TRANSIT AUTHORITY, 534 U. S. 1093;

No. 01–7052. MCDERMOTT *v.* INTERNAL REVENUE SERVICE ET AL., 534 U. S. 1106;

No. 01–7077. TAITT *v.* WHITECO INDUSTRIES, 534 U. S. 1136;

No. 01–7082. DASSENT *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., 534 U. S. 1106;

No. 01–7312. RICHARDSON *v.* FEDERAL BUREAU OF INVESTIGATION, 534 U. S. 1108;

No. 01–7351. MOSSERI *v.* FLORIDA ET AL., 534 U. S. 1143;

No. 01–7371. TINKER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 534 U. S. 1144;

No. 01–7531. MERCER *v.* UNITED STATES, 534 U. S. 1150; and

No. 01–7651. RASTEN *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *ante*, p. 908. Petitions for rehearing denied.

No. 99–1996. J. E. M. AG SUPPLY, INC., DBA FARM ADVANTAGE, INC., ET AL. *v.* PIONEER HI-BRED INTERNATIONAL, INC., 534 U. S. 124. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 01–5355. JONES *v.* UNITED STATES, 534 U. S. 974; and

No. 01–5811. CURRY *v.* JOHNSON, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., 534 U. S. 975. Motions for leave to file petitions for rehearing denied.

APRIL 22, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1936. NEWKIRK *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 252 F. 3d 1363.

No. 00–8114. MENTO *v.* UNITED STATES. C. A. 4th 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 *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 231 F. 3d 912.

No. 01–571. TAMPICO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 265 F. 3d 1059.

No. 01–805. FOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 248 F. 3d 394.

No. 01–836. O'CONNOR *v.* UNITED STATES. C. A. Armed Forces. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 56 M. J. 141.

No. 01–1058. PEEBLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 275 F. 3d 46.

No. 01–7495. SNOW *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 *Ashcroft* v. *Free Speech Coalition*, *ante*, p. 234. Reported below: 275 F. 3d 45.

Certiorari Dismissed

No. 01–8496. FORDJOUR *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506

U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–8601. MAYBERRY *v.* BURGHUIS. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–8793. GIBBS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 21 Fed. Appx. 813.

Miscellaneous Orders

No. D–2298. IN RE DISCIPLINE OF WEISS. Jeffrey Steven Weiss, of Pittsburgh, Pa., 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–2299. IN RE DISCIPLINE OF GAVLICK. Jean Gilroy Gavlick, of Wyomissing, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 01M48. MATNEY *v.* BATTLES, WARDEN; and
No. 01M50. BUELL *v.* MITCHELL, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01M49. KEARSE *v.* BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 01–1179. BANK OF AMERICA, N. A., INDIVIDUALLY, AND AS SUCCESSOR TO SECURITY PACIFIC NATIONAL BANK *v.* ABRAHAM ET AL.; and
No. 01–1187. NORCAL WASTE SYSTEMS, INC., ET AL. *v.* ABRAHAM ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 01–9270. PARIS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* de-

nied. Petitioner is allowed until May 13, 2002, 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. 01–9279. IN RE LAMP;
No. 01–9280. IN RE JERRY-EL;
No. 01–9290. IN RE WREN;
No. 01–9311. IN RE BEAUMONT;
No. 01–9325. IN RE WARD; and
No. 01–9367. IN RE SMITH. Petitions for writs of habeas corpus denied.

No. 01–8973. IN RE SHEMONSKY. Petition for writ of mandamus denied.

No. 01–8868. IN RE BRETON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 01–1067. UNITED STATES *v.* WHITE MOUNTAIN APACHE TRIBE. C. A. Fed. Cir. Certiorari granted. Reported below: 249 F. 3d 1364.

No. 01–1118. SCHEIDLER ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.; and
No. 01–1119. OPERATION RESCUE *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. C. A. 7th Cir. Motions of People for Ethical Treatment of Animals, Inc., Seamless Garment Network et al., and Life Legal Defense Foundation for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition in No. 01–1118, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 267 F. 3d 687.

No. 01–9094. ABDUR'RAHMAN *v.* BELL, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition.

Certiorari Denied

No. 01–1060. BISHOP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 264 F. 3d 535.

No. 01–1075. UNITED STATES EX REL. GALE *v.* ZENITH DATA SYSTEMS. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 3d 1154.

No. 01–1146. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, ET AL. *v.* WALCHER & FOX, INC.; and

No. 01–1337. WALCHER & FOX, INC. *v.* INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 270 F. 3d 1018.

No. 01–1181. GERNETZKE ET AL. *v.* KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 274 F. 3d 464.

No. 01–1183. GPM GAS CORP. ET AL. *v.* UNITED STATES EX REL. GRYNBERG. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–1192. WILSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 249 Ga. App. 560, 549 S. E. 2d 418.

No. 01–1193. YOUNGBLOOD *v.* HY-VEE FOOD STORES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 266 F. 3d 851.

No. 01–1194. SMALDONE *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 273 F. 3d 133.

No. 01–1195. CARTER ET AL. *v.* ENGINEERED PRODUCTS CO. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 716.

No. 01–1201. CITY OF LAKEWOOD *v.* FAIR HOUSING FOUNDATION OF LONG BEACH. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 3d 1114.

No. 01–1202. JACKSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 01–1204. EPSTEIN ET AL. *v.* MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 785 A. 2d 625.

No. 01–1210. GARCIA ET AL. *v.* WESTERN UNION FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 267 F. 3d 743.

No. 01–1217. SCHLICHTMANN *v.* CADLE CO. C. A. 1st Cir. Certiorari denied. Reported below: 267 F. 3d 14.

No. 01–1221. OLMSTEAD *v.* WALTER INDUSTRIES, INC., DBA MID STATE HOMES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1087.

No. 01–1239. JOHNSON *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 25 Fed. Appx. 32.

No. 01–1241. LIBERTY NATIONAL LIFE INSURANCE CO. *v.* MOORE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 267 F. 3d 1209.

No. 01–1278. RICHARD *v.* MIKE HOOKS, INC. Sup. Ct. La. Certiorari denied. Reported below: 799 So. 2d 462.

No. 01–1282. WILLIAMS *v.* JAGLOWSKI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 269 F. 3d 778.

No. 01–1286. HARRIS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 01–1288. FERNANDES *v.* SPARTA TOWNSHIP COUNCIL ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–1309. FORTINI *v.* MURPHY. C. A. 1st Cir. Certiorari denied. Reported below: 257 F. 3d 39.

No. 01–1338. HILVETY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 475.

No. 01–1347. MCS MANAGEMENT, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 25 Fed. Appx. 957.

No. 01–1349. POTOMAC CORP. *v.* SWINTON. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 3d 794.

No. 01–1400. TRAMMELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 658.

No. 01–1405. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–1409. AVALOS-BARRIGA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 626.

No. 01–1414. SUED JIMENEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 275 F. 3d 1.

No. 01–1422. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 271 F. 3d 1262.

No. 01–7693. LEWIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 334, 28 P. 3d 34.

No. 01–7776. WRINKLES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 749 N. E. 2d 1179.

No. 01–7858. HATTEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8405. STRAUGHN *v.* KIMMY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1107.

No. 01–8408. BORDNER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 53 S. W. 3d 179.

No. 01–8412. ARMSTRONG *v.* LEBOWITZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 17 Fed. Appx. 55.

No. 01–8415. MCBROOM *v.* COLUMBIA GAS OF OHIO, INC. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 01–8421. LEWIS *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1373.

No. 01–8426. MACKINTRUSH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 346 Ark. xx.

No. 01–8427. LIPPETT *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8428. LAINFIESTA *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 253 F. 3d 151.

No. 01–8430. TINSLEY *v.* MILLION, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8431. DAVIS *v.* DAVIS. Super. Ct. Henry County, Ga. Certiorari denied.

No. 01–8439. MCGEE *v.* HILDEBRAND. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 582.

No. 01–8448. SHABAZZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–8450. STEVENS *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 779.

No. 01–8458. MCCORD *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 795 So. 2d 101.

No. 01–8459. DRURY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8460. COWAN *v.* PHILLIPS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8461. PARKS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 751 N. E. 2d 351.

No. 01–8466. SWAILS *v.* GEORGIA STATE BOARD OF PARDONS AND PAROLE ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8469. WILLIAMS *v.* MERKLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8471. ROMANO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 282 App. Div. 2d 764, 724 N. Y. S. 2d 348.

No. 01–8472. MENDOZA *v.* BUCHER. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 687.

No. 01–8473. PARRILLA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 285 App. Div. 2d 157, 730 N. Y. S. 2d 301.

No. 01–8474. BROWN *v.* KENNEDY. Super. Ct. Ware County, Ga. Certiorari denied.

No. 01–8475. CALDWELL *v.* CAHILL-MASCHING, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 411.

No. 01–8483. GALLAMORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 43.

No. 01–8485. PEOPLES *v.* DOOLAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 388.

No. 01–8486. BAGLEY *v.* VANCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 135.

No. 01–8487. MCFARLAND *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8489. HILL *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 768.

No. 01–8493. HADLEY *v.* TAYLOR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 517.

No. 01–8494. HILTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8497. HIRSCH *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8498. HOLCOMB *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–8499. GORDON *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–8500. HERNANDEZ *v.* CANDELARIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8501. GROSS *v.* KUPEC, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 247.

No. 01–8502. KHAALID, AKA JONES *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 259 F. 3d 975.

No. 01–8504. HILL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 796 So. 2d 536.

No. 01–8520. SONTCHI *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8522. NADDI *v.* LAMARQUE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 537.

No. 01–8523. IN RE PELLEGRINO. C. A. 8th Cir. Certiorari denied.

No. 01–8524. PILARCZYK *v.* AYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 939.

No. 01–8526. DEVIEUX *v.* DELAWARE DIVISION OF FAMILY SERVICES ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 788 A. 2d 527.

No. 01–8530. SPURGEON *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 01–8533. WOODS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 01–8535. TRACY *v.* ADDISON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 928.

No. 01–8543. DUMAS *v.* JURY SELECTION COMMISSION OF LEBANON COUNTY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 780 A. 2d 805.

No. 01–8545. ANDERSON *v.* LAMBERT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 01–8560. NOBLES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 786 So. 2d 56.

No. 01–8571. BARNES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 346 Ark. 91, 55 S. W. 3d 271 and 65 S. W. 3d 389.

No. 01–8575. JONES *v.* BRYANT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 699.

No. 01–8584. SMITH *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–8586. MOORE *v.* JACKSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 517.

No. 01–8589. MOORE *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–8591. QUINT *v.* A. E. STALEY MANUFACTURING CO. C. A. 1st Cir. Certiorari denied. Reported below: 246 F. 3d 11.

No. 01–8609. PRICE *v.* SUTTON. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 130.

No. 01–8619. BOWEN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 01–8650. SODDU *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8651. KOWAL *v.* RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 01–8662. SODEN *v.* ROLLINS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–8663. EARLY *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 886.

No. 01–8670. WYNN *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8672. WEBBER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8677. FRIERSON *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 17 Fed. Appx. 975.

No. 01–8695. MALONE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8705. WELCH *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 146.

No. 01–8713. SAHU *v.* MAYO FOUNDATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 9 Fed. Appx. 575.

No. 01–8730. SELLARS *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 187.

No. 01–8739. BARBER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 795 So. 2d 60.

No. 01–8754. CARROLL *v.* HUCKABEE, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 398.

No. 01–8755. BRAXTON *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8778. GARNER *v.* BELL, SUPERINTENDENT, PENDER CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied.

No. 01–8784. LEARY *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 149.

No. 01–8791. HUMPHREY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 01–8815. MARSHALL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 60 S. W. 3d 513.

No. 01–8832. COOK *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 97.

No. 01–8836. SMITH *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 221.

No. 01–8852. DIBENEDETTO *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION-NORFOLK, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 272 F. 3d 1.

No. 01–8858. K. F. *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 01–8876. MILLS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 139 Md. App. 747.

No. 01–8890. PERKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8893. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8894. JACKSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8918. HARDEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8919. FOWLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8931. COX-BEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8936. KRIEBEL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 01–8944. BIRDOW *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8996. GAYLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 98.

No. 01–8997. BUNDY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8999. COPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 414.

No. 01–9006. JOSEPH, AKA SHANE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 805 So. 2d 807.

No. 01–9012. BEAUMONT *v.* HOLT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 01–9039. ZINN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 25 Fed. Appx. 962.

No. 01–9043. WILLIAMS-MAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9062. HOUSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 760.

No. 01–9063. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 275 F. 3d 490.

No. 01–9069. SWAYZER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 266.

No. 01–9098. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 491.

No. 01–9099. LOPEZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–9100. JIMENEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 62.

No. 01–9105. PETERSEN, AKA BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 193.

No. 01–9110. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9115. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153.

No. 01–9116. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–9118. TREVINO GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 128.

No. 01–9125. STARKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 396.

No. 01–9134. HORTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 805 So. 2d 807.

No. 01–9138. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9141. HOOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9144. FINNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 166.

No. 01–9145. GHOLSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 52.

No. 01–9150. LORENZANA-QUIROZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 900.

No. 01–9155. WALTON, AKA MURIEL, AKA WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 195.

No. 01–9159. GALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1361.

No. 01–9162. FAVORS *v.* PATRICK. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1085.

No. 01–9164. FERMIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 13 Fed. Appx. 60.

No. 01–9181. MCHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 297.

No. 01–9184. POTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 289.

No. 01–9185. DIAZ NIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–9187. CHARLES *v.* LAMANNA, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 545.

No. 01–9189. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 97.

No. 01–9190. MENDOZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9191. CRUZ-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 159.

No. 01–9192. COLLUMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–9194. HUFFLER, aka ARTHUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–9197. VELEZ BELCAZAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1283.

No. 01–9201. BACCHUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–9210. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 222.

No. 01–9211. MCKEITHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 279.

No. 01–9214. STUBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 109.

No. 01–9216. STRANGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 715.

No. 01–9217. SINGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1283.

No. 01–9226. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 225.

No. 01–9227. FERREIRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1020.

No. 01–9229. GOMEZ-FUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 602.

No. 01–9232. DESUMMA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 272 F. 3d 176.

No. 01–9241. MCKAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 274 F. 3d 755.

No. 01–9247. HERNANDEZ-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 154.

No. 01–9250. FITCH, aka KRAUSE, aka O'HARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 888.

No. 01–9251. HIGH ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 396.

No. 01–9253. GWIAZDZINSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9255. TATUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 156.

No. 01–9256. TWITTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 934.

No. 01–9258. BROWN *v.* FLEMING, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 01–9259. MARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 817.

No. 01–9262. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1284.

No. 01–9266. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 1069.

No. 01–9267. DAVENPORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 338.

No. 01–9271. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 635.

No. 01–9275. MALDONADO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9276. LEDEZMA-AMEZQUITA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 645.

No. 01–9278. MADEJ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 200.

No. 01–9281. PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 239.

No. 01–9282. OLASEBIKAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9288. THROWER *v.* MENGEL, CLERK, SUPREME COURT OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 490.

No. 01–9295. FITCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–9296. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 704.

No. 01–9299. FERNANDEZ-MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–9304. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 207.

No. 01–9305. ARMENDARIZ-BUSTAMANTE, AKA RAMIREZ, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 281.

No. 01–9307. ORTIZ RAMIREZ *v.* UNITED STATES; ZAVALA-ESPARZA *v.* UNITED STATES; and NUNEZ-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153.

No. 01–9319. TORRES-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1083.

No. 01–9324. TILLMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–1053. ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON *v.* MATHENEY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 253 F. 3d 1025.

Rehearing Denied

No. 01–5413. OLUFEMI *v.* DEKALB COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, 534 U. S. 1084;

No. 01–6575. MELENDEZ *v.* UNITED STATES, 534 U. S. 1030;

No. 01–6861. THOMAS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1088;

No. 01–7167. WILLIAMS *v.* NEWLAND, WARDEN, 534 U. S. 1138;

No. 01–7204. BENNINGS *v.* CONNECTICUT DEPARTMENT OF CORRECTIONS ET AL., 534 U. S. 1139;

No. 01–7434. KING *v.* NORTH CAROLINA, 534 U. S. 1147;

No. 01–8047. PEREZ *v.* UNITED STATES, *ante*, p. 910; and

No. 01–8174. IN RE COX, *ante*, p. 904. Petitions for rehearing denied.

APRIL 24, 2002

Certiorari Denied

No. 01–9463 (01A800). COLEMAN *v.* BAGLEY, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 268 F. 3d 417.

No. 01–9775 (01A801). COLEMAN *v.* OHIO. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 95 Ohio St. 3d 284, 767 N. E. 2d 677.

APRIL 25, 2002

Miscellaneous Orders

No. 01–9874 (01A816). IN RE COLEMAN. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 01–9875 (01A817). IN RE COLEMAN. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 01–9873 (01A815). COLEMAN *v.* COYLE, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 37 Fed. Appx. 134.

APRIL 26, 2002

Dismissal Under Rule 46

No. 01–8406. WILLIAMS *v.* HEAD, WARDEN. Sup. Ct. Ga. Certiorari dismissed under this Court's Rule 46.

APRIL 29, 2002

Certiorari Dismissed

No. 01–8606. JAMES *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and

certiorari dismissed. See this Court's Rule 39.8. Reported below: 807 So. 2d 654.

*Miscellaneous Orders**

No. 01A701. BURNETTE *v.* UNITED STATES. Application for release, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 01A729. THOMPSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–2300. IN RE DISCIPLINE OF BOBROW. Stuart Joseph Bobrow, of Glenview, 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–2301. IN RE DISCIPLINE OF LEO. Robert Samuel Leo, of Winchester, 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–2302. IN RE DISCIPLINE OF GILLILAND. John D. Gilliland, of Dallas, 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.

No. D–2303. IN RE DISCIPLINE OF WRIGHT. K. Anthony Wright, of Lubbock, 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.

No. D–2304. IN RE DISCIPLINE OF HALPERN. Marsha M. Halpern, of Dallas, Tex., is suspended from the practice of law in

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*For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1125; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1141; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1149; and amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1159.

this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2305. IN RE DISCIPLINE OF FREJLICH. Robert J. Frejlich, of Hinsdale, 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. 01M51. JAMES *v.* UNITED STATES;
No. 01M52. PIECZENIK *v.* DYAX CORP.; and
No. 01M53. POLYAK *v.* HULEN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01–9411. IN RE LONGIE;
No. 01–9460. IN RE WALKER;
No. 01–9462. IN RE PRADO;
No. 01–9478. IN RE BELL;
No. 01–9480. IN RE HINES;
No. 01–9481. IN RE HUBBARD; and
No. 01–9489. IN RE GRUBBS. Petitions for writs of habeas corpus denied.

No. 01–1438. IN RE BILYEU. Petition for writ of mandamus denied.

Certiorari Granted

No. 01–1229. PIERCE COUNTY, WASHINGTON *v.* GUILLEN, LEGAL GUARDIAN OF GUILLEN ET AL., MINORS, ET AL. Sup. Ct. Wash. Motions of International Municipal Lawyers Association and Association of American Railroads for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 144 Wash. 2d 696, 31 P. 3d 628.

Certiorari Denied

No. 01–941. 20TH CENTURY INSURANCE CO. *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 90 Cal. App. 4th 1247, 109 Cal. Rptr. 2d 611.

No. 01–1069. GRIFFIN *v.* CITY OF OPA LOCKA ET AL.; and

No. 01–1238. CITY OF OPA LOCKA *v.* GRIFFIN. C. A. 11th Cir. Certiorari denied. Reported below: 261 F. 3d 1295.

No. 01–1074. GILMORE *v.* GENERAL ELECTRIC CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 492.

No. 01–1211. FISHER *v.* GIBSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 262 F. 3d 1135.

No. 01–1222. SMITH *v.* TALLAHASSEE DEMOCRAT ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 795 So. 2d 64.

No. 01–1228. MORGAN, SUPERINTENDENT, STATE INSTITUTION AT SMITHFIELD, ET AL. *v.* ACKERIDGE. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 575.

No. 01–1232. KAUFMAN ET AL. *v.* ALLIED PILOTS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 274 F. 3d 197.

No. 01–1235. OHIO *v.* BURNETT. Sup. Ct. Ohio. Certiorari denied. Reported below: 93 Ohio St. 3d 419, 755 N. E. 2d 857.

No. 01–1236. NORTON *v.* CATANESE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1110.

No. 01–1244. GREENWELL *v.* AZTAR INDIANA GAMING CORP. C. A. 7th Cir. Certiorari denied. Reported below: 268 F. 3d 486.

No. 01–1249. LONG WARRIOR *v.* BOXX. C. A. 9th Cir. Certiorari denied. Reported below: 265 F. 3d 771.

No. 01–1251. COOK *v.* CLEVELAND STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 320.

No. 01–1252. LYONS *v.* SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 01–1253. DOSS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 01–1257. Z. G. *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY DIVISION, ET AL. Ct. App. D. C. Certiorari denied.

No. 01–1258. GULLA ET AL. *v.* NORTH STRABANE TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 259 F. 3d 716.

No. 01–1259. GOELZ *v.* PAUL REVERE LIFE INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 76.

No. 01–1264. JAE-WOO CHA *v.* KOREAN PRESBYTERIAN CHURCH OF WASHINGTON ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 262 Va. 604, 553 S. E. 2d 511.

No. 01–1287. HUYOT-RENOIR *v.* FLUSSER ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 276 App. Div. 2d 697, 714 N. Y. S. 2d 344.

No. 01–1293. RENTTO *v.* JUSTUS. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 733.

No. 01–1294. SOON GUAN LEE ET UX. *v.* RODGERS. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 548.

No. 01–1320. ODINKEMELU *v.* WILLIAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 136.

No. 01–1359. ARMOUR *v.* K. D. G. ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 262 Neb. 775, 635 N. W. 2d 256.

No. 01–1407. MONZON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 253 F. 3d 567.

No. 01–1432. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–1434. NG, AKA ENG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 452.

No. 01–1443. WEATHERSPOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 249.

No. 01–1451. COLLETTI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 439.

No. 01–7396. MEAIS, AKA BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 132.

No. 01–7449. CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–7468. ROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 244.

No. 01–7481. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 700.

No. 01–7521. DUFORT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1114.

No. 01–8013. SEATON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 598, 28 P. 3d 175.

No. 01–8119. LEBRON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 799 So. 2d 997.

No. 01–8165. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1147.

No. 01–8540. BROWN *v.* HOBBS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 175.

No. 01–8550. CRITTENDEN *v.* CHUCKAWALLA STATE PRISON. C. A. 9th Cir. Certiorari denied.

No. 01–8551. SANDERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 92 Ohio St. 3d 245, 750 N. E. 2d 90.

No. 01–8554. MARBLY *v.* MAYOR, CITY OF SOUTHFIELD. C. A. 6th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 536.

No. 01–8558. SNYDER *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–8559. SAFOUANE ET UX. *v.* KING COUNTY, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 780.

No. 01–8561. BAILEY *v.* MCCOY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 546.

No. 01–8562. BAKKEN *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8569. SANFORD *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 145 Wash. 2d 116, 34 P. 3d 799.

No. 01–8570. SELF *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 817.

No. 01–8574. LONG *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 01–8580. COOPER *v.* HENRY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 398.

No. 01–8581. VAZQUEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 800 So. 2d 617.

No. 01–8582. WARDEN *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 762.

No. 01–8583. WILLIAMS *v.* WAYNE STATE UNIVERSITY ET AL. Ct. App. Mich. Certiorari denied.

No. 01–8585. OLIVER *v.* TRUE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 114.

No. 01–8588. MOORE *v.* PLASTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 266 F. 3d 928.

No. 01–8592. SWENDRA *v.* SOARES, SUPERINTENDENT, LIMON CORRECTIONAL FACILITY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 923.

No. 01–8594. SCHMIDT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 01–8595. ROBINSON *v.* FIGUEROA, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 45.

No. 01–8600. BEATON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8602. LEE *v.* LAMARQUE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 700.

No. 01–8617. CHANDLER *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 01–8620. WILLIAMS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8622. BISHOP *v.* NEUFELD ET AL. C. A. 10th Cir. Certiorari denied.

No. 01–8625. STROUD *v.* POLLUNSKY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8635. PARRA *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 260 F. 3d 626.

No. 01–8644. LIVINGSTON *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–8647. HALLORINA *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8649. QUIMBY *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 01–8652. JACKSON *v.* MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 260 F. 3d 769.

No. 01–8654. JACKSON *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8656. SAWYER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–8666. TORRES *v.* HUBBARD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 839.

No. 01–8668. WASHINGTON *v.* OKLAHOMA DEPARTMENT OF CORRECTIONS ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 01–8673. OLIVER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. Sup. Ct. Pa. Certiorari denied.

No. 01–8674. PELLEGRINO *v.* WEBER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–8685. FLORES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8694. NADHEERUL-ISLAM *v.* PEPE ET AL. C. A. 1st Cir. Certiorari denied.

No. 01–8700. JOYCE *v.* YATES. C. A. 4th Cir. Certiorari denied.

No. 01–8701. TAYLOR *v.* BASSETT FURNITURE. Sup. Ct. Ga. Certiorari denied.

No. 01–8702. WASHINGTON *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 34 Fed. Appx. 248.

No. 01–8704. WICKWARE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8706. WILLIAMSON *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 01–8707. WILSON *v.* GUNDY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8709. ANUNKA *v.* CAMPBELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 475.

No. 01–8710. SNODDY *v.* HAWKE, COMPTROLLER OF THE CURRENCY. C. A. 10th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 768.

No. 01–8711. CARPENTER *v.* SIZER, DEPUTY COMMISSIONER, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 242.

No. 01–8715. FRIES *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 01–8717. WHEELER *v.* DE LA SIERRA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 776.

No. 01–8720. PIERCE *v.* PRICE, FORMER SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–8729. CONNELLY *v.* LEAHEY & JOHNSON. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 398.

No. 01–8731. ARMSTRONG *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8733. REID *v.* BOONE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 959.

No. 01–8737. MUNOZ *v.* CRAIG A. SMITH & ASSOCIATES. C. A. 11th Cir. Certiorari denied.

No. 01–8740. EARLY *v.* HARMON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 258 F. 3d 797.

No. 01–8742. KATYL *v.* HOSPITAL ASSOCIATION OF NORTHEASTERN PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 577.

No. 01–8764. ABBONDANZO *v.* NEW YORK COMMISSIONER OF LABOR ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 96 N. Y. 2d 713, 754 N. E. 2d 200.

No. 01–8782. OCHOA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 398, 28 P. 3d 78.

No. 01–8806. ROSENBACH *v.* DAVIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–8813. DUGGINS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 776 So. 2d 946.

No. 01–8862. ALFONSO MORALES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 01–8887. RA *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 01–8888. BARAJAS *v.* MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 01–8892. MOORE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 45.

No. 01–8924. HUNT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 839 So. 2d 686.

No. 01–8930. DAVIS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 145 N. C. App. 503, 550 S. E. 2d 281.

No. 01–8955. WINKE *v.* BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P. C. Ct. App. Iowa. Certiorari denied.

No. 01–9132. HAMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 205.

No. 01–9182. KNIGHT *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 101.

No. 01–9224. WEBBER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 56 M. J. 318.

No. 01–9244. PETTY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 634.

No. 01–9248. HERNANDEZ-DIAZ, AKA DIAZ, AKA ALCAROZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 895.

No. 01–9277. LEMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9285. VALENTINE, AKA PORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 213 F. 3d 644.

No. 01–9292. WOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 202.

No. 01–9297. FIMBRES-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 800.

No. 01–9303. BERRY, AKA QUINONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 190.

No. 01–9309. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 171.

No. 01–9310. SAYERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 656.

No. 01–9312. RITCHIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 621.

No. 01–9313. SALAS-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 554.

No. 01–9315. PANNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 696.

No. 01–9329. DARITY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 277.

No. 01–9333. MATHEWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9337. PATTERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 894.

No. 01–9342. ALERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 23 Fed. Appx. 79.

No. 01–9345. LONG *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 794 A. 2d 633.

No. 01–9348. LEATH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 195.

No. 01–9349. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 187.

No. 01–9351. HUBBARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–9353. JAMES, AKA COFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9355. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–9359. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 257 F. 3d 210.

No. 01–9365. SHAKESPEARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1359.

No. 01–9366. SCHAEFER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9370. BRYANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 932.

No. 01–9371. SANDERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9374. BONILLA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 896.

No. 01–9379. PEREZ-CARILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 94.

No. 01–9381. MCGILL *v.* OHIO. Ct. App. Ohio, Greene County. Certiorari denied.

No. 01–9388. ORGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–9392. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 01–9394. BLAYLOCK ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1030.

Rehearing Denied

No. 01–827. PHILLIPS, INDIVIDUALLY AND AS NEXT OF KIN TO PHILLIPS, ET AL. *v.* HILLCREST MEDICAL CENTER ET AL., *ante*, p. 905;

No. 01–5037. LEE *v.* PENN NATIONAL INSURANCE CO., 534 U. S. 899;

No. 01–6104. SHEEHAN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1003;

No. 01–7251. KACZYNSKI *v.* UNITED STATES, *ante*, p. 933;

No. 01–7724. FULTS *v.* GEORGIA, *ante*, p. 908; and

No. 01–8681. IN RE HOWARD, *ante*, p. 953. Petitions for rehearing denied.

No. 00–7455. REED *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 531 U. S. 1164; and

No. 01–6552. DAVIS *v.* VALLEY CARE MEMORIAL HOSPITAL ET AL., 534 U. S. 1048. Motions for leave to file petitions for rehearing denied.

APRIL 30, 2002

Miscellaneous Order

No. 01–9885 (01A825). IN RE BAIZA HERNANDEZ. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 01–9854 (01A811). BAIZA HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 1, 2002

Miscellaneous Order

No. 01A834 (01–9935). MOORE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending 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 terminate upon the issuance of the mandate of this Court.*

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I dissent from the Court's orders of May 1 and May 7, 2002, granting the applications of Curtis Moore and Brian Edward Davis for stay of execution of sentence of death. The Court has entered these stays even though the judgments of the Texas Court of Criminal Appeals from which review is sought dismissed the applicants' habeas petitions on adequate and independent state grounds. In each case, the Court disrupts the State's criminal process to entertain a last-minute claim (unconstitutionality of executing the mentally retarded) that was not raised previously at trial, or in extensive proceedings for direct and collateral re-

*[REPORTER'S NOTE: The following opinion of JUSTICE SCALIA, which also applies to *Davis* v. *Texas*, *post*, p. 1050, was filed on June 3, 2002.]

view. Indeed, in each case even the factual predicate for the new claim (mental retardation) had not been asserted at trial—and in Davis's case had not been asserted even in subsequent proceedings, right up until the day of scheduled execution. The Court's action is unprecedented.

I

The first of these murderers, Curtis Moore, participated in three brutal killings during the course of a drug deal and robbery. One victim was stuffed in the trunk of a car, shot, doused with gasoline, and lit afire. The second victim was driven to his girlfriend's home, where he and the third victim, the girlfriend, were shot dead. Before trial, Moore had discussed with his counsel the possibility of introducing into evidence an IQ test administered to Moore when he was 12 years old, showing a score of 68, a figure within the "mildly retarded" range. Counsel advised Moore that if the defense presented psychological testimony, the State could have an expert witness interview him to determine whether he posed a continuing threat to society. Because a pretrial IQ test (administered at counsel's request) showed a score of 76, within the "normal" range, Moore's counsel believed that introduction of the results of the earlier test would do more harm than good. Moore himself did not believe the earlier test result, insisted he was normal, and told counsel he did not want psychological testimony introduced.

Moore was convicted of capital murder and sentenced to death in November 1996. The Texas Court of Criminal Appeals affirmed, *Moore* v. *State*, No. 72,705 (Apr. 28, 1999). Moore's first state habeas petition alleged trial counsel was ineffective in failing to present evidence of his mental retardation at sentencing. The petition was denied, *Ex parte Moore*, No. C–297–3899–0631559–A (Dist. Ct. Tarrant County, Tex., Sept. 9, 1999), aff'd, No. 42,810–01 (Tex. Crim. App., Nov. 3, 1999). So was his first federal habeas petition, which raised the same claim of ineffective assistance, *Moore* v. *Johnson*, No. 4:99–CV–960–A (ND Tex., July 13, 2000), aff'd *sub nom. Moore* v. *Cockrell*, No. 00–10870 (CA5, Oct. 10, 2001), cert. denied, *ante*, p. 1040. On the day before his scheduled execution, Moore filed a second state habeas petition in which he claimed, for the first time, that his execution would violate the Eighth Amendment because he is mentally retarded. In support of this claim, Moore presented the same evidence that,

in prior habeas petitions, he had claimed his attorney should have presented at sentencing. The Texas Court of Criminal Appeals dismissed the petition as an abuse of the writ under Tex. Code Crim. Proc. Ann., Art. 11.071, § 5(a) (Vernon Supp. 2002), which generally precludes second or subsequent habeas petitions involving claims that could have been raised previously. *Ex parte Moore*, No. 42,810–02 (Apr. 30, 2002). Moore petitioned this Court for a stay of execution pending its decision in *Atkins* v. *Virginia*, No. 00–8452, cert. granted, 533 U. S. 976 (2001).

The second murderer, Brian Edward Davis, was convicted and sentenced to death in June 1992 for a killing during the course of a robbery. The mentally retarded victim was found in his ransacked apartment with a swastika drawn on his abdomen and 11 stab wounds to his neck, chest, abdomen, and back. Although Davis's trial attorney introduced evidence of a learning disability, he did not argue that Davis was mentally retarded. Indeed, a psychologist testified at trial that Davis was *not* mentally retarded, and Davis's score of 74 on a 1984 IQ test placed him in the range of normal intellectual functioning. The Texas Court of Criminal Appeals affirmed Davis's conviction and sentence, *Davis* v. *State*, 961 S. W. 2d 156 (1998), denied his first application for state postconviction relief, *Ex parte Davis*, No. 40,339–01 (Mar. 10, 1999), and dismissed his second state habeas petition as an abuse of the writ, *Ex parte Davis*, No. 40,339–02 (Sept. 13, 2000). After his federal habeas petition was denied, *Davis* v. *Cockrell*, No. 00–CV–852 (SD Tex., Oct. 1, 2001), Davis filed his third state habeas petition, which was likewise dismissed as an abuse of the writ, *Ex parte Davis*, No. 40,339–03 (Tex. Crim. App., Apr. 29, 2002). The Fifth Circuit denied Davis's request for authorization to file a successive federal habeas petition, *In re Davis*, No. 02–20479 (May 6, 2002); we denied his petition for an original writ of habeas corpus, *In re Davis*, *post*, p. 1050. On the day of his scheduled execution, Davis filed a fourth state habeas petition, raising an Eighth Amendment claim, and asserting the fact of mental retardation, for the first time. The Texas Court of Criminal Appeals once again dismissed the petition as an abuse of the writ, and Davis petitioned this Court for a stay of execution pending its decision in *Atkins*, *supra*.

It is apparent on the face of both these applications that the conditions for stay do not exist.

II

A stay is appropriate only when there is a "'reasonable probability'" that four Members of this Court will grant certiorari, a "'significant possibility'" that the Court, after hearing the case, will reverse the decision below, and a "'likelihood'" that the applicant will suffer irreparable harm absent a stay. *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983); see also *Rubin* v. *United States*, 524 U. S. 1301, 1302 (1998) (REHNQUIST, C. J., in chambers); *Edwards* v. *Hope Medical Group for Women*, 512 U. S. 1301, 1302 (1994) (SCALIA, J., in chambers). It is a firm rule that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). That rule applies "whether the state law ground is substantive or procedural," and in the case of direct review of a state-court judgment (which is at issue here) it is jurisdictional. *Ibid.*

The Texas Court of Criminal Appeals dismissed each of these applicants' successive habeas petitions as an abuse of the writ under Tex. Code Crim. Proc. Ann., Art. 11.071, § 5(a) (Vernon Supp. 2002), which declares in relevant part:

> "[A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that . . .
>
> "(1) the current claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; . . . or
>
> . . . . .
>
> "(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711 [which list aggravating and mitigating factors] . . . ."

There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994. See *Barrientes* v. *Johnson*, 221 F. 3d 741, 758–759 (CA5 2000).

Nor could there be a question whether it is independent of federal law. Insofar as § 5(a)(1) is concerned, Texas courts did not pass on any issue of federal law in deciding whether applicants' Eighth Amendment claim was "previously unavailable." A claim is "unavailable" under Texas law only "if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before" the date of the initial habeas application. Art. 11.071, § 5(d). The question whether a particular claim is "reasonably formula[ble]" from federal or state appellate decisions within the meaning of the Texas statute is a question of Texas, not federal, law. To be sure, Texas's answer cannot be so arbitrary or unreasonable as to violate due process, but that is not a problem here. On any assessment, applicants' claim—that execution of the mentally retarded violates the Eighth Amendment—was "available" when applicants filed their first state habeas petitions in 1999. In fact, the claim *was made* in at least two pre-1999 cases before the Texas Court of Criminal Appeals itself. See *Bell* v. *State*, 938 S. W. 2d 35, 55 (1996) (en banc); *Ramirez* v. *State*, 815 S. W. 2d 636, 654–655 (1991) (en banc).

The application of § 5(a)(3) to these cases is similarly independent of federal law. The Texas Court of Criminal Appeals was not required to pass on any federal question in deciding whether "clear and convincing evidence" showed that "but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury." The Eighth Amendment violation that applicants have alleged (failure to exempt the mentally retarded from the death penalty) could not possibly have caused any rational juror to give a different answer to the special issues—viz., whether there is a probability that the defendant would commit criminal acts of violence in the future, Tex. Code Crim. Proc. Ann., Art. 37.071, §§ 2(b)(1), 3(b)(2) (Vernon Supp. 2001), and (in Moore's case only) whether "mitigating circumstances" outweigh aggravating factors, § 2(e)(1). Not only is the constitutional point irrelevant to those issues, but the jury had no cause to think that either applicant was retarded, since neither had asserted mental retardation at trial or in the penalty phase.

The decisions of the Texas Court of Criminal Appeals, then, clearly rest on adequate and independent state grounds. It is equally clear that applicants have neither demonstrated cause for their procedural default nor have raised even a colorable claim of mental retardation. They present the same evidence that their trial attorneys concluded was too insubstantial to support an argument of mental retardation. IQ tests place both applicants above the *highest* cutoff used in state legislation prohibiting execution of the mentally retarded.* Brief for Respondent in *Atkins* v. *Virginia*, O. T. 2001, No. 00–8452, pp. 40–41. And in Davis's case, a psychologist testified at trial that the defendant was *not* mentally retarded. Thus, the specter of a "fundamental miscarriage of justice" (if *Atkins* should proscribe execution of the mentally retarded) could not possibly induce the Court to ignore the adequate and independent state grounds. *Coleman*, *supra*, at 750.

If prior law is to be adhered to, there is no possibility, much less a "significant" one (as the granting of a stay requires), that this Court will reverse the judgments of the Texas Court of Criminal Appeals. And I have not mentioned a further consideration, which should weigh heavily in the present circumstances: The Court "may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) *(per curiam)*. The Court's granting of these stays not only disrupts settled law but invites meritless last-minute applications to disrupt the orderly state administration of the death penalty.

May 3, 2002

Miscellaneous Orders

No. 99–6770 (01A821). Johnson *v.* Maynard, Director, South Carolina Department of Corrections, et al., 528 U. S. 1032. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the

*Moreover, all States prohibiting execution of the mentally retarded require a showing of impairment in adaptive behavior. Brief for Respondent in *Atkins* v. *Virginia*, O. T. 2001, No. 00–8452, pp. 40–41. The psychological evaluation that gave the 12-year-old Moore an IQ score of 68 (which is below the cutoff of some States) found that his adaptive abilities were "'low average.'" Brief in Opposition 3–4 (quoting State Habeas Tr. 67–68).

Court, denied. Motion for leave to file petition for rehearing out of time denied.

No. 01–9881 (01A819). IN RE JOHNSON. 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.

Certiorari Denied

No. 01–9882 (01A820). JOHNSON *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. 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.

MAY 6, 2002

Certiorari Denied

No. 01–9757 (01A798). BAKER *v.* MARYLAND. Ct. App. Md. 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: 367 Md. 648, 790 A. 2d 629.

MAY 7, 2002

Miscellaneous Orders

No. 01A853 (01–10022). DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending 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 terminate upon the issuance of the mandate of this Court.*

No. 01–9982 (01A845). IN RE DAVIS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

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*[REPORTER'S NOTE: For opinion of JUSTICE SCALIA dissenting from grant of application for stay of execution in this case, see *Moore* v. *Texas*, *ante*, p. 1044.]

MAY 8, 2002

Certiorari Denied

No. 01–9572 (01A846). REEVES *v.* COCKRELL, 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: 31 Fed. Appx. 833.

MAY 9, 2002

Rehearing Denied

No. 01–8240. MARTIN *v.* CAIN, WARDEN, *ante*, p. 961. Petition for rehearing denied.

MAY 10, 2002

Miscellaneous Orders

No. 01A878. MARTIN *v.* CAIN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 01–10115 (01A877). IN RE MARTIN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 01–10095 (01A872). MARTIN *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: 815 So. 2d 828.

MAY 13, 2002

Miscellaneous Orders

No. 01M54. MOORE *v.* ARIZONA DEPARTMENT OF TRANSPORTATION/MOTOR VEHICLE DIVISION;

No. 01M55. CHAMBERS *v.* ATTORNEY GRIEVANCE COMMISSION; and

No. 01M56. RANDOLPH *v.* CLINTON ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion of the Special Master for fees and reimbursements of expenses granted, and the Special Master is awarded a total of $20,112.75 for the period October 17, 2001, through April 16, 2002, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 534 U. S. 1103.]

No. 01–1317. ATTORNEY GENERAL OF CANADA *v.* R. J. REYNOLDS TOBACCO HOLDINGS, INC., ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 01–7924. AGUILAR, AKA OZMAN *v.* NEW MEXICO. Dist. Ct. N. M., Bernalillo County. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 953] denied.

No. 01–8895. KELLY *v.* TOWN OF CHELMSFORD. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 3, 2002, 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. 01–9081. IN RE STYRON;
No. 01–9633. IN RE THOMAS;
No. 01–9675. IN RE SHELTON; and
No. 01–9721. IN RE SMITH. Petitions for writs of habeas corpus denied.

No. 01–9727. IN RE SNAVELY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 01–8850. IN RE MERRICKS; and
No. 01–9202. IN RE DAVIS. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 01–939. SWONGER ET AL. *v.* SURFACE TRANSPORTATION BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 265 F. 3d 1135.

No. 01–954. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 305.

No. 01–1128. BLACKARD ET UX., INDIVIDUALLY AND AS PARENTS, LEGAL GUARDIANS, AND NEXT FRIENDS OF BLACKARD, A MINOR *v.* MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 262 F. 3d 568.

No. 01–1133. SINGER ET AL. *v.* CITY OF ALABASTER ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 821 So. 2d 954.

No. 01–1134. MCCARTY ET AL. *v.* MIDWESTERN GAS TRANSMISSION CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 270 F. 3d 536.

No. 01–1135. ARTHUR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 820 So. 2d 886.

No. 01–1139. RICK'S AMUSEMENT, INC., ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 351 S. C. 352, 570 S. E. 2d 155.

No. 01–1144. RENNIE ET AL. *v.* DAVIS. C. A. 1st Cir. Certiorari denied. Reported below: 264 F. 3d 86.

No. 01–1149. MISSOURI RIVER SERVICES, INC. *v.* OMAHA TRIBE OF NEBRASKA. C. A. 8th Cir. Certiorari denied. Reported below: 267 F. 3d 848.

No. 01–1157. MCCOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 264 F. 3d 792.

No. 01–1160. COMPRO-TAX, INC., ET AL. *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1095.

No. 01–1171. BURTON *v.* TAMPA HOUSING AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 271 F. 3d 1274.

No. 01–1182. HARDIN, LEGAL GUARDIAN OF HARDIN, A MINOR *v.* ACTION GRAPHICS, INC. Ct. App. Ky. Certiorari denied. Reported below: 57 S. W. 3d 844.

No. 01–1254. BERNHARDT *v.* SANTA MONICA COLLEGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 545.

No. 01–1261. GRANDSON ET AL. *v.* UNIVERSITY OF MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 568.

No. 01–1263. PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF MISSISSIPPI ET AL. *v.* MABUS. Cir. Ct. Hinds County, Miss. Certiorari denied.

No. 01–1266. UNITED PARCEL SERVICE, INC. *v.* MORTON. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 3d 1249.

No. 01–1271. KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON MASSACHUSETTS, ET AL. *v.* TOWN OF LEXINGTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 272 F. 3d 25.

No. 01–1272. LEVY *v.* SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 263 F. 3d 10.

No. 01–1273. SOUTHERN MANUFACTURED HOMES, INC., ET AL. *v.* BROOKS. Sup. Ct. Ala. Certiorari denied. Reported below: 832 So. 2d 44.

No. 01–1275. HARRIS ET AL. *v.* AKRON DEPARTMENT OF PUBLIC HEALTH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 316.

No. 01–1279. SEACOAST MOTORS OF SALISBURY, INC. *v.* DAIMLERCHRYSLER MOTORS CORP. C. A. 1st Cir. Certiorari denied. Reported below: 271 F. 3d 6.

No. 01–1281. MAXWELL *v.* WYMAN ET VIR. Sup. Ct. Okla. Certiorari denied. Reported below: 39 P. 3d 802.

No. 01–1284. ZANTOP INTERNATIONAL AIRLINES, INC. *v.* MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION. Ct. App. Mich. Certiorari denied.

No. 01–1291. MOWBRAY *v.* CAMERON COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 274 F. 3d 269.

No. 01–1295. BOOKER, CLASS REPRESENTATIVE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 1009.

No. 01–1296. KREISS ET AL. *v.* SALSITZ ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 198 Ill. 2d 1, 761 N. E. 2d 724.

No. 01–1298. PARKVIEW ASSOCIATES PARTNERSHIP ET AL. *v.* CITY OF LEBANON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 578.

No. 01–1299. WATTS *v.* CITY OF NORMAN. C. A. 10th Cir. Certiorari denied. Reported below: 270 F. 3d 1288.

No. 01–1301. SEYMOUR *v.* REESE. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 212.

No. 01–1302. HARPER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–1303. GREEN ET AL. *v.* NORTH ARUNDEL HOSPITAL ASSN., INC., ET AL. Ct. App. Md. Certiorari denied. Reported below: 366 Md. 597, 785 A. 2d 361.

No. 01–1306. FRYE *v.* HICKMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 273 F. 3d 1144.

No. 01–1308. INTRATEC RESOURCE CO. *v.* EL PASO CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 43.

No. 01–1314. VAIZ ET AL. *v.* SOUTHERN MULTIFOODS, INC., ET AL. Sup. Ct. Tex. Certiorari denied.

No. 01–1315. SCALES *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–1319. C. R. BARD, INC. *v.* W. L. GORE & ASSOCIATES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 281 F. 3d 219.

No. 01–1322. DODD ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 347 Ark. 142, 60 S. W. 3d 464.

No. 01–1333. BROOKS *v.* HOWMEDICA, INC., A DIVISION OF PFIZER HOSPITAL PRODUCTS GROUP, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 273 F. 3d 785.

No. 01–1335. STEELE *v.* CITY OF BEMIDJI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 257 F. 3d 902.

No. 01–1336. WISNESKI *v.* LEMARBE. C. A. 6th Cir. Certiorari denied. Reported below: 266 F. 3d 429.

No. 01–1339. HOLLAND, A MINOR, BY AND THROUGH HER NEXT BEST FRIEND AND PARENT, OVERDORFF, ET AL. *v.* HARRINGTON, UNDERSHERIFF OF LA PLATA COUNTY, COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 268 F. 3d 1179.

No. 01–1341. HENSLEY ET AL. *v.* HOME DEPOT U. S. A., INC. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–1344. JO-BET, INC., DBA HENRY THE VIII SOUTH *v.* MICHIGAN LIQUOR CONTROL COMMISSION. Ct. App. Mich. Certiorari denied.

No. 01–1345. CONNOLLY *v.* ENTEX INFORMATION SERVICES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 876.

No. 01–1346. OLICK *v.* JOHN HANCOCK DISTRIBUTORS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 275 F. 3d 35.

No. 01–1348. HUKKANEN-CAMPBELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 274 F. 3d 1312.

No. 01–1352. GENERAL MOTORS CORP. ET AL. *v.* CITY OF SEATTLE. Ct. App. Wash. Certiorari denied. Reported below: 107 Wash. App. 42, 25 P. 3d 1022.

No. 01–1356. BAILEY *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 803 So. 2d 683.

No. 01–1367. BARNETT *v.* DENVER PUBLISHING CO., DBA ROCKY MOUNTAIN NEWS, INC. Ct. App. Colo. Certiorari denied. Reported below: 36 P. 3d 145.

No. 01–1370. DEE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 01–1377. PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS UNION, LOCAL 1737 *v.* INLAND PAPERBOARD & PACKAGING, INC. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 316.

No. 01–1378. LEE *v.* ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 01–1383. CHONG SU YI *v.* YOUNG KI LEE ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 01–1391. SMITH *v.* FRIEDMAN ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 137 Md. App. 785.

No. 01–1394. PAULINE CO., INC., ET AL. *v.* IOWA DEPARTMENT OF TRANSPORTATION. Sup. Ct. Iowa. Certiorari denied. Reported below: 637 N. W. 2d 191.

No. 01–1397. PARADISE ET AL. *v.* TRANS WORLD AIRLINES, INC. Sup. Ct. Nev. Certiorari denied.

No. 01–1415. FOUNDRY DIVISION OF ALCON INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 260 F. 3d 631.

No. 01–1416. NADELL *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 268 F. 3d 924.

No. 01–1419. BOWLER *v.* MAINE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 23 Fed. Appx. 20.

No. 01–1425. PICKENS *v.* SOO LINE RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 264 F. 3d 773.

No. 01–1442. TEMPESTA *v.* MOTOROLA, INC. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 700.

No. 01–1452. SMITH *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 25 Fed. Appx. 965.

No. 01–1458. LEMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 1098.

No. 01–1465. POPICK *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–1478. SCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 275 F. 3d 1281.

No. 01–1484. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–1494. WAKLEY *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 859.

No. 01–7071. SOLIS-CARRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 597.

No. 01–7203. ZABIAN ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1119 and 1120.

No. 01–7304. DEBERRY *v.* UNITED STATES; and
No. 01–7435. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 233.

No. 01–7538. HAMPTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 260 F. 3d 832.

No. 01–7606. MADER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 251 F. 3d 1099.

No. 01–7663. ODOM *v.* UNITED STATES; and
No. 01–7799. BOONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1289.

No. 01–7939. WEAVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 4th 876, 29 P. 3d 103.

No. 01–8252. PERK *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 8 Fed. Appx. 46.

No. 01–8269. FLORES-MARTINEZ, AKA MADRID-FLORES, AKA FLORES MADRID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 550.

No. 01–8313. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 820 So. 2d 883.

No. 01–8346. RAMIREZ-MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–8352. HICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 577.

No. 01–8537. PRESNELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 246, 551 S. E. 2d 723.

No. 01–8611. CHMIEL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 777 A. 2d 459.

No. 01–8645. STOPHER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 57 S. W. 3d 787.

No. 01–8679. GONZALEZ-GALLEGOS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 45.

No. 01–8732. ESPINOZA-GONZALES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 152.

No. 01–8747. BEJARANO *v.* SMALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8748. BEDFORD *v.* SMITH. Sup. Ct. R. I. Certiorari denied.

No. 01–8752. NATAL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8753. AZIZ *v.* ORBITAL SCIENCES CORP. C. A. 4th Cir. Certiorari denied.

No. 01–8758. WARD *v.* ROONEY. C. A. 9th Cir. Certiorari denied.

No. 01–8763. JEROME *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 01–8767. QUEEN *v.* ROMINE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 579.

No. 01–8768. LOGAN *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 175.

No. 01–8769. BURTON *v.* WALTER. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 632.

No. 01–8772. MAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 172, 552 S. E. 2d 151.

No. 01–8783. LOZANO *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 158.

No. 01–8785. KUNKEL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–8798. YEKIMOFF *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 01–8800. CULL *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–8803. RUCKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 01–8805. SHANNON *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 01–8808. RODRIGUEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8809. ROWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 01–8810. SMITH *v.* MORRIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1147.

No. 01–8811. REID *v.* FRANK, DEPUTY SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 01–8820. MORRIS, AKA MARKES *v.* TAYLOR, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8821. DAVIS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Alameda County. Certiorari denied.

No. 01–8822. YARBROUGH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 262 Va. 388, 551 S. E. 2d 306.

No. 01–8824. ALLEN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 749 N. E. 2d 1158.

No. 01–8825. QUIROGA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8828. TEAGUE *v.* HOLIDAY INN EXPRESS ET AL. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 01–8833. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8834. MAIGNAN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1111.

No. 01–8838. SMITH *v.* SUTHERS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 727.

No. 01–8840. SVAB *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8843. MORRIS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION (two judgments). C. A. 5th Cir. Certiorari denied.

No. 01–8847. PEOPLES *v.* GILBERT, JUDGE; and PEOPLES *v.* ILLINOIS ET AL. C. A. 6th Cir. Certiorari denied.

No. 01–8853. APT *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 01–8855. DORSEY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8864. STAPLES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 01–8865. SUDDUTH *v.* CITY OF PITTSBURGH ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 769 A. 2d 1256.

No. 01–8874. PENA *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–8877. WHILBY *v.* CASON. C. A. 6th Cir. Certiorari denied.

No. 01–8882. SMITH *v.* FARMER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 579.

No. 01–8897. MATUTE-CHIRINOS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 800 So. 2d 258.

No. 01–8900. QUINONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8905. REMINGTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 262 Va. 333, 551 S. E. 2d 620.

No. 01–8906. MATTHEWS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 345 S. C. 638, 550 S. E. 2d 311.

No. 01–8909. JONES *v.* GUNJA, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 01–8910. NORRIS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 48 P. 3d 872.

No. 01–8911. METTS *v.* NORTH CAROLINA DEPARTMENT OF REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 217.

No. 01–8915. OVERTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 801 So. 2d 877.

No. 01–8916. PRESCHER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8917. HIGGINS *v.* SWIECICKI. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–8922. GILLESPIE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8923. HINOJOSA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–8925. GOMEZ *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1110.

No. 01–8934. ARRENDONDO IBARRA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8935. GILBERT *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8937. KINDRED *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–8939. OTT *v.* KAISER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 829.

No. 01–8941. HAMMOND *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8942. GARNIER *v.* WALTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–8943. HENDERSON *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 260 F. 3d 1213.

No. 01–8945. HARRIS *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 540.

No. 01–8947. FINCHER *v.* MITCHUM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–8948. HUGGINS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–8951. MACHADO *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8953. TEZEL *v.* MARINE MIDLAND BANK CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–8956. MOODY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 149.

No. 01–8957. MOODY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 220.

No. 01–8959. BARCENAS-ANGELINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 155.

No. 01–8962. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–8964. JIMENEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 810 So. 2d 511.

No. 01–8968. MARCELLO ET UX. *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 788 A. 2d 177.

No. 01–8969. WALKER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 285 App. Div. 2d 660, 727 N. Y. S. 2d 731.

No. 01–8970. DUBOSE *v.* KELLY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 428.

No. 01–8971. WEBB *v.* KILGORE, SHERIFF, LAFAYETTE COUNTY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–8982. HAYNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 263 F. 3d 164.

No. 01–8988. GUMPERT *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 48 S. W. 3d 450.

No. 01–8995. GILCHRIST *v.* SMITH, SUPERINTENDENT, OGDENSBURG CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 260 F. 3d 87.

No. 01–9005. WOOD *v.* HAGEN. C. A. 2d Cir. Certiorari denied. Reported below: 21 Fed. Appx. 81.

No. 01–9009. STANSBURY *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 830.

No. 01–9011. BUCKLES *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 52.

No. 01–9018. MASON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 324 Ill. App. 3d 762, 756 N. E. 2d 365.

No. 01–9027. ANDERSON *v.* MAYLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 15 Fed. Appx. 547.

No. 01–9050. TSHIWALA *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 138 Md. App. 770.

No. 01–9055. CARDENNAS-BACA ET AL. *v.* UNITED STATES; HERNANDEZ-CASTORENA *v.* UNITED STATES; and TOVAR-OLAIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 153 (second and third judgments) and 155 (first judgment).

No. 01–9057. BELCHER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 836 So. 2d 999.

No. 01–9091. DIXON *v.* CITY OF MINNEAPOLIS WATER DEPARTMENT. Ct. App. Minn. Certiorari denied.

No. 01–9096. MORROW *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 8th Cir. Certiorari denied.

No. 01–9107. CONLON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9143. GAMBLE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 211 W. Va. 125, 563 S. E. 2d 790.

No. 01–9176. TAYLOR *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 58 S. W. 3d 608.

No. 01–9178. TEEGARDEN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 123.

No. 01–9195. HOWARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–9198. CUNNINGHAM *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 361.

No. 01–9200. WHISLER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 272 Kan. 864, 36 P. 3d 290.

No. 01–9203. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 188.

No. 01–9205. TAYLOR *v.* ALABAMA INTERTRIBAL COUNCIL TITLE IV J. T. P. A. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 261 F. 3d 1032.

No. 01–9215. RANGEL RODRIGUEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9274. JONES *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 258 F. 3d 893.

No. 01–9291. TROYER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 806 So. 2d 479.

No. 01–9357. RAMSDALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9375. THOMAS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 277.

No. 01–9377. ALFEROS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 872.

No. 01–9384. LAMBERT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9386. SPINNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 22 Fed. Appx. 6.

No. 01–9398. STEPHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 202.

No. 01–9399. NAPIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 273 F. 3d 276.

No. 01–9401. HINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 252.

No. 01–9403. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 984.

No. 01–9408. HERRERA TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 842.

No. 01–9409. BRINKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 217.

No. 01–9413. PEREGRINO-LUJAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 833.

No. 01–9416. MOULTRIE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–9417. RAFAEL PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9419. RODRIGUEZ-CORONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–9420. CASTELLANOS-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 3d 773.

No. 01–9428. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9434. GRAVELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 132.

No. 01–9435. HUERTA-MENDOZA *v.* UNITED STATES; RAMIREZ-LANDERO *v.* UNITED STATES; ROBLES-ROBLES *v.* UNITED STATES; SANDOVAL-ENRIQUEZ *v.* UNITED STATES; PULIDO-MORENO *v.* UNITED STATES; and MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 893 (first judgment); 25 Fed. Appx. 658 (second judgment); 25 Fed. Appx. 659 (third judgment); 22 Fed. Appx. 895 (fourth judgment); 23 Fed. Appx. 880 (fifth judgment); 23 Fed. Appx. 824 (sixth judgment).

No. 01–9436. ALLUMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 198.

No. 01–9443. HOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 296.

No. 01–9444. HAMLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–9448. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 26 Fed. Appx. 40.

No. 01–9449. MASLIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 708.

No. 01–9450. KHATAMI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 280 F. 3d 907.

No. 01–9453. CARNEGIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 315.

No. 01–9457. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1372.

No. 01–9458. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 879.

No. 01–9459. WILKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9461. SMITH *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 707.

No. 01–9464. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1284.

No. 01–9466. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 275 F. 3d 648.

No. 01–9467. JOHNSON *v.* DEPARTMENT OF JUSTICE. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 460.

No. 01–9468. RUSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 245.

No. 01–9470. MCCLELLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 198.

No. 01–9471. WAFER *v.* POTTER, POSTMASTER GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1078.

No. 01–9472. AYALA TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 936.

No. 01–9473. ATWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9474. GODWIN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 272 F. 3d 659.

No. 01–9476. CARNIGLIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9494. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9496. ECHAVARRIA-ESCOBAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 3d 1265.

No. 01–9498. MOTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9500. VASSELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 200.

No. 01–9501. WALSER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 275 F. 3d 981.

No. 01–9502. DEAVAULT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9503. PINKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 287.

No. 01–9507. NATERA-SOSA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9510. GRACIDAS-ULIBARRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 922.

No. 01–9511. COLOMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 935.

No. 01–9512. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 412.

No. 01–9513. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 226.

No. 01–9514. SAPP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 202.

No. 01–9515. CEPEDA SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 623.

No. 01–9516. SANGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 152.

No. 01–9522. ALRED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9525. BUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9529. OBANION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 275 F. 3d 371.

No. 01–9531. YARBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 645.

No. 01–9532. ABDUR'RAHMAN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 01–9533. SANTIAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 268 F. 3d 151.

No. 01–9535. AMADOR-LEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 276 F. 3d 511.

No. 01–9536. TORRES, AKA BREWINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–9539. MONTELEONE, AKA MONTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 257 F. 3d 210.

No. 01–9542. KELLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 56.

No. 01–9543. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 81.

No. 01–9549. SAUNDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 78.

No. 01–9551. PFEIFERLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9552. BARRIENTOS-SOLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 379.

No. 01–9556. BUSTOS-USECHE, AKA DUARTE, AKA USECHE BUSTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 622.

No. 01–9559. NEELY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9562. WALLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9563. ALTMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9564. WITHROW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 340.

No. 01–9567. NIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–9568. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 28 Fed. Appx. 55.

No. 01–9569. SOLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 275 F. 3d 146.

No. 01–9571. SAMAYOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 833.

No. 01–9573. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 257 F. 3d 210.

No. 01–9575. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 611.

No. 01–9576. JIN SHENG CHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 438.

No. 01–9578. EDMONSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 283 F. 3d 300.

No. 01–9581. ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 74.

No. 01–9582. CHESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9585. MYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 681.

No. 01–9586. SHIRLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 198.

No. 01–9589. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 1069.

No. 01–9590. NOLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9591. NELSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1378.

No. 01–9593. GLOVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9597. HOFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 10 Fed. Appx. 340.

No. 01–9598. BONIFACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 812.

No. 01–9599. ADESIDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 01–9603. CALLARMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 273 F. 3d 1284.

No. 01–9610. MYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 723.

No. 01–9616. BLAIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 472.

No. 01–9621. GOODSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 131.

No. 01–9629. WINTERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 01–9632. WARE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 118.

No. 01–9634. WILSON *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9638. ELDRIDGE *v.* HEDRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 01–9655. APODACA *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–9717. EPPS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–932. CRATER CORP. *v.* LUCENT TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. Motion of petitioner for leave to file District Court order under seal granted. Certiorari denied. JUSTICE O'CONNOR and JUSTICE SCALIA took no part in the consideration or decision of this motion and this petition. Reported below: 255 F. 3d 1361.

No. 01–1311. MILWAUKEE SAFEGUARD INSURANCE CO. ET AL. *v.* SELCKE, DIRECTOR, ILLINOIS DEPARTMENT OF INSURANCE, ET AL. App. Ct. Ill., 1st Dist. Motions of Council on State Taxation and American Insurance Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 324 Ill. App. 3d 344, 754 N. E. 2d 349.

No. 01–1324. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY ET AL. *v.* DEJA VU OF NASHVILLE, INC., ET AL. C. A. 6th Cir. Motion of International Municipal Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 274 F. 3d 377.

No. 01–1353. LEE *v.* DOW CHEMICAL CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 31 Fed. Appx. 154.

No. 01–1408. SEARIVER MARITIME, INC. *v.* OWENS. C. A. 5th Cir. Motion of American Waterways Operators for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 272 F. 3d 698.

No. 01–7332. STITT *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to file presentence report under seal granted. Certiorari denied. Reported below: 250 F. 3d 878.

No. 01–9316. OKEN *v.* MARYLAND. Ct. App. Md. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 367 Md. 191, 786 A. 2d 691.

Rehearing Denied

No. 00–9285. MICKENS *v.* TAYLOR, WARDEN, *ante*, p. 162;

No. 00–10466. FOSTER *v.* HUBBARD, WARDEN, 534 U. S. 859;

No. 01–875. CURTIS *v.* SOUTH CAROLINA ET AL., *ante*, p. 926;

No. 01–883. BUSH ET UX. *v.* CITY OF ZEELAND, 534 U. S. 1133;

No. 01–1037. JEFFERSON ET AL. *v.* COMMISSIONER OF REVENUE OF MINNESOTA, *ante*, p. 930;

No. 01–1039. MOLNAR *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL., *ante*, p. 931;

No. 01–5361. CLOUD *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1084;

No. 01–5719. NWANZE *v.* PHILIP MORRIS INC. ET AL., 534 U. S. 962;

No. 01–6341. POTEET *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1028;

No. 01–6824. BISHOP *v.* DISCHNER ET AL., 534 U. S. 1086;

No. 01–6831. IN RE SCHAPIRO, 534 U. S. 1077;

No. 01–6889. HICKS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1089;

No. 01–6911. BROWN *v.* UNITED STATES, 534 U. S. 1051;

No. 01–6966. BECK, FKA VANDERBECK *v.* MINNESOTA, 534 U. S. 1092;

No. 01–7066. HOLLOWELL *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 534 U. S. 1116;

No. 01–7114. WALKER *v.* CAREY, WARDEN, ET AL., 534 U. S. 1137;

No. 01–7555. SPRY *v.* UNITED STATES, 534 U. S. 1151;

No. 01–7556. IN RE SMITH, 534 U. S. 1126;

No. 01–7612. DOERR *v.* PROTECTIVE LIFE INSURANCE CO., *ante*, p. 935;

No. 01–7707. ZHARN *v.* UNITED STATES, 534 U. S. 1166;

No. 01–7712. CLARK *v.* O'DEA, WARDEN, *ante*, p. 938;

No. 01–7772. NEAL *v.* LOUISIANA, *ante*, p. 940;

No. 01–7775. AYALA *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 956; and

No. 01–7890. QUEEN *v.* UNITED STATES, 534 U. S. 1170. Petitions for rehearing denied.

MAY 16, 2002

Certiorari Denied

No. 01–10191 (01A895). STYRON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 20, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1689. AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Verizon Communications Inc.* v. *FCC*, *ante*, p. 467. Reported below: 236 F. 3d 922.

No. 01–1079. MONTGOMERY *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lapides* v. *Board of Regents of Univ. System of Ga.*, *ante*, p. 613. Reported below: 266 F. 3d 334.

Certiorari Dismissed

No. 01–9041. TIDIK *v.* WAYNE COUNTY FAMILY COURT DIVISION ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–9112. THOMPSON *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. Motion of petitioner for leave

to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 272 F. 3d 1098.

No. 01–9128. BIRKHOLZ *v.* MONTANA ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 22 Fed. Appx. 797.

Miscellaneous Orders

No. 01M57. BAYRAMOGLU *v.* GOMEZ ET AL.; and

No. 01M59. AMAYA *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00–878. MATHIAS ET AL. *v.* WORLDCOM TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 532 U. S. 903.] Motions of respondents WorldCom Technologies, Inc., et al. and Illinois Bell Telephone Co., dba Ameritech Illinois, for leave to file supplemental briefs after argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 00–1531. VERIZON MARYLAND INC. *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL.; and

No. 00–1711. UNITED STATES *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL. C. A. 4th Cir. [Certiorari granted, 533 U. S. 928 and 534 U. S. 1072.] Motion of respondents MCI WORLDCOM, Inc., et al. for leave to file second supplemental brief after argument granted. Motion of petitioner Verizon Maryland Inc. for leave to file supplemental brief after argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 01–6978. EWING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante*, p. 969.] Motion for appointment of counsel granted, and it is ordered that Quin Denvir, Esq., of Sacramento, Cal., be appointed to serve as counsel for petitioner in this case.

No. 01–9761. IN RE FERGUSON; and

No. 01–9872. IN RE CUREAUX. Petitions for writs of habeas corpus denied.

No. 01–1402. IN RE WALL ET AL.;

No. 01–9089. IN RE PINET;

No. 01–9109. IN RE WARD;

No. 01–9223. In re Williams; and

No. 01–9234. In re Jones. Petitions for writs of mandamus denied.

No. 01–1455. In re Acomb et al. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 01–1120. Meyer *v.* Holley et al. C. A. 9th Cir. Certiorari granted. Reported below: 258 F. 3d 1127.

No. 01–1231. Connecticut Department of Public Safety et al. *v.* Doe, Individually and on Behalf of All Others Similarly Situated. C. A. 2d Cir. Certiorari granted. Reported below: 271 F. 3d 38.

Certiorari Denied

No. 01–807. Pheasant Bridge Corp. *v.* Township of Warren. Sup. Ct. N. J. Certiorari denied. Reported below: 169 N. J. 282, 777 A. 2d 334.

No. 01–929. DaimlerChrysler Aktiengesellschaft *v.* Olson et al. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 21 S. W. 3d 707.

No. 01–1024. Thompson et al. *v.* Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 278 F. 3d 1020.

No. 01–1044. Magic Chef Co. *v.* Department of Housing and Urban Development. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1144.

No. 01–1100. Eastern Minerals International, Inc., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 271 F. 3d 1090.

No. 01–1172. Piney Run Preservation Assn. *v.* County Commissioners of Carroll County. C. A. 4th Cir. Certiorari denied. Reported below: 268 F. 3d 255.

No. 01–1276. Rolleston *v.* St. Paul Fire & Marine Insurance Co. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. xxv, 556 S. E. 2d 131.

No. 01–1290. McInnis et al. *v.* Daniel, Administratrix of the Estate of Daniel, Deceased. Sup. Ct. Ala. Certiorari denied. Reported below: 820 So. 2d 795.

No. 01–1350. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, ET AL. *v.* CASUMPANG. C. A. 9th Cir. Certiorari denied. Reported below: 269 F. 3d 1042.

No. 01–1351. HALLEEN CHEVROLET, INC., ET AL. *v.* GENERAL MOTORS CORP. ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 01–1358. WALLACE *v.* METHODIST HOSPITAL SYSTEM. C. A. 5th Cir. Certiorari denied. Reported below: 271 F. 3d 212.

No. 01–1364. JITNER *v.* COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–1369. PIERCE ET AL. *v.* BOSS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 263 F. 3d 734.

No. 01–1371. PIMPER ET UX. *v.* GEORGIA EX REL. SIMPSON, ACTING DISTRICT ATTORNEY, ROME JUDICIAL DISTRICT. Sup. Ct. Ga. Certiorari denied. Reported below: 274 Ga. 624, 555 S. E. 2d 459.

No. 01–1373. MOLONEY COACHBUILDERS, INC. *v.* INTERNATIONAL ARMOR & LIMOUSINE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 912.

No. 01–1379. SPANAGEL *v.* SUPPORTIVE CARE SERVICES, INC. Sup. Ct. Del. Certiorari denied. Reported below: 787 A. 2d 101.

No. 01–1381. CALLAHAN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 24 S. W. 3d 483.

No. 01–1386. HANSEN ET AL. *v.* AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 90 Cal. App. 4th 977, 109 Cal. Rptr. 2d 482.

No. 01–1387. HICKS *v.* HARRISON. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 202.

No. 01–1389. HAYWARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAYWARD, DECEASED *v.* VALLEY VISTA CARE CORP. ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 136 Idaho 342, 33 P. 3d 816.

No. 01–1401. WALL ET AL. *v.* CHEVERIE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 18 Fed. Appx. 41.

No. 01–1403. BEAVER COUNTY, PENNSYLVANIA, ET AL. *v.* ARMOUR. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 417.

No. 01–1412. DAVIS *v.* GODWIN, RETIRED JUDGE, CIRCUIT COURT OF VIRGINIA, 5TH JUDICIAL CIRCUIT. Sup. Ct. Va. Certiorari denied.

No. 01–1421. MCKEOWN *v.* DELAWARE BRIDGE AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 23 Fed. Appx. 81.

No. 01–1431. TAYLOR *v.* HODGES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 268 F. 3d 1065 and 1066.

No. 01–1436. KENNEDY, AS SUCCESSOR IN INTEREST AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNEDY, ET AL. *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 268 F. 3d 763.

No. 01–1450. ECHOSTAR COMMUNICATIONS CORP., DBA DISH NETWORK, ET AL. *v.* CBS BROADCASTING INC. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1193.

No. 01–1508. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 211.

No. 01–1516. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–1518. CHRISTENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–1527. MINER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 740.

No. 01–1561. TURNBULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 200.

No. 01–7230. SIMMS *v.* UNITED STATES; and
No. 01–7335. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 52.

No. 01–7736. GOKTEPE *v.* GOKTEPE. Ct. Sp. App. Md. Certiorari denied. Reported below: 138 Md. App. 762.

No. 01–7769. JAMISON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 197 Ill. 2d 135, 756 N. E. 2d 788.

No. 01–7860. HELTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 259 F. 3d 1310.

No. 01–8060. GLOVER *v.* MIRO, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 3d 268.

No. 01–8270. HALL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 820 So. 2d 152.

No. 01–8453. WALKER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 273 F. 3d 393.

No. 01–8860. BLACK *v.* STEWART, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–8928. CANNON *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 259 F. 3d 1253.

No. 01–8950. WAMGET *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 67 S. W. 3d 851.

No. 01–8972. SHABAZZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–8975. LATHAM *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–8983. HORNER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–8985. GREEN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 249 Ga. App. 546, 547 S. E. 2d 569.

No. 01–8986. HARVEY *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 136 Idaho 457, 35 P. 3d 274.

No. 01–8987. GOODLOE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1376.

No. 01–8989. HELMS *v.* NELSON, WARDEN. Sup. Ct. Kan. Certiorari denied.

No. 01–8991. HUG *v.* TOMPKINS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1360.

No. 01–8994. FOSTER *v.* REWIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1084.

No. 01–8998. LYNCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 285 App. Div. 2d 518, 728 N. Y. S. 2d 489.

No. 01–9000. CLARK ET AL. *v.* WOODS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–9001. CHISOLM *v.* DAY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 01–9002. OUTLAW *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 678.

No. 01–9004. ECHOLS *v.* HAYES, DEPUTY SHERIFF, ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 698.

No. 01–9007. CHRISTOPH *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9010. SMILES *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9015. PERKINS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 836 So. 2d 1010.

No. 01–9017. CRUZ VARGAS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9020. LANDAU *v.* SHANNON. C. A. 3d Cir. Certiorari denied.

No. 01–9025. EDWARDS *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9028. OWENS-EL *v.* PUGH, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 878.

No. 01–9029. MURPHY *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 01–9036. O'NEILL *v.* DARDEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–9037. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9038. TALLY *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 7 P. 3d 172.

No. 01–9040. WILLIAMS *v.* BELL, CORRECTIONAL ADMINISTRATOR I, PENDER CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 238.

No. 01–9045. MENCHACA *v.* BUTLER, CHIEF DEPUTY WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 928.

No. 01–9046. NOEL *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9048. WILLIAMS *v.* FIELD CREST PROPERTIES. C. A. 11th Cir. Certiorari denied.

No. 01–9051. TORRES *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9058. TEPPER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9061. GATES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 01–9070. BROWN *v.* WARDEN, WALLENS RIDGE STATE PRISON. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 153.

No. 01–9071. MANLEY *v.* MONROE COUNTY SHERIFF'S DEPARTMENT ET AL. Ct. App. Ind. Certiorari denied. Reported below: 756 N. E. 2d 1095.

No. 01–9072. SMITH *v.* GRANT, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 156.

No. 01–9074. SHAW *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9075. DOERR *v.* CITY OF REDLANDS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9077. WOLDE-GIORGIS *v.* ELSNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9080. MULAZIM *v.* CHAVEZ, CORRECTIONAL FACILITY PROGRAM CLASSIFICATION DIRECTOR. C. A. 6th Cir. Certiorari denied.

No. 01–9083. COLE *v.* CARR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 276 F. 3d 576.

No. 01–9087. RODRIGUEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 01–9088. SIMMONS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9090. SCHIEBLE *v.* COURT OF APPEALS OF SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 01–9092. DIXON *v.* HARDIMON. Ct. App. Minn. Certiorari denied.

No. 01–9093. DIETZ *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–9102. LABRANCH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9103. POUND *v.* WILLIAMS, INSURANCE COMMISSIONER OF DELAWARE, AS RECEIVER OF NATIONAL HERITAGE LIFE INSURANCE CO. IN LIQUIDATION, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9108. TAYLOR *v.* REDDISH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 01–9111. THOMPSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9113. WALKER *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9114. WILLIAMS *v.* PETERSON ET AL. Ct. App. Mich. Certiorari denied.

No. 01–9117. HOFFMAN *v.* YOUNG, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 885.

No. 01–9119. FITTS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9120. FOSSIE *v.* MONETTE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 151.

No. 01–9121. HURD *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9122. HALL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9123. HASTINGS *v.* SUTHERS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 885.

No. 01–9124. HAYES *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9126. RICHARDSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1087.

No. 01–9127. SUTHERLAND *v.* AUTUMN CARE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 13 Fed. Appx. 111.

No. 01–9129. SOSA-OLIVARES *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9130. ROBINSON *v.* DOE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 921.

No. 01–9131. GUTIERREZ *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9133. FOSTER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9135. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 01–9136. GRAVES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 140 Md. App. 737.

No. 01–9137. HUTCH *v.* AHN ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9139. FRANKLIN *v.* TAYLOR, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 610.

No. 01–9140. HALEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–9142. HOOKS *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 44 S. W. 3d 607.

No. 01–9146. RAY *v.* CURTIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 333.

No. 01–9147. BRODIE *v.* CORRECTIONAL MEDICAL SERVICES ET AL. C. A. 6th Cir. Certiorari denied.

No. 01–9149. DAKER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 248 Ga. App. 657, 548 S. E. 2d 354.

No. 01–9163. GRAY *v.* LEBLANC, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1278.

No. 01–9174. SCABONE *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 01–9193. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 823 So. 2d 1.

No. 01–9237. MAYBUSHER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 805 So. 2d 808.

No. 01–9257. VIVONE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 01–9308. SMITH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9445. DAGUINOTNOT *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 20 Fed. Appx. 872.

No. 01–9477. DELGADO-BRUNET *v.* LAPPIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9528. WORSHAM *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 161.

No. 01–9607. MORENO-ROCHA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 19 Fed. Appx. 507.

No. 01–9615. BUTLER *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 833.

No. 01–9619. MEJIAS NEGRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 23 Fed. Appx. 10.

No. 01–9640. BISHAWI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 272 F. 3d 458.

No. 01–9642. MORRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9643. MUYET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–9646. BERNAL-PORTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 466.

No. 01–9650. CIVERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 200.

No. 01–9651. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 165.

No. 01–9654. MONTAG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 589.

No. 01–9656. YOULA, AKA FOFANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 70.

No. 01–9658. GONZALEZ LORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 149.

No. 01–9660. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 01–9662. MATTHEWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 278 F. 3d 560.

No. 01–9666. NICHOLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–9667. PARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 534.

No. 01–9669. PIRTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 790.

No. 01–9673. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 272 F. 3d 1069.

No. 01–9677. SCRUGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 211.

No. 01–9682. ASHTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 190.

No. 01–9683. BIBBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 502.

No. 01–9684. MCCARTHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 81.

No. 01–9689. GIORGIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 472.

No. 01–9690. HUTCHERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 934.

No. 01–9695. WESTBROOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 281 F. 3d 1283.

No. 01–9699. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 270 F. 3d 413.

No. 01–9701. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 574.

No. 01–9720. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1111.

No. 01–9723. AUSTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 36.

No. 01–9726. MEJIA-URIBE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9728. MOST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 688.

No. 01–9732. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 269.

No. 01–9733. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 535.

No. 01–9734. RODRIGUEZ-ROSALES *v.* MILES, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1280.

No. 01–9736. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 167.

No. 01–9739. NOLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 277 F. 3d 1377.

No. 01–9741. BURTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 835.

No. 01–9750. RODRIGUEZ-CORONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–9751. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9752. DEEB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9754. CARDOSA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 153.

No. 01–9755. ISRAFIL *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 768.

No. 01–9762. GARCIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 268 F. 3d 407.

No. 01–9766. KEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 121.

No. 01–9770. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9771. DUBE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–9774. REED *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied.

No. 01–9776. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 270.

No. 01–9777. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 36 Fed. Appx. 758.

No. 01–9780. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9781. GIBBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 276 F. 3d 884.

No. 01–9784. BOONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 279 F. 3d 163.

No. 01–9788. ABERNATHY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 277 F. 3d 1048.

No. 01–9789. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 573.

No. 01–9790. DOUGLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9792. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9793. CABEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 331.

No. 01–9802. HALL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 211 F. 3d 1262.

No. 01–9818. MARTIN *v.* HAVILAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 01–9826. BECKER *v.* WILKINSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 413.

No. 01–9832. HOLUB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–1042. PICKETT *v.* PETROLEUM HELICOPTERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 266 F. 3d 366.

No. 01–1191. WASHINGTON HOSPITAL CENTER ET AL. *v.* SNOWDEN ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 253 F. 3d 725.

No. 01–1200. SOUTHERN CO. ET AL. *v.* ALDERSON ET AL. App. Ct. Ill., 1st Dist. Motion of Defense Research Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 321 Ill. App. 3d 832, 747 N. E. 2d 926.

No. 01–9101. KERTH *v.* COUNTY OF ORANGE ET AL. Ct. App. Cal., 4th App. Dist. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 01–7791. NABELEK *v.* SCOTT, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL., *ante*, p. 956;

No. 01–7922. EDWARDS *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 959;

No. 01–8019. IN RE CAMPITELLI, *ante*, p. 969;

No. 01–8037. SACCO *v.* NEW YORK, *ante*, p. 974;

No. 01–8381. DORE *v.* UNITED STATES, *ante*, p. 950;

No. 01–8503. FLEMING *v.* UNITED STATES, *ante*, p. 963;

No. 01–8573. KEMP *v.* UNITED STATES, *ante*, p. 977; and

No. 01–8676. DEAN *v.* UNITED STATES, *ante*, p. 978. Petitions for rehearing denied.

No. 01–5955. EMBREY *v.* UNITED STATES, 534 U. S. 1085; and

No. 01–6568. PIERCE *v.* CITY OF PHILADELPHIA ET AL., 534 U. S. 1057. Motions for leave to file petitions for rehearing denied.

MAY 21, 2002

Miscellaneous Order

No. 01–10181 (01A894). IN RE MARTINEZ. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 22, 2002

Certiorari Denied

No. 01–10299 (01A912). MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 01–10309 (01A914). MARTINEZ ET AL. *v.* COURT OF CRIMINAL APPEALS OF TEXAS ET AL. C. A. 5th Cir. Application for temporary restraining order, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS took no part in the consideration or decision of this application and this petition. Reported below: 292 F. 3d 417.

MAY 24, 2002

Certiorari Denied

No. 01–10329 (01A923). BEAZLEY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS took no part in the consideration or decision of this application and this petition.

MAY 28, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1699. BELLSOUTH TELECOMMUNICATIONS, INC. *v.* NORTH CAROLINA UTILITIES COMMISSION ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, *ante*, p. 635. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 240 F. 3d 270.

Certiorari Dismissed

No. 01–9300. FORDJOUR *v.* MOTOROLA, INC., ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 01A753 (01–1632). TEXAS *v.* MCCARTHY. Ct. Crim. App. Tex. Application for stay of mandate, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2247. IN RE DISBARMENT OF EARLS. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2282. IN RE DISBARMENT OF KELLY. Disbarment entered. [For earlier order herein, see 534 U. S. 1016.]

No. D–2283. IN RE DISBARMENT OF ENGLAND. Disbarment entered. [For earlier order herein, see 534 U. S. 1016.]

No. D–2285. IN RE DISBARMENT OF MATTHEWS. Disbarment entered. [For earlier order herein, see 534 U. S. 1017.]

No. D–2306. IN RE DISCIPLINE OF SCHAEFER. John Michael Schaefer, of Las Vegas, Nev., 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–2307. IN RE DISCIPLINE OF O'BRIEN. Rondolyn Rae Rauch O'Brien, of Albuquerque, N. M., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2308. IN RE DISCIPLINE OF EDMONDS. Clyde Emmett Edmonds, of Plainfield, 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. D–2309. IN RE DISCIPLINE OF GRAYSON. Russell Wayne Grayson, of Ridgewood, 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. D–2310. IN RE DISCIPLINE OF LESTER. Althear A. Lester, of Newark, 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. D–2311. IN RE DISCIPLINE OF RICHARDS. Dean Edward Richards, of Indianapolis, Ind., 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–2312. IN RE DISCIPLINE OF RIGGS. Steven J. Riggs, of Lafayette, Ind., 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–2313. IN RE DISCIPLINE OF SHANAHAN. Joseph B. Shanahan, Jr., of Chelmsford, 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–2314. IN RE DISCIPLINE OF CHANCE. Brian Walter Chance, of Lowell, 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. 01M60. BONTON *v.* LOUISIANA DEPARTMENT OF LABOR UNEMPLOYMENT COMPENSATION OFFICE ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 01–7929. GYADU *v.* D'ADDARIO INDUSTRIES, INC., ET AL. Sup. Ct. Conn. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 953] denied.

No. 01–9265. KUYPERS *v.* COMPTROLLER OF THE TREASURY OF MARYLAND ET AL. C. A. 4th Cir.; and

No. 01–9269. DAUTREMONT *v.* PLANNED PARENTHOOD OF GREATER IOWA, INC. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 18, 2002, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 01–9955. IN RE BENNETT. Petition for writ of habeas corpus denied.

No. 01–10406 (01A931). IN RE BEAZLEY. 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 SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS took no part in the consideration or decision of this application and this petition.

No. 01–9314. IN RE AL-HAKIM. Petition for writ of mandamus denied.

Certiorari Granted

No. 01–1420. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES ET AL. *v.* GUARDIANSHIP ESTATE OF KEFFELER ET AL. Sup. Ct. Wash. Certiorari granted. Reported below: 145 Wash. 2d 1, 32 P. 3d 267.

No. 01–1107. VIRGINIA *v.* BLACK ET AL. Sup. Ct. Va. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 262 Va. 764, 553 S. E. 2d 738.

No. 01–1184. UNITED STATES *v.* JIMENEZ RECIO ET AL. C. A. 9th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 258 F. 3d 1069.

No. 01–1209. BOEING CO. ET AL. *v.* UNITED STATES; and

No. 01–1382. UNITED STATES *v.* BOEING SALES CORP. ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 258 F. 3d 958.

Certiorari Denied

No. 01–742. BULGIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 263 F. 3d 170.

No. 01–752. DANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 252 F. 3d 411.

No. 01–762. GALLEGO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 1191.

No. 01–766. BROWNLEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1062.

No. 01–904. ALANIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 265 F. 3d 576.

No. 01–1020. SACRAMENTO MUNICIPAL UTILITY DISTRICT *v.* UNITED STATES;

No. 01–1155. MAINE YANKEE ATOMIC POWER CO. *v.* UNITED STATES; and

No. 01–1398. OMAHA PUBLIC POWER DISTRICT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 271 F. 3d 1357.

No. 01–1048. AUDAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1286.

No. 01–1113. HAGEN *v.* UNITED STATES; and

No. 01–8356. BJORKMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 270 F. 3d 482.

No. 01–1165. BEHARRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1062.

No. 01–1208. BRADLEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 264 F. 3d 344.

No. 01–1212. GRAND TRUNK WESTERN RAILWAY CO. *v.* KAPITAN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF KAPITAN. Ct. App. Ind. Certiorari denied. Reported below: 745 N. E. 2d 924.

No. 01–1220. WALKER *v.* BAIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 257 F. 3d 660.

No. 01–1223. DICO, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 266 F. 3d 864.

No. 01–1224. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and

No. 01–1226. NEVADA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 256 F. 3d 935.

No. 01–1274. RCJ MEDICAL SERVICES, INC. *v.* DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 91 Cal. App. 4th 986, 111 Cal. Rptr. 2d 223.

No. 01–1280. LIGHTMAN *v.* FLAUM ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 128, 761 N. E. 2d 1027.

No. 01–1388. HORIZON WEST, INC., ET AL. *v.* UNITED STATES EX REL. FOUNDATION AIDING THE ELDERLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 265 F. 3d 1011 and 275 F. 3d 1189.

No. 01–1395. SPRINKLER FITTERS LOCAL 417 *v.* MINNESOTA CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 267 F. 3d 807.

No. 01–1399. UNITED STATES EX REL. SWAFFORD *v.* BORGESS MEDICAL CENTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 491.

No. 01–1406. TAVOULAREAS *v.* BANQUE NATIONALE DE PARIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1087.

No. 01–1411. COMMONWEALTH EDISON CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 271 F. 3d 1327.

No. 01–1423. WADDELL *v.* VALLEY FORGE DENTAL ASSOCIATES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 276 F. 3d 1275.

No. 01–1424. BAIN ET AL. *v.* BUECHEL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 97 N. Y. 2d 295, 766 N. E. 2d 914.

No. 01–1426. SHANK/BALFOUR BEATTY *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 876.

No. 01–1428. TAYLOR GROUP ET AL. *v.* ANR STORAGE CO. C. A. 6th Cir. Certiorari denied. Reported below: 24 Fed. Appx. 319.

No. 01–1430. SIENKIEWICZ *v.* HART ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 201.

No. 01–1454. CASTELLO *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–1463. HARRIS *v.* OWENS, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 264 F. 3d 1282.

No. 01–1470. PHONOMETRICS, INC. *v.* CHOICE HOTELS INTERNATIONAL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 21 Fed. Appx. 910.

No. 01–1472. FLORIDA DEPARTMENT OF INSURANCE *v.* CHASE BANK OF TEXAS NATIONAL ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 274 F. 3d 924.

No. 01–1483. BOERST *v.* GENERAL MILLS OPERATIONS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 403.

No. 01–1507. CLAY COUNTY SCHOOL BOARD ET AL. *v.* WILSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–1511. GARCIA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 716.

No. 01–1525. VEGA *v.* MILLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 273 F. 3d 460.

No. 01–1542. THOMAS *v.* TENNECO PACKAGING, INC. C. A. 11th Cir. Certiorari denied. Reported below: 268 F. 3d 1066.

No. 01–1557. PAJOOH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–1574. BARMES ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 01–5701. ANDRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1176.

No. 01–5861. WIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 245 F. 3d 1269.

No. 01–6398. PROMISE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 255 F. 3d 150.

No. 01–6422. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1062.

No. 01–7125. VENTURA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 794 So. 2d 553.

No. 01–7178. SUMMERHAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–7197. ANDRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1176.

No. 01–7272. MOODY *v.* PRYOR, ATTORNEY GENERAL OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–7386. HARDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 263 F. 3d 170.

No. 01–7399. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 270 F. 3d 1346.

No. 01–7420. ASTERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 268 F. 3d 1066.

No. 01–7477. POWELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1359.

No. 01–7575. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–7613. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1176.

No. 01–7738. GONZALES-GARCIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 266 F. 3d 587.

No. 01–7836. RAILEY *v.* UNITED STATES; and
No. 01–8012. LUNDIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 51.

No. 01–7842. WOODALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 F. 3d 1144.

No. 01–7961. MARTINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 258 F. 3d 582.

No. 01–8135. COLLINS, AKA SMALL, AKA DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 12 Fed. Appx. 437.

No. 01–8210. DELONG *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 534.

No. 01–8242. PRICE, AKA ANDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 265 F. 3d 1097.

No. 01–8300. SNOW *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 800 So. 2d 472.

No. 01–8305. SUMPTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 267 F. 3d 729.

No. 01–8317. RAMON PERULENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1114.

No. 01–8454. CROMARTIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 267 F. 3d 1293.

No. 01–8462. COOPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 275 F. 3d 1086.

No. 01–8508. NATIVIDAD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 565 Pa. 348, 773 A. 2d 167.

No. 01–8596. BARREIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1176.

No. 01–8875. BANKS *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 527.

No. 01–9151. OLSEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–9156. POBLAH *v.* BEATY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 21 Fed. Appx. 56.

No. 01–9157. GOODNOW *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 89.

No. 01–9158. HUNT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 01–9160. HEGWOOD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9161. HINKLE *v.* PARSONS, JUDGE, DISTRICT COURT OF TEXAS, 349TH JUDICIAL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–9165. FIELDING *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 01–9166. GARCIA-DOMINGUEZ *v.* MAHAFFEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 827.

No. 01–9167. POIRIER *v.* CASPERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 460.

No. 01–9168. HILL *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9169. GREENMAN *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 19 Fed. Appx. 9.

No. 01–9170. FALKIEWICZ *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 01–9171. FIRMINGHAM *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 530.

No. 01–9172. JOYCE *v.* PUGH. C. A. 4th Cir. Certiorari denied.

No. 01–9173. SPROW *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 805 So. 2d 809.

No. 01–9175. WEISS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 565 Pa. 504, 776 A. 2d 958.

No. 01–9177. TAYLOR *v.* HIXSON AUTOPLEX OF ALEXANDRIA, INC., ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 781 So. 2d 1282.

No. 01–9179. TURNBOE *v.* GUNDY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 292.

No. 01–9180. NABELEK *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 01–9183. MEDRENO *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 01–9186. EDWARDS *v.* LYONDELL-CITGO REFINING CO. LTD. C. A. 5th Cir. Certiorari denied.

No. 01–9188. JUNIOR *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 928.

No. 01–9196. JOYNER *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 23 Fed. Appx. 25.

No. 01–9204. VALLIMONT *v.* EASTMAN KODAK CO. C. A. 2d Cir. Certiorari denied. Reported below: 22 Fed. Appx. 64.

No. 01–9206. CRUTCHLEY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 799 So. 2d 1062.

No. 01–9207. CARRIO *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9208. OBADELE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9209. MIMS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9213. MCCALLUP *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 01–9218. MICHAU *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 01–9219. MITCHELL *v.* PINCUS ET AL. C. A. 2d Cir. Certiorari denied.

No. 01–9220. SMITH *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9221. OUTLAW *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 372.

No. 01–9222. BROWN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 146 N. C. App. 299, 552 S. E. 2d 234.

No. 01–9225. VAUGHN *v.* PEARSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9230. BRIDGES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 563 Pa. 1, 757 A. 2d 859.

No. 01–9233. BAILEY *v.* HEMPEN ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 01–9236. HILL *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 665.

No. 01–9239. AHMED *v.* MAHONEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 585.

No. 01–9240. JOSEY *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 16 Fed. Appx. 676.

No. 01–9242. ANDERSON *v.* ENTERPRISE RENTAL CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 01–9245. MCCONICO *v.* ALABAMA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 839 So. 2d 691.

No. 01–9249. GRAMS *v.* MORGENSTERN. Sup. Ct. Mont. Certiorari denied. Reported below: 306 Mont. 535.

No. 01–9252. PUJOLS *v.* GREINER, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9254. MOSLEY *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 263 F. 3d 164.

No. 01–9260. LEE *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 36 P. 3d 1133.

No. 01–9261. LUECK *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9263. ALVARO PRIETO *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9264. JACKSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 801 So. 2d 939.

No. 01–9268. CONNOR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 803 So. 2d 598.

No. 01–9272. DODSON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 01–9283. IN RE NABELEK (three judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 01–9287. URBAN *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–9289. WASHINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–9294. FRYE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 757 N. E. 2d 684.

No. 01–9298. FORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 802 So. 2d 1121.

No. 01–9301. GREEN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 254 F. 3d 71.

No. 01–9302. HARPER *v.* DERRICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9306. BARNES *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, SACRAMENTO COUNTY. Ct. App. Cal., 3d

App. Dist. Certiorari denied. Reported below: 93 Cal. App. 4th 1074, 113 Cal. Rptr. 2d 659.

No. 01–9317. BORCHARDT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 367 Md. 91, 786 A. 2d 631.

No. 01–9318. JENKINS *v.* BYRD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 397.

No. 01–9321. CIVIELLO *v.* ROSEMEYER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT LAUREL HIGHLANDS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 28 Fed. Appx. 127.

No. 01–9322. TURNBOE *v.* GUNDY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 339.

No. 01–9323. COLE *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9338. MILES *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 181.

No. 01–9343. WASHINGTON *v.* COWAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 425.

No. 01–9344. WILLS *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9346. FUGATE *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 261 F. 3d 1206.

No. 01–9358. BURCH *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 273 F. 3d 577.

No. 01–9373. JONES *v.* ANDERSON, SUPERINTENDENT, CRAGGY CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 236.

No. 01–9421. DYSE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 01–9437. BURNETT *v.* TENET HEALTHSYSTEM HOSPITALS, INC., DBA LUTHERAN MEDICAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 658.

No. 01–9486. HANSEN *v.* LAYTNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 939.

No. 01–9487. HAWKINS *v.* MAHONEY, WARDEN. Sup. Ct. Mont. Certiorari denied. Reported below: 308 Mont. 394, 40 P. 3d 1001.

No. 01–9534. ZARYCHTA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 44 S. W. 3d 155.

No. 01–9617. KESSLER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 01–9653. MURPHY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 01–9697. LEVENITE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 277 F. 3d 454.

No. 01–9748. LUERSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 278 F. 3d 772.

No. 01–9764. MILES *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 17 Fed. Appx. 993.

No. 01–9767. BOYD *v.* T'KACH. C. A. 10th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 792.

No. 01–9768. SAVAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 280.

No. 01–9797. LOVE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 928.

No. 01–9799. LIRIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–9808. GUILLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 928.

No. 01–9809. PACHECO-CAMACHO *v.* HOOD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 3d 1266.

No. 01–9810. SAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 168.

No. 01–9813. BUCKLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 277 F. 3d 1173.

No. 01–9815. JOYNER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9816. PEREZ-SANCHEZ *v.* UNITED STATES; BARAJAS-RAMOS *v.* UNITED STATES; BUSTOS-BENITEZ, AKA ACEVEDO-ACEVEDO *v.* UNITED STATES; CORTEZ-OROZCO, AKA TAPIA ORTIZ *v.* UNITED STATES; DIAZ-ZAVALA, AKA CASANOVA *v.* UNITED STATES; GARCIA-HERNANDEZ, AKA OCAMPO-ROSA *v.* UNITED STATES; GARCIA-RODRIGUEZ *v.* UNITED STATES; GUILLEN-OROZCO *v.* UNITED STATES; LOPEZ-ALVAREZ *v.* UNITED STATES; PEINADO *v.* UNITED STATES; RIOS-QUECHA, AKA OSORIO-MELCHOR, AKA TOLEDO *v.* UNITED STATES; and ZENDEJAS-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 01–9819. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 199.

No. 01–9824. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 01–9825. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9829. HUMPHRIES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 90.

No. 01–9834. BLATT, AKA MCDONALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 477.

No. 01–9841. MCMILLON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 356.

No. 01–9842. DICKERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 236.

No. 01–9843. CARTWRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9849. TAUALII *v.* ELLIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 01–9852. COOPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1119.

No. 01–9865. TORO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–9867. AUSTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 929.

No. 01–9868. ELLEDGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 26 Fed. Appx. 88.

No. 01–9870. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9871. CANTRELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9878. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 280.

No. 01–9883. CALLAHAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9884. NAGY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 01–9889. CABA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9890. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 231 F. 3d 933.

No. 01–9891. ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 280 F. 3d 835.

No. 01–9892. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 25 Fed. Appx. 199.

No. 01–9894. WYNNE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 27 Fed. Appx. 106.

No. 01–9895. WELLINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–921. ILLINOIS BELL TELEPHONE CO., DBA AMERITECH ILLINOIS *v.* WORLDCOM TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 179 F. 3d 566.

No. 01–1363. TERRITO ET AL. *v.* ADAMS ET AL. Ct. App. La., 5th Cir. Motion of Cooper/T. Smith Stevedoring Co., Inc., for

leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 784 So. 2d 46.

Rehearing Denied

No. 01–1007. GROSS *v.* IRTZ, *ante*, p. 906;

No. 01–7528. DUMONT *v.* UBC, INC., *ante*, p. 907;

No. 01–7709. WRIGHT *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., *ante*, p. 938;

No. 01–7790. MORENO *v.* UNITED STATES, 534 U. S. 1168;

No. 01–7984. JACKSON *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., *ante*, p. 973;

No. 01–8028. EDENS *v.* TAGUE, *ante*, p. 974;

No. 01–8634. MORTIMER *v.* UNITED STATES, *ante*, p. 977; and

No. 01–8826. BARBER *v.* UNITED STATES, *ante*, p. 1005. Petitions for rehearing denied.

No. 01–8661. IN RE BONTKOWSKI, *ante*, p. 969. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

JUNE 3, 2002

Certiorari Granted—Vacated and Remanded

No. 00–1765. PIONEER MAGNETICS, INC. *v.* MICRO LINEAR CORP. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 238 F. 3d 1341.

No. 00–1946. INSITUFORM TECHNOLOGIES, INC., ET AL. *v.* CAT CONTRACTING, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 10 Fed. Appx. 871.

No. 01–35. SENIOR TECHNOLOGIES, INC. *v.* R. F. TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 13 Fed. Appx. 930.

No. 01–269. CREO PRODUCTS INC. *v.* DAINIPPON SCREEN MANUFACTURING CO., LTD., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 10 Fed. Appx. 921.

No. 01–423. SEMITOOL, INC. *v.* NOVELLUS SYSTEMS, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 12 Fed. Appx. 918.

No. 01–506. LOCKHEED MARTIN CORP. *v.* SPACE SYSTEMS/LORAL, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 249 F. 3d 1314.

No. 01–541. ACCUSCAN, INC. *v.* XEROX CORP. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. JUSTICE BREYER took no part in the consideration or decision of this case. Reported below: 18 Fed. Appx. 828.

No. 01–677. PTI TECHNOLOGIES, INC. *v.* PALL CORPORATION TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 259 F. 3d 1383.

No. 01–711. BELL, WARDEN *v.* QUINTERO. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bell* v. *Cone*, *ante*, p. 685. Reported below: 256 F. 3d 409.

No. 01–740. MYCOGEN PLANT SCIENCE, INC., ET AL. *v.* MONSANTO CO. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, *ante*, p. 722. Reported below: 252 F. 3d 1306.

No. 01–1413. JONES, WARDEN *v.* FRENCH. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bell* v. *Cone*, *ante*, p. 685. Reported below: 282 F. 3d 893.

Certiorari Dismissed

No. 01–9439. SAFOUANE ET UX. *v.* FLECK ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 01–9451. MULAZIM *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 28 Fed. Appx. 470.

Miscellaneous Orders. (For opinion of JUSTICE SCALIA dissenting from grants of applications for stays of execution in No. 01A834, *ante*, p. 1044, and No. 01A853, *ante*, p. 1050, see *ante*, p. 1044.)

No. 01A768. OSTOPOSIDES ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (GLIMP ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–2234. IN RE DISBARMENT OF LITTLE. Disbarment entered. [For earlier order herein, see 531 U. S. 1122.]

No. 01M61. O'GRADY *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY; and

No. 01M62. MORRISON *v.* GOODMAN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 01M63. BOWERS *v.* ILLINOIS. Motion to direct the Clerk to file an original action denied.

No. 01–1229. PIERCE COUNTY, WASHINGTON *v.* GUILLEN, LEGAL GUARDIAN OF GUILLEN ET AL., MINORS, ET AL. Sup. Ct.

Wash. [Certiorari granted, *ante*, p. 1033.] Motion of the United States to intervene granted. Motion of respondents Whitmer to determine party status granted, and it is determined that the Whitmers are not parties under this Court's Rule 12.6, but they may file a brief as *amici curiae.*

No. 01–8796. WESTINE *v.* STEPP, WARDEN. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 983] denied.

No. 01–9423. TAYLOR *v.* PEARL CRUISES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 24, 2002, 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. 01–10019. IN RE BERRY. Petition for writ of habeas corpus denied.

No. 01–9426. IN RE WELLS. Petition for writ of mandamus denied.

No. 01–9372. IN RE ROBERTSON; and
No. 01–9499. IN RE OTIS. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 01–1289. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* CAMPBELL ET UX. Sup. Ct. Utah. Certiorari granted. Reported below: 65 P. 3d 1134.

No. 01–1444. CHAVEZ *v.* MARTINEZ. C. A. 9th Cir. Certiorari granted. Reported below: 270 F. 3d 852.

No. 01–1375. UNITED STATES *v.* NAVAJO NATION. C. A. Fed. Cir. Certiorari granted, and case set for oral argument in tandem with No. 01–1067, *United States* v. *White Mountain Apache Tribe* [certiorari granted, *ante*, p. 1016]. Reported below: 263 F. 3d 1325.

Certiorari Denied

No. 01–1104. HANSEN *v.* UNITED STATES; and
No. 01–1112. HANSEN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 262 F. 3d 1217.

No. 01–1111. HOFFMANN ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 17 Fed. Appx. 980.

No. 01–1267. SHISINDAY, AKA THOMAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 01–1283. MCMASTERS *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 260 F. 3d 814.

No. 01–1307. FOSTER ET AL. *v.* GARCY, SUPERINTENDENT, LIVERMORE VALLEY JOINT SCHOOL DISTRICT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 268 F. 3d 689.

No. 01–1312. DAVIS, GOVERNOR OF CALIFORNIA *v.* DUKE ENERGY TRADING AND MARKETING, L. L. C. C. A. 9th Cir. Certiorari denied. Reported below: 267 F. 3d 1042.

No. 01–1433. FOLEY *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION FUND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 3d 551.

No. 01–1439. SABO *v.* CITY OF OWENSBORO ET AL. Ct. App. Ky. Certiorari denied.

No. 01–1441. MICHAEL *v.* ST. JOSEPH COUNTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 259 F. 3d 842.

No. 01–1445. HOFFEND *v.* VILLA. C. A. 11th Cir. Certiorari denied. Reported below: 261 F. 3d 1148.

No. 01–1447. HOFFMAN ET AL. *v.* JEFFORDS. C. A. D. C. Cir. Certiorari denied.

No. 01–1448. HAGENBUCH ET AL. *v.* COMPAQ COMPUTER CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 234.

No. 01–1457. CLANTON *v.* GREENWOOD TRUST CO. Ct. App. Mich. Certiorari denied.

No. 01–1460. CIRCUIT CITY STORES, INC. *v.* ADAMS. C. A. 9th Cir. Certiorari denied. Reported below: 279 F. 3d 889.

No. 01–1461. SIERRA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 01–1467. MISSOURI REPUBLICAN PARTY ET AL. *v.* CONNOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 270 F. 3d 567.

No. 01–1476. VASEK *v.* MT. SAN JACINTO COLLEGE DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 01–1480. HIGHLANDS INSURANCE CO. *v.* CLERK, SUPERIOR COURT OF NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 01–1512. GONCE-WARNER *v.* BAYLOR UNIVERSITY. C. A. 5th Cir. Certiorari denied. Reported below: 281 F. 3d 1279.

No. 01–1513. KRUEGER *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 25 Fed. Appx. 908.

No. 01–1552. PRATER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 263 F. 3d 168.

No. 01–1563. AYERS, ADMINISTRATRIX OF THE ESTATE OF HARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 277 F. 3d 821.

No. 01–1565. HAWORTH *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 8 Fed. Appx. 962.

No. 01–1580. JAMES *v.* SUPREME COURT OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–1630. MOODY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 01–7623. PABELLON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 125.

No. 01–7988. RIZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 1191.

No. 01–8092. LOZANO-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1079.

No. 01–8133. ESPINOZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–8263. SCHWARTZ *v.* KING COUNTY JAIL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 673.

No. 01–8446. OSBORNE *v.* UNITED STATES; and
No. 01–9940. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 28 Fed. Appx. 427.

No. 01–8603. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 F. 3d 1062.

No. 01–8640. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 1113.

No. 01–8781. PARKER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 268, 553 S. E. 2d 885.

No. 01–8859. FAIR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 354 N. C. 131, 557 S. E. 2d 500.

No. 01–9013. FRANKLIN *v.* MAYNARD, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Sup. Ct. S. C. Certiorari denied. Reported below: 346 S. C. 563, 552 S. E. 2d 718.

No. 01–9326. MOORE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 251 Ga. App. 295, 554 S. E. 2d 204.

No. 01–9327. CHAMBERS *v.* TURLEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 537.

No. 01–9328. MCKAY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 01–9330. EVANS *v.* SIKES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 01–9331. BENSON *v.* FRANK, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 01–9332. MARTEL *v.* NEW HAMPSHIRE. Merrimack County Probate Court, N. H. Certiorari denied.

No. 01–9334. DILLS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9336. RED PAINT, AKA CLIFFORD *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 639 N. W. 2d 503.

No. 01–9340. PRICE *v.* MCCORMACK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 168.

No. 01–9341. ADAMS *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 01–9350. BROWN *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 01–9352. ANDERSON *v.* HOLMES, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 01–9354. JACKSON *v.* SINAI SAMARITAN HOSPITAL. Sup. Ct. Wis. Certiorari denied. Reported below: 246 Wis. 2d 178, 634 N. W. 2d 323.

No. 01–9356. RIEGO *v.* SUWANNEE RIVER SPRINGS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 273 F. 3d 398.

No. 01–9361. QUATREVINGT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 277 F. 3d 1374.

No. 01–9362. SNOW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 836 So. 2d 1002.

No. 01–9363. SWAIN *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9364. STEEL *v.* COURT OF CRIMINAL APPEALS OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1081.

No. 01–9368. SMITH *v.* HORNUNG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 01–9369. STANLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 01–9376. WILLIAMS *v.* HARDAWAY ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–9382. McClendon *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 01–9383. Lewal *v.* Wiley et al. C. A. 2d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 26.

No. 01–9385. Anderson *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 01–9387. Brown *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 01–9389. Priester, aka Thomas *v.* Sabourin, Superintendent, Bare Hill Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 01–9391. Trice *v.* Hall, Warden. C. A. 11th Cir. Certiorari denied.

No. 01–9393. McDowell *v.* Cornell Corrections et al. C. A. 5th Cir. Certiorari denied. Reported below: 275 F. 3d 1080.

No. 01–9395. Brown *v.* South Carolina. Sup. Ct. S. C. Certiorari denied.

No. 01–9396. Rauso *v.* Vaughn, Superintendent, State Correctional Institution at Graterford. C. A. 3d Cir. Certiorari denied.

No. 01–9397. Summerour *v.* Sikes, Warden. Super. Ct. Tattnall County, Ga. Certiorari denied.

No. 01–9402. Ferguson *v.* McGinnis, Superintendent, Downstate Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 23 Fed. Appx. 96.

No. 01–9404. Evans *v.* Evans. Sup. Ct. Ohio. Certiorari denied. Reported below: 93 Ohio St. 3d 1478, 757 N. E. 2d 775.

No. 01–9405. Crenshaw *v.* Keller Graduate School of Management, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 1084.

No. 01–9407. MASON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 01–9410. MASON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 01–9412. KELLAM *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 801 So. 2d 148.

No. 01–9414. IN RE MCCOLM. C. A. 9th Cir. Certiorari denied.

No. 01–9415. PIGOTT *v.* BELL, CORRECTIONAL ADMINISTRATOR I, PENDER CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 176.

No. 01–9425. WARD *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied.

No. 01–9427. TURNER *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 01–9429. LOFTEN *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9430. LEE, AKA CAMPBELL *v.* BERGE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 14 Fed. Appx. 690.

No. 01–9431. LOVE *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9432. HARRIS *v.* GILMORE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 01–9433. HUNTER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 783 A. 2d 558.

No. 01–9438. ROWSEY *v.* NASHVILLE POLICE DEPARTMENT. C. A. 6th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 539.

No. 01–9442. AVILES SANCHEZ *v.* COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 01–9446. NORTHERN *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 800.

No. 01–9447. MCQUILLIA *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 21 Fed. Appx. 177.

No. 01–9497. NEWBERRY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 812 So. 2d 426.

No. 01–9558. MCCULLEY *v.* SOUTHERN CONNECTICUT NEWSPAPER. C. A. 2d Cir. Certiorari denied.

No. 01–9577. DAVIS *v.* GAMMON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 715.

No. 01–9580. BROOKS *v.* WETHERINGTON ET AL. C. A. 11th Cir. Certiorari denied.

No. 01–9688. JONES *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 01–9749. CLAYTON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 63 S. W. 3d 201.

No. 01–9888. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 01–9902. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 01–9907. SOUTHWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 254 F. 3d 73.

No. 01–9915. CERVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 813.

No. 01–9917. CISNEROS-VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 30 Fed. Appx. 696.

No. 01–9918. COONEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 513.

No. 01–9920. DAVILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 932.

No. 01–9924. JOLLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 838.

No. 01–9925. MARLOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 278 F. 3d 581.

No. 01–9926. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 991.

No. 01–9928. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 38 Fed. Appx. 42.

No. 01–9929. RALEIGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 278 F. 3d 563.

No. 01–9930. ROBLEDO-TERAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 33 Fed. Appx. 336.

No. 01–9941. TRAIL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 984.

No. 01–9951. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 836.

No. 01–9952. GONZALO ISAIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 839.

No. 01–9953. GULLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 228.

No. 01–9962. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 272 F. 3d 366.

No. 01–9965. DELOACH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 Fed. Appx. 572.

No. 01–9967. KRUG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 20 Fed. Appx. 271.

No. 01–9970. TOKASH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 282 F. 3d 962.

No. 01–9971. WILKERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 878.

No. 01–9973. WOOD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 01–9975. JACKSON-BEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 01–9976. ABREU *v.* HUFFMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 27 Fed. Appx. 500.

No. 01–9977. NOVATON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 271 F. 3d 968.

No. 01–9978. MATTHEWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 278 F. 3d 880.

No. 01–9980. NEWMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 31 Fed. Appx. 931.

No. 01–9983. MIDDLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 17 Fed. Appx. 126.

No. 01–9984. MIRANDA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 799.

No. 01–9988. MELENDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 279 F. 3d 16.

No. 01–9991. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 29 Fed. Appx. 819.

No. 01–9992. WESTON *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 01–9999. MONTERO-CASTANEDA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 23 Fed. Appx. 108.

No. 01–10001. PINELA-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 262 F. 3d 974.

No. 01–10002. CRENSHAW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 01–10005. MILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 280 F. 3d 915.

No. 01–10026. POSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 26 Fed. Appx. 306.

No. 01–495. COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION *v.* BURDINE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma*

pauperis granted. Certiorari denied. Reported below: 262 F. 3d 336.

No. 01–1247. WISCONSIN *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Motion of Fidelity Exploration & Production Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 266 F. 3d 741.

No. 01–9400 (01A858). GONZALEZ ET UX. *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; GONZALEZ ET UX. *v.* RIDDLE ET AL.; and GONZALEZ ET UX. *v.* ELDORADO BANK ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied. Certiorari denied.

No. 01–9441. STRONG *v.* ILLINOIS OFFICE OF REHABILITATION SERVICES. C. A. 7th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 00–10873. MILES *v.* BURGESS ET AL., 534 U. S. 884;

No. 01–6112. POLANCO, AKA POLANCO-LIBRADO *v.* UNITED STATES, 534 U. S. 1057;

No. 01–7051. MCCALISTER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante,* p. 955;

No. 01–7749. YOUNG *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, *ante,* p. 939;

No. 01–7925. REEDER *v.* CITY OF PARIS ET AL., *ante,* p. 959;

No. 01–7982. JACKSON *v.* UNITED STATES, *ante,* p. 941;

No. 01–8262. MARKHAM *v.* SMITH, WARDEN, *ante,* p. 997;

No. 01–8400. BOWMAN *v.* BEASLEY ET AL., *ante,* p. 1001;

No. 01–8590. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL., *ante,* p. 1002; and

No. 01–8940. PERRY *v.* LAMANNA, WARDEN, *ante,* p. 1008. Petitions for rehearing denied.

No. 01–788. COOPER, AKA WADUD *v.* HVASS, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, *ante,* p. 954. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 29, 2002, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1124. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, and 523 U. S. 1147.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2002

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2002

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6.

[See *infra*, pp. 1127–1137.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules; title.

. . . . .

(*b*) *[Abrogated.]*

. . . . .

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

(*1*) *Time for filing a notice of appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

. . . . .

(*4*) *Effect of a motion on a notice of appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

. . . . .

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

. . . . .

(5) *Motion for extension of time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

. . . . .

(7) *Entry defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(*b*) *Appeal in a criminal case.*

. . . . .

(5) *Jurisdiction.*—The filing of a notice of appeal under this Rule 4(b) does not divest a district court of

jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

. . . . .

Rule 5. Appeal by permission.

. . . . .

(*c*) *Form of papers; number of copies.*—All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

. . . . .

Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

. . . . .

(*d*) *Form of papers; number of copies.*—All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 24. Proceeding in forma pauperis.

(*a*) *Leave to proceed in forma pauperis.*

(*1*) *Motion in the district court.*—Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in

the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(*2*) *Action on the motion.*—If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(*3*) *Prior approval.*—A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

. . . . .

Rule 25. Filing and service.

. . . . .

(*c*) *Manner of service.*

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 calendar days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(*d*) *Proof of service.*

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

. . . . .

Rule 26. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

. . . . .

(*c*) *Additional time after service.*—When a party is required or permitted to act within a prescribed period after

a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Rule 26.1. Corporate disclosure statement.

(*a*) *Who must file.*—Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(*b*) *Time for filing; supplemental filing.*—A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(*c*) *Number of copies.*—If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Rule 27. Motions.

(*a*) *In general.*

. . . . .

(*3*) *Response.*

(*A*) *Time to file.*—Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 8 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be

granted before the 8-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

. . . . .

(*4*) *Reply to response.*—Any reply to a response must be filed within 5 days after service of the response. A reply must not present matters that do not relate to the response.

. . . . .

(*d*) *Form of papers; page limits; and number of copies.*

(*1*) *Format.*

. . . . .

(*B*) *Cover.*—A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

. . . . .

Rule 28. Briefs.

. . . . .

(*j*) *Citation of supplemental authorities.*—If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Rule 31. Serving and filing briefs.

. . . . .

(*b*) *Number of copies.*—Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on

each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

. . . . .

Rule 32. Form of briefs, appendices, and other papers.

(*a*) *Form of a brief.*

. . . . .

(*2*) *Cover.*—Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (*e. g.,* Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

. . . . .

(*7*) *Length.*

. . . . .

(*C*) *Certificate of compliance.*

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the

word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

. . . . .

(*c*) *Form of other papers.*

(*1*) *Motion.*—The form of a motion is governed by Rule 27(d).

(*2*) *Other papers.*—Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(*d*) *Signature.*—Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(*e*) *Local variation.*—Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Rule 36. Entry of judgment; notice.

. . . . .

(*b*) *Notice.*—On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or

the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

Rule 41. Mandate: contents; issuance and effective date; stay.

. . . . .

(*b*) *When issued.*—The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

. . . . .

Rule 44. Case involving a constitutional question when the United States or the relevant state is not a party.

(*a*) *Constitutional challenge to federal statute.*—If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(*b*) *Constitutional challenge to state statute.*—If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Rule 45. Clerk's duties.

. . . . .

(*c*) *Notice of an order or judgment.*—Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any

opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

. . . . .

APPENDIX OF FORMS

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains *[state the number of]* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains *[state the number of]* lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using *[state name and version of word processing program]* in *[state font size and name of type style]*, or

☐ this brief has been prepared in a monospaced typeface using *[state name and version of word processing program]* with *[state number of characters per inch and name of type style]*.

(s) _____

Attorney for _____

Dated: _____

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 29, 2002, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1140. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, and 532 U. S. 1077.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2002

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2002

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1004, 2004, 2015, 4004, 9014, and 9027, and new Rule 1004.1.

[See *infra*, pp. 1143–1146.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1004. Involuntary petition against a partnership.

After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall promptly send to or serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.

Rule 1004.1. Petition for an infant or incompetent person.

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

Rule 2004. Examination.

. . . . . .

(*c*) *Compelling attendance and production of documents.*—The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the

examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

. . . . .

Rule 2015. Duty to keep records, make reports and give notice of case.

(*a*) *Trustee or debtor in possession.*—A trustee or debtor in possession shall

. . . . .

(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U. S. C. § 1930(a)(6), file and transmit to the United States trustee a statement of any disbursements made during that quarter and of any fees payable under 28 U. S. C. § 1930(a)(6) for that quarter.

. . . . .

Rule 4004. Grant or denial of discharge.

. . . . .

(*c*) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual,

(B) a complaint objecting to the discharge has been filed,

(C) the debtor has filed a waiver under § 727(a)(10),

(D) a motion to dismiss the case under § 707 is pending,

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending,

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending, or

(G) the debtor has not paid in full the filing fee prescribed by 28 U. S. C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

. . . . .

Rule 9014. Contested matters.

(*a*) *Motion.*—In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(*b*) *Service.*—The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(*c*) *Application of Part VII rules.*—Unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(*d*) *Testimony of witnesses.*—Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(*e*) *Attendance of witnesses.*—The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

Rule 9027. Removal.

(*a*) *Notice of removal.*

. . . . .

(*3*) *Time for filing; civil action initiated after commencement of the case under the Code.*—If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 29, 2002, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1148. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, and 532 U. S. 1085.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2002

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2002

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 54, 58, and 81, and a new Rule 7.1, and Rule C of Supplemental Rules for Certain Admiralty and Maritime Claims.

[See *infra*, pp. 1151–1155.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 7.1. Disclosure statement.

(*a*) *Who must file: nongovernmental corporate party.*—A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(*b*) *Time for filing; supplemental filing.*—A party must:

(1) file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

Rule 54. Judgments; costs.

. . . . .

(*d*) *Costs; attorneys' fees.*

. . . . .

(*2*) *Attorneys' fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms

of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).

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Rule 58. Entry of judgment.

(*a*) *Separate document.*

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(*b*) *Time of entry.*—Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(*c*) *Cost or fee awards.*

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(*d*) *Request for entry.*—A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Rule 81. Applicability in general.

(*a*) *To what proceedings applicable.*

. . . . .

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

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AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C. In rem actions: special provisions.

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(*3*) *Judicial authorization and process.*

(*a*) *Arrest warrant.*

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

. . . . . .

(*6*) *Responsive pleading; interrogatories.*

(*a*) *Civil forfeiture.*—In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows.

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(*b*) *Maritime arrests and other proceedings.*—In an in rem action not governed by Rule C(6)(a):

. . . . .

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 29, 2002, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1158. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, and 529 U. S. 1179.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2002

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Court did not approve the addition of a new Rule 26(b) as proposed by the Judicial Conference. JUSTICE BREYER has issued a dissenting statement, in which JUSTICE O'CONNOR joins. JUSTICE SCALIA has issued a separate statement.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2002

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1 through 60.

[See *infra*, pp. 1171–1259.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Federal Rule of Criminal Procedure 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

In *Maryland* v. *Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted). The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to

protect a child witness from trauma." *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Federal Rule of Criminal Procedure 15. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 54. See App. to statement of BREYER, J., *post*, at 1165–1166. Indeed, even this showing is not necessary: the Committee says that video transmission may be used generally as an alternative to depositions. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, at 57. See *post*, at 1169.

This is unquestionably contrary to the rule enunciated in *Craig*. The Committee reasoned, however, that "the use of a two-way transmission made it unnecessary to apply the *Craig* standard." Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, at 55 (citing *United States* v. *Gigante*, 166 F. 3d 75, 81 (CA2 1999) ("Because Judge Weinstein employed a two-way system that preserved . . . face-to-face confrontation . . . , it is not necessary to enforce the *Craig* standard in this case"), cert. denied, 528 U. S. 1114 (2000)). See *post*, at 1167. I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, *supra*, at 846–847, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we ap-

plied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White* v. *Illinois*, 502 U. S. 346, 358 (1992) ("There is thus no basis for importing the 'necessity requirement' announced in *[Craig]* into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule"). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc. 15(b) ("The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination . . .").

JUSTICE BREYER says that our refusal to transmit "denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair." *Post*, at 1164. This is an exaggeration for two reasons: First, because Congress is free to adopt the proposal despite our action. And second, because nothing prevents a defendant who believes this procedure is "more efficient and more fair" from voluntarily waiving his right of confrontation.* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER's belief that we should forward this proposal despite our constitutional doubts, so that we can "later consider fully any constitutional problem when the Rule is applied in an individual case." *Post*, at 1163. I see no more reason for us to for-

*JUSTICE BREYER's assertion to the contrary notwithstanding, existing Federal Rule of Criminal Procedure 26 does not prohibit the use of video transmission by consent. *United States* v. *Mezzanatto*, 513 U. S. 196, 201 (1995) ("The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause . . . suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances").

ward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is "anything goes, and litigation will correct our constitutional mistakes." It seems to me that among the reasons Congress has asked us to vet the Conference's proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise serious constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes. But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement.

I would transmit to Congress the Judicial Conference's proposed Federal Rule of Criminal Procedure 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable." The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Rule 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 53. See Appendix, *infra*, at 1164.

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless. And where the

defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply.

JUSTICE SCALIA believes that the present proposal does not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland* v. *Craig*, 497 U. S. 836 (1990). I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland* v. *Craig* five times. It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case]." It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*, and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States* v. *Gigante*, 166 F. 3d 75 (CA2 1999), cert. denied, 528 U. S. 1114 (2000); *Harrell* v. *Butterworth*, 251 F. 3d 926 (CA11 2001), cert. denied, 535 U. S. 958 (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong. Cf. Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity").

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional. Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking. At the same time, that approach would permit application of the proposed Rule in those cases in which application is clearly constitu-

tional. And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf. *ante*, at 1161. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, *e. g.*, Fed. Rule Crim. Proc. 26 (testimony must "be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other Rules adopted by the Supreme Court"). Others may hesitate to rely on highly general and uncertain sources of legal authority. Cf. *United States* v. *Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Rules 2 and 57(b)); *United States* v. *Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 43 (Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video teleconferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule.

APPENDIX TO STATEMENT OF BREYER, J.

Rule 26. Taking Testimony.

(a) In General.—In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by

a statute or by rules adopted under 28 U. S. C. §§ 2072–2077.

(b) Transmitting Testimony from a Different Location. In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes exceptional circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)–(5).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that

exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. See, *e. g.*, *United States v. Salim*, 855 F. 2d 944, 947–948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use "contemporaneous two-way" video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in *Maryland* v. *Craig*, 497 U. S. 836 (1990) (transmission of one-way closed circuit television of child's testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are "exceptional circumstances" for using video transmissions, a standard used in *United States* v. *Gigante*, 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999). While it is difficult to catalog examples of cir-

cumstances considered to be "exceptional," the inability of the defendant and the defense counsel to be at the witness's location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland* v. *Craig*, 497 U. S. 836 (1990). In that case the Court indicated that a defendant's confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U. S. at 850. In *Gigante*, the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. See, *e. g.*, *United States* v. *Gigante*, 166 F. 3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante*, *supra*, to appear at the

witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed under the rule. *See United States* v. *Gigante*, 971 F. Supp. 755, 759–760 (E. D. N. Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland* v. *Craig*, 497 U. S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.*, at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i. e., the witness was psychologically unavail-

able to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i. e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. See also *United States* v. *Gigante*, *supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause); *Harrell* v. *Butterworth*, [251] F. 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses' testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. See *Maryland* v. *Craig*, *supra*.

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AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

TITLE I. APPLICABILITY

Rule 1. Scope; definitions.

(*a*) *Scope.*

(*1*) *In general.*—These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.

(*2*) *State or local judicial officer.*—When a rule so states, it applies to a proceeding before a state or local judicial officer.

(*3*) *Territorial courts.*—These rules also govern the procedure in all criminal proceedings in the following courts:

(A) the district court of Guam;

(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and

(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(*4*) *Removed proceedings.*—Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.

(*5*) *Excluded proceedings.*—Proceedings not governed by these rules include:

(A) the extradition and rendition of a fugitive;

(B) a civil property forfeiture for violating a federal statute;

(C) the collection of a fine or penalty;

(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

(E) a dispute between seamen under 22 U. S. C. §§ 256–258; and

(F) a proceeding against a witness in a foreign country under 28 U. S. C. § 1784.

(*b*) *Definitions.*—The following definitions apply to these rules:

(1) "Attorney for the government" means:

(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(2) "Court" means a federal judge performing functions authorized by law.

(3) "Federal judge" means:

(A) a justice or judge of the United States as these terms are defined in 28 U. S. C. § 451;

(B) a magistrate judge; and

(C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates.

(4) "Judge" means a federal judge or a state or local judicial officer.

(5) "Magistrate judge" means a United States magistrate judge as defined in 28 U. S. C. §§ 631–639.

(6) "Oath" includes an affirmation.

(7) "Organization" is defined in 18 U. S. C. § 18.

(8) "Petty offense" is defined in 18 U. S. C. § 19.

(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.

(10) "State or local judicial officer" means:

(A) a state or local officer authorized to act under 18 U. S. C. § 3041; and

(B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates.

(*c*) *Authority of a justice or judge of the United States.*—When these rules authorize a magistrate judge to act, any other federal judge may also act.

Rule 2. Interpretation.

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

TITLE II. PRELIMINARY PROCEEDINGS

Rule 3. The complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest warrant or summons on a complaint.

(*a*) *Issuance.*—If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.

(*b*) *Form.*

(*1*) *Warrant.*—A warrant must:

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a judge.

(*2*) *Summons.*—A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(*c*) *Execution or service, and return.*

(*1*) *By whom.*—Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(*2*) *Location.*—A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.

(*3*) *Manner.*

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general

agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(*4*) *Return.*

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Rule 5. Initial appearance.

(*a*) *In general.*

(*1*) *Appearance upon an arrest.*

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(*2*) *Exceptions.*

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U. S. C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(*3*) *Appearance upon a summons.*—When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(*b*) *Arrest without a warrant.*—If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(*c*) *Place of initial appearance; transfer to another district.*

(*1*) *Arrest in the district where the offense was allegedly committed.*—If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(*2*) *Arrest in a district other than where the offense was allegedly committed.*—If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(*3*) *Procedures in a district other than where the offense was allegedly committed.*—If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 or Rule 58(b)(2)(G);

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(*d*) *Procedure in a felony case.*

(*1*) *Advice.*—If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(*2*) *Consulting with counsel.*—The judge must allow the defendant reasonable opportunity to consult with counsel.

(*3*) *Detention or release.*—The judge must detain or release the defendant as provided by statute or these rules.

(*4*) *Plea.*—A defendant may be asked to plead only under Rule 10.

(*e*) *Procedure in a misdemeanor case.*—If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(*f*) *Video teleconferencing.*—Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Rule 5.1. Preliminary hearing.

(*a*) *In general.*—If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(*b*) *Selecting a district.*—A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(*c*) *Scheduling.*—The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than

10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.

(*d*) *Extending the time.*—With the defendant's consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(*e*) *Hearing and finding.*—At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(*f*) *Discharging the defendant.*—If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(*g*) *Recording the proceedings.*—The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.

(*h*) *Producing a statement.*

(*1*) *In general.*—Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(*2*) *Sanctions for not producing a statement.*—If a party disobeys a Rule 26.2 order to deliver a statement to the mov-

ing party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The grand jury.

(*a*) *Summoning a grand jury.*

(*1*) *In general.*—When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(*2*) *Alternate jurors.*—When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(*b*) *Objection to the grand jury or to a grand juror.*

(*1*) *Challenges.*—Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(*2*) *Motion to dismiss an indictment.*—A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U. S. C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(*c*) *Foreperson and deputy foreperson.*—The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy fore-

person will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(*d*) *Who may be present.*

(*1*) *While the grand jury is in session.*—The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(*2*) *During deliberations and voting.*—No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(*e*) *Recording and disclosing the proceedings.*

(*1*) *Recording the proceedings.*—Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(*2*) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(*3*) *Exceptions.*

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state or state subdivisionor of an Indian tribe—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U. S. C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U. S. C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official

duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or

(iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(*4*) *Sealed indictment.*—The magistrate judge to whom an indictment is returned may direct that the indictment be

kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(*5*) *Closed hearing.*—Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(*6*) *Sealed records.*—Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(*7*) *Contempt.*—A knowing violation of Rule 6 may be punished as a contempt of court.

(*f*) *Indictment and return.*—A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(*g*) *Discharging the grand jury.*—A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(*h*) *Excusing a juror.*—At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(*i*) *"Indian tribe" defined.*—"Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U. S. C. § 479a–1.

Rule 7. The indictment and the information.

(*a*) *When used.*

(*1*) *Felony.*—An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(*2*) *Misdemeanor.*—An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

(*b*) *Waiving indictment.*—An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

(*c*) *Nature and contents.*

(*1*) *In general.*—The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

(*2*) *Criminal forfeiture.*—No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(*3*) *Citation error.*—Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

(*d*) *Surplusage.*—Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(*e*) *Amending an information.*—Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(*f*) *Bill of particulars.*—The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Rule 8. Joinder of offenses or defendants.

(*a*) *Joinder of offenses.*—The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(*b*) *Joinder of defendants.*—The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 9. Arrest warrant or summons on an indictment or information.

(*a*) *Issuance.*—The court must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the

court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.

(*b*) *Form.*

(*1*) *Warrant.*—The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information.

(*2*) *Summons.*—The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(*c*) *Execution or service; return; initial appearance.*

(*1*) *Execution or service.*

(A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(*2*) *Return.*—A warrant or summons must be returned in accordance with Rule 4(c)(4).

(*3*) *Initial appearance.*—When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment.

(*a*) *In general.*—An arraignment must be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(*b*) *Waiving appearance.*—A defendant need not be present for the arraignment if:

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(*c*) *Video teleconferencing.*—Video teleconferencing may be used to arraign a defendant if the defendant consents.

Rule 11. Pleas.

(*a*) *Entering a plea.*

(*1*) *In general.*—A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(*2*) *Conditional plea.*—With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(*3*) *Nolo contendere plea.*—Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(*4*) *Failure to enter a plea.*—If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(*b*) *Considering and accepting a guilty or nolo contendere plea.*

(*1*) *Advising and questioning the defendant.*—Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(*2*) *Ensuring that a plea is voluntary.*—Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(*3*) *Determining the factual basis for a plea.*—Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(*c*) *Plea agreement procedure.*

(*1*) *In general.*—An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(*2*) *Disclosing a plea agreement.*—The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(*3*) *Judicial consideration of a plea agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(*4*) *Accepting a plea agreement.*—If the court accepts the plea agreement, it must inform the defendant that to the

extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(*5*) *Rejecting a plea agreement.*—If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(*d*) *Withdrawing a guilty or nolo contendere plea.*—A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(*e*) *Finality of a guilty or nolo contendere plea.*—After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(*f*) *Admissibility or inadmissibility of a plea, plea discussions, and related statements.*—The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(*g*) *Recording the proceedings.*—The proceedings during which the defendant enters a plea must be recorded by a

court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(*h*) *Harmless error.*—A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Rule 12. Pleadings and pretrial motions.

(*a*) *Pleadings.*—The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(*b*) *Pretrial motions.*

(*1*) *In general.*—Rule 47 applies to a pretrial motion.

(*2*) *Motions that may be made before trial.*—A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(*3*) *Motions that must be made before trial.*—The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(*4*) *Notice of the government's intent to use evidence.*

(*A*) *At the government's discretion.*—At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(*B*) *At the defendant's request.*—At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(*c*) *Motion deadline.*—The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(*d*) *Ruling on a motion.*—The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(*e*) *Waiver of a defense, objection, or request.*—A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(*f*) *Recording the proceedings.*—All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(*g*) *Defendant's continued custody or release status.*—If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U. S. C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(*h*) *Producing statements at a suppression hearing.*—Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

Rule 12.1. Notice of an alibi defense.

(*a*) *Government's request for notice and defendant's response.*

(*1*) *Government's request.*—An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(*2*) *Defendant's response.*—Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(*b*) *Disclosing government witnesses.*

(*1*) *Disclosure.*—If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, address, and telephone number of each witness the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

(*2*) *Time to disclose.*—Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(*c*) *Continuing duty to disclose.*—Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of each additional witness if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(*d*) *Exceptions.*—For good cause, the court may grant an exception to any requirement of Rule 12.1(a)–(c).

(*e*) *Failure to comply.*—If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

(*f*) *Inadmissibility of withdrawn intention.*—Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.2. Notice of an insanity defense; mental examination.

(*a*) *Notice of an insanity defense.*—A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(*b*) *Notice of expert evidence of a mental condition.*—If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow

the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(*c*) *Mental examination.*

(1) Authority to order an examination; procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U. S. C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U. S. C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(*2*) *Disclosing results and reports of capital sentencing examination.*—The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(*3*) *Disclosing results and reports of the defendant's expert examination.*—After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(*4*) *Inadmissibility of a defendant's statements.*—No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(*d*) *Failure to comply.*—If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guiltor the issue of punishment in a capital case.

(*e*) *Inadmissibility of withdrawn intention.*—Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.3. Notice of a public-authority defense.

(*a*) *Notice of the defense and disclosure of witnesses.*

(1) Notice in general.—If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

(*2*) *Contents of notice.*—The notice must contain the following information:

(A) the law enforcement agency or federal intelligence agency involved;

(B) the agency member on whose behalf the defendant claims to have acted; and

(C) the time during which the defendant claims to have acted with public authority.

(*3*) *Response to the notice.*—An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(*4*) *Disclosing witnesses.*

(*A*) *Government's request.*—An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(*B*) *Defendant's response.*—Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(*C*) *Government's reply.*—Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

(*5*) *Additional time.*—The court may, for good cause, allow a party additional time to comply with this rule.

(*b*) *Continuing duty to disclose.*—Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(*c*) *Failure to comply.*—If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(*d*) *Protective procedures unaffected.*—This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.

(*e*) *Inadmissibility of withdrawn intention.*—Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.4. Disclosure statement.

(*a*) *Who must file.*

(*1*) *Nongovernmental corporate party.*—Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(*2*) *Organizational victim.*—If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(*b*) *Time for filing; supplemental filing.*—A party must:

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

Rule 13. Joint trial of separate cases.

The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Rule 14. Relief from prejudicial joinder.

(*a*) *Relief.*—If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(*b*) *Defendant's statements.*—Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

Rule 15. Depositions.

(*a*) *When taken.*

(*1*) *In general.*—A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(*2*) *Detained material witness.*—A witness who is detained under 18 U. S. C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(*b*) *Notice.*

(*1*) *In general.*—A party seeking to take a deposition must give every other party reasonable written notice of the

deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(*2*) *To the custodial officer.*—A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(*c*) *Defendant's presence.*

(*1*) *Defendant in custody.*—The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(*2*) *Defendant not in custody.*—A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(*d*) *Expenses.*—If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(*e*) *Manner of taking.*—Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(*f*) *Use as evidence.*—A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(*g*) *Objections.*—A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(*h*) *Depositions by agreement permitted.*—The parties may by agreement take and use a deposition with the court's consent.

Rule 16. Discovery and inspection.

(*a*) *Government's disclosure.*

(*1*) *Information subject to disclosure.*

(*A*) *Defendant's oral statement.*—Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(*B*) *Defendant's written or recorded statement.*—Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(*C*) *Organizational defendant.*—Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(*D*) *Defendant's prior record.*—Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(*E*) *Documents and objects.*—Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(*F*) *Reports of examinations and tests.*—Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(*G*) *Expert testimony.*—Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(*2*) *Information not subject to disclosure.*—Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U. S. C. § 3500.

(*3*) *Grand jury transcripts.*—This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(*b*) *Defendant's disclosure.*

(*1*) *Information subject to disclosure.*

(*A*) *Documents and objects.*—If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(*B*) *Reports of examinations and tests.*—If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(*C*) *Expert testimony.*—If a defendant requests disclosure under Rule 16(a)(1)(G) and the government complies, the defendant must give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(*2*) *Information not subject to disclosure.*—Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(*c*) *Continuing duty to disclose.*—A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(*d*) *Regulating discovery.*

(*1*) *Protective and modifying orders.*—At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(*2*) *Failure to comply.*—If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Rule 17. Subpoena.

(*a*) *Content.*—A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time

and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(*b*) *Defendant unable to pay.*—Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(*c*) *Producing documents and objects.*

(*1*) *In general.*—A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(*2*) *Quashing or modifying the subpoena.*—On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(*d*) *Service.*—A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(*e*) *Place of service.*

(*1*) *In the United States.*—A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(*2*) *In a foreign country.*—If the witness is in a foreign country, 28 U. S. C. § 1783 governs the subpoena's service.

(*f*) *Issuing a deposition subpoena.*

(*1*) *Issuance.*—A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(*2*) *Place.*—After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(*g*) *Contempt.*—The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U. S. C. § 636(e).

(*h*) *Information not subject to a subpoena.*—No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Rule 17.1. Pretrial conference.

On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.

TITLE V. VENUE

Rule 18. Place of prosecution and trial.

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience

of the defendant and the witnesses, and the prompt administration of justice.

Rule 19. [Reserved.]

Rule 20. Transfer for plea and sentence.

(*a*) *Consent to transfer.*—A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing.

(*b*) *Clerk's duties.*—After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.

(*c*) *Effect of a not guilty plea.*—If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

(*d*) *Juveniles.*

(*1*) *Consent to transfer.*—A juvenile, as defined in 18 U. S. C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if:

(A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment;

(B) an attorney has advised the juvenile;

(C) the court has informed the juvenile of the juvenile's rights—including the right to be returned to the district where the offense allegedly occurred—and the consequences of waiving those rights;

(D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district;

(E) the United States attorneys for both districts approve the transfer in writing; and

(F) the transferee court approves the transfer.

(*2*) *Clerk's duties.*—After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

Rule 21. Transfer for trial.

(*a*) *For prejudice.*—Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

(*b*) *For convenience.*—Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.

(*c*) *Proceedings on transfer.*—When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.

(*d*) *Time to file a motion to transfer.*—A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Rule 22. [Transferred.]

TITLE VI. TRIAL

Rule 23. Jury or nonjury trial.

(*a*) *Jury trial.*—If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;
(2) the government consents; and
(3) the court approves.

(*b*) *Jury size.*

(*1*) *In general.*—A jury consists of 12 persons unless this rule provides otherwise.

(*2*) *Stipulation for a smaller jury.*—At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(*3*) *Court order for a jury of 11.*—After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

(*c*) *Nonjury trial.*—In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

Rule 24. Trial jurors.

(*a*) *Examination.*

(*1*) *In general.*—The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(*2*) *Court examination.*—If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(*b*) *Peremptory challenges.*—Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(*1*) *Capital case.*—Each side has 20 peremptory challenges when the government seeks the death penalty.

(*2*) *Other felony case.*—The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(*3*) *Misdemeanor case.*—Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(*c*) *Alternate jurors.*

(*1*) *In general.*—The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(*2*) *Procedure.*

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(*3*) *Retaining alternate jurors.*—The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(*4*) *Peremptory challenges.*—Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(*A*) *One or two alternates.*—One additional peremptory challenge is permitted when one or two alternates are impaneled.

(*B*) *Three or four alternates.*—Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(*C*) *Five or six alternates.*—Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Rule 25. Judge's disability.

(*a*) *During trial.*—Any judge regularly sitting in or assigned to the court may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(*b*) *After a verdict or finding of guilty.*

(*1*) *In general.*—After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(*2*) *Granting a new trial.*—The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

Rule 26. Taking testimony.

In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U. S. C. §§ 2072–2077.

Rule 26.1. Foreign law determination.

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.

Rule 26.2. Producing a witness's statement.

(*a*) *Motion to produce.*—After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(*b*) *Producing the entire statement.*—If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(*c*) *Producing a redacted statement.*—If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(*d*) *Recess to examine a statement.*—The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

(*e*) *Sanction for failure to produce or deliver a statement.*—If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike

the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(*f*) *"Statement" defined.*—As used in this rule, a witness's "statement" means:

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;

(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

(*g*) *Scope.*—This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:

(1) Rule 5.1(h) (preliminary hearing);

(2) Rule 32(i)(2) (sentencing);

(3) Rule 32.1(e) (hearing to revoke or modify probation or supervised release);

(4) Rule 46(j) (detention hearing); and

(5) Rule 8 of the Rules Governing Proceedings under 28 U. S. C. § 2255.

Rule 26.3. Mistrial.

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Rule 27. Proving an official record.

A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Rule 28. Interpreters.

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Rule 29. Motion for a judgment of acquittal.

(*a*) *Before submission to the jury.*—After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(*b*) *Reserving decision.*—The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(*c*) *After jury verdict or discharge.*

(*1*) *Time for a motion.*—A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.

(*2*) *Ruling on the motion.*—If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(*3*) *No prior motion required.*—A defendant is not required to move for a judgment of acquittal before the court

submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(*d*) *Conditional ruling on a motion for a new trial.*

(*1*) *Motion for a new trial.*—If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(*2*) *Finality.*—The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(*3*) *Appeal.*

(*A*) *Grant of a motion for a new trial.*—If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(*B*) *Denial of a motion for a new trial.*—If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Rule 29.1. Closing argument.

Closing arguments proceed in the following order:

(a) the government argues;
(b) the defense argues; and
(c) the government rebuts.

Rule 30. Jury instructions.

(*a*) *In general.*—Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(*b*) *Ruling on a request.*—The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(*c*) *Time for giving instructions.*—The court may instruct the jury before or after the arguments are completed, or at both times.

(*d*) *Objections to instructions.*—A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

Rule 31. Jury verdict.

(*a*) *Return.*—The jury must return its verdict to a judge in open court. The verdict must be unanimous.

(*b*) *Partial verdicts, mistrial, and retrial.*

(*1*) *Multiple defendants.*—If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.

(*2*) *Multiple counts.*—If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.

(*3*) *Mistrial and retrial.*—If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.

(*c*) *Lesser offense or attempt.*—A defendant may be found guilty of any of the following:

(1) an offense necessarily included in the offense charged;

(2) an attempt to commit the offense charged; or

(3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

(*d*) *Jury poll.*—After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

TITLE VII. POST-CONVICTION PROCEDURES

Rule 32. Sentencing and judgment.

(*a*) *Definitions.*—The following definitions apply under this rule:

(1) "Crime of violence or sexual abuse" means:

(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or

(B) a crime under 18 U. S. C. §§ 2241–2248 or §§ 2251–2257.

(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

(*b*) *Time of sentencing.*

(*1*) *In general.*—The court must impose sentence without unnecessary delay.

(*2*) *Changing time limits.*—The court may, for good cause, change any time limits prescribed in this rule.

(*c*) *Presentence investigation.*

(*1*) *Required investigation.*

(*A*) *In general.*—The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U. S. C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U. S. C. § 3553, and the court explains its finding on the record.

(*B*) *Restitution.*—If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(*2*) *Interviewing the defendant.*—The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(*d*) *Presentence report.*

(*1*) *Applying the sentencing guidelines.*—The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(*2*) *Additional information.*—The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U. S. C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires.

(*3*) *Exclusions.*—The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(*e*) *Disclosing the report and recommendation.*

(*1*) *Time to disclose.*—Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(*2*) *Minimum required notice.*—The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(*3*) *Sentence recommendation.*—By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(*f*) *Objecting to the report.*

(*1*) *Time to object.*—Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(*2*) *Serving objections.*—An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(*3*) *Action on objections.*—After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(*g*) *Submitting the report.*—At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(*h*) *Notice of possible departure from sentencing guidelines.*—Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(*i*) *Sentencing.*

(*1*) *In general.*—At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(*2*) *Introducing evidence; producing a statement.*—The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(*3*) *Court determinations.*—At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(*4*) *Opportunity to speak.*

(*A*) *By a party.*—Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(*B*) *By a victim.*—Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(*C*) *In camera proceedings.*—Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(*j*) *Defendant's right to appeal.*

(*1*) *Advice of a right to appeal.*

(*A*) *Appealing a conviction.*—If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(*B*) *Appealing a sentence.*—After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

(*C*) *Appeal costs.*—The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(*2*) *Clerk's filing of notice.*—If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(*k*) *Judgment.*

(*1*) *In general.*—In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(*2*) *Criminal forfeiture.*—Forfeiture procedures are governed by Rule 32.2.

Rule 32.1. Revoking or modifying probation or supervised release.

(*a*) *Initial appearance.*

(*1*) *Person in custody.*—A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(*2*) *Upon a summons.*—When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.

(*3*) *Advice.*—The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(*4*) *Appearance in the district with jurisdiction.*—If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing—either originally or by transfer of jurisdiction—the court must proceed under Rule 32.1(b)–(e).

(*5*) *Appearance in a district lacking jurisdiction.*—If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no

probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application; and

(ii) the judge finds that the person is the same person named in the warrant.

(*6*) *Release or detention.*—The magistrate judge may release or detain the person under 18 U. S. C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.

(*b*) *Revocation.*

(*1*) *Preliminary hearing.*

(*A*) *In general.*—If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(*B*) *Requirements.*—The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(*C*) *Referral.*—If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(*2*) *Revocation hearing.*—Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; and

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(*c*) *Modification.*

(*1*) *In general.*—Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel.

(*2*) *Exceptions.*—A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(*d*) *Disposition of the case.*—The court's disposition of the case is governed by 18 U. S. C. § 3563 and § 3565 (probation) and § 3583 (supervised release).

(*e*) *Producing a statement.*—Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

Rule 32.2. Criminal forfeiture.

(*a*) *Notice to the defendant.*—A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant

that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(*b*) *Entering a preliminary order of forfeiture.*

(*1*) *In general.*—As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(*2*) *Preliminary order.*—If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(*3*) *Seizing property.*—The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court

may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(*4*) *Jury determination.*—Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(*c*) *Ancillary proceeding; entering a final order of forfeiture.*

(*1*) *In general.*—If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(*2*) *Entering a final order.*—When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order

on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(*3*) *Multiple petitions.*—If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(*4*) *Ancillary proceeding not part of sentencing.*—An ancillary proceeding is not part of sentencing.

(*d*) *Stay pending appeal.*—If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(*e*) *Subsequently located property; substitute property.*

(*1*) *In general.*—On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(*2*) *Procedure.*—If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(*3*) *Jury trial limited.*—There is no right to a jury trial under Rule 32.2(e).

Rule 33. New trial.

(*a*) *Defendant's motion.*—Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(*b*) *Time to file.*

(*1*) *Newly discovered evidence.*—Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(*2*) *Other grounds.*—Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.

Rule 34. Arresting judgment.

(*a*) *In general.*—Upon the defendant's motion or on its own, the court must arrest judgment if:

(1) the indictment or information does not charge an offense; or

(2) the court does not have jurisdiction of the charged offense.

(*b*) *Time to file.*—The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets during the 7-day period.

Rule 35. Correcting or reducing a sentence.

(*a*) *Correcting clear error.*—Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(*b*) *Reducing a sentence for substantial assistance.*

(*1*) *In general.*—Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(*2*) *Later motion.*—Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(*3*) *Evaluating substantial assistance.*—In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(*4*) *Below statutory minimum.*—When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Rule 36. Clerical error.

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Rule 37. [Reserved.]

Rule 38. Staying a sentence or a disability.

(*a*) *Death sentence.*—The court must stay a death sentence if the defendant appeals the conviction or sentence.

(*b*) *Imprisonment.*

(*1*) *Stay granted.*—If the defendant is released pending appeal, the court must stay a sentence of imprisonment.

(*2*) *Stay denied; place of confinement.*—If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.

(*c*) *Fine.*—If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to:

(1) deposit all or part of the fine and costs into the district court's registry pending appeal;

(2) post a bond to pay the fine and costs; or

(3) submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.

(*d*) *Probation.*—If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(*e*) *Restitution and notice to victims.*

(*1*) *In general.*—If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay—on any terms considered appro-

priate—any sentence providing for restitution under 18 U. S. C. § 3556 or notice under 18 U. S. C. § 3555.

(*2*) *Ensuring compliance.*—The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including:

(A) a restraining order;

(B) an injunction;

(C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or

(D) an order requiring the defendant to post a bond.

(*f*) *Forfeiture.*—A stay of a forfeiture order is governed by Rule 32.2(d).

(*g*) *Disability.*—If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.

Rule 39. [Reserved.]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for failing to appear in another district.

(*a*) *In general.*—If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U. S. C. §§ 3141–3156 or by a subpoena—the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest.

(*b*) *Proceedings.*—The judge must proceed under Rule 5(c)(3) as applicable.

(*c*) *Release or detention order.*—The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

Rule 41. Search and seizure.

(*a*) *Scope and definitions.*

(*1*) *Scope.*—This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(*2*) *Definitions.*—The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(*b*) *Authority to issue a warrant.*—At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U. S. C. § 2331)—having authority in any district in

which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(*c*) *Persons or property subject to search or seizure.*—A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(*d*) *Obtaining a warrant.*

(*1*) *Probable cause.*—After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c).

(*2*) *Requesting a warrant in the presence of a judge.*

(*A*) *Warrant on an affidavit.*—When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(*B*) *Warrant on sworn testimony.*—The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(*C*) *Recording testimony.*—Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(*3*) *Requesting a warrant by telephonic or other means.*

(*A*) *In general.*—A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(*B*) *Recording testimony.*—Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(*C*) *Certifying testimony.*—The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(*D*) *Suppression limited.*—Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(*e*) *Issuing the warrant.*

(*1*) *In general.*—The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(*2*) *Contents of the warrant.*—The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(*3*) *Warrant by telephonic or other means.*—If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(*A*) *Preparing a proposed duplicate original warrant.*—The applicant must prepare a "proposed duplicate original

warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(*B*) *Preparing an original warrant.*—The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(*C*) *Modifications.*—The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(*D*) *Signing the original warrant and the duplicate original warrant.*—Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(*f*) *Executing and returning the warrant.*

(*1*) *Noting the time.*—The officer executing the warrant must enter on its face the exact date and time it is executed.

(*2*) *Inventory.*—An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(*3*) *Receipt.*—The officer executing the warrant must:

> (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or
>
> (B) leave a copy of the warrant and receipt at the place where the officer took the property.

(*4*) *Return.*—The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(*g*) *Motion to return property.*—A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(*h*) *Motion to suppress.*—A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(*i*) *Forwarding papers to the clerk.*—The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

Rule 42. Criminal contempt.

(*a*) *Disposition after notice.*—Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(*1*) *Notice.*—The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(*2*) *Appointing a prosecutor.*—The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(*3*) *Trial and disposition.*—A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(*b*) *Summary disposition.*—Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U. S. C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

TITLE IX. GENERAL PROVISIONS

Rule 43. Defendant's presence.

(*a*) *When required.*—Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(*b*) *When not required.*—A defendant need not be present under any of the following circumstances:

(*1*) *Organizational defendant.*—The defendant is an organization represented by counsel who is present.

(*2*) *Misdemeanor offense.*—The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(*3*) *Conference or hearing on a legal question.*—The proceeding involves only a conference or hearing on a question of law.

(*4*) *Sentence correction.*—The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U. S. C. § 3582(c).

(*c*) *Waiving continued presence.*

(*1*) *In general.*—A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(*2*) *Waiver's effect.*—If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Rule 44. Right to and appointment of counsel.

(*a*) *Right to appointed counsel.*—A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(*b*) *Appointment procedure.*—Federal law and local court rules govern the procedure for implementing the right to counsel.

(*c*) *Inquiry into joint representation.*

(*1*) *Joint representation.*—Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(*2*) *Court's responsibilities in cases of joint representation.*—The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Rule 45. Computing and extending time.

(*a*) *Computing time.*—The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(*1*) *Day of the event excluded.*—Exclude the day of the act, event, or default that begins the period.

(*2*) *Exclusion from brief periods.*—Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(*3*) *Last day.*—Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(*4*) *"Legal holiday" defined.*—As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(i) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;
(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

(*b*) *Extending time.*

(*1*) *In general.*—When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(*2*) *Exceptions.*—The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.

(*c*) *Additional time after service.*—When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

Rule 46. Release from custody; supervising detention.

(*a*) *Before trial.*—The provisions of 18 U. S. C. §§ 3142 and 3144 govern pretrial release.

(*b*) *During trial.*—A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.

(*c*) *Pending sentencing or appeal.*—The provisions of 18 U. S. C. § 3143 govern release pending sentencing or appeal.

The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(*d*) *Pending hearing on a violation of probation or supervised release.*—Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.

(*e*) *Surety.*—The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following:

(1) the property that the surety proposes to use as security;

(2) any encumbrance on that property;

(3) the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and

(4) any other liability of the surety.

(*f*) *Bail forfeiture.*

(*1*) *Declaration.*—The court must declare the bail forfeited if a condition of the bond is breached.

(*2*) *Setting aside.*—The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:

(A) the surety later surrenders into custody the person released on the surety's appearance bond; or

(B) it appears that justice does not require bail forfeiture.

(*3*) *Enforcement.*

(*A*) *Default judgment and execution.*—If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment.

(*B*) *Jurisdiction and service.*—By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability.

(*C*) *Motion to enforce.*—The court may, upon the government's motion, enforce the surety's liability without an inde-

pendent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address.

(*4*) *Remission.*—After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).

(*g*) *Exoneration.*—The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.

(*h*) *Supervising detention pending trial.*

(*1*) *In general.*—To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses.

(*2*) *Reports.*—An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).

(*i*) *Forfeiture of property.*—The court may dispose of a charged offense by ordering the forfeiture of 18 U. S. C. § 3142(c)(1)(B)(xi) property under 18 U. S. C. § 3146(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.

(*j*) *Producing a statement.*

(*1*) *In general.*—Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U. S. C. § 3142, unless the court for good cause rules otherwise.

(*2*) *Sanctions for not producing a statement.*—If a party disobeys a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

Rule 47. Motions and supporting affidavits.

(*a*) *In general.*—A party applying to the court for an order must do so by motion.

(*b*) *Form and content of a motion.*—A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.

(*c*) *Timing of a motion.*—A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

(*d*) *Affidavit supporting a motion.*—The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

Rule 48. Dismissal.

(*a*) *By the government.*—The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.

(*b*) *By the court.*—The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:

(1) presenting a charge to a grand jury;
(2) filing an information against a defendant; or
(3) bringing a defendant to trial.

Rule 49. Serving and filing papers.

(*a*) *When required.*—A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(*b*) *How made.*—Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.

(*c*) *Notice of a court order.*—When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

(*d*) *Filing.*—A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.

Rule 50. Prompt disposition.

Scheduling preference must be given to criminal proceedings as far as practicable.

Rule 51. Preserving claimed error.

(*a*) *Exceptions unnecessary.*—Exceptions to rulings or orders of the court are unnecessary.

(*b*) *Preserving a claim of error.*—A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Rule 52. Harmless and plain error.

(*a*) *Harmless error.*—Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(*b*) *Plain error.*—A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Rule 53. Courtroom photographing and broadcasting prohibited.

Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

*Rule 54. [Transferred.]**

Rule 55. Records.

The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

Rule 56. When court is open.

(*a*) *In general.*—A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order.

(*b*) *Office hours.*—The clerk's office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and legal holidays.

(*c*) *Special hours.*—A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

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*All of Rule 54 was moved to Rule 1.

Rule 57. District court rules.

(*a*) *In general.*

(*1*) *Adopting local rules.*—Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U. S. C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(*2*) *Limiting enforcement.*—A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.

(*c*) *Effective date and notice.*—A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

Rule 58. Petty offenses and other misdemeanors.

(*a*) *Scope.*

(*1*) *In general.*—These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise.

(*2*) *Petty offense case without imprisonment.*—In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.

(*3*) *Definition.*—As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.

(*b*) *Pretrial procedure.*

(*1*) *Charging document.*—The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(*2*) *Initial appearance.*—At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

(A) the charge, and the minimum and maximum penalties, including imprisonment, fines, any special assessment under 18 U. S. C. § 3013, and restitution under 18 U. S. C. § 3556;

(B) the right to retain counsel;

(C) the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required;

(D) the defendant's right not to make a statement, and that any statement made may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a district judge—unless:

(i) the charge is a petty offense; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) the right to a jury trial before either a magistrate judge or a district judge—unless the charge is a petty offense; and

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(*3*) *Arraignment.*

(*A*) *Plea before a magistrate judge.*—A magistrate judge may take the defendant's plea in a petty offense case. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere.

(*B*) *Failure to consent.*—Except in a petty offense case, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.

(*c*) *Additional procedures in certain petty offense cases.*—The following procedures also apply in a case involving a petty offense for which no sentence of imprisonment will be imposed:

(*1*) *Guilty or nolo contendere plea.*—The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty.

(*2*) *Waiving venue.*

(*A*) *Conditions of waiving venue.*—If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere; to waive venue and trial in the district where the proceeding is pending; and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.

(*B*) *Effect of waiving venue.*—Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(*3*) *Sentencing.*—The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

(*4*) *Notice of a right to appeal.*—After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.

(*d*) *Paying a fixed sum in lieu of appearance.*

(*1*) *In general.*—If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law.

(*2*) *Notice to appear.*—If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address.

(*3*) *Summons or warrant.*—Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is

requested by an attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.

(*e*) *Recording the proceedings.*—The court must record any proceedings under this rule by using a court reporter or a suitable recording device.

(*f*) *New trial.*—Rule 33 applies to a motion for a new trial.

(*g*) *Appeal.*

(*1*) *From a district judge's order or judgment.*—The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence.

(*2*) *From a magistrate judge's order or judgment.*

(*A*) *Interlocutory appeal.*—Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(*B*) *Appeal from a conviction or sentence.*—A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

(*C*) *Record.*—The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

(*D*) *Scope of appeal.*—The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

(*3*) *Stay of execution and release pending appeal.*—Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

Rule 59. [Deleted.]

Rule 60. Title.

These rules may be known and cited as the Federal Rules of Criminal Procedure.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1259 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

BARTLETT ET AL. *v.* STEPHENSON ET AL.

ON APPLICATION FOR STAY

No. 01A848. Decided May 17, 2002

The application of North Carolina officials to stay a State Supreme Court decision invalidating the 2001 state legislative redistricting plan under the State Constitution is denied. That court held that the plan violated a state constitutional provision that does not allow a county to be divided when forming a senate or representative district. Harmonizing that provision with federal law, the court found that any new plan must preserve county lines except to the extent counties must be divided to comply with the United States Constitution and the Voting Rights Act. Applicants, who claim that a 1981 Department of Justice (DOJ) letter bars any consideration of the whole county provision in redistricting, do not satisfy the threshold requirement for the issuance of a stay. It is unlikely that four Members of this Court will vote to grant certiorari to resolve a dispute about the meaning of a single DOJ letter. This issue does not satisfy any of the criteria for the exercise of the Court's discretionary jurisdiction. And this case does not present the same situation as *Lopez* v. *Monterey County,* 519 U. S. 9, 19, 21, and *Clark* v. *Roemer,* 500 U. S. 646, 654–655, in which this Court issued stays enjoining a covered jurisdiction from conducting imminent elections under an unprecleared voting plan.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants, North Carolina officials charged with administering the State's elections, seek a stay of a decision of the Supreme Court of North Carolina invalidating North Carolina's 2001 state legislative redistricting plan under the North Carolina Constitution. The application is denied.

The Supreme Court of North Carolina held that the 2001 plan violated what is known as the "whole county provision" of the North Carolina Constitution, which provides that "no

county shall be divided in the formation of a senate or representative district," N. C. Const., Art. II, § 3(3). See 355 N. C. 354, 363, 562 S. E. 2d 377, 384 (2002). The court thus affirmed a lower court injunction enjoining applicants from conducting any elections under the 2001 plan and ordered that a new plan be drawn. *Id.*, at 359–360, 386, 562 S. E. 2d, at 382, 398. The court directed the state trial court to conduct a hearing on whether it is feasible for the state legislature to develop a new plan for the 2002 elections. If it is not, then the trial court is directed to solicit plans and adopt one. *Id.*, at 385, 562 S. E. 2d, at 398.

The Supreme Court of North Carolina recognized, however, that requirements of federal law will preclude the new plan from giving full effect to the "whole county provision." *Id.*, at 371, 381, 562 S. E. 2d, at 389, 396. The court therefore "harmonized" the state constitutional provision with federal law, ordering that the new plan "must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with Section 5 of the Voting Rights Act [of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1994 ed.)], and to comply with Section 2 of the Voting Rights Act, and to comply with the U. S. Constitution, including the federal one-person one-vote requirements." *Id.*, at 359, 562 S. E. 2d, at 382. The court cited decisions in four other States that have reconciled similar county boundary requirements with federal law. *Id.*, at 372, n. 3, 562 S. E. 2d, at 390, n. 3 (citing *In re Apportionment of Colo. Gen. Assembly*, 45 P. 3d 1237 (Colo. 2002); *Hellar* v. *Cenarrusa*, 106 Idaho 571, 574–575, 682 P. 2d 524, 527–528 (1984); *Fischer* v. *State Bd. of Elections*, 879 S. W. 2d 475, 479 (Ky. 1994); *State ex rel. Lockert* v. *Crowell*, 631 S. W. 2d 702, 714–715 (Tenn. 1982)). And the Supreme Court of North Carolina ordered that the trial court shall seek preclearance of the new plan, with respect to the districts in the 40 North Carolina counties that are covered jurisdictions under § 5 of the Voting

Rights Act, before elections are held. 355 N. C., at 385, 562 S. E. 2d, at 398.

Applicants contend that a stay is warranted because the Supreme Court of North Carolina's decision "defies the Voting Rights Act" and directs applicants "to violate the Voting Rights Act and to administer or enforce unprecleared state constitutional provisions." Application 13, 20. In support of these assertions, applicants rely on a 1981 Department of Justice (DOJ) letter that objected to the "whole county provision." In 1981, North Carolina submitted both its 1981 redistricting plan, which was faithful to the "whole county provision," and the "whole county provision" itself to the DOJ. The DOJ objected to both, stating that it was "unable to conclude that this amendment, prohibiting the division of counties in reapportionments, does not have a discriminatory purpose or effect." App. 2 to Application 1. The letter also stated that "until the objection is withdrawn or [a] judgment from the [United States District Court for the] District of Columbia is obtained, the effect of the objection by the Attorney General is to make the [whole county provision] legally unenforceable." *Id.*, at 2.

The Supreme Court of North Carolina rejected applicants' view that this letter bars any consideration of the whole county provision in redistricting. In its view, other statements in the letter demonstrate that the letter "merely disallows a redistricting plan that adheres strictly to a 'whole county' criterion without complying with the [Voting Rights Act]." 355 N. C., at 374, 562 S. E. 2d, at 391. The court quoted the following statement from the DOJ letter: "'This determination with respect to the jurisdictions covered by Section 5 of the Voting Rights Act should in no way be regarded as precluding the State from following a policy of preserving county lines whenever feasible in formulating its new districts. Indeed, this is the policy in many states, subject only to the preclearance requirements of Section 5,

where applicable.'" *Id.*, at 372–373, 562 S. E. 2d, at 390. The court thought this interpretation of the letter consistent with DOJ administrative guidance that provides "'criteria which require the jurisdiction to . . . follow county, city, or precinct boundaries . . . *may need to give way to some degree* to avoid retrogression.'" *Id.*, at 373, 562 S. E. 2d, at 391 (quoting 66 Fed. Reg. 5413 (2001)) (emphasis added).

A "single Justice will grant a stay only in extraordinary circumstances." *Whalen* v. *Roe,* 423 U. S. 1313, 1316 (Marshall, J., in chambers). Applicants do not satisfy the threshold requirement for the issuance of a stay. There is not a reasonable probability that four Members of this Court will vote to grant certiorari to resolve what is largely a dispute about the meaning of a single DOJ letter from 1981. See *Lucas* v. *Townsend,* 486 U. S. 1301, 1304 (1988) (KENNEDY, J., in chambers). This issue, which has few if any ramifications beyond the instant case, does not satisfy any of the criteria for the exercise of this Court's discretionary jurisdiction. See this Court's Rule 10.

Applicants cite two cases in which the Court issued stays enjoining a covered jurisdiction from conducting imminent elections "under an unprecleared voting plan." *Lopez* v. *Monterey County,* 519 U. S. 9, 19, 21 (1996); *Clark* v. *Roemer,* 500 U. S. 646, 654–655 (1991). This case does not present the same situation. The Supreme Court of North Carolina ordered that the new plan would have to be precleared before elections could be held in the 40 covered counties. On remand, the trial court has already made clear its understanding of this requirement, issuing an order stating that "[n]o plan submitted by the General Assembly and approved by this Court, or in the absence of such a plan, no plan adopted by the Court, shall be administered in the 2002 elections until such time as it is precleared pursuant to Section 5 of the Voting Rights Act." App. 13 to Response in Opposition 3. As there is no plan in North Carolina to hold elec-

tions in unprecleared districts, there are no grounds for granting a stay. The stay application is denied.

It is so ordered.

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