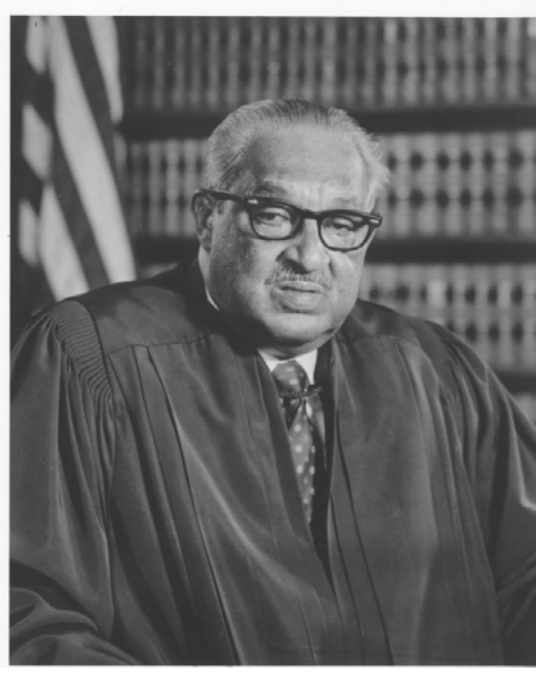
IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

VOLUME III



Thurgood Marshall
Associate Justice, October 2, 1967 – October 1, 1991

Collection of the Supreme Court of the United States

A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

VOLUME III

covering the 1979 Term through the 1998 Term

Compiled by

Cynthia Rapp
July 2001

with an Introduction by

Craig Joyce
May 2004

GREEN BAG PRESS
WASHINGTON, DC
2004

Recommended citation form:

[case name], 3 RAPP [page number] ([date])

First Trade Edition

Green Bag Press
6600 Barnaby Street NW
Washington, DC 20015

Green Bag Press is a division of
The Green Bag, Inc., publisher of the
Green Bag, Second Series,
an Entertaining Journal of Law.

For more information, please email
editors@greenbag.org or visit
http://www.greenbag.org.

ISBN 0967756871
Library of Congress Control Number 2004103933

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[Publisher's note: No in chambers opinions were issued during the 1989 Term.]

PREFACE

In an "Advertisement" dated October 1, 1851, near the front of volume 9 of the *Statutes at Large*, publishers Little & Brown made the following announcement:

> In publishing the following Laws, the same plan has been adopted that was prescribed in the joint resolution of Congress of March 3, 1845, authorizing a subscription to the edition of all the Laws of the United States just published by us. As we procured a careful collation with the records at Washington, by an experienced reader, and have scrupulously followed the original, we feel justified in saying that the public can safely rely on this publication. Any seeming errors, therefore, must be attributed to the Rolls, and not to us. Where any thing absolutely necessary to the sense is omitted in the Rolls, our plan is to insert it in the text, enclosed in brackets.

The *Green Bag* is not a publishing house with the stature of Little & Brown, and we do not have the honor of congressional endorsement of this edition of *In Chambers Opinions*. Still, we have procured a careful collation of the Justices' in chambers opinions from a very careful reader — Deputy Clerk of the Supreme Court Cynthia Rapp.

We at the *Green Bag* also lack the infallibility of the editors at Little & Brown, and so cannot say with certainty that "[a]ny seeming errors … must be attributed to the [originals]." We have, however, done our level best to scrupulously follow the originals that Ms. Rapp has provided — every word and mark in every opinion, including odd spelling, typesetting, capitalization, and usage — with "Publisher's notes" only where oddity merits explanation. This goal has also driven us to engage in some odd page layout. The original volumes prepared by Ms. Rapp are bound sets of 8½ x 11-inch photocopies, mostly of original documents. Some are typeset in pretty much the same form as the *United States Reports*. Others are not. Several are typed. Our edition is the same size as the *United States Reports* (so that it will fit on the same shelves) but with the same pagination as the original *In Chambers Opinions* (so that a citation to a page in our edition will match up with the original). And so we have had to lay out our pages, and vary type sizes, to keep the pagination as it should be. It is a compromise that elevates substance over form with sometimes ugly results — mostly line and page breaks that occur before the end of a line or the bottom of a page — but it's the best we could do.

In addition, please bear in mind the following conventions as you read the opinions in this volume: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) we've preserved running heads from the originals that sport them, and added the rest; (3) a caption misdesignating the Term in which an opinion was issued is in the original; and (4) party designations ("applicant", "movant", "petitioner", "plaintiff", "respondent", "defendant", etc.) are sometimes used more loosely than is the Court's wont — probably due to the time pressures under which the parties prepared their arguments and the Justices produced their opinions — but in each case the identity and posture of the parties are clear, and so we have left well enough alone.

When using this volume and others in the *In Chambers Opinions* series, it is important to bear in mind that many of the opinions collected here appear as they were initially drafted or issued by a Justice, rather than as they finally appeared in the *United States Reports*. In a few cases the differences are noticeable, but in most they are minor and typographical, and in none do such differences reach the outcome, holding, or substantive reasoning contained in an opinion. Nevertheless, where there is more than one version of an opinion, only one is correct as a matter of law: the one in the *United States Reports*. As a result, those who would cite for its legal authority an opinion in *In Chambers Opinions* should check for the existence of a version in the *United States Reports*, and, if there is one, read it and cite to it as the primary authority, with a parallel citation if appropriate to the *In Chambers Opinions* version. You will find the relevant *United States Reports* citation in a "Publisher's note" at the beginning of each such opinion in this volume. Those citations are also listed in the "In Chambers Index by Title" at 1 Rapp xxx, and, beginning this autumn, in the cumulative set of indexes and tables to be included in the *Green Bag*'s annual supplement to *In Chambers Opinions*. Then there are the opinions collected in *In Chambers Opinions* that do not appear in final, official form in the *United States Reports*. They fill almost the entire first volume of *In Chambers Opinions* and a substantial part of the second volume, and there are a scattering in this, the third volume in the series. See, *e.g.*, *California* v. *Winson*, 3 Rapp 1069 (1981) (Rehnquist). The bottom line is that there are roughly 150 opinions in the first three volumes of *In Chambers Opinions* for which there are no substitutes in the *United States Reports*. Thus, the prudent lawyer will supplement research in the *United States Reports* with a visit to *In Chambers Opinions*, and then return to the *United States Reports* for the last word, whenever possible. For a more elaborate discussion of the relationship between the *United States Reports* and the *In Chambers Opinions*, see *Preface*, 2 Rapp at v-vii.

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A few words about comprehensiveness. Ms. Rapp discovered opinions that had escaped the notice of earlier authorities, and we hope that even more will turn up. See *Introduction*, 1 Rapp at v & n.2. In fact, we already have several, which we will publish in a supplement later this year. If you know or learn of an opinion that is not included here — or, for that matter, some other nugget relating to in chambers opinions — please tell us (email editors@greenbag.org) and we will put it in the next supplement, with an appropriate salute to the discoverer.

The *Green Bag* thanks Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts, and for reviewing this edition (any remaining errors are the *Green Bag*'s); William Suter, Clerk of the Court, for his support of Ms. Rapp's work; Craig Joyce for his useful and entertaining introduction to this volume; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; and Susan Davies, Robert Hall, and Ee-Ing Ong.

Ross E. Davies
July 29, 2004

INTRODUCTION

THE TORCH IS PASSED: IN-CHAMBERS OPINIONS AND THE REPORTER OF DECISIONS IN HISTORICAL PERSPECTIVE

Craig Joyce[1]

Reporters of Decisions

Alexander J. Dallas	1791-1800
William Cranch	1801-1815
Henry Wheaton	1816-1827
Richard Peters, Jr.	1828-1843
Benjamin C. Howard	1843-1861
Jeremiah S. Black	1861-1864
John W. Wallace	1864-1875
William T. Otto	1875-1883
J.C. Bancroft Davis	1883-1902
Charles Henry Butler	1902-1916
Ernest Knaebel	1916-1944
Walter Wyatt	1946-1963
Henry Putzel, Jr.	1964-1979
Henry C. Lind	1979-1987
Frank D. Wagner	1987-date

THAT WAS THEN

In the beginning, there was nothing. When the Supreme Court of the United States assembled for its first public session in New York City on February 2, 1790, no rule of court required that any opinions it might render be reduced to writing and preserved for posterity. No statute or custom compelled it. And no Reporter of Decisions stood ready to discharge the task, should anyone have thought to assign it. Nor would there have been much to record, for the fledging tribunal's responsibilities and workload were slight.

That same institution is now the most powerful court on earth. No fundamental issue of American government or society can escape its writ. Not infrequently, an anxious nation awaits the Court's latest pronouncement on affirmative action, reproductive rights, the powers of the government in time of war, the outcome of a presidential election, or the very structure of our federalism. Within moments, the Court's decisions are available everywhere via the Internet, and in short order in official bound volumes of UNITED STATES REPORTS.

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[1] Craig Joyce is Law Foundation Professor and Co-Director, Institute for Intellectual Property & Information Law, at the University of Houston Law Center.

Today, the Supreme Court's Reporter of Decisions, charged by law[2] with preparing the opinions of the Court for dissemination to the world, sits ensconced in a high-ceilinged office amidst the Justices' chambers and near their ornate courtroom at the heart of the Marble Palace on Capitol Hill.[3] Today, every opinion by every Justice is rendered in writing and promptly transmitted to the Reporter. Today, the Reporter and a dozen-member staff, in conjunction with the various chambers, pore over every word, every punctuation mark, and every citation to ensure strictest fidelity both to the intent of the Justices and to the Court's complicated rules of style.[4] A Court without a Reporter would be difficult to imagine.

But then, it was not so.

The early Reporters were entrepreneurs and patriots, many of them young lawyers making their way in a new nation. They went on to become cabinet officers, members of Congress, diplomats, and scholars. The roll of their names is known to history, because the volumes they produced bear those names: Dallas, Cranch, Wheaton, Peters, Howard, Black, and Wallace.[5] The "nominative" Reporters (and their publishers) financed those efforts through sales of their volumes, sometimes operating at a financial loss in order to conserve the work of the Court for lower courts, members of the bar, and history.

In due course, Congress assumed the costs of publication,[6] and the volumes ceased to be called by the Reporters' names.[7] The "anonymous" Reporters, like the corps that preceded them, included lawyers of outstanding ability and devotion to the work of the Court: Otto, Davis, Butler, Knaebel, Wyatt, Putzel, Lind, and Wagner. Their names, however, are remembered in association with particular volumes of reports, if at all, only by direct descendants and antiquarians — and even their office has receded from the consciousness of members of the bar and students of the law.

Yet publication of the current bound volumes of in-chambers opinions brings to mind the long succession of Reporters and their contributions to our collective memory of the Supreme Court. In particular, the early Reporters left us our

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[2] 28 U.S.C. § 672. The remaining statutory officers of the Court are the Clerk, the Marshal, and the Librarian.

[3] For a more modest, but fuller, description of the Reporter's circumstances and functions, see Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. S. CT. HIST. 9 (2001), by the present incumbent in that office.

[4] Besides the editorial work just described, the Reporter of Decisions prepares detailed syllabuses summarizing the Justices' opinions. See Wagner, *supra* note 3, for additional information regarding these responsibilities.

[5] Their stories are told entertainingly and at length in Morris L. Cohen & Sharon Hamby O'Connor, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES (1995). *See also* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985) (consulted liberally in the pages that follow).

[6] Act of June 23, 1874, ch. 455, 18 Stat. 204 (appropriation for sundry civil expenses for the year ending June 30, 1875) ($25,000 to Supreme Court for printing and binding of reports).

[7] The last volume by a "nominative" Reporter, the ninetieth since Dallas's first, was Wallace's twenty-third, reporting the October 1874 Term. Its last decision, *American Wood-Paper Co. v. Fibre Disintegrating Co.*, commonly would be cited today as 90 U.S. (23 WALL.) 566 (1874). The successor volume, Otto's first, reporting the October 1875 Term, begins with *McComb v. Commissioners of Knox County, Ohio*, cited more simply as 91 U.S. 1 (1875).

strongest links to the indispensable heritage of that central institution of American law and government. The Chiefs and their Associates are celebrated elsewhere and often. This is the Reporters' story.

DALLAS AND CRANCH

Fame is one thing, fortune often another. The first of the Reporters, Alexander J. Dallas (1791-1800),[8] will live forever in the annals of American law. Yet he would write later of the financial folly of his years expended in preserving the first pronouncements of the new nation's highest court: "I have found such miserable encouragement for my Reports, that I have determined to call them all in, and devote them to the rats in the State-House."[9] It is not hard to see why.

Born in Jamaica and educated in England, Dallas migrated to the United States after the Revolution, achieved success at the Philadelphia bar, and ultimately served as Secretary of the Treasury and acting Secretary of War (during James Monroe's illness) under President James Madison. Early on, however, he endured lean years of practice, supplementing his income with political writing and, almost unique in early America, publishing reports of judicial decisions for the use of fellow attorneys.

Prior to Dallas, a few sensational cases had been reported in newspapers or pamphlets, but the great line of English judicial reports (exemplified by Coke's) had found only slight extension in one volume on general Connecticut law and another on the admiralty law of Pennsylvania. With this scant precedent, and no doubt animated in part by a desire to improve both his reputation and his income, Dallas proceeded to publish, as a purely private venture with no salary or commission from the relevant courts, REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA, BEFORE AND SINCE THE REVOLUTION in 1790.

Dallas's motivation, however, extended beyond personal gain and the hope that his reports would find a market among fellow practitioners. His efforts, he wrote in his preface, enabled him to "render an essential service to his country, by preserving the principles on which the future judgments of our Courts are founded; — a matter that . . . must daily become more interesting and important to the liberty, peace, and property of every citizen."[10] Three more volumes followed.

Volume 1 of Dallas's REPORTS, however, retains one distinction shared by none of those that followed: alone in the entire series of UNITED STATES REPORTS, 1 U.S. (1 DALL.) contains no decisions by the Supreme Court of the United States. For Dallas's REPORTS presented decisions of the federal courts — including what today is the Third Circuit Court of Appeals and, in Volumes 2 through 4, the Supreme Court itself — only because they were Pennsylvania courts. The Supreme Court, like the federal government generally, had moved to Philadelphia

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[8] Born Kingston, Jamaica, June 21, 1759; died Philadelphia, Pa., Jan 16, 1817. The case can be made, and some histories report, that Dallas' Reportership began in 1790. It is true that Dallas commenced reporting the decisions of various courts physically located in Pennsylvania in that year. As noted in the text below, however, the Court did not move from New York to Philadelphia until the following year, which is when Dallas began reporting its decisions. Thus, Dallas actually did not become Supreme Court Reporter until 1791.

[9] Alexander J. Dallas to Jonathan Dayton (Oct. 18, 1802), George M. Dallas Papers, Historical Society of Pennsylvania, Philadelphia.

[10] 1 U.S. (1 DALL.) v-vi (1790).

in 1791. But its cases, including those decided before its translation to the nation's second capital, did not begin to appear in Dallas's REPORTS until Volume 2.

The difficulty of the task that confronted Dallas scarcely can be overstated. In the absence of institutional habit to assist him, the Supreme Court proved to be difficult to report. Opinions, except in the most important cases, often were delivered extemporaneously from only the most rudimentary of notes — and never reduced to writing by the Justices themselves. Dallas found it necessary to rely upon his own notes from those sittings he could attend, and on the notes of fellow attorneys (and, very occasionally, Justices) for the many he could not. Thus, the accuracy and completeness of his reports remain matters of some doubt.[11] Thanks to high printing costs in America, particularly as compared with reports and legal tracts printed in England, potential purchasers complained of expense, as well.

Delay, however, provided the most serious complaint against Dallas's REPORTS. Between *Chisholm v. Georgia*,[12] the last decision of the Supreme Court reported in Volume 2, and the publication of the volume itself in 1798, there was a gap of five years. Volume 3 appeared in late 1799. Volume 4, however, although containing no Supreme Court decision of the Court after 1800, did not reach the public until 1807, a lapse of seven years. That delay so unnerved Dallas's successor (and, apparently, the Court) as to prompt a plea by the latter that he be allowed to publish Dallas's cases in the first volume of his own reports: "It would certainly be interesting to the profession, and important to the stability of our national jurisprudence, that the chain of cases should be complete."[13] In the end, Dallas did his duty, but not before the bench and bar had been inconvenienced greatly by the want of current reports.

In 1800, the federal government moved again, this time to Washington City. Dallas remained in Philadelphia, and there was need of a new volunteer to report the Court's opinions.

William Cranch (1800-1815),[14] although born in Massachusetts and educated at Harvard, had relocated to the new federal capital as legal agent for a real estate speculation syndicate. It failed spectacularly, as later recounted in his own reports.[15] Fortunately, Cranch had been a college classmate of John Quincy Adams. Still more fortunately, his mother was Abigail Adams's sister. Cranch's well-placed uncle, President Adams, quickly rescued the young lawyer, appointing him a commissioner of public buildings in 1800 and an assistant judge of the newly created District of Columbia Circuit Court in 1801.

Cranch again proved a survivor when the Jeffersonians' Act of March 8, 1802, intended to oust Adams's "midnight judges," omitted mention of his court. He became chief judge by appointment of President Jefferson himself in 1805 and

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[11] For details of the Court's work during its first decade of existence, the authoritative source is Maeva Marcus, ed., THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (1985-date), an ongoing project. Also useful is the first volume of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States (hereinafter "Devise History"): Julius Goebel, Jr., ANTECEDENTS AND BEGINNINGS TO 1801 (1 Devise History, 1971).

[12] 2 U.S. (2 DALL.) 419 (1793).

[13] William Cranch to Alexander J. Dallas (July 25, 1803), Dallas Papers, *supra* note 9.

[14] Born Weymouth, Mass., July 17, 1769; died Washington, D.C., Sept. 1, 1855.

[15] *Pratt v. Carroll*, 12 U.S. (8 CRANCH) 471 (1814).

remained in office, highly regarded, for another half-century. So high were Cranch's standards on the bench that he once agreed to admit to the bar a young lawyer of marginal attainments only after the latter promised not to practice in Washington but rather to remove to the "western country." Years later and suitably seasoned, Salmon P. Chase would become the Supreme Court's sixth Chief Justice.[16]

As Reporter, Cranch was less successful. Like Dallas, he seems to have appointed himself to the task, perhaps encouraged by the closeness that conditions in the Federal City fostered within its small legal community. A judge himself, he also appreciated the importance of the responsibility, as the preface to his first volume attests: "One of the effects, expected from the establishment of a national judiciary, was the uniformity of judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, can not need an apology . . ."[17]

Apologies, however, were soon much in order. The new Reporter's deficiencies resembled his predecessor's. The accuracy[18] and completeness[19] of the nine volumes of Cranch's REPORTS, while clearly an improvement over Dallas's start-up effort, remain subject to criticism. The cost of Cranch's volumes, along with their length, increased greatly, and beyond the financial means of many members of the bar, owing largely to the floodtide of maritime cases decided by the Court during his tenure. And delay remained a constant problem. Cases decided in 1801 lay unreported for three years, until the appearance of Volume 1 in 1804; and Cranch's later volumes were so tardy, appearing well after his departure as Reporter, that Chief Justice Marshall, upon receiving prepublication copies, directed his thanks to Cranch's successor, apparently convinced that Cranch himself had abandoned them.[20]

By 1815, the Court was ready for a change.

WHEATON AND PETERS

Delay and expense. Inaccuracy and incompleteness. To many, these were the hallmarks of the reports under Dallas and Cranch. No member of the Court was more aggrieved by that state of affairs than its newest member, Justice Joseph Story. Appointed in 1811, Story believed strongly in the promotion of a national jurisprudence, particularly in the maritime matters dear to his native Massachusetts. In pursuit of that goal, he believed, too, in the critical importance

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[16] Eugene Wambaugh, in 5 GREAT AMERICAN LAWYERS 344 (Lewis ed. 1908).

[17] 5 U.S. (1 CRANCH) iv (1804).

[18] The relevant volume of the Devise History refers circumspectly to the "vagaries of William Cranch's reporting." George L. Haskins & Herbert A. Johnson, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 at 497 (2 Devise History, 1981).

[19] Like Dallas, Cranch was handicapped by the Court's penchant, during its early years, for delivering oral opinions; and the Ninth Reporter, in his hundredth anniversary retrospective on reporting at the Court, observed that "there is no means of knowing whether, during the time covered by the nine volumes of Cranch, . . . the Court delivered any opinion in writing which the Reporter failed to report." J.C. Bancroft Davis, 131 U.S. app. xvi (1889).

[20] John Marshall to Henry Wheaton (Oct. 27, 1816), Wheaton Papers, The Pierpont Morgan Library, New York City.

of prompt, accurate reporting — and his "disrelish" for Cranch's work, as he advised one correspondent, had reached the breaking point.[21]

That correspondent was Henry Wheaton (1816-1827),[22] who would shortly become the Court's third Reporter. Like Story a New Englander, maritime law enthusiast and scholar, Wheaton already had proved himself to Story through publication of his ambitious DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES (1815). While the exact details of Cranch's departure (perhaps to attend to increasing duties in his own court) remain unclear, one fact is certain. By 1816, the Court had a new Reporter: Wheaton.

Wheaton seems to have been appointed by informal agreement among the Justices themselves, to whom he had submitted a plan proposing regular annual publication of their decisions.[23] For their part, the Justices agreed to furnish to him any written opinions they might prepare, or notes they might make in connection with their oral opinions.[24] The better to accomplish his task, Wheaton himself attended the Court's arguments daily during its sittings.

The results were immediate and impressive. Within two months after the 1816 Term ended, Wheaton had completed his work in preparing the opinions, abstracts, and arguments of counsel for the press. Seven months elapsed before he could locate a bookseller who would publish the reports on acceptable terms. But by the time the Court arrived in Washington for its 1817 Term, the bench and the bar of the Supreme Court had in hand, for the first time in history, a published set of cases from the preceding term.[25] Later volumes appeared even more promptly, at worst within six months of the conclusion of the term in which the last case had been decided.

Such promptitude was not without reward, albeit a paltry reward. At the urging of the Court itself,[26] Congress consented to recognize the Reporter's office and to appropriate a salary of $1,000, on condition that 80 copies of the reports be provided for government use.[27] Wheaton thus became the first official Reporter in the history of the Court, but with financial encouragement wholly insufficient to overcome his dependence on sales to the profession.

Wheaton pressed on, producing over the course of the twelve terms in which he served what has been called "the golden book of American law."[28] In Wheaton's REPORTS appear many of the greatest cases of the Marshall Court, including *Martin v. Hunter's Lessee*, *McCulloch v. Maryland*, *Dartmouth College*

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[21] Joseph Story to Henry Wheaton (Sept. 15, 1816), Wheaton Papers, *supra* note 20.

[22] Born Providence, R.I., Nov. 27, 1785; died Dorchester, Mass., Mar. 11, 1848.

[23] REPORT OF THE COPYRIGHT CASE OF WHEATON VS. PETERS 6 (1834), Columbia University Library, New York City.

[24] Record at 9-11, *Wheaton v. Peters*, 33 U.S. (8 PET.) 591 (1834), 4 THE RECORDS AND BRIEFS OF THE SUPREME COURT OF THE UNITED STATES 1523 (microfilm: Scholarly Resources, Inc., Wilmington, Del.) (hereinafter "Record").

[25] Dallas, at his worst, had allowed decisions to go unreported for eight years. Volume 4 of his reports, not published until 1807, contained cases dating back to 1799. Cranch, at one point, had permitted a lacuna of six years. When published in 1816, Volume 7 of his reports included cases decided as early as 1810.

[26] John Marshall to the Senate Judiciary Committee (Feb. 7, 1817), reprinted in 2 William Crosskey, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, app. G, at 1246 (1953).

[27] Act of Mar. 3, 1817, ch. 63, § 1, 3 Stat. 376.

[28] German obituary (source unknown), Wheaton Papers, *supra* note 20.

v. Woodward, *Sturges v. Crowninshield*, *Gibbons v. Ogden*, *Osborn v. Bank of the United States*, and *Ogden v. Saunders*. But there was more.

Under Wheaton, the fidelity of the reports was paramount. Accuracy[29] and completeness,[30] like timeliness of publication, improved dramatically. In addition, Wheaton provided to purchasers a resource unimagined by his predecessors: extensive scholarly annotations intended to furnish readers a comprehensive view of entire areas of law, apropos the decisions of each term.[31] Many of the annotations were prepared anonymously for Wheaton by Story, with whom Wheaton roomed and shared a common library while in Washington.[32]

Unfortunately for Wheaton, his otherwise admirable scholarship, combined with such factors as generous margins and handsome bindings, contributed greatly to the expense of his reports — and, accordingly, to the same slow sales that had afflicted Dallas and Cranch before him. That circumstance, combined with the meanness of the salary provided by Congress, prompted Wheaton's resignation in 1827 to accept a diplomatic posting to Denmark — raising his salary by 450%, plus expenses — and to hope for better things to come.[33]

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[29]"It is a duty which [the Reporter] owes to the Court, to the profession, and to his own reputation," Wheaton wrote in a note appended to the last opinion in the last case of his last volume, "to maintain the fidelity of the Reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal." *Ramsay v. Allegre*, 25 U.S. (12 WHEAT.) at 643 (1827). Ironically, the note was occasioned by the only suggestion of consequential error during Wheaton's entire Reportership, when an on-going dispute between Wheaton and his patron Justice Story, on the one side, and Justice Johnson, who had opposed their expansive views of the scope of federal admiralty jurisdiction, on the other side, boiled over into the Reports. *See* Joyce, *supra* note 5, at 1330, and G. Edward White, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 at 393-400 (3-4 Devise History, 1991).

[30] Wheaton's punctilious attendance at court assured a thorough record of decisions when it came time to prepare the reports. Nevertheless, he recognized that many decisions lacked precedential value and would take up precious space without appealing measurably to potential purchasers. Thus, his initial preface explained matter-of-factly that "discretion" had been exercised "in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted." 14 U.S. (1 WHEAT.) iv (1816). The practice continued in later volumes.

[31] Wheaton's aim, as he explained in the preface to Volume 1, was "to collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases," with the expected result "that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will, by this new strength laid to the foundation, be somewhat the more settled and corrected." 14 U.S. (1 WHEAT.) at v-vi (1816) (quoting Lord Bacon). In all, the annotations (or appendix notes) to Wheaton's twelve volumes run to 516 pages.

[32] *See, e.g.*, Joseph Story to Henry Wheaton (Dec. 23, 1816) ("nothing could be more pleasant to me than to chum [i.e., room] with you this winter") and Henry Wheaton to Joseph Story (Dec. 25, 1817) (indicating volumes that Wheaton would bring with him for the term and requesting that Story extract cases from others that "Lord knows . . . will not be found in Washington"), Wheaton Papers, *supra* note 20.

[33] Joseph Story to Sarah Story (Mar. 8, 1827), Story Papers, University of Texas Library, Austin, Texas. Serving abroad under six presidents, Wheaton eventually rose to U.S. minister plenipotentiary to Prussia and membership in elite academic societies throughout Europe. In addition, his ELEMENTS OF INTERNATIONAL LAW (multiple editions beginning in 1836) and HISTORY OF THE LAW OF NATIONS (1845) earned him wide acclaim as the "chief modern expounder of the science of international law." Frederick C. Hicks, MEN AND BOOKS FAMOUS IN THE LAW 215 (1921).

In accepting Wheaton's resignation, Chief Justice Marshall wrote: "I can assure you of my real wish that the place you have resigned had been more eligible [i.e., remunerative], and had possessed sufficient attractions to retain you in it. I part with you with regret . . ."[34] Sadly for Wheaton, whose plans for a happy retirement from the Court's employment contemplated continued income from sales of his reports, the greater sorrow would soon be his.

Wheaton's successor was Richard Peters, Jr. (1828-1843).[35] The new Reporter's father, Richard Peters, Sr., had been a member of the Continental Congress and become U.S. District Judge for the District of Pennsylvania in 1792, remaining on the bench until his death in 1828. As District Judge, Peters, Sr., served on the Third Circuit with Justice Bushrod Washington, whose decisions on that court Peters, Jr., had edited. With Washington's support, Peters the Younger apparently secured appointment to the Reportership by unanimous vote of the Justices.[36]

While not pretending to the intellectual stature of Dallas, Cranch and Wheaton nor destined to rival their accomplishments in other offices, Peters possessed one attribute his illustrious predecessors all notably had lacked: a keen business sense. He believed that the reports could be made to pay, and his plan for publishing them resembled the man himself: brisk, practical and determined to avoid unremunerative detours into esoteric scholarship.

Peters's publication plans contained two components. The first concerned the traditional annual volumes of reports. In terms of the Court's opinions, the accuracy and completeness of the new reports proved to be comparable to Wheaton's; and the new Reporter's Act of 1827,[37] requiring publication at a price not exceeding five dollars per volume within six months of the close of each sitting of the Court, assured timeliness and affordability. With respect to presentation and the Reporter's own contributions, however, Peters's REPORTS became the subject of much criticism.[38]

The second, more ambitious component of Peters's plan to make the reports

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[34] John Marshall to Henry Wheaton (June 21, 1827), Wheaton Papers, *supra* note 20.

[35] Born Belmont, Pa., Aug. 4, 1779 (sometimes reported as Aug. 17, 1780); died Belmont, Pa., May 2, 1848. Despite occasional listings of Peters's departure date from the Reportership as 1842, the historical record seems clear that he served until his dismissal by the Court in 1843. *See infra* text accompanying note 57.

[36] *See* C.C. Biddle to Richard Peters, Jr. (Dec. 15, 1827), Peters Papers, Historical Society of Pennsylvania, Philadelphia (congratulating Peters on his appointment).

[37] Act of Feb. 22, 1827, ch. 18, §§ 1-3, 4 Stat. 205.

[38] Upon receiving his copy of Volume 1, Justice Story wrote immediately to the new Reporter to express his regret "that the text is so compact & small," a measure he supposed "unavoidable to bring the work into a moderate compass" but nonetheless a respect in which he "greatly . . . preferred . . . the 12th of Wheaton." Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 36. In place of Wheaton's expansive scholarship explicating the jurisprudence of the term, moveover, Peters offered only compressed abstracts (or headnotes) of the cases decided. This innovation received similarly unflattering reviews. Boston's *American Jurist and Law Magazine* wrote: "After studying a page or two of fine type, [the reader's] mind is in a painful state of uncertainty as to the points actually decided by the court, and can only be relieved by examining the body of the decision." In at least one instance, Peters had stated as the holding of a case a rule "directly the reverse of the opinion" handed down by Marshall. "Indeed there is scarcely a single abstract in the volume which states the points in the case definitely and tersely, and which is not open to serious objections." *Peters's Reports*, 3 AM. JURIST & L. MAG. 101-03, 108-09 (1830).

pay is aptly described by the title of the project: CONDENSED REPORTS OF CASES IN THE SUPREME COURT OF THE UNITED STATES, CONTAINING THE WHOLE SERIES OF THE DECISIONS OF THE COURT FROM ITS ORGANIZATION TO THE COMMENCEMENT OF PETERS'S REPORTS AT JANUARY TERM 1827. Both the need for such a publication and Peters's gift for exploiting it shine with luminous clarity from the pages of his self-confident Proposals for the work, issued less than six months after assuming the Reporter's office:

> The Supreme Court of the United States has been organized for thirty-eight years, and its decisions form in themselves almost an entire code of laws. Many of the difficult and important questions of constitutional construction, and of the nature and extent of the powers reserved, granted, and claimed, under the constitution, have passed under the careful observation and judgment of the court. . . .
>
> . . . [T]he law thus general, thus established, thus supreme, should be universally known. That there should be found but few copies of the reports of the cases decided in the Supreme Court of the United States in many large districts of our country . . . is asserted to be a frequent fact. . . . These things should not be.
>
> It will not be denied that these circumstances are the consequences of the heavy expense which must be incurred by the purchase of the two [sic] volumes of the Reports of Mr. Dallas, the nine volumes of Mr. Cranch, and the twelve of Mr. Wheaton's Reports; together twenty-three [sic] volumes — the cost of which exceeds one hundred and thirty dollars.
>
> It is proposed to publish all the cases adjudged in the Supreme Court of the United States from 1790 to 1827, inclusive, in a form which will make the work authority in all judicial tribunals, and to complete the publication in not more than six volumes, the price of which shall not exceed thirty-six dollars.[39]

There were trade-offs, to be sure. The type employed would be smaller than in the original volumes. The arguments of counsel that had appeared in the earlier reports were to be omitted entirely, as well as the scholarly notes contained in Wheaton's twelve volumes. Most significantly, in his zeal to present the cases in "abbreviated form," Peters intended to pare away concurring and dissenting opinions. The means were as draconian as the aim was clear: at one stroke, Peters's CONDENSED REPORTS would supplant the entire market for all of his predecessors' volumes through slashing both bulk and expense by 75%.

Two sorts of reactions predictably followed. Those deeply concerned with, but not financially interested in, disseminating broadly the reports of the Supreme Court rejoiced. Justice Story thought the "compressed Edition" contemplated by Peters "a most valuable present to the Profession."[40] Justice Washington lauded it as "a treasure" that would "liberally reward" the Reporter.[41]

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[39] *Proposals For publishing, by subscription, The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term, 1827* (1828), Record, *supra* note 24, at 9-11.

[40] Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 36.

[41] Bushrod Washington to Richard Peters, Jr. (July 21, 1828), Peters Papers, *supra* note 36.

What of Dallas, Cranch, and Wheaton? Dallas had died in 1817, and the copyright in his volumes had expired. Cranch, still a sitting judge in the District of Columbia and still out of pocket $1,000 on the expenses of his final volumes, objected strongly.[42] Peters riposted that his project "will [not] injure the sale[s] of your or Mr. Wheaton's Reports," but on the contrary would render them "more in demand . . ." More to the point, Peters averred, his reports "will not be obnoxious to the law protecting literary property," for he planned to take from Cranch's volumes nothing written by his predecessor himself: "My work will be a 'Digest' of the facts of the case and the opinions of the Court — no more."[43] Ultimately, Cranch would settle with Peters in return for 50 copies of the CONDENSED REPORTS.[44]

That left only Peters's immediate predecessor in faraway Denmark. Wheaton had counted on future sales of his reports to realize the fruit of his labors. Clearly, this expectation would be defeated if sales of Peters's "Digest" — which was anything but a digest, and by reproducing all of the Court's opinions would eliminate any need to consult Wheaton's volumes for them — proceeded. Surely, he wrote to Daniel Webster, "amicable remonstrances" would avert that disaster?[45]

Nothing, however, would dissuade Peters, who forged ahead with publication of his first volume in 1829. By 1831, the CONDENSED REPORTS were a roaring success, and Wheaton sued. The case languished in the lower federal courts for three years, finally reaching the past and present Reporters' employers in 1834.

Wheaton had, by then, returned from Denmark to make his stand by assisting his attorneys, Webster and Elijah Paine, in preparing the case, *Wheaton v. Peters*,[46] for oral argument before the Court. The analysis had three prongs. First, according to Paine, Wheaton had an "acknowledged pre-existing right" to profits derived from his reports, based on the common law of Pennsylvania (where they had been published).[47] Second, despite deficiencies in the record, Wheaton had transmitted to the Secretary of State not only the 80 copies of each volume required by the 1817 Reporter's Act but also the additional copy prescribed by the Copyright Act, on which he relied independently of his natural property right under state law.[48]

Lastly, on the most critical issue before the Court, Paine argued that the manuscript opinions rendered in its major decisions — the truly valuable component of Wheaton's REPORTS reproduced in Peters's CONDENSED REPORTS

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[42] William Cranch to Richard Peters, Jr. (July 18, 1828), Peters Papers, *supra* note 36.
[43] Richard Peters, Jr., to William Cranch (Aug. 14, 1828), Peters Papers, *supra* note 36.
[44] Richard Peters, Jr., to Richard S. Coxe (Dec. 13, 1829), Peters Papers, *supra* note 36.
[45] Henry Wheaton to Daniel Webster (Nov. 25, 1828), Wheaton Papers, Library of Congress, Washington, D.C.
[46] 33 U.S. (8 PET.) 591 (1834). *See generally* Joyce, *supra* note 5, at 1351-86; White, *supra* note 29, at 384-426.
[47] Merely by adopting the Constitution, the states "ha[d] not surrendered to the Union their whole power over copyrights, but [had] retain[ed] a power concurrent with the power of congress." 33 U.S. (8 PET.) at 597-98.
[48] "The fact is, that eighty-one copies were sent, but the law giving the salary, not requiring more than eighty, the papers in the department under these acts speak of but eighty; and all being sent to the department together, is the reason why there was no minute, or memorandum, or certificate . . ." 33 U.S. (8 PET.) at 612.

— constituted copyrightable subject matter which Wheaton had acquired "by judges' gift":

> Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of? They cannot be matters of record, in the usual sense of the term. Record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. Nor were they ever put on record in this case. . . . The copy[right] in the opinions, as they were new, original and unpublished, must have belonged to some one. If to the judges, they gave it to Mr. Wheaton. That it did belong to them is evident; because they are bound by no law or custom to write out such elaborate opinions. They would have discharged their duty by delivering oral opinions. What right, then, can the public claim to the manuscript? The reporter's duty is to write or take down the opinions. If the court choose to aid him by giving him theirs, can anyone complain?[49]

To rule otherwise now would deprive not only Wheaton, but all other reporters as well, of their familiar rights,[50] and thus alter fundamentally, as Paine foresaw clearly, the entrepreneurial underpinnings of court reporting throughout the country.

J.R. Ingersoll and Thomas Sergeant, on behalf of Peters, contradicted Paine's argument on every point. Each recognized, however, that Wheaton's case would stand or fall according to the Court's disposition of Paine's claim that the opinions of the Justices constituted copyrightable matter, the rights to which they had transferred to the Reporter. Said Sergeant:

> The court appointed [Wheaton] under the authority of a law of the United States, and furnished him the materials for the volumes; not for his own sake, but for the benefit and use of the public: not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States.[51]

Ingersoll put the matter on an even higher plane, according equal dignity and an equal necessity of diffusion to enactments of Congress and decisions of the Court:

> Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. . . . The matter which they disseminate is, without a figure, *the law of the land*. Not indeed the actual productions of the legislature. Those are the rules which govern the action of the citizen. But they are constantly in want of interpretation, and that is afforded by the judge. He is the "*lex loquens*." His explanations of what is written are often more important than the mere naked written law itself. His expressions of the *customary*

[49] 33 U.S. (8 PET.) at 615.
[50] 33 U.S. (8 PET.) at 616-17.
[51] 33 U.S. (8 PET.) at 638.

> *law*, of that which finds no place upon the statute book, and is correctly known only through the medium of reports, are indispensable to the proper regulation of conduct in many of the most important transactions of civilized life. Accordingly, in all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. . . . It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it.[52]

Webster's speech to the Court, concluding the arguments, briefly rehearsed the doctrinal points discussed by other counsel but sought primarily to reduce the case to its essential human dimension. But for Wheaton's assumption of the Reportership in 1816 and his diligent discharge of duty until his resignation in 1827, there might have been no dissemination whatsoever of future reports of the Court. Lately, although "well advised" of Wheaton's rights, Peters had "materially injured" those interests by publication of the CONDENSED REPORTS. In short, he had made "an indefensible use of [his predecessor's] labours," which the Court must now remedy by construing Wheaton's rights "liberally."[53]

In the end, although deeply conflicted by the spectacle of the Reporters' duel that had played out before them, the Justices ruled decisively in Peters's favor.[54] Wheaton's claimed common law natural property right in the opinions of the Court was rejected, although his claim for infringement of the matter in his reports that he himself had created (*e.g.*, the statements of the cases), while doubtful on the record, was remanded for a trial by jury.[55]

For all practical purposes, however, the controversy had come to an end on March 19, 1834, when the Court announced in the concluding paragraph of its opinion:

> It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot

[52] 33 U.S. (8 PET.) at 619-20 (emphasis in original).
[53] 33 U.S. (8 PET.) at 651-52.
[54] For details of the decision and the dramatic events associated with its delivery, see Joyce, *supra* note 5, at 1379-86. Justice Story, upset by the bitter hostility between the Reporters, did not attend the announcement of the decision but instead departed Washington on the 8 a.m. stage. Henry Wheaton to Catherine Wheaton (Mar. 21, 1834), Wheaton Papers, *supra* note 20.
[55] In the event, the jury returned a verdict in Wheaton's favor in 1838, John Cadwalader to Henry Wheaton (May 23, 1838), Wheaton Papers, *supra* note 20, but the matter then dragged on interminably on its way back to the Supreme Court. Before the appeal could be heard there, both of the principal parties died: Wheaton, on March 11, 1848, and Peters, less than two months later, on May 2, 1848. Ultimately, their estates settled the litigation for a mere $400 in 1850. William Lawrence to Robert Wheaton (Henry's son) (Feb. 18, 1850), Wheaton Papers, *supra* note 20.

confer on any reporter any such right.[56]

In those few words, the Supreme Court of the United States did more than destroy Henry Wheaton's hope of leaving to his descendants a modest inheritance. Of inestimably greater importance, it established the true ownership of reports of the decisions of the Nation's Court, those classic expressions of American law that constitute its essential legacy to all Americans. Thanks to *Wheaton v. Peters* and the Reporters whose epic contest the case resolved, those opinions are now the property of none other than the people of the United States themselves.

NOTHING SUCCEEDS LIKE SUCCESSORS

By 1834, then, the Reporters and the Court had combined to establish both the nature of the Reporters' responsibilities and the parameters of their rights in the reports.[57] The subsequent history of the Reporter's office, while of immense significance in the history of the Supreme Court's jurisprudence, lacks somewhat in drama compared with the events that had gone before.

Peters himself continued in office for the better part of another decade. Ironically, he would be undone in the Reportership partly by another notable 1834 development: the Court's adoption of a formal requirement that all written opinions be filed with the Clerk of the Court.[58] Disputes with the Clerk, and conflicts with several of the Justices, resulted in Peters's dismissal by the Court in 1843.[59]

Peters was succeeded by Benjamin C. Howard (1843-1861),[60] like Chief Justice Roger B. Taney a Marylander. A veteran of the War of 1812, Howard served as Reporter through the dark days, including the Court's rendering of its

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[56] 33 U.S. (8 PET.) at 668. Both the opinion in full, by Justice McLean on behalf of himself, Marshall, Story and Duvall, and the dissents by Justices Thompson and Baldwin, were duly reported by Peters at 33 U.S. (8 PET.) 591 (1834).

[57] For further discussion of issues beyond ownership of matter contained in judicial reports other than the opinions themselves, see L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989) (cited with approval in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991)).

[58] By an order adopted only days before the decision in *Wheaton*, on March 14, 1834, the Court provided that, upon publication of each volume of the reports, the originals of such written opinions as had been prepared should be filed by the Reporter with the Clerk. 33 U.S. (8 PET.) vii (1834) (published in 42 U.S. (1 HOW.) xxxv (1843), as Rule No. 41). By a subsequent order, the Court required that opinions be first delivered to the Clerk for recording and then sent to the Reporter. 42 U.S. (1 HOW.) xxxv (1843) (Rule No. 42).

[59] Peters actually published a 17th (unofficial) volume of reports, competing with Howard's first. *See* Carl B. Swisher, THE TANEY PERIOD 1836-64 at 296-305 (5 Devise History, 1974); Cohen & O'Connor, *supra* note 5, at 72-74.

[60] *See generally* Cohen & O'Connor, *supra* note 5, at 76-86; Gerald T. Dunne, *Early Court Reporters*, 1976 S. CT. HIST. SOC'Y Y.B., 61, 66-67; Francis Helminski, *Benjamin Chew Howard*, in Kermit L. Hall, ed., OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 413-14 (1992) (hereinafter Hall).

Dred Scott decision,[61] that preceded the Civil War. In 1861, he resigned to run for governor of Maryland on the Friends of Peace ticket, but lost.

Jeremiah S. Black (1861-1864),[62] Attorney General and then Secretary of State to his fellow Pennsylvanian, President James Buchanan, failed of confirmation to a seat on the Supreme Court by one vote in 1861. Appointed Reporter, he appears to have viewed the position as a transition from public service to private practice, resigning after only three years.

The last of the "nominative" Reporters, John W. Wallace (1864-1875),[63] came to office already a noted authority on English court reporters. Critics described his own reports, however, as error-prone: the preface to his first volume, for example, misstated the year of his appointment. Wallace served also as president of the Historical Society of Pennsylvania.

William T. Otto (1875-1883)[64] was a judge and law professor in Indiana before becoming a Lincoln delegate at the 1860 Republican Convention. Arriving in Washington as a political appointee in the resulting Administration, he successfully argued a leading case on judicial power before the Supreme Court.[65] After Congress essentially assumed responsibility for financing the Court's reports,[66] Otto became the first of its nonproprietary Reporters.

A diplomat and historian of law, J.C. Bancroft Davis (1883-1902)[67] has the misfortune, despite a distinguished career, of being remembered most often for an erroneous syllabus criticized by the Court in *United States v. Detroit Timber & Lumber Co.*[68] Accordingly, every slip opinion syllabus today begins with a caution that "[t]he syllabus constitutes no part of the opinion of the Court but has

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[61] *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Howard's letter of resignation, forwarded to Taney in September 1861, was accepted by the Court the following December. Cohen & O'Connor, *supra* note 5, at 86.

[62] *See generally* Cohen & O'Connor, *supra* note 5, at 88-97; Dunne, *supra* note 60, at 67-68; Elizabeth B. Monroe, *Jeremiah Sullivan Black*, in Hall, *supra* note 60, at 75. Black's departure appears to have occurred early in 1864, *i.e.*, near the close of the Court's December 1863 Term, which was then reported by Black's successor, Wallace. Cohen & O'Connor at 94, 104-106.

[63] *See generally* Cohen & O'Connor, *supra* note 5, at 98-113; Dunne, *supra* note 60, at 68-70; Francis Helminski, *John William Wallace*, in Hall, *supra* note 60, at 907. Clearly, while 1 WALLACE reported the December 1863 Term, Wallace did not assume office as Reporter, taking over from Black, until March 21, 1864. *See supra* note 62 and sources cited there. Likewise, while his last volume, 23 WALLACE, reported the October 1874 Term, Wallace did not resign until October 9, 1875. Cohen & O'Connor at 112.

[64] *See generally* Dunne, *supra* note 60, at 67-68; Francis Helminski, *William Tod Otto*, in Hall, *supra* note 60, at 615.

[65] *Murdock v. Memphis*, 87 U.S. (20 WALL.) 590 (1875) (the Judiciary Act of 1867 conferred no more power on the Court than had the Judiciary Act of 1789).

[66] See text accompanying note 6.

[67] *See generally* Francis Helminski, *John Chandler Bancroft Davis*, in Hall, *supra* note 60, at 219.

[68] 200 U.S. 321 (1906). In *Detroit Timber*, the federal government sought to bolster its case through reliance on a point made in the syllabus to *Hawley v. Diller*, 178 U.S. 476, 477, 2d para. (1900). Writing for the Court in *Detroit Timber*, Justice Brewer declared such reliance misplaced: "The headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the Reporter [and] gives his understanding of the decision . . ." 200 U.S. at 337 (describing the note in question as a "misinterpretation" of the decision in *Hawley*). The story is recounted in Wagner, *supra* note 3, at 18-19.

been prepared by the Reporter of Decisions for the convenience of the reader," citing *Detroit Timber*.[69]

Charles Henry Butler (1902-1916),[70] who succeeded Davis, avoided similar embarrassment and, in due course, wrote a chatty memoir about life at the Court and his duties as Reporter.[71] He apparently tired, however, of the anonymity imposed on the Reporters since Otto's day, once complaining that he had been introduced at a meeting as "Head Stenographer of the Supreme Court."

The longest serving of the Reporters was Ernest Knaebel (1916-1944).[72] As head of the Justice Department's Public Lands Division, he argued many cases before the Supreme Court. During his tenure as Reporter, the office was reorganized by statute and the Government Printing Office assumed exclusive control over the publication and sale of U.S. REPORTS.[73]

Before becoming Reporter, Walter Wyatt (1946-1963)[74] served as General Counsel to the Board of Governors of the Federal Reserve System. Wyatt was appointed following a two-year vacancy in the Reporter's Office, and edited Volumes 322-325 of U.S. REPORTS retroactively.[75] Irked by outsiders' confusion between his responsibilities and those of court reporters, he convinced Chief Justice Fred Vinson in 1953 to permit him henceforth "to list [his] title as Reporter of Decisions instead of merely Reporter" in all official publications.[76]

Henry Putzel, Jr. (1964-1979)[77] came to the Court from the Justice Department's Civil Rights Division, where he served as chief of the Voting and Elections Section during the civil rights revolution of the late 1950s and early 1960s. Asked by a television interviewer to describe the characteristics of a successful Reporter, he replied: "to be a lawyer . . . a word nut . . . [a]nd a double revolving peripatetic nit-picker."[78]

Prior to succeeding Putzel, under whom he had worked as Assistant Reporter, Henry C. Lind (1979-1987)[79] edited SUPREME COURT REPORTS, LAWYERS' EDITION, for Lawyers Cooperative Publishing Co. During his tenure, he founded the Association of Reporters of Judicial Decisions, an international organization whose membership includes appellate reporters from the United States and around the world — a far cry, indeed, from Dallas's day. Upon his retirement, Lind was praised for having persuaded a majority of the Court to spell

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[69] Accordingly, one modern Justice has declared *Detroit Timber* "the most frequently cited of all Supreme Court cases." Wagner, *supra* note 3, at 17 (citing a July 1, 1996 memorandum to the Reporter of Decisions from Justice Ruth Bader Ginsburg).

[70] *See generally* Francis Helminski, *Charles Henry Butler*, in Hall, *supra* note 60, at 110.

[71] Charles Henry Butler, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES (1942).

[72] *See generally* Francis Helminski, *Ernest Knaebel*, in Hall, *supra* note 60, at 487.

[73] Act of July 21, 1922, ch. 267, 42 Stat. 818.

[74] *See generally* Francis Helminski, *Walter Wyatt*, in Hall, *supra* note 60, at 945.

[75] The decisions reported in those volumes had been supervised by Assistant Reporter Philip U. Gayaut. *Id.* at 945. Wyatt refused to include his name on their title pages.

[76] Paul R. Baier, *"Double Revolving Peripatetic Nitpicker,"* 1980 S. CT. HIST. SOC'Y Y.B. 10, 11 (as quoted by Knaebel's successor, Henry Putzel, Jr.).

[77] *See generally* Francis Helminski, *Henry Putzel, Jr.*, in Hall, *supra* note 60, at 696; Baier, *supra* note 76.

[78] Baier, *supra* note 76, at 12.

[79] *See generally* Francis Helminski, *Henry Curtis Lind*, in Hall, *supra* note 60, at 507.

"marijuana" with a "j" rather than an "h" by Chief Justice William H. Rehnquist.[80]

The present Reporter, appointed in 1987, is Frank D. Wagner, whose career in many ways has shadowed Lind's. After editing for Lawyers Cooperative Publishing a number of publications devoted to federal law, including SUPREME COURT REPORTS, LAWYERS' EDITION, Wagner was Managing Editor of the Washington, D.C., office of LCP's Research Institute of America when called to the Reportership. He served as the Association of Reporters of Judicial Decisions' 22d president.[81]

On the whole, and despite occasional departures motivated by such factors as relocation of the federal government (Dallas), competing obligations (Cranch), desire to earn a living wage (Wheaton), or outright firing (Peters), the Reporters have shown remarkable longevity.[82] They number only 15 since the founding of the Republic. Even Chief Justices — 16 to date — come and go more often.

THIS IS NOW

One of the greatest historians of American law has described the product of the Reporters' labors as "that magnificent series of reports, extending in an unbroken line down to the present, that chronicles the work of the world's most powerful court."[83]

Cynthia Rapp and the Green Bag Press stand in the long and honorable line of reporters and publishers that stretches back in time to Alexander Dallas, William Cranch, Henry Wheaton, and Richard Peters — patriots all, their faults notwithstanding, who shared a fascination with the law and a reverence for the nation's highest court.

Things are better now than they were then. The hallmarks of the old Reporters were inaccuracy, expense, delay, and omission. The accuracy of the present volumes of in-chambers opinions cannot be questioned, and their price is fair. The earliest of the decisions reproduced in these volumes will, it is true, have spent three-quarters of a century awaiting publication, but the blame can hardly be laid to "Reporter" Rapp.[84] And there are newly discovered decisions which, while not presented here, will surely see the light of day, the *Green Bag* willing, in future supplements to these volumes.

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[80] *Retirements and Appointments*, 479 U.S. xxi.

[81] As indicated below in note 84, and with all praise to Cynthia Rapp's heroic effort in compiling, for long overdue publication, the present volumes of in-chambers reports, Mr. Wagner remains, after 17 years, very much in harness as the Court's Reporter of Decisions — and creeping up in tenure on the longest serving of his predecessors (J.C. Bancroft Whitney at 19 years, and Ernest Knaebel who holds the record at 28).

[82] Their average tenure exceeds 14 years, more than the first three Chief Justices combined.

[83] Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 323 (2d ed. 1986).

[84] Or perhaps "Compiler" Rapp, although the title lacks alliteration. Ms. Rapp is Deputy Clerk under William K. Suter, Clerk of the Court, who in turn serves alongside Frank D. Wagner, Reporter of Decisions, with Judith A. Gaskell, Librarian, and Pamela Talkin, Marshall, as the four statutory officers of the Court. *See supra* note 2. While Compiler Rapp's undertaking in many ways harks back to those of Dallas & Company, all the duties of the office of the modern-day Reporter of Decisions continue to be performed by Mr. Wagner.

Whether the present reports will succeed commercially — a matter of great concern to the old Reporters — is, of course, unknown. But the accomplishment of their successors in presenting these in-chambers opinions to a grateful bench and bar is undoubted.

To all concerned with the production of these latest volumes of Reports, as was said of Henry Wheaton's reports, "[t]he Profession [is] infinitely indebted . . ."[85] May the "rats in the State-House" ne'er taste of this harvest of our priceless heritage.

[85] William Pinkney, uncrowned king of the early Supreme Court bar, to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 20.

[Publisher's note: See 444 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A-172 AND A-332

Kirk B. Lenhard and George E. Franzen, Clark County Deputy Public Defenders, individually and as next friends acting on behalf of Jesse Walter Bishop, Applicants, *v.* Charles Wolff, Warden, Nevada State Prison System, et al.	)	On Application for Stay of Execution and Petition for Rehearing.

[October 18, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

On October 1, 1979, this Court denied the application of Kirk Lenhard and George Franzen, acting as next friends of Jesse Bishop, for a stay of execution pending the filing and determination of a petition for certiorari. *Lenhard* v. *Wolff*, No. A-172 (Oct. 1, 1979) (JUSTICES BRENNAN and MARSHALL, dissenting). Respondent has subsequently rescheduled Bishop's execution for Monday, October 22, 1979. Lenhard and Franzen have now submitted to me, as Circuit Justice, a petition requesting rehearing of this Court's order of October 1, and an application for stay of execution pending determination of the petition for rehearing.

Resolving in applicants' favor all questions pertaining to procedures and rules of the Court, I am satisfied that the moving papers would not persuade the requisite number of Justices to grant applicants' proposed petition for certiorari, to grant the petition for rehearing of this Court's previous denial of a stay pending the filing of a petition for certiorari, or to grant a stay pending conference consideration of the petition for rehearing. See Supreme Court Rule 58. As a conse-

quence, whether the submission presented to me as Circuit Justice on October 16, 1979, is treated as a request for a rehearing of our previous denial of a stay of execution, or as a new request for a stay of execution, it is in all respects

Denied.

[Publisher's note: See 444 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-452

Roland W. Peeples, Applicant,	)	On Application for Stay
v.	)	and Injunction Pending
Harold Brown, Secretary of Defense.	)	Appeal

[November 29, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Peeples has presented me with what his attorney denominates as "Application for Stay and Injunction Pending Appeal," "pending appeal from an order of the United States Court of Appeals for the Ninth Circuit denying him a stay pending appeal to said court." App. 1. I have quoted *verbatim* from the application in order to permit some insight into my firm conviction that I have no idea as to what grounds applicant would urge upon the Court of Appeals for the Ninth Circuit in seeking reversal of the judgment of the United States District Court for the Northern District of California. The application is a hodgepodge of assertions as to the applicant's good character, his 19 years of service in the United States Navy, and his participation in an alcoholism therapy program.

Applicant complains at one point in the application, App. 3, that some of the evidence considered by the Administrative Discharge Board occurred during a prior enlistment and, under a precedent decided by the Court of Appeals for the Ninth Circuit, should not have been considered; applicant also states that he made "disclosures to his doctors of isolated apparent incidents of off-duty off-base homosexual behavior while severely intoxicated," App. 3, although on the same page of the application he alleges that "all of the examining

Navy doctors and alcohol counselors stated that he was *not homosexual."* App. 3 (emphasis in original).

According to the application, applicant's chief convened an Administrative Discharge Board, which heard the evidence obtained during therapy and, over his protest, found him guilty of acts of sexual misconduct and recommended his discharge. He then appealed his discharge to the Secretary of the Navy, who denied it without "any basis in fact or written explanation, and ordered his immediate discharge within five working days, whereupon he sought injunctive relief from the United States District Court for the Northern District of California." App. 4. Respondents agreed that applicant would be retained in the service at Treasure Island, Cal., pending the hearing of the preliminary injunction; meanwhile, according to applicant, his request for discovery under the Freedom of Information Act, 5 U.S.C. § 552a, was objected to "and the District Court below refused to rule on appellant's motion to compel." App. 5.

Thereafter, still according to the application, "the District Court granted [respondent's] motion for summary judgment and declined to rule on [applicant's] motion for a preliminary injunction. A 10-day stay pending appeal to the Ninth Circuit was granted by the trial court. On November 23, 1979, the Ninth Circuit denied [applicant's] Emergency Motion for a stay and injunction pending appeal whereupon the instant motion was filed." App. 5.

Applicant urges that he will suffer irreparable injury because he has 19 years of time in the service, because he will be stigmatized by discharge for sexual misconduct, because he will lose flight time, and because "such a traumatic rejection by the government to whom he has given loyal service could more than likely destroy the successful alcohol rehabilitation efforts to date." App. 5.

Applicant's moving papers, though consisting of nine typewritten pages, are remarkably skimpy in their reference to decisions of this Court. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). *Harmon* v.

Brucker, 355 U.S. 579 (1958), *Service* v. *Dulles*, 354 U.S. 363 (1957), and *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), are the only cases cited, with no more than cryptic allusions to their relevance to this case.

Applicant makes no effort to indicate what the less-than-*verbatim* transcript before the Administrative Discharge Board indicated by way of support for the findings of that board, or what the law prescribes as the standard of review for the Secretary of the Navy in reviewing the action of the Administrative Discharge Board. Application's [Publisher's note: "Application's" should be "Applicant's".] moving papers even fail to identify either the standard of review of the United States District Court or that of the United States Court of Appeals for the Ninth Circuit in reviewing the action of the District Court unfavorable to applicant. In short, I am presented with what applicant's attorney undoubtedly feels is an appealing set of facts, but with virtually no law to accompany them. If either the District Court or the Court of Appeals gave any explanation for their conclusion in the form of an opinion or memorandum order, applicant has not seen fit to attach them to his application here. Even if applicant's claim on the merits were more comprehensible and persuasive, in my judgment he would still have failed to show the necessary irreparable injury required for a mandatory injunction. As this Court noted in *Sampson* v. *Murray*, 415 U.S. 61, 91 (1974), the legislative history of the Back Pay Act, 5 U.S.C. § 5596, "suggests that Congress contemplated that [that Act] would be the usual, if not the exclusive, remedy for wrongful discharge."

Since what applicant actually seeks is not a "stay" in any orthodox sense of that term, but an injunction from me, a single Justice of the Supreme Court of the United States, forbidding the carrying out of the judgment of the Administrative Discharge Board, the Secretary of the Navy, the District Court, and the Court of Appeals for the Ninth Circuit, he labors under a heavy burden indeed. In my opinion, he has not met that burden, and his application is accordingly

Denied.

[Publisher's note: See 444 U.S. 1307 for the authoritative official version of this opinion.]

SYNANON FOUNDATION, INC., ET AL. *v.* CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A-556. Decided December 28, 1979

Application for a stay of the District Court's order denying a preliminary injunction sought by a church (applicants) to preclude respondents from instituting an action against the applicants in state court, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

Upon consideration of the applicants' request for a stay of the order of the United States District Court for the Eastern District of California denying their prayer for a preliminary injunction precluding respondents, including George Deukmejian, the Attorney General of California, from instituting an action against the applicants in state court, the request is hereby denied.

The District Court's opinion denying the prayer for a preliminary injunction indicates that the Attorney General of California has the traditional power of the chief law enforcement officer of most jurisdictions to intervene in the administration of charitable trusts or corporations when he has reason to believe that they are not being administered in accordance with the trust instrument or with state law. We have stated previously that a trial judge's determination of a preliminary injunction should be reversed by this Court or by other appellate courts in the federal system only when the judge's "discretion was improvidently exercised." *Alabama* v. *United States*, 279 U.S. 229, 231 (1929). See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U.S. 1207 (1972) (BURGER, C. J., in chambers); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 396 U.S. 1215 (1969) (BRENNAN, J., in chambers).

Applicants contend, however, that by reason of the fact that they are a church, under the First and Fourteenth Amend-

ments to the United States Constitution they are somehow entitled to different treatment than that accorded to other charitable trusts. But we held only last Term that state courts might resolve property disputes in which hierarchical church organizations were involved in accordance with "neutral principles" of state law. *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979); see also *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449 (1969). The District Court presumably found that this principle will probably be applicable in this litigation. The Court of Appeals for the Ninth Circuit also denied the application for a stay. I find no reason to differ with the conclusion of these two courts. Applicants' request for relief is accordingly denied.

[Publisher's note: See 444 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-636

	)	On Application for Stay of
State of California, Applicant,	)	Execution and Enforcement
v.	)	of the Judgment of the
Barry Floyd Braeseke.	)	Supreme Court of
	)	California.

[January 31, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, has asked me to stay a judgment of the Supreme Court of California in which that court held that the State had not carried its burden of showing that respondent had waived the rights to which he is entitled under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The respondent, on the other hand, contends that the Supreme Court of California, which divided by a vote of four to three on the question, decided the question on a state-law ground.

If respondent is correct, that is the end of the matter. My own reading of the majority and dissenting opinions in the case leaves me in doubt, since the three dissenters concluded that "there can be no doubt this twenty-year old defendant knowingly and intelligently waived his *Miranda* protections."

Within the past month we have summarily reversed a judgment of the Supreme Court of Louisiana, holding that it did not hold the State to a high enough standard of proof as to the waiver of a defendant's "Miranda" rights. *Tague* v. *Louisiana*, — L.W. —. On the other hand, last Term we twice reversed state supreme courts for imposing additional or stricter requirements than we thought were required by the *Miranda* decision as a matter of federal constitutional law. *Fare* v. *Michael C.*, 439 U.S. 1310, 1311 (1978); *North Carolina* v. *Butler*, — U.S. — (1978). In the latter case we said:

> "The question is not one of form, but rather whether

> the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As we unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." [47 L.W. 4455.]

Obviously this Court cannot review all decisions of other courts which hold that the prosecution has or has not carried its burden of showing that a defendant waived his "Miranda" rights. But my reading of the opinion of the Supreme Court of California in this case makes me think that if it was decided on the basis of federal constitutional law, it comes extraordinarily close to the adoption of a rule that in *no* cases can waiver be inferred from the actions and words of the person interrogated. I believe that four Members of the Court are sufficiently likely to share this view that I shall grant the stay requested by the State pending referral of the matter to the next scheduled full Conference of the Court, at which time the Court will have the opportunity of deciding whether to continue the stay, pending the filing of a petition for certiorari by the State, in order to remand the case to the Supreme Court of California in order that it may say whether its judgment was based "on an adequate and independent non-federal ground." *California* v. *Krivda*, 409 U.S. 33, 35 (1972).

The application for stay pending consideration by the full Court is accordingly granted.

[Publisher's note: See 444 U.S. 1311 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-638 (79-5885)

Daniel J. Portley, Applicant,	)	On Application for Stay
v.	)	of Execution of Judgment.
Lawrence Grossman, Warden, et al.	)	

[February 1, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

The United States District Court for the Central District of California granted applicant's petition for a writ of habeas corpus and released him from federal custody pending appeal in the Ninth Circuit. The Ninth Circuit reversed, denying the writ, and declined to issue an order staying its mandate pending review on certiorari in this Court. Applicant then filed this request for a stay of execution of the Ninth Circuit's mandate, scheduled for issuance on February 11, 1980.

In April 1972, after pleading guilty to federal offenses, applicant was sentenced to serve six years in federal custody. Applicant was released on parole July 1, 1974. During his parole term, applicant was convicted of two separate offenses in state court. On June 20, 1978, the Parole Commission held a hearing and revoked applicant's parole on the basis of the two convictions. The Commission applied its guidelines currently in force, 28 CFR § 2.21, in establishing applicant's next presumptive parole date, indicating that a customary range of 34 to 44 months would be served before re-release.

Applicant filed a writ of habeas corpus in federal court, and the trial judge granted the writ, ordering the Parole Commission to reconsider and determine applicant's parole eligibility under the standards for reparole in effect when the applicant was sentenced in April 1972. The Ninth Circuit reversed,

relying on its decision in *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (CA9 1978), holding that the Parole Commission did not violate the constitutional prohibition against *ex post facto* laws by failing to rely on the guidelines in effect at the time of sentencing, rather than at the time of parole eligibility.

When applicant was sentenced in April of 1972, the statutes then in force provided that if an individual was found to have violated parole, "the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced." 18 U.S.C. § 4207. Now, as in 1972, the Commission's determination to grant or deny parole is "committed to agency discretion." 18 U.S.C. § 4218(d). The administrative guidelines articulating the factors relied on by the Commission in making parole and reparole decisions have changed from those in effect at the time of applicant's sentencing. But even assuming for purposes of this application that the *Ex Post Facto* Clause applies to parole in the manner it does to trial and sentence, the changes in issue are not impermissible, as applicant contends. In *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977), this Court held that the prohibition of *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Ibid.*

The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion. The terms of the sentence originally imposed have in no way been altered. Applicant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violations would put him at risk of serving the balance of his sentence in federal custody. The guidelines, therefore, neither deprive applicant of any pre-existing right nor enhance the punishment imposed. The change in guidelines assisting the Commission in the exercise of its discretion

is in the nature of a procedural change found permissible in *Dobbert*, *supra.*

Since I do not believe that applicant is being held in custody in violation of the Constitution, I deny the application for a stay.

[Publisher's note: See 445 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-773

	)	On Application for Stay of
State of California, Applicant,	)	Execution and Enforcement
v.	)	of the Judgment of the
Nick Ramon Velasquez.	)	Supreme Court of
	)	California.

[March 24, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks a stay of the enforcement of the judgment of the Supreme Court of California in *People* v. *Velasquez*, 26 Cal. 3d 425, — Cal. Rptr. —, — P.2d — (1980), pending the filing of a petition for certiorari and its disposition by this Court. Applicant contends that the Supreme Court of California has reversed the imposition of a sentence of death, although upholding the conviction, because the trial was conducted in violation of this Court's decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

This Court has granted certiorari in *Adams* v. *Texas*, No. 79-5175, and that case is presently set for argument on Monday, March 24th, 1980. The issues presented there are sufficiently related to the issues which the applicant State says it will raise in its petition for certiorari in this case that I have decided to grant the State's application for stay pending (1) consideration and decision of *Adams* v. *Texas*, *supra*, by this Court, and (2) the filing and disposition of a timely petition for certiorari in this case by the applicant.

I am not persuaded by the response that the decision below rests upon a reading of state law by the Supreme Court of California. Neither *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 447 P.2d 117 (1968), which was cited by the court below, nor *People* v. *Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), which was not, supports respond-

ent's position. *Anderson*, as I read it, was based primarily upon this Court's decision in *Witherspoon*. *Wheeler*, while itself based on state law, seems clearly distinguishable from the present case.

The application for stay is accordingly granted.

[Publisher's note: See 446 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

EDWARD V. HANRAHAN ET AL. *v.* IBERIA HAMPTON ET AL.

and

MARLIN JOHNSON ET AL. *v.* IBERIA HAMPTON ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 79-912 & 79-914. Decided April 30, 1980

Motion to recuse presented to MR. JUSTICE REHNQUIST, by him denied.

Memorandum of MR. JUSTICE REHNQUIST.

Plaintiffs-respondents and their counsel in this case have moved that I "be recused from the proceedings in this case" for the reasons stated in their 14-page motion and their five Appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-defendant petitioners [Publisher's note: "state-defendant petitioners" should be "state defendants-petitioners". But see 446 U.S. at 1301.] in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see *Jewell Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U.S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state defendants, 28 U.S.C. § 455 as amended, and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly

Denied.

[Publisher's note: See 446 U.S. 1307 for the authoritative official version of this opinion.]

PACILEO, SHERIFF *v.* WALKER

ON APPLICATION FOR STAY

No. A-894. Decided May 1, 1980

An application for a stay, pending consideration of a petition for certiorari, of a California Supreme Court order in connection with the extradition to Arkansas of respondent, who had escaped from an Arkansas prison, is granted. The order, *inter alia*, directed the California Superior Court to conduct hearings to determine if the Arkansas prison was presently operated in conformance with the Eighth Amendment and stayed execution of the Governor of California's warrant of extradition pending final determination of the proceeding. A stay of the order is warranted since the Governor of California had granted the request for extradition, which was in compliance with federal standards; the proper forum for respondent's challenge to Arkansas prison conditions was in the Arkansas courts; and the order was very much at odds with principles set forth in this Court's decisions governing judicial proceedings in extradition cases.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Sheriff of El Dorado County, Cal., applies for a stay of an order of the Supreme Court of California issued April 9, 1980. The order was made in connection with a request for extradition of respondent Walker by the demanding State of Arkansas to the rendering State of California pursuant to the Extradition Clause of the Constitution and federal statutes implementing it. The stay is requested pending consideration by this Court of a petition for certiorari to review the order, which is sufficiently short to permit its pertinent parts to be set forth *in haec verba*:

> "The Sheriff of the County of El Dorado is ordered to show cause before the Superior Court of El Dorado County with directions to that court to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance

> with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits.
>
> "Pending final determination of this proceeding execution of the Governor's Warrant of Extradition is stayed, and the Sheriff of the County of El Dorado is directed not to release petitioner into the custody of any agent of the State of Arkansas."

Though there are numerous factual allegations in both the application and in the response for which I called, the only one which is verified was made to Governor Brown of California in urging him to refuse to issue an extradition warrant in this case. In that affidavit, a practicing attorney in Little Rock, Ark., stated: "I have no hesitation in stating that I fear if James Dean Walker is returned to the Arkansas penitentiary system that he faces grave danger to his physical well being."

Nonetheless, on February 18, 1980, the Governor of California honored the requisition for the arrest and rendition of respondent James Dean Walker, who was then within the State of California and who escaped from an Arkansas prison prior to completing a sentence imposed upon him in that State following his conviction for murder. The legal issues posed by the applicant's request for a stay can probably be best understood in the light of the legal proceedings which have ensued since Governor Brown issued the warrant of arrest and rendition.

Respondent Walker first challenged his extradition by filing a petition for a writ of habeas corpus in the Superior Court of El Dorado County, Cal., then in the California Court of Appeal, Third Appellate District, and then in the United States District Court for the Eastern District of California. Each of these efforts was unsuccessful.

It was only upon this final application to the Supreme Court of California that he obtained the relief which he sought, and the Sheriff of El Dorado County who is his

present custodian is now the applicant before me. Thus the executive aspect of extradition, and the legal obligation of the Governor of one State to surrender a fugitive found in that State to the Governor of a demanding State upon his request discussed in *Kentucky* v. *Dennison*, 24 How. 66 (1861), are not involved here. The Governor of California has already issued an extradition warrant in response to the request of the Governor of Arkansas, and the question is to what extent may the courts of the so-called "asylum" or "rendering" State inquire beyond the face of the extradition warrant and its conformity to state law.

This Court most recently considered that question in *Michigan* v. *Doran*, 439 U.S. 282 (1978), in which it stated that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution." *Id.*, at 288. We further stated in that case:

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

In an earlier decision, *Sweeney* v. *Woodall*, 344 U.S. 86 (1952), the Court stated:

> "The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system." *Id.*, at 89-90 (footnotes omitted).

In this case, the demanding State is Arkansas, whose prisons were the subject of our opinion in *Hutto* v. *Finney*, 437 U.S. 678 (1978). The asylum State is California, and the Superior Court of El Dorado County, Cal., has been ordered by the Supreme Court of that State "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits."

The 1970 census conducted by the United States indicates that El Dorado County, Cal., has a population of 43,833 persons. Its county seat, Placerville, with a population indicated by the same census as being in the neighborhood of 5,000 persons, is located between Sacramento and the Nevada border on the south side of Lake Tahoe. While there is in terms no doctrine of "*forum non conveniens*," the doctrines of this Court in *Sweeney* v. *Woodall*, *supra*, and *Michigan* v. *Doran*, *supra*, indicate that the interstate rendition of fugitives has a federal constitutional and statutory basis, and cannot be decided solely in accordance with the principles of law enunciated by the courts of one State. Here the Governor of California has granted the request for extradition, which is in compliance with federal standards. And under *Sweeney* the proper forum for respondent's challenge to Arkansas prison conditions is in the Arkansas courts. It seems to me that the order issued by the Supreme Court of California is very much at odds with principles set forth in *Doran* and *Sweeney*, and I have therefore decided to grant the application of applicant Pacileo for a stay pending timely filing of a writ of certiorari in this Court to review the order of the Supreme Court of California. In the event that the petition is denied, the stay issued by me shall expire of its own force. In the event that the petition for certiorari is granted, the stay shall continue in force until final disposition of the case by this Court or further order of the Court.

[Publisher's note: See 446 U.S. 1302 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-882 (79-1601)

George Sumner, Warden,	)	
v.	)	On Application for Stay.
Robert Mata.	)	

[May 1, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks to stay the mandate of the United States Court of Appeals for the Ninth Circuit under which a writ of habeas corpus would issue unless the State of California grants respondent Robert Mata a new trial on the charge of murder. See *Mata* v. *Sumner*, 611 F.2d 754 (CA9 1979). On April 15, 1980, I temporarily stayed that mandate pending consideration of a response to the application and further order, in order to see whether there was a conflict among the Courts of Appeals or a substantial doctrinal difference from cases decided by this Court that would distinguish this decision from the numerous mine-run decisions on the reliability of identification that could not possibly be individually reviewed by this Court.

In 1972 respondent, then a prisoner at a medium-security prison in Tehachapi, Cal., was charged with the murder of another prisoner, Leonard Arias. While investigating the murder, prison officials showed two prisoners who had witnessed the killing a series of photographic arrays containing pictures of respondent and his two alleged accomplices. Without recounting the details of each display, see 611 F.2d, at 755-757, it suffices to say that the two witnesses eventually selected respondent's photograph from the arrays and subsequently identified him at trial as one of the persons involved in the killing.

On direct appeal from his conviction, respondent challenged the pre-trial identification procedures and claimed they

tainted the subsequent in-court identifications. The California Court of Appeals rejected this challenge, finding that there had been "no showing of influence by the investigating officers; that the witnesses had an adequate opportunity to view the crime; and that their descriptions [were] accurate." Pet. for Cert. in *Sumner* v. *Mata*, No. 79-1601, C-4 through C-5. The California courts also rejected respondent's petition for a writ of habeas corpus, which petition similarly challenged the identification procedures employed by prison officials.

On respondent's subsequent petition for a federal writ of habeas corpus, the District Court concluded that, although "irregularities occurred in the pre-trial photographic identification" of respondent, those irregularities "did not so taint the in-court identifications . . . as to establish a constitutional violation. . . ." Pet. for Cert. D-3.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. In evaluating the admissibility of the in-court identifications, the majority of the Court of Appeals employed a "two-part approach." First, it considered whether photographic identification, as opposed to a lineup, was necessary under the circumstances. It answered this inquiry in the negative. Second, the majority inquired "whether there was a very substantial likelihood of irreparable misidentification" due to the less-than-ideal procedures employed. It answered this inquiry in the affirmative. In summarizing this latter holding, the court clearly indicated that it considered the feasibility of a lineup a significant factor in its determination:

> "Based upon the lack of necessity [for a photographic array], the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant [by one of the witnesses], and the inescapable focusing of attention upon the [respondent] by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as

> to give rise to a very substantial likelihood of irreparable misidentification." 611 F.2d, at 759.

In his petition for a writ of certiorari, applicant contends that the majority of the Court of Appeals gave undue weight to the failure of the prison officials to employ a lineup as opposed to a photographic array in the present case. To the extent that the Court of Appeals did overturn respondent's conviction because it believed that "less suggestive" procedures were available, I believe that its decision ignores this Court's indication in *Manson* v. *Braithwaite*, [Publisher's note: "*Braithwaite*" should be "*Brathwaite*". But see 446 U.S. at 1304.] 432 U.S. 98, 114 (1977), holding that reliability, not necessity, is the "linchpin in determining the admissibility of identification testmony [Publisher's note: "testmony" should be "testimony".] . . . ," a conclusion in turn derived from our decision in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972). The decision of the majority of the Court of Appeals in this regard would also seem to conflict with *United States* v. *Gidley*, 527 F.2d 1345 (CA5), cert. denied, 429 U.S. 841 (1976), where the United States Court of Appeals for the Fifth Circuit stated that the availability of less suggestive methods of identification is "not relevant" in determining whether a photographic display is impermissibly suggestive. *Id.*, at I350. [Publisher's note: "I350" should be "1350".]

Two arguments offered by respondent merit brief mention. First, respondent asserts that the Court of Appeals' "two-part approach" incorporates the necessity of a challenged procedure only in determining whether that procedure, although suggestive, was nevertheless constitutionally permissible given the exigencies of the situation. A close reading of the appellate court's opinion, however, belies that interpretation, and demonstrates instead that the court considered the availability of less suggestive procedures an "important factor" in determining the reliability of the procedures actually employed. See 611 F.2d, at 757, 759. Second, respondent suggests that this Court has declined on several prior occasions to review the two-part approach employed in the Ninth Circuit. See *United States* v. *Crawford*, 576 F.2d 794 (CA9), cert. denied, 439 U.S. 851 (1978); *United States* v. *Pheaster*, 544 F.2d 353 (CA9 1976), cert. denied, 429 U.S. 1099 (1977);

United States v. *Calhoun*, 542 F.2d 1094 (CA9 1976), 429 U.S. 1064 (1977); *United States* v. *Valdivia*, 492 F.2d 199 (CA9 1973), cert. denied, 416 U.S. 940 (1974). In addition to the hazards of reading any meaning into this Court's denials of certiorari, I would also note that each of the afore-cited cases came to this Court after the Court of Appeals had upheld the identification procedures there employed. We thus were not presented with opportunities to consider the relevance of the feasibility of less suggestive procedures to a determination that the procedure actually employed was unconstitutionally suggestive.

In this case the Court of Appeals rejected the uniform conclusion of several state courts and another federal court that the identification procedures employed here were not so suggestive as to taint the witnesses' in-court identification of respondent. Given the tension between the analysis employed by the majority of the Court of Appeals for the Ninth Circuit in this case and our decisions in *Manson*, *supra*, and *Neil*, *supra*, and given the apparent conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Fifth Circuit in *Gidley*, *supra*, I have decided to grant applicant's request for an order staying the mandate in *Mata* v. *Sumner* (the present case), 611 F.2d 754 (CA9 1979), cert. pending, No. 79-1601, because I am of the opinion that four Members of this Court are likely to vote to grant certiorari in that case when presented. As nearly as I can determine, that case should be considered by the Court on certiorari in the near future, and the stay which I am presently issuing shall expire without further action of the Court in the event that certiorari is denied. If certiorari is granted, the stay shall remain in effect until final disposition of the case or further order of the Court.

Accordingly, the application for the stay of mandate of the United States Court of Appeals in this case is–

Granted.

[Publisher's note: See 446 U.S. 1311 for the authoritative official version of this opinion.]

BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* CALDWELL ET AL.

ON APPLICATION FOR STAY

No. A-946. Decided May 6, 1980

Application by the Commissioner of the New York Department of Social Services to stay, pending the filing and disposition of a petition for certiorari, the Court of Appeals' mandate affirming the District Court's preliminary injunction against enforcement of a New York statute limiting eligibility for Medicaid assistance to those medically needy persons who have not made a voluntary transfer of property for the purpose of qualifying for such assistance within 18 months prior to applying for Medicaid, is denied. Applicant has not satisfied her burden of showing, with respect to the risk of irreparable harm, that the balance of equities favors her as against respondent aged, blind, and disabled persons who were denied Medicaid under New York's "no transfer" rule, nor has she met her burden of showing that four Members of this Court would vote to grant certiorari.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicant Barbara Blum, the Commissioner of the New York State Department of Social Services, seeks a stay of the mandate of the United States Court of Appeals for the Second Circuit pending filing and disposition of her petition for a writ of certiorari. The mandate of the Court of Appeals will issue on May 7, 1980, and that court has denied a motion for a stay. This application for a stay was filed on May 5, 1980. Oral argument was heard in chambers. For the reasons that follow, I deny the application for a stay.

I

This case involves medical assistance to the needy pursuant to the Medicaid program. Subchapter XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396k, establishes the fed-

eral statutory guidelines which govern plans for medical assistance if a State chooses to participate in the Medicaid program. Any State which participates in Medicaid must extend medical benefits to all persons receiving supplemental security income (SSI) benefits under Subchapter XVI (Supplemental Security Income for the Aged, Blind, and Disabled), see 42 U.S.C. § 1396a(a)(10)(A). Such persons are known as the "categorically needy." The State may also provide medical assistance under Medicaid for persons "who would, except for income and resources, be eligible . . . to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services," 42 U.S.C. § 1396a(a)(10)(C)(i). Such persons are known as the "medically needy."

New York opted to participate in the Medicaid program and to provide Medicaid payments to the medically needy as well as the categorically needy. The State has imposed an eligibility requirement for those persons seeking to qualify as medically needy. New York Soc. Serv. Law § 366.1(e) (McKinney Supp. 1979) limits eligibility to those persons who have not made "a voluntary transfer of property (i) for the purpose of qualifying for such [medical] assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance." A transfer of property within 18 months prior to application for Medicaid is presumed to have been for the purpose of qualifying for medical assistance. Any such transfer results in the denial of Medicaid benefits. See also 18 N.Y.C.R.R. § 360.8 (1979). No such "no-transfer" rule applies to the categorically needy, since an applicant is allowed

to transfer property in order to qualify for SSI benefits. See 42 U.S.C. § 1382b(b).

Respondents are aged, blind, or disabled persons who would be eligible for SSI benefits but for their income and resources and who have been denied medical assistance benefits for the medically needy because they voluntarily transferred property prior to application for such benefits or while receiving such benefits. They filed suit in the Federal District Court for the Northern District of New York pursuant to 42 U.S.C. § 1983 to challenge N.Y. Soc. Serv. Law § 366.1(e) (McKinney Supp. 1979) and 18 N.Y.C.R.R. § 360.8 as violative of due process, equal protection, and the Supremacy Clause. The District Court found jurisdiction under 28 U.S.C. § 1343(3). The suit was certified by the District Court as a class action on behalf of all aged, blind, or disabled persons who have been denied or will in the future be denied medical assistance benefits for the medically needy in New York State on the basis of a transfer of assets in violation of Soc. Serv. Law § 366.1(e) and 18 N.Y.C.R.R. § 360.8.

The District Court granted respondents' motion for a preliminary injunction. The court concluded first that there had been a sufficient showing by respondents of likelihood of success on the merits. The Social Security Act provides that if the State chooses to provide benefits to the medically needy, the State must make such assistance available to all persons who would, except for income and resources, be eligible for SSI benefits "and who have insufficient (as determined in accordance with *comparable* standards) income and resources to meet the costs of necessary medical and remedial care and services." 42 U.S.C. § 1396a(a)(10)(C)(i) (emphasis supplied). The Department of Health, Education, and Welfare (HEW) in its accompanying regulation has provided that a state agency "must not use requirements for determining eligibility [for Medicaid benefits] for optional coverage groups [such as the medically needy] that are . . .

(2) For aged, blind and disabled individuals, more restrictive than those used under SSI. . . .” 42 CFR § 435.401(c) (1979). Since under SSI an applicant may transfer assets voluntarily in order to become eligible, the District Court concluded that the more restrictive no-transfer rule of New York for the medically needy was in “apparent” conflict with federal law. The court noted that HEW officials had notified New York that its no-transfer rule violated federal requirements. The court therefore found that the respondents’ likelihood of success was “strong.” The District Court also concluded that the balance of harms weighed in favor of granting the injunction, because “the very survival of these individuals and those class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions.”

The preliminary injunction was entered by the District Court on December 3, 1979. Pursuant to a stipulation by the parties, the Court of Appeals entered a temporary stay of the injunction on January 3, 1980. On April 16, 1980, the Court of Appeals affirmed the grant of the preliminary injunction, “substantially for the reasons stated by Judge Munson.” The Court of Appeals noted that the only other Court of Appeals to address this issue reached the same result, see *Fabula* v. *Buck*, 598 F.2d 869 (CA4 1979) (Maryland no-transfer rule). The New York Supreme Court, Appellate Division, has also found that Soc. Serv. Law § 366.1(e) conflicts with the Social Security Act and therefore violates the Supremacy Clause, see *Scarpuzza* v. *Blum*, 73 App. Div. 2d 237, 426 N.Y.S. 2d 505 (1980). The Court of Appeals also noted that Congress is considering legislation to authorize States to impose a no-transfer rule for Medicaid benefits, which suggests that such a rule is not presently allowed. The Court of Appeals agreed with the District Court that the “balance of hardships . . . would tip decidedly toward [respondents] if relief were denied.” The court also vacated its stay.

On April 30, 1980, the Court of Appeals denied a motion for a stay of the mandate pending filing of a petition for writ of certiorari.

II

Applicant states in her motion papers that she will argue in her petition for certiorari that Congress has not expressed any intention to pre-empt state no-transfer rules. Applicant will also argue that HEW regulation 42 CFR § 435.401(c) (1979), interpreting the Social Security Act to prohibit the New York no-transfer rule, is beyond the authority of the agency.

The criteria for determining whether to grant a stay pending the filing and disposition of a petition for writ of certiorari are well established. First, the Circuit Justice must balance the equities to determine on which side the risk of irreparable harm weighs most heavily. *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (MARSHALL, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (MARSHALL, J., in chambers). Second, if the balance of equities favors the applicant, the Circuit Justice must determine whether it is likely that four Members of this Court would vote to grant a writ of certiorari. *Holtzman* v. *Schlesinger*, *supra*, at 1310; *Beame* v. *Friends of the Earth*, *supra*, at 1312. The burden of persuasion on both these issues is on the applicant, *ibid.* That burden is particularly heavy here since the Court of Appeals has vacated its original stay and denied the motion for a new stay. Cf. *ibid.* (stay denied by District Court and Court of Appeals).

The applicant has not satisfied her burden in this case. Blum contends that compliance with the preliminary injunction will cost the State of New York "millions" of dollars. At oral argument on this application counsel for applicant estimated that the State will have to expend an additional $150 million per year in Medicaid benefits as a result of the deci-

sion below, but the economic harm to be considered on this stay application is only the additional expenditure during the time in which the petition for certiorari is pending. Such harm must be considerably less than $150 million.* On the other side of the balance are the life and health of the members of this class: persons who are aged, blind, or disabled and unable to provide for necessary medical care because of lack of resources. The District Court noted that some of the members of the class have already died since this suit was filed, and the denial of necessary medical benefits during the months pending filing and disposition of a petition for writ of certiorari could well result in the death or serious medical injury of members of this class. The balance of equities therefore weighs in favor of the respondents.

In addition, Blum has failed to carry her burden of showing that four Members of this Court would be likely to vote to grant a writ of certiorari. There is no conflict in the courts of appeals, but rather uniformity of decision in the two Circuits which have addressed the issue. The intermediate appellate court in New York is also in agreement with the decision below. The terms of the Social Security Act support the judgment of the Court of Appeals, and the agency responsible for administering the Act is in complete accord

* New York entered into an agreement with HEW in 1973 whereby the Secretary of HEW determines the eligibility for medical assistance benefits of persons who are also eligible for SSI benefits. This eliminates the need for a separate medical assistance application and eligibility determination by New York State. Blum has notified the Secretary of HEW that New York will terminate the agreement in 120 days, as provided by the agreement, because of HEW's determination that the New York no-transfer rule violates federal eligibility requirements. Applicant cites the added administrative costs to New York of having to establish an eligibility agency of its own as an additional harm to be weighed in the balance on this stay application. The cancellation of the agreement, however, is a voluntary act by Blum, and the added burdens of that voluntary act should not weigh in the balance of equities here.

with the decision below. Finally, Congress is presently considering legislation to amend the Act on this very issue. Under the circumstances, it is not sufficiently likely that four Members of this Court would vote to grant a writ of certiorari to warrant issuing a stay of the mandate.

The application for a stay is denied.

[Publisher's note: See 446 U.S. 1318 for the authoritative official version of this opinion.]

BARNSTONE *v.* UNIVERSITY OF HOUSTON ET AL.

ON APPLICATION TO VACATE ORDER

No. A-978. Decided May 12, 1980

Application to vacate the Court of Appeals' order vacating, on a specified condition, the District Court's order compelling respondents to broadcase [Publisher's note: "broadcase" should be "broadcast".] a certain television program, is denied.

MR. JUSTICE POWELL, Circuit Justice.

On May 9, 1980, the District Court for the Southern District of Texas entered a temporary restraining order compelling respondents to broadcast "The Death of a Princess," a television program to be distributed by the Public Broadcasting Service, on May 12, 1980, at 8 p.m. Today, the Court of Appeals for the Fifth Circuit vacated the District Court order on condition that the respondents "tape and preserve the program in issue." Applicant seeks relief from the Court of Appeals order. The respondents oppose the application, and represent that "The Death of a Princess" will be preserved on videotape for later airing should the applicant obtain a permanent injunction. The Public Broadcasting Service has filed an *amicus* brief also asking that the application of the applicant be denied.

Although applicant requests that the Court grant certiorari and reverse the judgment of the Court of Appeals, in purpose and effect applicant is requesting that the order of that court be vacated, thereby reinstating the temporary restraining order of the District Court. Such a request normally comes to me as Circuit Justice. Although I may have considered referring this to the entire Court, a quorum is not present. I therefore exercise my authority as Circuit Justice to rule on applicant's application.

Upon consideration of the papers, I deny the application.

I have consulted informally with each of my Brethren who was present at the Court when these papers arrived late this

afternoon. Although no other Justice has participated in the drafting of this order, I am authorized to state that each of the three whom I consulted would vote to deny this application. Of course, this action should not be taken as expressing a view on the merits of the questions raised in this case. See *Graves* v. *Barnes*, 405 U.S. 1201, 1204 (1972) (POWELL, J., in chambers).

[Publisher's note: See 446 U.S. 1320 for the authoritative official version of this opinion.]

MARTEN ET UX. *v.* THIES, DIRECTOR OF COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, ET AL.

ON APPLICATION FOR STAY

No. A-972. Decided May 16, 1980

Application to stay California Court of Appeal's order declining to continue applicants' right to visit their prospective adoptive child, pending review by this Court, is denied. It appears unlikely that four Members of this Court would vote to grant plenary review, and the record amply supports the Court of Appeal's finding that further legal obstacles to the child's placement in another adoptive home would be to the child's detriment.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants Kelly Marten and Kathy Marten have asked me to stay an order of the California Court of Appeal declining to continue their right to visit their prospective adoptive daughter, Sarah, pending disposition of applicants' appeal or petition for a writ of certiorari to this Court. The Court of Appeal earlier had rejected applicants' appeal from an order of the Superior Court upholding the decision of the respondent placement agency to terminate applicants' status as Sarah's prospective adoptive parents. Because I do not believe that four Members of this Court will vote to hear applicants' ultimate appeal or petition, and because the Court of Appeal specifically found that further legal obstacles to Sarah's placement in another adoptive home would be to the child's detriment, I will deny the requested stay.

The historical facts in this case are not in dispute and may be gleaned from the application and the opinion of the California Court of Appeal. In early 1976, applicants, who are husband and wife, qualified as prospective adoptive parents with respondent San Bernadino County Adoption Services (the Agency). On May 17, 1977, Sarah, then 15 weeks

old, was placed in applicants' home on a "quasi-adoptive" basis pending final adoption at some later date. At that time, applicants agreed to inform the Agency of any change in their domestic circumstances.

Unbeknownst to the Agency, applicants had been experiencing marital problems even before they took custody of Sarah. These problems finally culminated in a separation in January 1978, when Kelly Marten left his wife and Sarah and moved in with another woman. Contrary to their original agreement, however, applicants did not inform the Agency of this change in circumstances. Applicants apparently remain separated as of this date.

In April 1978 the Agency learned of applicants' separation through a third party. The Agency sent first one and then another social worker to Kathy Marten's home to interview Ms. Marten and to assess Sarah's environment. The first advised applicants that removal of Sarah from their custody was a possibility, but that she would have to consult her superiors. The second social worker concluded that Ms. Marten's psychological state was deteriorating and recommended that Sarah be removed from applicants' home. Upon receiving these reports, the Agency's acting chief of adoptions and its director agreed that Sarah should be removed from Ms. Marten's custody and that the removal should take place without notice to applicants. This latter determination was based on their belief that notice would place Sarah in "imminent danger" because of the perceived likelihood that Ms. Marten would flee from the State with the child. On August 21, 1978, Sarah was, in fact, removed from Ms. Marten's custody without prior notice and was placed in a foster home.

Pursuant to applicable California law, applicants sought administrative review of the Agency's decision to terminate their status as Sarah's prospective adoptive parents. After a hearing, the "Review Agent" issued a decision upholding the Agency. He found, *inter alia*, that there had been substan-

tial cause to believe that Sarah was a child whose health and safety had been in jeopardy, that she had been in imminent danger, and that the jeopardy would have been greatly increased if prior notice of the removal had been given to applicants.

On applicants' petition to Superior Court for a writ of mandate, that court found that the conclusions of the Review Agent were amply supported by the record and that return of Sarah to applicants "'would not be in the best interest of the child, and in fact would be detrimental to the child.'" 99 Cal. App. 3d 161, 167, 160 Cal. Rptr. 57, 60 (1979).

The Court of Appeal affirmed, rejecting each of the contentions that applicants claim they will advance in their appeal or petition to this Court. First, the appellate court concluded that, while preremoval notice to custodial "parents" in applicants' position was a normal requisite of procedural due process, California law specifically permitted removal without notice where "[t]he agency director has reasonable cause to believe the child is in imminent danger. . . ." 22 Cal. Admin. Code § 30684 (d)(l)(A) (1976). Here, according to the Court of Appeal, substantial evidence supported a finding that Ms. Marten might flee if notified and that such flight would endanger the child. In particular, the Court of Appeal cited

> "(1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of the state; (4) the wife's emotional instability and over-dependence on the child for her emotional needs; (5) insensitivity of both husband and wife to the child's emotional and developmental needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge." 99 Cal. App. 3d, at 172, 160 Cal. Rptr., at 63.

Second, the Court of Appeal confronted applicants' contention that their marital separation should not disqualify them "*a fortiori*" from adopting Sarah. According to the court, however, applicants' separation was only one factor in the Agency's decision to terminate their status as prospective adoptive parents. Other important considerations included "emotional stability of the parents, parental sensitivity to the child's developmental needs, trustworthiness of the parents and their willingness to abide by the rules, maturity of the parents, motivation to correct deficiencies, and economic security." *Id.*, at 173, 160 Cal. Rptr., at 64. Looking to the record, the appellate court concluded that all these considerations supported the Agency's decision.

Finally, the Court of Appeal rejected applicants' claim, raised for the first time in their reply brief to that court, that the Review Agent should have appointed independent counsel to represent Sarah at the administrative hearing. Overlooking the belated nature of this argument, the court found no evidence of any divergence of interest between the Agency and Sarah, and therefore no need "to further encumber the . . . placement procedure" by requiring provision of independent counsel. *Id.*, at 174, 160 Cal. Rptr., at 64.

Prior to their appeal to the Court of Appeal, applicants had been visiting Sarah twice a week at her foster home pursuant to an agreement reached with the Agency. During its consideration of applicants' case, the Court of Appeal entered an order permitting applicants to continue their visits. When that court entered its judgment, however, it specifically vacated that order, noting that applicants had "already delayed the child's placement in a proper adoptive home by several months, to the child's detriment," and that "[f]urther legal maneuvers to perpetuate a relationship initiated by their own wrongful act should not be tolerated." *Id.*, at 175, 160 Cal. Rptr., at 64. After the Supreme Court of California declined to hear applicants' appeal, the Court of Appeal denied applicants' motion to recall its mandate and to

grant them continued visitation rights pending appeal or petition to this Court. It is this last order that applicants would have me stay so as to grant them the visitation rights terminated by the court below.

Applicants state that in their ultimate appeal or petition to this Court they will raise each of the three aforementioned contentions rejected by the Court of Appeal. I find it highly unlikely that four Members of this Court would vote to grant plenary review on any of these issues.

In regard to applicants' claim that they were entitled as a matter of procedural due process to preremoval notice, I would note initially that such a claim depends entirely upon their ability to show that they have been deprived of some protected interest in life, liberty, or property. As I read this Court's opinion in *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 842-847 (1977), their success on this threshold issue is far from certain. See also *id.*, at 856-863 (STEWART, J., concurring in judgment). Even assuming such success, however, applicants candidly, and somewhat cryptically, pose the primary issue presented to this Court as whether authorities can dispense with preremoval notice on a finding of "'prospective' imminent danger" to the child as opposed to "actual imminent danger." Statement of Points and Authorities 7. Like the court below, I find this distinction somewhat elusive. In any event, I am reasonably certain that, given the uniform conclusion of the agencies and courts below that there was indeed an imminent danger to Sarah, four of my colleagues would not vote to examine that conclusion.

As for applicants' contention that they were disqualified as prospective adoptive parents "merely" because they had separated, I note only that this contention finds no support in the decision of the Court of Appeal or in any of the documents filed in support of the application.

Finally, applicants reassert their contention that Sarah was entitled to independent counsel in the administrative proceeding. Absent a showing of actual conflict or other

prejudice to Sarah, however, I see little chance that this argument will receive plenary review.

Applicants argue doggedly that the equities in this case favor continuation of their visitation privileges pending disposition of their case by this Court. They rely in particular upon affidavits by various child psychologists indicating that such visits would not harm Sarah and actually would assist her in overcoming the trauma of removal from applicants' home. The Court of Appeal also was presented with these affidavits, however, and concluded on the basis of all the evidence that further visitation would not be in Sarah's best interest. In a passage I consider quite telling, that court stated:

> "The concealment of [applicants'] marital difficulties and [their] failure to report their separation suggests that the initial placement may have been sought in an effort to salvage a failing marriage. It is unfortunate when natural parents resort to such practices; to permit adoption to be used for such purpose would be a serious breach of duty on the part of the Agency." 99 Cal. App. 3d, at 173, 160 Cal. Rptr., at 64.

Removed as I am from the actual events at issue by nearly 3,000 miles and by several layers of judicial proceedings, I decline to make my own assessment of Sarah's best interests [Publisher's note: "interests" should be "interest". But see 446 U.S. at 1325.] and instead defer to the amply supported conclusions of the courts below.

The application is accordingly

Denied.

[Publisher's note: See 448 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1135

Railway Labor Executives' Association, Applicant,	)	
v.	)	On Application for Stay.
William M. Gibbons, Trustee; Continental Illinois National Bank and Trust Company of Chicago, et al.	)	

[June 28, 1980]

MR. JUSTICE STEVENS, Circuit Justice.

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad (the Rock Island) pursuant to § 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, have been pending before Judge McGarr in the United States District Court for the Northern District of Illinois for over five years. Because the Rock Island had been sustaining continuing substantial losses, on January 25, 1980 Judge McGarr ordered the Trustee to prepare and file a preliminary plan of liquidation. On May 27, 1980, the Interstate Commerce Commission filed an advisory report with the District Court concluding "that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Consistent with its own precedents, the Commission apparently did not recommend that any special labor protection condition be imposed on the Rock Island in connection with the abandonment. On June 2, 1980, after receiving briefs and hearing argument, Judge McGarr entered an order authorizing complete abandonment of all Rock Island operations and expressly holding that "no labor protection arrangement may be imposed on the Rock Island estate."

Two days earlier, however, the President had signed Public Law 96-254 [Publisher's note: There should be a comma here.] entitled the Rock Island Railroad Transition and Employee Assistance Act ("the Act"). Section 106 (a) of the Act required the Trustee, within 10 days, to enter into an agreement with the collective-bargaining representatives of Rock Island employees and former employees to provide for labor protection payments to terminated employees. Section 106 (b) authorized the Interstate Commerce Commission to impose a labor protection arrangement on the estate if the Trustee failed to reach agreement with the unions. Section 110 of the Act authorized the Trustee to borrow up to $75 million from the United States to provide the funds for payments pursuant to that arrangement. It further provides that such borrowing, as well as the employee protection claims themselves, should be treated as an expense of administration. It is my understanding that, effectively, the employee protection payments and any concomitant obligations of repayment to the United States are thus given priority over the claims of the general creditors on the assets of the estate. The Act further provides that no court may stay the payment of any labor protection benefits. And finally, § 110 (e) provides: "Except in connection with obligations guaranteed under this Section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under § 106 of this Title."[1]

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[1] An explanation of the Act is found in the Senate Proceedings. See remarks of Senator Kassebaum of Kansas, 126 Cong. Rec. S2280-S2281 (Mar. 6, 1980). In substance, it appears that the Senator was particularly concerned with preserving the possibility of selling a portion of the Rock Island, known as the Tucumcari Line from Kansas City to New Mexico, to the Southern Pacific Railroad. She explained that the bill extended "directed service" of the Rock Island, which as I understand it, means service ordered by the Federal Government with any losses incurred underwritten by the Federal Government. She indicated that in February representatives of the Labor Unions and the acquiring railroads had worked out labor agreements adequate to protect employees who would be re-employed by the acquiring roads, but that there was a

Within the 10-day period, the Trustee applied for a preliminary injunction against implementation of the labor protection arrangement provisions of the Act on the ground that the statute authorized an unconstitutional taking of the property of the estate. Judge McGarr granted that relief, con-

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substantial risk that no protection would be made available to terminated employees who would not be re-employed, and that the smooth transfer might be interrupted by a broad strike called to obtain compensation for the employees who lost their jobs. It was in order to avoid this prospect that the bill was apparently designed to compel the estate to make adequate termination payments that it was not already obligated to make to those terminated employees. It also appears that the original plan was to fund $50 million for those employees, $30 million of which would be secured by the Government as a high priority administration expense, the other $20 million being subordinated to the claims of all other creditors. The total loan was changed to $75 million prior to passage, and, more significantly, all of which was to be given the high priority of an administration expense. Thus, Congress rather clearly indicated its intent that the Government ultimately not to [Publisher's note: The "to" preceding this note is surplus.] be required to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

See also the remarks of Congressman Madigan, 126 Cong. Rec. H2329 (Mar. 28, 1980), in support of H. R. 6837, which included two titles, the first containing provisions for the completion of the northeast corridor. Title II, which became the Rock Island Railroad Employee Assistance Act, seemed primarily intended to authorize so-called "directed service" to be funded by the Federal Government, but it also included the employee protection program. With respect to the latter, Congressman Madigan stated, in part:

"There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and it is structured exactly the same as the Milwaukee bill which we passed late last year.

. . . . .

"At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. *The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad."* (Emphasis added.)

It is worth noting that the "Milwaukee bill" concerned a genuine railroad reorganization, not a liquidation.

cluding that (1) the procedural provisions of the Act required him to take action immediately in order to preserve the estate from irreparable damage, (2) there were no pre-existing contractual or statutory obligations to make labor protection payments that were being quantified by the Act, and (3) it would serve neither a public purpose nor the interest of the estate in view of the total abandonment of the Rock Island's operations that had been authorized. He also implicitly concluded that the statutory program could not be justified as necessary to facilitate sales by the Trustee of portions of the Railroad's operating properties.

On June 21, 1980, applicant Railway Labor Executives [Publisher's note: There should be an apostrophe after "Executives".] Association applied to me in my capacity as Circuit Justice for a stay of Judge McGarr's preliminary injunction.[2] Four days later, on June 25, 1980, the United States filed a memorandum supporting that stay application. The applicant contends that the estate will not suffer irreparable damage by simply permitting the negotiation of a labor protection plan to commence. It argues that even if payments pursuant to such a plan would result in an unconstitutional taking of the estate's property, the estate might still be able to convince Judge McGarr that the statutory prohibition against court orders prohibiting payments pursuant to such arrangement is unconstitutional, and that it would be better to enjoin such payments rather than the negotiation of the underlying plan. Alternatively, it is argued that a remedy against the Government to make the estate whole may ultimately be available in the Court of Claims under the Tucker Act if it turns out that any payments made were unconstitutionally required.

Like Judge McGarr, I do not find persuasive any of the suggestions that the Act could not cause the estate irreparable harm. And while the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, see Memorandum for the United States, at

[2] Appeal lies to this Court under 28 U.S.C. § 1252, since Judge McGarr held an Act of Congress unconstitutional.

5-6, it is obvious that his suggestion is equivocal. Moreover, having read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

Accordingly, since there is a strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable, I believe that a sufficient showing of irreparable damage has been made to support the entry of the preliminary injunction. Necessarily, my views are tentative, based as they are on the relatively brief submissions of the parties. Nonetheless, for the forgoing [Publisher's note: "forgoing" should be "foregoing".] reasons, I have decided to deny the application for a stay.

[Publisher's note: See 448 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-70

Bernard Rostker, Director of Selective Service, et al., Applicants, *v.* Robert L. Goldberg et al.	))))	On Application for Stay

[July 19, 1980]

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending review on appeal of the July 18, 1980 order of a three-judge District Court for the Eastern District of Pennsylvania invalidating the registration provisions of the Military Selective Service Act, 50 U.S.C. App. § 451 *et seq.*, and enjoining the Government from enforcing them.[1] At stake are the Government's plans

[1] Briefly, the procedural history of this case is as follows: The original complaint was filed in June 1971 by male citizens subject to registration and induction who argued that the Selective Service Act violated several of their constitutional rights, including the right to equal protection of the laws guaranteed by the Fifth Amendment. Application to the United States District Court for the Eastern District of Pennsylvania for the convening of a three-judge court under the then-applicable statute, 28 U.S.C. § 2282, was denied and the suit was dismissed. On review, the United States Court of Appeals for the Third Circuit upheld the dismissal of all claims except that founded upon the failure to conscript females. The Court of Appeals remanded the case to the District Court for a determination of the substantiality of the equal protection claim, and of plaintiffs' standing to raise that issue. On remand, the District Court found that plaintiffs had standing, and convened a three-judge court.

On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, denied defendants' motion to dismiss. *Rowland* v. *Tarr*, 378 F. Supp. 766 (ED Pa. 1974). There were no further proceedings until June 1979, when the court proposed to dismiss the case due to inaction. Additional discovery ensued, and on February 19, 1980, defendants' motion for summary judgment was denied. On July 1, 1980, a plaintiff class of potential

to register more than four million males born in 1960 and 1961 in the two weeks commencing on July 21.

The District Court concluded that the exclusion of females from the registration provisions constitutes gender-based discrimination and that the federal parties had failed to demonstrate that the exclusion was substantially related to an important governmental interest. Accordingly, it found the provisions violative of the equal protection component of the Fifth Amendment. The applicants, Bernard Rostker, Director of Selective Service, et al., urge both that the District Court applied too strict a standard of scrutiny in light of the national defense interests at stake, and that even under the standard which that court applied the decision not to include females could be justified. Beyond that, the Government contends that it will suffer irreparable injury if it is not permitted to go forward with implementation of the President's July 21 through August 2 call for draft registration, while respondents—a class including persons required to register within the next two weeks—will suffer only minor and remediable harms should I decide to stay the District Court's injunction. Respondents submit that the three-judge court properly decided the constitutional question before it, that its injunction was proper, and that its subsequent decision to deny a stay of that injunction was likewise appropriate.

The principles that control a Circuit Justice's consideration of in-chambers stay application [Publisher's note: "application" should be "applications".] are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. *Whalen* v. *Roe*, 423 U.S. 1313, 1316-1317 (1975) (MARSHALL, J., in

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registrants was certified, and on July 18, 1980, the District Court entered its order enjoining registration under the Selective Service Act and declined to enter a stay of execution.

Although the statute authorizing three-judge courts in actions such as this was repealed in 1976, Pub. L. 94-381, §§ 1 and 2, 90 Stat. 1119 (Aug. 12, 1976), the act remains applicable to suits filed before the date of repeal, *id*., § 7, 90 Stat. 1119.

chambers). In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in chambers); *Mahan* v. *Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers). Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, *supra*, at 1203-1204. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. *Whalen* v. *Roe*, *supra*, at 1316; *Graves* v. *Barnes*, *supra*, at 1203. And fourth, in a close case it may be appropriate to "balance the equities"— to explore the relative harms to applicant and respondent, as well as the interests of the public at large. Cf. *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (MARSHALL, J., in chambers) (citing cases); *Republican Committee* v. *Ripon Society*, 409 U.S. 1222, 1224 (1972) (REHNQUIST, J., in chambers).

That the first prong of this test is satisfied is undeniable. The importance of the question and substantiality of the constitutional issues are beyond cavil. The second prong is more troubling. In my judgment the case is a difficult and perplexing one. My task, however, is not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole. In the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate, compare *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), with *Craig* v. *Boren*, 429 U.S. 190 (1976). And my Brethren's application of the standard upon which we have finally settled in a context as

sensitive as that before me cannot be predicted with anything approaching certainty. Nonetheless, it does seem to me that the prospects of reversal can be characterized as "fair." I therefore turn to the interrelated inquiries that make up the third and fourth prongs of the approach set forth above.

The Government identifies three distinct injuries that the United States would sustain if the District Court's order were to remain in force and this Court were then to uphold the Selective Service Act. First, during the life of the District Court's injunction, the United States is barred from instituting registration without time-consuming congressional action, even in the face of a clear and present threat to national security. Accordingly, the Nation's military capability to respond to emergencies would remain uncertain until the full Court completes review of their ruling below.[2] See Affidavit of W. Graham Claytor, Deputy Secretary of Defense, at 2 (July 16, 1980); Affidavit of Bernard Rostker, Director of Selective Service, at 2 (July 15, 1980). Second, the inauguration of registration by the President and the Congress was not merely a predicate to possible future conscription. It was an act of independent foreign policy significance—a deliberate response to developments overseas. Thus, a suspension of registration until a decision on its validity is reached might frustrate coordinate branches in shaping foreign policy. Affidavit of John P. White, Dep. Dir. of OMB, at 2-4 (July 15, 1980); Affidavit of W. Graham Claytor, *supra*, at 3; Affidavit of Warren Christopher, Deputy Secretary of State, at 1-2 (July 12, 1980).[3] Third, considerable resources have

[2] Further, inasmuch as congressional appropriations for registration lapse on September 30, 1980, at the end of the current fiscal year, Affidavit of John P. White, Dep. Dir. of OMB, at 6 (July 15, 1980), a decision by the full Court in favor of the Government after that date will necessitate additional delay while Congress authorizes a new appropriation.

[3] To be sure, the extent and duration of these irreparable injuries could be curtailed if the Government were substantially to amend the Selective Service Act during the period preceding review by this Court. In light of the serious question raised by this case, however, the Government

been expended in preparation for the imminent registration effort. The Government has distributed publicity material, trained and assigned personnel, engaged computer support, and entered into contractual arrangements, all with a view toward the commencement of actual registration on Monday, July 21. Should the Government ultimately prevail at some future date, these preparations will have to be replicated at considerable expense. Affidavit of Bernard Rostker, *supra*, at 4-5; Affidavit of John P. White, *supra*, at 6. While difficult to evaluate with precision, these are considerations of palpable weight.

For their part, respondents urge that should they eventually succeed on the merits they will have suffered irreparable injury by virtue of having had to register during the pendency of the Government's appeal. But although registration imposes material interim obligations upon respondents—including the duty to appear—I cannot say that the inconvenience of those impositions outweighs the gravity of the harm to the United States should the stay requested be refused. Nor does an irremediable injury stem from the fact that respondents' names will be enrolled upon registration lists. If respondents' claim is upheld, the destruction of those lists can be ordered. On balance, therefore, I conclude that the equities favor the Government. Accordingly, I have today entered an order staying execution and enforcement of the District Court's judgment.

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should not be obliged to abandon an important statutory scheme without an opportunity for plenary consideration by the Court.

[Publisher's note: See 448 U.S. 1312 for the authoritative official version of this opinion.]

IN RE ROCHE

ON APPLICATION FOR STAY

No. A-66. Decided July 23, 1980

An application to stay, pending a petition for certiorari, a Massachusetts Supreme Judicial Court Justice's order adjudicating applicant television news reporter in civil contempt for refusal to disclose the identities of news sources in connection with disciplinary proceedings against a state judge, and the Supreme Judicial Court's affirmance of such order, is granted. It appears reasonably probable that four Justices will vote to grant certiorari, that there is a fair prospect of reversal, and that, in considering the irreparable harm that would result to applicant if the stay is denied, the balance of equities favors a stay.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay of enforcement, pending a petition for a writ of certiorari, of the July 10, 1980, order of a single justice of the Massachusetts Supreme Judicial Court, adjudicating applicant in civil contempt for refusal to disclose the identities of news sources, and of the July 16, 1980, order of the Supreme Judicial Court affirming the adjudication of contempt.

Applicant Roche is a reporter who participated in a television news team's investigation of a number of state judges. On January 11, 1979, applicant broadcasted a television news story about alleged misconduct by respondent, a State District Court Justice. The report prompted an investigation by the Massachusetts Commission on Judicial Conduct that culminated in the filing of formal proceedings.

In anticipation of disciplinary hearings, the Commission furnished the state judge with the names of 65 witnesses whom the Commission proposed to call. Among these was applicant. On May 16, the Commission issued an order allowing the judge to depose 11 of the 65 witnesses, including applicant. At his deposition, applicant testified about his own observa-

tions in the course of his investigation, and indicated a willingness to reveal the content of interviews with any individual who could be independently identified as one of applicant's sources. Accordingly, applicant did communicate to respondent judge the substance of his interviews with those persons who publicly appeared on the television news broadcast. Applicant also conceded that names of all the people whom he had previously interviewed were contained in the list of witnesses for the disciplinary hearings. Citing a newsman's "privilege," however, applicant refused to specify or discuss those on the list whom he had interviewed in confidence, unless they had first been identified by other means.

In the course of some procedural skirmishing, applicant Roche moved for a protective order from Justice Kaplan of the Supreme Judicial Court based upon this asserted newsman's privilege, and respondent judge sought an order compelling applicant to identify his sources. Justice Kaplan referred the issue to the Conduct Commission, which ruled that the claim of newsman's privilege under the First Amendment was insubstantial, and that applicant should divulge the identities of his sources so that the respondent judge could prepare to impeach or correct the testimony of those sources during the hearings. Upon renewal of the motions to him, Justice Kaplan concurred in the Commission's view. He reasoned that inasmuch as the applicant had consented to disclose the substance of interviews with sources if otherwise identified—as through the process of deposing each of the 65 hearing witnesses—the net effect of applicant's claim of privilege was simply to compel the respondent judge to sift through a series of deponents to obtain information directly available from the reporter. Justice Kaplan concluded that "no significant principle [was] to be served by the suggested approach," Applicant's Ex. B., p. 4, and, on July 7, ordered Roche to respond to questions about unidentified sources.

Applicant subsequently appeared at a deposition but once again declined to identify his undisclosed sources. On July

10, Justice Kaplan adjudicated him in civil contempt, and stayed execution of the contempt order. The adjudication of contempt was affirmed by the full Supreme Judicial Court on July 16, and the next day Justice Kaplan ordered that the stay of civil contempt sanctions be vacated on July 21. Upon application to me as Circuit Justice, I entered an interim order continuing the stay pending filing of a response and further order of the Circuit Justice or this Court.

Only recently, I have had occasion to review the principles that guide a Circuit Justice's determination of stay applications. *Rostker* v. *Goldberg*, *ante*, p. 1306 [Publisher's note: See 3 Rapp 974.]. Generally, a stay will issue upon a four-part showing that (1) there is a "reasonable probability" that four Justices will find the issue sufficiently substantial to grant certiorari; (2) there is a "fair prospect that a majority of the Court will conclude that the decision below was erroneous," *ante*, at 1308 [Publisher's note: See 3 Rapp 976.]; *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers);[1] (3) irreparable harm to applicant is likely to result if the request for a stay is denied; and (4) the "balance of equities"—to the parties and to the public—favors the issuance of a stay.

Predicting the probability of a grant of certiorari and of a reversal of the decision below in this case is an uncertain undertaking. The question of a newsman's privilege to conceal sources is not a matter of first impression. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), held that the First Amendment does not provide newsmen with an absolute or qualified testimonial privilege to be free of relevant questioning about

[1] In *Rostker*, my evaluation of the "fair prospect" for reversal of the decision below was conducted in the context of a direct appeal. Where review is sought by the more discretionary avenue of writ of certiorari, however, the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case. Thus, it may be that the "fair prospect"-of-reversal criterion has less independent significance in a stay determination when review will be sought by way of certiorari.

sources by a grand jury. More recently, two of my Brethren found the prospects for review by the full Court insufficient to warrant staying contempt proceedings against a New York Times reporter for his failure to submit documents to *in camera* judicial inspection in compliance with a subpoena for those documents by the defendant in a murder trial. *New York Times Co.* v. *Jascalevich*, 439 U.S. 1317 (1978) (WHITE, J., in chambers); *New York Times Co.* v. *Jascalevich*, 439 U.S. 1331 (1978) (MARSHALL, J., in chambers).

At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoenaing of confidential information and work product from a newsgatherer. Four dissenting Justices in *Branzburg* discerned at least some protection in the First Amendment for confidences garnered during the course of newsgathering. 408 U.S., at 721 (Douglas, J., dissenting); *id*., at 744-747 (STEWART, J., dissenting, joined by BRENNAN and MARSHALL, JJ.). And MR. JUSTICE POWELL, who joined the Court in *Branzburg*, wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the "vital constitutional and societal interests" at stake. *Id.*, at 710. Consequently, I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds.[2]

[2] The opinions in chambers denying the requested stay in *New York Times Co.* v. *Jascalevich* on the basis of the unlikelihood of review turned not upon the general meritlessness of a newsman's privilege, but more particularly upon the improbability that such a privilege would be applied to preclude *in camera* inspection of papers by a judge. 439 U.S., at 1322-1323 (WHITE, J.); 439 U.S., at 1337 (MARSHALL, J.); see *United States* v. *Nixon*, 418 U.S. 683 (1974).

Respondent also suggests that *Herbert v. Lando*, 441 U.S. 153, 167-169 (1979), contradicts any assertion of a newsman's privilege. That decision, however, dealt with discovery of editorial processes when the collective state of mind of a news organization was directly in issue in a suit against that organization.

Assuming that there is at least a limited First Amendment right to resist intrusion into newsgatherers' confidences, this case presents an apt occasion for its invocation. As determined by Justice Kaplan below, respondent judge could have obtained the information sought from the applicant by other adequate—albeit somewhat roundabout—methods. Thus, this case does not present a question of necessity for the confidences subpoenaed. What is ranged against the asserted First Amendment interests of the applicant is essentially respondent's convenience. If I am correct, therefore, that a majority of the Court recognizes at least some degree of constitutional protection for newsgatherers' confidences, it is reasonably probable that four of my Brothers will vote to grant certiorari, and there is a fair prospect that the Court will reverse the decision below.[3]

Turning to consider the irreparable harm of the applicant in the absence of a stay, and to weigh the "balance of equities," I conclude that these favor the continuation of the stay below pending a petition for writ of certiorari and disposition thereof. Without such a stay, applicant must either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail. If the stay remains in force, on the other hand, the judge subject to the disciplinary inquiry can obtain the information he seeks by deposing the hearing witnesses. The hardship that this would impose—although not negligible—does not outweigh the unpalatable choice that civil contempt would impose upon the applicant. Finally, even respondent's burden of going forward without the desired cooperation of the applicant can be alleviated by an agreement with the Commission to continue disciplinary

[3] Civil contempt proceedings such as these—against a nonparty and colored by First Amendment overtones—are appealable for purposes of our review. *New York Times Co.* v. *Jascalevich, supra,* at 1318-1319 (WHITE, J., in chambers). The judgment sought to be stayed has been affirmed by the Supreme Judicial Court of Massachusetts and is final.

proceedings until resolution of applicant's petition for a writ of certiorari.[4]

Having decided that a stay pending a timely petition for writ of certiorari and disposition thereof is warranted,[5] I have today entered an order continuing my stay of enforcement of the order of the single justice of July 10, 1980, adjudicating applicant Roche in civil contempt.

[4] Respondent judge suggests that "the ends of justice might . . . be served by the Circuit Justice ordering a stay of the formal proceedings against the Respondent." Memorandum in Opposition 7. Should the Commission and respondent judge be unable to agree upon a continuance, respondent judge is, of course, free to apply for a stay of the proceedings in accordance with proper procedures.

[5] For the reasons stated in this opinion, I believe that applicant's showing is sufficient to support my order of a stay notwithstanding the denial of an indefinite stay below. Cf. *Rostker* v. *Goldberg*, *ante*, p. 1306 [Publisher's note: See 3 Rapp 974.].

[Publisher's note: See 448 U.S. 1318 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-126

W.C. McDaniel et al., Applicants,	)	
v.	)	On Application for Stay.
Jose Sanchez et al.	)	

[August 14, 1980]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit, pending consideration of a petition for certiorari. Applicants are officials of Kleberg County, Texas, who have been ordered by the United States District Court for the Southern District of Texas to proceed immediately with procedures for the "preclearance" of a new apportionment plan for county commissioner precincts under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

I

This suit began in 1978 as a class action challenging the boundary lines of the four county commissioner precincts in Kleberg County. Plaintiffs claimed that these precincts, as drawn, violated the one-person, one-vote principle and unconstitutionally diluted the voting strength of Mexican-Americans. After a trial, the District Court found that the precincts did violate the one-person, one-vote principle, but ruled that plaintiffs had failed to meet their burden of proof on the dilution claim.

The District Court then directed defendants to submit a proposed new apportionment plan. That plan was drawn by a university professor selected by the county commissioners and approved for submission to the District Court by the commissioners. The District Court approved the plan and rejected an argument by plaintiffs that preclearance under the

Voting Rights Act was necessary, relying on *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (*per curiam*). In *East Carroll* this Court stated that "court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5." *Id.*, at 638, n. 6.

On appeal, the Fifth Circuit reversed in a *per curiam* opinion. — F.2d — (1980). It relied on this Court's later decision in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), for the proposition that plans drawn up or approved by a legislative body are "legislative" plans even if submitted in response to a court order. As a result, the court of appeals found that the plan in this case is legislative and concluded that it is subject to the preclearance provisions of § 5. The court remanded the case for appropriate action and the District Court then ordered applicants to begin the § 5 procedures "immediately." On July 25, 1980, the Fifth Circuit denied a stay pending consideration of a petition for a writ of certiorari.

II

The preclearance procedures at issue here require either an action in the District Court for the District of Columbia for a declaratory judgment that the new plan is not racially discriminatory, or submission of the plan to the Attorney General of the United States, who may interpose an objection within 60 days. 42 U.S.C. § 1973c. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 548-550 (1969). Applicants will argue in their petition for certiorari that they should not be required to follow these procedures because this apportionment plan was court-ordered and was not the product of a legislative action. They argue in this application that their petition is likely to be granted because the decisions of this Court have left unsettled the principles that determine which apportionment plans are essentially "legislative," as opposed to "judicial," in nature. They further argue that a stay is necessary in order to prevent their claim from becoming moot before it can be heard.

In *Wise* v. *Lipscomb*, *supra*, we faced the question whether a plan for the election of members of the City Council of

Dallas was judicial or legislative. The existing system of electing members at large had been declared unconstitutional and the city had been given an opportunity by the court to produce a substitute plan. Because the plan submitted by the City Council, and approved by the District Court, included a provision for the election of several council members at large, it was necessary to decide whether the plan was invalid under *East Carroll, supra*, in which we held that *judicially* imposed plans should not, absent special circumstances, include multimember districts.

The Court in *Wise* decided that the Dallas plan was legislative, rather than judicial, and therefore was exempt from the higher level of scrutiny accorded to judicial plans. MR. JUSTICE WHITE, in an opinion joined by MR. JUSTICE STEWART, viewed the plan as one enacted by the City Council, emphasizing that in his view the Council was exercising its lawful powers in so acting. 437 U.S., at 546-547. MR. JUSTICE MARSHALL, in a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS, agreed that the power of the legislative body under state law to enact the plan at issue is an important factor, but disagreed about the powers possessed by the City Council in that case. He concluded that the Council could only have acted pursuant to a court order and that the case was therefore controlled by *East Carroll*, *supra*, 424 U.S., at 638, n. 6, where we labeled a plan "judicial" partly because the legislative body had no authority to reapportion itself. 437 U.S., at 550-554. My opinion concurring in part and concurring in the judgment, joined by the three remaining Justices, asserted that assumptions about state law were "unnecessary" because the "essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Id.*, at 548.

Arguably, it was this last approach that the Court of Appeals followed in the present case. It determined that the plan was a legislative one because it was approved for submission by the commissioners of Kleberg County. The

Court of Appeals was apparently unconcerned that the reapportionment might be outside the commissioners' legislative powers.[1] If so, it can be contended that the court was following an approach that has been endorsed by only a minority of Justices. Applicants also make a substantial argument that this approach is inconsistent with the decision in *East Carroll*, as that case has been interpreted by the majority of this Court.[2]

III

It is fair to say that the opinions in *East Carroll* and *Wise* v. *Lipscomb* fall considerably short of providing clear guidance to the courts that initially address this difficult issue. It would be helpful, therefore, for this Court to exercise its responsibility to provide such guidance. It seems to me that this case presents the opportunity.

I mention briefly the settled principles that govern the granting of stays. *Times-Picayune Publishing Corp.* v. Schulingkamp [Publisher's note: "Schulingkamp" should be italicized.], 419 U.S. 1301, 1305 (1974) (Powell [Publisher's note: "Powell" should be in small caps.], Circuit Justice); *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (Powell [Publisher's note: "Powell" should be in small caps.], Circuit Justice). In view of the ambiguity of our precedents (to which I may have contributed), I cannot say whether the possibility of reversal is significant. I do think there is a "reasonable probability" that four Members of the

[1] Under Tex. Rev. Civ. Stat. Ann., Art. 2.04(1) (Vernon Supp. 1980), the commissioners can only enact a reapportionment plan during their July or August terms. See *Wilson* v. *Weller*, 214 S.W.2d 473 (Tex. Civ. App. 1948). The plan in this case was submitted in November. Respondents contend, however, that the commissioners have an "inherent" power to reapportion their precincts when a "vacuum" has been created by a court ruling that the existing precincts are drawn unconstitutionally.

[2] Indeed, this apparent inconsistency may have produced a conflict within the Fifth Circuit on the issues raised here. In *Marshall* v. *Edwards*, 582 F.2d 927 (CA5 1978) (en banc), cert. denied, 442 U.S. 909 (1979), a case involving the same litigation as *East Carroll* but an entirely different plan, the Fifth Circuit labeled that plan "court-ordered" partly because the legislative body merely submitted it, rather than adopting it. *Id.*, at 933-934. Applicants contend that the commissioners acted in a similarly limited fashion here.

Court will consider the issue sufficiently meritorious—and the need for clarification sufficiently evident—to warrant a grant of certiorari. The applicants assert that, absent a stay, they will be required immediately to expend substantial money on preclearance procedures, and that this expenditure will be irretrievable. They argue further that without a stay their petition to this Court will become moot. The balance as to the possibility of "irreparable harm" seems to favor the applicants.

I will therefore enter an order recalling the mandate and staying the judgment of the United States Court of Appeals for the Fifth Circuit pending disposition of the petition for certiorari.

[Publisher's note: See 448 U.S. 1323 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-169

Francis A. Willhauck, Jr., Applicant,	)	
v.	)	On Application for Stay.
Newman A. Flanagan et al.	)	

[August 28, 1980]

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending appeal to the United States Court of Appeals for the First Circuit from an order of the United States District Court for the District of Massachusetts denying a request for a temporary restraining order. The facts are briefly as follows. On July 2, 1979, the applicant, Francis A. Willhauck, Jr., allegedly led local police on a high speed automobile chase through Norfolk and Suffolk Counties. He was finally arrested in Suffolk County and charged with various offenses by the district attorneys in both counties. In Norfolk County (Quincy District Court), he was charged with driving so as to endanger, failure to stop for a police officer, failure to slow down for an intersection, and driving at an unreasonable speed. In Suffolk County (West Roxbury District Court), he was also charged with driving so as to endanger and failure to stop for a police officer, and in addition was charged with assault and battery with a motor vehicle.

With the complaints pending in the respective county district courts, applicant moved in Quincy District Court to consolidate the cases into a single proceeding there pursuant to Rule 37 of the Massachusetts Rules of Criminal Procedure. However, since the Rule requires the written approval of both prosecuting attorneys to effectuate transfer and consolidation, his attempt failed when one of the district attorneys apparently declined to approve the consolidation. Applicant subsequently moved for consolidation in at least one of the

Superior Courts of Norfolk and Suffolk Counties, where his indictment was handed down, but the motion was similarly denied.

Finally, applicant brought his claim before a single Justice of the Massachusetts Supreme Judicial Court, contending, *inter alia*, that failure to consolidate would put him twice in jeopardy for the same offenses, in violation of the Constitution. The Justice dismissed it in a four-page memorandum and order for judgment entered June 19, 1980, rejecting applicant's argument that the charges in the two counties were for a single offense. He also noted that, even if he had the power to transfer and consolidate the two trials, he would refuse to do so because, in his view, this would be an unwarranted intrusion and interference with the lower courts and prosecutors.

On August 1, 1980, Willhauck brought an action pursuant to 42 U.S.C. § 1983 in Federal District Court to obtain a declaration that Mass. Rule Crim. Proc. 37(b)(2), giving prosecuting attorneys a veto over transfer and consolidation, violates the Double Jeopardy and Due Process Clauses of the Constitution. He sought a temporary restraining order, a preliminary injunction, and a permanent injunction against the two county district attorneys to enjoin their criminal prosecutions against him. The District Court entered an *Order Denying Temporary Restraining Order* on August 12, 1980, on the basis that applicant's prayer for relief did not fall within one of the recognized exceptions to the rule announced in *Younger* v. *Harris*, 401 U.S. 37 (1971). Willhauck later moved for a stay of the District Court order in the Court of Appeals for the First Circuit pending appeal. The Court of Appeals denied this motion on August 13, 1980, assuming without deciding that the District Court's order was "in reality" an order denying a preliminary injunction.

Willhauck now applies to me as Circuit Justice for a stay pending resolution of his appeal to the Court of Appeals for the First Circuit. The cases against him appear to be proceeding simultaneously in Suffolk Superior and Quincy Dis-

rict Courts. He was scheduled for "status" hearings in the two courts on August 14, or August 14 and 15, 1980. Applicant advises me that both cases now have been continued until September 12, 1980.

In my view, Willhauck has a potentially substantial double jeopardy claim, if not on the face of the Massachusetts Rule or as applied to him, then simply on the possibility the State may conduct simultaneous prosecutions against him in two separate courts on the same offenses. Whether the *Younger* doctrine would bar federal intervention in a continuing state criminal proceeding in this simultaneous prosecution context or, for that matter, in a case where the claim of double jeopardy is made after jeopardy has attached in the first proceeding, seems to me an open question. The principles of *Abney* v. *United States*, 431 U.S. 651 (1977), and *Harris* v. *Washington*, 404 U.S. 55 (1971) (*per curiam*), suggest that an exception to *Younger* for double jeopardy claims may be appropriate, at least when all state remedies have been exhausted.

Nevertheless, I do not find that applicant has alleged sufficient irreparable harm for me to consider whether there is a reasonable probability that four Justices would consider the above issue sufficiently meritorious to grant certiorari, should the merits of the case eventually come before us. Neither trial has begun and no jury has been empaneled. Until a jury is empaneled and sworn, *Crist* v. *Bretz*, 437 U.S. 28, 38 (1978), or, in a bench trial, until the first witness is sworn, *id.*, at 37, n. 15 (federal rule); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) (federal rule), jeopardy does not attach. Accordingly, applicant's constitutional claim is premature. Of course, once jeopardy does attach in one of the trials, applicant should be able to make his claim before the second trial judge, at which time the courts can give due consideration to his claim.

Therefore, I deny the application for a stay pending appeal.

[Publisher's note: See 448 U.S. 1327 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-179

Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants, *v.* State of Texas et al.	)))))	On Application to Vacate Stay.

[September 4, 1980]

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying pending appeal an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code, which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment.[1] The Court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas's motion to stay its injunction, because the Court found that a stay "would substantially harm the plaintiffs and would not be in the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their

[1] Another Federal District Court in Texas had previously held that § 21.031 violates the Equal Protection Clause as applied to the Tyler Independent School District, *Doe* v. *Plyler*, 458 F. Supp. 569 (ED Tex. 1978), *appeal pending*, No. 78-3311 (CA5).

parents.[2] Precise calculation of the number of children in Texas encompassed by this description is impossible. The State estimates that there are 120,000 such children, but the District Court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not been legally admitted to the United States through established channels of immigration. None, however, is presently the subject of deportation proceedings, and many, the District Court found, are not deportable under federal immigration laws. The District Court concluded that "the great majority of the undocumented children . . . are or will become permanent residents of this country."

This case came before the District Court as a result of a consolidation, by the Judicial Panel on Multidistrict Litigation, of lawsuits filed in all federal judicial district [Publisher's note: "district" should be "districts".] in Texas against the State and state education officials challenging the validity of § 21.031. No other State has a similar statute. The Court found that § 21.031 effectively denied an education to the plaintiff children. Although they could attend school upon payment of tuition, the Court further found that such payment is beyond the means of their families. It held that the Equal Protection Clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on analogous rulings of this Court, see, *e.g.*, *Matthews* v. *Diaz*, 426 U.S. 67, 77 (1976) (Due Process Clause applies to aliens unlawfully residing in the United States), and precedents in lower courts, *see Balanos* v. *Kiley*, 509 F.2d 1023, 1025 (CA2 1975) (dictum), [Publisher's note: The comma preceding this note should be a period.] In addition, the Court found guidance in the language of the Equal Protection Clause, which extends protection to *persons* within a State's jurisdiction, and ruled that a state law which purports to act on any person residing within the State is subject to scrutiny under the clause.

[2] The United States intervened on the side of plaintiffs below and has filed here a statement in support of the application to vacate the stay.

The District Court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish *San Antonio School Board* v. *Rodriguez*, 411 U.S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necessary for the exercise of other fundamental rights such as voting and free expression. *Id.*, at 29-39. The Court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the question reserved in *Rodriguez* of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the States, an involvement condemned in *Rodriguez.* Applying strict scrutiny, the court held the statute violative of the Equal Protection Clause because it was not justified by a compelling state interest. While not explicitly so holding, the Court also implied that it would hold the statute unconstitutional even if it applied rational basis scrutiny or merely required that the law be substantially related to an important state interest.

II

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's

> decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."

Times-Picayune Publishing Corp. v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers). When an application to vacate a stay is considered, this formulation must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision.

Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to ajudication [Publisher's note: "ajudication" should be "adjudication".] of the merits, be exercised with restraint. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augumented [Publisher's note: "augumented" should be "augmented".] burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful alien [Publisher's note: "alien" should be "aliens".] residing in our country has risen dramatically. In more

immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Matthews* v. *Diaz*, *supra*, upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress's necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the states rather than between aliens and the Federal Government." 426 U.S., at 84-85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio School Board* v. *Rodriguez*, *supra*, to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the Court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be

possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

III

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for 5 years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio School Board* v. *Rodriguez*, *supra*, 411 U.S., at 6-17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school

year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimus.* But the core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative.

Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year. The admission of numbers of illiterate, solely Spanish-speaking children may tax the resources of a school district. The affidavits submitted to the Court of Appeals document the possibility of severe stress only in the Houston Independent School District.[3] Affidavits submitted by the applicants indicate, however, that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilities to provide a customary education to all their pupils.

Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely ham-

[3] The State argues here that serious difficulties can be expected in the Dallas and Brownsville school districts as well.

per the provision of education to all its students during the coming year, the granting of a stay would be justified.[4]

[4] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

[Publisher's note: See 448 U.S. 1335 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-195

John L. Moore et al., Applicants,	)	Application for Stay of
v.	)	Preliminary Injunction.
Leila G. Brown et al.	)	

[September 5, 1980]

MR. JUSTICE POWELL, Circuit Justice.

The applicants, the Mobile County School Board and its Commissioners (the School Board), request that I stay a preliminary injunction entered by the District Court in another phase of the litigation over the composition of the Board. The injunction ordered Alabama election officials to conduct district rather than at-large voting to fill School Board vacancies.

Last Term, in *City of Mobile* v. *Bolden*, No. 77-1844 (April 22, 1980), this Court considered a constitutional challenge to Mobile's system of at-large elections for City Commissioners. MR. JUSTICE STEWART wrote for a plurality of four justices [Publisher's note: "justices" should be "Justices".] and concluded that the plaintiffs were required to prove a racially discriminatory purpose to show that Mobile's at-large voting system violated the Fourteenth Amendment. The District Court, by contrast, had thought it sufficient to show that the existing election system had the *effect* of impeding the election of blacks. The Court of Appeals for the Fifth Circuit had affirmed.[1] Because we disagreed with the analysis of the District Court and Court of Appeals, we reversed and remanded for further proceedings.

Bolden's companion case, *Williams* v. *Brown* (No. 78-357), involved at-large elections for the School Board. In that

[1] Although recognizing that a discriminatory purpose had to be proved, the Court of Appeals had thought that the "aggregate" of discriminatory effects was sufficient to establish a discriminatory purpose.

case as well, the District Court and Fifth Circuit had held unconstitutional a system of at-large elections, relying on analysis similar to that used by them in *Bolden.* We therefore vacated the judgment and remanded for further proceedings in light of *Bolden.* Approximately 11 weeks later, the Court of Appeals in turn vacated the decision of the District Court and remanded the case to it.

I

The Alabama Legislature created the Mobile County Board of School Commissioners in 1826. Commissioners then were elected at large. That practice has continued to the present day.[2] Under current law, the Board is composed of five persons who serve staggered six-year terms. The at-large election system contains no obstacle to ballot access by blacks. In *Brown I*, however, the District Court nevertheless concluded that the system of at-large elections "diluted" the effectiveness of black votes. The court ordered a phased-in system of district elections to increase the likelihood that blacks would be elected to the Board. Under the District Court's plan, Mobile County was divided into five districts. Two of the district seats were filled in elections in 1978.[3] Another district seat was scheduled to be filled in an election this fall. The two remaining district seats were to be filled in 1982.

Under the District Court's original plan, however, the introduction of district seats did not necessarily correspond to the expiration of incumbents' terms of office. Only one at-large seat expired in 1978, but two new district seats were added that year.[4] Thus, since 1978 the Board has operated with six members rather than five. The District Court therefore ordered one of the at-large Commissioners whose term is

[2] In 1975, after this suit was filed, the state legislature passed a local Act restructuring the Board into five single-member districts. A state court subsequently held that the Act violated the Alabama Constitution because of a defect in its publication.

[3] On August 29, 1978, I denied an application to stay the District Court's plan pending review by this Court.

[4] A black was elected to each district seat in 1978.

to expire in 1980 to act as the nonvoting "chairman" of the Board during the remainder of his term.[5]

In sum, at the time we vacated the District Court's original plan, the Board contained six members, two of whom had been elected from districts pursuant to the plan. Two at-large seats were due to expire this fall, and one new district member would be elected. Thus, the coming election would have resulted in a return to a five-member Board, three of whom would have been elected from districts.

II

Controversy has followed our decision vacating the District Court's original district election plan. At least some of the at-large Commissioners thought that our decision in effect invalidated the election of the two district Commissioners chosen in 1978. Accordingly, some persons refused to acknowledge the legitimacy of the votes of the district members. Under these circumstances, the Board is reported to have been paralyzed since April.

The District Court reassumed jurisdiction over the case on July 11, 1980. Two primary issues confronted the court. First, as I have noted, substantial dispute had arisen over the legitimacy of the two 1978 district elections. Board members disagreed with one another, not only substantively, but also on the threshold question of whether two of their number were even official Board members at all. In sum, the Board could not function. The District Court resolved the deadlock by holding that the 1978 winners remained the official Board members.

The second issue concerned future elections. Under the District Court's original plan, one district election was to have been held in 1980, and two at-large seats were to expire. The district primary was scheduled for Tuesday, September 2, and the general election for November 4. Without taking evidence or making findings of fact, the District Court on July 25 entered a preliminary injunction that would, as the court characterized

[5] The nonvoting "chairman" did have the power to break ties.

it, "preserv[e] the status quo pending a decision on remand." The injunction reinstated the district election plan that we had vacated in April. The injunction was appropriate, according to the District Court, because plaintiffs would be irreparably harmed if the at-large election were held. Holding the district election, by contrast, would not impose significant harm to defendants or to the public interest. Finally, the court thought that the plaintiffs had "a substantial likelihood" of eventually prevailing on the merits.

Defendants—applicants here—sought a stay of the injunction pending appeal. Specifically, they asked that the District Court enjoin the district election scheduled for this fall, and permit the two at-large members now on the Board to continue to serve past the normal expiration of their terms. The District Court denied the requested stay on August 19. Defendants next asked the Fifth Circuit to stay the preliminary injunction. On August 26, that court denied the stay without opinion. Late Thursday, August 28, defendants applied to me to stay the preliminary injunction.

III

I have serious concerns about the process and reasoning underlying the District Court's entry of a preliminary injunction. The District Court and the Court of Appeals in *Brown I* had invalidated the at-large election law and imposed a system of district elections. We vacated their judgment, and remanded the case for further proceedings. On remand, the District Court purportedly acted to preserve the status quo *pendente lite*, but did so by reinstating its own election plan that we had vacated. After our remand, I would have thought that the slate was wiped clean until there had been further evidence, or at least fresh findings of fact. Until then, the status quo was the presumptively valid election system provided by Alabama law—not the judge-made election plan that we had vacated.

I also was troubled by two additional elements of the District Court's analysis. First, it concluded that the balance

of harms heavily favored entering the preliminary injunction. The court seemed to perceive little or no harm to the defendants, and to the public interest, resulting from reinstatement of the judge-created election plan. The court's injunction, however, imposes on Mobile a method of selecting its School Board members that had not been enacted by state or local elected representatives. While the preliminary injunction is in effect, district elections will be held. These elections may produce—indeed, the District Court intended that they produce—Commissioners who would not have been elected under the longstanding system of at-large elections. As MR. JUSTICE STEVENS observed, "the responsibility for drawing political boundaries is generally committed to the legislative process." *City of Mobile* v. *Bolden*, *supra*, at 9 (STEVENS, J., concurring). The District Court appeared to ignore the fact that altering the voting system established by Alabama law more than a century ago, and since maintained, is a substantial intrusion on local self-government.

Second, the court concluded that plaintiffs had "a substantial likelihood" of success on the merits. Yet, the court made no finding of fact, nor indeed alluded to any fact known to it, to justify that conclusion. Compare Fed. Rule Civ. Proc. 52(a) ("in granting or refusing interlocutory injunctions, the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.") Nor did the District Court explain how the plaintiffs would prove a purposeful violation of constitutional rights as required by the plurality's decision in *Bolden*.[6] Indeed, although we had directed that proceedings on remand be conducted in light of this Court's decision in *Bolden*, our opinion in that case was not mentioned in the District Court's opinion.

IV

It may well be, for the reasons stated above, that the Dis-

[6] Moreover, in *Brown I*, the District Court itself had recognized that, in general, it is "a difficult task" to prove "overt racial considerations in the actions of government officials." A. 30.

trict Court erred in entering the preliminary injunction.[7] The court at least offered unsatisfactory reasons for its decision. Yet, I am reluctant to stay the effect of the injunction. The parties agree that, at this late date, if an election is to occur this fall at all, it must be the district election ordered by the District Court.[8] The applicants therefore urge me to grant a stay that would prevent holding any election at all, and to keep in office, until an at-large election can be held, the incumbents whose terms are due to expire. In *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers), I summarized the principles that normally guide a Circuit Justice in considering a request for a stay. Although applicants here forcefully argue that the *Times-Picayune* requirements are fully met, I have concluded not to stay the injunction. A Circuit Justice should exercise restraint before staying an interim order entered by a District Court and affirmed by a Court of Appeals.[9] This caution

[7] This opinion is not intended to convey any doubt about the legitimacy of the status of the two Commissioners elected in 1978 pursuant to the District Court's then-operative district election plan. The applicants do not challenge that aspect of the District Court's order.

[8] As often happens (and for reasons that rarely are explained) emergency applications with respect to elections reach us on the eve of the weekend before the election. This places the Court, or the Circuit Justice (as is usually the case), in the unwelcome position of ruling under serious time constraints on the validity of an election that has been planned for months. This is an example. The application was presented to me less than five full days (including the Labor Day weekend) before the scheduled primary election. Had proceedings on remand moved more expeditiously, it might have been possible to hold this fall the at-large elections envisioned by Alabama law.

[9] Just recently, I commented:

A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levin,* 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The main reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an in-

seems especially pertinent where a scheduled election would be enjoined. Thus, in the posture in which this case now comes to me—and in light of the unacceptable alternative of enjoining the fall election and retaining in office incumbents whose terms have expired—I decline to stay the preliminary injunction.[10]

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terim order invades the normal responsibility of that Court to provide for orderly disposition of cases on its docket.

Certain Named and Unnamed Noncitizen Children v. *Texas*, No. A-179, at 4 (September 4, 1980) (POWELL, J., in chambers).

[10] Because of the time constraints that I have mentioned, see note 8 *supra*, I issued an order denying the stay on Friday, August 29, reserving the right subsequently to file this opinion.

[Publisher's note: See 448 U.S. 1342 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-203

Gregory-Portland Independent School District, Applicant,	)	
v.	)	On Application to Vacate Stay.
United States of America and the State of Texas.	)	

[September 8, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have [Publisher's note: "Applicants have" should be "Applicant has". But see 448 U.S. at 1342.] requested me to grant a stay pending appeal to the Court of Appeals of [Publisher's note: "of" should be "for".] the Fifth Circuit of a decision by the District Court ordering the busing of students within the applicant district. The application, as was proper, was first submitted to MR. JUSTICE POWELL, the Circuit Justice for the Fifth Circuit, and denied by him. It has now been resubmitted to me. As indicated by the cases discussed in the application for stay, *e.g.*, *Columbus Board of Education* v. *Penick*, 439 U.S. 1348 (1978), this Court has been divided for a number of years as to the constitutional propriety of busing orders. If I were casting my vote as a single Justice of this Court, rather than as a Circuit Justice empowered to grant a stay, I would in all likelihood not only vote to grant certiorari in the case if the Court of Appeals for the Fifth Circuit affirmed it, but [Publisher's note: There should be a "would also" here.] give the most serious consideration to voting on the merits to reverse that decision. However, as has been frequently pointed out, that is not the role of the Circuit Justice in a case such as this. That obligation is to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.

For these reasons, and because MR. JUSTICE POWELL is the

Circuit Justice for the Fifth Circuit, and more familiar with the situation of any case in it than I could be, I am unwilling to "second-guess" his own denial of the application in this case. I accordingly deny the application for a stay.

[Publisher's note: See 448 U.S. 1343 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-214

Board of Education of City of Los Angeles, Applicant,	)	
v.	)	On Application for Stay.
Superior Court of California, County of Los Angeles (Mary Ellen Crawford et al., real parties in interest).	)	

[September 12, 1980]

MR. JUSTICE REHNQUIST, Circuit Justice.

The Board of Education of the Los Angeles Unified School District requests that I stay an order of the California Supreme Court, dated August 27, 1980, which left standing an order of the Superior Court of the State of California for Los Angeles County requiring mandatory reassignment of between 80,000 and 100,000 first through ninth grade students attending approximately 165 elementary and junior high schools pending consideration by this Court of its petition for certiorari. On July 7, 1980, the Superior Court entered its final remedial order in this action finding that the Board had participated in racial [Publisher's note: "racial" probably should be "racially". But see 448 U.S. at 1343.] discriminatory practices which led to the segregation in the school district and requiring the Board to implement a mandatory busing plan pursuant to guidelines contained in the order. The Board applied to the Court of Appeal of California to stay the Superior Court's order and on August 6, 1980, that court partially stayed the order insofar as it relied on a definition of a desegregated school as one where there is a plurality of white students not in excess of 5% over the next largest ethnic group in the school and insofar as it required mandatory busing of students currently attending substantially desegregated

schools. The Court of Appeal, however, in all other respects denied the Board's petition for a stay, thus precipitating the current situation where upwards of 80,000 pupils will be bused at the start of school on Monday, September 16, 1980. The court also accelerated the date of oral argument so that the appeal could be heard in January 1981. On August 27, 1980, the California Supreme Court denied, without opinion, the Board's application for a writ of mandamus and/or prohibition to stay in its entirety the order of the Superior Court and recommended that the Court of Appeal accelerate oral argument even further. The California Supreme Court also denied a motion by the original plaintiffs in this action, minority school children, to vacate the partial stay entered by the Court of Appeal.

This case comes to me after extensive and complicated litigation. Briefly stated, in 1970, the Superior Court issued an opinion finding that the segregation in the school district was *de jure* in nature and that the Board had taken "affirmative" steps which it "knew or should have known" would perpetuate segregation in the district. The specific items detailed in the court's findings included the Board's adoption of (1) a neighborhood school policy, (2) an "open transfer" policy, (3) a "feeder school" policy and (4) "mandatory attendance areas." In *Crawford* v. *Board of Education*, 17 Cal. 3d 286, 130 Cal. Rptr. 724, 551 P.2d 28 (1976), the California Supreme Court accepted the finding of *de jure* segregation, but did not base its affirmance of the Superior Court's order of mandatory busing on that ground, holding instead that the California Constitution permitted busing to be ordered regardless of the cause of segregation. On September 8, 1978, I denied a stay for this reason. *Bustop, Inc.* v. *Los Angeles Board of Education*, 439 U.S. 1380 (REHNQUIST, J., in chambers).

During remand, the California Constitution was amended by way of a state referendum, Proposition 1, adopted in November 1979 to eliminate state independent grounds as a basis for court ordered busing, and the Board contended that

the Superior Court's 10 year old [Publisher's note: "10 year old" should be "10-year-old".] findings did not justify a finding of a federal constitutional violation or the system-wide remedy of mandatory assignment of children by race. In its July 7, 1980 order, the Superior Court apparently rejected that argument, reasoning that the California Supreme Court, in *Crawford*, affirmed the finding of *de jure* segregation. Contrary to the assertions of the respondents, it seems to me that this application necessarily turns on a question of federal constitutional law, as other courts have held. Indeed, I find myself unable to articulate the point better than Judge Cohn of the Superior Court of San Mateo County in *Tinsley* v. *Palo Alto Unified School District*, No. 206010 (July 10, 1980):

> "Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

There is an initial question as to whether this Court would have jurisdiction over the present action if a petition for writ of certiorari were filed. In *Fisher* v. *District Court of Sixteenth Judicial District*, 424 U.S. 385, 385, n. 7 (1976), this Court stated:

> "The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction under 28 U.S.C. § 1257(3). It is available only in original proceedings of the Montana Supreme Court . . . and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. . . . A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final

> even if further proceedings are to be held in the lower court. *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n. 1 (1954). . . ."

In this action, the Board's petition for writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment of August 27, 1980. I am thus persuaded that this Court would in all probability have jurisdiction over the present action should a petition for certiorari be filed by the Board.

There is no question here as to the standing of the Board, since it is a party to an action which has been required by the Superior Court (respondent) to mandatorily reassign an extraordinarily large number of students in what the Board claims is the largest school district in the Nation. There might be some question of "standing" if the petitioners were a group of whites, "Anglos," or whatever the current terminology used to describe them is, for if the latest 1979 school census submitted by the Board in its application is to be credited, they themselves would be a "minority." That census indicates that in kindergarten and the first three grades of the school affected by the busing order, students classified as "white" ranged from 17.9% to 21.9% of the school population, those classified as "black" ranged from 18.3% to 22.1%, and those classified as "Hispanic" ranged from 57.8% to 48.9%. Application, at 18, compiled from trial exhibit 11B.

As seems typical with school cases, applications for stay are presented to a Circuit Justice of this Court close to the opening of school. It appears that the process leading to the formulation of a mandatory busing plan, and the inevitable challenge to it, takes time which apparently is devoted in sufficient amount only as the deadline of school-opening approaches. And as has been noted before in many Circuit Justices [Publisher's note: There should be an apostrophe after "Justices".] opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is

presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

The thrust of the Board's petition is that the Superior Court, by relying on the 1970 finding of *de jure* segregation, erroneously found that the Board had violated the Fourteenth Amendment. The Board contends that the Superior Court was required to conduct a hearing as to the existence of a federal constitutional violation rather than rely on 10 year old [Publisher's note: "10 year old" should be "10-year-old".] findings, since the case law as to what constitutes *de jure* segregation has changed in those years. Were this case presently before the entire Court on certiorari, I would in all probability vote to grant certiorari, since it seems to me that on the basis of the application the findings are even less supportive of a constitutional violation than were those upheld in *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979). But that is not the question before a Circuit Justice and I do not think I in good conscience could say that four Justices of this Court would vote to grant certiorari in this case. One factor militating against the granting of certiorari here is that the Court of Appeal has recognized that the significance of the *Crawford* court's "affirmance" of the finding of *de jure* segregation is ambiguous and it has indicated that it will carefully review the Superior Court's findings of a constitutional violation on review this fall or early next year.

Because the merits of the Board's argument are not free from doubt, the proper disposition of this application for a stay turns on the equities. The Board's primary contention here is that "white flight," which all parties concede has taken place in the school district, will accelerate if this plan is put into effect. Not only will increased "white flight" injure the Board in financial terms, such as in reduced pupil reimbursement from the State, but a reduction in the number of white

students in the district will defeat any hope of further desegregating the schools in the district. Indeed, the Superior Court found that over the past two years, when a mandatory busing plan has been in effect, the district has lost 50,000 white students and that 25,000 of those students withdrew from the district to avoid mandatory reassignment. Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum number of schools may be desegregated.

I find this analysis somewhat troublesome, since it puts "white" students much in the position of text books, visual aids, and the like—an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of "white flight" by whatever term it is denominated. *Estes* v. *Metropolitan Branches of Dallas NAACP*, 48 U.S.L.W. 4118 (Jan. 21, 1980) (POWELL, J., dissenting from the dismissal of a writ of certiorari as improvidently granted). As JUSTICE POWELL has observed: "A desegregation remedy that does not take account of the social and educational consequences of extensive student transportation can be neither fair nor effective." 48 U.S.L.W., at 4122.

The Court of Appeal here has partially mitigated the potential harm to the Board resulting from "white flight" by rejecting the Superior Court's rigid definition of a desegregated school as one in which there is a plurality of white pupils not in excess of 5% over the next largest ethnic group in the school and by prohibiting mandatory reassignment of students to or from a school which is substantially desegregated. Nonetheless, upwards of 80,000 students will still be bused, although even with school to begin on September 16th it appears from the Board's own application to this Court that the "exact number and identity of all participating schools have not been finalized." I think that a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final

pieces of a plan, would not be a proper exercise of my function as a Circuit Justice, even though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently. The application for a stay is accordingly

Denied.

[Publisher's note: See 449 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-384

Karen O'Connor, by her parents and next friends, Joseph O'Connor and Frances O'Connor, Applicant, *v.* Board of Education of School District 23 et al.	)	On Application to Vacate Stay.

[November 4, 1980]

MR. JUSTICE STEVENS, Circuit Justice.

On October 27, 1980, a panel of the United States Court of Appeals for the Seventh Circuit granted a stay pending appeal of a preliminary injunction entered by the District Court in favor of the plaintiff. Two days later, the Court of Appeals sitting en banc entered an order continuing the stay. The plaintiff has submitted to me, in my capacity as Circuit Justice, an application to vacate this stay. For the reasons explained below, I have decided not to vacate the stay entered by the Court of Appeals.

I

On October 22, 1980, plaintiff Karen O'Connor, represented by her father and her mother, filed a verified complaint and a motion for a temporary restraining order and preliminary injunction, supported by appropriate affidavits, in the United States District Court for the Northern District of Illinois. Her papers allege the following facts which, since they have not yet been denied or contradicted by countervailing affidavits or evidence, must be accepted as true.

Karen is an 11-year-old sixth grade student at MacArthur Junior High School; she is 4'11" tall and weighs 103 pounds. For at least four years she has successfully competed with

boys in various organized basketball programs. A professional basketball coach who witnessed her play with boys and girls aged 10 to 13 during the summer of 1980 rates her ability as equal to or better than a female high school sophomore player and equal to that of a male eighth-grade player.

MacArthur Junior High School is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics. MacArthur has programs for seventh and for eighth-grade teams; sixth-grade students are eligible to tryout [Publisher's note: "tryout" should be "try out".] for both the seventh and the eighth-grade teams. Students of either sex may compete on the same teams in some noncontact sports, but Conference rules require separate teams for boys and girls for contact sports. Contact sports include "boxing, wrestling, rugby, ice hocky [Publisher's note: "hocky" should be "hockey".], football, basketball and other sports the purpose of [Publisher's note: Normally, we would suggest that the "of" preceding this note should be "or", but the offending "of" appears in the original regulation. See 45 C.F.R. § 86.41(b).] major activity of which involves bodily contact." See Complaint ¶ 35.

On August 27, 1980, Karen's father requested that she be permitted to tryout [Publisher's note: "tryout" should be "try out".] for the boys' basketball teams. After a series of requests and refusals, Karen and her parents commenced this litigation, seeking both a temporary order requiring defendants to allow her to participate in the tryouts which were originally scheduled to commence on October 27, 1980, and permanent relief allowing her to play in interscholastic competition if she made either the seventh or the eighth-grade team.

After an adversary hearing, on October 23, 1980, the District Court rendered an oral opinion and granted temporary relief to the plaintiff. The court held that the plaintiff had established a likelihood of success on the merits and that she would suffer irreparable injury if temporary relief was denied. The court concluded that she had a constitutionally protected interest in equal access to training and competition that would develop her athletic talents. The court rejected the two justifications presented by the defendants at the hearing.

First, without deciding whether the provision of separate but equal facilities to male and female students would avoid

any constitutional objection, the District Court found that the separate programs offered by the defendants were not in fact equal because Karen's opportunity to compete with persons of substantially lesser skill in the girls' program was not as valuable as the opportunity to compete with those who are equal or superior to her in ability in the boys' program.

Second, the defendants argued that if they allowed Karen to tryout [Publisher's note: "tryout" should be "try out".] for the boys' teams, they would have to allow boys to tryout [Publisher's note: "tryout" should be "try out".] for the girls' teams, and since boys generally have superior athletic ability, the boys would dominate the girls' programs and ultimately deprive girls of a fair opportunity to engage in competitive athletics. The District Court rejected this argument, stating merely that the defendants had not persuaded him that there were no less restrictive alternatives available, other than completely separate programs classified entirely on the basis of sex.

The District Court refused to grant a stay pending appeal. As I understand the facts, defendants thereafter (1) postponed the tryouts;[1] (2) filed an appeal from the preliminary injunction requiring them to allow Karen to tryout [Publisher's note: "tryout" should be "try out".] for the boys' teams; and (3) applied to the Court of Appeals for a stay of the District Court's injunction. On October 27, by a vote of 2 to 1, a three-judge panel granted a stay, without opinion. On October 29, 1980, the Court of Appeals, sitting en banc, voted 5 to 3 to continue the stay pending the appeal. On October 31, 1980, the plaintiff filed her petition to vacate the stay entered by the Court of Appeals, supported by various papers filed in the District Court and the Court of Appeals. Defendants filed their response on November 3, 1980.

[1] The papers filed on behalf of Karen in this Court suggest that the defendants rescheduled the tryouts in order to deprive Karen of the opportunity to tryout [Publisher's note: "tryout" should be "try out".] for the boys' teams while the defendants sought a stay from the Court of Appeals. The defendants assert that the rescheduling was required because of the postponement, due to inclement weather, of another athletic event. Because the motive underlying the rescheduling is not relevant to the question presented here, resolution of this factual conflict is unnecessary.

II

Although I have the power, acting as Circuit Justice, to dissolve the stay entered by the Court of Appeals, *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (MARSHALL, J., in chambers), this power is to be exercised "with the greatest of caution and should be reserved for exceptional circumstances." *Id.*, at 1308. A Court of Appeals' decision to enter a stay is entitled to great deference, *Commodity Futures Trading Commission* v. *British American Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (MARSHALL, J., in chambers); such deference is especially appropriate when the Court of Appeals has acted en banc. Nevertheless, the question presented by the petition is sufficiently difficult to justify careful consideration.[2] In answering that question, I shall first identify certain propositions that seem to be adequately established.

First, there is no dispute about the fact that the defendants have acted under color of state law and that their refusal to allow Karen to tryout [Publisher's note: "tryout" should be "try out".] for the boys' teams is based solely on the fact that she is a girl. Whether or not Karen's interest in improving her athletic skills is characterized as "fundamental" or something less, I think it is clear that the defendants have the burden of justifying a discrimination of this kind.

Second, since the burden of justification was on the defendants, at this stage of the proceeding the stay entered by the Court of Appeals cannot be upheld on grounds not yet supported by the record, even though it may remain open to the defendants to offer additional evidence at a full trial. Thus, for example, the defendants have preserved the right to offer evidence to support the proposition that the exclusion of girls

[2] The difficulty of the question presented by the defendants' request for a stay is illustrated by the fact that Judge Cudahy, a member of the majority of the panel which granted the stay on October 27, dissented from the Court of Appeals' en banc decision to continue the stay on October 29.

from the boys' teams is necessary to protect female athletes from harm. They were unable to present evidence supporting such a justification at the preliminary hearing, however, and therefore this justification is not available to them at this stage of this proceeding. Defendants have also made no claim that the *boys'* athletic program would be harmed in any way by allowing Karen to participate.[3] Nor have they suggested that the exclusion of Karen is necessary in order to protect Karen from harm.

Third, although the record is incomplete, plaintiff does not appear to dispute defendants' representation that the separate athletic programs for the girls are equal to the boys' programs in the sense that the time, money, personnel and facilities devoted to each are equal. Defendants are therefore correct in putting to one side the cases in which a number of courts have ordered schools to allow girls to participate on boys' teams following a showing that the girls' programs were inferior.

Fourth, in deciding whether to vacate the stay, I have a duty to consider the potential of irreparable harm to the respective parties. Although defendants have argued to the contrary, I am persuaded that the District Court was correct in concluding that if Karen will probably succeed on the merits, she would suffer greater harm than would the defendants by allowing her to tryout [Publisher's note: "tryout" should be "try out".] for the boys' teams. I am therefore persuaded that the stay can only be supported by the sufficiency of the defendants' showing that there is an

[3] In their response filed in this Court, the defendants have suggested that the girls' basketball program will be injured if Karen is allowed to participate in the boys' program, because the girls' program will then be deprived of its best athlete. This justification, like the need to protect female athletes from physical or psychological harm, while plausible, is not supported by the present record. It cannot, therefore, be used as a basis for upholding the stay entered by the Court of Appeals. The fact that defendants advance this argument indicates that they regard Karen as still eligible to participate in the girls' program even though she declined to participate in the girls' tryouts while this matter has been pending.

adequate reason for discriminating against Karen because of her sex.

In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.[4]

It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. The defendants' program appears to have been adopted in full compliance with the regulations promulgated by the Department of Health, Education, and Welfare.[5] Although such com-

[4] I share District Judge Marshall's view that if attention is confined to the application of the rule to Karen—rather than to the general validity of the rule—the discrimination does appear arbitrary. In some respects, Karen's claim is no different from that of any other sixth or seventh grader. The younger children are permitted to tryout [Publisher's note: "tryout" should be "try out".] for the eighth-grade teams, but the eighth graders are excluded from the seventh-grade teams because their participation would be unfair to the younger students. The fact that an eighth grader must face competition from talented seventh graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights. I would also note that Karen's claim is supported by the Court's equal protection analysis in *Caban* v. *Mohammed*, 441 U.S. 380, 391-394 (1979); see *id.*, at 409-412 (STEVENS, J., dissenting).

[5] The Department of Health, Education, and Welfare, pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, promulgated regulations designed to eliminate discrimination on the basis of sex

pliance certainly does not confer immunity on the defendants, it does indicate a strong probability that the gender-based classification can be adequately justified. At least that probability is sufficient to persuade me that I should adhere to the practice of according deference to the judgment of the majority of my colleagues on the Court of Appeals.

The petition to vacate the stay is denied.

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in education programs and activities receiving federal financial assistance. One of these regulations, specifically addressing gender-based discrimination in athletic programs, provides in part:

"[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of [Publisher's note: The "of" preceding this note appears in the original regulation.] major activity of which involves bodily contact." 45 CFR § 86.41 (b).

[Publisher's note: See 449 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-631

Daniel J. McCarthy, Superintendent,	)	
v.	)	On Application for Stay.
Monroe Harper.	)	

[February 3, 1981]

JUSTICE REHNQUIST, Circuit Justice.

Applicant McCarthy has requested me to stay the issuance of the mandate of the Court of Appeals for the Ninth Circuit in this case pending his petition for certiorari on the grounds that the Court of Appeals failed to require respondent to exhaust all of his state remedies before seeking federal habeas [Publisher's note: There probably should be a "corpus" here. But see 449 U.S. at 1309.] to challenge his conviction. The Court of Appeals reversed a judgment of the United States District Court for the Central District of California dismissing respondent's petition for habeas corpus, and in doing so it relied on its own earlier decision in *Harris* v. *Superior Court*, 500 F.2d 1124 (1974) (en banc), cert. denied, 420 U.S. 973 (1975). *Harris* in turn held that a "postcard" denial of a petition for writ of habeas corpus by the California Supreme Court, without opinion or citation, constitutes a denial on the merits and therefore satisfies the exhaustion requirement.

Because I felt there was a threshold jurisdictional problem which had not been addressed by the Court of Appeals or by the applicant, I called for a response from the respondent. This document, consisting of 16 lines of text, quite candidly states that "respondent must tell the court that according to the records of the California Bureau of Prisons, Theodore Monroe Harper is no longer in prison or on parole. Respondent's counsel did not learn this until a few days ago, when a status letter to Mr. Harper and copies of pleadings which he had sent to his client were returned without a forwarding address. Respondent's counsel now is unable to locate his

client. As a result of this situation, it is respondent's belief that this case may be moot and no case or controversy may be present." Response, p. 1.

Federal habeas corpus is a civil action, and this Court has jurisdiction to consider applicant's petition for certiorari to the Court of Appeals for the Ninth Circuit only if the case was properly appealed from the District Court to the Court of Appeals. 28 U.S.C. § 2253 provides in pertinent part:

> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

The District Court in this case, in a judgment rendered pursuant to Fed. Rule Civ. Proc. 58, stated that "It Is Adjudged that the Petition for Writ of Habeas Corpus is dismissed." There is no indication that either the judge of the District Court or a circuit justice or judge has issued a certificate of probable cause in this case. As presently advised I am therefore of the opinion, which I believe would be shared by at least four of my colleagues, that the Court of Appeals was prohibited by statute from entertaining respondent's appeal from the order of the District Court dismissing his application for a writ of habeas corpus. "Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists." *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976). That leads me to the further conclusion that this Court would grant applicant's petition for certiorari, and, unless it chose to ignore the above quoted [Publisher's note: "above quoted" should be "above-quoted". But see 449 U.S. at 1311.] provision of 28 U.S.C. § 2253, reverse the judgment of the Court of Appeals with instructions to dismiss respondent's appeal from the order of the District Court.

If I am correct in my reasoning, the mandate of the Court of Appeals for the Ninth Circuit should be stayed pending applicant's petition for certiorari to this Court. Because of the

jurisdictional defect in the appeal, I find it unnecessary to reach applicant's contentions respecting the correctness of the decision of the Court of Appeals for the Ninth Circuit in *Harris* v. *Superior Court*, *supra.*

A stay has been entered pending the timely filing of a petition for writ of certiorari by applicant, with the usual terms as to its duration.

It is so ordered.

[Publisher's note: See 449 U.S. 1312 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-625

Victor Atiyeh, Governor of Oregon, et al.,	)	
	)	On Application for Stay.
v.	)	
Tom Capps, et al.	)	

[February 4, 1981]

JUSTICE REHNQUIST, Circuit Justice.

This matter has previously come before me on the application of applicant Atiyeh, Governor of Oregon, applicant Watson, administrator of the Corrections Division of the State of Oregon, and applicant Cupp, Superintendent of the Oregon State Penitentiary on a motion for a stay of the final injunction issued by the United States District Court for the District of Oregon pending appeal to the Court of Appeals for the Ninth Circuit. I issued a temporary stay feeling that on the basis of the application there was merit to some of the applicants' points, but not wanting to proceed further with even my own analysis without calling for a response. I called for that response, and it has now been received.

The tests have been stated and restated as to probability of success on the merits, the probability of four Justices voting to grant certiorari and the like as guideposts for the exercise of the function of the Circuit Justice in granting or denying stays. Because this is not an appeal from an adverse ruling of the Court of Appeals to [Publisher's note: "to" should be "for".] the Ninth Circuit, from which a similar stay was sought and denied, it is not in a posture where the so-called "stay equities" can be readily evaluated, but I am satisfied in my own mind that, although it should not be nearly as frequently done as in the case of a final judgment of the Court of Appeals, an application to a Circuit Justice of this Court from a District Court is within the contemplation of the All Writs Act, 28 U.S.C. § 1651

(A). I do not understand the respondents to contest this proposition as a matter of law. I recognize that they are correct in their statement on page 2 of their response that "the normal presumption is that 'in all cases, the fact weighs heavily that the lower court refused to stay its order pending appeal.'" Response, p. 2. And, because an appeal from the District Court order is presently pending before the Court of Appeals for the Ninth Circuit, the rule to be followed is that "ordinarily a stay application to a Circuit Justice on a matter before a Court of Appeals is rarely granted. . . . [Publisher's note: There should be closing quotation marks here.] *Pasadena Board of Education* v. *Spangler*, 423 U.S. 1335 (1975) (REHNQUIST, J., in Chambers).

Having given such time as was possible to the consideration of the lengthy and able submissions on the part of both parties, I have decided to grant the stay pending the decision of this Court in *Rhodes* v. *Chapman*, No. 80-332, presently scheduled for argument this Term, or the decision of the Court of Appeals for the Ninth Circuit pursuant to its expedited briefing schedule (whichever may come first). My reasons for doing so follow and they rest both on procedural and substantive grounds.

I find in the carefully considered opinion, findings of fact and conclusions of law of the District Court a set of assumptions which I do not believe the Constitution warrants, and I believe that at least three other Justices of this Court would concur in my belief. The Court [Publisher's note: "Court" should be "court".] dealt with a "maximum security prison" located in Salem, Oregon, comprising 22 acres surrounded by a re-enforced concrete wall averaging 25 feet in height. Prisoners are housed in five units. One of these cellblocks was built in 1929, two in the early 1950's, and the newest in 1961. (Ex. A, Findings and Conclusions of the District Court, at 3). The findings of fact and conclusions of law proceed to set forth in great detail the numbers, facilities, and conditions at this prison. Some of those findings and conclusions were based on the testimony of the Standards of the American Correctional Association (Findings and Conclusions, at 6), the National Sheriffs' Associa-

tion Standards (Finding [Publisher's note: "Finding" should be "Findings".] and Conclusions, at 7), and the Standards of the United States Army. *Ibid.*

The District Court also relied on the testimony of a professor of psychology at the University of Texas at Arlington to the effect that the housing at the Salem institution is "inadequate to avoid adverse physical and mental effects." (Findings and Conclusions, at 6). It also relied on the testimony of the Dean of the [Publisher's note: "University of" should appear here.] Chicago Law School that the "overcrowding" levels that exist at the institution undermine the initiative of inmates to seek self-improvement and prevent their rehabilitation. (Findings and Conclusions, at 9).

Naturally, penal officials would like to have a larger share of the State's budget, just as would any number of other state officials administering programs mandated by the State. But there is nothing in the Constitution that says that "rehabilitation" is the sole permissible goal of incarceration, and we have only recently stated that retribution is equally permissible. See *Gregg* v. *Georgia*, 428 U.S. 153, 184, n. 30 (1976).

The District Court concluded by stating that overcrowding "exceeds the level of applicable professional standards; has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions [Publisher's note: "institutions" is in the original District Court opinion. See 496 F. Supp. 802, 813 (D. Or. 1980).] to protect the inmates from assaults; and is likely to produce embittered citizens with heightened anti-social attitudes and behavior." (Findings and Conclusions, at 12).

I think the District Court, while it may be correct in its findings of fact, and is certainly closer to the scene than a single Circuit Justice in Washington, has missed the point of several of our cases, including *Price* v. *Johnston*, 334 U.S. 266 (1948); *Procunier* v. *Martinez*, 416 U.S. 396 (1974), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979). It has chosen to rely on a plurality opinion in *Trop* v. *Dulles*, stating in *dicta*

that the touchtone [Publisher's note: "touchtone" should be "touchstone".] of the Eighth Amendment is "nothing less than the dignity of man." 356 U.S. 66, 101 (1958).

I find the District Court's efforts to distinguish *Bell* v. *Wolfish*, *supra*, particularly unpersuasive, although I likewise realize that there is considerable difference of opinion among the members of this Court as to the merits of that decision. The District Court states that *Bell* "is not controlling here" because double-celling of pre-trial detainees for no more than 60 days is quite different from institutions housing people who have been convicted of crime and are sentenced to long term [Publisher's note: "long term" should be "long-term".] confinement. But this cuts both ways: a pre-trial detainee, presumably detained on probable cause but not yet having been found guilty as charged under our constitutional procedures, cannot be "punished" at all. See *Bell* v. *Wolfish*, *supra*. The respondents here, however, each of whom *has* been tried, found guilty, and sentenced to a term which turns out to be, in terms of "mean time served" [Publisher's note: There should be a comma after "served".] 24 months (Findings and Conclusions, at 15), are in a different boat from both their perspective and society's perspective. So far as they are concerned, they will have to endure the overcrowded conditions for a longer period of time than the pre-trial detainees had to endure them in *Bell* v. *Wolfish*, *supra*; but from the point of view of society, the legislature has spoken through its penal statutes and its conferring of authority on the parole authorities to seriously penalize those duly convicted of crimes which it has defined as such. In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.

It is equally well-settled that prisoners have constitutional rights, and that *cadena temporal*, see *Weems* v. *United States*, 217 U.S. 349, 382 (1910), and conditions such as

those described in the Arkansas prison system in *Hutto* v. *Finney*, 437 U.S. 678 (1978), exceed the bounds permitted the States by the Eighth and Fourteenth Amendments to the United States Constitution. It is considerations such as these with which this Court must deal in its upcoming decision and opinion in *Rhodes* v. *Chapman*, *supra*, a case relied upon by the District Court in its findings and conclusions when it was simply a decision of the Court of Appeals for the Sixth Circuit. I think it best, in the exercise of my function as Circuit Justice, that the District Court have the benefit of this Court's opinion in that case before it takes over the management of the Oregon prison system.

The actual order entered by the District Court reads as follows:

> "[T]he court will require that a reduction of the total population of the three facilities by 500 persons be accomplished by December 31, 1980, together with a further reduction of at least 250 by March 31, 1981. The order will not direct the state to adopt any particular methods to achieve this goal. However, to assure that progress toward that goal is being made, defendants will be ordered to report monthly, commencing on September 1, 1980, on the number of persons housed at each facility and the steps that have been taken and remain to be taken to meet the deadlines imposed." Ex. B, Opinion, at 8.

In my opinion, the above order of the District Court fails to comply with Fed. Rules Civ. Proc. 65 (d), which provides in relevant part:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or other acts sought to be restrained. . . ."

Several years ago we stated in *Schmidt* v. *Lessard*, 414 U.S. 473 (1974):

> "As we have emphasized in the past, the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid possible founding of a contempt citation on a decree too vague to be understood." [Publisher's note: There should be an opening parenthesis here.] Citation omitted).
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> "The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. [*Gunn* v. *University Committee to End the War*, 399 U.S. 383, 388 (1979).] We can hardly begin to assess the correctness of the judgment entered by the District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible." *Id.*, at 477.

The language in the order of the District Court directing the prison officials to accomplish a further reduction of "at least 250" by March 31, 1981, falls short of this specificity requirement.

For all of the above stated [Publisher's note: "above stated" should be "above-stated".] reasons, and because in the normal course of events by the close of this Court's October, 1980 Term a decision should be handed down in *Rhodes* v. *Chapman*, *supra*, I think that the District Court's ultimate resolution of the case before it will be facilitated, not retarded, by the issuance of a stay as previously indicated. There is no reason for courts to become the allies of prison officials in seeking to avoid unpleasant prison conditions when the executive and the legislature of the State have decided that only a certain amount of money shall be allocated to prison facilities; there is likewise no reason for the District Court to stay its hand when specific constitutional violations are called to its attention.

It is accordingly ordered that the injunction issued by the District Court be stayed, pending either the decision of the Court of Appeals of the Ninth Circuit in this case or the decision of this Court in *Rhodes* v. *Chapman*, *supra*, whichever may come first.

[Publisher's note: See 449 U.S. 1319 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-659

California, Applicant,	)	
v.	)	On Application for Stay.
Robert Lawrence Riegler.	)	

[February 5, 1981]

JUSTICE REHNQUIST, Circuit Justice.

The applicant, the State of California, has asked me to stay the execution and enforcement of the judgment of the California Court of Appeal in *People* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), pending the filing of a petition for writ of certiorari and a final determination of the case by this Court. Review is sought of the Court of Appeal's conclusion that the failure of law enforcement officers to obtain a search warrant in this case violated the Fourth Amendment and mandates a reversal of the respondent's conviction for possession of marijuana for sale.

The facts are not in dispute. On November 8, 1977, U.S. Customs officials in New York were alerted by specially trained police dogs of the possible presence of marijuana in two packages mailed from Germany to Merced, California. Pursuant to Customs laws, officials of the Post Office and the Drug Enforcement Administration opened the packages and confirmed that they contained hashish. The packages were then resealed and sent to authorities in California. Postal authorities and local California officials arranged for a controlled delivery of the packages and obtained a search warrant authorizing them to enter the place of delivery and to search for and seize the packages and their contents. The packages were delivered, and in order to allow the occupants time to open the packages and exercise dominion and control over the contents, the police did not immediately execute the

search warrant. Approximately 15 minutes after the packages were delivered, the respondent and two companions arrived by automobile at the residence and left almost immediately thereafter with the packages. While some police remained at the residence and executed the search warrant, others followed the respondent and his companions in the hopes that they would lead them to other suspects. Eventually, the police, fearful that they would lose the suspects in heavy traffic, stopped the automobile and arrested the respondent and his companions. The packages were in plain view in the back seat and were seized at the time of arrest. The packages were in the same condition as they were before the delivery to the home. They were transported to Merced that evening where they were photographed, opened and inventoried. No second search warrant was obtained before the re-opening of the packages. The hashish was still in the packages. The street value of the hashish was $100,000.

A majority of the California Court of Appeal held that the seizure by the police of the packages containing the hashish was valid but the subsequent re-opening of the packages at the police station without a search warrant violated the Fourth Amendment. Its holding rested on this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and its progeny, particularly *Walter* v. *United States*, — U.S. — (1980). Judge Andreen wrote separately concurring in the result but questioning the wisdom of the majority's opinion and its rejection of the State's argument that the respondent had a lesser expectation of privacy because the packages had previously been subject to a Customs search and determined to contain contraband. Accordingly, the packages could move through the mail only by virtue of governmental authorization. Were it not for an earlier decision by a panel of that Court which Judge Andreen considered controlling, he would hold that the packages were in the constructive possession of the law enforcement officers from the time of the opening of them in New York until the subsequent stop of the automobile. Three of the seven Justices

of the Supreme Court of California voted to grant a hearing at the request of the State.

There are three pertinent inquiries which are usually made in evaluating a request for stay of enforcement of an order of a state court: whether that order is predicated on federal as opposed to state grounds; whether the "balance of equities" militates in favor of the relief requested by the applicant; and whether it is likely that four Justices of this Court would vote to grant certiorari. I conclude here that each of these questions must be answered in the affirmative.

First, the decision of the California Court of Appeal is predicated on the Federal Constitution. The opinion refers specifically to the Fourth Amendment and relies for support on federal cases and state cases addressing the federal constitutional issue.

Second, the "balance of equities" favors the granting of the stay. The State argues that unless the requested stay is granted under present California law the case must either be set for retrial or dismissed. The State will therefore be denied the opportunity to have the Court of Appeal's decision reviewed by this Court. By contrast, the prejudice to the respondent is less. The State asserts without contradiction that respondent has been free on bail since his conviction.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari. The case presents important issues regarding the level of expectation of privacy a recipient of a package containing contraband sent through the international mails may have when the packages have been previously subjected to a *lawful* Customs search and delivered under controlled conditions and constant surveillance. None of our prior cases have directly addressed this oft recurring situation and certainly none of the three opinions in *Walter* v. *United States*, *supra*, provides a ready answer. In my opinion, the case presents issues which are of sufficient importance that four Justices of this Court would likely vote to grant the State's petition for certiorari.

The request for a stay of the judgment of the California

Court of Appeal pending consideration of a timely petition for certiorari by the applicant is granted, to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay is to remain in effect until this Court decides the case or until this Court otherwise orders.

[Publisher's note: See 450 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE *v.* LONG ET AL.

ON APPLICATION FOR STAY

No. A-720. Decided March 3, 1981

An application for a stay of the District Court's order requiring applicant, pursuant to the Freedom of Information Act, to turn over to respondents certain information regarding tax audit standards is denied, and a previously granted temporary stay is vacated, in view of applicant's failure, under the circumstances, to amend its answer in the District Court to raise additional defenses.

JUSTICE REHNQUIST, Circuit Justice.

Applicant Bureau of Economic Analysis, a division of the United States Department of Commerce, seeks to stay an order of the United States District Court for the Western District of Washington ordering applicant, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, to turn over to respondents certain information regarding tax audit standards. The procedural history of this case is somewhat confusing. In 1975 respondents commenced an action against the Internal Revenue Service to obtain certain data. Respondents prevailed in that suit and the IRS appealed to the Court of Appeals for the Ninth Circuit. While that action was pending, respondents commenced this action in the District Court against applicant to obtain similar data in its possession and, on February 20, 1979, moved for summary judgment. In May 1979, the Ninth Circuit ruled against the IRS, *Long* v. *Internal Revenue Service*, 596 F.2d 362 (1979), cert. denied, 446 U.S. 917 (1980), but remanded the case so that the IRS could raise certain additional defenses.

On October 17, 1980, the IRS on remand did indeed amend its answer to raise the additional defenses. Significantly, however, the applicant did not amend its answer in *this* case. On January 12, 1981, the District Court entered summary judgment against applicant on the ground of its "unreasonable delay" in amending its answer to respondents' complaint and ordered that the sought-after information be disclosed. The Court of Appeals for the Ninth Circuit has declined to stay the District Court's order.

In its application for a stay, the applicant asserts that it is likely to prevail on the merits and that it will suffer irreparable harm if the tax information is disclosed. Although I express no views as to the probability of this Court granting a petition for certiorari should applicant lose its appeal to the Court of Appeals for the Ninth Circuit, I think if Congress makes the Government answerable as a defendant in the courts of the United States, the Government is obligated to abide by the rules prescribed for it as a litigant. It is my view that the applicant, by failing to amend its answer in this case for more than a year and a half after the Ninth Circuit's decision in *Long* v. *Internal Revenue Service*, rendered itself liable for summary judgment. The applicant argues that any delay was not unreasonable, since it wrote a letter to the District Court on October 16, 1979, saying that it would be inappropriate to render summary judgment in this case until a final resolution of *Long* v. *Internal Revenue Service.* But the United States Attorney's two-paragraph letter falls well short of an amendment of its answer in this case. Accordingly, I am unwilling to exercise my authority as Circuit Justice at this stage of the litigation and stay the order of the United States District Court for the Western District of Washington.

Accordingly, the temporary stay heretofore granted by me on February 23, 1981, is vacated, and the application for stay is denied.

SUPREME COURT OF THE UNITED STATES

No. A- 875

Los Angeles NAACP, et al., Applicants	)
v.	) On Application to Vacate Order
Los Angeles Unified School District, et al.	)

(April 19, 1981)

JUSTICE REHNQUIST, CIRCUIT JUSTICE.

I cannot but share the views of the Court of Appeals for the Ninth Circuit with respect to the dilemma [Publisher's note: There should be an "in" here.] which all of the parties find themselves at this stage of this prolonged litigation. Much as it would be desirable for me as Circuit Justice for the Ninth Circuit to act immediately upon applicants' request for a stay, I find that I cannot, in the proper discharge of my judicial duties, act without benefit of a response from the respondents. Therefore, without either granting or denying the applicants' request, I request respondents to file a response to the application for a stay by 5 p.m. P.S.T., Wednesday, April 22, 1981.

Meanwhile, the order of the Court of Appeals for the Ninth Circuit vacating the order issued by the District Court, and allowing respondent Los Angeles Unified School District to implement its proposed plan, shall remain in effect.

So ordered.

[Publisher's note: See 451 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-834

State of California, Applicant,	)	
v.	)	On Application for Stay.
Randall James Prysock.	)	

[April 24, 1981]

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the People of the State of California (hereafter State), seeks a stay of the judgment of the California Court of Appeal (Fifth Appellate District) in this case after the Supreme Court of California denied the State's petition for hearing on March 17, 1981, with Justices Mosk and Richardson expressing the view that the petition should be granted. Because it appeared to be common ground between the Court of Appeal which ruled against the State, the State, and other courts which have spoken to the question of the applicability of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that its precision was one of its great virtues, I entered a temporary stay of the order of the Court of Appeal in view of the strict California speedy trial requirements in order that I might consider in more detail the application, the response, and the decided cases on the issue.

The facts may be briefly stated. The victim was brutally murdered on January 30, 1978. She was struck with a wooden dowel, bludgeoned with a fireplace poker, stabbed with an ice pick, and finally strangled with a telephone cord. On the evening of the murder respondent, a minor, was arrested along with a co-defendant. He was brought to a substation of the Tulare County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided

to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. Respondent was advised of his constitutional rights. The tape reflects the following warnings regarding the right to counsel:

> "Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You all, uh, — if, — you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?
>
> "Randall P.: Yes."

Respondent thereafter made incriminating statements which were admitted at trial. He was convicted of first-degree murder with two special circumstances of torture and robbery, robbery, burglary, auto theft, destruction of evidence, and escape from a juvenile camp. He was sentenced to life imprisonment.

The Court of Appeal reversed on the ground that respondent was not properly advised of his right to the services of a free attorney before and during interrogation. Although respondent was informed that he had "the right to talk to a lawyer before you are questioned, have him present while you are being questioned, and all during the questioning," and "the right to have a lawyer appointed to represent you at no cost to yourself," the Court of Appeal ruled that these warn-

ings were inadequate because respondent was not informed of his right to have an attorney appointed before further questioning.

The Court of Appeal stated:

> "It is not for this Court to overrule *Miranda*, disparage it, nor extend it. Its meaning is clear. It has stood the test of time. Law enforcement practices have adjusted to its strictures. One of its virtues is its precise requirements which are so easily met." App. 7.

The Court of Appeal went on to quote from a recent decision of the United States Court of Appeals for the Fifth Circuit sitting en banc in *Harryman* v. *Estelle*, 616 F.2d 870, 873-874 (1980), to the following effect:

> "The rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. E.g., *Tague* v. *Louisiana*, . . . U.S. . . ., 100 S. Ct. 652, 62 L. Ed. 2d 622 (1980); *Miranda* v. *Arizona*, 384 U.S., at 479, . . . See also *Fare* v. *Michael C.*, 439 U.S. 1310, 1314, 99 S. Ct. 3, 5, 58 L. Ed. 2d 19 (1978) (REHNQUIST, J., on application for stay) (calling rigidity of *Miranda* its single "core virtue"). The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of *Miranda's* [Publisher's note: The apostrophe and the "s" following "*Miranda*" are italicized in the original at 616 F.2d at 874.] safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief." App. 7-8.

In *Harryman* v. *Estelle*, however, the defendant was asked and answered a question before being given any *Miranda* warnings at all. *Fare* v. *Michael C.* considered whether a minor's request to talk with his probation officer should be

treated for *Miranda* purposes in the same manner as a request to consult with an attorney, and the Court held that it should not. 442 U.S. 707 (1979). The case did not consider the content of *Miranda* warnings. Neither did *Tague* v. *Louisiana*, which reversed a decision upholding a conviction when "no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights." 444 U.S. 469, 471 (1980) (*per curiam*). In short, none of the decisions cited for the proposition that the rigidity of *Miranda* is its great virtue support the proposition that the desirable rigidity extends to the precise formulation of the warnings.

The decision of the Court of Appeal in this case may, in the name of advancing *Miranda*'s virtue of rigidity and precision, have transformed the *Miranda* warnings into a ritualistic formalism. Respondent was told of his right to have a lawyer present before questioning, and of his right to have a lawyer appointed. The Court of Appeal seems to have held that the warnings were inadequate because of the order in which they were given.

Applying the relevant factors, see *Fare* v. *Michael C.*, 439 U.S. 1310, 1311 (1978) (REHNQUIST, J., Circuit Justice), I have decided to issue the requested stay. The request for a stay of the judgment of the California Court of Appeal pending the timely filing of a petition for writ of certiorari and final determination of the case by this Court is accordingly granted.

[Publisher's note: See 451 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-918

Walter J. Becker and Sara A. Becker et al.	)	
	)	On Application for Stay.
v.	)	
United States et al.	)	

[May 29, 1981]

JUSTICE REHNQUIST, Circuit Justice.

Applicants claimed depreciation, investment credits, and other expenses on their federal income tax returns with respect to certain videotapes. The Internal Revenue Service issued summonses directing the production of the videotapes and, on the appointed date, applicants appeared before the IRS agent with the videotapes. They agreed to permit the agent to examine, play, and otherwise inspect the videotapes for as long as desired, but only in their presence, and declined to leave the videotapes in the possession of the agent. Not satisfied with such an arrangement, the IRS brought an enforcement proceeding under 26 U.S.C. §§ 7402(b) and 7604(a).

The United States District Court for the Eastern District of California ordered applicants to turn over the videotapes as demanded by the IRS. Applicants filed notices of appeal and moved the District Court to stay its judgment pending appeal. They offered to post a supersedeas bond and argued in their memorandum in support that they were entitled to a stay under Federal Rule of Civil Procedure 62 (d) upon posting of such bond. This rule provides:

> "*Stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time

> of filing of the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

The exceptions mentioned in 62(a) are injunction cases, receivership cases, and patent infringement cases in which an accounting has been ordered. The District Court denied the motion for a stay and the Court of Appeals for the Ninth Circuit denied a subsequent motion for a stay.

Applicants thereupon filed the instant application for a stay pending appeal of the District Court judgment to the Court of Appeals. I granted a temporary stay and called for a response from the United States. That response has now been received and, upon examination of it and the relevant authorities, I have decided to continue the stay pending further action by the full Court.

Pursuant to Federal Rule of Civil Procedure 81(a)(3), the federal rules apply "to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." In *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971), however, we ruled that Rule 81(a)(3) and prior language in *United States* v. *Powell*, 379 U.S. 48, 58, n. 18 (1964) to the effect that the rules apply in summons enforcement proceedings were "not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available." When gathering testimony, the need for summary enforcement of IRS summonses is clear and justifies dispensing with federal rules which might interfere with that task. The question here is whether the Government's enforcement order includes more than mere testimony, as broadly as we have construed the word "testimony" in cases such as *United States* v. *Euge*, 444 U.S. 707 (1980), *United States* v. *Dio-*

nisio, 410 U.S. 1 (1973), *United States* v. *Mara*, 410 U.S. 19 (1973), and *Schmerber* v. *California*, 384 U.S. 757 (1966). If the effect of the summons enforcement proceeding is to take what is potentially income-producing property of the respondent rather than merely require him to produce evidence, the need to proceed summarily is less clear, as is the justification for dispensing with otherwise applicable provisions of the federal rules.

If the federal rules do apply, it should be noted that whether the automatic stay provisions of Rule 62(d) or the discretionary stay provisions of Rule 62(c) apply will have no effect on applicants' case once its merits are decided by the Court of Appeals for the Ninth Circuit, before which it is presently pending. While I am not fully convinced by the submissions of either the applicants or the Government on this point, I do not think it can be said that applicants' position is totally unwarranted. The Government devotes only one page of its nine-page response to this contention, and its treatment of the subject is not altogether persuasive. The language of Rule 62(d) seems clear and the enumerated exceptions do not include tax summons enforcement proceedings. *Expressio unius est exclusio alterius*. Contrary to the Government's assertion, an order enforcing an IRS summons is not the "equivalent" of a mandatory injunction—and hence within the exceptions to Rule 62(d)—simply because the coercive power of the court is invoked. The only authority directly in point supports applicants' contention. *United States* v. *Neve*, 80 F.R.D. 461 (ED La. 1978). But cf. *Federal Trade Commission* v. *TRW, Inc.*, — U.S. App. D. C. —, 628 F.2d 207, 210, n. 3 (1980) (dictum criticizing district court for granting stay as of right under Rule 62(d) in FTC subpoena enforcement proceeding).

The question before me in my capacity as Circuit Justice, however, is not simply whether applicants were entitled to a stay from the District Court or from the Court of Appeals pursuant to Rule 62(d), but rather whether I should now continue in effect a stay previously entered to protect the

ultimate jurisdiction of this Court in the event that applicants' case is decided adversely to them by the Court of Appeals, and they petition this Court for certiorari. See 28 U.S.C. § 1651(a). It is at this point that the Rules of Civil Procedure, the summons enforcement proceedings of the Internal Revenue Code, and the extent of my authority under 28 U.S.C. § 1651(a) do not nicely mesh. Once the Court of Appeals decides the merits of the case, it will not be relevant to either party whether a stay should have been granted pending appeal, and Rule 62(d) by its terms speaks only to such stays. Thus, the Rule 62(d) question will "wash out" after decision on the merits by the Court of Appeals, unless applicants can persuade at least four Justices of this Court that the issue is one "capable of repetition, yet evading review" and therefore not moot. Yet if a decision of the Court of Appeals is favorable to the applicants on the merits of their claim, it would make the unavailability of any stay pending appeal pursuant to the posting of an appropriate supersedeas bond a hardship on them and others similarly situated. This hardship may be of some weight in deciding whether to grant a stay pending decision by the Court of Appeals and a subsequent petition for certiorari by applicants in the event the decision is unfavorable to them.

The question applicants present before the Court of Appeals, as I understand it, is whether a taxpayer who has offered to make available to the IRS on conditions unsatisfactory to the Service videotaped material which is not merely "evidence" but is also "property" with which applicant conducts business, may be compelled by the IRS to relinquish possession of the property. 26 U.S.C. § 7602(1) confers authority on the IRS to examine "any books, papers, records, or other data which may be relevant or material" to an inquiry into a taxpayer's liability. The videotapes do not appear to be such record or data; rather, they are applicants' copies of the asset itself. Under 26 U.S.C. § 7606 the IRS can *examine* objects subject to tax such as these videotapes. Requiring applicants to relinquish possession of the asset subject to tax as opposed to records *concerning* that asset

would seem to be tantamount to ruling that a taxpayer must upon demand relinquish possession of a building to the IRS simply because he claimed depreciation on the building. The Government relies on *United States* v. *Davey*, 543 F.2d 996, 999 (CA2 1976), which held that the IRS could compel production of taxpayer's financial records which were on computer tape, but the computer tape in that case was not the asset in question but rather simply the form in which records were kept.

I am by no means convinced of the correctness of the position of either party, and neither the District Court nor the Court of Appeals entered more than a minute order by way of explanation of their action in denying a stay. Obviously, as pointed out in *Donaldson*, the IRS must retain its authority to conduct summary enforcement proceedings if large amounts of properly taxable income are not to evade taxation. But in this case no deficiency has been assessed by the IRS, and the summary provisions for the seizure of actual assets which are then authorized by statute have not yet become available to the Government. This is not the typical case with which the Court has dealt in the last few years, culminating in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), where the Government is seeking to inspect purely evidentiary or testimonial material—from which the taxpayer would derive no monetary benefit by retaining it in his possession—and the taxpayer denies the Government access to that evidence on grounds of privilege or the like. Obviously the taxpayer cannot simply write his own ticket as to the manner in which relevant nonprivileged evidence shall be made available to the IRS; but it seems to me that until the Government has gathered sufficient information to invoke its summary seizure authority, there are probably four Justices of this Court who would vote to grant certiorari to determine whether the IRS may, pursuant to its summons authority, acquire and indefinitely retain material which is not merely books and records relevant for purposes of determining the correctness of the taxpayer's income tax return,

but which is also property which the taxpayer uses for the production of income.

The balance of equities tips heavily in favor of applicants. If a stay is not granted applicants will be required to turn over their videotapes and their appeal may well become moot, particularly if the IRS completes its investigation prior to decision by the Court of Appeals. Much of the harm applicants contend will result from turning their videotapes over to the IRS will not be remediable if a stay is denied here and applicants eventually prevail. Applicants will lose the use of their videotapes as a sales promotional device for the time they are in the possession of the IRS.

Injury to the Government, on the other hand, seems to me minimal in this case. Applicants have already agreed, at the request of the IRS, to extend the statute of limitations. They have made the videotapes available to the Services for examination, and have indicated no hesitancy to continue to do so, albeit on terms which the Government regards as unsatisfactory.

My conclusions, however, are not entertained without considerable doubt. It is, as the Government has pointed out in its response, highly unusual for a Circuit Justice to stay an order of the District Court while an appeal from that order is pending in the Court of Appeals. Were I convinced that either the District Court or the Court of Appeals thought it had the usual discretion to grant the stay in question, but nonetheless declined to exercise that discretion, the proverbial "stay equities" might well fall on the other side of the line. The decisions below not to grant a stay, however, may have been based on the view that this was an ordinary tax summons enforcement proceeding, a view which at least four Justices of this Court may not share. For these reasons I shall continue the stay in effect, subject to the posting of the supersedeas bond approved as to form and amount by the District Court, until the question may be reviewed at the next regularly scheduled Conference of the full Court on June 4, 1981.

It is so ordered.

[Publisher's note: See 452 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-961

Richard S. Schweiker, Secretary of Health & Human Services et al. Appellants, *v.* William McClure et al.	)	On Application for Stay.

[June 12, 1981]

JUSTICE REHNQUIST, Circuit Justice.

Applicant requests [Publisher's note: "Applicant requests" should be "Applicants request".] that I stay a judgment of the District Court of the Northern District of California pending a direct appeal of that judgment to this Court pursuant to 28 U.S.C. § 1252. On May 5, 1981, applicant filed a notice of appeal.

This case involves the constitutionality of the hearing procedures available under Part B of the Medicare Act, 42 U.S.C. §§ 1395j-1395w, 1395ff. The Medicare Act is divided into two parts. Part A provides insurance for hospital and related post-hospital services. 42 U.S.C. (& Supp. III) § 1395c; § 1395d. Part B provides a voluntary program of supplementary medical insurance covering, in general, 80% of the reasonable costs of certain other services, primarily physicians [Publisher's note: "physicians" should be "physician". See 42 U.S.C. § 1395k(a)(2)(B)(i); but see 452 U.S. at 1302.] services and medical supplies. 42 U.S.C. (& Supp. III) § 1395k; § 1395*l*. The Secretary determines whether an individual is eligible to enroll in the Part B program, and the individual is entitled to an administrative hearing and judicial review of that eligibility determination. 42 U.S.C. §§ 1395ff(a) and (b)(l)(B). As to the implementation of Part B, Congress authorized the Secretary to enter into contracts with private insurance carriers under which the carriers would determine and pay Part B benefits on a reimbursable basis. 42 U.S.C. § 1395u. Under these contracts, the carriers receive advances of funds, which they then

disburse to claimants in reimbursement for medical services found by the carriers to be covered by Part B. 42 U.S.C. § 1395u(c). If a claimant is dissatisfied with the reimbursement allowed by the private carrier, the claimant is entitled to a "fair hearing" conducted by the private carrier if the amount of the claim is $100 or more. § 1395u(b)(3)(C). The Act does not provide for an appeal to the Secretary of an adverse judgment by the carrier after a hearing.

Respondents, a class of Part B beneficiaries, brought suit challenging the constitutionality of that hearing procedure. In a decision rendered May 19, 1980, the United States District Court for the Northern District of California concluded that Congress' vesting of final decisionmaking authority in the carrier violates the claimant's due process rights because, in the court's view, hearing officers selected by the carrier may be biased and because hearings conducted by Administrative Law Judges employed by the Government may be more reliable. In relief, the District Court ordered that any Part B claimant whose claim was finally rejected after a full evidentiary hearing by the carrier's hearing officer on or after May 1, 1980 be given the opportunity for a *de novo* evidentiary hearing before an Administrative Law Judge of the Secretary. On May 1, 1981, the District Court denied the Government's application for a stay of its order pending appeal.

In both form and substance, the District Court has declared unconstitutional an important part of the Medicare statute. Given the presumption of constitutionality granted to all Acts of Congress, I believe that there is a substantial likelihood that four Justices of this Court would vote to note probable jurisdiction of the Secretary's appeal. In addition, because the District Court's remedial order involves a drastic restructuring of the appeals procedure carefully designed by Congress, it will cause hardship to the Secretary. In the application for a stay, the Secretary points out that the day-to-day administration of the Part B program requires a determination of a vast number of individual claims for reimbursement.

Indeed, even the District Court noted that, in 1978 alone, more than 124 million such claims were processed. App. to Application, at 12. The cost of providing Administrative Law Judge hearings to dissatisfied claimants will be substantial even if a small percentage of claimants seek such appeals. Indeed, Administrative Law Judges are already overloaded with cases arising under other statutory provisions in which *Congress* has provided for Administrative Law Judge hearings. I thus believe that the Secretary should be relieved of the burden placed on it by the District Court's order until this Court decides whether or not to note probable jurisdiction of the Secretary's appeal.

It is, therefore, ordered that the judgment of the District Court in this case is stayed pending the filing and consideration of the jurisdictional statement challenging that judgment by the Secretary.

[Publisher's note: See 453 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

NOS. A-5 AND A-33

South Park Independent School District, Applicant,	)	
A-5 *v.*	)	
United States.	)	On Applications for Stay.
	)	
Geraldine Huch et al., Applicants,	)	
A-33 *v.*	)	
United States.	)	

[July 21, 1981]

JUSTICE POWELL, Circuit Justice.

A school district in Beaumont, Tex., and a group of intervenor parents, children, and citizens have requested me as Circuit Justice to stay the mandate of the Court of Appeals for the Fifth Circuit pending disposition of their petition for a writ of certiorari. The Court of Appeals ordered the District Court to prepare and implement a desegregation plan to operate during the 1981-1982 school year. For the reasons stated below, I must deny the motion.

Much of the history of this lawsuit is set out in *South Park Independent School District* v. *United States*, 439 U.S. 1007 (1978) (REHNQUIST, J., dissenting from the denial of certiorari). In brief, prior to 1970, the applicant maintained a dual school system based on *de jure* racial segregation. In that year the District Court entered a school integration plan that was accepted by all parties. The plan established racially neutral attendance zones for each school and included a provision allowing any student to transfer from a school where his race was in the majority to one where it was in the minority.

In 1976, the United States filed a motion for supplemental relief, alleging that a dual system still existed in fact. The

District Court denied relief, holding that its 1970 order had created a unitary school system and finding that the present racial concentrations in the school district were the result of shifting residential patterns, the transfer of some pupils to private schools, and other factors beyond the control of the school district. It held that it no longer retained jurisdiction over the case and that the United States must file a new complaint if it seeks further relief.

The Court of Appeals reversed. 566 F.2d 1221 (1978). Relying on *Swann* v. *Charlotte-Mechlenburg Board of Education*, 402 U.S. 1, 26 (1971), it held that the District Court's findings were insufficient to show that the predominance of substantially one-race schools was not the result of past or present acts of intentional discrimination. The court remanded to the District Court to hold further hearings on the question whether the school district is now a unitary system. This Court denied certiorari. 439 U.S. 1007. Two Justices dissented, suggesting that the case presented an important issue whether *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), precluded continuing jurisdiction by the District Court where all parties had acquiesced in a desegregation plan 6 years previously.

On remand the District Court held an evidentiary hearing and made findings of fact. It found that the 1970 order created a unitary school system by implementing a racially neutral attendance zone for each school and that the court was now without jurisdiction to entertain a motion for supplemental relief. The court recounted at length evidence tending to show that the "lesser percentage of desegregation that had been anticipated" was caused by demographic changes and parental resistance. The court found no evidence that the school district had committed any act of intentional discrimination, but rather that the authorities had implemented the 1970 plan in good faith.

The Court of Appeals again reversed. — F.2d — (1981). It held that the District Court's finding that the implementation of the 1970 order had created a unitary school

system was clearly erroneous. In reaching this decision, the court compared statistics concerning the racial composition of schools in the district in the 1969 and 1979 school years. These statistics indicate that there has been little lasting progress in achieving schools with balanced pupil populations. In 1969, 15 of 20 schools in the district had student populations 90% or more of one race; in 1979, 11 of 18 still were 90% or more of one race. The percentage of blacks in the system rose from 33% in 1969 to 40% in 1979. The court held that the District Court retained jurisdiction because these figures proved that the school authorities "had [Publisher's note: "had" should be "have". But see 453 U.S. at 1303.] failed to eliminate the continuing system wide effects of the prior discriminatory dual school system." *Id.*, at —.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers).

I cannot conclude that there is a "reasonable probability" four Members of the Court will vote to grant certiorari. The issues presented by petitioners are almost identical to those presented 3 years ago, when the Court voted to deny certiorari. Indeed, much of the school board's argument for granting a stay merely incorporates by reference JUSTICE REHNQUIST's opinion, joined by me, dissenting from the denial of certiorari at that time. Because this argument did not persuade the Court then, I cannot predict responsibly that it will persuade the Court now.

Speaking for myself, I believe that the case in its present posture merits review by this Court. The Court of Appeals, relying exclusively on statistics comparing 1969 and 1979, re-

jected with little explanation the District Court's finding of fact that the implementation of the consensual 1970 plan had created a unitary school system, and that the degree of segregation existing in 1980 was caused, not by any discriminatory action by the school authorities, but by demographic changes in the public school population and by private parental choice. The statistics relied on by the Court of Appeals do not address the legal effect of the implementation of [Publisher's note: There probably should be a "the" here.] 1970 order or the legal cause of the degree of present imbalance. These latter questions should determine whether the District Court retains jurisdiction over the local schools.

It seems to me that the Court of Appeals may have erred as a matter of law in failing to give appropriate recognition to the District Court's factual findings as to the cause of the lack of present integration. *Pasadena* made clear that once a unitary school system has been attained, the District Court no longer has jurisdiction to continue its oversight, respond to inevitable demographic changes, and attempt by judicial decree to maintain for an indefinite time what it perceives to be a desirable racial mix in the schools. This is not to say, of course, that a federal court should not respond forcefully to proof of fresh or continued racial discrimination.

In sum, it seems to me that there is an impasse between the District Court and the Court of Appeals as to the meaning of our decision in *Pasadena.* This is an important question of law. For this reason, I expect to vote to grant certiorari. Yet, I cannot say with confidence that the requisite number of other Justices will join me. Accordingly, the request for a stay is denied.

SUPREME COURT OF THE UNITED STATES

No. A-72

Charles A. Graddick, Attorney General of Alabama, Applicant, *v.* N.H. Newman et al.	))))	On Application for Stay.

[July 25, 1981]

JUSTICE POWELL, Circuit Justice.

Petitioner Charles A. Graddick, the Attorney General of the State of Alabama, has asked me as Circuit Justice to stay an order of the District Court for the Middle District of Alabama, entered July 15. The order directed the release of some 400 inmates in the Alabama prison system at midnight on July 24. The application for a stay was filed here on July 23. I entered a temporary stay and requested responses. Upon consideration, I now deny the application.

The history of this protracted litigation, involving conditions in the Alabama prison system, need not be reviewed here in detail. A brief summary will suffice to place the current issues in proper context. On more than one occasion the District Court has held specifically that the totality of conditions in the Alabama prison system, including but not limited to overcrowding, violates the rights of inmates under the Eighth and Fourteenth Amendments. See *Newman* v. *Alabama*, 349 F. Supp. 278 (MD Ala. 1972); *Pugh* v. *Locke*, 406 F. Supp. 318 (MD Ala. 1976); *James* v. *Wallace*, 406 F. Supp. 318 (MD Ala. 1976). In *Pugh* and *James*, the court ordered far-reaching injunctive relief, and enjoined the defendants from failing fully to implement it. The defendants in those cases were the State of Alabama; the Governor of Alabama, George C. Wallace; the Commissioner of Corrections; the Deputy Commissioner of Corrections; the Mem-

bers of the Alabama Board of Corrections; the State Board of Corrections; and Wardens at various State Institutions. On consolidated appeal, the Fifth Circuit upheld most of the relief prescribed in the various orders of the District Court. *Newman* v. *State of Alabama*, 559 F.2d 283 (CA5 1977). But it also held that certain terms of the order in *Pugh* and *James* must be modified, and it ordered dissolution of the injunction entered against Governor Wallace. This Court granted certiorari on the limited question whether suits against the State of Alabama and the Alabama Board of Corrections were barred by the Eleventh Amendment. We held that they were. *State of Alabama* v. *Pugh*, 438 U.S. 781 (1978). Our decision therefore restricted the defendant parties to those persons "responsible for the administration of [Alabama] prisons." *Ibid.*

As a result of the decisions by this Court and by the Court of Appeals, the State of Alabama, the Governor of Alabama, and the Alabama Board of Corrections were dismissed as parties. Nonetheless, the District Court retained jurisdiction, and it continued to enter orders and decrees affecting various areas of compliance.

In February 1979, the District Court entered an order naming Fob James, the Governor of Alabama, as Receiver of the Alabama Prison System. The order provided that all powers, duties, and authority of the Alabama Board of Corrections were transferred to the Receiver. After James' appointment as Receiver, the Alabama Legislature abolished the Alabama Board of Corrections and transferred its powers, duties, and authority to the Governor of Alabama. See Ala. Code §§ 14-1-15, 14-1-16 (Supp. 1980). Thus, both by court order and by Alabama law, responsibility for the maintenance of Alabama prisons rests in Fob James, in his capacity as receiver in one instance and in his capacity as governor in the other.

On October 9, 1980, the District Court found, based on the agreement of the parties, that the Alabama prison system had failed to achieve compliance with standards provided in prior judicial orders. By order of that date, the court established

deadlines for the achievement of certain levels of compliance. At a hearing on May 18, 1981, it was stipulated that thoses [Publisher's note: "thoses" should be "those".] deadlines had not been met. On the contrary, it was established that overcrowding had grown more severe. Although the District Court took no immediate remedial action, on May 20 it ordered the Alabama Department of Corrections and the Receiver to submit a list of prisoners "least deserving of further incarceration." On July 15, it entered the order at issue here, granting a writ of habeas corpus directing the release of some 400 named inmates, all of whom normally were entitled to be released no later than January 8, 1982.

On July 16, the petitioner Charles A. Graddick, the Attorney General of Alabama, made his first appearance in the litigation. He filed papers in the District Court seeking to intervene as of right as a party defendant, and sought a stay of the order granting the writ of habeas corpus. On July 17, Governor Fob James, in his capacity as Receiver, moved to dismiss all motions filed by Attorney General Graddick. The District Court set the Attorney General's motions for hearing on August 6, but declined to stay its order directing release of the 400 inmates on July 24. On July 22, Attorney General Graddick filed a notice of appeal with the Court of Appeals for the Fifth Circuit. He also requested a stay pending appeal. The Court of Appeals denied the stay on July 23. Following this denial, Attorney General Graddick filed his application for a stay with me as Circuit Justice.

The standards governing the grant of this relief are well established. See *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers). These include a requirement that the applicant show himself to be threatened with irreparable injury if the stay is not granted pending appeal.

In his petition, the Attorney General avers that "the people of the State of Alabama" will incur irreparable injury unless a stay is granted. But he makes no showing that he is the proper official to assert that claim. As indicated above, responsibility for the administration of the Alabama prison

system is vested in Fob James, pursuant both to judicial decree and Alabama statute. Governor James affirmatively supports the release order of the District Court and opposes any stay thereof. Attorney General Graddick presents no state-law basis for his attempt to assert the rights of Alabama citizens generally. See *Baxley* v. *Rutland*, 409 F. Supp. 1249, 1257 (MD Ala. 1976) (three-judge court) (common law powers of Alabama Attorney General insufficient to support standing to represent citizen interests in federal court). Moreover, Attorney General Graddick makes no allegation that he, either as an official or as a citizen of the State of Alabama, will suffer any individualized injury.

Attorney General Graddick has failed to show that he has standing to seek the relief that he requests. In addition, the Governor of Alabama—who has been vested by the State's legislature with official authority over the State's prison system—apparently is satisfied that the people of Alabama will suffer no irreparable injury by virtue of the District Court's order.

Accordingly, the request of the Attorney General for a stay is denied. I therefore do not reach the substantial issues that he seeks to raise on the merits. These include, but are not limited to, the propriety of the District Court's use of the writ of habeas corpus as a class remedy for prison overcrowding.

[Publisher's note: See 453 U.S. 1306 for the authoritative official version of this opinion.]

METROPOLITAN COUNTY BOARD OF EDUCATION ET AL. *v.* KELLEY ET AL.

ON MOTION TO VACATE STAY

No. A-144. Decided August 20, 1981

The motion of Nashville, Tenn., school officials to vacate the Court of Appeals' stay, pending appeal to that court, of the District Court's order, which substantially modified its earlier school desegregation order, is denied. The changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented.

JUSTICE STEVENS.

Pursuant to the Rules of this Court, the motion of the Metropolitan Nashville Board of Education to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit on August 19, 1981, has been referred to me for decision. The movants have persuaded me that I have jurisdiction to vacate the stay entered by the Court of Appeals, but for the following reasons I have decided not to do so.

The District Court order of April 17, 1981, that has been stayed by the Court of Appeals substantially modifies the desegregation order that had previously been in effect in Davidson County, Tenn. The plaintiffs filed an appeal from the April 17 order and, after hearing oral argument in connection with the plaintiffs' application for a stay, the Court of Appeals expressed the opinion that the changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented. I share that opinion.

Although, as the Board of Education has pointed out, the stay will cause significant expense and inconvenience to the community, because the interim order will affect 21 elementary schools, 6 middle schools and 3 high schools immediately, and also will have an impact on the permanent plan sched-

uled to go into effect in 1984, it seems to me that even greater inconvenience might result if the plan were to go into effect forthwith and be modified or set aside at a later date when the Court of Appeals reviews its merits. The Court of Appeals has greater familiarity with the case than it is possible for me to have in the brief time I have had to examine the papers that have been filed with me; for the purpose of my action I accept the correctness of that court's determination that there is a likelihood that plaintiffs will prevail on their appeal. If that be so, it seems to me that in the long run there will be less inconvenience and hardship to all parties if appellate review is had prior to the implementation of the interim order of the District Court. Accordingly, the motion of the Board of Education to vacate the stay is denied.

[Publisher's note: See 453 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-230

City of Los Angeles et al., Applicants,)
v.) On Application for Stay.
Adolph Lyons.)

[September 29, 1981]

JUSTICE REHNQUIST, Circuit Justice.

The Court of Appeals, in its most recent opinion in this case, rested its holding on the proposition that "[t]his court will not disturb an order granting a preliminary injunction unless it was an abuse of discretion by the District Court." App., Ex. 5. This proposition, of course, is not only in accord with its own precedents cited in the opinion, but with our own cases on the subject. See, *e.g.*, *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). If that were all the case involved, there would be so little likelihood that four Members of this Court would grant certiorari that no further discussion would be necessary and the applicant's request for a stay would be denied.

But, as I understand the matter, there is a good deal more to this case than the most recent opinion of the Court of Appeals issued August 17, 1981. The preliminary injunction referred to in that opinion was issued by the District Court only after its earlier partial summary judgment in favor of the applicants had been reversed by the Court of Appeals in *Lyons* v. *City of Los Angeles*, 615 F.2d 1243 (CA9), cert. denied, 449 U.S. 934 (1980) (*Lyons I*).

In its opinion in *Lyons I*, the Court of Appeals held that respondent had standing to challenge the use by members of the City of Los Angeles Police Department of so-called "choke-holds" in situations that are not life threatening. *Id.*,

at 1246-1249. Because respondent had once been the subject of such a "choke-hold," the Court of Appeals held that respondent had standing to seek an injunction, even though there was no indication that he would ever be subjected to them again by reason of an arrest by Los Angeles police officers. "[T]he threat of future injury to not only Lyons, but to every citizen in the area is much more immediate than those described in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), or *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)." *Id.*, at 1246.

The Court of Appeals in *Lyons I* also held that respondent's request for injunctive relief was not moot. "Lyons once had a live and active claim meeting all the Article III requirements . . . if only for a period that lasted but a few seconds. That period could be described as the time between the moment he was stopped and the moment the strangle hold was applied, or even the split second between the moment the officer moved to grab him and the moment the strangle hold was applied." *Id.*, at 1248. The Court of Appeals also explained that Lyons' claim is one that is "capable of repetition, yet evading review," even though a "future recurring controversy [will] have but a small chance of affecting the original plaintiff."

On remand, the United States District Court entered the following temporary injunction:

> "It is ordered that defendants are hereby enjoined from the use of both the carotid artery and bar arm holds under circumstances which do not threaten death or serious bodily harm.
>
> "It is further ordered that this injunction is effective . . . and shall continue in force until this Court approves a training program presented to it. Such program shall consist of a detailed written training manual, prepared by qualified individuals, in addition to appropriate, practical training sessions for the members of the Los Angeles Police Department.
>
> "It is further ordered that defendant City of Los Angeles establish a requirement, forthwith, that all appli-

> cations of the use of the holds in question, *even under the conditions permitted by this order*, to wit, the death or serious bodily harm situation, be reported in writing to said defendant within 48 hours after the use of such holds.
>
> "It is further ordered that defendant City of Los Angeles shall maintain records of such reports in an orderly fashion, and shall allow this court ready access to such records upon 24 hours [Publisher's note: There should be an apostrophe after "hours".] notice." App., Ex. 4 (emphasis added).

It was this latter "preliminary injunction" that the Court of Appeals affirmed in its most recent *per curiam* opinion issued August 17, 1981. Respondent, in opposing this stay of that judgment of the Court of Appeals, states that "[t]he question of Lyons' standing to sue was settled in *Lyons I*." Response, at 2. This is undoubtedly quite true insofar as the Court of Appeals for the Ninth Circuit is concerned, but *Lyons I* is not "law of the case" so far as this Court is concerned. The city petitioned for certiorari to review *Lyons I*, but its petition was at that time denied with JUSTICE WHITE, JUSTICE POWELL, and I dissenting. *City of Los Angeles* v. *Lyons*, 449 U.S. 934 (1980).

I am of the opinion that since the District Court has now formulated the specific terms of an injunction, and held the use of the so-called "choke-holds" unconstitutional except in life-threatening situations, there is a substantial likelihood that an additional member of this Court would now join JUSTICE WHITE's dissent from denial of certiorari in *Lyons I*, thereby resulting in a grant if the city, as it proposes to do, files a timely petition for certiorari by December 9, 1981. The issue to be reviewed, of course, is not whether a preliminary injunction should be affirmed on appeal unless it represents an abuse of discretion, but whether respondent has standing to maintain this action. On this issue, I think there is enough difference in the approach of the Court of Appeals in this case and the approach of this Court in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Rizzo* v. *Goode*, 423 U.S.

362 (1976), to offer applicants a reasonable chance of success on the merits should the Court grant certiorari. I likewise think that the Court of Appeals' "capable of reptition [Publisher's note: "reptition" should be "repetition".] but evading review" discussion with respect to mootness is not entirely consistent with this Court's opinion in *Weinstein* v. *Bradford*, 423 U.S. 147, 150 (1975).

Applicants assert that "the effect of the District Court's order will be to cause more injuries to and deaths of suspects," because "police officers will be unequipped to deal with the day-to-day handling of violent arrestees who do *not* threaten death or serious bodily harm." Application, at 12-13. Respondent argues to the contrary, since he claims that the applicant City of Los Angeles may obtain relief from the preliminary injunction merely by properly reforming its training practices "to assure that its police officers understand how dangerous strangulation is and when its officers should strangle." Response, at 18. I find it both unnecessary and probably impossible to decide which of these forecasts, if either, will prove true.

Respondent urges that I should not act on this stay, because the applicants' request for a stay is nothing more than a petition for rehearing of the earlier denial of certiorari by this Court and therefore our Rule 51 prevents me from granting a stay. I am not persuaded by this argument. In *Lyons I*, the Court of Appeals stated that:

> "We note that the appellant in no way asks for a complete prohibition on the use of the strangle hold. He only seeks to restrain its use to situations where it is constitutional. In what circumstances the use of the strangle hold is constitutional is, of course, a judgment for the District Court to make." *Lyons* v. *City of Los Angeles*, *supra*, at 1244, n. 1.

The District Court has now made that judgment, and entered an injunction forbidding its use except under certain circumstances. The order requires recordkeeping and that such records be made available to the District Court upon its request. The case has thus progressed considerably further toward

final resolution than it had at the time certiorari was denied in *Lyons I*.

The complaint alleging the use of these police tactics was filed on February 7, 1977, and the City's petition for certiorari is due by December 9, 1981. Thus, what is basically involved in a consideration of traditional "stay equities" is whether the City shall be allowed to use a particular procedure, already in use for at least four years, for the few additional months before this Court acts on its petition for certiorari. I conclude that there is sufficient doubt about the correctness of the basic holding of the Court of Appeals with respect to standing on the part of respondent, together with sufficient equities in favor of the City, to warrant a stay of the Court of Appeals' order affirming the District Court's granting of an injunction, pending a timely filing of a petition for certiorari by the applicants and the disposition thereof by this Court.

It is so ordered.

[Publisher's note: This opinion was typed on plain sheets of paper.]

October 2, 1981

California v. Winson, No. A-270

Opinion of Justice Rehnquist accompanying denial of application for stay.

The State of California seeks a stay of a decision of the Supreme Court of California holding the transcript of a preliminary hearing inadmissible in a proceeding to revoke respondent's probation. The application states that unless a stay is granted, the State will be denied an opportunity to challenge the ruling in this Court. This, of course, is not the case; the State may, like any other losing litigant, petition this Court for certiorari under 28 U.S.C. § 1257 without first obtaining a stay. The State also claims that unless the stay is granted, "this case will be sent back to the trial court where any further revocation proceedings will be dismissed." Application 4. I construe this to mean no more than that the State will be unable to proceed with any further revocation proceedings unless the judgment of the Supreme Court of California is reversed after this Court has granted a petition for certiorari and considered the merits of this case. There is no suggestion that in the absence of a stay, respondent will flee the jurisdiction or that the State will suffer other irreparable harm. Whatever the merits of the interpretation of the United States Constitution by the Supreme Court of California, they may be presented by the State in due course in a petition for

certiorari. Absent more urgent allegations of harm to the State resulting from the normal delay in our consideration of such petitions, I decline to grant the State's application for a stay.

[Publisher's note: See 454 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-417 (81-847)

ROBERT MORI AND SAM POLINO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPLICANTS, *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, ETC.

ON APPLICATION FOR STAY

[November 23, 1981]

JUSTICE REHNQUIST, Circuit Justice.

The decision of the Court of Appeals for the Ninth Circuit in this case, the mandate of which I have been asked to stay, turns upon the construction of § 411(a)(3)(A) of Title 29 of the United States Code:

> "Except in a case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> "(A) in the case of a local labor organization, (i) by majority vote by *secret* ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by *secret* ballot." (Emphasis supplied.)

A convention of the International Union was held in August 1977 at which a majority of the delegates adopted a new dues structure applicable only to field construction members. The balloting was not secret. The new dues structure re-

quired payment of not less than two percent of gross income to the Local as a "field dues supplement" to regular Local dues, unless the International President approved payment of a lesser amount. These amendments, which were incorporated into Art. XX of the International's Constitution, also established an additional dues requirement of one half of one percent of gross wages, to be collected by the Local and forwarded to the International.

At the beginning of the following year, respondent Local 6 collected from the plaintiffs field dues of two percent of gross earnings plus regular dues of $13 per month. The membership of Local 6 has never approved the increase of field dues, and has attempted to adopt bylaws excluding the new field dues requirement. The membership also unsuccessfully sought permission from the President of the International to halt the collection of the supplemental dues. Pet. A-2, A-3.

Applicants contend that this action on the part of the International violated the above quoted [Publisher's note: "above quoted" should be "above-quoted".] provisions of Title 29, and have lodged with this Court a petition for certiorari setting out the reasons why the writ should be granted. The Court of Appeals decision in this case, which upheld the validity of the dues increase, is supported by *Raines* v. *Office Employees Union Local 28*, 317 F.2d 915 (CA7 1963), and by dicta in *Local 2, International Brotherhood of Telephone Workers* v. *International Brotherhood of Telephone Workers*, 362 F.2d 891 (CA1), cert. denied, 385 U.S. 947 (1966). It seems to me to be contrary to the decision of the Court of Appeals for the Fifth Circuit in *Steib* v. *New Orleans Clerks and Checkers Local 1497*, 436 F.2d 1101 (1971).

In my opinion, there is a strong probability that four Justices of this Court would vote to grant applicants' presently pending petition. The funds held in escrow, now totalling somewhere in the neighborhood of $150,000, would be very difficult to recover should applicants' stay not be granted. Since I believe that applicants have a reasonable probability

of success on the merits, and the balance of equities weighs heavily in their favor,

It is ordered that the applicants' application for stay of mandate of the United States Court of Appeals for the Ninth Circuit be, and hereby is, granted until consideration and disposition of their petition for certiorari to review the judgment of the Court of Appeals in this case.

[Publisher's note: See 454 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-480

J. ELWOOD CLEMENTS AND CAROL J. SACHTLEBEN *v.* LUCY N. LOGAN

ON REAPPLICATION FOR STAY

[December 9, 1981]

JUSTICE REHNQUIST, Circuit Justice.

Applicants, a former sheriff of Arlington County, Virginia, and a deputy sheriff, ask that I stay the mandate of the United States Court of Appeals for the Fourth Circuit remanding this case to the District Court following the Court of Appeals' holding that a policy of strip searches implemented at the Arlington County Detention Center is unconstitutional. This request was denied by THE CHIEF JUSTICE, and a reapplication has been addressed to me. For the reasons that follow, I have referred the reapplication to the full Court at its next regularly scheduled Conference and I have temporarily stayed the mandate of the Court of Appeals pending the Court's disposition of the stay request.

The events that prompted this suit began with respondent's arrest on suspicion of driving while intoxicated following a two-car collision. Respondent failed several field tests for intoxication and she was taken by police cruiser to the Arlington County Detention Center for administration of a breathalyzer examination. Respondent, an attorney, refused to take the test until allowed to telephone a friend who was also an attorney. She persisted in this demand despite being informed by the investigating officer and a magistrate before whom she appeared that she had no right to contact an attorney under Virginia's implied consent statute, Va. Code § 18.2-268 (1975 and Cum. Supp. 1981). The magistrate issued two warrants against respondent, one for driving while intoxicated and the other for refusing to submit to a breatha-

lyzer test.[1] The magistrate authorized respondent's release on her own recognizance on the condition that a responsible person come to the Detention Center to assume custody. The magistrate's office did not have a phone available for respondent's use, but she was informed that she could make a call upon commitment to jail. The arresting officer then transferred custody of respondent to applicant Carol Sachtelben [Publisher's note: "Sachtelben" should "Sachtleben".], a deputy sheriff.

Prior to respondent's arrest, applicant Clements, at that time the sheriff, had instituted a policy requiring deputies to conduct visual strip searches of all persons held at the Center in order to discover whether weapons or contraband were being concealed. This policy was adopted after the shooting of a deputy by a misdemeanant who had not been strip-searched. Pursuant to this policy, applicant Sachtelben [Publisher's note: "Sachtelben" should "Sachtleben".] first inventoried respondent's personal property and then took her to a holding cell where she conducted a visual strip search.[2] Respondent was then allowed to call her friend, and eventually was released into her friend's custody.

Respondent subsequently brought suit for damages and injunctive relief under 42 U.S.C. § 1983, alleging an assortment of constitutional violations. She complained of (1) denial of the assistance of counsel; (2) unjustified detention following establishment of the conditions of release; and (3) the sheriff's policy of administering strip searches of all persons held at the Detention Center without reasonable cause to suspect concealment of weapons or contraband. The com-

[1] Under Virginia law, driving while intoxicated is a Class 2 misdemeanor, punishable by imprisonment for up to six months and a fine of $500. Va. Code §§ 18.2-270, 18.2-11 (1975). Unreasonable refusal to submit to a breathalyzer test is punishable as a first offense by mandatory suspension of the driver's license for 90 days. Repeat offenses are punishable by imprisonment for six months. *Id*. § 18.2-268(n).

[2] Respondent was asked to remove her clothing, one garment at a time, to hand them to the deputy, and to turn around for visual inspection. Respondent complied and her clothes were immediately returned to her.

plaint named as defendants the arresting officer, a correctional officer at the Detention Center, several deputy sheriffs (including applicant Sachtelben [Publisher's note: "Sachtelben" should "Sachtleben".]), three magistrates, the Commonwealth Attorney for Arlington County, applicant Clements, the current Sheriff Gondles, and Arlington County. Several claims were dismissed prior to trial, directed verdicts were entered as to others in favor of the defendants, and after posttrial briefing, the District Court entered judgment for defendants on those claims that remained. *Logan* v. *Shealy*, 500 F. Supp. 502 (ED Va 1980). In particular, the court held that the policy of conducting strip searches did not violate the Fourth Amendment. *Id.*, at 506.

The Court of Appeals for the most part affirmed, but it reversed on the issue of strip searches. *Logan* v. *Shealy*, 660 F.2d 1007 (CA4 1981). The court purported to rely on the standard for judging the reasonableness of searches expressed in *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), which requires consideration of "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." The court concluded:

> "On the undisputed and stipulated evidence, Logan's strip search bore no such discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified. At no time would Logan or similar detainees be intermingled with the general jail population; her offense, though not a minor traffic offense, was nevertheless not one commonly associated by its very nature with the possession of weapons or contraband; there was no cause in her specific case to believe that she might possess either; and when strip-searched, she had been at the Detention Center for one and one-half hours without even a pat-down

> search. An indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations." 660 F.2d, at 1013.

The court remanded with directions to enter a permanent injunction against enforcement of the policy.[3] The court also reversed directed verdicts in favor of applicants and remanded with instructions that judgment be entered against them "for all damages determined by a jury to have been proximately caused by the strip search, unless those defendants can establish before a jury their respective defenses of good faith immunity (or any others available to them) in accordance with [the court's] opinion." *Id.*, at 1014. Applicants unsuccessfully sought a stay from the Court of Appeals. A similar request was denied by the THE CHIEF JUSTICE, and the present reapplication was delivered to me on December 8, 1981. Without a stay, trial of the damage claims against applicants will commence on December 9.

Applicants for a stay bear a heavy burden of demonstrating the need for exercise of the equitable power conferred on a Circuit Justice by 28 U.S.C. § 2101(f). That burden is heavier still if the request for a stay has previously been de-

[3] The jurisdiction of the Court of Appeals to order the issuance of a permanent injunction is, I think, open to serious question. Although respondent has suffered an injury sufficient to establish her standing to seek damages, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. . .if unaccompanied by any continuing, present adverse effects." *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974). As *O'Shea* makes clear, standing to seek injunctive relief depends on a showing of "a real and immediate threat of repeated injury." *Id.*, at 496. Respondent has not alleged that she anticipates being arrested again and again subjected to a strip search at the Arlington County Detention Center. Even if she had made such an allegation, it would "[take] us into the area of speculation and conjecture." *Id.*, at 497. See *Rizzo* v. *Goode*, 423 U.S. 362, 371-373 (1976).

nied by a member of this Court. See, *e.g.*, *New York Times Co.* v. *Jascalevich*, 439 U.S. 1331, 1337 (1978) (MARSHALL, J., in chambers); *Republican State Central Committee* v. *The Ripon Society*, 409 U.S. 1222, 1227 (1972) (REHNQUIST, J., in chambers). While THE CHIEF JUSTICE is not entitled to a presumption that by virtue of his office he knows more law than the other members of the Court, it is presumed that he knows at least as much, and his denial of relief "counsels circumspection." *Republican State Central Committee*, *supra*, at 1227.

After consideration of the reapplication and the response, I have concluded that the issues involved warrant consideration by the full Court. This opportunity will arise at the next regularly scheduled Conference on Friday, December 11. Nevertheless, that date is several days in the distance and, more importantly, the proceedings that applicants seek to stay will commence in the interim in the absence of a stay. As a result, I think it is incumbent on me to exercise my authority as Circuit Justice to determine how the matter shall remain until it can be considered by the full Court. See *Evans* v. *Atlantic Richfield Co.*, 429 U.S. 1333, 1334 (1976) (REHNQUIST, J., in chambers).

In my view, the decision of the Court of Appeals is so at odds with this Court's resolution of a similar issue in *Bell* v. *Wolfish*, *supra*, that its mandate ought to be stayed temporarily pending consideration by the full Court. *Bell* v. *Wolfish* was a class action initiated by inmates of a federally operated short-term detention facility challenging the constitutionality of numerous conditions of confinement and related administrative practices. The facility was primarily used to house persons charged with a crime but not yet brought to trial. One of the challenged practices was the requirement that inmates submit to a strip search and visual inspection of their body cavities after every contact visit with someone from outside the institution. This Court ultimately held that under the circumstances, such searches were not

unreasonable under the Fourth Amendment. 441 U.S., at 558-560. Rather, they were "reasonable responses . . . to legitimate security concerns," *id*., at 561, and could be conducted in the absence of probable cause, *id*., at 560.

The Court of Appeals recited from *Bell* v. *Wolfish* the general standard by which searches are judged under the Fourth Amendment, but it chose to ignore the Court's application of that standard to the practice of conducting strip searches of persons detained after being charged with a crime. Respondent in this case was arrested and charged by a magistrate with driving while intoxicated and unlawful refusal to submit to a breathalyzer examination.[4] The magistrate authorized her release from the Detention Center only when a responsible individual arrived to take custody. Until that time, respondent remained officially under arrest and subject to those measures adopted for the maintenance of internal security at the jail. Her position was no different, for constitutional purposes, from the pretrial detainees in *Bell* v. *Wolfish.* If anything, the detainees in that case were subject to more onerous conditions, given the greater intrusiveness of a body cavity search. The Court nevertheless upheld such searches "in the light of the central objective of prison administration, safeguarding institutional security." *Id*., at 547.

The Court of Appeals gave little or no weight to that objective. The clear import of its decision is that strip searches may not be conducted without probable cause to believe that the subject of the search possesses weapons or contraband. No such requirement attended the search policy upheld in *Bell* v. *Wolfish*, and indeed the Court expressly held that strip searches need not be conditioned on probable cause. *Id*., at 560. Nor was the result in *Bell* v. *Wolfish* predicated on a showing that searches were limited to those persons whose alleged offenses were "commonly associated by [their] very nature with the possession of weapons or contraband."

[4] See note 1, *supra.*

660 F.2d, at 1013. In short, the Court of Appeals decision reads as if *Bell* v. *Wolfish* had never been decided. Much as that may have been the desire of the lower court, the decision is authoritative precedent and I believe it clearly dictates a contrary result in this case.

In view of the Court of Appeals' attempt to distinguish a decision of this Court which to me seems clearly applicable to the case before it, I believe there is substantial likelihood that the full Court will grant a stay pending disposition of the petition for certiorari. A delay in the proceedings until the Court has an opportunity to consider the application will not prejudice respondent, and it will forestall the expense and effort of a trial until the legal basis for further proceedings is clarified. Accordingly, the mandate of the Court of Appeals is hereby stayed temporarily, pending consideratiuon [Publisher's note: "consideratiuon" should be "consideration".] of the application for a stay by the full Court at the next regularly scheduled Conference.

[Publisher's note: See 455 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-768

REPUBLICAN NATIONAL COMMITTEE, TIRSO DEL JUNCO, CHAIRMAN, CALIFORNIA REPUBLICAN PARTY *v.* PHILLIP BURTON, ET AL.

ON APPLICATION FOR STAY

[March 11, 1982]

JUSTICE REHNQUIST, Circuit Justice.

Applicants ask that I stay, pending their appeal therefrom, the judgment of the Supreme Court of California entered on January 28, 1982, in mandate proceeding S.F. No. 24354. That proceeding concerns certain redistricting statutes enacted by the California Legislature in response to the 1980 decennial census which allotted California two additional congressional seats, the effect upon such statutes of a petition calling for their review in a state-wide referendum, and the congressional districts to be used by the State in the interim. The California Supreme Court held that the referendum petition effectively suspended the operation of the redistricting statutes, but that the June 8, 1982 primary election nonetheless should be conducted in accordance with the district boundaries set forth in those statutes.

Applicants argue that the June election should be conducted according to district boundaries in effect prior to the 1980 census, with the two new seats to be filled by at-large elections. They contend that the California Supreme Court erred when it held that 2 U.S.C. § 2c, which requires that each representative be elected from a separate district, superseded 2 U.S.C. § 2a(c)(2), which requires that newly allotted seats be filled by at-large elections if the State has not completed redistricting. Applicants assert that this holding merits review by this Court, and they present such arguments in a Jurisdictional Statement filed simultaneously with

this application.

Even if the applicants are correct in their contention that the California Supreme Court wrongly interpreted the effect of § 2c—a question on which I express no opinion—I think it is highly unlikely that this Court will give plenary consideration to their appeal. In addition to construing provisions of the United States Code, the decision of the California Supreme Court recites several state-law reasons for its holding that the boundaries of the new redistricting scheme should be followed in the June election.[*] Thus, the judgment appears to be based on adequate and independent state grounds. Of course, this Court has no jurisdiction to review decisions based on adequate, nonfederal grounds. *Zacchini* v. *Scripps-Howard Broadcasting Co*., 433 U.S. 562, 568 (1977); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281 (1961). Accordingly, the application for a stay of the judgment is denied, and the application for expedited oral argument is referred to the full Court.

[*] It does not appear that a contrary holding on the federal statutory question would alter the validity of the state grounds, for 2 U.S.C. § 2a(c)(2) by its terms applies only "[u]ntil a State is redistricted *in the manner provided by the law thereof*." (Emphasis added.)

[Publisher's note: See 455 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-783

ALAN J. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL.
v. GEORGE T. DAGGETT, ET AL.

ON APPLICATION FOR STAY

[March 15, 1982]

JUSTICE BRENNAN, Circuit Justice.

Applicants, the Speaker of the New Jersey Assembly, the President of the New Jersey Senate, and eight Members of the United States House of Representatives from New Jersey, have applied to me for a stay pending this Court's review on appeal of the judgment of a three-judge District Court for the District of New Jersey entered March 3, 1982. The judgment declared unconstitutional New Jersey P.L. 1982, c. 1, which creates districts for the election of the United States Representatives from New Jersey, and enjoined the defendant state officers from conducting primary or general congressional elections under the terms of that statute.

On the basis of the 1980 decennial census, the number of United States Representatives to which New Jersey is entitled has been decreased from fifteen to fourteen. Consequently the New Jersey legislature was required to apportion fourteen congressional districts. P.L. 1982, c. 1 is the product of the state legislature's effort to meet that requirement. The District Court found that in drafting P.L. 1982, c. 1, the legislature was concerned not only with drawing districts of equal population as an "aspirational" goal but also with recognizing such factors as the preservation of the cores of pre-existing districts, the preservation of municipal boundary lines, and the preservation of the districts of incumbent Democratic Congressmen. P.L. 1982, c. 1 creates 14 congres-

sional districts with an overall absolute range of deviation of 3674 people and an overall relative range of deviation of 0.6984% from the "ideal" map of 14 districts of 526,059 persons each. There were, however, several other proposals brought before the legislature that yielded total deviations less than 0.6984%. The opinion for the majority of the District Court says of these:

> "For example, the Roeck plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco plan . . . had a total deviation of .1253%. The Hardwick plan . . . contained a total deviation of .4515%. The Bennett plan. . . and the Kavanaugh plan . . . contain total deviations of .1369% and .0293% respectively."

All three judges of the District Court agreed that the constitutionality of P.L. 1982, c. 1 was to be determined under the standard announced in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and its progeny, *e.g.*, *White* v. *Weiser*, 412 U.S. 783 (1973). But the judges divided 2 to 1 on what that standard is. The majority read *Kirkpatrick* as holding that, even if .6984% was to be regarded as a *de minimis* variance,

> "P.L. 1982, c. 1 can withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality. . . .' *Kirpatrick*, [Publisher's note: "*Kirpatrick*" should be "*Kirkpatrick*".] 394 U.S. at 531. It is clear that the .6984% population deviation of P.L. 1982, c. 1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%."

The dissenting judge, on the other hand, read *Kirkpatrick* to suggest:

> "[V]ariances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with

> that of voters in smaller districts. . . . [*Kirkpatrick* is to be read to announce] a prohibition against toleration of *de minimis* dilutions of relative representation rather than as a prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category."

The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision.

The principles that control my determination as Circuit Justice of this in-chambers application were stated in *Rostker* v. *Goldberg*, 448 U.S. 1306 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable

> harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1308 (citations omitted).

The importance of a definitive answer from this Court as to the proper interpretation of the *Kirkpatrick* standard is self-evident: Doubtless all 50 states would be assisted by that answer in any review of the apportionment of congressional seats in consequence of the 1980 census. My task is not to adjudicate this application on my own view of the merits of that question, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction of this appeal, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless it does seem to me that there is a reasonable probability that jurisdiction of the appeal will be noted, and that there is a fair prospect of reversal.

As to the third *Rostker* requirement, I conclude that appellants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the Legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans are to be preferred to judicially constructed plans.

Accordingly, I am today entering an order granting appellants' application for a stay pending the filing of a jurisdictional statement and, if probable jurisdiction is noted, final disposition of the appeal.

[Publisher's note: See 458 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-130

WILLIAM MELVIN WHITE *v.* FLORIDA

ON APPLICATION FOR STAY

[August 13, 1982]

JUSTICE POWELL, Circuit Justice.

William White has requested me as Circuit Justice to stay the judgment and mandate of the Supreme Court of Florida pending filing and disposition of his petition for a writ of certiorari. A state trial court convicted White of first degree murder and sentenced him to death. The Florida Supreme Court upheld both the conviction and sentence. It denied rehearing on July 8, 1982, and stayed the mandate until August 9, 1982, requiring White to seek any further stay from this Court.

In his application for a stay, filed by counsel, White states that he intends to file a petition for a writ of certiorari because the judgment affirming his conviction and sentence is "in violation of [the] rights secured by the Constitution of the United States." His application does not suggest any more specific basis for seeking the writ. The only reason advanced by White for staying the mandate is that, absent a stay, administrative proceedings culminating in the execution of his sentence will be instituted on August 9. The state has responded, however, that the threat of execution is not imminent. No execution date has been set, and the state does not contemplate that one will be set in the near future.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four

> members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers).

See *Karcher* v. *Daggett*, — U.S. — (1982) (BRENNAN, J., in chambers); *Whalen* v. *Roe*, 423 U.S. 1313, 1316-17 (1975) (MARSHALL, J., in chambers). Although White's application establishes that he may suffer irreparable harm at some point in the future, there is no indication that the harm is imminent. Additionally, White's application does not specify either the issues for which certiorari will be sought or the reasons why review is appropriate. In the absence of such information, I am unable to determine whether there is a reasonable probability that four members of the Court would find that this case merits review. Because there is no threat of imminent harm and no basis for determining whether certiorari would be granted, the request for a stay is denied.

[Publisher's note: See 458 U.S. 1303 for the authoritative official version of this opinion, which identifies Justice Rehnquist as its author.]

SUPREME COURT OF THE UNITED STATES

No. A-208

ARTURO BELTRAN *v.* WILLIAM FRENCH SMITH ET AL.

ON APPLICATION FOR STAY

[August 26, 1982]

Applicant Arturo Beltran, a former member of the Nuestra Familia criminal organization, is currently incarcerated in the Metropolitan Correction Center in San Diego on the basis of several criminal convictions in state courts. Because Beltran is cooperating with state and federal authorities by testifying in pending prosecutions, and because federal officials have determined that his cooperation has created a risk to him, he is in federal custody in the witness protection program. *See* 18 U.S.C. § 5003; Organized Crime Control Act of 1970, Title V, §§ 501-03 of the Act of Oct. 15, 1970, P.L. No. 91-452, 84 Stat. 933, note preceeding 18 U.S.C. § 3481.

In July, 1982, federal officials decided to transfer Beltran to another federal facility where he would remain in the witness protection program. On July 20, Beltran filed a complaint for declaratory relief and an application for a temporary restraining order in the Southern District of California. The district court entered a T.R.O. and set a hearing for the next morning. Between July 22 and July 30, the court held three hearings and received extensive briefs.

Beltran contended in the district court that he would be in more danger at any other facility than at San Diego, in part because he would have to return to California to testify and the trips back and forth would be dangerous. He also claimed that he was entitled to remain in San Diego under the terms of his plea bargain with state officials. On July 30, the

district court denied a preliminary injunction. It ruled from the bench that Beltran had not demonstrated the requisite irreparable injury. Although there would be an added danger from the additional movement that the transfer would require, the court held that there was no indication that the federal officials charged with his movement would not take all necessary precautions, and that the added risk does not rise to immediate irreparable harm.

Beltran appealed to the court of appeals and sought a stay pending appeal. On July 30, the court of appeals granted a temporary stay and ordered the government to file a response. On August 24, the court of appeals vacated its temporary stay, denied a motion for an injunction pending appeal, and denied a motion for a temporary stay pending application to this Court. Beltran's appeal from the denial of the preliminary injunction remains pending in the court of appeals.

Beltran has applied to me in my capacity as Circuit Justice for an emergency stay while his appeal to the court of appeals is pending. Beltran fears that he will be killed if he is transferred. He states there is no guarantee that a new facility will offer him as much safety and security as his current location. Finally, Beltran claims that part of his security in his current location is based on his familiarity with prison personnel and inmates and that once he is moved he will be unable to return to M.C.C. San Diego and enjoy the same degree of safety because the prison's population and personnel will change in the interim.

There is always a risk that Beltran will be attacked; this is why he is in the witness protection program. Although Beltran may be correct that that risk will be increased if he is moved, there is no indication that the officials responsible for the program will not continue to provide him with protection under the terms of the program. Beltran has not submitted to me any evidence sufficiently compelling to overcome the conclusion of the courts below that any increased risk he may

bear does not rise to the level of irreparable injury. Indeed, Beltran's contentions are, in essence, that he is more comfortable and feels safer where he is than he would elsewhere. The Attorney General has authority to transfer Beltran from one facility to another in his discretion. 18 U.S.C. § 4082(b). In the light of the conclusions of the district court and the court of appeals, Beltran's claims are insufficient to justify me in interfering with the Attorney General's discretion to run the prison system. *See generally*, *Bell* v. *Wolfish*, 441 U.S. 520, 562 (1979).

For these reasons, the application is denied.

[Publisher's note: See 458 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-226

PAUL CORSETTI *v.* COMMONWEALTH OF MASSACHUSETTS

ON APPLICATION FOR STAY

[September 1, 1982]

JUSTICE BRENNAN, Circuit Justice.

Applicant has applied to me for a stay, pending this Court's review on certiorari, of the judgment of the Massachusetts Supreme Judicial Court affirming applicant's conviction of criminal contempt in the Massachusetts Superior Court and of the 90 day sentence imposed for such contempt.

The principles that control my determination as Circuit Justice of this in-chambers application were stated, in pertinent part, in *Rostker* v. *Goldberg*, 448 U.S. 1306 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. . . . In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari. . . . Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative

> harms to applicant and respondent, as well as the interests of the public at large."

My task is not to adjudicate this application on my own view of the merits of the federal questions presented, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issues sufficiently meritorious to grant the petition of certiorari, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless I have concluded that there is not a reasonable probability that certiorari will be granted, and that in any event there is not a fair prospect of reversal. Although applicant has demonstrated that he will suffer irreparable harm, he has not demonstrated that the balance of equities in his favor is sufficient to overcome my strong doubt that certiorari will be granted or, in any event, that the judgment will be reversed. Accordingly, the application is denied.

[Publisher's note: See 459 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-349
(In re Case No. 81-1893)

CALIFORNIA *v.* MARCELINO RAMOS

ON APPLICATION FOR STAY

[October 26, 1982]

JUSTICE REHNQUIST, Circuit Justice.

Respondent Marcelino Ramos was convicted of capital murder and sentenced to death in the California courts. The trial judge had, pursuant to state statute, informed the sentencing jury that a sentence of life imprisonment without possibility of parole may be commuted by the governor to a sentence that permits parole. The California Supreme Court vacated the death sentence and remanded for a new sentencing proceeding on the ground that Respondent was denied due process in violation of [Publisher's note: There should be a "the" here.] Fifth, Eighth, and Fourteenth Amendments.

In March 1982, the State of California applied for a stay of the California Supreme Court's judgment. I referred the application to the full Court, which denied the stay. In April, the State filed a petition for a writ of certiorari. On October 4, 1982, the Court granted the petition for certiorari, — U.S. — (1982), and California now has reapplied for a stay. It states that the new penalty proceeding is scheduled to begin on November 8, 1982. Respondent has stated that he does not object to issuance of a stay.

I have therefore decided that petitioner's motion for a stay pending disposition of the case by this Court should be granted.

It is so ordered.

[Publisher's note: See 459 U.S. 1302 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

KPNX BROADCASTING COMPANY ET AL. *v.* THE ARIZONA SUPERIOR COURT

ON APPLICATION FOR STAY

No. A-543. Decided December 23, 1982

JUSTICE REHNQUIST, Circuit Justice.

Applicants, KPNX Broadcasting Company and several reporters and courtroom sketch artists, ask that I stay two orders issued by the Superior Court of Maricopa County, Arizona. Respondents are reporting on a murder case presently being tried before one of the judges of that court in Phoenix. This is the third trial to arise out of the same murder; three accomplices have been convicted in two previous jury trials. The crime allegedly involves several conspiracies and other connections with organized crime, and has generated extensive publicity. Some members of the jury venire expressed a fear for personal and family safety if they were selected as jurors. The trial court responded that it would do whatever was possible to prevent their pictures from being displayed. Early in the course of this trial, a magazine in Phoenix published an article about one of the prosecuting attorneys.

The trial has been open to the public and press at all times. There has not been any restriction on the reporting of the proceedings in open court. The trial court has, however, entered two orders that "restrict" the press from covering the trial as it would like to do.

First, the trial court ordered court personnel, counsel, witnesses, and jurors not to speak directly with the press. The court appointed a court employee as "liason [Publisher's note: "liason" should be "liaison".] with the media" to provide a "unified and singular source for the media concerning these proceedings."

Second, on November 30th the trial judge observed two of the applicants, who are television sketch artists, drawing the jurors. The court ordered that all drawings of jurors that

are to be broadcast on television be reviewed by the court before being broadcast.

After the second order was issued, an organization calling itself the First Amendment Coalition sought a conference with the trial judge to object to these orders. Nothing was resolved at this conference, and the trial was then recessed until December 6. On that day, the "First Amendment Coalition" filed a petition for special action with the Supreme Court of Arizona, asking that court to vacate the two ordebs [Publisher's note: "ordebs" should be "orders".] and enjoin the trial judge from issueing [Publisher's note: "issueing" should be "issuing".] any similar orders. The Arizona Supreme Court dismissed this petition on December 8 on the ground that the First Amendment Coalition lacked standing and the petitioners had failed to join as parties the defendants in the murder trial.

On December 12, the present applicants filed a similar petition for special action and an application for a stay of the two orders. The following day, the Arizona Supreme Court denied the application for a stay and set the petition for oral argument for hearing on January 18. On December 14, the trial court held a hearing on applicants' standing to challenge the orders in that court. The trial court decided that applicants have standing, and set a hearing on their application to vacate the orders on December 17. The applicants also filed this application on December 17.

On December 20, the trial court entered an order explaining its earlier orders and declining to vacate them. With respect to the order that participants in the case not communicate with the press, the trial court stated that it had evaluated the press's First Amendment rights against the defendants' Sixth Amendment rights to a fair trial. It found that the least restrictive course of conduct that would protect the defendants' rights was to restrict the participants [Publisher's note: There should be an apostrophe after "participants".] outside contact with the press and appoint a court official to answer questions about the proceedings. As to the sketch order, the court held that the sketches of jurors by television artists were used in lieu of actual video recording of the jurors during the proceedings. It held that there is no constitutional right to broadcast pictures of the jurors, relying on *Chandler*

v. *Florida*, 449 U.S. 560 (1981), and *Nixon* v. *Warner Communications, Inc*., 435 U.S. 509 (1977).

Applicants contend that the order that trial participants not communicate with the press conflicts with *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), and with several decisions from the federal courts of appeals. Applicants contend there was no showing that the order was necessary to protect the defendants' right to a fair trial. Respondents contend that this order is supportable on the merits because the trial court has struck a proper balance between the defendats' [Publisher's note: "defendats'" should be "defendants'".] right to a fair trial and the press's First Amendment rights. They point out that nothing in the order limits the press's right to attend the trial and report anything they observe.

Applicants also contend that the order prohibiting broadcast of sketches of the jurors is an unconstitutional prior restraint. They contend the decision conflicts with *Stuart, supra*, and with the decisions of several state Supreme Courts. Respondents contend that this order is based on an interpretation of the Arizona Supreme Court's guideline concerning television coverage of trials. Since the order applies only to television, respondents contend that it is correct under *Chandler* v. *Florida*, 449 U.S. 560 (1981).

These facts seem to place the issues in the general area of constitutional law that is covered by our decisions in cases such as *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*, — U.S. — (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980); *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979); and *Nebraska Press Association* v. *Stuart, supra*. It does not appear that stays were sought from this Court in any but the last of these four cases; and the present case is in a posture very similar to that of *Stuart, supra*, when that case was before JUSTICE BLACKMUN on an application for stay. 423 U.S. 1319 (1975); 423 U.S. 1327 (1975). The applicants there, like the applicants in this case, were seeking a stay of a state trial court order pending review of that order in the state Supreme Court. As JUSTICE BLACKMUN pointed out, "[i]t is highly desirable,

of course, that the issue, concerning, as it does, an order by a . . . state court, should be decided in the first instance by the Supreme Court" of the state. 423 U.S., at 1325; 423 U.S., at 1328. There, as here, the state Supreme Court had given some indication that it would not rule on the case for several weeks.

In these circumstances, JUSTICE BIACKMUN noted that where "a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." 423 U.S. 1327, 1329. JUSTICE BLACKMUN thought that parts of the order at issue in *Stuart* created irreparable injuries that required him to act before the state Supreme Court. The applicants in that case were prohibited from "reporting of the details of the crimes, of the idendities [Publisher's note: "idendities" should be "identities".] of the victims, [and] of the testimony of the pathologist at the preliminary hearing." *Id.*, at 1331. At the same time, JUSTICE BLACKMUN declined to stay other parts of the order, including a complete prohibition on reporting that the accused had confessed, *id.*, at 1332-13333 [Publisher's note: "13333" should be "1333".], a ban on photography in the courthouse, and restrictions on trial participants' contacts with the media, *id.*, at 1334. JUSTICE BLACKMUN thought it proper to stay only "the most obvious features that require resolution immediately and without one moment's further delay." *Id.*, at l334.

Given the procedural posture of this case, it would seem that in order for a stay to be granted before the case is heard by the highest court of the state, there should be a risk of irreparable injury together with a demonstrable departure on the part of the trial court from the law laid down in our cases. I simply do not find those elements to be present here. The orders at issue in this case do not prohibit the reporting of any facts on the public record. The trial has never been closed, and all the proceedings may be reported and commented upon. With respect to the Court's order barring communication between trial participants and the press, it seems to me that the following language from *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), quoted with approval in *Stu-*

art, *supra*, goes far towards sustaining the action of the trial court:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . The courts must take such steps by role and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutor, counsel for defense, the accused, witnesses, court staff nor the enforcement officers coming under the jurisdiction of the court, should be permitted to frustrate its function. Collaberation [Publisher's note: "Collaberation" should be "Collaboration".] between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U.S., at 362.

So far as communication between the trial participants and the press during actual sessions of the court in the courtroom and its immediate environs, I do not have the slightest doubt that a trial judge may insist that the only performance which goes on in the courtroom is the trial of the case at hand. The fact that media coverage has transformed events such as professional sports contests into a framework designed to accommodate that coverage does not mean that the First Amendment requires criminal trials to undergo the same transformation. The mere potential for confusion if unregulated communication between trial participants and the press at a heavily covered trial were permitted is enough to warrant a measure such as the trial judge took in this case. Continuation of the proscription against communication to hours and places where the court is not in session appears to me to be warranted under the above-quoted language from *Sheppard*, *supra.*

I find the requirement of clearance with the trial judge before sketches of the jurors may be shown on television the more troubling of the two orders issued by the trial judge. The judge limited the order to sketches drawn for television showing, and did not include within it sketches to be reproduced in newspapers. He apparently made this distinction

because *Chandler*, *supra*, suggests a greater latitude in trial courts for regulating television coverage of a trial than for regulation of coverage by the press. For this purpose I am somewhat at a loss to know why the print media and the electronic media should be treated differently, since whatever potential for disruption or distortion may exist would appear to be the same whether the sketches are ultimately reprinted in newspapers or shown on television.

But I cannot accept applicant's [Publisher's note: "applicant's" should be "applicants'".] conclusion, drawn from this distinction, that the limitation of the regulation of sketches indicates that the trial judge did not regard it as essential; I think he regarded it as essential, and probably would have extended it to all sketches if he thought that the First Amendment permitted him to do it. Likewise, the requirement of previous clearance of the sketches smacks, at least in the abstract, of the notion of "prior restraint", which has been roundly condemned in a long line of our cases beginning with *Near* v. *Minnesota ex. rel. Olson*, 283 U.S. 697 (1931). I think that in all probability the trial judge's order would be more defensible on federal constitutional grounds if he had flatly banned courtroom sketching of the jurors, and if he had extended the ban to those who sketch for the print media as well as to those who sketch for television.

But balancing the doubts that this portion of the judge's second order generates against the procedural posture of the case, I conclude that the application for a stay should be denied. Surely all of the lofty historical reasons which have been advanced in our opinions to support the right of public and press access to criminal trials contemplate the traditional criminal trial as a public governmental procedure of some importance to every citizen. I would think that of all conceivable reportorial messages that could be conveyed by reporters or artists watching such trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches.

Stuart is a prototypical example of a recent case in this area which has admonished trial courts to employ their usually considerable discretion to search for other alternatives

than prior restraints in order to protect the defendant's constitutional right to a fair trial and the state's interest in a verdict which may be upheld on appeal. I am satisfied that the trial judge has indeed sought for these alternatives here, and I do not find them so demonstrably impermissible as to warrant a stay at this stage of the proceedings. The application is therefore

Denied

[Publisher's note: See 459 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-584

JOSEPH CONFORTE *v.* COMMISSIONER OF INTERNAL REVENUE

ON APPLICATION FOR STAY

[January 12, 1983]

JUSTICE REHNQUIST, Circuit Justice.

This controversy began when the IRS issued tax deficiencies and penalties against applicant and his wife for the years 1973 through 1976. The Confortes filed tax returns for the years in question stating a "net income," but without disclosing their gross income and deductions; they claimed these details would be incriminating. Based on projections of income and expenses, the IRS determined that the Confortes had a greater tax liability than their "net income" revealed.

The Confortes petitioned to the Tax Court for a redetermination. That court sustained the calculations made by the IRS. 74 T.C. 1160 (1980). Pursuant to 26 U.S.C. § 7482 (1976 & Supp. IV 1980), the Confortes appealed to the United States Court of Appeals for the Ninth Circuit. 692 F.2d 587 (1982). On November 5, 1982, the Court of Appeals affirmed in part and reversed in part as to Mrs. Conforte. Applicant's appeal, however, was dismissed. Applicant seeks a stay of that dismissal.

The Court of Appeals found that applicant is a fugitive from justice for convictions on four counts of willfully attempting to evade federal employment taxes. See *United States* v. *Conforte*, 624 F.2d 869 (1980). Relying on this Court's decision in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), the court held that as a fugitive from jus-

tice applicant should not be allowed to prosecute an appeal in the federal courts.

The court rejected applicant's argument that *Molinaro* only applies to appeals from criminal convictions. The court noted that "the rule should apply with greater force in civil cases where an individual's liberty is not at stake," 692 F.2d, at 589, and cited a series of cases from the Courts of Appeals so holding. See *Doyle* v. *Department of Justice*, 668 F.2d 1365 (CADC 1981) (*per curiam*), cert [Publisher's note: "cert" should be "cert."] denied, — U.S. — (1982); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (CA5 1976); *United States* v. *Commanding Officer*, 496 F.2d 324 (CA1 1974). The court also said it need not determine whether *Molinaro* would apply where the criminal conviction and the civil appeal are unrelated because here the issues of the two cases "are each related components of a general tax evasion scheme." 692 F.2d, at 590. Finally, relying on its own decisions in *United States* v. *Wood*, 550 F.2d 435 (1976), and *Johnson* v. *Laird*, 432 F.2d 77 (1970), the court held that *Molinaro* is not limited to discretionary appeals.

The Court of Appeals did not leave applicant without recourse. The court ruled that "[i]f within 56 days he submits himself to the jurisdiction of the District Court of Nevada [the court from which he is a fugitive], he may move to reinstate his appeal." 692 F.2d, at 590. With a three day extension because of the New Year's Eve holiday, the 56 days expired on January 3, 1982. On the same day applicant filed in this Court for a stay of the Court of Appeals decision pending his filing of a petition for certiorari and our disposition of that petition.

Applicant argues that a stay should be granted because "the 56 day limitation will expire before the application for a writ of certiorari can be completed and filed." He maintains that should this Court deny his yet-to-be filed petition for certiorari he desires to have time remaining to comply with the Court of Appeals' directive. The 56 days expired on the day applicant filed for this stay. Except in extreme circum-

stances the Court generally is unable to provide same-day-service [Publisher's note: The hyphen between "day" and "service" is surplus.]. While it might be within our jurisdiction to grant a stay retroactively, an applicant detracts from the urgency of his situation where he makes a last minute claim and offers no explanation for his procrastination.

Applicant may be injured if a stay does not issue. Assuming he files a petition for certiorari, unless we grant that petition and reverse the lower court the running of the 56 days will bar applicant from reinstating his appeal by surrendering to the authorities. A stay is appropriate, however, only where there is a reasonable possibility that four justices of this Court will vote to grant certiorari. See *Houchins* v. *KQED, Inc*., 429 U.S. 1341, 1344 (1977) (REHNQUIST, J., in chambers); *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers). I do not believe that a reasonable possibility exists here.[1]

In *Molinaro* v. *New Jersey*, *supra*, the Court said that while a litigant's status as a fugitive from justice "does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the [litigant] to call upon the resources of the Court for determination of his claims." 396 U.S., at 366. See also *Smith* v. *United States*, 94 U.S. 97 (1876). While this Court has never extended the "fugitive from justice" rule beyond the facts of *Molinaro* and *Smith* (*i.e.*, where the criminal conviction the litigant is a fugitive from is the judgment being challenged on appeal), the court below correctly points out that the Courts of Appeals have done so on a number of occassions [Publisher's note: "occassions" should be "occasions".]. Since we have denied certiorari in this type [Publisher's note: There probably should be an "of" here. But see 459 U.S. at 1312.] case in the past, I do not believe it

[1] While applicant alleges injury in his request for a stay, he does not set forth a legal argument on the merits. Thus, the application could be denied for applicant's failure to carry his burden of overcoming the presumptive correctness of the Court of Appeal's [Publisher's note: "Appeal's" should be "Appeals'".] decision. *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (MARSHALL, J., in chambers).

likely that applicant's petition will be granted. See, *e.g.*, *Doyle* v. *Department of Justice*, *supra*.[2]

For these reasons the application is denied.

[2] Applicant's failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay. "An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof." Rule 44.4. Applicant seeks to be excused from his failure to comply with this rule, not because of any "extraordinary circumstances," but because, according to applicant, the Court of Appeals "has ruled that [he] has forfeited any right to seek relief from the judicial processes of" that court. To the contrary, the court found only that applicant could not pursue his civil appeal unless he turned himself in within 56 days.

[Publisher's note: See 459 U.S. 1313 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-622

DALE BONURA, ET AL., APPLICANTS *v.* CBS, INC., ET AL.

ON APPLICATION TO VACATE STAY

[January 16, 1983]

JUSTICE WHITE, in-chambers.

There is no doubt that as Circuit Justice I have the power to set aside the stay issued by the Court of Appeals in this case. Only the weightiest considerations, however, would warrant such action by a Circuit Justice. *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (MARSHALL, J., in chambers); *O'Rourke* v. *Levine*, 4 L. Ed. 2d 615, 616 (Harlan, J., in chambers).

I have examined the transcript of the hearing held by the District Judge at 8:30 p.m. on January 15, 1983 in New Orleans, the order issued after the hearing forbidding the broadcast by CBS in the Dallas area of a particular segment of a designated program, the order issued by a divided panel of the Court of Appeals staying the District Court's order, and the application to me to vacate the stay of the Court of Appeals. I am not myself convinced that the Court of Appeals was in error in issuing the stay; and I do not think that if the application were before the full court, five Justices would vote to vacate the stay. Accordingly, I deny the application to vacate the stay.

[Publisher's note: See 459 U.S. 1314 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-663

ISHMAEL JAFFREE, ET AL., APPLICANTS *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL.

ON APPLICATION FOR STAY

[February 11, 1983]

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States District Court for the Southern District of Alabama pending an appeal to the United States Court of Appeals for the Eleventh Circuit. Applicant Ishmael Jaffree is the father of minor applicants Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, three students in the Mobile County, Alabama, public schools. Respondents are various school and state officials. The application was filed here on Feburary [Publisher's note: "Feburary" should be "February".] 2. In my capacity as Circuit Justice, I entered an order staying the judgment of the District Court until respondents were afforded an opportunity to respond. Their responses are now in hand, and I have considered the merits of the application for a stay.

The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence "for meditation or voluntary prayer" at the commencement of each day's classes in the public elementary schools. Ala. Code § 16-1-20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was "obligated to enjoin the enforcement" of the statutes, *id*., at 733.

In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, — F. Supp. — (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that clause has been construed by this Court. The District Court nevertheless ruled "that the United States Supreme Court has erred." *Id*., at —. It therefore dismissed the complaint and dissolved the injunction.

There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engel* v. *Vitale*, 370 U.S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions

of the full Court. Accordingly, I am compelled to grant the requested stay.

It is so ordered.

[Publisher's note: See 461 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. 82-6581 (A-848)

JOHN LOUIS EVANS, III *v.* ALABAMA

ON APPLICATION FOR STAY

[April 21, 1983]

JUSTICE POWELL, Circuit Justice.

This is an application for a stay of execution set for April 22, 1983, pending the disposition of a petition for certiorari to the Alabama Supreme Court. The petition for certiorari was filed on April 19, 1983. This application was filed later the same day, following the Alabama Supreme Court's denial of applicant's motion for a stay of execution. On April 20 the State filed a response in opposition to the application for a stay, and applicant filed a reply to the State's opposition.

Applicant was tried and convicted on April 26, 1977, in the Mobile County, Ala., Circuit Court of first-degree murder committed during the commission of a robbery. The trial court sentenced him to death. Applicant's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, 361 So. 2d 654 (1977), and the Alabama Supreme Court, 361 So. 2d 666 (*per curiam*), rehearing denied, 361 So. 2d 672 (1978) (*per curiam*). This Court denied a petition for certiorari. 440 U.S. 930 (1979).

In April 1979 applicant filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, challenging the constitutionality of both the conviction and the death sentence. The District Court rejected all of his contentions and denied the petition. *Evans* v. *Britton*, 472 F. Supp. 707 (1979). The Court of Appeals for the Fifth Circuit reversed, finding that applicant's conviction was invalid. *Evans* v. *Britton*, 628 F.2d 400 (1980) (*per curiam*), modified on rehearing, 639 F.2d 221 (1981) (*per curiam*). This Court granted the State's petition

for a writ of certiorari and, after briefing and argument, reversed the judgment of the Court of Appeals. *Hopper* v. *Evans*, 456 U.S. 605 (1982).

This Court's judgment reinstated applicant's conviction, but his challenges to Alabama's capital-sentencing procedures remained to be decided by the Court of Appeals on remand. In July 1982, however, applicant dismissed his attorneys and filed a motion with the Court of Appeals seeking to dismiss his appeal. The court dismissed the appeal on October 19, 1982.

On October 22, 1982, the State of Alabama sought an order from the Alabama Supreme Court setting an execution date. Applicant then filed a motion requesting a new sentencing hearing. On February 18, 1983, the Supreme Court of Alabama denied this motion, and on April 8, 1983, the court ordered that applicant's execution be set for April 22, 1983.

Applicant's constitutional challenges to Alabama's capital-sentencing procedures have been reviewed exhaustively and repetitively by several courts in both the state and federal systems. I have reviewed the record and conclude that there is not "a reasonable probability that four members of the Court would find that this case merits review." *White* v. *Florida*, 458 U.S. — (1982) (POWELL, J., in chambers). All of the papers relevant to applicant's request for a stay of execution also have been circulated to the entire Court. With the concurrence of six other Members of the Court, I deny the application for a stay.

JUSTICE BRENNAN and JUSTICE MARSHALL have indicated that they would vote to grant the stay.

[Publisher's note: See 461 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-875

VOLKSWAGENWERK A.G. *v.*
JOSEPH AND BARBARA FALZON, ETC.

ON APPLICATION FOR STAY

[April 29, 1983]

JUSTICE O'CONNOR, Circuit Justice.

Under Rule 44.4, the Justices of this Court will not entertain an application for a stay unless the applicant has first sought relief from the appropriate lower court or courts, except "in the most extraordinary circumstances." I conclude that this case presents most extraordinary circumstances and will therefore entertain the application and grant a stay.

The applicant is a German corporation that is defending an action in the Michigan state courts. The plaintiffs in that action seek to depose a number of employees of the applicant, all of whom reside in the Federal Republic of Germany. Attempting to prevent the depositions in the trial court, the applicant argued that the method the plaintiffs sought to employ violated the Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. § 1781, a treaty to which the United States and the Federal Republic of Germany are parties. See Department of State, Treaties in Force 249 (1983). The trial court denied the motion, and the Michigan Court of Appeals denied leave to appeal. The applicant then sought review in the Michigan Supreme Court. Meanwhile, the trial court ordered that the depositions take place on or before August 30, 1982, and the plaintiffs filed notice to take the depositions on August 23, 1982. The applicant then applied to the Michigan Supreme Court for an emergency stay of the order and for immediate consideration

of the order. When the state supreme court did not act, the applicant sought a stay from this Court, and on August 23, 1982, THE CHIEF JUSTICE granted a stay pending final disposition of the appeals before the Michigan Supreme Court. *Volkswagenwerk A.G.* v. *Falzon*, A-191, O.T. 1981 (order of August 23, 1982). He later denied a motion to vacate the stay. *Volkswagenwerk A.G.* v. *Falzon*, A-191, O.T. 1981 (order of September 2, 1982).

On February 22, 1983, the Michigan Supreme Court denied the applicant's application for leave to appeal. At that point, the stay entered by THE CHIEF JUSTICE expired by its own terms. The plaintiffs then filed notice of taking depositions, scheduling the depositions for May 2, 1983. On April 4, 1983, the applicant sought a stay of the depositions from the Michigan Supreme Court, pending disposition of its appeal to this Court of the earlier judgment of the Michigan Supreme Court. The state supreme court has not acted, so the applicant now seeks a stay from this Court pending disposition of the appeal here.

In granting the stay pending the disposition of the appeal to the Michigan Supreme Court, THE CHIEF JUSTICE must have concluded that there was a substantial chance that four Justices would agree to consider the case on the merits, that there was a significant chance that the applicant would prevail, and that the injury resulting from the denial of a stay would be irreparable. See generally *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in Chambers). Since the question on the merits is unchanged, it is essentially the "law of the case" that a stay would be appropriate, unless, of course, the response presents new information. Cf. *Shlesinger* [Publisher's note: "*Shlesinger*" should be "*Schlesinger*".] v. *Holtzman*, 414 U.S. 1321, 1324-1325, and nn. 3, 4 (1973) (Douglas, J., dissenting) (single Justice not empowered to vacate stay granted by another Justice); R. Stern and E. Gressman, Supreme Court Practice 866-867 (5th ed. 1978) (same). Consequently, the failure of the Michigan Supreme Court to act promptly should not prevent a

member of this Court from entertaining an application to stay the order pending final disposition of the appeal in this Court. Proper deference to the Michigan Supreme Court, however, requires that that court have an opportunity to dispose of the stay application before it. Accordingly, I grant the stay pending disposition of the application for a stay in the Michigan Supreme Court.

[Publisher's note: See 463 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1077

DOYLE WILLIAMS *v.* STATE OF MISSOURI

ON APPLICATION FOR STAY

[July 6, 1983]

JUSTICE BLACKMUN, Circuit Justice.

On May 31, 1983, the Supreme Court of Missouri affirmed applicant Williams' conviction and death sentence. It noted applicant's execution as set for July 15. On June 30, the Missouri Supreme Court denied applicant's timely motion for rehearing, and his motion requesting that court to stay issuance of its mandate pending final disposition of a petition for certiorari in this Court. Under the rules of this Court, applicant has until August 29, 1983, to file a petition for certiorari. He has applied to me for a stay of execution pending timely filing and disposition of that petition. The application is granted.

"[D]irect appeal is the primary avenue for review of a conviction or sentence." *Barefoot* v. *Estelle*, — U.S. —, — (1983) (slip op. 5). If a federal question is involved, the process of direct review "includes the right to petition this Court for a writ of certiorari." *Ibid.* A stay of execution obviously is essential to realization of this right if the execution otherwise would occur prior to the expiration of a defendant's time to petition this Court for direct review. The defendant must have at least one opportunity to present to the full Court his claims that his death sentence has been imposed unconstitutionally. For this reason, if a State schedules an execution to take place before filing and disposition of a petition for certiorari, I must stay that execution pending completion of direct review, as a matter of course.

[Publisher's note: See 463 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1071

PAUL JULIAN *v.* UNITED STATES

ON APPLICATION FOR BAIL

[July 13, 1983]

JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed a motion for bail pending disposition of his petition for writ of certiorari. He was arrested in Los Angeles on May 7, 1980 while attempting to board a nonstop flight to Lima, Peru. Prior to the scheduled departure time, a Customs Official had announced that anyone taking more than $5,000 currency out of the country was required to file a report with the Customs Service. When stopped on the boarding ramp, petitioner acknowledged that he had heard the announcement but denied that he was carrying more than $5,000. He repeated this denial during subsequent questioning, but a search of his person and belongings revealed approximately $29,000 in cash as well as a variety of narcotics paraphernalia.

Following a jury trial in the United States District Court for the Central District of California, applicant was convicted of attempted importation of narcotics; making false statements to a government official, in violation of 18 U.S.C. § 1001; and failing to file a report in connection with the transportation of more than $5,000 outside the United States, in violation of 31 U.S.C. § 1101. He was sentenced to concurrent five-year terms and fined $5,000 each on the first two counts. He received a consecutive one-year term and a $5,000 fine on the third count.

Applicant was freed on bond pending appeal. The Court of Appeals, by a divided vote, affirmed his conviction in all

respects, and this application followed. For the reasons explained below, the application is denied.

The standards to be applied are well-established. Applications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, "the lower court refused to stay its order pending appeal." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers). At a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari. *Bateman* v. *Arizona*, 429 U.S. 1302, 1305 (1976) (REHNQUIST, J., in chambers).

Applicant raises a number of contentions in his petition, none of which, I believe, is likely to command the vote of four Justices. First, he argues that 18 U.S.C. § 1001 does not apply to his statements at all because those statements were oral, unsworn, exculpatory and immaterial. A fair reading of the statute, however, brings applicant's false statements to the Customs Official squarely within the prohibition of § 1001.[*] Second, petitioner contends that a conviction under both 18 U.S.C. § 1001 and 31 U.S.C. § 1101 violates the Double Jeopardy Clause. But under the test established in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), cumulative punishments under separate statutes are permitted provided only that each statute requires proof of a fact not required by the other. 18 U.S.C. § 1001 requires a finding that applicant misled a government official by material false statements. 31 U.S.C. § 1101 requires a different finding that applicant failed to file the required currency reporting form. Thus, the *Blockburger* test is satisfied.

[*] 18 U.S.C. § 1001 provides in relevant part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Petitioner also claims that the evidence taken from his person and his luggage was the fruit of unconstitutional searches and should have been suppressed. But see, *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977) (border searches require neither probable cause nor a warrant). Petitioner's remaining contentions are even less substantial.

For these reasons, the application is

Denied.

[Publisher's note: See 463 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1070

CAPITAL CITIES MEDIA, INC., ET AL. *v.*
PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ON APPLICATION FOR STAY

[July 13, 1983]

JUSTICE BRENNAN, Circuit Justice.

This is an application for an immediate stay of several orders entered by the Court of Common Pleas of Luzerne County, Pennsylvania, in connection with a homicide trial in that court, *Commonwealth* v. *Banks*, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, that had attracted a great deal of public interest. The specific orders in question were entered by respondent Judge Toole on June 3, 1983, after selection of the trial jury but before its sequestration. In one order, respondent directed first that "[n]o person shall print or announce in any way the names or addresses of any juror," Order in Accordance with Pa. Rules Crim. Proc. 1111(c), June 3, 1983, ¶2 (hereinafter ¶2), and also that "[n]o person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings. . . ," *id.*, ¶6 (hereinafter ¶6). In a separate order, Judge Toole ordered that "[n]o one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of the Court," Order Pursuant to Pa. Rules Crim. Proc. 326, June 3, 1983, ¶11 (hereinafter ¶11). The application for a stay was first presented to me on June 18, 1983, but I held it pending action by the Supreme Court of Pennsylvania on a substantially identical application for summary relief. On June 21, the

jury returned a guilty verdict in the *Banks* case and was discharged; on June 30, the Supreme Court of Pennsylvania denied summary relief. Applicants immediately reapplied to me for a stay. An initial response was received by telegram on July 7, with a more complete response submitted on July 13.

In recent years, several Justices have had occasion to explain the role of a Circuit Justice in precisely this context, when a trial court has enjoined the press and other media from publication of information in connection with a criminal trial. Caution is the refrain of any Justice acting as Circuit Justice, but we have recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints. It is clear that even a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect. When it appears that there is a significant possibility that this Court would grant plenary review and reverse the lower court's decision, at least in part, a stay may issue. *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1330 (1975) (BLACKMUN, Circuit Justice); *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, Circuit Justice). See also *Bonura* v. *CBS, Inc.*, — U.S. — (Jan. 16, 1983) (WHITE, Circuit Justice).

I address first the ¶2 provision, which on its face permanently restrains publication of the names or addresses of any juror. Counsel for respondent has informed the Clerk of this Court that this order remains in effect, and that publication at this time of the name of a juror would subject the publisher to the possibility of being held in contempt of court. This order was entered by the Court *sua sponte* and without a hearing or a record; neither the prosecution nor defendant has expressed any interest in it. Compare *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979). The jury was selected at

voir dire proceedings begun prior to the issuance of this order, from which the press and public were not excluded, and at which the names of the prospective jurors were not kept confidential. Compare *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (cert. granted Jan. 24, 1983).

It hardly requires repetition that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," and that the State "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (*per curiam*). This Court has given plenary consideration to a number of state statutes and court orders issued thereunder restraining publication of information in connection with a criminal trial or restricting press access to a criminal trial for the purpose of preventing such publication. Just last Term, in *Globe Newspaper Co.* v. *Superior Court*, — U.S. — (June 23, 1982), we held that the First and Fourteenth Amendments prohibited enforcement of a rule barring press and public access to criminal sex-offense trials during the testimony of minor victims. We adopted a familiar standard: "Where, as in the present case, the State attempts . . . to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id*., at — (slip op. 10); cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors. Cf. *Globe Newspaper*, — U.S., at — (slip op. 11); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 600 (1980) (Stewart, J., concurring in the judgment). Our precedents make clear, however, that far more justification than appears on this record would be necessary to show that this

categorical, permanent prohibition against publishing information already in the public record was "narrowly tailored to serve that interest," if indeed any justification would suffice to sustain a permanent order. Based on these precedents, I must conclude that if the Supreme Court of Pennsylvania sustained this order on its merits, four Justices of this Court would vote to grant review, and there would be a substantial prospect of reversal.

Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged. Cf. *Gannett Co.* v. *DePasquale*, 443 U.S., at 400 (POWELL, J., concurring). As for the State's concern for the jurors' privacy, we have not permitted restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding in a criminal trial, *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311-312 (1977) (*per curiam*); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 568 (1976), even for the obviously sympathetic purpose of protecting the privacy of rape victims, *Globe Newspaper*, — U.S., at — (slip op. 11-12); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-495 (1975). See also *Smith* v. *Daily Mail*, 443 U.S., at 104: "If the information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here"—*i.e.*, protecting the privacy of an 11-year-old boy charged with a juvenile offense. In an extraordinary case such a restriction might be justified, but the justifications must be adduced on a case-by-case basis, with all interested parties given the opportunity to participate, and less restrictive alternatives must be adopted if feasible. *Globe Newspaper*, — U.S., at -—, and n. 25 (slip op. 12); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580-581 (1980) (opinion of THE CHIEF JUSTICE); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S.

829, 842-843 (1978). The ¶2 order was entered without a hearing, and without findings of fact that would justify it; respondent has suggested no concern specific to this case in support of his order. Accordingly, I grant applicant's request for a stay of the ¶2 provision.

It would be inappropriate for me to grant a stay of the ¶6 or ¶11 provisions. By its terms, the ¶6 provision applied only "during [the jurors'] service in these proceedings." Since the jury has been discharged, this particular provision can no longer have effect. It may be that such an order, although it had expired, could be [Publisher's note: The "be" preceding this note is surplus.] still receive appellate review in this Court under the "capable of repetition, yet evading review" doctrine, see *Nebraska Press Assn.*, 427 U.S., at 546-547, but there is no prospect of immediate injury to applicants before they can seek review of the order, so their application for a stay must be denied. As for the ¶11 provision, restricting access to exhibits, applicants have neither identified the exhibits to which they seek access, nor have they indicated that they have sought a court order permitting them access. The application for a stay of the ¶11 provision is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

I shall issue an order accordingly.

[Publisher's note: See 463 U.S. 1311 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-24

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.*
THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA
AND THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

ON APPLICATION FOR STAY

[July 21, 1983]

JUSTICE WHITE, Circuit Justice.

The application for a stay is granted, and the temporary stay of the judgments of the Court of Appeals and the District Court is continued pending the timely filing and disposition of a petition for writ of certiorari in the above-entitled action. If the petition is denied, this stay will terminate automatically. If certiorari is granted, the stay will continue in effect, pending judgment on the merits or other disposition of the case. Briefly stated, the reasons for granting the stay are as follows.

The National Collegiate Athletic Association is a private, non-profit association of some 900 four-year colleges and universities meeting certain academic standards and of athletic conferences, associations, and other groups interested in intercollegiate athletics. Of these, some 800 are voting members, about 500 field football teams, and 187 are so-called division I schools. These latter schools, the District Court found, dominate college football television.

The NCAA regulates many aspects of intercollegiate athletics, including the televising of intercollegiate football games, the arrangements for which it has controlled since

1953. The current plan involves contracts with two networks, CBS and ABC, covering the 1982-1985 seasons, as well as a two-year contract with the Turner Broadcasting System. The District Court, in describing the contracts, stated that each network must broadcast a game on at least 14 different dates, and each must televise at least 35 games each year. At least seven broadcasts must be national and at least six regional. The networks select the games they will broadcast, at least 82 different teams must appear on each network over a two-year period, and no school may appear more than six times during a two-year period. Each network is obligated to pay a minimum of $131,750,000 over the four years; TBS will pay $17,696,000 over two years. From these sums, the NCAA takes a percentage, certain sums are reserved for participants in the Division II and III competitions, and the balance is divided equally among those schools who have appeared on the broadcasts covered by the contracts. Schools not selected to appear under the contract are not permitted to make their own arrangements to broadcast their games, and schools that do appear may not undertake to have additional games televised.

The Regents of the University of Oklahoma and the University of Georgia Athletic Association brought this action against the NCAA, asserting that the NCAA's regulatory scheme violates the antitrust laws. The District Court agreed, holding that the scheme constituted price-fixing that was illegal *per se* under § 1 of the Sherman Act and the relevant cases; it also held that the arrangement was an illegal group boycott, was monopolization forbidden by § 2, and was in any event an unreasonable restraint of trade. The contracts were declared null and void, and an injunction was entered forbidding their further implementation.

The Court of Appeals for the Tenth Circuit, while disagreeing with the boycott and monopolization holdings, otherwise upheld the decision of the District Court. Although it ordered the judgment affirmed, it remanded with instruc-

tions that the District Court "consider its injunction in light of" the Court of Appeals' opinion. The Court's mandate has issued. The NCAA, asserting that it will petition for certiorari, has requested a stay; the respondents have opposed the stay, as has the United States as amicus curiae.

Having examined the papers so far filed with me and assuming that they fairly represent the issues and what has occurred in this case, I can say with confidence that I would vote to grant certiorari. Somewhat less confidently, I expect that at least three other Justices would likewise vote to grant. The judgment below would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws.

I also have little doubt that if the case is to be granted the equities pending decision on the merits are with the NCAA. The two respondent schools might do better for themselves during the 1983 season if they were free to go their own way, but were a stay to issue, their harm would be limited to the difference between what they would receive under the NCAA arrangements and what they could otherwise garner. On the other hand, unless the judgment is stayed, it would appear that the networks' contracts would be void under the outstanding judgment and could not be enforced; the entire 1983 season would be at risk not only for the NCAA but for many, if not most, of the schools which it represents, including many schools that would prefer the NCAA arrangements to continue at least through the 1983 season.

Although the question is a close one, I am also of the view that there is a sufficient likelihood that the court below erred in one or more important respects to justify issuing the stay. For example, the *per se* price-fixing holding is questionable to my mind; also, although in the long run I may agree with the courts below in this respect, I have some doubt whether they reached the correct result under the Rule of Reason.

Accordingly, having determined that certiorari will likely be granted, that there is a sufficient prospect that the NCAA

will ultimately prevail, and that the equities favor the NCAA, I conclude that a stay is in order.

Respondents suggest that the NCAA should be required to post bond if the stay is granted. I am not inclined to impose that requirement. I note that the Court of Appeals stayed the judgment of the District Court without bond while the case was on appeal to it. I see no need to change that procedure.

[Publisher's note: See 463 U.S. 1315 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1066

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* MONSANTO COMPANY

ON APPLICATION FOR STAY

[July 27, 1983]

JUSTICE BLACKMUN, Circuit Justice.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, as amended in 1978, 92 Stat. 820, requires pesticide manufacturers to register their products with the Environmental Protection Agency (EPA) prior to marketing them in the United States. The EPA decides whether to register a pesticide; it bases its decision on an evaluation of test data concerning the product's effectiveness and potential dangers. This data typically is submitted by the pesticide's manufacturer. Section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D) (1976 ed., Supp. V), provides, however, that test data submitted in connection with a particular pesticide may be used by manufacturers seeking registration of similar pesticides. In effect, a subsequent applicant for registration may "piggyback" its registration on the efforts of the initial applicant. The subsequent applicant must offer to compensate the initial applicant, and compensation is to be determined by binding arbitration if the parties cannot agree on a sum. § 3(c)(1)(D), 7 U.S.C. § 136(c)(1)(D) (1976 ed., Supp. V). In addition, health and safety data submitted by the initial applicant may be disclosed to the public pursuant to § 10(d), 7 U.S.C. § 136h(d) (1976 ed., Supp. V).

Respondent Monsanto Company manufactures several registered pesticides. To obtain registration, Monsanto submit-

ted test data developed at a cost claimed to be in excess of $23 million. These test data are trade secrets under the law of Missouri, and Monsanto consequently has the right to prevent their use and disclosure. Monsanto brought suit in the United States District Court for the Eastern District of Missouri, contending that the use or disclosure of its test data pursuant to the FIFRA provisions described above would constitute an unconstitutional taking of its property. The District Court agreed, and enjoined enforcement of these and related provisions of FIFRA. The District Court declined to stay its injunction pending direct appeal to this Court, and the Administrator of the EPA has applied to me for a stay. Having reviewed the application, the response, and the other memoranda and supporting documents filed by the parties and several *amici*, I deny the application.

A Justice of this Court will grant a stay pending appeal only under extraordinary circumstances, *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers), and a district court's conclusion that a stay is unwarranted is entitled to considerable deference. *Id*., at 1203-1204; *Bateman* v. *Arizona*, 429 U.S. 1302, 1304 (1976) (REHNQUIST, J., in chambers). An applicant for a stay "must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (MARSHALL, J., in chambers); see *Graves* v. *Barnes*, 405 U.S., at 1203. An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay. *Whalen* v. *Roe*, 423 U.S., at 1317-1318.

In this case, the Administrator has not convinced me that irreparable harm will result if the District Court's injunction remains in effect pending appeal. During this interim period, the injunction prevents the EPA from registering new pesticides through use of previously submitted test data, and

members of the public will be unable to obtain test data relating to health and safety. The EPA will remain able, however, to register new pesticides; applicants for registration may submit their own test data to support their applications, and may rely on previously submitted data if the submitters have given permission. The EPA has adopted interim procedures to permit registration in this manner. See 48 Fed. Reg. 32012-32013 (1983). If an applicant for registration chooses to rely on previously submitted data without the submitter's permission, the EPA may process the application although it may not actually register the product pending appeal. While registrations and disclosures will be delayed somewhat, "delay alone is not, on these facts, irreparable injury." *Whalen* v. *Roe*, 423 U.S., at 1317.

Two other considerations enter into my decision to deny this application. First, the granting of a stay might well cause irreparable harm to Monsanto. If the District Court's injunction were lifted, the EPA would be free to use Monsanto's trade secrets for the benefit of its competitors and could disclose them to members of the public. Monsanto's trade secrets would become public knowledge, and could not be made secret again if the judgment below ultimately is affirmed. In addition, the Administrator has not been particularly expeditious in seeking a stay or in pressing his appeal. This application was filed more than 7 weeks after the District Court issued its amended judgment. The Administrator has requested and received a 30-day extension of time in which to file his jurisdictional statement with this Court. While certainly not dispositive, the Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay. See *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (MARSHALL, J., in chambers).

I shall enter an order accordingly.

[Publisher's note: See 463 U.S. 1319 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-99

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, COMMONWEALTH OF MASSACHUSETTS *v.* LATINO POLITICAL ACTION COMMITTEE ET AL.

ON APPLICATION FOR STAY

[August 11, 1983]

JUSTICE BRENNAN, Circuit Justice.

The Attorney General of the Commonwealth of Massachusetts has applied to me for a stay pending the filing and consideration by this Court of a petition for a writ of certiorari to review the judgment of the District Court for the District of Massachusetts entered on July 26, 1983. *Latino Political Action Committee, et al.* v. *City of Boston, et al.*, — F. Supp. —. That judgment found unconstitutional a new electoral districting plan adopted by the Boston City Council and approved by the Mayor of Boston for the election by district of members of the City Council and the School Committee, and enjoined the defendants from conducting preliminary or final elections under the provisions of the plan. On August 2, 1983, the District Court permitted the Attorney General to intervene in this matter and denied his motions to stay the court's judgment pending appeal and for relief from judgment. The Court of Appeals for the First Circuit, on August 5, 1983, also denied the Attorney General's request for a stay, and this application followed.

The general principles that guide my consideration as a Circuit Justice of this application are well-settled:

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the

> merits and on the proper interim disposition of the case — are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'— to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers) (citations omitted).

After carefully considering the opinions below and the submissions of the applicant and respondent, I have concluded that under the circumstances of this case it is not reasonably probable that four Justices will consider the issues presented by the applicant sufficiently meritorious to grant certiorari; nor is there, in my judgment, a fair prospect that a majority of the Court will conclude that the decision below was erroneous. With respect to the third *Rostker* consideration, I have concluded that the inconvenience and delay imposed by the District Court's requirement that the districting plan be revised before elections can go forward are not so great as to warrant a stay of the judgment of the District Court.

Accordingly, the application is denied.

[Publisher's note: See 463 U.S. 1321 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

A-133

RALPH M. KEMP, SUPERINTENDENT, COLUMBIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* JOHN ELDON SMITH

ON APPLICATION FOR STAY

[August 24, 1983]

JUSTICE POWELL, Circuit Justice.

Respondent Smith, a convicted murderer, is scheduled to be executed by the state of Georgia at 8:00 a.m. tomorrow, Thursday August 25.

At about 5:25 p.m. on August 23, the Court of Appeals for the Eleventh Circuit—reversing the district court—granted a stay of execution. Its brief opinion stated that substantial issues were raised in this habeas corpus proceeding that justified review of their merits. Judge Hill dissented. At about 10:00 a.m. today, the Attorney General of Georgia filed an application with me as Circuit Justice requesting that I dissolve and vacate this stay. A response to this application was received this afternoon in my chambers at about 3:00 p.m.

This is the fourth time that this capital case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and now in Smith's second federal habeas proceeding. Apart from rehearings, this case has been reviewed sixteen times by state and federal courts since Smith's conviction in 1975. In these circumstances, and for the reasons stated by Judge Hill in his dissenting opinion below, it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration.

But in the present posture of the case, the question before me as Circuit Justice is whether the Court of Appeals has abused its discretion in granting a temporary stay pending a hearing on the merits. I am not able so to conclude. It is apparent from the papers presented that the Court of Appeals heard arguments at some length on [Publisher's note: The "on" preceding this note is surplus.] yesterday afternoon. Moreover, and quite properly, that court has provided for an expeditious hearing on the merits.

Accordingly, the application of the state of Georgia to vacate the stay ordered by the Court of Appeals is denied.

[Publisher's note: See 463 U.S. 1323 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-113

HAWAII HOUSING AUTHORITY ET AL. *v.*
FRANK E. MIDKIFF ET AL.

ON APPLICATION FOR STAY

[September 2, 1983]

JUSTICE REHNQUIST, Circuit Justice.

Applicants,[*] the Hawaii Housing Authority, its commissioners and executive director, request that I stay or vacate an order of the United States Court of Appeals for the Ninth Circuit. The present application bears only tangentially on the merits of the underlying lawsuit, in which the Court of Appeals decided that the condemnation provision of the Hawaii Land Reform Act violated the "takings clause" of the Fifth Amendment to the United States Constitution. Applicants have appealed to this Court from that ruling, and their jurisdictional statement will be considered by this Court in due course. This application arises out of the decision of the Court of Appeals on August 11th, some four months after its opinion on the merits was issued, to recall its mandate for clarification and, pending such clarification, to enjoin applicants from pursuing or initiating any state administrative or judicial proceedings under the Hawaii Land Reform Act. For the reasons that follow, I will deny applicants' request.

Applicants base their request for a stay on three arguments. First, they argue that because a notice of appeal to this Court was filed with the Court of Appeals on July 18, 1983, the Court of Appeals lacked the power to recall and clarify its mandate on August 11, 1983. Jurisdiction over

[*] Applicants are supported by numerous lessee homeowner associations which intervened in the proceedings below.

this case, they claim, had shifted to this Court. I find this reasoning unpersuasive. Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, it is well-settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court. *See, e.g., Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177 (1932); *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527, 531-535 (1911); Fed. Rules Civ. Proc. 62. Applicants also argue that respondents circumvented the normal appellate process when it sought recall of the mandate after the District Court had denied their request for injunctive relief. Although recalling a mandate is an extraordinary remedy, I think it probably lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion. On the record before me, I am not prepared to say that the Court of Appeals abused its power in recalling its mandate.

Second, applicants contend that the traditional equitable requirements for an injunction were not shown to exist at the time the Court of Appeals issued its order in this case. While the August 11th order of the Court of Appeals contained no findings such as those contemplated by Rule 65, Fed. Rules Civ. Proc., the Court of Appeals obviously contemplates possible modification of its injunction in the near future. At the present time, a stay based on this contention would be inappropriate.

Applicants' third contention raises by far the most serious question: whether the injunction issued by the Court of Appeals against further state proceedings violates the principles of federalism established in *Younger* v. *Harris*, 401 U.S. 37 (1971), *Huffman* v. *Pursue*, 420 U.S. 592 (1975), and later cases. The underlying rationale of *Younger* is a recognition that rational government functions best if state institutions are unfettered in performing their separate functions in their separate ways. *Younger*, 401 U.S. at 44. A central part of

this policy is a frank recognition that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights. *See Trainor* v. *Hernandez*, 431 U.S. 434, 446 (1977). Although originally adopted to prevent a federal court from enjoining pending state criminal proceedings, the principles of *Younger* are fully applicable to non-criminal proceedings when important state interests are involved. *See Middlesex County Ethics Committee* v. *Garden State Bar Association*, — U.S. —, 102 S. Ct. 2515 (1982); *Trainor*, *supra*; *Huffman*, *supra*. Where vital state interests are involved, a federal court should refrain from enjoining an on-going state judicial proceeding unless state law clearly bars the interposition of constitutional claims, or some extraordinary circumstance exists requiring equitable relief. *Middlesex County Ethics Committee*, *supra*, 102 S. Ct., at 2521.

On the record before me, this third ground on which applicants' request for a stay is based seems to present a close and rather intricate question. There is no doubt in my mind that the *Younger-Huffman* rationale applies to a federal injunction against state judicial implementation of a far-reaching land reform program in which the state is itself a party to the proceedings in its own courts. I am totally unpersuaded by respondent's reliance on *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In *Wooley*, the three state proceedings had already concluded, and the federal injunction had absolutely no effect on them. The same cannot be said of the effect of the Court of Appeal's [Publisher's note: "Appeal's" should be "Appeals'".] injunction on the pending action in the courts of Hawaii.

A more doubtful question, both as to the law and the facts of this case, is the time as of which the determination should be made as to the pendency of state court proceedings. As I understand it, the injunction issued by the Court of Appeals in this case was the first such remedy that affected judicial proceedings. As of the date it was issued—August 11, 1983—there were indisputably significant condemnation

cases pending in state court under the Land Reform Act. Certainly a strong argument can be made that this case may be analogized to *Hicks* v. *Miranda*, 422 U.S. 332 (1975), in that although the federal proceedings began before those brought by the state, no federal injunction of state condemnation proceedings was granted until the latter proceedings were underway. If, on the other hand, the critical date is the commencement of the proceeding in the United States District Court for the District of Hawaii in 1979, the question of whether state proceedings were pending might well be resolved differently. This application may also raise the issue left undecided in *Steffel* v. *Thompson*, 415 U.S. 452 (1974), as to the circumstances under which a properly issued federal judgment declaring a state law unconstitutional may be converted into an injunction against the enforcement of that law.

Even though these questions obviously cannot be finally resolved by a single Justice of this Court, were the Court of Appeals to continue its injunction in the present form after revising its mandate, or for an indefinite period of time, I would have to do the best I could to forecast how the full Court would resolve them. But the unique interlocutory posture of the case at present spares me that task. It would be an inappropriate exercise of my authority as Circuit Justice to stay an order of the Court of Appeals which is not demonstrably wrong and which that court itself may be disposed to revise in short order. The application is therefore denied without prejudice to its being renewed in the event of changed circumstances.

[Publisher's note: See 463 U.S. 1328 for the authoritative official version of this opinion.]

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL.

ON APPLICATION FOR STAY

No. A-145. Decided September 9, 1983

An application by the Secretary of Health and Human Services—who had terminated social security disability benefits without first producing evidence that the recipient's medical condition had improved, contrary to earlier decisions of the Court of Appeals for the Ninth Circuit requiring such proof—to stay that portion of the District Court's preliminary injunction (in a class action challenging the constitutionality of the Secretary's action) requiring the Secretary to pay benefits to reapplying prior recipients until she establishes their lack of disability through hearings complying with the Ninth Circuit rule, is granted pending applicant's appeal to the Court of Appeals for the Ninth Circuit. In view of the scope of the injunction—involving issues relating to exhaustion of administrative remedies and judicial review of the Secretary's determinations of eligibility for benefits—four Justices would probably vote to grant certiorari should the Court of Appeals affirm the injunction.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), requests that I issue a partial stay pending appeal of a preliminary injunction issued by the District Court for the Central District of California. The Court of Appeals for the Ninth Circuit rejected the Secretary's application for an emergency stay and for a stay pending appeal. On September 1, 1983, I granted the Secretary's request for a temporary stay pending further consideration of the application and the response. I have now decided to grant the stay requested by the Secretary.

This class action was instituted by numerous individuals and organizations to challenge the Secretary's failure to follow two Ninth Circuit decisions in terminating the payment of benefits under Title II and Title XVI of the Social Security Act to recipients in the Ninth Circuit. On the authority of *Finnegan* v. *Matthews*, 641 F.2d 1340 (CA9 1981),

and *Patti* v. *Schweiker*, 669 F.2d 582 (CA9 1982), respondents contend that the Secretary cannot terminate the payment of benefits without producing evidence that a recipient's medical condition has improved since he previously was declared disabled. The Secretary, on the other hand, relying on agency regulations which specifically disavow the holdings of *Patti* and *Finnegan*, contends that she can terminate benefits when current evidence indicates that a prior recipient is not now disabled. She argues that she need not produce specific evidence that the prior recipient's medical condition has improved.

Respondents styled their claim in the District Court as a constitutional challenge to the Secretary's "nonacquiescence" with settled law in the Ninth Circuit, an action which they argue violates constitutional principles of separation of powers and which deprives them of due process and equal protection. The District Court granted respondents' motion for class certification and their motion for a preliminary injunction.

The first part of the District Court's injunction, which the Secretary has not sought to stay, restrains the Secretary from disregarding *Patti* and *Finnegan* in pending and future cases. Paragraph 4(c), on the other hand, directs the Secretary within 60 days of the order to notify each member of the class that he can apply for reinstatement of benefits if he believes that his medical condition has not improved since his initial disability determination. Paragraph 4(c) requires the Secretary immediately to reinstate benefits to the applicants who apply. Following reinstatement of benefits, the Secretary can conduct hearings to establish lack of disability, but in those hearings, the Secretary must make a showing of medical improvement pursuant to *Patti* and *Finnegan* before terminating benefits. In a later order the District Court ruled that the Secretary can recoup interim benefits if she produces evidence at the hearing that the applicant's medical

condition has improved now or that it had improved at the earlier time when benefits were terminated.

On August 15, 1983, after the Ninth Circuit refused to issue an emergency stay, the Secretary notified approximately 30,000 members of the class that they could apply for reinstatement of benefits. The Secretary already has begun to receive applications. Thus the Secretary only requests that I stay the portion of Paragraph 4(c) which requires her to pay benefits to all applicants until she establishes their lack of disability through hearings complying with *Patti* and *Finnegan.*

My obligation as a Circuit Justice in considering the usual stay application is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342 (1980) (REHNQUIST, J., in chambers). The Secretary's stay application does not come to me in the posture of the usual application, however. The Secretary does not ask me to stay the judgment of the Court of Appeals pending the disposition of a petition for certiorari in this Court. She asks instead that I grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay.

Although there is no question that I have jurisdiction to grant the Secretary's request, it is also clear that "'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.'" *Atiyeh* v. *Capps*, 449 U.S. 1312, 1313 (1981) (REHNQUIST, J., in chambers) (citation omitted); see *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). For the reasons I am about to set out, I believe that the present case is sufficiently unusual to warrant the relief sought.

Ordinarily, in an action for an injunction, the decision of the court on the "merits" will be of greater concern to a re-

viewing court than the particular provisions of an injunction, which are primarily entrusted to the discretion of the district court. In this case, however, I believe that the scope of the District Court's injunction would prompt review of the injunction by at least four Members of this Court should the Court of Appeals affirm it without modification. I believe this is true even though I assume that the Court of Appeals for the Ninth Circuit will certainly follow its *Patti* and *Finnegan* decisions when it hears the Secretary's appeal. I likewise assume that since there does not appear to be any significant circuit conflict on this point at present, four Justices of this Court would not be likely to grant a petition for certiorari should the Secretary seek review in this Court of the merits of a Ninth Circuit opinion reaffirming *Patti* and *Finnegan.*

But the District Court's injunction goes far beyond the application of *Patti* and *Finnegan* to concrete cases before it. I think that Paragraph 4(c) of the injunction issued by the District Court, because of its mandatory nature, its treatment of the statutory requirement of exhaustion of administrative remedies, and its direction to the Secretary to pay benefits on an interim basis to parties who have neither been found by the Secretary nor by a court of competent jurisdiction to be disabled, significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established. While review of an injunction issued by a lower federal court independently of the "merits" of the issue involved in the case is not common, this Court has not hesitated to reverse a District Court where it concluded that the injunction did not comply with a provision of the Federal Rules of Civil Procedure, without ever reaching the "merits" of the question involved. See, *e.g.*, *Schmidt* v. *Lessard*, 414 U.S. 473 (1974).

The injunction issued by the District Court in this case must be evaluated first in the light of the provisions for judi-

cial review of determinations of eligibility for benefits by the Secretary. The principal provisions follow:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ." 49 Stat. 624, as amended, 42 U.S.C. § 405(g) (1976 ed., Supp. V).
>
> "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h).

We have held that these provisions codify the doctrine of exhaustion of administrative remedies, circumscribe the methods by which judicial review of a determination of the Secretary may be obtained, and set forth the standard for the exercise of judicial review. *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). We have also held that the scope of judicial review of the Secretary's determinations is a very limited one. *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983).

The scope of the District Court's injunction must also be evaluated in the light of familiar principles of administrative law enunciated in our decisions. In *Vermont Yankee Nu-*

clear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), this Court said:

> "[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), the Court explicated this principle, describing it as 'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'"

In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), this Court similarly observed: "[I]n the absence of substantial justification for doing otherwise, a reviewing court may not after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)."

With these general principles in mind, I turn to the particulars of the injunction issued by the District Court. It is unlike the usual "prohibitory" injunction which merely freezes the positions of the parties until the court can hear the case on the merits. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). The injunction issued here is in substance, if not in terms, a mandatory one, which "like a mandamus, is an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a

sound judicial discretion." *Morrison* v. *Work*, 266 U.S. 481, 490 (1925).

Paragraph 4(c) forces the Secretary immediately to pay benefits to every Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) recipient whose benefits have been terminated within the last two years because of cessation of disability. It also forces the Secretary to pay benefits to every SSI recipient under the "Grandfather Clause" of the Social Security Act whose benefits have been terminated within the last three years because of cessation of disability. The Secretary's obligation to pay is triggered merely by the recipient's statement in his application that, in his subjective belief, his medical condition has not improved since the earlier determination. I have serious doubt, which I believe would be shared by other Members of this Court, whether this provision is consistent with 42 U.S.C. § 405(i) or with this Court's admonition in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), that the courts have a duty "'to observe the conditions defined by Congress for charging the public treasury.'" *Id.*, at 788 (quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380, 385 (1947)).

The nature of the mandatory relief granted by the District Court in this case is exacerbated by the fact that the District Court defined the class to include numerous individuals who have never received "final decisions" from the Secretary on their claims within the meaning of 42 U.S.C. § 405(g) and over whom arguably the District Court has no jurisdiction. In *Weinberger* v. *Salfi*, *supra*, the Court held that there was a nonwaivable and a waivable portion of § 405(g)'s exhaustion requirement. The nonwaivable portion requires that "a claim for benefits shall have been presented to the Secretary" before judicial review can be sought. *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). Like this case, *Mathews* involved a prior recipient whose benefits were terminated. We held there that the nonwaivable exhaustion requirement had been satisfied because, after Eldridge re-

ceived notice of termination, he "specifically presented the claim that his benefits should not be terminated because he was still disabled." *Id.*, at 329. The preliminary injunction here, however, covers individuals who have never questioned the initial determination that they cease to be disabled. I have difficulty in seeing how these individuals have satisfied the nonwaivable jurisdictional requirement set out in *Salfi*.

The class includes still other individuals who have satisfied *Salfi*'s nonwaivable but not its waivable exhaustion requirement. These individuals may have sought review of the original agency determination that their benefits should be terminated, but they never pursued their claims any further. We held in *Salfi* that the Secretary herself could waive the exhaustion requirement if she deemed it futile in a particular case, but we also held that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Weinberger* v. *Salfi*, 422 U.S., at 766.

In this case the District Court concluded that the Secretary's announced policy of nonacquiescence establishes her final position on the medical improvement issue and that further exhaustion would be futile. Although there are other federal-court opinions which have accepted that argument, there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement. See *Ringer* v. *Schweiker*, 697 F.2d 1291 (CA9 1982), cert. granted, *ante*, p. 1206 [Publisher's note: See 463 U.S. 1206.]. The Secretary vigorously pressed the exhaustion argument before the District Court, noting that many of the class members who did exhaust their administrative remedies have had their benefits restored for reasons unrelated to the medical improvement issue. The District Court's determination that exhaustion would be futile seems to me to contradict our holding in *Salfi* that such determinations properly rest with the Secretary and not with the court.

Relying on this Court's decision in *Mathews*, respondents argue that they present the kind of case where deference to the Secretary's judgment concerning the need to exhaust is inappropriate. They argue that they are not making a demand for benefits *per se*, but rather that they are raising a collateral constitutional challenge to the Secretary's failure to comply with Ninth Circuit precedent. I am not persuaded that just because respondents put the label "constitutional" on their claim they can fit within the language of our opinion in *Mathews.* The constitutionality of the failure of the Secretary to provide pretermination hearings in *Mathews* appears substantially different to me from respondents' claim that their benefits were unlawfully terminated because of the Secretary's insufficient evidentiary showing. Unlike the claim in *Mathews*, respondents' unlawful-termination claim could benefit from further factual development and refinement through the administrative process.

Respondents argue that all class members are prior recipients who were once determined to be disabled by a final decision of the Secretary, and that the District Court has merely exercised its broad remedial powers to return the class members to the positions they occupied before the unlawful termination. Whatever might be the merits of such a determination in a lawsuit between private litigants, the remedial powers of a federal court in an action seeking to enjoin an agency of a coordinate branch of the Government are circumscribed by the principles which I have previously stated. This Court recently granted certiorari in *Day* v. *Schweiker*, 685 F.2d 19 (CA2 1982), cert. granted, 461 U.S. 904 (1983). In that case the Solicitor General contends that an order of payment of interim benefits was beyond the authority of the District Court. If the full Court were to sustain this contention, its opinion might well indicate that an award of interim benefits such as that contained in Paragraph 4(c) of the District Court's order in the present case was likewise beyond the competence of such a court.

The Secretary takes issue with the assessment of comparative equities by the District Court and by the Court of Appeals. For purposes of ruling upon the Secretary's application, I think I must accept, and do accept, the factual conclusions of both of these courts on the question. It bears repeating that if it seemed to me that nothing more were involved than the exercise of a District Court's traditional discretion in fashioning a remedy for an adjudicated harm or wrong, there would be no occasion for me as Circuit Justice to grant a stay where both the Court of Appeals and the District Court had refused to grant one. But as I have stated earlier in this opinion, I do not believe this is such a case. I agree with the statement of this Court in *FCC* v. *Pottsville Broadcasting Co*., 309 U.S. 134, 141 (1940):

> "A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled

> within the limited scope of 'judicial power' conferred by Congress under the Constitution."

I therefore grant the application of the Secretary to stay Paragraph 4(c) of the order of the District Court pending determination of the Secretary's appeal by the Court of Appeals for the Ninth Circuit.

[Publisher's note: See 463 U.S. 1339 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-156

DONOVAN WESLEY McGEE *v.* ALASKA

ON APPLICATION FOR BAIL

[September 9, 1983]

JUSTICE REHNQUIST, Circuit Justice.

Applicant has moved for bail pending disposition of his petition for certiorari to the Court of Appeals for the Ninth Circuit. He was tried in the state courts of Alaska and convicted of two crimes under state law. His conviction was affirmed on direct appeal by the Supreme Court of Alaska, *McGee* v. *State*, 614 P.2d 800 (Alaska 1980), and we denied certiorari, *McGee* v. *Alaska*, 450 U.S. 967 (1981). He then sought federal habeas relief in the United States District Court for the District of Alaska, claiming that certain evidence should have been suppressed and certain eyewitness testimony should have been excluded. Following a magistrate's investigation and report, applicant pursued only the Fourth Amendment claim before the District Court, which denied the claim because the applicant had received a full and fair hearing on his Fourth Amendment claim in the state courts. The Court of Appeals affirmed the judgment of the District Court, and applicant began serving his sentence.

Applicant, however, seeks to have me implement what amounts to an agreement between the parties to permit his release on bail, since the state has submitted a statement to the effect that it does not oppose release on bail. No doubt the proper Alaska authorities can release applicant on bail any time they choose to do so, but it is no part of the function of the federal courts to allow bail in federal habeas review of state proceedings simply because the state does not object. Requests for bail to this Court are granted only in extraordi-

nary circumstances, especially if, as here, a previous bail application has been denied. See *Julian* v. *United States*, A-1071, — U.S. — (July 13, 1983) (REHNQUIST, J., in chambers). Applicants must also demonstrate a reasonable possibility that four members of this Court will vote to grant the petition for certiorari. I am satisfied from the papers submitted to me that the probability of this Court granting certiorari to review the judgment of the Court of Appeals approaches, if it does not actually reach, zero. See *Stone* v. *Powell*, 428 U.S. 465 (1976). Therefore, his application will be denied, notwithstanding the fact that the respondent state does not oppose it.

It is so ordered.

[Publisher's note: See 463 U.S. 1341 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-147

M.I.C., LIMITED AND WEST POINT DRIVE-IN, INC. *v.* BEDFORD TOWNSHIP

ON APPLICATION FOR STAY

[September 13, 1983]

JUSTICE BRENNAN, Circuit Justice.

Applicants are the owner and operator of the West Point Auto Theatre, located in the Township of Bedford, Michigan. They request that I issue a stay, pending decision of their appeal in the Michigan courts, of a preliminary injunction entered on May 23, 1983, by the Circuit Court for the County of Calhoun, enjoining them from exhibiting allegedly obscene films at the West Point Auto Theatre.[1]

On April 29, 1983, Bedford Township brought this action for common-law nuisance against applicants, seeking a preliminary injunction and claiming that the recent exhibition of two allegedly obscene films at the drive-in theatre had created a public nuisance. Following a hearing, the trial court granted the Township's motion. The order, issued on May 23, 1983, enjoined applicants from displaying or projecting on the screen of the West Point Auto Theatre any films containing scenes of explicit sexual intercourse or other carnal acts. By its terms, the preliminary injunction was to continue in effect until a full trial on the matter was held or until further order of the court.

The next day, applicants appealed to the Michigan Court of Appeals, seeking immediate consideration of their application for a stay pending appellate review of the trial court's pre-

[1] The application, initially directed to JUSTICE O'CONNOR as Circuit Justice, was, because of her unavailability, referred to me.

liminary injunction. The Court of Appeals, on June 22, 1983, granted the motion for immediate consideration of the stay application but declined to issue a stay of the trial court's order. The court also directed that the case be placed on the calendar of the October 1983 session for a hearing on the merits. Applicants then sought similar relief from the Michigan Supreme Court, and, on August 16, 1983, that court denied both their motion for review prior to consideration of the appeal by the court of appeals and for a stay of the preliminary injunction. This application followed.

In support of their request for a stay, applicants principally contend that the delay entailed in processing their appeal before the Michigan Court of Appeals—a delay that they allege may extend up to six months[2]—violates the "procedural safeguards" that must attend the imposition by a State of a prior restraint on protected speech. *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

I recognize at the outset that there is a view that a Circuit Justice generally has authority to issue a stay of a state-court decision only where that decision is a "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U.S.C. §§ 2101(f); 1257(3). The Michigan courts can be expected ultimately to review the trial court's decision and, in that sense, the judgment of the lower court is neither the final decision in this matter, nor one rendered by the state's highest court. But here, as in *National Socialist Party of America* v. *Village* of *Skokie*, 432 U.S. 43, 44 (1977), and *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1329-1330 (1975) (BLACKMUN, J., in chambers), the state's highest court has refused either to lift the challenged restraint or to provide for immediate appellate review. Such a failure indicates that the state court has decided finally to maintain the restraint in effect during the pendency of re-

[2] This estimate of the appellate timetable is supported by an affidavit submitted by applicants, which respondents have not directly contradicted or refuted.

view. In this situation, I have no doubt that a Justice of this Court has full power to issue a stay.

Faced with situations similar to that presented here, this Court has repeatedly required that when a State undertakes to shield the public from certain kinds of expression it has labelled as offensive, it must "provide strict procedural safeguards . . . including immediate appellate review. Absent such review, the State must instead allow a stay." *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (citations omitted). See also *Freedman* v. *Maryland*, *supra*, 380 U.S., at 59; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560-562 (1975); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1328-1330 (1975) (BLACKMUN, J., in chambers).

In this case it appears that in all likelihood appellate review of the preliminary injunction will not be completed for several months. During that time, the trial court's broad proscription will bar, in advance of any final judicial determination that the suppressed films are obscene, the exhibition of any film that might offend the court's ban. Because of the delay involved, this prohibition will remain in effect for a considerable period without any final judicial review of the trial court's order. In these circumstances, the requirement imposed by the First Amendment that a State provide procedures to "assure a prompt final judicial decision," *Freedman* v. *Maryland*, *supra*, 380 U.S., at 59, has not been satisfied.

Accordingly, I will grant a stay of the preliminary injunction entered by the trial court on May 23, 1983, and amended on August 15, 1983, pending the disposition of applicants' appeal by the Michigan courts.

[Publisher's note: See 463 U.S. 1344 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-186

RALPH M. KEMP, SUPERINTENDENT, COLUMBIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* JOHN ELDON SMITH

ON APPLICATION FOR VACATION OF STAY

[September 17, 1983]

JUSTICE POWELL, Circuit Justice.

On August 23, 1983, the Court of Appeals for the 11th Circuit granted respondent Smith a stay of execution pending consideration of the merits of Smith's petition for habeas corpus. In its opinion, the Court of Appeals stated that the petition raised substantial issues that warranted review. The Attorney General filed an application with me as Circuit Justice requesting that I dissolve and vacate the stay. I denied the application. *See* — U.S. — (1983).

On September 9, the Court of Appeals—after a hearing on the merits—denied Smith's petition for habeas corpus. On September 13, Smith filed a suggestion for rehearing en banc and a motion for stay of execution.[1] The Court of Appeals stayed Smith's execution on September 15. The court provided that the stay would remain in effect until the mandate issues. Under the Federal Rules of Appellate Procedure, if Smith's suggestion for rehearing is denied, the mandate will issue automatically after 7 days. The Court of Appeals may shorten or lengthen that period by order. Fed. R. App. P. 41(a).

The Attorney General of Georgia filed an application with me on September 16 requesting that I vacate the Court of

[1] On September 9, the Superior Court of Bibb County Georgia scheduled Smith's execution for September 21.

Appeals [Publisher's note: There should be an apostrophe after "Appeals".] latest stay. Again I cannot say that the court abused its discretion in staying Smith's execution. The Court of Appeals is in a better position to determine the merits of Smith's request for rehearing and how much time it needs adequately to consider his claims. In the past, the Court of Appeals has addressed this case in an expeditious manner, consist with our opinion in *Barefoot* v. *Estelle*, — U.S. — (1983). I have no reason to believe that the court will not expedite consideration of Smith's suggestion for rehearing. The Court of Appeals also has authority to order that the mandate issue forthwith if Smith's request for a rehearing is denied.[2]

Accordingly, the application of the State of Georgia to vacate the stay ordered by the Court of Appeals is denied.

[2] Smith was convicted January 30, 1975. As I noted in my Chambers opinion of August 23, this is the fifth time that this case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and twice in Smith's second federal habeas proceeding. Apart from rehearings, this case has now been reviewed sixteen times by state and federal courts. Few cases have received more repetitive consideration than this one. I cannot say whether the judicial process has been abused deliberately. Certainly our dual state and federal process, as presently structured by law, invites the years of repetitious litigation experienced in this case. But so long as present law remains unchanged, courts—absent evidence of deliberate abuse—must respect it. Courts, however, can and should expedite consideration in the absence of new and clearly substantial claims.

[Publisher's note: See 464 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-242

JAMES DAVID AUTRY *v.* W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ON APPLICATION FOR STAY

[October 5, 1983]

JUSTICE WHITE, Circuit Justice.

Applicant is under a sentence of death imposed by the courts of Texas. His execution is scheduled to be carried out after midnight of October 4, c. d. t. He has once unsuccessfully sought a writ of habeas corpus from the United States District Court; denial of the writ was affirmed by the Court of Appeals for the Fifth Circuit, 706 F.2d 1394 (1983), and on October 3, 1983, we denied a stay pending the filing of a petition for certiorari. *Ante*, p. —. Applicant then filed a second petition for habeas corpus, raising grounds not presented in his first petition and hence not before us when we so recently denied a stay of execution. After a hearing, the District Court denied both the writ and a certificate of probable cause, which, under 28 U.S.C. § 2253, is a prerequisite to an appeal. The Court of Appeals then held a hearing, denied the certificate of probable cause, and denied the stay. Applicant has now applied to me for a stay.

One of the three grounds on which applicant sought relief in his second habeas corpus petition is the failure of the Texas Court of Criminal Appeals to compare his case with other cases in order to determine whether his death sentence is disproportionate to the punishment imposed on others. That ground as I have said was not presented in his first petition. Although it appears that no such review was in fact carried out in this case, the Court of Appeals held that the Texas

death-penalty system, as a whole, satisfies any constitutional requirement with respect to proportionality.

I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253, and to enter a stay pending the final disposition of the appeal by the Court of Appeals. On March 21, we granted certiorari in No. 82-1095, *Pulley* v. *Harris.* [Publisher's note: The period preceding this note should be a comma.] 460 U.S. —. In that case, the Court of Appeals for the Ninth Circuit held that a death sentence cannot be carried out by the State of California until and unless the State Supreme Court conducts a comparative proportionality review, which, the court held, was constitutionally required. 692 F.2d 1189 (1982). We shall hear argument in that case in November, and if we affirm the Court of Appeals for the Ninth Circuit, there will be a substantial question whether the views of the Court of Appeals for the Fifth Circuit with respect to the proportionality issue were correct. Of course I do not know how the Court will rule on this question, but in view of the judgment of the Court of Appeals for the Ninth Circuit and in view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance. Accordingly, I hereby issue a certificate of probable cause and stay petitioner's execution pending the final disposition of the appeal by the Court of Appeals, or until the Court's or my further order.

In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, res judicata has been inapplicable to habeas corpus proceedings, *Sanders* v. *United States*, 373 U.S. 1, 7-8 (1963), and 28 U.S.C. § 2244(a) and 28 U.S.C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated.

[Publisher's note: See 464 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A-470 AND A-471

WILLIAM P. CLARK, SECRETARY OF INTERIOR, ET AL.
A-470 *v.*
CALIFORNIA ET AL.

WESTERN OIL AND GAS ASSOCIATION, ET AL.
A-471 *v.*
CALIFORNIA, ET AL.

ON APPLICATIONS FOR STAY

[December 20, 1983]

JUSTICE REHNQUIST, Circuit Justice.

Applicants, the Secretary of the Interior and the Western Oil and Gas Association, request that I stay a preliminary injunction issued by the United States District Court for the Central District of California. The United States Court of Appeals for the Ninth Circuit denied the request for a stay without opinion. The preliminary injunction prohibits the Secretary from conducting Lease Sale 73, the sale of 137 designated tracts on the Pacific Outer Continental Shelf for oil and gas leasing. As issued it is effective pending final determination of respondent California's claims, the principle of which is its claim that the Secretary did not prepare an adequate "consistency determination" pursuant to section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), as interpreted by the Court of Appeals for the Ninth Circuit in *California* v. *Watt*, 683 F.2d 1253 (1982), *cert. granted*, *Clark* v. *California*, Nos. 82-1326, 82-1327, and 82-1511 (argued November 1, 1983).

Section 307(c)(1) provides:

> "Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (emphasis added).

In *Clark* v. *California*, *supra*, the Court will decide whether the Secretary's sale of oil and gas leases is an activity "directly affecting" the coastal zone within the meaning of section 307(c)(1). Unless the Court answers that question in the affirmative, there is no statutory requirement at this stage of the project that the Secretary prepare the "consistency determination" which the District Court deemed inadequate and which formed the basis of its decision to issue the injunction in this case.

Having examined the submissions of the parties, I have decided to stay the preliminary injunction pending this Court's resolution of the question presented in *Clark* v. *California*, concluding as I do that in the interim the traditional considerations affecting the award of equitable relief favor the applicants.

It is so ordered.

[Publisher's note: See 464 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A-525, A-526, A-527 AND A-531

SAMUEL LEE MCDONALD
A-525 *v.*
MISSOURI

LEONARD MARVIN LAWS
A-526 *v.*
MISSOURI

THOMAS HENRY BATTLE
A-527 *v.*
MISSOURI

GEORGE CLIFTON GILMORE
A-531 *v.*
MISSOURI

ON APPLICATIONS FOR STAYS

[January 3, 1984]

JUSTICE BLACKMUN, Circuit Justice.

I have before me applications to stay the executions of Samuel Lee McDonald, Leonard Marvin Laws, Thomas Henry Battle, and George Clifton Gilmore, each convicted in a Missouri state court of capital murder and each sentenced to die on January 6, 1984. Their respective convictions and sentences have been affirmed by the Supreme Court of Missouri on direct appeal, *State* v. *McDonald*, — S.W.2d —, [Publisher's note: The comma preceding this note is surplus.] (1983); *State* v. *Laws*, — S.W.2d —, [Publisher's note: The comma preceding this note is surplus.] (1983); *State* v. *Battle*, — S.W.2d — (1983); *State* v. *Gilmore*, — S.W.2d —, [Publisher's note: The comma preceding this note is surplus.] (1983), but review here on such federal grounds as the respective applicants may possess has not yet been had. The execution date in each case has been fixed by

the Missouri Supreme Court. See Mo. Rule of [Publisher's note: The "of" preceding this note is surplus.] Crim. Proc. 29.08(d).

In *Williams* v. *Missouri*, — U.S. — (1983), I granted a stay of execution pending timely filing and disposition of a petition for certiorari on direct review. That case procedurally was similar to these, and the Supreme Court of Missouri there, also, had denied a stay of its mandate. In a short accompanying opinion, I pointed out that, if a federal question is involved, the process of direct review "'includes the right to petition this Court for a writ of certiorari,'" *id*., at —, quoting *Barefoot* v. *Estelle*, — U.S. —, — (1983) (slip op. 5). I specifically stated:

> "[I]f a State schedules an execution to take place before filing and disposition of a petition for certiorari, I must stay that execution pending completion of direct review, as a matter of course." — U.S., at —.

Every defendant in a state court of this Nation who has a right of direct review from a sentence of death, no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless. It makes no sense to have the execution set on a date within the time specified for that review, see 28 U.S.C. §§ 1257 and 2101; U.S. Sup. Ct. Rule 20.1, and before the review is completed. I thought I had advised the Supreme Court of Missouri once before, in *Williams*, that, as Circuit Justice of the Circuit in which the State of Missouri is located, I, upon proper application, shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.

Accordingly, in each of the four cases, I grant the application to stay the execution now scheduled for January 6, 1984. Orders are being entered accordingly.

[Publisher's note: See 465 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-589

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPLICANT *v.*
SAMMIE GAIL BLANKENSHIP ET AL. AND GEORGIA FINCH ET AL.

ON APPLICATION FOR STAY

[January 26, 1984]

JUSTICE O'CONNOR, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), requests that I issue a stay pending the filing and disposition of a petition for a writ of certiorari to review the *per curiam* judgment of the United States Court of Appeals for the Sixth Circuit in this case. The Court of Appeals' judgment, affirming an order entered by the District Court for the Western District of Kentucky, requires the Secretary: (1) to promulgate regulations adopting a *nationwide* 180-day time limit for the rendering of decisions in disability benefit cases under Titles II and XVI of the Social Security Act, and (2) to promulgate regulations imposing a *nationwide* 90-day time limit for the rendering of decisions in disability termination cases under Title XVI of that Act. Although respondents requested only that the Secretary immediately be required to provide hearings and appeals to Kentucky class members, the Court of Appeals affirmed the District Court's order without limiting it in any way. The Secretary attests that the Solicitor General has determined that a petition for a writ of certiorari will be filed to seek review of this order. She further suggests that, in the meantime, it makes no sense to order her to impose nationwide time limits when this Court is about to address the propriety of a court's imposing such deadlines in even one *state* in *Heck-*

ler v. *Day*, No. 82-1371 (argued December 5, 1983). Accordingly, she seeks a stay from this Court.

My obligation as a Circuit Justice in considering a stay application is "to determine whether Four Justices would vote to grant certiorari, to balance the so-called 'stay-equities,' [Publisher's note: "stay-equities" should be "stay equities".] and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342 (1980) (REHNQUIST, J., in chambers). These factors lead me to conclude that the request for a stay should be granted.

By granting the Secretary's petition for a writ of certiorari in *Day*, this Court has already determined that the question of judicial imposition of time limits on the disability adjudication and appeal process warrants review by this Court. The instant case presents issues of potentially even greater legal and social significance than does *Day*, because the court below has imposed on the Secretary the obligation to promulgate nationwide, as opposed to statewide, regulations. I think it is fair to say, therefore, that at least four Justices would vote to grant certiorari.

Furthermore, the balance of equities clearly weighs in favor of a stay. Imposition of nationwide time limits would, in all likelihood, require a substantial restructuring of the existing claims adjudication and appeals process. Respondents consist only of residents of Kentucky, and therefore have no standing to insist upon the imposition of deadlines for decisions on claims filed by residents of other states, as the courts below have ordered. Moreover, since the District Court's order had been stayed for almost 20 months prior to the Court of Appeals' decision, the extension of that stay for several more months until this Court decides *Day* should not cause significant incremental hardship to the interests respondents represent in Kentucky. The Secretary remains under her statutory duty to provide hearings and appeals within a reasonable period of time, and I must assume that she will abide by the statutory requirement and make all rea-

sonable efforts to mitigate the hardships that members of the respondent class undoubtedly suffer pending resolution of their claims. But since imposition of time limits would necessarily require a period of transition, it is unlikely that immediate implementation of the District Court's order would produce benefits for claimants in Kentucky or elsewhere. The equities therefore counsel that the order be stayed until we render our decision in *Day*.

Finally, irrespective of the likelihood of success on the merits, it is clear that the Court's opinion in *Day* will provide guidance concerning the Secretary's duties in Kentucky and elsewhere. With the equities as they are, prudence dictates that implementation of the District Court's order await our decision in that case.

I therefore grant the requested stay of the District Court's order requiring the Secretary to promulgate regulations imposing time limits on the adjudication and appeal of disability claims pending the timely filing and subsequent disposition of a writ of certiorari in this case.

It is so ordered.

[Publisher's note: See 465 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-615

RALPH LILES ET AL. *v.* NEBRASKA ET AL.

ON APPLICATION FOR STAY

[February 13, 1984]

JUSTICE BLACKMUN, Circuit Justice.

On January 31, 1984, Ralph Liles and others presented to me, as Circuit Justice, an application for a stay, pending review here, of an order of the District Court of Cass County, Nebraska, issued on December 14, 1983. That order committed the applicants to the Cass County jail for their refusal to answer certain questions when ordered to do so by the District Court. The Fifth Amendment claim made by the applicants did not appear to be insubstantial. At the time that the applicants submitted their application for a stay, each had an appeal from the contempt order pending before the Nebraska Supreme Court.

On February 7, respondents filed an opposition to the application for stay. On February 9, the Supreme Court of Nebraska entered an order in each applicant's case dismissing his appeal to that court "for lack of an appealable order."

With these cases in that posture, I have no jurisdiction to act pursuant to 28 U.S.C. § 2101(f). I therefore must deny the relief requested of me by the applicants. This, of course, is without prejudice to any further application, if necessary, if and when the cases return in a more favorable posture.

[Publisher's note: See 465 U.S. 1305 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-725

HARRY EUGENE CLAIBORNE, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES

ON APPLICATION FOR STAY

[March 12, 1984]

JUSTICE REHNQUIST, Circuit Justice

Harry Eugene Claiborne, the applicant, is a sitting United States Judge in the District Court for the district [Publisher's note: "district" should be "District".] of Nevada. In December, 1983, he was indicted for violations of 18 U.S.C. § 201(c) and 18 U.S.C. § 1343. His contentions that a sitting federal judge may not be criminally prosecuted before being removed from office by impeachment, and that the government prosecuted him in order to punish him for decisions made as a federal judge, were rejected by the Court of Appeals for the Ninth Circuit. He requests that I stay the criminal proceedings against him, scheduled to commence today, in order that this Court may review these determinations.

The first contention—that a federal judge may not be indicted and tried for a criminal offense until he is first impeached and convicted by Congress—has been rejected not only by the Court of Appeals in this case but by the only two other Courts of Appeals to consider the question. *United States* v. *Hastings*, 681 F.2d 706 (5th Cir.); *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.). This Court denied a stay in *Hastings*, 103 S. Ct. 1188 (1983), and denied certiorari in *Isaacs*, 417 U.S. 976 (1974).

Applicant's second claim appears to be a species of "vindictive" or "selective" prosecution, and the fact that he is a sitting federal judge does not seem to me to remove the claim from the principles most recently discussed in *United States*

v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982). I think the Court of Appeals was correct in concluding that the denial of relief on this claim by the District Court was not immediately appealable under the "collateral order" doctrine. Applicant finally contends that because the first of his claims was appealable under the collateral order doctrine, the District Court lost jurisdiction to determine other pre-trial matters pending resolution of the appeal by the Court of Appeals. The Court of Appeals applied the dual jurisdiction approach set forth in *United States* v. *Dunbar*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926 (1980), and rejected this claim.

I do not believe that four Justices of this Court would vote to grant certiorari to review any one of these claims at the present stage of this litigation, and I therefore deny the application.

[Publisher's note: See 466 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-935 (83-1747)

ARTHUR TATE JR., SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE *v.* CHARLES E. ROSE

ON APPLICATION FOR STAY

[May 19, 1984]

JUSTICE O'CONNOR, Circuit Justice.

The petitioner in No. 83-1747 is the Superintendent of the Chillicothe Correctional Institute at Chillicothe, Ohio. The respondent is an Ohio prisoner in petitioner's custody. Respondent applied to the United States District Court for the Southern District of Ohio for a writ of habeas corpus. The District Court granted the writ, and the United States Court of Appeals for the Sixth Circuit affirmed. *Rose* v. *Engle*, 722 F.2d 1277 (1983). Petitioner challenges that decision in No. 83-1747.

Respondent, who is entitled to a new trial under the Court of Appeals' ruling, has been ordered released on May 21, 1984, pending retrial. Petitioner seeks a stay of the Court of Appeals' judgment until this Court completes its consideration of his petition. In deciding whether to grant the requested stay, I am obliged to determine whether four Justices are likely to vote to grant certiorari, to balance the "stay equities," and to gauge the likely outcome of this Court's consideration of the case on the merits. See *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342 (1980) (REHNQUIST, J., in chambers). I conclude that the stay should be granted.

Respondent was convicted of murder in 1979. At the trial, the prosecutor introduced certain statements that respondent made, after he had invoked his right to silence and

to the presence of an attorney, in response to a police officer's renewed questioning. Petitioner concedes that these statements were elicited in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), decided two years after respondent's conviction.

The Court of Appeals affirmed the District Court's grant of habeas relief because it concluded, following the analysis of *United States* v. *Johnson*, 457 U.S. 537 (1982), that *Edwards* should be applied retroactively to respondent's case. The court observed that respondent's conviction had not become final at the time *Edwards* was decided, since the time for filing a petition for a writ of certiorari on direct appeal expired at the end of the very day *Edwards* was handed down. The issue presented in the petition is whether the *Edwards* decision should have been applied to respondent's case.

In *Solem* v. *Stumes*, No. 81-2149 (February 29, 1984), this Court recently decided that *Edwards* v. *Arizona* "is not to be applied in collateral review of final convictions." Slip op. at 12. The Court expressly declined to decide whether *Edwards* was retroactive in collateral proceedings for any case, such as respondent's, in which the conviction was not yet final when *Edwards* was decided. The petition in No. 83-1747 accordingly presents a question left open in *Solem* v. *Stumes.*

The Court's decision in *Stumes*, however, sheds considerable light on the correctness of the Sixth Circuit's decision in respondent's case. First, the Court concluded, contrary to the Sixth Circuit's view, that the analysis adopted in *United States* v. *Johnson*, *supra*, is not applicable to the decision whether *Edwards* is retroactive. Slip op. at 5, n. 3. Thus, the Court of Appeals followed an erroneous approach in considering the retroactivity of *Edwards.* Second, the rationale of the Court in *Solem* v. *Stumes* casts into substantial doubt the Sixth Circuit's conclusion that *Edwards* presents a ground for ordering a new trial in respondent's case. The Court reasoned that *Edwards* "has only a tangential relation to truthfinding at trial," slip op. at 5; that police cannot "be

faulted if they did not anticipate [the] *per se* approach" of *Edwards*, slip op. at 9; and that "retroactive application of *Edwards* would have a disruptive effect on the administration of justice," slip op. at 11. Although new arguments, of course, might be made to blunt the force of this reasoning in cases presenting different facts from those presented in *Stumes*, the reasoning of *Stumes* strongly suggests that *Edwards* should not retroactively render inadmissible a statement, such as those at issue in respondent's case, obtained by police years before *Edwards* was decided.

Because the petition in No. 83-1747 presents an open question and because *Solem* v. *Stumes* makes highly doubtful the correctness of the decision of the Court of Appeals, I think it likely that four Justices will vote to grant the petition. As for disposition of the case on the merits, I think it likely that the Court will either (1) give plenary consideration to the question left open in *Solem* v. *Stumes* and reverse the judgment of the Court of Appeals or (2) vacate the Court of Appeals' judgment and remand the case for reconsideration in light of *Solem* v. *Stumes.* I further conclude that the "stay equities" balance in petitioner's favor: granting the stay for the time necessary to consider the petition should not cause a significant incremental burden to respondent, who has been incarcerated for several years, but doing so will relieve the State of Ohio of the burden of releasing respondent or retrying him.

I therefore grant the application for a stay of the judgment of the United States Court of Appeals for the Sixth Circuit in *Rose* v. *Engle*, 722 F.2d 1277 (1983), pending disposition of the petition for a writ of certiorari in No. 83-1747.

It is so ordered.

[Publisher's note: See 468 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-1061 (83-2144)

SAMUEL P. GARRISON, WARDEN, ET AL. *v.* JAMES LEE HUDSON

ON APPLICATION FOR STAY

[July 6, 1984]

CHIEF JUSTICE BURGER, Circuit Justice.

On June 29, 1984 the petitioners, the Warden and Attorney General of the State of North Carolina, filed a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. In respondent's second federal appeal concerning his murder conviction and life sentence, the Court of Appeals reversed the decision of the United States District Court for the Western District of North Carolina and directed that a writ of habeas corpus issue to release respondent from confinement if petitioners fail to retry him within a reasonable time. The District Court then ordered retrial prior to August 18, 1984. Petitioners challenge the Court of Appeals' decision in their certiorari petition, No. 83-2144, and seek to stay the scheduled retrial until this Court acts on the petition for certiorari. Hudson filed a response to the application earlier today asserting that the decision of the Court of Appeals is correct.

The petition for certiorari would not in the normal course be acted on by this Court before the start of the October 1984 Term—some six weeks after the scheduled retrial. See Supreme Court Rule 22.4. Retrial of respondent by August 18, 1984 prior to the "first Monday in October" would effectively deprive this Court of jurisdiction to consider the petition for writ of certiorari. Petitioners assert that their right to a review of the holding of the Court of Appeals will be extinguished if they are compelled to retry respondent on or

[Publisher's note: Roughly 2 cm of text are cut off on the left side of the original of this page, probably as a result of imperfect photoduplication. We have filled in with text – bracketed here – from 468 U.S. 1301, 1302. We have not, however, attempted to otherwise conform the text of the *Rapp* version of the opinion to the *United States Reports* version. Thus, for example, in the *United States Reports* version the word "petitioners" in the fourth and sixth lines of the text below has been replaced with the word "applicants", and "petitioners'" in the ninth line has been replaced with "the".]

[about Au]gust 18. When, as in this case, "the normal course [of appella]te review might otherwise cause the case to become [moot," *In*] *re Philip Bart*, 82 S. Ct. 675 (1962) (Warren, C.J., [in chamb]ers), issuance of a stay is warranted. The balance [of harm f]avors petitioners; foreclosure of certiorari review by [this Cour]t would impose irreparable harm upon petitioners. [In contra]st, a six-week delay of the scheduled retrial would [not impos]e an unreasonable delay on respondent who has re[mained in] confinement under a life sentence since 1977.

[I there]fore grant petitioners' application for a stay of the [order of] the United States District Court for the Western [District] of North Carolina in *Garrison, et al.* v. *Hudson*, [p]ending disposition of the petition for writ of certio[rari in No]. 83-2144.

It is so ordered.

[Publisher's note: See 468 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-19

CALIFORNIA *v.* LEE EDWARD HARRIS

ON APPLICATION FOR STAY

[July 23, 1984]

JUSTICE REHNQUIST, Circuit Justice.

The State of California requests that I stay, pending action by this Court on its petition for certiorari, a judgment of the Supreme Court of California that reversed the capital murder conviction of respondent. The State wishes this Court to review the holding of the California court that the jury that tried respondent was not "drawn from a fair cross section of the community" as that phrase is used in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and other cases.

Respondent was tried in Los Angeles County, which at the time the jury in his case was empaneled summoned jurors by use of a voter registration list. The majority of the Supreme Court of California decided that respondent had produced credible evidence of substantial disparity between the representation of Blacks and Hispanics on the voter lists, on the one hand, and their representation in the population at large, on the other. That court also concluded that the State had failed to rebut this evidence.

The State contends that the Supreme Court of California has misapplied this Court's *Duren* decision so as to find a violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class because of the failure of class members to register to vote. If I thought this issue were squarely presented by the State's application, I would grant a stay, because I think four Members of our Court would probably vote to grant certiorari to review the issue and, with California's rule requiring retrial in 60 days,

the case would become moot without a stay. Whether this sort of jury selection procedure can be described as "systematically" excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, see 439 U.S. at 368-370, are by no means open and shut questions under *Duren.*

The plurality opinion of the Supreme Court of California, however, says in substance that the State failed to preserve the second of these two questions in defending against respondent's appeal. The concurring opinion in that court, on the other hand, indicates disagreement with this view. While I cannot at this stage of the proceedings determine even to my own satisfaction which is the correct view of California law, I think this procedural snarl is likely to deter some Members of this Court who would wish to review the substantive issues involved in this case from voting to grant certiorari. While there appears to be no such procedural objection to the first of these two questions, I am doubtful that the "systematic" underrepresentation issue alone would attract enough votes to grant certiorari.

The State's application is accordingly denied.

[Publisher's note: See 468 U.S. 1305 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-59 (83-1097)

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* SANDRA TURNER ET AL.

ON APPLICATION FOR STAY

[August 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Health and Human Services, requests that I stay, pending review by this Court, prospective enforcement of the permanent injunction entered by the United States District Court for the Northern District of California on July 29, 1982, and affirmed by the United States Court of Appeals for the Ninth Circuit. The issue before the District Court was whether the $75.00 standard work expense disregard in § 402(a)(8) of the Aid to Families with Dependent Children (AFDC) statute, 42 U.S.C. § 602(a)(8) (1976 ed., Supp. V), is deducted from net income or gross income in determining AFDC eligibility and benefits. That court concluded that the disregard was intended by Congress to be deducted from net income, and it entered a permanent injunction prohibiting state and federal officials

> "from including mandatory payroll deductions such as federal, state and local income taxes, Social Security taxes (F.I.C.A.) and state disability insurance within the definition of 'income' in interpreting and applying that term as used in Section 602(a)(7)(A) of Title 42 of the United States Code [Section 402(a)(7)(A) of the AFDC statute]."

The Ninth Circuit's affirmance of the District Court's interpretation is in conflict with decisions of the Third and Fourth

Circuits, causing a significant disparity in the treatment of AFDC beneficiaries based solely on residence. This Court granted the Government's petition for a writ of certiorari to resolve the conflict.

Subsequently, on July 19, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. 98-369 (1984). Section 2625(a) of that Act, entitled "Clarification of Earned Income Provision," amends § 402(a)(8) of the AFDC statute to provide "that in implementing [Section 402(a)(8)] the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." This amendment became effective on the date of enactment.

The Government argues in its application for a stay that Congress has resolved, at least from the date of enactment of this amendment forward, the precise issue on which we granted certiorari. In their memorandum in opposition to the Government's application for a stay, which I requested, the AFDC respondents argue that the Deficit Reduction Act, while resolving the meaning of "earned income" in § 402(a)(8), does not resolve the meaning of "income" in § 402(a)(7)(A) and thus does not overrule, prospectively, the interpretation of the Ninth Circuit on the ultimate issue of whether the $75.00 standard work expense disregard is deducted from net income or gross income. In my judgment, respondents' position is wrong. The conference report to the Deficit Reduction Act refers specifically to the conflict between the Ninth Circuit on the one hand and the Third and Fourth Circuits on the other, including the fact that this Court has agreed to hear the Ninth Circuit case, and states that the Act

> "[a]mends the AFDC statute to make clear that the term 'earned income' means the gross amount of earnings, prior to the taking of payroll or other deductions."

H.R. Conf. Rep. No. 98-861, pp. 1394-1395 (1984). From the report's discussion, it seems clear to me that Congress intended the amendment of § 402(a)(8) to resolve the conflict, at least for the future, on the issue on which we granted cer-

tiorari. I do not see how this discussion is either confusing or ambiguous, as claimed by respondents.

The Government has made out a compelling case for a prospective stay. Effective July 18, 1984, petitioners are unambiguously directed by statute to deduct the work expense disregard from gross income, prior to any deductions for taxes or for any other purposes; yet they are still subject to an injunction prohibiting them from doing the same. When this Court decides the merits of the Ninth Circuit decision affirming the injunction, which was based on the statute as it stood prior to the Deficit Reduction Act, the Court will probably also decide the validity of the injunction after the effective date of the Act. As is evident from the discussion above, I think there is a high probability that the Court will determine, as urged by the Government in this application, that the injunction is prospectively improper and should be dissolved as to AFDC eligibility and benefit determinations subject to the July 18, 1984, amendment. I express no opinion on the merits prior to the effective date of the Deficit Reduction Act.

I also conclude that without a stay the Government will suffer irreparable injury. If the Government succeeds on the merits, which I am confident it will as to the future interpretation of the work expense disregard, the continued application of the injunction will result in approximately $2.6 million in improper AFDC payments each month, divided equally between the federal Government and the State of California, a figure which respondents apparently concede. Should the Government ultimately lose on this issue, respondents and others so entitled will be able to collect back AFDC payments that would have been made but for the requested stay. On the other hand, it is extremely unlikely that the Government would be able to recover funds improperly paid out. See *Edelman* v. *Jordan*, 414 U.S. 1301, 1302-1303 (1973) (REHNQUIST, Circuit Justice). A stay is, therefore, appropriate.

Finally, the individual respondents cite this Court's Rule 44.4, which provides that an application for a stay to a Justice "shall not be entertained, except in the most extraordinary circumstances," unless the relief requested has first been sought below, and argue that there are no extraordinary circumstances present in this case. They further cite my opinions in *Conforte* v. *Commissioner of Internal Revenue*, — U.S. —, 103 S. Ct. 663 (1983) (REHNQUIST, Circuit Justice), and *Dolman* v. *United States*, 439 U.S. 1395 (1978) (REHNQUIST, Circuit Justice), where stays were denied in part for failure to apply first for a stay in the lower courts. In *Conforte* there was no reasonable probability that certiorari would have been granted, and the applicant had not shown any legitimate reason, let alone extraordinary circumstances, for not seeking a stay in the Court of Appeals. In *Dolman* the information presented to me in the application for a stay was sketchy as to whether the applicants had requested a stay below, and there was no apparent reason for not requesting such a stay below.

The situation in the instant case is quite different. The reason for requesting a stay arose only after this Court granted certiorari and was not available when the case was before the lower courts. The Government contends that because certiorari had been granted, it was doubtful that either the District Court or the Court of Appeals had the authority to modify the injunction. I agree with the Government that such doubt exists; and whether or not an application to one of the lower courts would have been proper under the circumstances, I believe an application directly to this Court is not improper.

I think there are compelling reasons to grant immediate relief. With respect to the future propriety of the injunction, the Government is almost certain to prevail on the merits, because of the intervening congressional action. Every day the injunction remains in force the clearly expressed intent of Congress is being frustrated, and public funds are being im-

properly expended without realistic possibility of recovery at the rate of $2.6 million per month. It would be an empty and costly formality to force the Government to refile its application in the lower courts. In my judgment, the "most extraordinary circumstances" requirement of Rule 44.4 is met in the unusual circumstances of this case.

The application for a stay of the District Court injunction is granted prospectively from July 18, 1984.

[Publisher's note: See 468 U.S. 1310 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-137

LEWIS K. UHLER ET AL. *v.* AMERICAN FEDERATION OF LABOR–CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL.

ON APPLICATION FOR STAY

[September 7, 1984]

JUSTICE REHNQUIST, Circuit Justice

Petitioners ask that I stay a mandate of the Supreme Court of California prohibiting the placement on California's November 1984 ballot of a proposed "balanced federal budget statutory initiative." The initiative would have required the California Legislature to request Congress to call a Constitutional Convention for the purpose of amending the United States Constitution to require a balanced federal budget. If the legislature failed to act, the initiative would have directed the California Secretary of State, the nominal respondent in this case, to apply directly to Congress in [Publisher's note: The "in" preceding this note probably should be "on". But see 468 U.S. at 1310.] behalf of the State's voters. At present, 32 of the necessary 34 States have formally applied to Congress to convene such a Constitutional Convention.

The Supreme Court of California ruled at the behest of respondents, the American Federation of Labor-Congress of Industrial Organizations, et al., who filed an original action in that court challenging the legality of the initiative under both state law and the United States Constitution. The constitutional provision at issue is that part of Article V which states that "[t]he Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."

The California Court undertook to decide two clearly federal questions relating to the meaning of the word "Legisla-

ture" in the above clause: (1) whether that word encompasses the voters of a State who have power to enact laws by initiative, and (2) whether it includes a legislature not acting as an independent body, but forced to act by exercise of the initiative power. The court answered each of these questions in the negative, concluding that the word "Legislature" means the state's lawmaking body of elected representatives, acting independently of restrictions imposed by state law. These federal questions are important and by no means settled; however, because the California Court went on to hold the proposed initiative invalid on independent state law grounds, I am satisfied that a majority of this Court would conclude that there is an adequate and independent state ground for the California Court's decision.

After a detailed analysis of California law and a discussion of the treatment of similar questions by other state courts, the Supreme Court of California decided that important portions of the proposed initiative were not "statutes," as that term is used in the California Constitution, but were "resolutions," and were therefore not a proper subject of the initiative process under the California Constitution. *AFL-CIO* v. *Eu*, S.F. 24746, at 48-49 (Cal. Sup. Ct., Aug. 26, 1984). We have long held that we will not review state court decisions such as this, largely for the reason that decisions on the federal questions in such cases would amount to no more than advisory opinions. See *Michigan* v. *Long*, — U.S. —, 103 S. Ct. 3469, 3474-3476 (1983); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

Petitioners urge that the foregoing construction of the California initiative provision, although denominated a state law question by the California Court, is actually a "political question" as a matter of federal law and therefore not subject to decision on the merits by a state court. Petitioners base their "political question" claim on the decision of this Court in *Coleman* v. *Miller*, 307 U.S. 443 (1939). In that case four Justices of this Court adopted the position that the Court

lacked jurisdiction to rule on questions arising in connection with the ratification of a constitutional amendment because all such questions were "political" in nature. But that position did not command a majority in *Coleman*, *supra*, and however this Court would presently resolve the issues raised in the *Coleman* case, I do not think a majority would subscribe to petitioners' expansive reading of the "political question" doctrine in connection with the amending process. Acceptance of petitioners' arguments would, in effect, mean that courts in the State of California or elsewhere would be powerless to prevent the placing on the ballot of initiative measures designed to play a part in the process of amending the United States Constitution even though such initiative proposals clearly did not comply with State requirements as to the necessary number of signatures, time of filing, and the like. In the light of later discussions of the "political question" doctrine in cases such as *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Baker* v. *Carr*, 369 U.S. 186 (1962), I simply do not think this Court would believe that petitioners' claim in this regard raises a substantial federal question. See also *Dyer* v. *Blair*, 390 F. Supp. 1291 (D.C. [Publisher's note: "D.C." should be "ED".] Ill. 1975) (three-judge court).

The application for a stay is accordingly denied.

[Publisher's note: See 468 U.S. 1315 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES ET AL., PETITIONERS *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION FOR STAY

[September 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

Applicants National Farmers Union Insurance Companies and Lodge Grass School District No. 27 request that I stay the mandate of the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the United States District Court for the District of Montana. The latter court had enjoined the Crow Tribe of Indians from executing against the applicants on a judgment rendered by the Crow Tribal Court. The Court of Appeals for the Ninth Circuit held, as I read its opinion, that litigants who seek to challenge the exercise of jurisdiction by an Indian Tribal Court in a civil action have no federal court remedy of any kind. I have concluded that four Members of this Court are likely to vote to grant the applicants' petition for certiorari, and that the applicants have a reasonable probability for at least partial success on the merits if this Court grants certiorari. I have therefore decided that the temporary stay I earlier granted on August 21, 1984, pending consideration of a response, should be continued until this Court disposes of the applicants' petition for certiorari which was filed on August 29th.

In May, 1981, Leroy Sage, a Crow Indian school child, was struck by an uninsured motorcyclist on the property owned by applicant School District. The school is located on land within the external boundaries of the Crow Indian Reserva-

tion, but the land is owned by the State of Montana in fee subject to a reserved mineral interest in the Tribe. Sage sustained a broken leg, and filed suit against the School District in Crow Tribal Court.

Dexter Falls Down served process for Sage upon Wesley Falls Down; Wesley was a member of the school board. Wesley did not notify anyone of the summons and a default judgment for $153,000 was entered against the school three weeks later in Tribal Court. Actual medical bills came to $3,000. Petitioners became aware of the suit when the Tribal Court mailed a copy of the judgment to the school. Instead of seeking review of the default judgment in Tribal Court, applicants filed suit in the United States District Court for the District of Montana, alleging that the Tribal Court's exercise of jurisdiction violated Due Process and the Indian Civil Rights Act, 25 U.S.C. § 1302, [Publisher's note: The comma preceding this note is surplus.] *et seq.* (1982). Petitioners sought a permanent injunction against the execution of the Tribal Court judgment.

The District Court held that petitioners' complaint, based on federal common law, stated a claim under 28 U.S.C. § 1331 (1982). *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 360 F. Supp. 213, 214-15 (D. Mont. 1983). The District Court held that the Tribal Court lacked subject matter jurisdiction over Sage's claim, because the land upon which the court [Publisher's note: "court" should be "tort".] had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our decision in *Montana* v. *United States*, 450 U.S. 544, 565-66 (1981) [Publisher's note: There should be a comma here.] in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 736 F.2d 1320 (9th Cir. 1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the Fourteenth Amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights

Act, 25 U.S.C. § 1301 *et seq.* and that § 1302(8) of this Act requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal court review of a claimed violation of the ICRA to a single remedy—the writ of habeas corpus—there could be no federal court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 66-70 (1977 [Publisher's note: "1977" should be "1978".]) [Publisher's note: There should be a comma here.] to reach this conclusion. The Court of Appeals recognized that our decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) [Publisher's note: There should be a comma here.] had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same term in *Santa Clara Pueblo*, *supra*, suggested a restriction on federal court review of Indian tribal jurisdiction as a result of the Indian Civil Rights Act. The Court of Appeals observed in a footnote that "should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the Tribal Court's jurisdiction in the collateral proceedings. See generally *Durfee* v. *Duke*, 375 U.S. 106 (1963)." 736 F.2d 1320, 1324 n. 5.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state court proceedings in order to enforce the judgment of the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the school district. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is

indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in *United States* v. *Kagama*, 118 U.S. 375, 379 (1886), and repeated the statement as recently as *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978):

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There exists in the broad domain of a sovereignty but these two."

But if because only the national and state governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a state in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U.S.C. § 1257 (1982). Every decision of a United States District Court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. *Id.*, §§ 1252-54; *cf.* § 1291. If the courts of the states, which in common with the national government exercise the only true sovereignty exercised within our Nation, *Kagama*, *supra*, are to have their judgments reviewed by this Court on a clam of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent of its jurisdiction. See *Montana* v. *United States*, *supra.* It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the Indian Civil Rights Act, *supra*, did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as *Montana* v. *United States*, *supra.* As JUSTICE WHITE pointed out in his dissent in that case [Publisher's note: "that case" is a reference to the *Santa Clara Pueblo* case.], 436 U.S. [Publisher's note: There should be an "at" here.] 72-73, "the declared purpose of the Indian Civil Rights Act . . . is 'to ensure that the American Indian is afforded the broad constitutional rights secured to other Americans.' But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting 'the well-established federal "policy" of furthering Indian self-Government.'" 436 U.S. 49, 62. The facts as well as the holding of *Santa Clara Pueblo*, *supra*, satisfy me that Congress' concern in enacting the Indian Civil Rights Act was to enlarge the rights of individual Indians as against the Tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the Indian Civil Rights Act, *Santa Clara Pueblo*, *supra*, does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, *e.g.*,

Illinois v. *City of Milwaukee*, 406 U.S. 91, 99-100 (1972). We said in *Oliphant* v. *Suquamish Indian Tribe*, *supra*:

> "'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the Indian Civil Rights Act affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal court judgments claimed to be in excess of Tribal Court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicant's [Publisher's note: "applicant's" should be "applicants'".] request for a stay. That rule provides:

> "If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court or justice may require."

I do not think that the rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the proceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make

to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a public body is not required to post a supersedeas bond in a state court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that Tribal Court judgments are subject to federal court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed. [Publisher's note: "Ed." should be "ed.".]), to the effect that "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." The District Court, in reaching the conclusion it did, relied on the following language from our opinion in *United States* v. *Montana*:

> "To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, *supra*, 450 U.S., at 565-566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian owned fee land within the boundaries of the Reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction.

It is so ordered.

[Publisher's note: See 468 U.S. 1313 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-166

VELMANETTE MONTGOMERY ET AL. *v.*
ANNA V. JEFFERSON AND STANLEY E. CLARK ET AL.

ON APPLICATION FOR STAY OF ENFORCEMENT OF ORDERS

[September 10, 1984]

JUSTICE MARSHALL, Circuit Justice.

Applicants request that I stay enforcement of two orders of the United States District Court for the Eastern District of New York concerning tomorrow's Democratic primary election in Kings County, New York. In those orders, the District Court directed the Board of Elections in the City of New York to accept the designating petitions of respondents Jefferson and Clark and to place their names on the Democratic primary ballot.

The underlying litigation arose out of challenges to the designating petitions of Jefferson and Clark filed with the Board of Elections. On August 28, 1984, the New York Court of Appeals held that the petitions were invalid under state law because their cover sheets overstated the number of signatures in the petitions. Jefferson and Clark then challenged the constitutionality of the New York election law's requirement that a designating petition's cover sheet state the number of signatures in the petition. On September 6, the District Court held the requirement unconstitutional as applied. Thus, it ordered that Jefferson's and Clark's names be placed on the ballot. On September 7, it denied applicants' motion for a stay.

Applicants then moved for a stay and for expedited appeal in the United States Court of Appeals for the Second Circuit. Today, the Second Circuit denied the motion for a stay but

granted the motion for expedited appeal. It scheduled oral argument for the week of September 24.

This application was filed at approximately 3:30 p.m. today. Given the little time left for evaluating, before tomorrow's primary, the questions raised by the application, I am not persuaded to interfere with the actions of the Second Circuit.

The application for a stay is accordingly denied.

It is so ordered.

[Publisher's note: See 468 U.S. 1323 for the authoritative official version of this opinion.]

WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL.

ON APPLICATION FOR STAY

No. A-214. Decided September 27, 1984

An application to stay the District Court's injunction prohibiting on constitutional grounds the enforcement of 38 U.S.C. §§ 3404 and 3405—which forbid the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with a claim for monetary benefits under laws administered by the Veterans Administration—is granted pending applicants' timely filing of a jurisdictional statement and the disposition of the same by this Court. Respondents' contention that the balance of hardships militates against the granting of a stay is not persuasive under the circumstances of the case.

JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I stay an injunction issued by the United States District Court for the Northern District of California prohibiting on constitutional grounds the enforcement of 38 U.S.C. §§ 3404 and 3405. These sections prohibit the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with a claim for monetary benefits under laws administered by the Veterans Administration.

The statute which the single District Judge found unconstitutional has been on the books in some form for 122 years. Within the past decade, this Court has summarily affirmed a decision of a three-judge District Court upholding the constitutionality of 38 U.S.C. § 3404(c). *Gendron* v. *Levi*, 423 U.S. 802 (1975), aff'g *Gendron* v. *Saxby*, 389 F. Supp. 1303 (CD Cal.). The Court of Appeals for the Ninth Circuit has also recently upheld the validity of § 3404(c). *Demarest* v. *United States*, 718 F.2d 964 (1983), cert. denied, 466 U.S. 950 (1984).

The application for a stay is granted. Respondents urge that the balance of hardships militates against the granting of a stay. It would take more than the respondents have presented in their response, however, to persuade me that the action of a single District Judge declaring unconstitutional an Act of Congress that has been on the books for more than 120 years should not be stayed pending consideration of the jurisdictional statement of applicants by this Court. The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships. *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347 (1977) (REHNQUIST, J., in chambers).

The application for a stay is accordingly granted pending the timely filing of a jurisdictional statement and the disposition of the same by this Court.

[Publisher's note: See 469 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

MONTANANS FOR A BALANCED FEDERAL BUDGET COMMITTEE ET AL. *v.* HARPER ET AL.

ON APPLICATION FOR STAY

No. A-245. Decided October 10, 1984

An application to stay the Montana Supreme Court's mandate prohibiting the placement on Montana's 1984 ballot of an initiative that would direct the Montana Legislature to apply to Congress pursuant to Article V of the Federal Constitution to call a convention to consider a federal balanced budget amendment, is denied. The state court's order, in addition to holding the initiative violative of Article V, was also based on the adequate and independent state-law ground that the initiative was invalid under the Montana Constitution.

JUSTICE REHNQUIST, Circuit Justice.

Applicants ask that I stay a mandate of the Supreme Court of Montana prohibiting the placement on Montana's November 1984 ballot of a "Balanced Federal Budget" initiative. If adopted by the voters, the initiative would direct the Montana Legislature to apply to Congress pursuant to Article V of the United States Constitution to call a convention to consider a federal balanced budget amendment. In addition to holding the initiative unconstitutional on its face, in violation of Article V, the Montana Supreme Court held it to be "independently and separately facially invalid under the Montana Constitution." The Montana court's *per curiam* order stated that an opinion would follow—an opinion which apparently has not yet been issued—but the order is sufficient to indicate an adequate and independent state-law ground for the decision. I am not persuaded by applicants' attempt to distinguish *Uhler* v. *American Federation of Labor-Congress of Industrial Organizations*, 468 U.S. 1310 (1984) (REHN-

QUIST, J., in chambers). The Montana Supreme Court has rested its decision on the Montana Constitution, and it is the final authority as to the meaning of that instrument. Accordingly, for the same reasons given in *Uhler*, the application for a stay is denied.

[Publisher's note: See 469 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-238

THE CATHOLIC LEAGUE, SOUTHERN CALIFORNIA CHAPTER, ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER, INC., ET AL.

ON APPLICATION FOR STAY

[October 11, 1984]

JUSTICE REHNQUIST, Circuit Justice.

Appellants[1] ask that I stay an order of the California Court of Appeals, Second Appellate District, which determines, under state law, the disposition of some 16,000 aborted fetuses presently in the custody of the Los Angeles County District Attorney. Because I am satisfied that this appeal raises no substantial questions of federal law, I will deny the application.

The fetuses were discovered by a container company on the premises of a defunct pathology laboratory, and were turned over to the District Attorney's office. After a period of indecision concerning the disposition of the fetuses, during which the District Attorney's office was contacted by several groups, religious and otherwise, offering various means of disposal, the District Attorney made public his decision to turn the fetuses over to a religious organization for the purpose of holding a burial service, and subsequently arranged

[1] Appellants claim that this Court would have appellate jurisdiction over this case under 28 U.S.C. § 1257(2). It is questionable whether this case would present a proper appeal, since the lower court opinion does not specifically uphold a state constitutional provision against a claim that it is repugnant to federal law; nevertheless, I would reach the same conclusion with respect to this application whether a subsequent filing would properly be considered an appeal or a petition for certiorari.

for interment in a private cemetery that had offered its space to the State free of charge.

In the meantime appellee organization had filed an action for declaratory and injunctive relief against the District Attorney, in the California courts, seeking to prevent him from turning over the fetuses to a religious group on the ground that such an action would violate the Establishment Clauses of the Federal and State Constitutions. Appellants thereafter contracted with the private cemetery to hold a religious burial service when the fetuses were interred, and to place a memorial plaque at the site. The California Court of Appeals held that the District Attorney's proposal to turn the fetuses over to a religious organization for purposes of holding a memorial service would violate the Establishment Clause of the California Constitution, and another provision of the California Constitution prohibiting state action indicating a "preference" for any particular religion.[2] The California Supreme Court denied review.

The California Court of Appeals found the District Attorney's proposed actions prohibited by independent religion clauses of the California Constitution. This Court of course lacks the power to review such decisions if they are truly independent of questions of federal law. See *Uhler* v. *AFL-CIO*, 53 U.S.L.W. 3166 (U.S. Sept. 18, 1984) (REHNQUIST, J., in-chambers). Appellants contend, however, that as applied the California Constitution's provisions have the effect of denying them their rights to free speech, assembly, and exercise of religion protected by the First Amendment to the United States Constitution. I think that appellants' federal claims are insubstantial. Nothing in the order of the California Court prevents appellants from assembling for purposes of expressing their views with respect to abortion, or from

[2] The California Constitution prohibits laws "respecting an establishment of religion," and also guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference . . . ." Cal. Const., Art. I, § 4.

holding a religious or other memorial service. Appellants would find in the First Amendment's speech or religion clauses a right to hold their service as an incident to the actual burial of the fetuses. But the First Amendment does not entitle appellants to have the State enhance the impact of their speech by providing the subjects of a funeral service. The proper disposition of these fetuses is peculiarly a question governed by the law of the State of California. The California courts have held that California laws concerned with avoiding the entanglement of the State with religious causes prohibit the District Attorney from turning the fetuses over to appellants for the holding of a religious service. Because I can find nothing in the First Amendment that is contravened by the Court of Appeals' holding, I am satisfied that this Court would not wish to give this case plenary consideration.

The application for a stay is accordingly denied.

[Publisher's note: See 469 U.S. 1306 for the authoritative official version of this opinion.]

NORTHERN CALIFORNIA POWER AGENCY *v.*
GRACE GEOTHERMAL CORP.

ON APPLICATION FOR STAY

No. A-379. Decided December 7, 1984

An application to stay the Federal District Court's order granting a preliminary injunction against applicant's commencing state-court eminent domain proceedings under California law to condemn certain geothermal leases obtained by respondent from the Federal Government, [Publisher's note: The comma preceding this note is surplus. But see 469 U.S. at 1306.] is denied. Although the District Court has not, as required by Federal Rule of Civil Procedure 65(d), provided any reviewing court with the benefit of its views as to the nature of the irreparable injury that respondent might suffer or the inadequacy of the remedy at law, or any other requirement for an injunction, appeal as of right lies from the District Court to the Court of Appeals. Moreover, it cannot be said with any certainty that this Court would grant certiorari to review a Court of Appeals judgment approving the District Court's action, or that the District Court may not enter appropriate findings in support of an injunction before the case is heard in the Court of Appeals.

JUSTICE REHNQUIST, Circuit Justice.

Applicant asks that I stay an order of the United States District Court for the Northern District of California granting a preliminary injunction against its commencing eminent domain proceedings in state court against certain leasehold interests held by respondent. On the basis of the papers submitted to me by both parties, it seems to me that the applicant has made out a strong case for the proposition that respondent had a plain and adequate remedy at law through the process afforded under California's eminent domain laws. A party seeking an injunction from a federal court must invariably show that it does not have an adequate remedy at law. See *Hillsborough* v. *Cromwell*, 326 U.S. 620, 622 (1946). Nevertheless, for the reasons that follow I have decided not to grant the application for stay.

Respondent contends that it will suffer irreparable harm because upon the filing of a state eminent domain proceeding

by applicant, an order would issue for immediate possession of the property in question. It claims that loss of possession would mean loss of its only source of revenue, and would lead to immediate financial complications. On the merits, respondent's contention is that applicant's exercise of eminent domain to condemn its geothermal leases, which leases were obtained from the Federal Government under the Geothermal Steam Act of 1970, 84 Stat. 1566, 30 U.S.C. § 1001 *et seq.*, would be pre-empted by the provisions of that statute. Applicant in turn contends that respondent would have had an adequate opportunity to raise this federal claim in the state condemnation proceedings prior to being deprived of possession. See Cal. Civ. Proc. Code Ann. §§ 1255.420, 1255.430, 1250.360(h) (West 1982).

So far as the papers before me indicate, the only written document issued by the District Court in connection with its granting of an injunction contains only the following operative language:

> "The court finds that the plaintiffs have satisfied the requirements for issuance of a preliminary injunction and, accordingly, a preliminary injunction will issue.
>
> "The defendants, and each of them, are enjoined, pending further order of this court, from filing in any way, instituting or commencing any eminent domain or condemnation proceedings or any litigation affecting plaintiff's interest of whatsoever kind or character in the property, real or personal, which is the subject of this litigation."

Thus, the District Court has not provided any reviewing court with the benefit of its views as to the nature of the irreparable injury that respondent might suffer or the inadequacy of the remedy at law, or any other requirement for an injunction. If this were the only order or finding issued by the District Court, it seems to me to wholly fail to satisfy Federal Rule of Civil Procedure 65(d), which provides that

"[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . ."

While this Court has on another occasion summarily reversed the judgment of a District Court which failed to comply with Rule 65(d), see *Schmidt* v. *Lessard*, 414 U.S. 473 (1974), in that case an appeal lay directly from the District Court to this Court. Here, appeal as of right lies from the District Court to the Court of Appeals. I have previously expressed my view that the All Writs Act, 28 U.S.C. § 1651(a), grants the authority to issue stays of district court orders pending appeal to the court of appeals, see *Atiyeh* v. *Capps*, 449 U.S. 1312, 1313 (1981) (REHNQUIST, J., in chambers), but I have also noted my belief that such an exercise should be reserved for the unusual case. *Ibid.* Here the absence of appropriate findings by the District Court makes it impossible for me to determine whether the District Court properly required the respondent to show that it had no adequate remedy at law in the state proceedings. The very absence of these findings, if the District Court entered no further order than the one that I have quoted, would seem to be a significant departure from the requirements of Rule 65(d); but I cannot say with any certainty that this Court would grant certiorari to review a judgment of the Court of Appeals which approved the action of the District Court here, nor can I say that the District Court may not enter appropriate findings in support of an injunction before the case is heard in the Court of Appeals.

The application for a stay is accordingly denied.

[Publisher's note: See 469 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

LEE M. THOMAS, ACTING ADMINISTRATOR AND THE ENVIRONMENTAL PROTECTION AGENCY, APPLICANTS

A-537 *v.*

SIERRA CLUB ET AL.

IDAHO MINING ASSOCIATION, APPLICANT

A-540 *v.*

SIERRA CLUB ET AL.

ON APPLICATIONS FOR STAY

Nos. A-537 AND A-540. Decided January 17, 1985

JUSTICE REHNQUIST, Circuit Justice

Petitioners, the Acting Administrator of the Environmental Protection Agency (EPA) and the Idaho Mining Association, ask me to stay an order of the United States District Court for the Northern District of California pending appeal to the Court of Appeals for the Ninth Circuit. The order holds the Administrator in contempt for failing to promulgate certain emission standards for radionuclides as required by an earlier District Court order. The controversy has reached this point due to a disagreement between the District Court and the agency over the construction of § 112(b)(1)(B) of the Clean Air Act (42 U.S.C. § 7412(b)(1)(B)), which governs the actions the agency must take with respect to establishing emission standards for hazardous air pollutants. Essentially, the District Court reads the section to require the EPA either to promulgate emission standards for all sources of the pollutant previously identified by the agency or to make a specific finding that the pollutant "is not a hazardous air pollutant"; the agency believes that under the section it may establish standards for some sources but not for others.

Petitioners seek the unusual relief of a stay from this Court pending appeal to a Court of Appeals. See *Atiyeh* v. *Capps*, 449 U.S. 1312, 1313 (1981) (REHNQUIST, J., in chambers). They have not pointed us to a conflict of authority on the issue decided by the District Court. Under those circumstances I do not think a stay is in order. Even if the Court of Appeals were to affirm the District Court I am by no means certain that four members of this Court would vote to grant certiorari to review this statutory question.

The applications for stay are accordingly denied.

[Publisher's note: See 469 U.S. 1311 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-582

MOISES GARCIA-MIR, ET AL., APPLICANTS *v.* WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPLICATION TO VACATE STAY

[February 1, 1985]

JUSTICE REHNQUIST, Circuit Justice.

Applicants are members of a class of Cuban nationals who unlawfully entered the United States as part of the Mariel boatlift in 1980. They have been detained in the federal penitentiary in Atlanta pending Cuba's willingness to accept their return, and have had final orders of exclusion entered against them by the Board of Immigration Appeals. The instant proceedings are the most recent stage of litigation which has lasted for more than four years. Attorneys for the class have sought to reopen the administrative exclusion hearings of two individual class members on the theory that they belong to a "social group," defined as the Mariel boatlift participants, whose members allegedly would be subject to persecution if returned to Cuba, thus making them eligible for consideration for asylum. See 8 U.S.C. §§ 1101(a)(42)(A), 1158. The parties stipulated that the decisions on the two individual motions to reopen "will be binding on all asylums/withholding of deportation issues relating to membership in the Freedom Floatilla as a social group," but they also expressly provided that the decisions would have no binding effect over the determinations of other class members "with respect to statutory and regulatory exceptions to asylum/withholding eligibility."

The Board of Immigration Appeals denied the two test motions to reopen on the ground that the aliens had not pre-

sented a *prima facie* case of persecution. The District Court ruled on October 15, 1984, that the aliens had presented sufficient evidence of a likelihood of persecution and, therefore, that the Board had abused its discretion in failing to reopen the test cases. The District Court remanded the test cases to the Board and set aside all outstanding orders of exclusion.

Meanwhile, the United States and Cuba on December 14, 1984, concluded an agreement on immigration matters in which Cuba consented to the return of 2,746 named boatlift participants in exchange for the resumption of this Country's normal processing of preference immigration visas for Cuban nationals. The agreement limits the number of boatlift participants that may be returned to 100 per month, except that, if fewer than 100 are returned in a calendar month, the shortfall may be made up in subsequent months up to a total of 150 returnees per month. The Cuban government apparently has indicated that it will not mistreat anyone returned under the agreement. Respondents contend that the United States will be severely prejudiced by any delay in carrying out this agreement because Cuba may refuse at some future time to complete its end of the bargain after it has received the domestic political benefits of the eased immigration to this Country.

The Government appealed the District Court's October 15, 1984, order and sought a stay pending appeal, which was denied by the District Court. The Court of Appeals for the Eleventh Circuit granted a partial stay on January 16, 1985, which it modified by order of January 24, 1985. The net effect of the stay as modified is threefold: first, to stay the vacation and remand of all outstanding orders of exclusion; second, to acknowledge the Government's voluntary agreement not to deport any class members until February 8, 1985; and third, to prohibit the Government from taking any "action to return to Cuba any of those class members identified in the stipulations who claim eligibility for asylum on the ground that they have a well-founded fear of persecution because of

membership in the social group, and who are not returnable under subsection 2 of 8 U.S.C. § 1253(h), until such time as the issues on this appeal are resolved or until further order of this Court" (footnotes omitted). Applicants seek to have this stay set aside or further modified.

A stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case. See *Bonura* v. *CBS, Inc*., 459 U.S. 1313 (1983) (WHITE, J., in chambers); *O'Connor* v. *Board of Education*, 449 U.S. 1301, 1304 (1980) (STEVENS, J., in chambers); *Coleman* v. *PACCAR, Inc*., 424 U.S. 1301, 1304 (1976) (REHNQUIST, J., in chambers). There is no need to evaluate applicants' likelihood of success on the merits; they simply have not made a showing of irreparable injury which would warrant interference with the partial stay granted by the Court of Appeals. The Court of Appeals merely refused to further delay deportation of class members who would not be eligible for asylum under the "social class" theory even if the two individual test motions were ultimately successful on the merits. These are persons who are excludable and not entitled to asylum under 8 U.S.C. § 1253(h)(2) because they have committed serious crimes or they otherwise pose a danger to the security of the United States. There is no reason to grant these individuals automatic relief simply because some of their fellow class members may be eligible to be considered for asylum.

Under the partial stay, every class member may pursue his own individual remedies during the pendency of the appeal and, if he is not excludable under § 1253(h)(2), prevent his deportation. In fact, the terms of the partial stay shift to the Government the burden of proving that the alien is within that statutory provision before he may be excluded, when ordinarily the burden would be on the alien to prove his entitlement to remain in this country. Applicants' principal argument against the partial stay is that requiring individual

motions to reopen would present significant administrative difficulties. Each of the more than 1,500 class members will have to file individual motions to reopen. The necessary balancing of these difficulties against the prejudice to the Government from further delay is something the Court of Appeals is in a far better position than this Court to do. The specificity of the partial stay order indicates that it was drafted with some care and that it endeavors to reflect a considered balancing of the various interests at issue. This Court is not in a position to second-guess a balancing of this kind.

The application is denied.

[Publisher's note: See 471 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-778

NATIONAL FARMERS UNION INSURANCE COMPANIES AND LODGE GRASS SCHOOL DISTRICT NO. 27, APPLICANTS *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION TO VACATE STAY

[April 24, 1985]

JUSTICE REHNQUIST, Circuit Justice.

The Court of Appeals for the Ninth Circuit has stayed all proceedings with respect to this case in the United States District Court and in the Crow Tribal Court pending resolution of the merits of the case by this Court. Applicants contend that the Court of Appeals was without jurisdiction to issue the stay, and request me to "dissolve" the stay issued by the Court of Appeals. The jurisdiction of the Court of Appeals to issue the stay order is indeed debatable, but I do not believe that four Members of the Court would wish to review that separate issue in addition to resolving the merits of the principal case argued on April 16th. Nor do I believe that the equities favor a stay to preserve the posture between the parties that applicants seek, given the present state of affairs in the District and Tribal Courts. Decision of the merits by this Court may ordinarly [Publisher's note: "ordinarly" should be "ordinarily".] be expected before the summer recess around July 1st, and the stay issued by the Court of Appeals will expire by its own terms upon the happening of that event. The application is therefore denied.

[Publisher's note: See 473 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-5

OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON APPLICATION TO VACATE

[July 5, 1985]

CHIEF JUSTICE BURGER, Circuit Justice.

On October 25, 1983, the Office of Personnel Management (OPM) published in final form new personnel regulations affecting federal employees.[1] The new regulations were intended to allow federal agencies to give more weight to merit and less weight to seniority in personnel decisions. The new regulations were to take effect November 25, 1983.

On November 12, 1983, Congress adopted House Joint Resolution 413 which, in effect, prohibited OPM and several other federal agencies from expending funds appropriated under that resolution "to implement, promulgate, administer or enforce" the new regulations.[2] On November 21, 1983, OPM announced that the new regulations would become effective on November 25, 1983.[3] The announcement stated that no expenditure was required for the new regulations to go into effect and that each federal agency would administer and enforce the regulations without the assistance or oversight of OPM. The implementation of the new regulations was stayed on November 23, 1983, however, by the United

[1] 48 Fed. Reg. 49,462 (1983); 48 Fed. Reg. 49,472 (1983); 48 Fed. Reg. 49,494 (1983). For a discussion of the events leading up to the publication of the new regulations on October 25, 1983, see *National Treasury Employees Union* v. *Devine*, 733 F.2d 114, 115-16 (CADC 1984) *("NTEU")*. [Publisher's note: The parentheses around "*NTEU*" should not be italicized.]

[2] H.J. Res. 413, Pub. L. 98-151, 97 Stat. 964 (1983).

[3] OPM News Release (Nov. 21, 1983).

States District Court for the District of Columbia,[4] and that stay was affirmed by the Court of Appeals on April 27, 1984.[5] In the Continuing Appropriations Act for 1985, Pub. L. No. 98-473, enacted in October 1984, Congress extended the restrictions on the implementation of the new regulations but specifically provided that the restrictions "shall expire on July 1, 1985."

On June 28, 1985—some eight months after Congress had finally fixed the date on which the new regulations would become effective and fewer than 72 hours before that effective date—respondent sought a temporary restraining order blocking implementation of the new regulations from the United States District Court for the District of Columbia. In an opinion delivered from the bench the same day, the District Court denied the requested order, noting that respondent had failed to show that irreparable harm would result from denial of the temporary restraining order. The court found that nothing "of any concrete nature [would occur] in the immediately foreseeable future which would be unable to be redressed in some form or another at some later time should the regulations go into effect."

Respondent appealed the decision of the District Court to the Court of Appeals for the District of Columbia Circuit and, at the same time, moved the Court of Appeals to enjoin implementation of the new regulations. On Saturday, June 29, 1985, a motions panel of the Court of Appeals ordered that respondent's emergency motion for injunctive relief be "held in abeyance" and that the District Court hear and decide by July 10, 1985, "any motion for a preliminary injunction."

[4] *National Treasury Employees Union* v. *Devine*, No. 83-3322 (DDC Nov. 24, 1983) (temporary restraining order); *National Treasury Employees Union* v. *Devine*, 557 F. Supp. 738 (DDC 1983).

[5] *NTEU*. In its opinion in *NTEU*, the Court of Appeals affirmed the judgment of the District Court and declared that the new regulations were "null and void" until the barriers erected by Congress to the implementation thereof are removed. *Id*., at 120. Once those barriers are removed, "OPM will be free to implement and enforce the [new regulations]." *Ibid.*

The court ordered "on its own motion," that the effective date of the proposed regulations be stayed until further order of that court. The court observed that respondents "may suffer irreparable injury in the absence of a stay" but did not identify that irreparable injury.

On July 2, 1985, OPM filed with me, as Circuit Justice for the District of Columbia Circuit, an application to vacate the order of the Court of Appeals. I granted the application on July 3, reciting in my order that a memorandum opinion would follow.

The Court of Appeals corrrectly [Publisher's note: "corrrectly" should be "correctly".] acknowledged that the established rule is that denials of temporary restraining orders are ordinarily not appealable. The court nonetheless asserted jurisdiction over the District Court's denial of the temporary restraining order in this case, holding that it falls within an exception to the general rule "because . . . [the new regulations] are now scheduled to become effective before any hearing on the preliminary injunction can be held." The court reasoned that because a hearing could not be held before the regulations went into effect, the District Court's denial of the temporary restraining order was tantamount to a denial of a preliminary injunction.

The principal authority relied on by the Court of Appeals in support of this exception to the general rule of unappealability is a footnote in our opinion in *Sampson* v. *Murray*, 415 U.S. 61, 86-87 n. 58 (1974).[6] The footnote from *Sampson* cited by the Court of Appeals merely quotes an opinion of the Court of Appeals for the Second Circuit in *Pan American World Airways* v. *Flight Engineers' Assn.*, 306 F.2d 840,

[6] In *Sampson*, we reversed a decision of the Court of Appeals for the District of Columbia Circuit which upheld a temporary injunction barring the dismissal of a federal employee. We held that loss of income to a dismissed federal employee, even when coupled with damage to reputation resulting from such dismissal, "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." 415 U.S., at 91-92.

843 (1962), to the effect that a temporary restraining order which is continued beyond the statutory period is appealable because it is, in effect, a preliminary injunction. In the present case, however, the District Court *denied* the temporary restraining order; a temporary restraining order was, therefore, not continued beyond the statutory period. The footnote in *Sampson* relied on by the Court of Appeals is simply irrelevant.

The Court of Appeals also relied on its own opinion in *Adams* v. *Vance*, 570 F.2d 950 (1977), but this reliance is also misplaced. In *Adams*, the Court of Appeals held that it had jurisdiction over an appeal from a grant of a temporary restraining order because the order in question "did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering" a delicate balance involving the foreign relations of the United States. *Id*., at 953. Again, however, in contrast to *Adams*, the District Court in this case *denied* the temporary restraining order. Its denial merely allows implementation of regulations in accordance with the express intent of Congress. Only if the District Court *granted* the temporary restraining order would it have disturbed the *status quo.* Moreover, the District Court's order of a temporary restraining order in *Adams* was extraordinary. It "deeply intrude[d] into the core concerns of the executive branch," *id.*, at 954, and directed action . . . potent with consequences . . . irretrievable," *id*., at 953. The consequences of the District Court's order in the present case were not nearly so grave. And the opinion of the District Court explicitly contemplated a prompt hearing on a preliminary injunction. The District Court's denial of the temporary restraining order here was not in any sense a *de facto* denial of a preliminary injunction.[7]

[7] The Court of Appeals also cited to *Dilworth* v. *Riner*, 343 F.2d 226, 229-230 (CA5 1965), to support its conclusion that, because the regulations would become effective before a preliminary injunction hearing could be

The exception fashioned and relied on by the Court of Appeals is not supported by the authority cited; nor is there any independent basis on which jurisdiction could rest. I therefore conclude that the Court of Appeals had no jurisdiction to review the denial by the District Court of respondent's motion for a temporary restraining order. The Court of Appeals should have dismissed the appeal, thereby allowing respondent to proceed in the District Court on a motion for a preliminary injunction.

Possibly to ensure that it would retain jurisdiction over the disposition of the preliminary injunction motion which it ordered the District Court to hear and decide, the panel "held in abeyance" the motion for injunctive relief and issued what it termed an "administrative stay," in effect granting respondent more extensive relief than it had sought from the District Court. However, since the Court of Appeals was without jurisdiction over the appeal from the District Court's order denying the temporary restraining order, the motions panel was necessarily without authority to grant such a stay.

Accordingly, the order of the Court of Appeals is vacated.

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held, the District Court's ruling was immediately appealable. *Dilworth* simply does not support this conclusion.

[Publisher's note: See 473 U.S. 1307 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-31

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH SIDE LUMBER CO., ET AL.

ON APPLICATION FOR STAY

[July 24, 1985]

JUSTICE REHNQUIST, Circuit Justice

The United States District Court for the District of Oregon preliminarily enjoined applicant John R. Block, Secretary of Agriculture, from enforcing contracts between him and respondent lumber company. These contracts required the latter to harvest timber in national forests. The Court of Appeals for the Ninth Circuit vacated the injunction holding that the Tucker Act, 28 U.S.C. §§ 1346 and 1491, impliedly barred the grant of such relief. The Court of Appeals stayed the issuance of this mandate for 30 days so that respondents might petition this Court for certiorari. The Secretary requests that I vacate that stay because of the prospect of continuing deterioration of abandoned timber on the ground. Respondents dispute this factual claim.

The District Court held that the "equity" favored respondents, and the Court of Appeals by staying issuance of the mandate even after vacating the injunction, must have agreed with the District Court on this point. The Secretary has furnished me no basis for disturbing their conclusion in this highly factual issue. The application is accordingly denied.

[Publisher's note: See 473 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-32

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* REDBUD HOSPITAL DISTRICT ETC.

ON APPLICATION FOR STAY

[July 24, 1985]

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), asks that I stay an order entered by the United States District Court for the Northern District of California pending disposition of her appeal to the Court of Appeals for the Ninth Circuit. This suit began as a challenge by the operator of a single hospital, Redbud Hospital District (Redbud) to its Medicare reimbursement rate. In addition to affording Redbud itself preliminary relief, the District Court, in a "preliminary injunction" dated July 30, 1984 and a "modification" of that injunction dated June 14, 1985, required the Secretary to promulgate, by July 1, 1985, nationwide regulations providing hospitals like Redbud with rights to immediate administrative review and enhanced reimbursement for inpatient services. On June 28, 1985, a two-judge panel of the Ninth Circuit denied the Secretary's request for an emergency stay. On July 1, 1985, the Secretary published the regulations in question "under protest." 50 Fed. Reg. 27208. Absent a stay, these regulations will go into effect on August 1, 1985. After considering both the Secretary's application and Redbud's response, I have decided to grant in part and deny in part the Secretary's request for a stay.

Section 1886(d) of the Social Security Act, added by the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 149-172, established a prospective payment system

(PPS) for Medicare payment to hospitals furnishing inpatient services to Medicare beneficiaries. Under this system, payment is made at a predetermined rate for each hospital discharge. The rate is based in part on a "hospital specific" rate, which in turn is based on the hospital's actual operating costs during a particular "base year." See 42 U.S.C. § 1395ww(d)(1). The Secretary has delegated to "fiscal intermediaries" the responsibility for calculating the hospital-specific rate for each of the hospitals participating in the Medicare program.

Redbud, the operator of a sole community hospital in Cleardale, California, brought this suit against the Secretary on June 26, 1984, challenging the fiscal intermediary's determination of Redbud's hospital-specific rate. Redbud alleged that it would suffer losses of approximately $20,000 per month unless its hospital-specific rate were adjusted to reflect recent capital improvements completed after the close of its base year. In its prayer for relief, Redbud requested (1) a declaratory judgment that the Secretary must allow the intermediary to adjust Redbud's hospital-specific rate to account for costs not reflected in the base year, (2) a preliminary and permanent injunction barring the Secretary "from implementing Medicare reimbursement to Redbud under PPS unless such reimbursement accounts for" those costs, and (3) an order requiring the Secretary "to instruct the intermediary to account for [those] costs." Redbud did not seek the promulgation of nationwide regulations.

The Secretary moved to dismiss the complaint on the ground that Redbud had not obtained a final agency determination properly subject to either administrative or judicial review, and that the court therefore had no jurisdiction over Redbud's claim. Apparently in response to this motion, Redbud then requested a hearing before the Provider Reimbursement Review Board (the Board) to review the intermediary's refusal to make the requested adjustments to Redbud's hospital-specific rate. On July 17, 1984, the Board

sent a response stating that, pursuant to a ruling of the Health Care Financing Administration, 49 Fed. Reg. 22413 (May 29, 1984), it was "unable to accept" Redbud's request for a hearing because that request was premature. On July 30, 1984, the District Court denied the Secretary's motion to dismiss, holding that it had "jurisdiction under 42 U.S.C. § 1395oo to review the Board's decision of July 17, 1984." The District Court went on to state that it "also has jurisdiction under the All Writs Act to issue an injunction maintaining the status quo in this case pending agency action." Relying on these jurisdictional findings, the District Court then entered a "preliminary injunction" that "remanded" the case to the Secretary with instructions to promulgate "regulations or written policies" that (a) "take into account" the "extraordinary and unusual costs not necessarily reflected in a hospital's base year costs"; (b) "take into account the special needs of hospitals serving a disproportionate number of Medicare and low-income patients"; (c) "take into account . . . the special needs of sole community hospitals and the unique effects of their status upon the hospital-specific rate"; and (d) "provide for timely and reasonable review" of intermediary estimates of hospital-specific rates under the PPS program. As to Redbud itself, the District Court ordered Redbud's intermediary to "reconsider" its estimate of Redbud's hospital-specific rate

> in light of regulations promulgated in accordance with the foregoing . . . . Pending compliance with this order and until further order of the court, defendant is enjoined from imposing the pre-payment system upon [Redbud] or otherwise reducing [Redbud]'s current level of reimbursement.

No date was set for compliance with the "preliminary injunction."

In the Spring of 1985, the parties filed a number of motions in the District Court, all of which were heard on May 20,

1985. Redbud asked, inter alia, that the court modify the "preliminary injunction" by requiring the Secretary to publish, by July 1, 1985, the "regulations or written policies" described in the court's original order. The Secretary moved to dissolve the injunction, renewing her argument that the District Court lacked jurisdiction.

At the May 20 hearing, the District Court stated that it would grant Redbud's motion to modify the "preliminary injunction." On June 14, 1985, the District Court entered an order stating that "[t]he following paragraph will be added to this court's July 1984 order:

> The Secretary shall publish these implementing regulations in the *Federal Register* as an interim final rule by no later than July 1, 1985, effective August 1, 1985. A 45-day comment period shall follow publication of the interim final rule. The regulations shall be published in the *Federal Register* as a final rule no later than October 1, 1985."

The obligation of a Circuit Justice in considering the usual stay application is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980) (REHNQUIST, Circuit Justice). In this case, however, the Secretary is not asking for the usual stay of a judgment of the Court of Appeals pending the disposition of a petition for certiorari in this Court. She asks instead that I grant a stay of the District Court's order pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay. As is often noted, "'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.'" *Atiyeh* v. *Capps*, 449 U.S. 1312, 1313 (1981) (REHNQUIST, Circuit Justice) (quoting *Pasadena Board of Education* v. *Spangler*, 423 U.S. 1335, 1336 (1975) (REHN-

QUIST, Circuit Justice)). Nevertheless, for the reasons set out below, I believe that the present case is sufficiently unusual to warrant granting a partial stay of the District Court's order.

In arguing for a stay, the Secretary contends that there is a "strong probability" that the District Court's order will be overturned on one of three distinct grounds. First, she claims that the District Court exceeded its jurisdiction in reaching the merits of Redbud's claim for additional reimbursement. Even if the Board's July 17, 1984 ruling that Redbud's administrative claim was premature is a judicially renewable final decision under 42 U.S.C. § 1395oo(f), the scope of the District Court's review was limited to the Board's own jurisdictional determination. Second, the Secretary argues that the District Court's use of a "preliminary injunction" to compel publication of nationwide regulations is "unprecedented, unwarranted, and a clear abuse of the court's power to fashion preliminary relief." And third, the Secretary asserts that in deeming the regulations in question mandated by Congress the District Court "plainly misconstrued" the relevant provisions of the Medicare statute.

However the Ninth Circuit may decide these questions on appeal, I am not at all certain that four Members of this Court would be inclined to review either the "finality" of the Board's July 17, 1984 ruling or the District Court's conclusions on the merits. I do believe, however, that the District Court's use of a "preliminary injunction" to require the Secretary to issue regulations of nationwide application would prompt at least four Members of this Court to grant review should the Court of Appeals affirm that aspect of the District Court's order.

Federal district courts have jurisdiction under 42 U.S.C. § 1395oo(f) to review "any final decision of the Board" in suits brought by providers of Medicare services such as Redbud. Judicial review under section 1395oo(f) is sharply circumscribed, however, *see, e.g., V. N. A. of Greater Tift County*

v. *Heckler*, 711 F.2d 1020, 1024-1027 (CA11 1983), and I am persuaded that the section does not authorize the kind of sweeping "preliminary" relief awarded by the District Court here. Nor do I believe that such relief is authorized, as the District Court thought, by the All Writs Act, which encompasses a limited judicial power to preserve the status quo while administrative proceedings are in progress and to prevent impairment of the effective exercise of appellate jurisdiction. *See FTC* v. *Dean Foods Co*., 384 U.S. 597, 603-604 (1966). The District Court's requirement that the Secretary promulgate new nationwide regulations cannot possibly be justified as necessary to preserve the status quo. Redbud's interest in maintaining the status quo is protected by that part of the District Court's order, which I do not stay, that enjoins the Secretary from applying the prospective payment system to Redbud or "otherwise reducing [Redbud]'s current level of reimbursement" without making the requested adjustments. In its complaint Redbud did not even seek regulatory reform. Nor can I view the regulations as in any way necessary to the effective exercise of appellate jurisdiction. The District Court's July 30, 1984 and June 14, 1985 orders, in combination, are a far cry from "the usual 'prohibitory' injunction which merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U.S. 1328, 1333 (1983) (REHNQUIST, Circuit Justice). Plainly, I think, the District Court has inappropriately used its "preliminary injunction" as a vehicle for final relief on the merits. *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981).

The new regulations will at least require significant readjustment in the administration of PPS and will therefore cause hardship to the applicant. More important, the District Court's requirement that the Secretary promulgate new regulations is plainly not necessary to protect Redbud's interests in this litigation. I think the "stay equities" favor the applicant.

Accordingly, I grant the application of the Secretary to stay the preliminary injunction of the District Court, as modified, pending determination of the Secretary's appeal by the Court of Appeals for the Ninth Circuit, but only insofar as the injunction orders the Secretary to promulgate and apply nationwide regulations. In all other respects the application for a stay is denied.

[Publisher's note: See 473 U.S. 1315 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-122

CITY OF RIVERSIDE, ET AL. *v.* SANTOS RIVERA, ET AL.

ON APPLICATION FOR STAY

[August 28, 1985]

JUSTICE REHNQUIST, Circuit Justice.

Applicants, the City of Riverside and five of its current or former police officers, ask that I stay pending disposition of their petition for certiorari the mandate of the Court of Appeals for the Ninth Circuit requiring applicants to pay respondents $245,456.25 in attorney's fees. The attorney's fees were awarded by the District Court pursuant to 42 U.S.C. § 1988, following a trial in which respondents recovered from applicants a total of $33,350 in damages. This case seems to me to present a significant question involving the construction of § 1988: should a court, in determining the amount of "a reasonable attorney's fee" under the statute, consider the amount of monetary damages recovered in the underlying action? On August 15, 1985, I temporarily stayed the Ninth Circuit's mandate in order to permit further study of the stay application, the response thereto, and the petition for certiorari. Having fully considered the parties' submissions, I now grant the requested stay.

On August 1, 1975, respondents were attending a large private party in the Latino section of Riverside when numerous police officers entered, forcibly broke up the party, and arrested many of the guests, including four of the respondents. The four respondents who were arrested were later prosecuted, but the charges were dismissed for lack of probable cause. Respondents, in turn, filed suit against the City of Riverside, its chief of police, and thirty police officers, al-

leging violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, violations of 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986, and pendent state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, and negligence. Respondents sought compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees.

Prior to trial, respondents dropped their requests for injunctive and declaratory relief, along with their original allegation that the police officers had acted with discriminatory intent. Also prior to trial, seventeen of the individual defendants were dismissed on motions for summary judgment. After a nine-day trial, the jury returned a verdict exonerating another nine of the individual defendants from liability, and awarding $33,350 to respondents based on eleven violations of § 1983, four instances of false arrest and imprisonment, and twenty-two instances of common negligence. Respondents did not prevail on any of their remaining theories of liability, no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices or policies as a result of the suit.

Respondents filed a post-trial motion for attorney's fees pursuant to § 1988. Following the submission of affidavits documenting the hours spent on the case by counsel for respondents, the District Court awarded respondents $245,456.25 in attorney's fees. Applicants appealed the award, and the Court of Appeals affirmed. *Rivera* v. *City of Riverside*, 679 F.2d 795 (CA9 1982). We granted certiorari, vacated the judgment, and remanded the case for further consideration in light of our then-recent decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). *City of Riverside* v. *Rivera*, 461 U.S. 952 (1983). On remand, and after a brief hearing, the District Court again awarded respondents

$245,456.25 in attorney's fees, and the Court of Appeals again affirmed, this time in an unpublished opinion. The Court of Appeals also denied applicants' motion for a stay pending the disposition by this Court of a petition for certiorari.

At each stage of the proceedings in this case, applicants have challenged the attorney's fee award on the ground that it is disproportionately large in comparison to the amount of the monetary judgment recovered. In the District Court, in opposition to respondents' initial request for nearly $500,000 in attorney's fees, applicants cited *Scott* v. *Bradley*, 455 F. Supp. 672 (ED Va. 1978), for the contention that "there is no reason to provide an economic windfall to plaintiffs' counsel by awarding them 16 times the award received by plaintiffs in the instant action." App. to Pet. for Cert. at 10-21. The opinion of the Court of Appeals on the first appeal states that "[a]ppellants urge this court to reduce the amount awarded . . . because the attorney's fees were disproportionately larger than the jury verdict." *Rivera* v. *City of Riverside*, 679 F.2d 795, 797 (CA9 1982). The Court of Appeals rejected the disproportionality argument, however, holding that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict." *Id.*, at 798. Applicants in their petition for certiorari to this Court have framed the more general question of "the proper standards within which a district court may exercise its discretion in awarding attorney's fees to prevailing parties under § 1988," but although such a formulation is not a model of specificity, it does "fairly subsume," *inter alia*, the disproportionality issue.

There is also presently pending before this Court a petition for certiorari in the case of *City of McKeesport* v. *Cunningham*, No. 84-1793, which raises the same issue as to disproportionality between the amount of a money judgment recovered and the size of the attorney's fee award under § 1988. In that case the District Court entered judgment for the

plaintiff in the amount of $17,000 as damages for the taking of property without due process of law, and plaintiff then moved for an award of some $35,000 in attorney's fees and costs based on time spent on the case. The District Court, after review of the relevant materials, reduced the amount of the requested award because, among other things, the plaintiff's lawsuit created no new law and was unlikely to benefit anyone but the plaintiff. On appeal, the Court of Appeals for the Third Circuit reversed, holding that the District Court was wrong in applying what the Court of Appeals characterized as a "negative multiplier" based on the low value of the lawsuit to the general public. *Cunningham* v. *City of McKeesport*, 753 F.2d 262, 268-269 (CA3 1985). The Court of Appeals directed that the plaintiffs recover the full amount of attorney's fees claimed.

In my view, the question of the proportionality of § 1988 attorney's fees to the amount of the monetary judgment awarded, a question which seems to me to be presented by each of these cases, is likely to command the votes of four members of the Court to grant certiorari in one of the cases and to postpone consideration of the certiorari petition in the other pending plenary review of the first. I also think, for the reasons hereafter stated, that the probability of applicants' succeeding on the merits is substantial. As we have previously acknowledged, § 1988 was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, *supra*, at 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). At the same time, the statute authorizes only the award of "reasonable" attorney's fees, reflecting Congress's intent that such fees be "adequate to attract competent counsel," yet not so large as to "produce windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976). I think the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained,

is so disproportionately large that it could hardly be described as "reasonable."

The question of what is a "reasonable" attorney's fee involves substantial elements of judgment and discretion in the District Court, but Congress has provided the courts with some guidelines for the exercise of this judgment and discretion. The Senate and House Reports accompanying § 1988 refer the courts to the twelve factors identified in *Johnson* v. *Georgia Highway Express, Inc*., 488 F.2d 714 (CA5 1974). Those factors include "the amount involved and the results obtained." *Hensley*, *supra*, at 430 n. 3. Perhaps more important, the House Committee on the Judiciary, in citing *Johnson*, chose to highlight the following five factors: "the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, *and the amount received in damages, if any*." H.R. Rep. No. 94-1558, p. 8 (1976) (emphasis supplied).

Despite this seemingly clear statement of legislative intent, however, other Courts of Appeals in addition to the Ninth Circuit have held not only that the amount of damages received is not a *mandatory* consideration in awarding attorney's fees under § 1988, but that it is not even a *permissible* one. For example, in *DiFilippo* v. *Morizio*, 759 F.2d 231 (CA2 1985), the Second Circuit held: "We believe a reduction made on the grounds of a low award to be error unless the size of the award is the result of the quality of representation." *Id*., at 235. Similarly, in *Ramos* v. *Lamm*, 713 F.2d 546 (CA10 1983), the Tenth Circuit stated: "Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice." *Id*., at 557. Other courts, including the Seventh Circuit, have taken the opposite view. See, *e.g.*, *Bonner* v. *Coughlin*, 657 F.2d 931, 934 (CA7 1981) ("[T]he nominal nature of

the damages is a factor to be considered in determining the amount of the award. . . . The amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated."); *Scott* v. *Bradley*, 455 F. Supp. 672, 675 (ED Va. 1978).

This Court has already recognized that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, *supra*, at 434. Similarly, in *Blum* v. *Stenson*, — U.S. — , 104 S. Ct. 1541 (1984), we explained that "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." *Id.*, at —, 104 S. Ct. at 1548. Neither *Hensley* nor *Blum*, however, addressed whether disproportionality between the amount of the monetary judgment obtained and the amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee.

This is not to suggest that substantial attorney's fees cannot be awarded in cases involving primarily injunctive or other nonpecuniary relief, see S. Rep. No. 94-1011, p. 6 (1976) ("It is intended that the amount of fees . . . not be reduced because the rights involved may be nonpecuniary in nature."); H.R. Rep. No. 94-1558, p. 9 (1976). Nor would an unusually large attorney's fee necessarily be inappropriate where a defendant's bad-faith conduct requires plaintiff's counsel to spend an inordinate amount of time on a case. But in this case and in *City of McKeesport*, there are only monetary judgments, and it is difficult for me to believe that Congress intended by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years

of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of $245,000 for services which had resulted solely in a monetary award of less than $34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure. Nothing in the language of § 1988 or in the legislative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute.

Thus, I conclude that it is likely that certiorari will be granted in either this case or *City of McKeesport*, or both, and that the likelihood of applicants' prevailing on the merits is sufficiently great to warrant the granting of a stay. Respondents contend that the supersedeas bond previously posted by applicants is inadequate to cover interest on the amount of the judgment, but this is an issue which may more properly be addressed in the first instance by the District Court.

[Publisher's note: See 473 U.S. 1322 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-173

RENAISSANCE ARCADE AND BOOKSTORE ET AL. *v.* COUNTY OF COOK AND VILLAGE OF FRANKLIN PARK

ON APPLICATION FOR STAY

[September 5, 1985]

JUSTICE STEVENS, Circuit Justice.

On March 8, 1985, the Circuit Court of Cook County entered a permanent injunction which prohibits petitioners from operating their adult bookstores in certain unincorporated areas of Cook County, Illinois.[*] Petitioners' appeal from the injunction is currently pending in the Appellate Court of Illinois for the First Judicial District. On March 20, 1985, that court denied petitioners' motion for a stay of the injunction pending appellate review. On April 22, 1985, the Illinois Supreme Court likewise entered an order denying petitioners' motion to stay enforcement of the injunction pending review.

[*] The authority for the Circuit Court's injunction is a zoning ordinance adapted by the Cook County Board of Commissioners which restricts "adult uses" and defines one such use, an "adult book store," as

"An establishment having as a substantial or significant portion of its stock in trade books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' or an establishment with a segment or section devoted to the sale or display of such material."

County of Cook, Ill., Zoning Ordinance, § 14.2. In their application, petitioners represent that their stay request "only concerns itself with the rights of adult bookstores." Application ¶ 19.

Petitioners filed an application for a stay with me in my capacity as Circuit Justice for the Seventh Circuit on August 29, 1985. Because the application was not filed within ninety days of the Illinois Supreme Court's April 22, 1985 order, however, neither this Court nor a Justice thereof has the authority to treat the application as a petition for certiorari to review "the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review," *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) *(per curiam)*. [Publisher's note: The parentheses around "*per curiam*" should not be italicized.] See 28 U.S.C. § 2101(c). Moreover, because the application does not indicate that the appeal will become moot unless a stay is granted, it does not appear that an extraordinary writ may be issued pursuant to 28 U.S.C. § 1651 in aid of this Court's appellate jurisdiction. Accordingly, the application is denied.

[Publisher's note: See 474 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-428

REPUBLICAN PARTY OF HAWAII, ET AL., APPLICANTS *v.* PATSY MINK ET AL.

ON APPLICATION FOR STAY

[November 29, 1985]

JUSTICE REHNQUIST, Circuit Justice.

Appellants, two recalled city councilmen of the city of Honolulu and the Republican Party of Hawaii, ask me to stay an order of the Supreme Court of Hawaii, or to affirmatively enjoin the conduct of appellee Pua, the city clerk of the city of Honolulu. They claim that the following provision of the Honolulu City Charter violates the United States Constitution as interpreted by this Court in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983):

> "No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation."

Appellants Matsumoto and Paccaro were recalled in an election held October 5. They seek to run in a special election called to fill the vacancies caused by the recall which is scheduled for tomorrow, Saturday, November 30. The stay application was presented to me about 1 p.m. Eastern Standard Time today, Friday, November 29. The Court of Appeals for the Ninth Circuit concluded that the ordinance as it construed it was unconstitutional, but the Supreme Court of Hawaii has now adopted a narrowing construction, which nonetheless prevents Matsumoto and Paccaro from appearing on

the ballot, and ordered the city clerk to enforce the statute in tomorrow's election.

It is almost impossible in the length of time available to me to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the decision of the Supreme Court of Hawaii, or whether a majority of this Court would be likely to reverse the decision of that court. The City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional under our decision in *Anderson* v. *Celebrezze*, *supra*. Under these circumstances, the "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws lead me to deny the application.

[Publisher's note: See 475 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-699

CALIFORNIA *v.* ALBERT GREENWOOD BROWN, JR.

ON APPLICATION FOR STAY

[March 27, 1986]

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Brown in 1980 for the first-degree murder of a 15-year-old girl. See 40 Cal. 3d 512, 709 P.2d 440 (1985), [Publisher's note: The citation following this note is surplus.] modified on rehearing, 41 Cal. 3d 439e, — P.2d — (1986). The California Supreme Court invalidated Brown's death sentence because it believed that a jury instruction given during the sentencing phase of Brown's trial, which told the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," violated the Eighth Amendment to the United States Constitution. The court felt that this instruction was incompatible with our decisions in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), which construed the Eighth Amendment to require that the sentencer in a capital case be allowed to consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id*., at 110, quoting *Lockett*, *supra*, at 604.

I think it is likely that four Members of this Court would vote to grant certiorari to review the California Supreme Court's holding that the jury instruction at issue in this case violated Brown's Eighth Amendment rights under *Lockett*

and *Eddings*, and that the decision below ultimately would be reversed. The California death penalty statute in effect at the time of Brown's trial expressly permitted Brown to introduce evidence, at sentencing, "as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition." Cal. Penal Code Ann. § 190.3 (West 1978). The California statute also provided:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . .
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of

> his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Ibid.*

A portion of the jury instructions given at the sentencing phase of Brown's trial tracked the above statutory language, thus clearly informing the jury of its constitutional duty to consider in mitigation all relevant aspects of the defendant's character and the circumstances of his crime. See CALJIC No. 8.84.1 (4th ed. 1979). In my view a strong argument can be made that these statutory provisions, and the instructions which explained them to Brown's sentencing jury, fully complied with the dictates of *Lockett* and *Eddings*.[1]

The jury instruction held by the California Supreme Court in this case to be unconstitutional was in no way inconsistent with the aforementioned statutory provisions. Nor did the instruction tell the jury to ignore any relevant evidence or mitigating circumstances. On the contrary, it simply told the jury not to be swayed by "*mere* sentiment, conjecture," and the like. Such an instruction focuses the jury's attention on the evidence and the reasonable inferences to be drawn therefrom. It is consistent with JUSTICE STEVENS' observation in *Gardner* v. *Florida*, 430 U.S. 349 (1977), that "[i]t is

[1] In *California* v. *Ramos*, 463 U.S. 992 (1983), we cited these very same provisions of the California statute and noted:

"[R]espondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U.S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case." *Id*., at 1005, n. 19.

of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id*., at 358.[2]

Brown argues that the decision below was based on adequate and independent state grounds, and is therefore unreviewable by this Court. It is true that, prior to this Court's 1972 decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the California Supreme Court had held that a jury instruction identical to the one at issue in this case violated the state constitution. See *People* v. *Bandhauer*, 1 Cal. 3d 609, 618-619, 463 P.2d 408, — (1970). After this Court's 1976 decision in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), however, the California Supreme Court revisited the question, treating it as a matter of federal, not state, constitutional law. See *People* v. *Robertson*, 33 Cal. 3d 21, 56-59, 655 P.2d 279, — (1982). In *People* v. *Easley*, 34 Cal. 3d 858, 671 P.2d 813 (1983), the court explained that "the federal cases following *Furman* and *Gregg* do not undermine [the prior] line of California authority, but, on the contrary, establish that these decisions *are compelled as a matter of federal constitutional law*." *Id*., at 876, 671 P.2d, at — (emphasis added); see also *People* v. *Lanphear*, 36 Cal. 3d 163, 165, 680 P.2d 1081, — (1984) ("federal constitutional law forbids" the instruction at issue in this case). Finally, in the instant case, the court did not cite the state constitution at all, but stated that it was relying on "the individualized sentencing concerns inherent in the Eighth Amendment." 40 Cal. 3d, at 537, 709

[2] Moreover, in practical terms, I would expect the instruction at issue to generally *help* capital defendants, by reducing the possibility that sentencing juries will be swayed by sympathy *for the victim*, along with other adverse forms of "passion, prejudice, public opinion or public feeling." See *People* v. *Easley*, 34 Cal. 3d 858, 886, 671 P.2d 813, — (1983) (Mosk, J., dissenting) ("In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.").

P.2d, at —. Thus, it seems that this case is one in which, "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979), quoting *Zacchini* v. *Scripps-Howard Broadcasting Co*., 433 U.S. 562, 568 (1977). As such, we have jurisdiction to review the California Supreme Court's decision. "If the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.'" *Delaware* v. *Prouse*, 440 U.S., at 653, quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5 (1950).

I also think the State has met its burden of demonstrating irreparable harm if its application for a stay is not granted. The California Supreme Court denied the State's application for a stay of issuance of its remittitur, and for an order deferring enforcement of its judgment, and issued the remittitur to the California Superior Court for Riverside County on January 30, 1986. The remittitur was filed by the Superior Court on February 3. Under California law, if the State does not hold a new trial on the issue of Brown's penalty within 60 days of the filing of the remittitur, or by April 4, it will be forever barred from seeking the death penalty in the instant case. See Cal. Penal Code Ann. § 1382(2) (West). On the other hand, since the California Supreme Court affirmed Brown's murder conviction, his status will be unaffected by the issuance of a stay pending disposition of the State's petition for certiorari. Accordingly, I grant the State's application for a stay.[3]

[3] The State's petition for certiorari also asks this Court to review a portion of the California Supreme Court's opinion in which it placed a new construction on certain portions of the California death penalty statute in order to avoid what it perceived to be a potential Eighth Amendment problem. See 40 Cal. 3d, at 538-545, 709 P.2d, at —. I express no view on whether this Court would be likely to grant certiorari on this issue, which was not relied upon by the California Supreme Court as an alternative basis for invalidating Brown's death sentence.

[Publisher's note: See 476 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-805

CALIFORNIA *v.* BERNARD LEE HAMILTON

ON APPLICATION FOR STAY

[May 6, 1986]

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Hamilton for the 1979 murder of a woman near San Diego. 41 Cal. 3d 408, 710 P.2d 981 (1985). The jury was not instructed that it was required, as a matter of state law under *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 672 P.2d 862 (1983), to find that Hamilton intended to kill his victim before it could impose the death penalty. The California Supreme Court held that this failure to properly instruct the jury on the issue of intent violated Hamilton's right to due process under this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). 41 Cal. 3d, at 431, 710 P.2d, at —. The court also held that such *Sandstrom* error was not harmless under the four-part test for harmlessness set forth in *People* v. *Garcia*, 36 Cal. 3d 539, 554-557, 684 P.2d 826, — (1984), cert. denied, — U.S. — (1985). In particular, the court concluded that the fourth part of the *Garcia* test, under which a *Sandstrom* error may be found harmless if "the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration," *Garcia*, 36 Cal. 3d, at 556, 684 P.2d, at —, did not apply to the instant case. 41 Cal. 3d, at 432, 710 P.2d, at —.

The State requests a stay so that it can petition for certiorari, raising the following question: "What is the proper

standard of prejudice under the United States Constitution for errors in jury instructions regarding intent to kill in capital cases?" The State argues that the California Supreme Court misconstrued this Court's decision in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), when it set up in *Garcia* its four-part harmlessness test for *Sandstrom* errors, and that under a proper test the *Sandstrom* error in the instant case would be found harmless. The State also points out that, under California law, it will be forced to begin a new trial on the issue of Hamilton's sentence by May 12, 1986, or be forever barred from seeking the death penalty. See Cal. Penal Code Ann. § 1382(2) (West). On the other hand, since the California Supreme Court affirmed Hamilton's murder conviction, he will remain confined whether or not a stay is granted.

This Court currently has before it the case of *Rose* v. *Clark*, No. 84-1974, which involves the question whether a *Sandstrom* error may ever be found harmless and, if so, under what circumstances. Our decision in *Rose* v. *Clark* may well affect the outcome of the instant case. For this reason, I believe that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in *Rose* v. *Clark*. I therefore stay the enforcement of the judgment of the California Supreme Court pending further action by me or by the Court.

[Publisher's note: See 478 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-18

GREGORIO ARANETA, III AND IRENE MARCOS ARANETA *v.* UNITED STATES

ON APPLICATION FOR STAY

[July 19, 1986]

CHIEF JUSTICE BURGER, Circuit Justice.

Applicants, a daughter and son-in-law of former President Ferdinand Marcos, ask that I stay a contempt order of the United States District Court for the Eastern District of Virginia requiring their incarceration if they fail to testify before a grand jury on July 22. They contend that requiring them to so testify would violate their Fifth Amendment privilege against self-incrimination because their testimony might be used against them in related criminal proceedings currently pending in the Philippines. They assert they will file a petition for certiorari on this issue.

Soon after their arrival in the United States, applicants were served with subpoenas requiring their testimony before a Grand Jury sitting in the Eastern District of Virginia to investigate alleged corruption relating to arms contracts made with the government of the Philippines. The District Court denied the applicants' motion to quash the subpoenas on Fifth Amendment grounds, and granted instead the Government's motion to give the applicants use and derivative use immunity as to prosecutions in the United States. The court also entered a restrictive order designed to protect the secrecy of their testimony and held that no constitutional question was presented because the applicants had not demonstrated a real and substantial danger of prosecution abroad.

The Court of Appeals affirmed, but on different grounds. It acknowledged that applicants faced a substantial possibil-

ity of prosecution in the Philippines. It also found the District Court's restrictive order insufficient to protect against disclosures to the Philippine government because, *inter alia*, the order itself contemplates permitting disclosure of applicants' testimony at a future date, and because the order does not prohibit the United States from revealing evidence derived from that testimony. The court therefore reached the constitutional question, and held that the Fifth Amendment privilege is not violated simply because compelled testimony might be used in a foreign prosecution. The court denied rehearing on July 3.

The requirements for obtaining a stay pending certiorari are well established. Such a stay should be granted only when (1) there is a reasonable probability that four Justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the Justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the applicant's favor. See, *e.g.*, *National Collegiate Athletic Association* v. *Board of Regents*, 463 U.S. 1311, 1313 (1983) (WHITE, J., in chambers); *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980) (REHNQUIST, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). In assessing whether each of these factors has been met, a Circuit Justice acts as a "surrogate for the entire Court." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1313 (1973) (MARSHALL, J., in chambers).

As to the first requirement, I conclude that four Justices will likely vote to grant certiorari on the issue that presumably will be presented in the applicants' petition, namely whether the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution. Substantial confusion exists on this issue.[*] Moreover, this Court

[*] Compare *Mishima* v. *United States*, 507 F. Supp. 131, 135 ([Publisher's note: There should be a "D" here. But see 478 U.S. at 1303.] Alaska 1981); *United States* v. *Trucis*, 89 F. R. D. 671, 673 (ED Pa. 1981); and *In*

voted to consider the question in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), but did not reach it because, in the view of the majority, the appellant there "was never in real danger of being compelled to disclose information that might incriminate him under foreign law," *id*., at 480. We did, however, reserve the issue, observing that if the appellant should later be questioned about "matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, . . . , [Publisher's note: The comma preceding this note is surplus.] then a constitutional question will be squarely presented." *Id*., at 481.

Against this background, it is more likely than not that at least five Justices will agree with the Court of Appeals that the applicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome. That case held only that the privilege against self-incrimination protects a witness against compelled disclosures in state court which could be used against him in federal court or vice versa. However, the Court also discussed with apparent approval several English cases holding that the privilege protects a witness from disclosures which could be used against him in a foreign prosecution. *See id*., at 58-63, 77; *United States of America* v. *McRae*, L.R., 3 Ch. App. 79 (1867); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ex. 1750); *East India Co.* v. *Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

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re Cardassi, 351 F. Supp. 1080, 1085-1086 ([Publisher's note: There should be a "D" here. But see 478 U.S. at 1303.] Conn. 1972); with *Parker* v. *United States*, 411 F.2d 1067, 1070 (CA10 1969), vacated and dismissed as moot, 397 U.S. 96 (1970); and *Phoenix Assurance Co.* v. *Runck*, 317 N.W.2d 402, 413 ([Publisher's note: There should be a "D" here. But see 478 U.S. at 1303.] N.D.), cert. denied, 459 U.S. 862 (1982).

Finally, I conclude that the equities weigh in applicants' favor, particularly if the stay is appropriately conditioned. Applicants clearly will suffer irreparable injury if the Court of Appeals is right about the likelihood of prosecution and the inability of the District Court's restrictive order to prevent disclosure. Cf. *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984). If that secrecy order is enforceable under all circumstances, it may afford applicants protection should they later be extradited for trial in the Philippines; however, that will depend, in part, on what protection is afforded to accused persons under Philippine law.

The Government and the public plainly have a strong interest in moving forward expeditiously with a grand jury investigation, but on balance the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay. Accordingly, I grant the stay, conditioned upon applicants' filing their petition for certiorari by August 5, 1986. This should permit the Court to act on the petition during its first conference of the coming Term.

[Publisher's note: See 478 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-195

MECISLOVAS MIKUTAITIS *v.* UNITED STATES

ON APPLICATION FOR STAY

[September 17, 1986]

JUSTICE STEVENS, Circuit Justice.

The United States District Court for the Northern District of Illinois is holding applicant, Mecislovas Mikutaitis, in civil contempt of court because he refuses to testify at a deposition in Chicago despite a grant of immunity by the United States District Court for the Middle District of Florida, where denaturalization proceedings against one Jurgis Joudis are pending. The papers before me indicate that the testimony the Government seeks from Mikutaitis will tend to prove that he, as well as Joudis, cooperated with the Nazi government, committed war crimes, and engaged in treasonous activity against the Soviet Union after it invaded Lithuania during World War II. Mikutaitis asserts that the testimony the government seeks to compel may be used by the Soviet Union in a criminal proceeding against him in the event that he is denaturalized and deported there and his testimony comes to the attention of the Soviet government. Thus, he contends that because the grant of immunity does not adequately protect against the use of his testimony against him in a criminal prosecution by a foreign sovereign, he has a Fifth Amendment privilege against testifying.

In support of his theory, Mikutaitis argued before the District Court that there is a probability that he too will eventually be denaturalized and deported since his deposition testimony may be used against him in such a civil proceeding. In this regard, a lawyer for the government's Office of Special Investigations testified that the United States is actively

engaged in seeking to denaturalize and deport those who cooperated with the Nazi government and concealed their involvement to obtain entry into the United States. Mikutaitis also presented an expert in Soviet law, who testified that the Soviet Union is likely to prosecute Mikutaitis for treason if he is deported there. The District Court recognized that Mikutaitis has a "realistic fear of prosecution," but nonetheless found Mikutaitis in contempt. The District Court held that the court order sealing the deposition sufficiently protected him from the risk that his testimony would ever be disclosed to the Soviet Union. See *United States* v. *Joudis*, — F.2d —, — (1986) (slip op. 3). The District Court allowed Mikutaitis to remain free on bail pending appeal.

The United States Court of Appeals for the Seventh Circuit affirmed the contempt order, concluding that "the sealing order was adequate to protect Mikutaitis from Soviet acquisition of his testimony and thus override his Fifth Amendment claim." *Id.*, at — (slip op. 7). In light of this conclusion, it was not necessary for the court to decide whether the constitutional privilege against self-incrimination provides any protection against compelled testimony when there is a substantial risk that a foreign sovereign will prosecute the witness. See *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972) (declining to reach constitutional issue since there was no "real and substantial danger" that witness' testimony would be used against him in foreign prosecution).

On September 5, 1986, a panel of the Court of Appeals granted the Government's motion for immediate issuance of the mandate, and on September 10, the District Court ordered Mikutaitis to surrender himself to the custody of the United States Marshal on the following day. Mikutaitis complied with that order. He now asks me, in my capacity

as Circuit Justice, to stay the issuance of the Court of Appeals' mandate and the District Court's order requiring him to report for custody, thereby allowing him to remain free on bond pending his filing a suggestion for rehearing to the Court of Appeals, or a petition for certiorari to this Court.[1] Pursuant to my request, the United States has filed a memorandum in opposition to the application.

In my opinion the question raised by this application is sufficiently similar to the question identified by THE CHIEF JUSTICE in *United States* v. *Araneta*, 478 U.S. — (1986) (BURGER, C.J., in chambers), to make it appropriate for the full Court to consider this application for a stay at the same time it decides whether or not to grant certiorari in *Araneta*.[2] In *Araneta*, THE CHIEF JUSTICE granted a stay of the contempt order pending a petition for certiorari, based in part on his prediction that it is "more likely than not" that five justices will agree with the United States Court of Appeals for the Fourth Circuit that the sealing of the grand jury testimony under Fed. Rule Crim. Proc. 6(e) in that case did not provide adequate protection against future disclosure of testimony to the government of the Phillipines. *Id*., at —. That conclusion was supported by the risk that the testimony might be disclosed inadvertently, the fact that the order did not forbid disclosure of evidence derived from the testimony, and the possibility that the grand jury record might be opened at a later date. See *United States* v. *(Under Seal)*, 794 F.2d 920 (CA4 1986). All of these factors are relevant in this case as well.[3]

[1] A suggestion for rehearing en banc was filed with the Court of Appeals on September 16, 1986.

[2] A petition for certiorari was filed in *Araneta* on August 4, 1986, and the Court should be able to act upon it during its conference later this month. See *Araneta*, 478 U.S., at —.

[3] Recognizing that two courts have now ruled that the sealing order eliminates Mikutaitis' substantial fear of disclosure, I nonetheless believe that the legal question of whether sealing orders adequately protect against disclosure for Fifth Amendment purposes is one of the two key

It does not appear that the Government will be significantly prejudiced by an additional short delay in obtaining Mikutaitis' deposition.[4] On the other hand, it is possible that continued enforcement of the contempt order may have the practical consequence of rendering the proceeding moot if Mikutaitis is pressured into testifying because of the prospect of lengthy imprisonment pending consideration of his petitions for review by the en banc Court of Appeals, or this Court. In light of these considerations, I have decided to grant the application. Accordingly, the enforcement of the contempt order entered by District Court on March 11, 1986, which had been stayed until September 5, 1986, is stayed until further order of this Court.[5]

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issues presented in *Araneta*, and that the full Court should have the opportunity to consider this stay application in light of its action on the petition in *Araneta*. As it stands, some of the circuit courts of appeals appear to have reached differing conclusions on this issue. See *United States* v. *(Under Seal)*, 794 F.2d 920, 925 (CA4 1986) (acknowledging that three circuits have deemed Rule 6(e) orders sufficiently protective, but holding that the "contrary authority [is] the more compelling").

[4] The government [Publisher's note: "government" should be "Government".] initially sought to depose Mikutaitis in 1983, the order requiring him to testify was issued in October, 1985, and he was found to be in contempt on March 11, 1986.

[5] The entry of this order shall not in any way affect the jurisdiction of the Court of Appeals to take whatever action it deems appropriate in response to the pending suggestion for rehearing. Nor does this order preclude the District Court from entering whatever orders it deems appropriate to insure that Mikutaitis will be available to testify in the event that the judgment of the panel of the Court of Appeals is ultimately upheld. Finally, issuance of this order is in no way intended to discourage either Mikutaitis or the government [Publisher's note: "government" should be "Government".] from seeking a broader sealing order. See *Joudis*, — F.2d, at — (slip op. 7-8).

[Publisher's note: See 478 U.S. 1311 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-229

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL. *v.* MILDRED FLANIGAN

ON APPLICATION FOR INJUNCTION

[September 25, 1986]

JUSTICE REHNQUIST, Circuit Justice.

The application for a writ of injunction pending appeal is denied. The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. See *Femling* v. *Montana State University*, — Mont. —, 713 P.2d 996, 999 (1986); *Dodd* v. *East Helena*, 180 Mont. 518, 523, 591 P.2d 241, 244 (1979). Under these circumstances, the claims presented by the petitioners are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." *Radio Station WOW* v. *Johnson, Inc*., 326 U.S. 120, 128 (1945).

Denied.

[Publisher's note: See 479 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-262

J. FRANK CURRY, ET AL. APPLICANTS *v.*
JOHN BAKER, CHAIRMAN OF ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE ET AL.

ON APPLICATION FOR STAY

[October 7, 1986]

[Publisher's note: In the caption above there should not be a comma after "CURRY" but there should be a comma after "COMMITTEE".]

JUSTICE POWELL, Chambers Opinion.

This is an application for a stay of the mandate of the Court of Appeals for the Eleventh Circuit pending the filing and disposition of a petition for certiorari. The case involves the legal contest between two candidates for the Democratic gubernatorial nomination in Alabama.[*] One of the applicants received a majority of the votes cast in a run-off election held on June 24. A three-judge court found that the applicant had encouraged widespread violations of a state party rule against cross-over voting in the run-off, a rule that apparently has the force of state law. *Henderson* v. *Graddick*, — F. Supp. — (MD Ala. 1986). The State Democratic Executive Committee conducted an investigation, concluded that the applicant's opponent received a majority of the votes legally cast, and certified the applicant's opponent as the Democratic nominee. The issue, generally stated, is whether the actions of the State Democratic Executive Committee exceeded the bounds of due process. Following state court litigation, the applicants filed this § 1983 action in the District Court for the Northern District of Alabama. The District Court found a constitutional violation and ordered a new election. On appeal, the Court of Appeals for the Elev-

[*] The applicants are one of the candidates and two persons who voted for him in the run-off.

enth Circuit reversed. The court found no violation of federal law.

This Court rarely grants a stay of mandate pending disposition of the petition for certiorari unless three conditions are met. First, there must be a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari. Second, there must be a significant possibility that a majority of the Court will conclude that the decision below was erroneous. Finally, there must be a likelihood that irreparable harm will result if the decision below is not stayed. *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (POWELL, J., in chambers). This case presents unique facts closely tied to Alabama election law and rules. The applicants concede that this case is unlikely to recur. There is no conflict among the Circuits. It is no doubt true that, absent the run-off election ordered by the District Court, the applicant here will suffer irreparable injury. This fact alone is not sufficient to justify a stay in the unique circumstances of this case. Accordingly, the application is denied.

[Publisher's note: See 479 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-274 (86-572)

COMMONWEALTH OF KENTUCKY *v.* SERGIO STINCER

ON APPLICATION FOR STAY

[October 15, 1986]

JUSTICE SCALIA, Circuit Justice.

I doubt the conclusion of the Kentucky Supreme Court that the Confrontation Clause of the Sixth Amendment gives an accused child-molester the right to be present at the hearing inquiring into the competency of his child victim to testify. I see, moreover, at least a "fair prospect" that a majority of this Court would find that conclusion erroneous. See *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). However, approximately one month after this case was decided the Kentucky Legislature enacted a statute providing specific procedures for securing the testimony of young victims of sexual abuse. See Ky. Rev. Stat. § 421.350 (Supp. 1986). The Supreme Court of Kentucky has upheld the validity of that statute, even though it does not require presence of the accused at the competency hearing. See *Commonwealth* v. *Willis*, — S.W.2d — (July 3, 1986). Since, therefore, it is unlikely that the issue presented by this case will arise again in Kentucky, and since I am unaware of any other State which has resolved the issue as did the Kentucky Supreme Court, see, *e.g.*, *State* v. *Taylor*, 103 N. M. 189, —, 704 P.2d 443, 449 (App. 1985); *Moll* v. *State*, 351 N.W.2d 639, 644 (Minn. App. 1984); *People* v. *Breitweiser*, 38 Ill. App. 3d 1066, 1067-1068, 349 N.E.2d 454, 455-456 (1976); *State* v. *Ritchey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971), I cannot discern "a 'reasonable prob-

ability' that four Justices will . . . [vote] to grant certiorari . . . ." *Rostker* v. *Goldberg*, *supra*, at 1308 (citations omitted). The application for stay of the Commonwealth of Kentucky is accordingly

Denied.

[Publisher's note: See 479 U.S. 1305 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-288

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK *v.* PHILLIP WILLIAM FEIOCK

ON APPLICATION FOR STAY

[October 23, 1986]

JUSTICE O'CONNOR, Circuit Justice.

Applicant requests that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Three. The California Court of Appeal judgment granted Phillip William Feiock's petition for habeas corpus, holding that the United States Constitution requires that the government prove beyond a reasonable doubt in a civil contempt proceeding that Mr. Feiock was able to comply with a previous court order. The Orange County Superior Court had ordered Mr. Feiock to make child support payments, and after Mr. Feiock failed to comply with this court order, he was held in civil contempt. He was sentenced to a 25-day suspended sentence, placed on probation, and ordered to begin making his child support payments or prepare himself for incarceration. At the civil contempt hearing, the trial court applied Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982), which provides that proof that a court of competent jurisdiction had issued a child support order which was filed and served on a parent, together with proof of noncompliance, constitutes prima facie evidence of a contempt of court.

On petition of Mr. Feiock, the California Court of Appeal granted a writ of habeas corpus and annulled the judgment of contempt. *In re Feiock*, 180 Cal. App. 3d 649, 225 Cal.

Rptr. 748 (1986). The court held that § 1209.5 was unconstitutional under the Due Process Clause of the Fourteenth Amendment because it created a mandatory presumption that shifted the burden of proof to the defendant, requiring him to prove that he was able to comply with the child support order. The court relied on this Court's decisions involving the use of mandatory presumptions in criminal prosecutions. See *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979). The Supreme Court of California denied the State's petition for review.

My obligation as a Circuit Justice in considering a stay application under 28 U.S.C. § 2101(f) and Rule 44 of this Court is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342 (1980) (REHNQUIST, J., in chambers). These factors lead me to conclude that the request for a stay should be granted.

I have serious doubts about the validity of the California Court of Appeal's conclusion in light of this Court's nearly unanimous decision in *United States* v. *Rylander*, 460 U.S. 752 (1983). In *Rylander*, this Court held that an alleged contemner has the burden of showing a current inability to comply with a court order, and that a contemner must overcome a presumption of ability to comply with a court order. Moreover, the decision of the California Court of Appeal that the State must prove a parent's ability to comply with a child support order has far-reaching implications for the enforcement of child support obligations. I think it fair to say, therefore, that at least four Justices would vote to grant certiorari. Furthermore, given this Court's holding in *Rylander*, I conclude that the applicant is likely to prevail on the merits.

Finally, the balance of equities clearly weighs in favor of a stay. The father is required merely to comply with an admittedly valid child support obligation. The decision of the California Court of Appeal, however, will make it far more difficult for the State of California to enforce child support payments. As even the Court of Appeal observes, its judgment permits recalcitrant parents to "literally 'sit on [their] hands,' and defend any contempt allegation by relying on the prosecution's burden of proof." 180 Cal. App. 3d, at 654, 225 Cal. Rptr., at 750. The burden placed on the State, custodial parents, and children is unquestionably sufficient to support a stay. Finally, because the Orange County Superior Court has not yet dismissed the judgment of contempt it appears that this case is not moot. Cf. *California* v. *Brown* — U.S. — (1986) (REHNQUIST, J., in chambers).

I therefore grant the requested stay of the enforcement of the judgment of the California Court of Appeal pending the timely filing and subsequent disposition of a writ of certiorari in this case.

It is so ordered.

[Publisher's note: See 479 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-416

FERRIS KLEEM AND TONY KLEEM v.
IMMIGRATION AND NATURALIZATION SERVICE

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

[December 4, 1986]

JUSTICE SCALIA, Circuit Justice.

Counsel for applicants has asked for a 60-day extension of time in which to file a petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit. The stated reason for the request is that the case presents "important questions under the Constitution of the United States which were determined adversely to the petitioner by the court below," and counsel desires "additional time to research and prepare the Writ of Certiorari."

Writs of certiorari in civil cases "shall be . . . applied for within ninety days" after entry of the subject judgment, 28 U.S.C. § 2101(c), which period may be extended by a Justice of this Court (up to an additional 60 days) "for good cause shown," *ibid*. Under this Court's Rule 20.6, requests for extensions of time "are not favored." In this case, counsel has given no reason for his request other than his desire for additional time to research constitutional issues. The same reason could be adduced in virtually all cases. It does not meet the standard of "good cause shown" for the granting of a disfavored extension. Pursuant to the Rules of this Court, the application for extension is

Denied.

[Publisher's note: See 479 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-448

JAMES D. LEDBETTER, COMMISSIONER, GEORGIA DEPT. OF HUMAN RESOURCES *v.* VERNITA BALDWIN ET AL.

ON APPLICATION FOR STAY

[December 18, 1986]

JUSTICE POWELL, Circuit Justice.

The applicant in this case is the Commissioner of the Georgia Department of Human Resources. He promulgated regulations implementing 42 U.S.C. § 602(a)(38) (Supp. III 1985). That section alters the requirements for state plans distributing grants under the Aid to Families with Dependent Children program (AFDC). Generally, § 602(a)(38) requires the States, in determining a family's need for AFDC payments, to consider child support payments made to certain children living with the family. Respondents filed suit in the United States District Court for the Northern District of Georgia, contending that applicant's regulations violated the federal Constitution in two respects: the regulations took property from the children without just compensation and violated substantive due process. The District Court held in favor of respondents and declared the regulations unconstitutional. Applicant sought a stay pending appeal from the District Court. Before the District Court ruled on that motion, applicant filed a notice of appeal in this Court pursuant to 28 U.S.C. §§ 1252 and 2101. Subsequently, the District Court denied applicant's request for a stay.

Three considerations govern a Justice's decision whether to grant an application for a stay pending appeal. First, there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently

meritorious to justify notation of probable jurisdiction. Second, there must be a significant possibility of reversal of the lower court's decision. Finally, there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed. See *Times-Picayune Publishing Co.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in chambers).

Respondents concede that the case raises an issue sufficiently meritorious for the Court to note probable jurisdiction. On December 8, the Court noted jurisdiction in the similar case of *Kirk* v. *Gilliard*, No. 86-509 (on appeal from *Gilliard* v. *Kirk*, 633 F. Supp. 1529 (WDNC 1986)). My review of the papers filed with this application and in No. 86-509 convinces me that there is a significant possibility that the Court will reverse the lower court's decision in this case. Finally, the State will suffer irreparable harm if the decision is not stayed. The State will bear the administrative costs of changing its system to comply with the District Court's order. Even if this Court reverses the judgment of the District Court, it is unlikely that the State would be able to recover these costs. Similarly, it is unlikely that disputed payments made pursuant to the District Court's judgment could be recovered. On the other hand, respondents argue that they will suffer irreparable injury if a stay is issued. If the Court affirms the judgment of the District Court, a stay will have deprived them of the disputed payments during the period of the Court's consideration. If the State then pays the disputed amount with interest, as presumably it would, this may not fully compensate respondents for the difficulties caused by interruption of their income. Although respondents' argument has some force, I conclude that the balance of irreparable injuries, coupled with the likelihood of reversal on the merits, supports a stay.

The application is granted.

[Publisher's note: See 479 U.S. 1312 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-480

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. *v.* NUCLEAR REGULATORY COMMISSION ET AL.

ON APPLICATION FOR STAY

[December 31, 1986]

JUSTICE SCALIA, Circuit Justice.

Ohio Citizens for Responsible Energy, Inc., has filed with me as Circuit Justice for the Sixth Circuit an "Application to Stay Mandate of United States Court of Appeals for the Sixth Circuit Pending Certiorari," seeking an order under 28 U.S.C. § 2101(f) staying the full-power operation of the Perry Nuclear Power Plant located near Cleveland, Ohio. The order sought would remain in effect until the Court of Appeals for the Sixth Circuit issues its final decision in the pending suit filed by the applicant against the Nuclear Regulatory Commission, and, should the applicant be unsuccessful in that suit, until disposition of a petition for writ of certiorari in this Court.

The application must be denied. Section 2101(f) provides: "In any case in which the *final* judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of *such* judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." (Emphasis added.) It is clear from this language that, even though certiorari review of interlocutory orders of federal courts is available, see 28 U.S.C. §§ 1254(1) & 1292, it is only the execution or enforcement of *final* orders that is stayable under § 2101(f). See *Twentieth Century Airlines* v. *Ryan*, 74 S. Ct. 8, 10 (1953) (Reed, J., in chambers). In this case, the only extant order which, if

stayed, could conceivably affect the full-power operation of the Perry plant, is the Sixth Circuit's order of December 23, 1986 lifting the stay of full-power operation that it imposed on November 13, 1986. That order, however—like the stay itself—is interlocutory.

What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 44.1, against full-power operation of the power plant. A Circuit Justice's issuance of such a writ—which, unlike a § 2101(f) stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts—demands a significantly higher justification than that described in the § 2101(f) stay cases cited by the applicant, *e.g.*, *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). The Circuit Justice's injunctive power is to be used "sparingly and only in the most critical and exigent circumstances," *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (MARSHALL, J., in chambers) (quoting *Williams* v. *Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers)), and only where the legal rights at issue are "indisputably clear," *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers). Moreover, the applicant must demonstrate that the injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdiction[]." 28 U.S.C. § 1651(a). I will not consider counsel to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the peculiar requirements for its issuance.

The application for stay is denied.

[Publisher's note: See 480 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

WESTERN AIRLINES, INC., ET AL. *v.*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.

ON APPLICATION FOR STAY

No. A-716. Decided April 2, 1987

An application to stay the Court of Appeals' order—which, *inter alia*, enjoined the merger of applicants Delta Air Lines and Western Airlines—is granted pending the timely filing and subsequent disposition of a petition for certiorari. Respondent unions, which represented various of Western's employees, filed suits in the District Court, alleging that Western had violated the successorship provisions of the relevant collective-bargaining agreements by failing to secure Delta's agreement to be bound by the agreements, and seeking an order compelling System Board of Adjustment arbitration of the dispute as a "minor" dispute under the Railway Labor Act (RLA). Treating the dispute instead as a "representation" dispute subject to the exclusive jurisdiction of the National Mediation Board under the RLA, the District Court dismissed the complaints for lack of subject matter jurisdiction. However, little more than 12 hours before the merger was scheduled to take place, the Court of Appeals issued its order reversing the District Court's decisions, requiring the entry of orders compelling arbitration, and enjoining the merger pending completion of arbitration or until applicants filed with the Court of Appeals a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, would bind the successor corporation. The timing and substance of the order under the exigencies of this case make compliance with this Court's Rule 44.4 both virtually impossible and legally futile, and this situation presents one of those rare, extraordinary circumstances in which the Rule does not require a request for a stay before the Court of Appeals. Moreover, the order is not divested of its finality within the meaning of 28 U.S.C. § 2101(f) by its provision lifting the injunction upon the filing of the required stipulations, which, to have any significance, must bind applicants to a concession of their position on the only question before the Court of

Appeals. The application for a stay is granted because (1) the reasoning of every other Court of Appeals that has ruled on that issue casts grave doubt on the validity of the Ninth Circuit's action in this case; (2) it is therefore very likely that at least four Justices would vote to grant certiorari, and that applicants are likely to prevail on the merits; and (3) the balance of the equities clearly weighs in applicants' favor, since the cost of enjoining this huge and complicated merger only hours before its long awaited consummation is staggering in its magnitude, since respondents had no entitlement to the concession required by the stipulation, since preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, and since the employees themselves are protected by Delta's assumption of other labor protection provisions.

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq*. The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by § 6 of the Act, 45 U.S.C. §§ 156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under § 2, Ninth, of the Act, the National

Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §§ 152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. See *infra*, at 1308 [Publisher's note: See 3 Rapp at 1271.].

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet, and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the

District Court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8 p.m., eastern time, March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
>
> • • • • •
>
> "It is so ordered. A written opinion will be filed as soon as practicable." Application Exh. A.

The timing and substance of the Court of Appeal's [Publisher's note: "Appeal's" should be "Appeals'". But see 480 U.S. at 1304.] order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare, extraordinary circumstances in which request for

a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the District Court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U.S.C. § 2101(f). The Court of Appeals' provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman* v. *Paccar, Inc*., 424 U.S. 1301, 1304 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters* v. *Texas Int'l Airlines, Inc*., 717 F.2d 157 (1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employ-

ees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated that "[a] court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. . . . Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective-bargaining violations implicating post-merger representation as one settled by "'the overwhelming and well-developed case law,'" and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968 (quoting Order No. 86C5239 (ND Ill. July 28, 1986)), cert. denied, 479 U.S. 962 (1986). See also *Air Line Pilots Assn. Int'l* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (CA2 1981); *International Assn. of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975, 977 (CA1), cert. denied, 429 U.S. 961 (1976); *Brotherhood of Railway & S. S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (CA6 1963), cert. dism'd, 379 U.S. 26 (1964). It was upon this overwhelming body of case law that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining

the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-0040 (Feb. 20, 1987). On March 31, 1987, the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by respondents fall under the jurisdiction of the System Adjustment Boards, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stipulation, the successor corporation was required to do no more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the

same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the System Adjustment Boards. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by the applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, the applicants have been planning to combine their large-scale, complex, interrelated, and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification, and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration (FAA) of changes in Western's operating certificates, specifications, and training programs have been sought and received. Maintenance schedules, flight schedules, and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican and Canadian routes with the respective governments of those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers.

Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987, merger date. And the list of consequences goes on. See Application, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under the collective-bargaining agreement to System Board arbitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on the applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protec-

tive Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser paying jobs, moving and related costs for employees required to move, integration of seniority lists, and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972); Heil Affidavit, ¶ 6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the System Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

[Publisher's note: See 481 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-820

UNITED STATES POSTAL SERVICE *v.*
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

ON APPLICATION FOR STAY

[May 21, 1987]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant United States Postal Service asks that I stay the mandate of the Court of Appeals for the District of Columbia Circuit, enforcing an arbitrator's decision that applicant reinstate Edward Hyde as a postal worker. In 1984, Hyde was convicted of unlawful delay of the mail by a postal employee after postal inspectors found more than 3,500 pieces of undelivered mail in his possession. The Postal Service discharged Hyde for dereliction of duty. Respondent filed a grievance against applicant on Hyde's behalf, seeking arbitration. The arbitrator ordered that applicant reinstate Hyde after a 60-day medical leave of absence. Applicant filed suit, seeking to set aside the award as contrary to public policy. The District Court set aside the arbitrator's decision, finding that the Postal Service must retain the power to remove employees who breach the public trust and hamper the strong public interest in ensuring prompt delivery of the mails. 631 F. Supp. 599 (DDC 1986). The Court of Appeals reversed, holding that a court may set aside an arbitrator's award as contrary to public policy only when the award itself violates established law or compels unlawful conduct. 810 F.2d 1239 (1987).

The standards for granting a stay pending a petition for certiorari are well settled: a Circuit Justice is required "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' [Publisher's note: "'stay equities,'" should be "'stay equities,'".] and to give

some consideration as to predicting the final outcome of the case in this Court." *Heckler* v. *Redbud Hospital District*, 473 U.S. 1308, 1311 (1985) (REHNQUIST, Circuit Justice), quoting *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980).

In my view, the applicant has satisfied these requirements. There is a reasonable probability that four Justices will eventually grant certiorari in this case. The Court has already granted certiorari in *United Paperworkers International Union* v. *Misco, Inc.*, cert. granted, 479 U.S. — (1987), which raises the identical issue: the scope of the public policy exception to enforcement of arbitration awards. Although that case presents the issue in the context of a private employer, applicant presents a stronger case for setting aside the arbitrator's award because it operates under a statutory mandate to ensure prompt delivery of the mails. See 39 U.S.C. § 101(a). Moreover, I find that the stay equities favor the applicant. Even the temporary reinstatement of Hyde, a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers. While Hyde does have some interest in returning to his position, he has not worked for the applicant for almost three years. Continuation of the status quo will not work an irreparable harm on Hyde, but it will preserve the applicant's ability to carry out its legal obligations.

The application for a stay of the Court of Appeals' mandate pending the filing and disposition of a petition for certiorari is granted.

[Publisher's note: See 483 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-10

MICHAEL K. DEAVER *v.* UNITED STATES

ON APPLICATION FOR STAY

[July 1, 1987]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that I stay his imminent criminal trial pending this Court's disposition of his petition for certiorari.

In certain cases, the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (1982 ed. and Supp. III), provides for appointment of an independent counsel to investigate alleged impropriety of government officials. After an investigation by an independent counsel, applicant was indicted for perjury, and is set to be tried on July 13, 1987. In a motion to dismiss, applicant challenged the constitutionality of the Act, claiming that appointment of an independent counsel violates the separation of powers. The District Court denied the motion. Applicant appealed, and the Court of Appeals for the District of Columbia Circuit dismissed the appeal because the District Court's order is not a final decision. See 28 U.S.C. § 1291. Applicant has filed a petition for certiorari seeking review of that judgment, and asks that I stay the proceedings below pending disposition of that petition.

The standards for granting a stay pending disposition of a petition for certiorari are well settled. A Circuit Justice is required "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Heckler v. Redbud Hospital District*, 473 U.S. 1308, 1311-1312 (1985) (REHNQUIST, Circuit Justice), quoting *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980).

In my view, there is not a fair prospect that a majority of this Court would find the decision below erroneous. "Congress has limited the jurisdiction of the Courts of Appeals to 'final decisions of the district courts.' 28 U.S.C. § 1291. This Court has long held that the policy of Congress embodied in this statute is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law." *United States* v. *Hollywood Motor Car Co*., 458 U.S. 263, 264-265 (1982). It is clear that the District Court's denial of applicant's motion to dismiss did not terminate the litigation. Although applicant claims that his challenge to the constitutionality of the Act is sufficiently collateral to fall within the limited exception enumerated in *Cohen* v. *Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), I do not think the exception covers this case. "[I]f [applicant's] principle were to be applied, questions as to the constitutionality of the statutes authorizing the prosecution and doubtless numerous other questions would fall under such a definition, and the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car*, *supra*, at 270. There will be time enough for applicant to present his constitutional claim to the appellate courts if and when he is convicted of the charges against him.

Accordingly, the application for a stay and recall of the mandate of the Court of Appeals is

Denied.

[Publisher's note: See 483 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-99

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CHAN KENDRICK ET AL.

ON APPLICATION FOR STAY

[August 10, 1987]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Government requests that I stay an order of the United States District Court for the District of Columbia enjoining the enforcement of parts of the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z, [Publisher's note: The comma preceding this note is surplus.] *et seq.* It has been the unvarying practice of this Court so long as I have been a member of it to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government. "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters* v. *National Association of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (REHNQUIST, J., in chambers). "Given the presumption of constitutionality granted to all Acts of Congress," it is both likely that the Court will note probable jurisdiction here and appropriate that the statute remain in effect pending such review. *Schweiker* v. *McClure*, 452 U.S. 1301, 1303 (1981) (REHNQUIST, J., in chambers).

Respondents contend that the merits of the case are controlled by the Court's recent decisions in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and *Grand Rapids School District* v. *Ball*, 473 U.S. 373

(1985). The District Court agreed with respondents, but the Government contends that the merits are instead controlled by cases such as *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736 (1976), *Hunt* v. *McNair*, 413 U.S. 734 (1973), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971). The issue seems to me fairly debatable, and I believe that there is a "fair prospect" that the Court will ultimately reverse the judgment below. See *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers).

The application for a stay pending timely docketing of the Government's appeal and this Court's ultimate disposition of the case is granted.

[Publisher's note: See 483 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-100

AMERICAN TRUCKING ASSOCIATION, INC., ET AL. *v.*
HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.

ON APPLICATION FOR WRIT OF INJUNCTION

[August 14, 1987]

JUSTICE BLACKMUN, Circuit Justice.

This is an application for an injunction that would require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization (HUE) tax, see Ark. Stat. Ann. §§ 75-817.2 and .3 (Supp. 1985), shall be placed, pending further proceedings challenging the constitutionality of that tax in Arkansas courts. The applicants, American Trucking Associations, Inc., et al. (ATA), brought suit in 1983 to challenge the HUE tax under the Commerce Clause, Art. I, § 8, cl. 3, of the Federal Constitution. The Chancery Court of Pulaski County sustained the constitutionality of the tax, and a divided Arkansas Supreme Court affirmed. *American Trucking Assn., Inc.* v. *Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986). ATA appealed to this Court under 28 U.S.C. § 1257(2). We held the case pending our decision in No. 86-357, *American Trucking Assns., Inc.* v. *Scheiner*, which involved a similar constitutional challenge to two flat highway use taxes enacted by the Commonwealth of Pennsylvania. On June 23, 1987, this Court ruled in the Pennsylvania case that the Commonwealth's highway taxes violated the Commerce Clause because "the taxes are plainly discriminatory" in that they impose a heavier burden on out-of-state businesses that compete in an interstate market than they impose on local businesses that engage in similar commerce. 483 U.S. —, — (slip op. 18). The

Court explained further that the Pennsylvania taxes failed the "internal consistency" test because "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id*., at — (slip op. 17). We then vacated the judgment of the Arkansas Supreme Court and remanded the present case for further consideration in light of *Scheiner*. — U.S. — (1987). On July 16, 1987, pursuant to this Court's Rule 52.2, I granted ATA's motion for immediate issuance of the mandate.

Upon remand, ATA moved for further remand to the Chancery Court so that it could petition for a preliminary injunction either to enjoin enforcement of the HUE tax or to order an escrow of the funds collected. The Arkansas Supreme Court denied the motion. It also denied ATA's application for temporary relief, in the form of an escrow, pending decision in this case. That court is now in summer recess and consequently will not consider the merits of ATA's challenge until this fall, at the earliest. Applicants have requested that I order an escrow of the tax revenues pending final disposition of the case on the merits.

Several factors control a single Justice's consideration of an application for writ of injunction pursuant to this Court's Rule 44. If there is a "significant possibility" that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction. See *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1330 (1975) (BLACKMUN, J., in chambers). See also, *e.g.*, *Ledbetter* v. *Baldwin*, 479 U.S. —, — (1986) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). Applying these principles to the facts before me, I grant the application.

After considering the submissions of applicants and respondents, I have concluded that ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax. The effect of the HUE tax is substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*. For most motor carriers, the HUE tax is a flat amount that is not assessed in proportion to the taxpayer's presence in the State. According to the statistics presented to the Arkansas courts, in its practical operation the tax discriminates against interstate motor carriers whose trucks are registered outside Arkansas. On average, trucks registered outside Arkansas pay a per-mile HUE tax that is more than three times greater than the per-mile tax paid by trucks registered in Arkansas. Respondents argue that the validity of this statistical evidence has not been established. But given the structure of the tax, which benefits trucks that travel extensively within the State, it appears probable that any further analysis would confirm the discriminatory impact. Moreover, the tax exposes trucks that engage in extensive interstate operations to a cumulative tax burden that is not shared by trucks that operate in only one or a few States. The tax thus works to deter interstate commerce. I therefore find that there is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the "internal consistency" test pronounced by this Court in *Scheiner*. If they fail to do so, I believe that there is a significant possibility that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction and that this Court will reverse the decision.

I have also concluded that the applicants risk irreparable injury absent injunctive relief. Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a deter-

mination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert, by way of affidavit, that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order. Respondents have not denied that they will adopt this stance. There is a risk that, like other state courts, the Arkansas courts would deny restitution of taxes found to have been unconstitutionally collected. See, *e.g.*, *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N.H. 466, 517 A.2d 1150, 1155-1157 (1986); *American Trucking Assns., Inc.* v. *Conway*, 146 Vt. 579, 508 A.2d 408, 413-414 (1986), cert. denied, 483 U.S. — (1987). Such a denial would constitute irreparable injury.

For their part, respondents will not be irreparably injured by the issuance of the injunction. Respondents have not argued that the temporary loss of revenues, while the funds are held in escrow, will adversely affect the State's operations. Rather, they contend that the State will be harmed if the funds are returned to the motor carriers, because the HUE tax is intended to defray the cost of wear on Arkansas' highways attributable to the heavy trucks subject to the tax. But the requested injunction would not direct a refund. If the funds are escrowed and the HUE tax is invalidated, the issue of the appropriate remedy will be a separate matter for the Arkansas courts to determine. On balance, therefore, I conclude that the equities favor issuance of the injunction. Accordingly, I have today entered an order enjoining respondents to escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached.

[Publisher's note: See 486 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

LUCAS ET AL. *v.* TOWNSEND ET AL.

ON APPLICATION FOR STAY

No. A-898. Decided May 30, 1988

An application to enjoin a school bond referendum election scheduled for May 31, 1988, is granted, pending the timely docketing of an appeal. The Bibb County, Georgia, Board of Education (Board), which had originally voted to place the referendum on the March 1988 primary election ballot, postponed the referendum until May when it would be voted on with a second bond issue. Applicants asked the Board to rescind its decision, arguing that changing the date from a primary day would adversely affect voter turnout, that the bond issues had been combined in an effort to manipulate the minority vote, and that the May referendum had not been submitted for preclearance as required by § 5 of the Voting Rights Act, which provides that certain jurisdictions may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from, *inter alia*, the Attorney General. Subsequently, the Board applied for preclearance—a procedure not yet completed—and applicants sought an injunction in the District Court to prohibit the Board from holding the election on the ground that it had not been precleared. A three-judge court denied the request, concluding, among other things, that the referendum was not a "change" covered by § 5, a conclusion that is problematic under this Court's precedents. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166. It is likely that four Members of the Court would vote to note probable jurisdiction, and there is a fair prospect that the Court would vote to reverse the judgment below. Moreover, irreparable harm would likely flow from a denial of injunctive relief because letting the election go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their diligence in seeking to adjudicate their rights before the election; and because the effect of even a subsequently invalidated election is likely to be most disruptive. Also, the burden an injunction places on defendants

can be ascribed to their own failure to seek preclearance sufficiently in advance of the election. On balance, the equities favor applicants.

JUSTICE KENNEDY, Circuit Justice.

This is an application to enjoin a bond referendum election scheduled for May 31, 1988, in Bibb County, Georgia. The applicants are five black citizens registered to vote in Bibb County. On May 27, 1988, a three-judge District Court for the Middle District of Georgia declined to issue an injunction, concluding that the applicants had failed to establish that holding the election now contemplated would violate § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U.S.C. § 1973c. The United States has submitted, and I have reviewed, a memorandum advising me that it supports the applicants' request for immediate injunctive relief. I have also reviewed and considered a submission by the respondents in opposition.

I

On December 17, 1987, the Bibb County Board of Education resolved to place a bond referendum on the March 8, 1988, ballot, a primary election date popularly known as "Super Tuesday." The bond issue was intended to help defray the cost of air conditioning certain local schools. The Board subsequently voted, on January 4, 1988, to rescind its prior resolution. It resolved to postpone the referendum until May 31, 1988, when it would be voted on with a second bond issue for the building of a new high school.

On March 7, 1988, counsel for the applicants requested the Board to rescind its vote calling for the May 31 referendum. In his letter to the Board, counsel argued that changing the date of the election from a primary day would adversely affect minority voter turnout. The letter also argued that the two bond issues had been combined in an effort to manipulate the minority vote, and noted that the call for the May 31 referendum had not yet been submitted for preclearance to the Voting Section of the Civil Rights Division of the United States Department of Justice.

On March 30, 1988, the state authorities applied to the Voting Section of the Civil Rights Division for preclearance. On May 25, 1988, the Civil Rights Division responded that "the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," and asked for additional information, including a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."

The Civil Rights Division also requested that state authorities respond to allegations (i) that the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date, and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects. Finally, the Division noted that the Attorney General has 60 days to consider a completed submission, and that the period would begin to run upon receipt by the Division of all necessary information.

The applicants sought an injunction prohibiting the Board from holding the election on the ground that the election had not been precleared by the Attorney General in accordance with § 5. On May 27, 1988, the three-judge court denied the request for an injunction. The court stated that it was required to determine whether the actions proposed "'have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5.'" Civ. Action No. 88-166-1 (MD Ga., May 27, 1988) (slip op., at 3), quoting *Georgia* v. *United States*, 411 U.S. 526, 534 (1973). It also adverted to the Attorney General's regulation providing that any discretionary setting of the date for a special election, which is defined to include a referendum, is subject to the preclearance requirement, 28 CFR § 51.17 (1987), and acknowledged that the Attorney General had not precleared the referendum.

The court concluded that the applicants had failed to present evidence that the procedures to be utilized in the upcoming election differ from those in use at the time the Act became law. Accordingly, it concluded that the referendum was not a "change" covered by § 5. While the court noted that the Attorney General's regulation provides otherwise, it held that the regulation is not supported by the language of § 5. Alternatively, the court concluded that the applicants had failed to show that holding the referendum on May 31, 1988, "has even the potential for diluting the minority vote." Civ. Action No. 88-166-1, *supra*, slip op., at 4-5. Accordingly, the court declined to issue the injunction prayed for by the applicants. This application followed.

II

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, *e.g.*, *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief. In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See *Rostker* v. *Goldberg*, *supra*, at 1308; *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1304 (1974) (Powell, J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain

jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case. The three-judge court concluded, however, that the discretionary setting of the date of a special election is not a "change" covered by the statute, notwithstanding the provision in 28 CFR § 51.17 (1987) to the contrary. The conclusion is most problematic under our precedents, see, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (noting that it could not seriously be disputed that "a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5"), and I have concluded that four Members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on the respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.

[Publisher's note: See 486 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-896

SAMUEL LORING MORISON *v.* UNITED STATES

ON APPLICATION FOR CONTINUED RELEASE FROM DETENTION

[June 2, 1988]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Samuel Loring Morison was convicted in the district court of two counts each of espionage, in violation of 18 U.S.C. § 793(d), (e), and theft of government property, in violation of 18 U.S.C. § 641. His conviction was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit, No. 86-5008 (CA4 April 1, 1988), and he now asks that he be allowed to remain free on bond pending the consideration of his yet-to-be-filed petition for writ of certiorari. The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. § 3143(b), and the only real issue in this application is whether Morison's appeal "raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." I agree with the courts below, however, that regardless of whether Morison has raised a "substantial question" with respect to the propriety of his conviction under the Espionage Act, he has not done so with respect to his conviction for theft of government property under § 641. Because Morison has not shown that his appeal is "likely to result in reversal" with respect to all the counts for which imprisonment was imposed, see *United States* v. *Bayko*, 774 F.2d 516, 522 (CA1 1985), his application is denied.

[Publisher's note: See 486 U.S. 1308 for the authoritative official version of this opinion.]

DOE *v.* SMITH

ON APPLICATION FOR WRIT OF INJUNCTION

No. A-954. Decided June 15, 1988

Applicant's application for an order enjoining Jane Smith from obtaining an abortion of their unborn child is denied. There is serious doubt whether there is a federal remedy for this claim since Smith's decision to obtain an abortion can be carried out without any state action. Applicant's claim—that the respective interests of the parties should be balanced by a neutral tribunal before Smith's decision is implemented—provides a particularly weak basis for invoking the extraordinary judicial relief sought. Such balancing has already been done by an Indiana trial court, which found that applicant's interests did not outweigh Smith's constitutionally protected right to abort the fetus. In addition, the State Supreme Court has indicated that there is a presumption of correctness to the trial court's decision in such matters. Moreover, there is some danger that a delay in implementing Smith's decision may increase her risk of harm. There is also substantial doubt whether the State Supreme Court has issued a final decision providing a basis for this Court's appellate jurisdiction.

JUSTICE STEVENS, Circuit Justice.

Applicant has filed an application with me as Circuit Justice to enter an order enjoining Jane Smith from obtaining an abortion of their unborn child. For the reasons hereinafter stated, the application is denied.

Applicant initiated proceedings seeking this relief from the Elkhart, Indiana, Superior Court on May 31, 1988. After granting a temporary restraining order without notice, the Superior Court held an evidentiary hearing, made detailed findings of fact, conclusions of law, and filed a written opinion. The findings recite, in part:

> "5) That the unrebutted testimony from both the parties is that the Plaintiff is the natural father of the unborn child of the mother.
>
> "6) That the Plaintiff and the Defendant have never been married and do not contemplate marriage.

> "7) That the child was conceived in April of 1988 during a liaison between the mother and the father, which commenced in February or March and terminated shortly after conception.
>
> "8) That at the time conception occurred, the father was separated from his wife of six months, and upon leaving the Defendant he became reunited with his first wife.
>
> "9) That the father has two children, one his biological issue, with his first wife.
>
> • • • • •
>
> "12) That the father has been sporadically employed at low-paying jobs for the last eighteen months.
>
> "13) That the mother has testified she is physically, emotionally and economically unwilling to bear the child.
>
> "14) That the parties mutually agree that there is no foreseeable possibility of their reuniting in any way."

In his opinion, the trial judge stated, in part:

> "While the Court has carefully weighed the testimony, it is apparent that although the Plaintiff has expressed a legitimate and apparently sincere interest in the unborn fetus, his interest would not be sufficient to outweigh the Constitutionally protected right of the Defendant to abort her child. It would appear from the *Danforth* decision that in order to require the mother to carry a child to term against her wishes, the father must demonstrate clear and compelling reasons justifying such actions. In this case, the father has failed to do so. Reviewing the undisputed facts presented in this Cause, the Court is unable to find that the interests of the Plaintiff outweigh the interest of the Defendant. It is significant that, among other facts, the evidence discloses the parties are not married, that there is no suggestion they will ever reunite, that the Plaintiff is able to father other children and, in fact, has other children, and that the Plaintiff has showed substantial instability in his marital and roman-

> tic life. Based upon the Plaintiff's romantic patterns over the last eight months, it would be impossible for the Court to predict the stability of his family unit at the time of birth.
>
> "In summary, even if the *Danforth* decision permits the Court to balance the interest of the father of the unborn child against those of the mother, in this particular case the balancing would be in the mother's favor."

On June 14, 1988, the Indiana Supreme Court accepted transfer of the case, based on its emergency nature, but denied a petition for a stay. In doing so it relied on "the presumption of the validity accorded all trial court judgments," this Court's decision in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67-72 (1976), and its conclusion that there was not a sufficient likelihood that John Doe would prevail on the merits of his appeal to justify a stay.

In addition to the reasons set forth by the trial court and the Indiana Supreme Court, I would add that I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State of Indiana or any other state governmental subdivision. Applicant does not argue that he has an absolute right to veto Jane Smith's decision, but rather contends that the respective interests of the parties should be balanced by a neutral tribunal before her decision is implemented. Since such balancing has already been done by the trial court, since the Indiana Supreme Court has indicated that there is a presumption of correctness to the decision of the trial court in a matter of this kind, and since there is some danger that a delay in implementing Jane Smith's decision may increase the risk of physical or emotional harm to Smith, applicant's claim provides a particularly weak basis for invoking the extraordinary judicial relief that is sought. Indeed, I have substantial

doubt whether there has yet been a final decision by the highest court of the State of Indiana that would provide a basis for appellate jurisdiction in this Court.

[Publisher's note: See 488 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* BOUKNIGHT

ON APPLICATION FOR STAY

No. A-494. Decided December 21, 1988

An application to stay the judgment of the Court of Appeals of Maryland—that Jacqueline Bouknight's confinement for civil contempt violated her privilege against self-incrimination under the Fifth Amendment to the United States Constitution—is granted pending the timely filing and subsequent disposition of a petition for certiorari. At the request of the Baltimore City Department of Social Services (DSS), the Circuit Court for the city determined that Bouknight's son, Maurice, who had received several suspicious injuries, was a "child in need of assistance" under Maryland law. Bouknight received supervised custody of Maurice, but failed to cooperate with DSS and refused to produce him or tell DSS where he was. Subsequently, she was arrested and ordered to disclose the child's whereabouts. After giving a false answer, she was jailed until she purged herself of contempt by either producing Maurice or revealing his location. The Court of Appeals found that the terms of the confinement violated Bouknight's privilege against self-incrimination, since the risk that producing Maurice would necessarily admit a measure of continuing control over the child that might be relevant in a subsequent criminal prosecution could not be outweighed by any governmental interest in finding Maurice. DSS meets the requirements for the issuance of a stay. The lower court's decision is based on the United States Constitution, and the burden on Bouknight's liberty must be weighed against the very real jeopardy to a child's safety and well-being and perhaps even his life. If Bouknight is permitted to go free, DSS may not have the means to obtain information about or to locate the child. Also, it is likely that four Justices will vote to grant certiorari, and DSS has a fair prospect of persuading a majority of the Court that the state-court decision was erroneous.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Baltimore City Department of Social Services (DSS) has asked me to stay the judgment of the Court of Appeals of Maryland in this case, *In re Maurice*, No. 50 (Dec. 19, 1988). The Court of Appeals held that Jacqueline Bouknight's confinement for civil contempt violated the privilege against self-incrimination secured to her by the Fifth Amendment to the United States Constitution. Bouknight is presently incarcerated until she either presents her child, Maurice M., to the DSS or tells where the child can be found. There is no indication that she is unable to comply in one way or the other.

When Maurice was three months old, he was admitted for treatment of a fractured left leg. X rays disclosed that the child had previously suffered multiple fractures of various other major bones. Nurses and others observing Maurice's mother at the hospital reported her unusual conduct with the child, including shaking him and dropping him into his crib when he was in a cast. Because of the suspicious nature of Maurice's injuries at such a young age, DSS obtained authorization to place the child in foster care. It then filed a petition in the Circuit Court for Baltimore City seeking a determination that Maurice was a "child in need of assistance" under Maryland law, Md. Cts. & Jud. Proc. Code. Ann. § 3-801(e) *et seq.* (1984 and Supp. 1988). Maurice was found to be such.

By agreement of the parties, Bouknight received custody of Maurice under an order of protective supervision specifying that she accept parenting assistance, attend classes, and refrain from corporal punishment of the child. Some months later, DSS advised the court that Bouknight had ceased cooperating with it, and that she had refused to produce the child or tell DSS where he was. DSS feared for Maurice's safety because Bouknight was not complying with the court order, because of her history of child abuse, because of her known use of drugs and current threats to kill herself, and

because Maurice had not been seen for nearly a month and could not be located by DSS or the police.

Bouknight did not attend the hearing set to consider these representations, but was later arrested and ordered to disclose the whereabouts of Maurice. After giving a false answer, she was jailed until she purged herself of contempt by either producing Maurice or revealing his location.

The Court of Appeals of Maryland granted certiorari and heard the case without decision by the state intermediate appellate court. It found that the terms of Bouknight's confinement violated her privilege against compulsory self-incrimination. Noting that some acts of production have been found testimonial, see *United States* v. *Doe*, 465 U.S. 605 (1984), it concluded that the act of producing Maurice would necessarily admit a measure of continuing control over the child which might be relevant in a subsequent criminal prosecution. That risk, it thought, was so substantial that it could not be outweighed by any governmental interest in finding Maurice. Two judges dissented. They argued that there were no testimonial components to compliance with the civil contempt order; that if there were, they were clearly outweighed by the public interest in protecting children from abuse; and that Bouknight had waived any Fifth Amendment privilege against disclosing Maurice's whereabouts when she accepted conditional custody of the child from the city.

In my opinion DSS meets the requirements we have established for the issuance of a stay. See *Rostker* v. *Goldberg*, 448 U.S. 1306 (1980) (BRENNAN, J., Circuit Justice); *California* v. *Riegler*, 449 U.S. 1319, 1321 (1981) (REHNQUIST, J., Circuit Justice). First, the decision of the Court of Appeals of Maryland is unquestionably based on the United States Constitution. Second, I think the balance of equities favors the granting of a stay. There is undoubtedly a burden on Bouknight's liberty caused by her confinement, but against it must be weighed a very real jeopardy to a child's safety, well-being, and perhaps even his life. There is hard

evidence in this case suggesting Bouknight has abused Maurice in the past and may well do so again. If she is permitted to go free, DSS may not have an alternative means of obtaining information about the child or of locating the child.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari in this case, and that DSS has a fair prospect of persuading a majority of the Court that the decision of the Court of Appeals of Maryland was erroneous. Of the claims made in the application to me, I think two fit this category. The first is an important question about whether acts—such as the act of production of Maurice on the part of Bouknight—would constitute testimony for purposes of the Fifth Amendment. See *United States* v. *Doe*, *supra*; *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Schmerber* v. *California*, 384 U.S. 757 (1966).

Second, and in my view equally as important, is whether even assuming there is a testimonial element in the act of surrendering Maurice, the Fifth Amendment privilege is available in this situation. In *California* v. *Byers*, 402 U.S. 424 (1971), we upheld a California law making it a crime to leave the scene of an automobile accident without giving one's name and address. In that case we recognized that "[t]ension between the State's demand for disclosures and the protection of the right against self-incrimination" must "[i]nevitably . . . be resolved in terms of balancing the public need on the one hand, and the individual claim of constitutional protections on the other." *Id.*, at 427 (plurality opinion of Burger, C. J.). This plurality found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities," *id.*, at 430, and was not aimed at a "'highly selective group inherently suspect of criminal activities.'" *Ibid.*, quoting *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

"Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the dis-

closures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." 402 U.S., at 458 (Harlan, J., concurring in judgment.)

In *New York* v. *Quarles*, 467 U.S. 649 (1984), we recognized a public safety exception to the usual Fifth Amendment rights afforded by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), so that police could recover a firearm which otherwise would have remained in a public area. In the present case, a citation for civil contempt in order to obtain the production of a child such as Maurice, or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child. Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents.

The DSS has offered to file a petition for certiorari within 35 days. The stay requested is therefore granted, pending consideration of a timely petition for certiorari and disposition of the same by the Court. If the petition is granted, the stay shall remain in effect until the Court disposes of the case or otherwise orders.

[Publisher's note: See 488 U.S. 1306 for the authoritative official version of this opinion.]

JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP.

ON APPLICATION FOR STAY

No. A-552. Decided January 30, 1989

An application to stay the enforcement of the Court of Appeals' judgment granting the Freedom of Information Act (FOIA) request of John Doe Corporation (Corporation) pending the disposition of a petition for a writ of certiorari is granted. The court below held that documents prepared during a Government audit in connection with the Corporation's performance of Government contracts and subsequently transferred to a law enforcement agency during a grand jury investigation of the Corporation were not exempt from disclosure under the FOIA's exemption for records or information compiled for law enforcement purposes. The balance of equities clearly weighs in favor of a stay, since the Court of Appeals left undisturbed the District Court's finding that disclosure posed a substantial risk of jeopardizing the grand jury investigation; since disclosure would moot part of the Court of Appeals' decision; and since the Corporation's interest in receiving the information immediately, while significant if its interpretation of the FOIA is correct, poses no threat of irreparable harm. There is a reasonable probability that four Justices will vote to grant certiorari, since there are divergent interpretations of the meaning of the FOIA exemption at issue. And, given the plausibility of the arguments advanced in those cases adopting a broader view of the exemption, there is a fair prospect that a majority of the Court will vote to reverse.

JUSTICE MARSHALL, Circuit Justice.

The Solicitor General requests that I issue a stay pending the disposition of the federal parties' petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. The Second Circuit granted the request of John Doe Corporation (Corporation), a government contractor, for certain documents under the Freedom of Information Act, 5 U.S.C. § 552 (1982 ed. and Supp. IV) (FOIA). The documents had been prepared during a 1978 audit by John Doe Agency (Agency) of certain costs incurred by the Corporation in connection with its performance of government contracts. Eight years later, the Corporation filed

a request with the Agency under the FOIA for documents relating to this audit. The request came in the context of a grand jury investigation into possibly fraudulent activity by the Corporation in connection with its government contracts, an investigation in which these documents were believed to be relevant. 850 F.2d 105, 106 (1988).

The Agency denied the request on November 18, 1986. It stated, apparently upon the advice of a federal prosecutor, that the documents were exempt from disclosure under Exemption 7 of the FOIA, which exempts from mandatory disclosure "records or information compiled for law enforcement purposes" to the extent disclosure gives rise to one or more specified harms. 5 U.S.C. § 552(b)(7) (1982 ed., Supp. IV). It proceeded to transfer the requested records to John Doe Government Agency (Government Agency), a federal law enforcement agency. The Corporation then filed a similar FOIA request with the Government Agency. 850 F.2d, at 106-107.

After an administrative appeal failed, the Corporation sought *de novo* review in the Federal District Court for the Eastern District of New York. The court ordered the Agency and the Government Agency to prepare a "*Vaughn* index" (after *Vaughn* v. *Rosen*, 157 U.S. App. D. C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977 (1974)) describing the documents, and to submit the index for an *in camera* inspection. After reviewing the index, the court ruled, without elaboration, that there was a "substantial risk" that disclosure of the documents or the *Vaughn* index would jeopardize the grand jury proceedings investigating the Corporation. The court therefore ruled that the Agency and the Government Agency were not required to turn over the documents to the Corporation. 850 F.2d, at 107.

The Court of Appeals for the Second Circuit reversed. It held that, because the documents in question were prepared in routine audits and only later transferred to a law enforcement agency, they were not "compiled for law enforcement

purposes" within the meaning of § 552(b)(7). *Id.*, at 106. The court's mandate issued on November 28, 1988. On remand, the District Court ordered that the *Vaughn* index be disclosed, and the Court of Appeals refused to stay that order. The Solicitor General, on behalf of the Agency and the Government Agency, has filed a petition for a writ of certiorari (No. 88-1083) seeking review of the Court of Appeals' determination that the documents in question were not "compiled for law enforcement purposes." The Solicitor General seeks a recall and stay, pending the disposition of the petition for a writ of certiorari, of the mandate of the Court of Appeals, and a stay of the District Court's order on remand requiring disclosure of the *Vaughn* index.

My obligation as a Circuit Justice in considering a stay application under 28 U.S.C. § 2101(f) and this Court's Rule 44 is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School Dist.* v. *United States*, 448 U.S. 1342 (1980) (REHNQUIST, J., in chambers); see also *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312-1313 (1977) (MARSHALL, J., in chambers). Evaluating these factors, I am convinced that the request for a stay should be granted.

First, the balance of the equities clearly weighs in favor of a stay. The District Court, having undertaken an *in camera* review of the *Vaughn* index and other documents, specifically found that disclosure of the *Vaughn* index and the documents posed a substantial risk of jeopardizing an important ongoing grand jury investigation. The Court of Appeals did not disturb this finding, basing its judgment for the Corporation instead on its determination that Exemption 7 mandated release of the documents. The Solicitor General further supports this interest by proffering an affidavit from an Assistant United States Attorney; the affidavit states that disclo-

sure can reasonably be expected to interfere with an ongoing law enforcement investigation by apprising the targets of that investigation of the nature of the grand jury's inquiry and by facilitating hindrance of the investigation. The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure of the *Vaughn* index would also create an irreparable injury. See *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (MARSHALL, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals"). Conversely, the Corporation's interest in receiving this information immediately, while significant if the Corporation's interpretation of the FOIA is correct, poses no threat of irreparable harm.

I also believe that there is a "reasonable probability" that four Justices will consider the Exemption 7 issue posed by this case sufficiently meritorious to grant certiorari, and that there is a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous. *Rostker*, *supra*, at 1308 (BRENNAN, J., in chambers). The Courts of Appeals have widely differed in interpreting the meaning of the FOIA exemption for documents "compiled for law enforcement purposes." Compare *New England Medical Center Hospital* v. *NLRB*, 548 F.2d 377, 386 (CA1 1976); *Gould, Inc.* v. *GSA*, 688 F. Supp. 689, 699 (DC 1988); *Fedders Corp.* v. *FTC*, 494 F. Supp. 325, 328 (SDNY) (holding it is the context in which the documents in question are *currently* being used rather than the purpose for which they are created that is relevant in determining whether a record was "compiled for law enforcement purposes"), aff'd, 646 F.2d 560 (CA2 1980), with *John Doe Corp.* v. *John Doe Agency*, 850 F.2d 105, 109 (CA2 1988) (case below); *Hatcher* v. *USPS*, 556 F. Supp. 331 (DC 1982); *Gregory* v. *FDIC*, 470 F. Supp. 1329, 1333-1334 (DC 1979) (holding that record must originally

have been compiled for law enforcement purposes to qualify under Exemption 7); see also *Crowell & Moring* v. *Department of Defense*, 703 F. Supp. 1004, 1009 (DC 1989) (reading of Exemption 7 in *John Doe Corp.* "comports with neither the plain language of the exemption nor the purpose underlying its enactment").

In light of these divergent interpretations, I believe it likely that four Justices will vote to grant certiorari. In light of the plausibility of the arguments advanced in those cases adopting a broader view of Exemption 7's compilation provision than that of the court below, there is also a "fair prospect" that a majority of the Court will vote to reverse. I therefore grant the requested stay of the enforcement of the Court of Appeals' mandate and of the District Court's disclosure order pending the disposition of the petition for a writ of certiorari in this case.

It is so ordered.

[Publisher's note: See 488 U.S. 1311 for the authoritative official version of this opinion.]

CALIFORNIA *v.* FREEMAN

ON APPLICATION FOR STAY

No. A-602. Decided February 1, 1989

California's application for a stay of enforcement of the State Supreme Court's judgment reversing respondent Freeman's conviction for pandering under the California Penal Code pending the disposition of a petition for certiorari is denied. It is unlikely that four Justices would vote to grant certiorari since the state court's decision rests on the adequate and independent state law ground that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under the State Code. The court's discussion of state law is not interwoven with its discussion of federal law, specifically the First Amendment. Even if this Court were to review the case below and find that the state court had misinterpreted the strictures of the First Amendment, on remand that court would still reverse Freeman's conviction on state statutory law grounds.

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U.S.C. § 2101(f) pending the disposition of a petition for certiorari (No. 88-1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U.S. 1305, 1306 (1986) (O'CONNOR, J., in chambers), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under Cal. Penal Code Ann. § 266i (West 1988). 46 Cal. 3d 419, 758 P.2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman

was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1987).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that person "procure[s] another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute*.'" 46 Cal. 3d, at 424, 758 P.2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534-535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification*." 46 Cal. 3d, at 424, 758 P.2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id*., at 424-425, 758 P.2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the appli-

cation of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974); *Murdoch* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under § 266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977), quoting *Missouri ex rel. Southern R.*

Co. v. *Mayfield*, 340 U.S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law." *Michigan* v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent, alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' [Publisher's note: "'end run'" should be "'end run'".] around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P.2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally," *id.*, at 425, 758 P.2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is inde-

pendent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

[Publisher's note: See 489 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BROTHERHOOD OF RAILROAD SIGNALMEN ET AL. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

ON APPLICATION TO VACATE INJUNCTION

No. A-715. Decided March 14, 1989.

Application to vacate the injunction issued by the District Court is denied.

JUSTICE BRENNAN, Circuit Justice.

Applicants request me, as Circuit Justice, to enter an order "immediately dissolving" the injunction issued by the District Court for the Eastern District of Pennsylvania. I deny the application. In my view, applicants have not "established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers).

[Publisher's note: See 492 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* AMERICAN STORES COMPANY ET AL.

ON APPLICATION FOR STAY

No. A-151. Decided August 22, 1989

The request of applicant, the State of California, for a stay of the Court of Appeals' mandate is granted, pending disposition of its petition for a writ of certiorari and conditioned upon the posting of a bond with the Clerk of the District Court. The State, through its attorney general on behalf of himself and as *parens patriae*, filed in the District Court an action as a private plaintiff to enjoin the merger of respondents, the largest and fourth largest retail grocery chains in the State, contending that the merger would lessen competition in the relevant market in violation of the Clayton and Sherman Acts and state law. The court granted the motion for a preliminary injunction and ordered respondents to operate independently and to refrain from merging or integrating their assets and businesses during the pendency of the action. The Court of Appeals remanded, finding, *inter alia*, that the order enjoining respondents from integrating their operations amounted to indirect divestiture, a remedy not available to private plaintiffs under the Clayton Act. However, it granted a stay of its mandate to allow the State to file a petition for a writ of certiorari. The District Court conditioned the stay on the posting of a bond. The State declined to post the bond, and the Court of Appeals vacated its stay and ordered issuance of the mandate. The State has set forth sufficient reasons for granting a stay. It has made an adequate showing of irreparable injury, since other appropriate injunctive relief may be inadequate to remedy the injury. There is also a reasonable probability that the petition will be granted, given the conflict among the lower courts on the important and recurring issue whether divestiture constitutes injunctive relief within the meaning of the Clayton Act and the need for uniform enforcement of federal antitrust laws. Moreover, the fact that the weight of academic authority favors a reading of the Act that would permit divestiture as a remedy in private actions suggests that there is at least a fair prospect that a

majority of the Court will vote to reverse the decision below. Finally, the equities favor the State, since the harm of a substantial lessening of competition in the relevant market outweighs the harm that respondents may suffer as the result of the stay.

JUSTICE O'CONNOR, Circuit Justice.

Applicant, the State of California, requests a stay of the mandate of the judgment of the United States Court of Appeals for the Ninth Circuit, pending disposition of its petition for a writ of certiorari.

Applicant, through its attorney general on behalf of himself and as *parens patriae*, brought the underlying action as a private plaintiff to enjoin the merger of respondent Lucky Stores, Inc., the largest retail grocery chain in California, and respondent American Stores Company, operator of Alpha Beta, the fourth largest retail grocery chain in California.[*] Applicant contends that the merger would substantially lessen competition in the relevant markets, in violation of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, and California's Cartwright Anti-

[*] American Stores initiated a hostile takeover bid for the Lucky chain on March 21, 1988. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1390, 15 U.S.C. § 18a, American Stores notified the Federal Trade Commission (FTC) of its intentions. On May 23, American Stores increased its tender offer, and Lucky's board of directors approved the merger. On May 31, the FTC filed an administrative complaint alleging violations of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45. The FTC simultaneously proposed a consent order under which it would settle its antitrust complaint in exchange for American Stores' compliance with certain demands, including divestiture of certain supermarkets in northern California and an agreement to "hold separate" the two firms until American Stores satisfied all of the consent order's conditions. American Stores agreed to the consent order, and by June 9 completed its $2.5 billion acquisition of the outstanding Lucky stock. On August 31, the FTC gave final approval to the proposed consent order without modification. On September 1, applicant initiated the underlying action.

trust and Unfair Competition Acts, Cal. Bus. & Prof. Code Ann. §§ 16700-16761 and 17200-17208 (West 1987 and Supp. 1989).

The District Court granted applicant's motion for a preliminary injunction and ordered respondents to operate the two companies independently and refrain from merging or integrating their assets and businesses during the pendency of the action. 697 F. Supp. 1125 (CD Cal. 1988). The court concluded:

> "The overwhelming statistical evidence has demonstrated a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act. This showing has not been rebutted by clear evidence that the proposed merger will not, in fact, substantially lessen competition. . . . [U]nless defendants are enjoined, the citizens of California will be substantially and irreparably harmed. While the Court in no way belittles the harm defendants may suffer as a result of this preliminary injunction, the Court concludes that it is substantially less than the harm plaintiff would suffer if the merger is not enjoined." *Id*., at 1135.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part. 872 F.2d 837 (1989). The Court of Appeals affirmed the District Court's finding that applicant had shown a likelihood of success on the merits and the possibility of irreparable harm. *Id*., at 844. The Court of Appeals found, however, that the remedy ordered by the District Court amounted to indirect divestiture, which, the Court of Appeals held, was not a remedy available to private plaintiffs under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U.S.C. § 26. 872 F.2d, at 844-846. Accordingly, the Court of Appeals remanded the case, concluding that the District Court's order enjoining respondents from integrating their operations was overly broad and thus an abuse of discretion. *Id*., at 845-846.

The Court of Appeals denied applicant's petition for rehearing and rehearing en banc, but granted a stay of its mandate for 30 days to enable applicant to file a petition for a writ of certiorari with this Court. The Court of Appeals also partially remanded the case to the District Court to determine whether, pursuant to Federal Rule of Appellate Procedure 41(b), a bond or other security or condition should be required of applicant as a condition of the stay. The District Court ordered applicant to post an initial bond of $16,288,898 to protect respondents against potential financial losses as a result of the stay of mandate. Applicant, claiming budgetary and administrative impossibility, declined to post the bond and appealed the bond order. The Court of Appeals consequently vacated its stay and ordered issuance of the mandate.

In its application for a stay of the mandate pending this Court's disposition of its petition for certiorari, applicant contends that the Court of Appeals' bond requirement amounts to a denial of a stay and will result in irreparable harm to the State's consumers because of the merger's anticompetitive effects. Applicant also maintains that there is both a reasonable probability that its petition for a writ of certiorari will be granted, because the case presents an issue of great importance on which there is a conflict among the Circuits, and a fair prospect that applicant will prevail on the merits. Finally, applicant asserts that the equities justify a stay of the Court of Appeals' mandate.

I am persuaded that applicant has set forth sufficient reasons for granting a stay in this case. I agree with both the District Court and the Court of Appeals that applicant has made an adequate showing of irreparable injury. See 872 F.2d, at 844 (lessening of competition "is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent") (citations omitted); 697 F. Supp., at 1134. Even if applicant is free to seek

other appropriate injunctive relief on remand, the possibility of irreparable injury, it seems to me, remains to the extent that such other relief would be inadequate to remedy the injury. Cf. 2 P. Areeda & D. Turner, Antitrust Law § 328b, p. 137 (1978) ("[D]ivestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff").

Moreover, the issue presented appears to be an important question of federal law over which the Circuits are in conflict. Section 16 of the Clayton Act provides in relevant part that "[a]ny person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. The Court of Appeals, relying on Circuit precedent, held that divestiture, whether direct or indirect, did not constitute "injunctive relief" within the meaning of § 16. See 872 F.2d, at 844-846 (citing *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (CA9 1975)); accord, *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1060 (CA6), cert. denied, 469 U.S. 1036 (1984). As applicant notes, however, the Court of Appeals for the First Circuit has ruled that divestiture is a remedy available to private plaintiffs under § 16 in appropriate circumstances. *Compania Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404, 413-430 (1985); see also *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F.2d 262, 278-279 (CA3 1975) (dictum), vacated on other grounds, 429 U.S. 477 (1977). A number of District Courts have also reached the same conclusion. See, *e.g.*, *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F. Supp. 1250, 1255-1256 (ED Pa. 1987); *Julius Nasso Concrete Corp.* v. *Dic Concrete Corp.*, 467 F. Supp. 1016, 1024-1025 (SDNY 1979); *Credit Bureau Reports*,

Inc. v. *Retail Credit Co.*, 358 F. Supp. 780, 797 (SD Tex. 1971), aff'd, 476 F.2d 989 (CA5 1973); *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 340 F. Supp. 76, 81-82 (ND Cal. 1972). Given the conflict among the lower courts on this important and recurring issue and the need for uniform enforcement of federal antitrust laws, I think it fair to say that there is a reasonable probability that the petition for a writ of certiorari will be granted in this case.

Indeed, the weight of academic commentary favors a reading of § 16 that would permit divestiture as a remedy in private actions. See, *e.g.*, 2 P. Areeda & D. Turner, Antitrust Law § 328b, p. 137 (1978) ("[D]ivestiture is available in a private suit challenging unlawful mergers"); P. Areeda & H. Hovenkamp, Antitrust Law § 328b, pp. 290-291 (Supp. 1988) (approving *Petrolera*, *supra*); E. Kintner, Primer on the Law of Mergers 361-364 (1973) (divestiture is available in private actions under § 16); L. Sullivan, Law of Antitrust § 216, p. 672, n. 3 (1977) (same); Kintner & Wilberding, Enforcement of the Merger Laws by Private Party Litigation, 47 Ind. L. J. 293 (1972); Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Texas L. Rev. 54 (1969); Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 Ford. L. Rev. 569 (1973); Note, The Use of Divestiture in Private Antitrust Suits, 43 Geo. Wash. L. Rev. 261 (1974); Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1965); Comment, Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief, 19 Pac. L. J. 143 (1987). Although I cannot, of course, predict with mathematical certainty my colleagues' views on the subject, see *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1347 (1977) (REHNQUIST, J., in chambers), this commentary suggests to me that plausible arguments exist for reversing the decision below and that there is at least a fair prospect that a majority of the Court may vote to do so. Cf. *Zenith Radio Corp.* v. *Hazeltine Re-*

search, Inc., 395 U.S. 100, 130-131 (1969) ("Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' . . . Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect'") (citation omitted).

Finally, balancing the stay equities persuades me that the harm to applicant if the stay is denied, in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer as a result of a stay of the mandate. Applicant alleges, for example, that permitting the merger would cost the State's consumers $400 million a year in higher prices. Respondents contend that they are incurring costs of over $1 million a week by reason of the District Court's injunction and applicant's decision to file suit after the merger had been consummated. To be sure, the cost of enjoining a merger before consummation is staggering, see *Western Airlines, Inc.* v. *Teamsters*, 480 U.S. 1301, 1309 (1987) (O'CONNOR, J., in chambers), and the cost of enjoining an already completed transaction even greater. But, as the District Court found, "the State conducted [its] investigation as swiftly as was responsibly possible." 697 F. Supp., at 1135. Under the circumstances, and in light of the public interests involved, it appears that the equities favor applicant.

Because the citizens of California will likely suffer irreparable harm if integration of respondents' companies is not enjoined, and because there is both a reasonable probability that at least four Justices will vote to grant the petition for a writ of certiorari and a fair prospect that applicant may prevail on the merits, I grant the requested stay of the mandate of the United States Court of Appeals for the Ninth Circuit in this case, pending the disposition by this Court of the petition for a writ of certiorari or further order of this Court.

This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the United States District Court for the Central District of California, the adequacy of such bond to be determined by that court.

[Publisher's note: See 498 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICE IN CHAMBERS

MADDEN *v.* TEXAS

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

No. A-626. Decided February 20, 1991[*]

Good cause is found to grant 30-day extensions of time to file petitions for writs of certiorari to the Court of Criminal Appeals of Texas in Nos. A-627, A-628, and A-635, where applicants, who are under death sentences, have requested the opportunity to find replacement counsel following the withdrawal of their appellate counsel. Such an excuse does not automatically justify an extension of time without regard to its basis or predictability. There is even greater need to reject an automatic rule in capital cases, because a lawyer should not be burdened with the knowledge that his client's appeal could be lengthened if he withdraws from the case. Nonetheless, good cause is found as to these petitions, since JUSTICE SCALIA only became the Circuit Justice for the Fifth Circuit at the beginning of the current Term, since he has not had the opportunity in such capacity to set forth his views on the application of the "good cause" standard, and since his views may be more restrictive than what the Circuit bar has been accustomed to. However, there is inadequate cause to extend the time limit in No. A-626, because it would extend the filing period beyond applicant Madden's scheduled execution date. Such an extension is either futile or will disrupt the State's orderly administration of justice and, thus, is not an appropriate action for a Circuit Justice to take.

JUSTICE SCALIA, Circuit Justice.

In each of these four cases, a lawyer affiliated with the Texas Resource Center, on behalf of an applicant convicted of capital murder and sentenced to death, has requested a 60-

[*] Together with No. A-627, *DeBlanc* v. *Texas*, No. A-628, *Goodwin* v. *Texas*, and No. A-635, *Hammond* v. *Texas*, also on applications for extension of time.

day extension of time in which to file a petition for a writ of certiorari to the Court of Criminal Appeals of Texas.

In No. A-626, the Texas court issued an opinion affirming the conviction and sentence of Robert Madden on September 12, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that Madden's appellate counsel "has never before prepared a certiorari petition on a capital case" and requires the assistance of the Resource Center "to assist him and provide him with sufficient guidance to ensure that the important constitutional issues in [the] case are properly researched and presented to this Court." Madden is scheduled to be executed on February 28, 1991.

In No. A-627, the Texas court issued an opinion affirming the conviction and sentence of David Wayne DeBlanc on October 24, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[f]ollowing the affirmance of [applicant's] conviction and sentence on appeal, Eden E. Harrington of the Texas Resource Center learned that [applicant's] appellate counsel, Craig Washington, would no longer represent Mr. DeBlanc because Mr. Washington is now a member of the United States Congress. The Texas Resource Center has tried to locate new volunteer counsel for [applicant] since November, 1990, but no new counsel has yet been located." DeBlanc's execution has not yet been scheduled.

In No. A-628, the Texas court issued an opinion affirming the conviction and sentence of Alvin Urial Goodwin on October 24, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[f]ollowing the affirmance of [applicant's] conviction and sentence on appeal, [applicant's] appellate counsel, John D. McDonald, notified Eden E. Harrington of the Texas Resource Center that he could no longer represent Mr. Goodwin due to conflicting employment. The Texas Resource Center has tried to locate new volunteer counsel for

[applicant] since learning of Mr. McDonald's withdrawal, but no new counsel has yet been located." Goodwin's execution has not yet been scheduled.

In No. A-635, the Texas court issued an opinion affirming the conviction and sentence of Karl Hammond on October 31, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[i]n November, 1990 the Texas Resource Center received notice that [applicant's] appellate attorney, David Weiner, was withdrawing from Mr. Hammond's case and could not prepare his petition for certiorari. Since that time, the Texas Resource Center has attempted to recruit new counsel for Mr. Hammond but has been unsuccessful. Therefore, undersigned counsel intends to prepare a petition for writ of certiorari on [applicant's] behalf and the Texas Resource Center will continue to try to locate new counsel to assist petitioner with his future appeals. Undersigned counsel, however, cannot prepare the petition for writ of certiorari . . . because of his father's recent death." Hammond's execution has not yet been scheduled.

The law states that "[t]he time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." 28 U.S.C. § 2101(d). Those rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6. Any such application "must be submitted at least 10 days before the specified final filing date," Rule 30.2; applications "*received* less than 10 days before the final filing date" will not be granted "except in the most extraordinary circumstances," *ibid*. (emphasis added).

The 90-day period for filing a petition for a writ of certiorari in each of these cases expires on February 26, 1991. Each of the present extension applications was sent via overnight courier on February 15, 1991 (the Friday preceding a 3-day holiday weekend), and received by the police officer on duty on Saturday, February 16, the last possible day under the 10-day rule.

In my view, none of these applications, as an original matter, would meet the standard of "good cause shown" for the granting of an extension. In No. A-626, the desire of Madden's appellate counsel for the assistance of the Texas Resource Center is entirely unremarkable; *all* petitioners can honestly claim that they would benefit from additional advice and consultation. Nor does the excuse put forward in the other three cases, namely, withdrawal of appellate counsel, automatically justify an extension of time. There is no indication in any of them that the withdrawal was a reasonably unforeseeable occurrence. Indeed, in DeBlanc's case, No. A-627, the factor requiring withdrawal (membership in the United States Congress) was of such a nature that it must have been anticipated before November 28, the date rehearing was denied. The application in Hammond's case, No. A-635, sets forth as additional justification the death of counsel's father—which would in some circumstances qualify as "good cause shown." The counsel in question, however, is not one who has been working diligently on the petition and has been prevented by the death from completing his work, but rather an attorney affiliated with the Resource Center who now, because no other counsel has been found since the unexplained withdrawal of appellate counsel, "intends to prepare" applicant's petition. There is no indication why some other attorney at the Resource Center could not have undertaken this last-minute task, nor why the task has been left to the last minute.

All of these are capital cases. That class of case has not, however, been made a generic exception to our 90-day time

limit, and I do not think I have authority to create such an exception through the power conferred upon me to grant case-by-case extensions for "good cause shown." As I have stated above, moreover, I do not consider that the withdrawal of appellate counsel automatically constitutes "good cause," without regard to its basis or predictability. There is even greater need to reject such an automatic rule in capital cases than there is elsewhere, since no lawyer should be burdened with the knowledge that, if he were only to withdraw from the case, his client's appeal could be lengthened and the execution of sentence, in all likelihood, deferred.

I became Circuit Justice for the Fifth Circuit at the beginning of the current Term. Because I have not previously had an opportunity in this capacity to set forth my views on application of the "good cause" standard of Rule 13.2; because it is possible that those views are more restrictive of extensions than what the Fifth Circuit bar has been accustomed to; and because these are capital cases; I find good cause to grant 30-day extensions in Nos. A-627, A-628, and A-635. I shall not grant extensions in similar circumstances again. I find inadequate cause to extend the filing period in No. A-626. In that case, Madden's execution date has been set for February 28, 1991, two days after the end of the regular 90-day filing period. Extending the period in which to file a petition for a writ of certiorari to a point after an established execution date is either futile or will disrupt the State's orderly administration of justice. I do not consider it appropriate for me to take such action as a Circuit Justice.

It is so ordered.

[Publisher's note: See 498 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-661

MISSISSIPPI, APPLICANT *v.* KEVIN LEWIS TURNER

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

[March 2, 1991]

JUSTICE SCALIA, Circuit Justice.

In this case, the State of Mississippi has requested a 30-day extension of time within which to file a petition for a writ of certiorari to the Mississippi Supreme Court. The State submits that the extension is required due to "state budgetary cuts," which have resulted in a reduction in appellate staff.

The law states that the "time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court." 28 U.S.C. § 2101(d). Those rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6.

In my view, counsel's overextended caseload is not "good cause shown," unless it is the result of events unforeseen and uncontrollable by both counsel and client. That is not so here. Like any other litigant, the State of Mississippi must choose between hiring more attorneys and taking fewer appeals. Its budget allocations cannot, and I am sure were not expected to, alter this Court's filing requirements.

The application is denied.

It is so ordered.

[Publisher's note: See 499 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-704 (90-7411)

TED CALVIN COLE *v.* TEXAS

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

[March 18, 1991]

JUSTICE SCALIA, Circuit Justice.

I have before me an application for a stay of execution pending disposition of a petition for writ of certiorari to the Court of Criminal Appeals of Texas. The petitioner seeks direct review of the judgment of the Texas courts affirming his death sentence.

I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari. While I will not extend the time for filing a petition beyond an established execution date, see *Madden v. Texas*, — U.S. — (1991) (SCALIA, J., in chambers), neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.

It is so ordered.

[Publisher's note: See 501 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL. *v.* E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN ET AL.

ON APPLICATION FOR STAY

No. A-94. Decided August 2, 1991

An application to stay the Court of Appeals' judgments—declaring that the Texas Administrative Services Tax Act is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), enjoining the tax's enforcement, and ordering the State to issue refunds to challenging taxpayers—is granted, pending applicant state officials' timely filing, and the Court's disposition of, a petition for certiorari. There is a reasonable likelihood that certiorari will be granted. The lower court's holding that the Tax Injunction Act—which provides that federal courts may not interfere with state tax collection where a plain, speedy, and efficient remedy may be had in state court—does not apply to state taxes that violate ERISA conflicts with the position of another Court of Appeals and addresses a question explicitly reserved by this Court. There is also a substantial possibility that the judgment will be reversed. In addition, unlawful interference with state tax collection always entails a likelihood of irreparable harm to the State, and there appears to be no corresponding harm that a stay would produce.

JUSTICE SCALIA, Circuit Justice.

Texas state officials responsible for the collection of taxes and the regulation of insurance seek a stay of the judgments of the Court of Appeals for the Fifth Circuit in these two sets of consolidated cases, pending action by this Court on their intended petition for certiorari. The judgments at issue upheld decisions by the United States District Court for the Western District of Texas, which declared the Texas Administrative Services Tax Act, Tex. Ins. Code Ann., Art. 4.11A

(Vernon Supp. 1991), to be pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.* (1988 ed. and Supp. I), enjoined its enforcement, and directed the State to issue refunds to the challenging taxpayers. *E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (1991).

The authority for a single Justice to issue a stay of the sort requested here is conferred by 28 U.S.C. § 2101(f). Before the predecessor to that provision was enacted in 1925, see Act of Feb. 13, 1925, 43 Stat. 940, similar action could be taken by the Court by issuing a supersedeas under the All Writs Act, 28 U.S.C. § 1651. See *Magnum Import Co.* v. *Coty*, 262 U.S. 159 (1923); *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 190 (1867); *Hardeman* v. *Anderson*, 4 How. 640, 642-643 (1846). Under § 2101(f), as under the All Writs Act and the prior common law, a stay issues not of right but pursuant to sound equitable discretion; "it requires," as Chief Justice Taft said, "a clear case and a decided balance of convenience." *Magnum Import Co.*, *supra*, at 164.

The practice of the Justices has settled upon three conditions that must be met before issuance of a § 2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). In my view all three of these conditions are met here.

The Tax Injunction Act, 28 U.S.C. § 1341, provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Fifth Circuit's holding that this provision does not apply to state taxes that violate ERISA is in apparent conflict with the position taken by the Ninth Cir-

cuit. See *Ashton* v. *Cory*, 780 F.2d 816, 821-822 (1986) (Kennedy, J.). See also *General Motors Corp.* v. *California Bd. of Equalization*, 815 F.2d 1305, 1308 (CA9 1987) (Kennedy, J.). The question has been explicitly reserved in an opinion of this Court. *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 20, n. 21, 27, n. 31 (1983). The establishment of an ERISA exception to the Tax Injunction Act is alone a matter of some importance to the States. In addition, however, the Fifth Circuit's basis for the exception is that there can be no "plain, speedy and efficient remedy" in Texas courts because ERISA forbids their consideration of ERISA pre-emption challenges. *E-Systems, Inc., supra,* at 1102. This means, apparently, that state courts cannot even grant refund relief, since we have held that refund relief alone may constitute "a plain, speedy and efficient remedy." See, *e.g., California* v. *Grace Brethren Church*, 457 U.S. 393, 413-414 (1982); *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 514-515 (1981). In addition, the Fifth Circuit rejected, without explanation, applicants' objection that the Eleventh Amendment forbade the District Court from requiring a refund of the ERISA pre-empted taxes from Texas' State Treasury. *E-Systems, Inc., supra,* at 1101-1102. This is also in apparent conflict with the views of the Ninth Circuit. See *General Motors Corp., supra,* at 1309. In my view these issues are of sufficient importance that a grant of certiorari by this Court is probable.

I also think there is a substantial possibility that the judgment below will be reversed. The Fifth Circuit's construction of the Tax Injunction Act and ERISA assumes that ERISA's creation of a private cause of action to enjoin violations of ERISA, 29 U.S.C. § 1132(a)(3), and its provision that this cause of action can be brought only in federal court, § 1132(e)(1), implicitly deprive the state courts of jurisdiction to entertain claims for monetary or equitable relief that rest upon the invalidity (under the Supremacy Clause) of a state

statute that violates ERISA. That is not an inevitable implication, and perhaps not a likely one. The Fifth Circuit's position on the Eleventh Amendment presumably rests upon the proposition that ERISA has impliedly authorized suit against States for monetary (as well as injunctive) relief, thus abrogating state sovereign immunity. But ERISA makes no mention of monetary relief, and in any event our cases do not favor implicit abrogation of Eleventh Amendment immunity. See *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985).

As to the third condition, the likelihood of irreparable harm: In my view the Tax Injunction Act itself reflects a congressional judgment, with which I agree, that unlawful interference with state tax collection always entails that likelihood. It produces in all cases not merely the possibility of ultimate noncollection because of the taxpayer's exhaustion of the funds but also an interference with the State's orderly management of its fiscal affairs.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871).

See also *California* v. *Grace Brethren Church*, *supra*, at 410, and n. 23. The same may be said of the asserted Eleventh Amendment violation: Directing a priority expenditure from the state treasury "may derange the operations of government, and thereby cause serious detriment to the public."

The conditions that are necessary for issuance of a stay are not necessarily sufficient. Even when they all exist, sound

equitable discretion will deny the stay when "a decided balance of convenience," *Magnum Import Co*., *supra*, at 164, does not support it. It is ultimately necessary, in other words, "to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted). The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others. (This depends, of course, not only upon the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also upon the relative likelihood that the merits disposition one way or the other is correct.) Or the irreparable harm threatened to the applicant, while more likely, may be vastly less severe. The balancing seems to me quite easy in the present case, since I am aware of no irreparable harm that granting the stay would produce. The State's credit remains good, and I have been advised of no emergency need for the funds already paid under protest or for any funds that will be collected before termination of the litigation.

The application for stay of the judgments of the Fifth Circuit Court of Appeals is granted, pending applicants' timely filing, and this Court's disposition, of a petition for certiorari.

[Publisher's note: See 502 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-301

JESSE CAMPOS, W.R. (RESENDEZ) MORRIS AND THE MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON, APPLICANTS *v.* THE CITY OF HOUSTON ET AL.

ON APPLICATION FOR INJUNCTION AND STAY

[October 29, 1991]

JUSTICE SCALIA, Circuit Justice.

The application before me seeks "an injunction and stay from the Court stopping the entire City election process" with respect to elections for the Houston City Council scheduled for November 5. Application, at 11. As the amicus United States points out, there is no basis in law for such an original order, and the application must be denied.

Assuming that the applicants would desire the lesser relief of a mere stay of the district court's order, I would nonetheless deny it. The issuance by a circuit justice of a stay pending appeal calls for consideration of not only the probability that the district court was wrong, but also the nature of (including responsibility for) the alleged injury that will occur absent a stay, and the effect that a stay would have upon the public interest. See *Republican State Comm. of Arizona* v. *The Ripon Society Inc*., 409 U.S. 1222, 1224 (1972) (REHNQUIST, J., in chambers). Like the Court of Appeals, I am doubtful of the district court's authority to issue the present order. However, while the City may have been guilty of overimaginative lawyering in obtaining it, I have no reason to believe the City was acting in bad faith in the sense of seeking to frustrate the purposes of the Voting Rights Act. Moreover, in my view both the applicants and the United States share some responsibility, by

their delay, for this matter's having been presented and decided in inordinate haste. Finally, and most important, I am not certain that more good than harm to the public interest will be achieved by staying the district court's order, making the imminent elections (in which some people have already casted [Publisher's note: "casted" should be "cast".] absentee ballots) impossible. On this last point, which seems to me in the present case the determinative one, I am inclined to rely upon the judgment of those federal judges on the scene, who have declined the stay.

For the foregoing reasons, the application is denied.

[Publisher's note: See 505 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-954

HARRY L. REYNOLDS, JR. *v.*
INTERNATIONAL AMATEUR ATHLETIC FEDERATION, ET AL.

ON APPLICATION FOR STAY

[June 20, 1992]

JUSTICE STEVENS, Circuit Justice.

On June 19, 1992, the United States District Court for the Southern District of Ohio entered a preliminary injunction barring The Athletic Congress of the U.S.A., Inc. (TAC) and the International Amateur Athletic Federation (IAAF) from impeding or interfering with Harry L. Reynolds, Jr.'s ability to compete in the 1992 United States Olympic Trials. Later that day, the United States Court of Appeals for the Sixth Circuit issued an order staying the preliminary injunction. Mr. Reynolds has applied to me in my capacity as a Circuit Justice for a stay of the order of the Court of Appeals.

In my opinion, the IAAF's threatened harm to third parties cannot dictate the proper disposition of applicant's claim. The dispositive questions for me are, first, whether applicant has established a probability of success on the merits, and second, whether the availability of a damages remedy precludes a finding of irreparable harm. With respect to the first, I find the District Court's opinion persuasive. With respect to the second, a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete.

Of course, I recognize that this ruling may not establish applicant's right to compete in the Olympics at Barcelona, but that opportunity will presumably be foreclosed if he is not allowed to participate in the Olympic Trials. On the other hand, the harm, if any, to the IAAF can be fully cured by a fair and objective determination of the merits of the controversy. Indeed, applicant may fail to qualify, thus mooting the entire matter; if he does qualify, his eligibility can be reviewed before the final event in Barcelona.

The IAAF's threat to enforce its eligibility decision—no matter how arbitrary or erroneous it may be—by punishing innocent third parties cannot be permitted to influence a fair and impartial adjudication of the merits of applicant's claims.

The application for a stay is granted.

[Publisher's note: See 506 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-324

RICKY LEE GRUBBS *v.* PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

[October 20, 1992]

Statement of JUSTICE BLACKMUN.

This application for a stay of execution reaches me, as Circuit Justice, at approximately 11:00 p.m. Eastern Daylight Time this Tuesday, October 20, 1992. Applicant's execution by the State of Missouri is scheduled two hours later, at 1:00 a.m. EDT Wednesday, October 21. This afternoon, Judge Carol Jackson of the Eastern District of Missouri granted a stay. This evening, a panel of the United States Court of Appeals for the Eighth Circuit, by a 2 to 1 vote, with Judge Bright in dissent, vacated the District Court's stay. Then the Court of Appeals, by a vote of 9 to 1, still later this evening, denied a suggestion for rehearing en banc, and denied a motion for stay of execution.

The present application thus comes to me with the judges below apparently divided 9 to 3. The State, before me, relies on its brief filed with the Court of Appeals.

In this situation, there just is not sufficient time for me adequately to consider the merits of the stay application. (There is no suggestion of undue delay or procedural unfairness on the part of the applicant.) With an execution so irrevocable, I therefore choose to err, if at all, on the side of the applicant. I have granted the stay pending further order by me as Circuit Justice or of the full Court.

[Publisher's note: See 507 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-798

TURNER BROADCASTING SYSTEM, INC., ET AL. *v.*
FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON APPLICATION FOR AN INJUNCTION

[April 29, 1993]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants have asked me, as Circuit Justice for the District of Columbia Circuit, to enjoin enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1471-1481, which require cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcast stations. Applicants, cable operators and programmers, contend that these "must-carry" provisions violate the First Amendment because (1) they tell cable operators what speakers they must carry, thereby controlling the content of the operator's speech and shrinking the number of channels available for programming they might prefer to carry; (2) they inhibit the operators' editorial discretion to determine what programming messages to provide to subscribers; and (3) they give local broadcast "speakers" a preferred status. I herewith deny the application.

The 1992 Cable Act, like all Acts of Congress, is presumptively constitutional. As such, it "should remain in effect pending a final decision on the merits by this Court." *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (REHNQUIST, J., in chambers). Moreover, the Act was upheld by the three-judge District Court, and even the dissenting judge rejected the argument now urged by applicants — that Congress may not compel cable operators

to carry the video signals of programmers they would otherwise choose not to carry. ___ F. Supp. ___, ___ (DC 1993). Unlike applicants, therefore, all three judges below would recognize that the government may regulate cable television as a medium of communication. *Ibid*.

Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends "judicial alteration of the status quo," an injunction "grants judicial intervention that has been withheld by the lower courts." *Ohio Citizens For Responsible Energy, Inc*. v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers). By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. See, *e.g., Ohio Citizens For Responsible Energy, supra*, at 1313; this Court's Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S.Ct. 1, 2, 13 L.Ed. 12 (1964) (BLACK, J., in chambers). [Publisher's note: The sentence preceding this note is unconventional. Normally, references to former members of the Supreme Court are in roman type, not small caps. And "S.Ct." and "L.Ed." should be "S. Ct." and "L. Ed.".]

An injunction is appropriate only if (1) it is "necessary or appropriate in aid of [our] jurisdiction," 28 U.S.C.

§ 1651(a), and (2) the legal rights at issue are "indisputably clear." *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers); *Ohio Citizens For Responsible Energy*, *supra*, at 1313. Without doubt, implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it "indisputably clear" that applicants have a First Amendment right to be free of the must-carry provisions. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), we struck down Florida's right of reply statute, holding that the State may not compel "editors or publishers to publish that which reason tells them should not be published." *Id*., at 256 (internal quotation marks omitted). Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), however, we upheld the Federal Communication Commission's requirement that broadcasters cover public issues, and give each side of the issue fair coverage. Noting that there is a finite number of frequencies available, we stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id*., at 390. Although we have recognized that cable operators engage in speech protected by the First Amendment, *Leathers* v. *Medlock*, 499 U.S. ___, ___ (1991); *Los Angeles* v. *Preferred Communications, Inc*., 476 U.S. 488, 494 (1986), we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters. *Id*., at 494-495.

In light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation. The

application for an injunction pending appeal to this Court is therefore denied.

[Publisher's note: See 508 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-851

JAMES BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, APPLICANT
v.
CHARLES CAMPBELL

ON APPLICATION TO VACATE ORDER

[May 14, 1993]

JUSTICE O'CONNOR, Circuit Justice.

I have before me an application requesting that I vacate a remand order issued by an en banc panel of the United States Court of Appeals for the Ninth Circuit. This is not the first time that applicant James Blodgett, who is Superintendent of the Washington State Penitentiary, has sought relief here with respect to Charles Campbell's second petition for a writ of habeas corpus. Last Term applicant sought a writ of mandamus to compel the United States Court of Appeals for the Ninth Circuit to issue a decision in Campbell's appeal from a District Court decision denying the petition. *In re Blodgett*, 502 U.S. ___ (1992). Campbell's appeal, which had been argued and submitted on June 27, 1989, still had not been resolved in January 1992, a delay of well over two years. *Id.*, at ___ (slip op., at 1). Although we declined to issue a writ of mandamus—applicant had failed to seek appropriate relief from the Court of Appeals before seeking extraordinary relief here, *id.*, at 4-5—we expressed concern about the delay and noted that applicant was free to seek mandamus relief again if the panel did not handle the case expeditiously. *Id.*, at 5. In fact, we cautioned that "[i]n view of the delay that has already occurred any further postponements or extensions

of time will be subject to a most rigorous scrutiny in this Court if [applicant] files a further and meritorious petition for relief." *Ibid.* Approximately three months later, the Ninth Circuit panel issued an opinion in applicant's favor.

That, however, did not end the matter. If applicant's account is correct, the Ninth Circuit since then has extended the time for filing a petition for rehearing in Campbell's case, granted rehearing en banc, and denied applicant's motion for expedited review. After vacating submission of the case so it could receive and review supplemental briefs, the Ninth Circuit en banc panel issued an order remanding the case to the District Court for an evidentiary hearing on whether hanging is cruel and unusual punishment under the Eighth Amendment. The court, however, did not indicate that the hearings the District Court already had held were inadequate. Nor did it conclude that the District Court would have erred had it denied Campbell a hearing altogether. Instead, the en banc court stated that, because it had "chosen to address whether hanging is cruel and unusual punishment," it would be helpful to have "the benefit of an evidentiary hearing, with findings and conclusions by the district court." *Campbell* v. *Blodgett*, No. 89-35210 (Apr. 28, 1993), p. 1. Applicant moved for reconsideration of that order, and the en banc court denied the motion. Judges O'Scannlain and Kleinfeld dissented:

> "Over a year ago, the Supreme Court reminded us that the State of Washington has sustained 'severe prejudice' by the stay of execution in this case, which is now over four years old. *In re Blodgett*, [502 U.S. ___ (1992)]. While the further delay to be caused by this remand order may not be egregious, it is symptomatic of this court's handling of this case. . . . Absent any indication by this court that the district court erred — by holding that Campbell was [wrongfully] denied a hearing on this issue altogether or that the hearing given was somehow inadequate as a

> matter of law—I can see no basis to remand for a new evidentiary hearing." *Campbell* v. *Blodgett*, No. 89-35210 (May 7, 1993), pp. 2-3.

Frustrated with the slow rate of progress and the additional delay occasioned by the en banc court's April 26 remand order, Blodgett has submitted an application that asks me to vacate that order. Although I am concerned about the glacial progress in this case, I have grave doubts about my authority to offer such relief by way of application. After all, most applications seek temporary relief, such as a stay of judgment, vacation of a stay, or a temporary injunction, and only where necessary or appropriate in aid of this Court's jurisdiction. See, *e.g.*, *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, J., in chambers) (application for stay); *O'Brien* v. *Skinner*, 409 U.S. 1240 (1972) (Marshall, J., in chambers) (application for stay); see also *Coleman* v. *Paccar Inc.*, 424 U.S. 1301 (1976) (REHNQUIST, J., in chambers) (application to vacate lower court stay); *American Trucking Assns., Inc.* v. *Gray*, 483 U.S. 1306 (1987) (BLACKMUN, J., in chambers) (application for injunction requiring that funds be escrowed pending outcome of case). Applicant, however, does not seek *interim* relief. Nor has he filed with this Court a petition for either a writ of certiorari or an extraordinary writ. Rather, he requests that I act alone to vacate the remand order of the en banc court, thereby barring the case's return to district court and prohibiting the taking of more evidence. I have not located a single published order in which a Circuit Justice has vacated or reversed a court of appeals' order, other than an order providing interim relief; indeed, it appears that such an action would exceed my authority, which is limited to providing or vacating stays and other temporary relief where necessary or appropriate in aid of this Court's jurisdiction. See *Kimble* v. *Swackhamer*, 439 U.S. 1385, 1385 (1978) (REHNQUIST, J., in chambers) ("It scarcely requires reference to authority to conclude that a single

Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits"). Because I do not believe I have the authority to vacate the Court of Appeals' remand order unilaterally in my capacity as Circuit Justice, the application is dismissed without prejudice.

[Publisher's note: See 509 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A-64 AND A-65

JESSICA DEBOER AKA BABY GIRL CLAUSEN, BY HER NEXT FRIEND, PETER DARROW

A-64 *v.*

ROBERTA AND JAN DEBOER ET AL.

ROBERTA AND JAN DEBOER

A-65 *v.*

DANIEL SCHMIDT

ON APPLICATIONS FOR STAY

[July 26, 1993]

JUSTICE STEVENS, Circuit Justice.

Applicants in case number A-65 are residents of Washtenaw County, Michigan. On July 2, 1993, the Michigan Supreme Court entered an order requiring them to comply with custody orders that had previously been entered by the Michigan Court of Appeals and by the Iowa State Courts which had directed them to deliver a child to its natural parents in Iowa. They have filed an application with me in my capacity as Circuit Justice for the Sixth Circuit for a stay of enforcement of that order. Applicant in Case No. A-64 is the child represented by her "next friend," who seeks the same relief. Because I am convinced that there is neither a reasonable probability that the Court will grant certiorari nor a fair prospect that, if it did so, it would conclude that the decision below is erroneous, I have decided to deny the applications.

Respondents are the natural parents of Jessica Clausen, who was born in Iowa on February 8, 1991. When the child was 17 days old, applicants filed a petition for adoption in the Iowa courts. In the ensuing proceedings,

the Iowa courts determined that the parental rights of the child's biological father had not been terminated in accordance with Iowa law and that therefore applicants were not entitled to adopt the child. For reasons that have been stated at length in opinions of the Iowa Supreme Court, the Michigan Court of Appeals, and the Michigan Supreme Court, those determinations control the ultimate outcome of this proceeding. Applicants' claim that Jessica's best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they were not entitled to adopt her. Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous." *In re B.G.C.*, 496 N.W.2d 239, 241 (1992) (internal quotation marks and citation omitted).

My examination of the opinions in the case persuade me that there is no valid federal objection to the conduct or the outcome of the proceedings in the Iowa courts. Indeed, although applicants applied to JUSTICE BLACKMUN in his capacity as Justice for the Eighth Circuit for a stay of enforcement of the judgment entered by the Iowa Supreme Court on September 23, 1992, they did not seek review of that judgment after he had denied the stay application. Rather than comply with the Iowa judgment, applicants sought a modification of that judgment in the Michigan courts. In my opinion, the Michigan Supreme Court correctly concluded that the Michigan courts are obligated to give effect to the Iowa proceedings. The carefully crafted opinion of the Michigan Supreme Court contains a comprehensive and thoughtful explanation of

the governing rules of law. Accordingly, the stay applications will be denied.

It is so ordered.

[Publisher's note: See 510 U.S. 1301 for the authoritative official version of this opinion. The typesetting in the original reproduced here is strange. Text that normally would simply be italicized is instead set in roman sans serif type, which we have reproduced in conventional italics.]

SUPREME COURT OF THE UNITED STATES

No. A-426

IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR ET AL.

ON APPLICATION FOR STAY

[November 26, 1993]

JUSTICE O'CONNOR, Circuit Justice.

The Solicitor General, on behalf of the Immigration and Naturalization Service, requests that I stay an order of the District Court for the Western District of Washington pending appeal to the Court of Appeals for the Ninth Circuit. The Court of Appeals has rejected the INS' application for such a stay. Though "stay application[s] to a Circuit Justice on a matter before a court of appeals [are] rarely granted," *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (REHNQUIST, J., in chambers), I believe this is an exceptional case in which such a stay is proper.

I

In 1986, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, which provided a limited amnesty for immigrants who had come to or stayed in the country illegally. See 8 U.S.C. § 1255a. Not all such immigrants were, however, eligible. Among other restrictions, the amnesty was available only to those who had "resided continuously in the United

States in an unlawful status since [January 1, 1982]," § 1255a(a)(2)(A); also, those who came to the country legally but stayed illegally could only get amnesty if their "period of authorized stay . . . expired before [January 1, 1982]" or their "unlawful status was known to the Government as of [January 1, 1982]," § 1255a(a)(2)(B). Respondents, organizations that provide legal help to immigrants, believe the INS interpreted these provisions too narrowly, in violation of the statute and the United States Constitution, and in 1988 brought their challenge to court.

In March 1989, the District Court ruled in respondents' favor, and in September 1992, the Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for further proceedings. On June 1, 1993, the District Court issued an order requiring the INS to, among other things, identify and adjudicate legalization applications filed by certain categories of applicants, not arrest or deport certain classes of immigrants, and temporarily grant certain classes of immigrants stays of deportation and employment authorizations.

On June 18, 1993, this Court decided *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. ___ (1993) (*CSS*), a case involving a very similar challenge to another portion of IRCA. In *CSS*, we held that the claims of most of the plaintiff aliens were barred by the ripeness doctrine. A federal court, we held, generally ought not entertain a request for an injunction or declaratory judgment regarding the validity of an administrative regulation unless it is brought by someone who has actually been concretely affected by the regulation. *Id.*, at ___. The mere existence of the regulation, we held, was not enough; rather, the regulation must actually

have been applied to the plaintiff. *Ibid*. We concluded that the only people who could ask for injunctive or declaratory relief under IRCA were those who were told by the INS that they should not even bother to file their applications—a policy called "front-desking"—and perhaps also those who could show that the front-desking policy was a substantial cause of their failure to apply in the first place. *Id.*, at ___, and n. 28. Under the statute, aliens who did apply and whose applications were considered but rejected could only get judicial review of this rejection if the INS tried to deport them. 8 U.S.C. § 1255a(f)(1).

In light of our decision in *CSS*, the Government asked the District Court to vacate its order, on the theory that respondents' claims here, like the claims of the *CSS* plaintiffs, were not ripe. The District Court, however, disagreed. The *CSS* plaintiffs, the District Court pointed out, were individual aliens, whereas the plaintiffs in this case are organizations. The District Court concluded that the organizations had "suffered a concrete and demonstrable injury" because "the challenged regulations drained organizational resources and impaired their ability to assist and counsel nonimmigrants"; therefore, the court held, the organizations' claims were ripe. App. B to Application 6, citing *Legalization Assistance Project of the Los Angeles County Federation of Labor* v. *INS*, 976 F.2d 1198, 1204 (CA9 1992), cert. pending, No. 93-73. Therefore, "because this case has assumed the posture of a broad-based challenge to the regulations in question by organizations which the Ninth Circuit explicitly found have standing to bring these claims," App. B to Application 6, the court declined to vacate its June 1 order.

II

As a Circuit Justice dealing with an application like this, I must try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called "stay equities." *Heckler* v. *Lopez*, *supra*, at 1330-1331. This is always a difficult and speculative inquiry, but in this case it leads me to conclude that a stay is warranted.

Respondents assert that the INS is violating the law of the land, and they ask the federal courts to order the INS to stop this. But the broad power to "take Care that the Laws be faithfully executed" is conspicuously not granted to us by the Constitution. Rather, it is given to the President of the United States, see U.S. Const., Art. II, § 3, along with the power to supervise the conduct of the Executive Branch, Art. II, §§ 1, 2, which includes the INS. The federal courts are granted a different sort of power—the power to adjudge "Cases" or "Controversies," Art. III, § 2, cl. 1, within the jurisdiction defined by Congress, Art. III, § 2, cl. 2.

Congress has in fact considered the proper scope of federal court jurisdiction to review administrative agency actions. It has explicitly limited such review to claims brought by "person[s] suffering legal wrong[s] because of agency action" (not applicable to the respondent organizations involved here) or by persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). We have consistently interpreted this latter clause to permit review only in cases brought by a person whose putative injuries are "within the 'zone of

interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990) (*NWF*); see also *Clarke* v. *Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987).

I believe that, were it presented with this question, this Court would grant certiorari and conclude that the respondents are outside the zone of interests IRCA seeks to protect, and that therefore they had no standing to seek the order entered by the District Court. The District Court's decision and the Court of Appeals decision on which it relies, 976 F.2d, at 1208, conflict with *Ayuda, Inc.* v. *Reno*, ___ F.3d ___ (CADC 1993), and relate to an important question of federal law. See this Court's Rule 10. Moreover, on the merits, IRCA was clearly meant to protect the interests of undocumented aliens, not the interests of organizations such as respondents. Though such organizations did play a role in the IRCA scheme—during the amnesty period, they were so-called "qualified designated entities," which were to "assis[t] in the program of legalization provided under this section," § 1255a(c)(2)—there is no indication that IRCA was in any way addressed to their interests. The fact that the INS regulation may affect the way an organization allocates its resources—or, for that matter, the way an employer who currently employs illegal aliens or a landlord who currently rents to illegal aliens allocates its resources—does not give standing to an entity which is not within the zone of interests the statute meant to protect. *NWF*, *supra*, at 883.

The balance of equities also tips in the INS' favor. The order would impose a considerable administrative burden on the INS, and would delay the deportation of—and require the granting of

interim work authorizations to—at least those aliens who are deportable and who could not seek relief on their own behalf under *CSS*. Moreover, if the above analysis is correct, the order is not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government. See *Heckler* v. *Lopez*, 463 U.S., at 1336-1337; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940). On the other hand, neither *CSS* nor this stay prevents those aliens who were ordered deported or were front-desked, and are therefore possibly eligible for relief under *CSS*, from suing in their own right. Likewise, neither *CSS* nor this stay prevents any membership organizations which have members whose claims are ripe under *CSS* from suing on behalf of those members, assuming the organizations meet the criteria required for organizational standing.

I therefore grant the application to stay the District Court's order pending final disposition of the appeal by the Court of Appeals.

[Publisher's note: See 510 U.S. 1307 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-517

CAPITAL SQUARE REVIEW AND ADVISORY BOARD ET AL. *v.* VINCENT J. PINETTE ET AL.

ON APPLICATION FOR STAY OF INJUNCTION

[December 23, 1993]

JUSTICE STEVENS, Circuit Justice

Today is Thursday, December 23, 1993. Yesterday evening petitioners filed with me, in my capacity as Circuit Justice for the Sixth Circuit, an application for a stay of an injunction entered by the District Court and upheld by the Court of Appeals. The injunction required petitioners to allow the respondents, the Knights of the Ku Klux Klan and its leading officers, to erect a large Latin cross in front of the Ohio Statehouse in Columbus, Ohio. As I understand the situation, the cross is in place now and is scheduled to be removed tomorrow. If I were to grant the application forthwith, it would be removed today—unless, of course, respondents could persuade the full Court to reinstate the injunction.

The case is unique because the District Court found that the local government has effectively disassociated itself from the display:

> "Indeed, the 'reasonable' observer—being an individual who is knowledgeable about local events—might well know by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the cross and any messages which might reasonably be associated with this display by the Klan. Moreover,

> the reasonable observer would likely know that a menorah was displayed during the celebration of Hanukkah, and a Christmas tree has been displayed throughout the month of December. From all of this, the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." No. C2-93-1162 (SD Ohio, Dec. 21, 1993), p. 13.

In their application, petitioners do not dispute the accuracy of that finding.

Whether or not petitioners' legal position is sound (and my opinion in *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 646-655 (1989) explains why I am not unresponsive to their arguments), they must shoulder the burden of persuading me that irreparable harm will ensue if I do not grant their application. Frankly, it is my opinion that whatever harm may flow from allowing the privately owned cross to remain in place until tomorrow has probably already occurred. Moreover, because the legal issues are presumably capable of repetition, I do not believe the case will become moot when the cross is removed tomorrow. Rather than asking my colleagues to resolve those issues summarily, applicants may be well advised to marshal their arguments in a certiorari petition that can be considered with appropriate deliberation.

For these reasons, I shall defer to the judgment of the Court of Appeals and deny the application.

It is so ordered.

[Publisher's note: See 510 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-655

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL. *v.* ROBERT CASEY ET AL.

ON APPLICATION FOR STAY OF MANDATE

[February 7, 1994]

JUSTICE SOUTER, in chambers.

Addressing me in my capacity as Circuit Justice for the Third Circuit, the applicants seek a stay of the Court of Appeals's mandate in this case, pending their filing a petition for certiorari. See 28 U.S.C. § 2106. In the decision from which applicants intend to seek review, *Casey* v. *Planned Parenthood of Southeastern Pennsylvania*, ___ F.3d ___ (Nos. 93-1503 & 93-1504) (CA3 1994), the Court of Appeals held that the District Court's order allowing applicants to reopen the record in their facial constitutional challenge to Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§ 3203-3220 (1990), and continuing its order enjoining the Commonwealth from enforcing various provisions of that statute, see 822 F. Supp. 227 (ED Pa. 1993), was inconsistent with both the mandate of this Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. ___, and that of the Third Circuit on remand, see 978 F.2d 74 (1992).[1] For the reasons set out below, I decline to stay the mandate of the Court of Appeals.

The conditions that must be shown to be satisfied before a Circuit Justice may grant such an application

[1] The Third Circuit panel also denied a motion, substantially identical to the one presented here, to stay its mandate.

are familiar: a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits, see generally *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). The burden is on the applicant to "rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Ibid.*

With respect to the first consideration, the applicants assert that enforcement of the pertinent provisions of the Abortion Control Act will, for a "large fraction," *Casey*, 505 U.S. ___, (slip op., at 53) of the affected population, interpose a "substantial obstacle," *id*., at ___ (slip op., at 34) to the exercise of the right to reproductive freedom guaranteed by the Due Process Clause and affirmed in this Court's *Casey* opinion.[2] I have no difficulty concluding that such an imposition, if proven, would qualify as "irreparable injury," and support the issuance of a stay if the other factors favored the applicants' position. Those other factors, however, point the other way.[3]

[2] For the purposes of this opinion, I join the applicants and the courts below in treating the joint opinion in *Casey*, see 505 U.S. ___, ___ (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) to be controlling, as the statement of the Members of the Court who concurred in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U.S. 188 (1977).

[3] I note in this regard that the availability of further opportunities to test the constitutionality of the statute mitigates somewhat the quantum of harm that might ensue. The Court of Appeals acknowledged, correctly, that the applicants or other potential litigants remain free to test the constitutionality of the Act "as applied." See Opinion at 22 n. 18, 25. Since I am convinced that a majority of this Court would likely hold a farther facial challenge by the parties

The core of the applicants' submission is that the Court of Appeals fundamentally misread our opinion and mandate in *Casey* in determining that the District Court erred in re-opening the record and continuing its injunction against enforcement of the Pennsylvania statute.[4] Although applicants are right as a general matter in arguing that this Court has a special interest in ensuring that courts on remand follow the letter and spirit of our mandates, see, *e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256 (1895), I am not convinced (nor, I believe, would my colleagues be) that the Court of Appeals's opinion represents such an arguable departure from our mandate as to warrant discretionary review or, in the end, an award of the relief the applicants seek.

I note that I am not as certain as the Court of Appeals was that the District Court here has defied the terms of our remand in a manner that justifies comparison to *Aaron* v. *Cooper*, 163 F. Supp. 13 (ED Ark.), *rev'd*, 257 F.2d 33 (CA8), *aff'd sub nom. Cooper* v.

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in this case to be precluded by the opinion and mandate in *Casey*, there is no occasion to consider here the Court of Appeals's broader assertion that, even in cases where a statute's facial validity depends on an empirical record, see *Fargo Women's Health Org.* v. *Schafer*, ___ U.S. ___ [Publisher's note: There should be a "(1993)" here.] (O'CONNOR, J [Publisher's note: There should be a period here.], concurring in denial of stay), a decision rejecting one such challenge must be dispositive as against all other possible litigants. Also potentially relevant to the irreparable injury calculus is the District Court's "considerable doubt" whether the Commonwealth is, in fact, prepared to begin immediate enforcement of several of the disputed provisions. See 822 F. Supp., at 237.

[4] The applicants' contention that the Court of Appeals's ruling "conflicts" with decisions recognizing district court discretion to decide matters left open by a mandate, see [Publisher's note: There should be a comma here.] *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 347 n. 18 (1979), cf. Sup. Ct. R. 10.1(c), amounts to no more than a restatement of their basic claim, *i.e.*, that the District Court's reading of *Casey*, and not the Third Circuit's, was the correct one.

Aaron, 358 U.S. 1 (1958). The letter of our *Casey* opinion is not entirely hard-edged. We remanded for "proceedings consistent with this opinion, including consideration of the question of severability," 505 U.S., at ___ (slip op., at 60), thereby allowing for the possibility (as applicants strenuously argue) that there might be something for the courts below to determine beyond the severability from the body of the statute of the provisions held constitutionally invalid.[5] More than once, we phrased our conclusion that particular provisions withstood facial challenge under the Due Process Clause in terms of "the record" before us in the case, see 505 U.S. at ___ , ___ & ___ (slip op., at 42, 44-45, 59); see also 505 U.S., at ___ (slip op., at 5) (BLACKMUN, J [Publisher's note: There should be a period here.], concurring in part and dissenting in part) (suggesting that evidence could be adduced "in the future" that would establish the invalidity of the provisions and arguing that the joint opinion did not "rule[] out [that] possibility").

The Court of Appeals's construction of the opinion and mandate, however, is the correct one. Although we acknowledged in *Casey* that the precise formulation of the standard for assessing constitutionality of abortion regulation was, in some respects, novel, see 505 U.S., at ___ (slip op., at 34-35); see also ___ F.3d ___ (slip op., at 6-7) (acknowledging that Court had modified the Third Circuit's "undue burden" test), we did not remand the case to the lower courts for application of the proper standard, as is sometimes appropriate when a new legal standard is announced, see, *e.g.*, *Lucas* v. *South Carolina Coastal Council* [Publisher's note: There should be a comma here.] ___ U.S. ___ (1992). Instead, we undertook to apply the standard to the Pennsylvania

[5] After the Court of Appeals had held that the invalid provisions could be severed from the rest of the statute, see 978 F.2d 74 (CA3 1992), that court itself remanded to the District Court for "such further proceedings as may be appropriate," *id.*, at 78.

statute, upholding the constitutionality of its core provisions governing informed consent, record-keeping, and parental consent, while ruling that the husband-notification requirement, on its face, imposed a constitutionally intolerable burden on the freedom of women to choose abortion. 505 U.S., at ___ (slip op., at 45-57). Significantly, none of the five opinions took the position that the record was inadequate in a way that would counsel leaving those judgments to the District Court in the first instance. Compare, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 506, 523-528 (1991) (Marshall [Publisher's note: There should be a comma here.] J., dissenting). Thus, the references to "this record," combined with our readiness to decide the validity of the challenged provisions under the "undue burden" standard are plausibly understood as reflecting two conclusions: (1) that litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied, see *Fargo Women's Health Org.* v. *Schafer*, ___ U.S. ___ [Publisher's note: There should be a "(1993)" here.] (O'CONNOR, J [Publisher's note: There should be a period here.], concurring in denial of stay); and (2) that applicants had been given a fair opportunity to develop the record in the District Court.

Indeed, the District Court's error in rejecting the latter conclusion deserves a word of comment. The District Court reasoned that because our opinion in *Casey* altered the "rules of the game," it would be unjust to dispose of an "undue burden" challenge on the basis of a record developed for purposes of a challenge based on "strict scrutiny." See 822 F. Supp., at 235-236. But even if this reasoning were not in tension with the approach ultimately taken in the *Casey* opinion, the applicants do not seriously suggest that the vitality of the "strict scrutiny" test was free from uncertainty at the time this case was brought in the District Court or that they lacked incentive to compile a record to support the invalidation of the challenged provisions under a less strict standard of review. The original District Court

opinion contains 287 detailed findings of fact and carries every indication that the applicants were given broad latitude to introduce evidence, call witnesses, and elicit testimony about the potential effects of the challenged provisions on the reproductive freedom of women.

In addition to these reasons for thinking there is no reasonable probability of review and no fair prospect of reversing the Court of Appeals, one other point bears mention. In continuing its order enjoining enforcement of various statutory provisions, the District Court concluded that the evidence applicants were seeking to introduce raised only a "plausible likelihood" of prevailing in their renewed facial challenge to the statute. 822 F. Supp., at 238. It was at least unusual for a District Court to enjoin enforcement of a statute, the last word on which was the recent judgment of this Court upholding its constitutionality, on a showing of "plausible likelihood" of success. This element of the case would certainly, and properly, influence my colleagues' decision whether to review the judgment of the Court of Appeals, as well as their view of its merits if review were granted.

The application for stay of mandate is denied.

[Publisher's note: See 510 U.S. 1315 for the authoritative official version of this opinion. "CORRECTED COPY" is printed on the original.]

SUPREME COURT OF THE UNITED STATES

No. A-669

CBS INC., ET AL. *v.*
JEFF W. DAVIS, CIRCUIT JUDGE, SEVENTH JUDICIAL CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA ET AL.

ON APPLICATION FOR STAY

[February 9, 1994]

JUSTICE BLACKMUN, Circuit Justice.

CBS Inc., CBS News Division, a Division of CBS Inc., and 48 Hours ("CBS") apply for an emergency stay of a preliminary injunction entered by the Circuit Court for the Seventh Judicial District [Publisher's note: "District" should be "Circuit". But see 510 U.S. at 1315.] of South Dakota prohibiting CBS from airing videotape footage taken at the factory of Federal Beef Processors, Inc. ("Federal"), a South Dakota meat packing company. CBS seeks to televise the videotape this evening on a 48 Hours investigative news program and contends that the injunction constitutes an intolerable prior restraint on the media. Due to the time pressure involved in resolving this emergency application, my discussion is necessarily brief.

As part of an ongoing investigation into unsanitary practices in the meat industry, CBS obtained footage of Federal's meat packing operations through the cooperation of a Federal employee, who voluntarily agreed to wear undercover camera equipment during his shift one day in Federal's plant. The employee received no compensation for his cooperation. CBS represents that the investigation was not targeted at Federal but at the meat processing industry generally and that CBS did not intend to reveal the company that was the source of the material.

Federal sued to prevent the telecast of the videotape, alleging, *inter alia*, claims of trespass, breach of the duty of loyalty and its aiding and abetting, and violation of the Uniform Trade Secrets Act, Comp. Laws Ann. § 37-39-1, *et seq*. On January 25, 1994, the South Dakota Circuit Court entered a temporary restraining order, and on February 7 the court preliminarily enjoined CBS from "disseminating, disclosing, broadcasting, or otherwise revealing" any footage of the Federal plant interior. Findings of Fact, Conclusions of Law, and Order for Preliminary Injunction, Civ. No. 94-590, p. 8. The court found that disclosure of the videotape "could result in a significant portion of the national chains refusing to purchase beef processed at Federal and thereafter the Federal plant's closure" and that "[p]ublic dissemination of Federal's confidential and proprietary practices and processes would likely cause irreparable injury to Federal." *Id.*, at 3. The court concluded that because the videotape "was obtained by CBS, at the very least, through calculated misdeeds," *id.*, at 4, conventional First Amendment prior restraint doctrine was inapplicable, and that any injury to CBS resulting from delay was outweighed by the potential economic harm to Federal.

On February 8, 1994, the South Dakota Supreme Court denied CBS' application for a stay of the injunction and scheduled oral argument on CBS' original petition for a writ of mandamus for March 21, 1994. The State Supreme Court later amended its order to require that the circuit judge rescind the injunction or show cause on March 21 why a peremptory writ of mandamus should not be issued.

Although a single Justice may stay a lower court order only under extraordinary circumstances, such circumstances are presented here. For many years it has been clearly established that "any prior restraint on expression comes to this Court with a 'heavy presumption'

against its constitutional validity." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971), quoting *Carroll* v. *Princes* [Publisher's note: "*Princes*" should be "*Princess*".] *Anne*, 393 U.S. 175, 181 (1968). "Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1329 (1975) (BLACKMUN, J., in chambers). As the Court recognized in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 559 (1976), prior restraints are particularly disfavored:

> "A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted . . . . A prior restraint, by contrast, . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."

Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Even where questions of allegedly urgent national security, see *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), or competing constitutional interests, *Nebraska Press Assn.*, 427 U.S., at 559, are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures. *Id.*, at 562.

Federal has not met this burden here. The Circuit Court no doubt is correct that broadcast of the videotape "could" result in significant economic harm to Federal. Even if economic harm were sufficient in itself to justify

a prior restraint, however, we previously have refused to rely on such speculative predictions as based on "factors unknown and unknowable." *Id*., at 563; see also *New York Times Co.* v. *United States*, *supra.*

Nor is the prior restraint doctrine inapplicable because the videotape was obtained through the "calculated misdeeds" of CBS. In *New York Times Co*., the Court refused to suppress publication of papers stolen from the Pentagon by a third party. Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context. Even if criminal activity by the broadcaster could justify an exception to the prior restraint doctrine under some circumstances, the record as developed thus far contains no clear evidence of criminal activity on the part of CBS, and the court below found none.

I conclude that the decision below conflicts with the prior decisions of this Court, that there is a reasonable probability that the case would warrant certiorari, and that indefinite delay of the broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment. Entry of a stay therefore is appropriate under the All Writs Act, 28 U.S.C. § 1651. See *INS* v. *LEAP*, ___ U.S. ___, ___ (1993) (O'CONNOR, J., in chambers). If CBS has breached its state law obligations, the First Amendment requires that Federal remedy its harms through a damages proceeding rather than through suppression of protected speech.

The Circuit Court's injunction is therefore stayed.

[Publisher's note: See 510 U.S. 1319 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-704

BOB PACKWOOD, APPLICANT *v.*
SENATE SELECT COMMITTEE ON ETHICS

ON APPLICATION FOR STAY

[March 2, 1994]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant Senator Bob Packwood requests that I grant a stay pending appeal to the Court of Appeals for District of Columbia Circuit of a decision by the District Court enforcing the subpoena *duces tecum* issued by respondent Senate Select Committee on Ethics (Senate Ethics Committee). The Court of Appeals recently, and unanimously, denied his emergency motion for a stay pending appeal.

The criteria for deciding whether to grant a stay are well established. An applicant must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. *Barnes* v. *E-Systems, Inc. Group Medical & Surgical Ins. Plan*, 501 U.S. ___, ___ (1991) (slip op., at 2) (SCALIA, J., in chambers). Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden. "When a matter is pending before a court of appeals, it long has been the practice of members of this court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Organization* v. *Schafer*, 507 U.S. ___, ___ (1993) (slip

op., at 2) (O'CONNOR, J., concurring in denial of stay application) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d, [Publisher's note: The comma preceding this note is surplus.] 615, 616 (1960) (Harlan, J., in chambers); see also *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (a stay applicant's "burden is particularly heavy when . . . a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals").

Applicant raises three challenges to the enforcement of the subpoena. First, he contends that the subpoena is impermissibly broad and seeks information beyond the defined subject matter of the pending Committee investigation. In applicant's view, the subpoena should have been limited to those documents pertaining to the Committee's initial inquiry into allegations regarding sexual misconduct; as it stands now, the subpoena, according to applicant, is tantamount to a general warrant. See *Stanford* v. *Texas*, 379 U.S. 476, 480 (1965) (holding that general warrants are clearly forbidden by the Fourth Amendment).

As we stated in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946), determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." Because resolution of applicant's claim would entail a factbound determination of the nature and scope of respondent's investigation, I do not think his claim raises an issue on which four members of the Court would grant certiorari. Cf. *United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues"). Moreover, whatever merit applicant's argument may have had initially, it has been seriously

undermined by the evidence, presented to the District Court, that his diary transcripts and tapes have been altered. Regardless of the scope of respondent's initial inquiry, surely respondent has the authority to investigate attempts to obstruct that inquiry, and the evidence of tampering very likely renders all of the requested diary entries relevant to that investigation.

Applicant next asserts that the subpoena violates his Fourth Amendment right to privacy. The District Court, relying on our decisions in *O'Connor* v. *Ortega*, 480 U.S. 709 (1987), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), balanced applicant's privacy interests against the importance of the governmental interests. The Court concluded that the latter outweighed the former. Applicant does not quarrel with the legal standard applied by the District Court, only with its conclusion. Because this claim thus also involves only a factbound determination, I do not think certiorari would be granted to review it.

Finally, applicant argues that the subpoena violates his Fifth Amendment protection against self-incrimination. He relies primarily on *Boyd* v. *United States*, 116 U.S. 616 (1886), and argues that the Courts of Appeals are in conflict as to whether *Boyd* remains controlling with regard to the production of private papers. We recently denied a petition for certiorari raising this precise issue. See *Doe* v. *United States*, 510 U.S. ___ (1994) (No. 93-523). Our recent denial demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue. See *South Park Independent School Dist.* v. *United States*, 453 U.S. 1301, 1304 (1981) (Powell, J., in chambers) (denying stay application because it raised issues "almost identical to those presented three years ago, when the Court voted to deny certiorari").

Accordingly, the request for a stay is denied.

[Publisher's note: See 512 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-124

EDWIN EDWARDS, GOVERNOR OF LOUISIANA, ET AL., *v.* HOPE MEDICAL GROUP FOR WOMEN, ET AL.

ON APPLICATION FOR STAY

[August 17, 1994]

JUSTICE SCALIA, Circuit Justice.

Applicants, officers of the State of Louisiana, ask that I stay an order entered by the United States District Court for the Eastern District of Louisiana which enjoins them from enforcing La. Rev. Stat. Ann. § 40:1299.34.5 (West 1994) while at the same time accepting federal Medicaid funds pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. The District Court stayed its judgment until 5:00 p.m. on August 19, 1994. Yesterday, the Court of Appeals for the Fifth Circuit unanimously denied the applicants' motion for stay pending appeal.

Section 40:1299.34.5 provides in relevant part:

> [N]o public funds . . . shall be used in any way for, to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother.

The District Court concluded that this statute was inconsistent with what it determined to be the requirement of Title XIX, as modified by the 1994 version of the Hyde Amendment, Pub. L. No. 103-112 § 509, 107 Stat. 1082, 1113 (1993), that States participating in the Medicaid program fund medically necessary abortions upon fetuses conceived by acts of rape or incest.

Accordingly, it ordered applicants either to cease enforcing section 40:1299.34.5 or to withdraw from participation in the Medicaid program. *Hope Medical Group for Women* v. *Edwards*, No. 94-1129 (E.D. La. July 28, 1994).

The practice of the Justices has consistently been to grant a stay only when three conditions obtain. There must be a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the applicant's position is correct) if the judgment below is not stayed. *Barnes* v. *E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan*, ___ U.S. ___, ___, 112 S. Ct. 1, 2 (1991) (Scalia, J., in chambers). Moreover, when a District Court judgment is reviewable by a Court of Appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears "an especially heavy burden," *Packwood* v. *Senate Select Comm. on Ethics*, ___ U.S. ___, ___, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers).

Under this standard, I have no authority to stay the judgment here. The only issue potentially worthy of certiorari is the premise underlying the District Court's decision: that Title XIX requires States participating in the Medicaid program to fund abortions (at least "medically necessary" ones) unless federal funding for those procedures is proscribed by the Hyde Amendment. The Courts of Appeals to address this question have uniformly supported that premise. See *Roe* v. *Casey*, 623 F.2d 829, 831, 834 (CA3 1980); *Hodgson* v. *Board of County Comm'rs*, 614 F.2d 601, 611 (CA8 1980); *Zbaraz* v. *Quern*, 596 F.2d 196, 199 (CA7 1979), cert. denied, 448 U.S. 907 (1980); *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 126-27, 134 (CA1), cert. denied, 441 U.S. 952 (1979). We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on

the Title XIX question unless and until a conflict in the Circuits appears.

Accordingly, the application for a stay of the judgment of the District Court for the Eastern District of Louisiana is denied.

[Publisher's note: See 513 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-369

IN RE DOW JONES AND COMPANY, INC.

ON APPLICATION FOR STAY

[December 5, 1994]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

On November 3, 1994, the United States Court of Appeals for the District of Columbia, Division for Appointing Independent Counsels, issued an order denying Dow Jones & Company, Inc.'s (Dow Jones) "Motion for Disclosure of and Access to Report of Former Independent Counsel Robert B. Fiske." That order was filed "under seal," apparently to prohibit Dow Jones from publishing or reporting on the order or its contents. Dow Jones subsequently filed a Motion to Unseal the November 3, 1994 Order (which has not been ruled on) and a Motion for Reconsideration of the November 3, 1994 Order.

On November 22, 1994, Dow Jones filed in this Court an Emergency Application for Stay of the November 3, 1994 Order, seeking permission only to publish and report on the Court of Appeals' order and its contents. The following day, the Court of Appeals denied Dow Jones' previously filed Motion for Reconsideration by an order in which it discussed the November 3, 1994 Order and its contents, and gave its reasons for refusing to release the report of Independent Counsel Fiske. This order was *not* filed "under seal," and there is no indication that Dow Jones is prohibited from reporting on or publishing this order. Because Dow Jones may report on and publish this second order, which refers to the

November 3, 1994 Order and its contents, I believe that Dow Jones' Emergency Application for Stay is moot.

[Publisher's note: See 513 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A-555 AND A-558

EDWARD J. O'CONNELL, GUARDIAN AD LITEM FOR BABY BOY RICHARD

A-555 *v.*

OTAKAR KIRCHNER

JOHN AND JANE DOE

A-558 *v.*

OTAKAR KIRCHNER

ON APPLICATION [Publisher's note: "APPLICATION"should be "APPLICATIONS". But see 513 U.S. at 1303.] FOR STAYS

January 28, 1995

JUSTICE STEVENS, Circuit Justice.

The guardian *ad litem* for Baby Boy Richard and his adoptive parents have filed with me in my capacity as Circuit Justice for the Seventh Circuit applications to recall the mandate of the Illinois Supreme Court and to stay that Court's issuance of a writ of habeas corpus directing that custody of Baby Boy Richard be transferred to his natural father. The decision implements an earlier judgment entered by the Illinois Supreme Court, see *Petition of Doe*, 159 Ill. 2d 347, 202 Ill. Dec. 535, 638 N.E.2d 181 (1994); two months ago, this Court denied a petition for certiorari seeking review of that judgment, ___ U.S. ___ [115 S. Ct. 499] (1994).

The applications are based on a procedural due process theory that Baby Boy Richard has a constitutionally protected liberty interest in remaining in the family of John and Jane Doe, his adoptive parents, and that the Does have a liberty interest in maintaining their relationship with Richard. Under this theory, no writ of habeas corpus ordering a change in the child's

custody could be issued absent a full and fair hearing. I accept the representation in footnote 5 of the Does' application that this claim was presented to the Illinois Supreme Court, at least as to the rights of the adoptive parents. I must therefore assume that the state court passed upon this claim and that this Court has jurisdiction. I have concluded, however, that the claim cannot succeed. The underlying liberty interests the applicants claim have already been the subject of exhaustive proceedings in the Illinois courts, culminating in the Illinois Supreme Court's decision last year. The result of those proceedings was a determination that the biological father was entitled to present custody. The habeas corpus proceeding from which the adoptive parents now seek relief was an execution of the Court's prior decision, ordering the adoptive parents to surrender custody "forthwith." That order adjudicated no new substantive rights, but merely enforced the mandate of the prior decision. Accordingly, applicants have received all the process due them under federal law.

The adoptive parents also claim that Illinois law requires an additional hearing in these circumstances. But the highest court in the State apparently disagrees; for if applicants correctly described their state-law entitlement, the Supreme Court of the State would have ordered the hearing they seek. I have no authority to review that Court's interpretation of the law of Illinois. Finally, the regrettable facts that an Illinois court entered an erroneous adoption decree in 1992 and that the delay in correcting that error has had such unfortunate effects on innocent parties are, of course, not matters that I have any authority to consider in connection with the dispositions of the pending applications for federal relief.

Accordingly, both stay applications are denied.

It is so ordered.

[Publisher's note: See 515 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-126

JAMES LEE FOSTER, SHERIFF, ET AL., *v.*
DARRELL WAYLAND GILLIAM, JR., ET AL.

ON APPLICATION FOR STAY

[August 17, 1995]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The State of South Carolina seeks relief from an order of the Court of Appeals for the Fourth Circuit, in which that court refused to stay the issuance of a writ of habeas corpus to respondents, defendants in criminal proceedings in South Carolina. The State asks that I stay the District Court's order and allow the State to resume its prosecution of respondents, and stay the enlargement of respondents pending appellate review of their habeas corpus petition.

Respondents were prosecuted in South Carolina state court in 1994 on charges of murder and lynching. During the trial, confusion and dispute arose over whether particular photographs which had been seen by the jury during a luncheon recess had actually been admitted into evidence or were merely marked for identification. The prosecuting attorney's motion for a mistrial was granted by the trial court over respondents' objection, and the trial court calendared the case for a second trial starting July 17, 1995. Between the first and the second trial, the trial court denied a motion by respondents to dismiss the charges on grounds of double jeopardy, and the Supreme Court of South Carolina dismissed respondents' appeal without ruling on its merits.

Respondents then sought habeas relief in federal court under 28 U.S.C. § 2254, and sought to enjoin the imminent second trial pending final disposition of their habeas petition. On July 11, 1995, six days before the second trial was to start, the District Court for the District of South Carolina refused to issue an injunction, and a panel of the Court of Appeals affirmed the district court's determination four days later, with one judge in dissent. On July 20, three days into the trial, the Court of Appeals *en banc* granted respondents' request for a temporary restraining order, enjoined the state proceedings until the District Court ruled on respondents' habeas petition, and ordered the District Court to rule on the petition as expeditiously as possible. The State did not apply for a stay of the Court of Appeals' order at this time.

The very next day, the District Court, having held an eight-hour hearing to investigate respondents' double jeopardy claim, granted respondents' petition for a writ of habeas corpus. (This order, though entered July 21, was not reduced to writing for another week.) The District Court denied the State's application to stay the issuance of the writ on July 31, and the Court of Appeals denied a similar application on August 8. The State then made the application before me now.

However debatable may have been the justification for the Court of Appeals' July 20 order enjoining the continuation of a state criminal trial which had already begun, the trial was interrupted as of that date, and the State sought no relief in this Court from the order of the Court of Appeals. Nothing I do now, several weeks later, can undo the interruption of the state trial, and I therefore decline to stay the District Court's order granting habeas relief to the extent that it enjoins the resumption of the state trial proceedings.

That portion of the District Court's order releasing respondents from custody, however, seems to me to

stand on a different footing, and I believe that the State has met the traditional criteria for a stay of the enlargement of a prisoner in a habeas corpus proceeding. The state trial court ruled against respondents' double jeopardy claims on the merits. In *Arizona* v. *Washington*, 434 U.S. 497 (1978), we held that one claiming double jeopardy by reason of a second trial must show that there was no "manifest necessity" for the trial court to grant the State's mistrial motion. And we stated that the trial court's judgment about the necessity is entitled to great deference, never more so than when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors. *Id.*, at 513-514. *Washington* indicates that the State will be able to present at the least a substantial case on the merits on appeal, and the other traditional factors in a stay analysis counsel in favor of continued custody. See *Hilton* v. *Braunskill*, 481 U.S. 770, 777-778 (1987) (discussing the circumstances in which a stay of enlargement should be granted under Fed. Rules App. Proc. 23(c) and (d), which are virtually identical to this Court's Rules 36.3(b) and 36.4). I will therefore stay the enlargement of respondents under the District Court's July 21 order pending disposition of the State's appeal from that order (now set for argument before the *en banc* court on September 26) by the Court of Appeals.

Accordingly, the application for stay of enlargement is granted, and the application is otherwise denied.

[Publisher's note: See 515 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-180

JOHNNY PAUL PENRY *v.* TEXAS

ON APPLICATION FOR EXTENSION OF TIME

[August 28, 1995]

JUSTICE SCALIA, Circuit Justice.

I have before me an application for extension of time in which to file a petition for a writ of certiorari to the Court of Criminal Appeals of Texas. Counsel seek a 59-day extension of the filing deadline "because of the voluminous record below and the breadth of errors that were committed below which warrant review by this Court." Counsel explain that "[t]he petitioner's brief to the Court of Criminal Appeal[s] of Texas discussed 132 points of error and is 375 pages in length. The State's brief is 248 pages in length. The judgment affirming petitioner's conviction and death sentence is 76 pages with 6 additional pages of concurrences." The application offers one additional reason for the extension request: "[C]ounsel of record will be out of his office during the entire week before September 5, 1995—the day that the time to file the petition will expire."

Our rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment," Rule 13.1, and that a Justice may extend the time to file for up to 60 days "for good cause shown," Rule 13.2. Our rules specify, however, that "[a]n application to extend the time to file a petition for a writ of certiorari is not favored." Rule 13.6.

I have made it clear that I take the role of disfavor seriously. In *Madden* v. *Texas*, 498 U.S. 1301 (1991) (SCALIA, J., in chambers), I considered four applications for extensions of time in capital cases. Three of them sought an extension because appellate counsel had withdrawn from the applicant's case (with no indication that the withdrawal could not reasonably have been foreseen). *Id.*, at 1302-1304. In the fourth, the asserted reason was similar to that offered here: counsel needed additional time "'to ensure that the important constitutional issues in [the] case are properly researched and presented to this Court." *Id*., at 1302. At that time, I expressed my view that "none of these applications, as an original matter, would meet the standard of 'good cause shown' for the granting of an extension." *Id*., at 1304. I nonetheless granted extensions in the three cases where counsel had withdrawn, primarily because I was a new Circuit Justice, and was reluctant to impose without notice a standard more stringent, perhaps, than what the Fifth Circuit bar was accustomed to. I gave notice, however, that "I shall not grant extensions in similar circumstances again." *Id*., at 1305.

By now, counsel litigating in the Fifth Circuit ought to be familiar with my view of what constitutes "good cause" to support the disfavored application to extend the time to file a petition for certiorari. See R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice § 6.7 (7th ed. 1993). The reasons offered by counsel in this application fall short. As I have previously observed, all applicants can honestly claim that they would benefit from additional time to prepare a petition for certiorari. *Kleem* v. *INS*, 479 U.S. 1308 (1986) (SCALIA, J., in chambers); see also *Madden*, *supra*, at 1304. By their own account, counsel here filed a brief of 375 pages, raising 132 assignments of error, in the Court of Criminal Appeals; it is inconceivable that

this could have been achieved without acquiring considerable familiarity with the record, voluminous though it may be. Moreover, counsel sought rehearing below, and thus have had six months to review the opinion of the Court of Criminal Appeals, which discussed in considerable detail the 132 allegations of error as it rejected each of them. Finally—and needless to say—counsel's planned absences should affect neither the degree of preparation afforded a client's case nor the orderly administration of our deadlines.

This is indeed a capital case, but our rules envision only one "good cause" standard. See *id.*, at 1304-1305. Because the applicant here has failed to meet that standard, I deny the application for extension of time.

[Publisher's note: See 515 U.S. 1307 for the authoritative official version of this opinion.]

RODRIGUEZ *v.* TEXAS

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

No. 95-5650 (A-202). Decided August 31, 1995

An application for a stay of execution pending disposition of a petition for writ of certiorari seeking direct review of the Texas Court of Criminal Appeals' judgment is denied, without prejudice to its renewal at a later date. There being no reason to believe that the certiorari petition will not be disposed of well before the scheduled execution date, that date is not likely to interfere with the petition's orderly processing. See *Cole* v. *Texas*, 499 U.S. 1301.

JUSTICE SCALIA, Circuit Justice.

I have before me an application for a stay of execution pending disposition of a petition for writ of certiorari to the Court of Criminal Appeals of Texas. Petitioner seeks direct review of that court's judgment, entered May 17, 1995, affirming his conviction and death sentence. The petition was timely filed on August 15, 1995, and petitioner's application states that he is scheduled to be executed on November 8, 1995.

I have said that "I will . . . in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari." *Cole* v. *Texas*, 499 U.S. 1301 (1991). I have also made clear, however, that the purpose of such a stay is to prevent the execution date from "interfer[ing] with the orderly processing of a petition on direct review by this Court." *Ibid.* In the present case, and at the present time, there is no reason to believe such interference will occur. A petition for certiorari filed in this Court on August 15 will ordinarily be disposed of well before November 8.

Staying the hand of state justice is no small matter, and should not be considered when no need exists. Accordingly, the application for stay is denied, without prejudice to its renewal at a later date.

[Publisher's note: See 515 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-276

McGRAW-HILL COMPANIES, INC. *v.*
PROCTER & GAMBLE COMPANY ET AL.

ON APPLICATION FOR STAY

[September 21, 1995]

MEMORANDUM OF JUSTICE STEVENS.

On September 19, 1995, petitioner, the publisher of Business Week Magazine, filed with me in my capacity as Circuit Justice for the Sixth Circuit, a hastily prepared document entitled "Application to Stay Restraining Order Pending Certiorari." The Caption of the document recites: "On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit." The Conclusion of the document asks me to stay the "outstanding prior restraint" against petitioner effected by an order entered by the United States District Court for the Southern District of Ohio on September 13. That order restrains petitioner from publishing an article containing "any disclosure of documents filed under seal, or the contents thereof, without the prior consent" of the District Court. Petitioner requests that a stay of the District Court order "be granted pending its filing of and this Court's ultimate determination of a petition for a writ of certiorari."

It appears that the District Court order of September 13 was entered without notice to petitioner and that it was not supported by the findings of fact required by Rule 65(b) of the Federal Rules of Civil Procedure. I assume, therefore, that if petitioner had filed a prompt motion to dissolve the order, the District Court would have granted that relief, or if it had refused to do so,

the Court of Appeals would have had jurisdiction to address the merits of the restraint. Petitioner, however, filed an expedited appeal in the Sixth Circuit, and, on September 19, that Court dismissed the appeal on the ground that it did not have jurisdiction to review the merits of the restraining order.

The stay application that petitioner has filed with me indicates that it will seek review by writ of certiorari of the Court of Appeals' jurisdictional holding, but the arguments advanced in the application address the merits of the District Court's order. The application does not explain why there is a substantial basis for concluding that the Court of Appeals erred, or that four justices of this Court would grant certiorari to review the jurisdictional issue. Moreover, a stay is not necessary to preserve this Court's jurisdiction to review the Court of Appeals decision; indeed, if the requested stay were granted, any possible review of that decision would probably become moot.

In its discussion of the merits of the District Court's order, petitioner explains that the documents whose contents it wants to publish were attachments to a motion filed by Procter & Gamble in the District Court on September 1, 1995. Referring to that motion, petitioner states:

> The motion was not filed under seal with the district court and there is no indication anywhere on the motion itself that any of the described attachments were being filed under seal.

That statement appears to have been intended to give me the impression that petitioner's agents obtained knowledge of the contents of the attachments either (1) without any notice that they were filed under seal, or (2) under the legitimate belief that their filing in court without any effort to preserve their confidentiality had the effect of placing their contents in the public domain.

The memoranda filed in opposition to the stay application indicate that I may have been misled by the foregoing statement and that disputed issues of fact should be resolved before expressing an opinion on the important constitutional issue that petitioner argues in its stay application. The statement that I have quoted above seems to acknowledge that the manner in which petitioner came into possession of the information it seeks to publish may have a bearing on its right to do so.

Even if I have jurisdiction to pass on the merits of the District Court's order of September 13—a matter which is doubtful at best—I am satisfied that the wiser course is to give the District Court an opportunity to find the relevant facts, and to allow both that Court and the Court of Appeals to consider the merits of the First Amendment issue before it is addressed in this Court. The stay application is, accordingly, denied.

[Publisher's note: See 516 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-368

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* RADIOFONE, INC.

ON APPLICATION TO VACATE STAY

[October 25, 1995]

MEMORANDUM OF JUSTICE STEVENS.

The Federal Communications Commission has applied to me in my capacity as Circuit Justice for the Sixth Circuit to vacate a stay entered by the Court of Appeals on October 18, 1995. The stay prevented the FCC from taking any action in furtherance of a nationwide auction of a portion of the electromagnetic spectrum. Apparently, the Court of Appeals feared that completion of the auction would moot a challenge pending before it to FCC regulations that prevent the respondent from bidding for three of the 493 licenses available. I am persuaded, however, that allowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that the respondent overcomes the presumption of validity that supports the FCC regulations and prevails on the merits. I am also persuaded that the harm to the public caused by a nationwide postponement of the auction would outweigh the possible harm to respondent. I should point out that because the respondent has not filed an opposition to the application, my opinion is based on the factual representations in the FCC's papers.

Accordingly, the application to vacate the stay is GRANTED.

[Publisher's note: See 517 U.S. 1301 for the authoritative official version of this opinion.]

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

NETHERLAND, WARDEN *v.* TUGGLE

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A-910. Decided May 15, 1996

An application to vacate the Fourth Circuit's order staying respondent Tuggle's execution has been filed. However, there is no such stay in effect in this case. Although Tuggle asked the Fourth Circuit both to stay his execution and to stay issuance of its mandate in his case, the court order only stayed the issuance of its mandate.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed an application to vacate an order of the Court of Appeals for the Fourth Circuit staying the execution of respondent Tuggle. It is my understanding, however, that no such stay of execution is in effect. While Tuggle asked the Court of Appeals both to stay his execution and to stay issuance of its mandate in his case, see *Tuggle* v. *Netherland*, 79 F.3d 1386 (1996), the Court of Appeals' order only stayed the issuance of its mandate for a period of 30 days. Hence there is no stay of execution for me to vacate.

[Publisher's note: See 519 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-425

J.D. NETHERLAND, WARDEN *v.* COLEMAN WAYNE GRAY

ON APPLICATION TO VACATE STAY OF EXECUTION

[December 23, 1996]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Commonwealth of Virginia has asked me to vacate the Court of Appeals for the Fourth Circuit's stay of execution in respondent Gray's case, noting that the court did not purport to follow the standard for such stays set out in *Barefoot v. Estelle*, 463 U.S. 880 (1983).

In *Gray* v. *Netherland*, 518 U.S. ___, ___ (1996) (slip op., at 9-15), we remanded to the Court of Appeals Gray's claim that the Commonwealth had violated due process by misleading him about evidence it intended to use at sentencing. The court held that the claim was procedurally defaulted. *Gray* v. *Netherland*, 99 F.3d 158, 166 (CA4 1996). The Court of Appeals therefore remanded Gray's case to the District Court with instructions to dismiss his *habeas corpus* petition but added, "[i]n view of the Supreme Court's opinion remanding the case to us, we think the respectful course is to stay both our mandate and [Gray's] execution until such time as the Supreme Court rules on any petition for certiorari." *Ibid.*

We have repeatedly and recently stated that it is not appropriate for a Court of Appeals to grant a stay of execution to permit a death-row inmate to file a petition for a writ of certiorari without first conducting the *Barefoot* inquiry. See *Netherland* v. *Tuggle*, 515 U.S. ___, ___ (1995) (slip op., at 2). We have rejected the

view that "a capital defendant as a matter of right [is] entitled to a stay of execution until he has filed a petition for certiorari in due course." *Id.*, at ___ (slip op., at 2).

I nonetheless deny the Commonwealth's motion to vacate the stay of execution because, so far as I can tell, there is no execution scheduled. If there is no execution scheduled, it cannot be stayed, and there is nothing for me to vacate. See *Netherland* v. *Tuggle*, 517 U.S. ___ (1996) (REHNQUIST, C. J., Circuit Justice) (no stay of execution to vacate where Court of Appeals had only stayed its own mandate).

[Publisher's note: See 524 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-53 (98-93)

ROBERT RUBIN, SECRETARY OF THE TREASURY, ET AL., *v.* UNITED STATES OF AMERICA ACTING THROUGH THE INDEPENDENT COUNSEL

ON APPLICATION FOR STAY

[July 17, 1998]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

This case is before me as Circuit Justice on the application for stay submitted by the Solicitor General, on behalf of the Secretary of the Treasury Robert E. Rubin. Because several of my colleagues are out of the country, I have decided to rule on the matter myself rather than refer it to the Conference.

An applicant for stay first must show irreparable harm if a stay is denied. In my view, the applicant has not demonstrated that denying a stay and enforcing the subpoenas pending a decision on certiorari would cause irreparable harm. The Secretary identifies two injuries that would result from denying a stay: any privileged information would be lost forever and the important interests that the "protective function privilege" protects would be destroyed. I cannot say that any harm caused by the interim enforcement of the subpoenas will be irreparable. If the Secretary's claim of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future. On balance, the

equities do not favor granting a stay.

An applicant for stay must also show that there is a likelihood that four members of this Court will grant certiorari to review the decision of the Court of Appeals on the merits. This case is obviously not a run-of-the-mine dispute, pitting as it does the prosecution's need for testimony before a grand jury against claims involving the safety and protection of the President of the United States. I shall assume, without deciding, that four members of this Court on that basis would grant certiorari.

But a stay applicant must also show that there is a likelihood that this Court, having granted certiorari and heard the case, would reverse the judgment of the Court of Appeals. The applicant simply has not made that showing to my satisfaction, and I believe my view would be shared by a majority of my colleagues. The opinion of the Court of Appeals seems to me cogent and correct. The District Court which considered the matter was also of that view, and none of the nine judges of the Court of Appeals even requested a vote on the applicant's suggestion for rehearing *en banc*.

The application for stay is accordingly denied.

[Publisher's note: See 525 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A-396

RANDOLPH MURDAUGH, SOLICITOR 14TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, ET AL. *v.* AUNDRAY LIVINGSTON

ON APPLICATION TO VACATE STAY

[November 18, 1998]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The district court in this case entered a temporary restraining order on October 20, 1998, against the State, enjoining it from proceeding further with the indictments against respondent. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order cannot remain in effect for more than ten days unless extended for good cause by the district court or consented to by the adverse party. I am advised that the Magistrate Judge to whom this case was assigned has recommended dismissal, and so far as I know, the matter is now pending before the district court. I therefore deny the State's application to vacate the stay, without prejudice to its renewal should the district court issue a preliminary injunction or further stay the criminal proceedings.