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PREFACE

Surely the year will come when we will not stumble across a single old and previously unpublished in-chambers opinion. Based on our experience so far, however, I am inclined to suspect that our first barren year may still be pretty far in the future. This volume, for example, includes both (a) *In re Heath*, the first opinion we have seen from Chief Justice Melville W. Fuller, and (b) *In re Richardson*, a strikingly blunt, even brutal, rejection by the first Justice John Marshall Harlan of an early attempt by a habeas corpus applicant to challenge the validity of his murder conviction on grounds related to the racial composition of the convicting jury. And members of the current Court continue to opine in chambers. During the 2009 Term, Chief Justice John G. Roberts issued two opinions, and Justice Antonin Scalia issued one.

And, unfortunately, we must continue our longstanding appeal for help with *Hooper v. Goldstein* (1929). It is the only opinion we have yet to track down — not for lack of trying — from the 21 missing opinions listed in Cynthia Rapp's introduction to the first volume in this series.

We continue to follow the conventions we've used in the other in-chambers volumes: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) running heads are preserved where they appear in the originals, and added to those that lack them; (3) a caption misdesignating the Term in which an opinion was issued is in the original; and (4) party designations ("applicant", "movant", "petitioner", "plaintiff", etc.) are sometimes used more loosely than is the Court's wont, but in each case the identity and posture of the parties are clear, and so they remain unchanged. Also bear in mind that 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. The relevant *U.S. Reports* citation appears in a "Publisher's note" above each opinion.

The page numbers here are the same as they will be in the bound volume 4 of *In Chambers Opinions*, thus making the *permanent* citations available upon publication of this *Supplement*. If you find any errors — or any in-chambers opinions that we have missed — please let us know at editors@greenbag.org. We will give credit where credit is due.

Thanks as always to Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts; to William Suter, Clerk of the Court, for his support of this project; to the George Mason University School of Law and its Law & Economics Center for supporting the *Green Bag*; to Green Bag Fellow Liz Heaps; and to the indefatigable Ira Matetsky.

Ross E. Davies
January 24, 2011

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VACATE STAY, APPLICATIONS TO (cont'd)
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King v. Smith
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Meredith v. Fair
Metropolitan County Bd. of Ed. v. Kelley
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Authority to Vacate
Certain Named and Unnamed Children v. Texas
Coleman v. Paccar, Inc.
CFTC v. British Am. Commodity Options
Holtzman v. Schlesinger, 2 Rapp 590
Meredith v. Fair
New York v. Kleppe
O'Connor v. Board of Ed. of School Dist. 23

Remand Order
Blodgett v. Campbell

Stay of Execution
Kemp v. Smith, 3 Rapp 1133
Kemp v. Smith, 3 Rapp 1155
Netherland v. Tuggle
Netherland v. Gray

[Publisher's note: This opinion is also available in the *Federal Reporter* at 29 F. 775 (C.C.N.J. 1887); *see also Ex parte Lamar*, 274 F. 160, 175 (2d Cir. 1921).]

UNITED STATES *v.* PATTERSON, Keeper, etc.

(*Circuit Court, D. New Jersey*. January 31, 1887.)

On *Habeas Corpus* for the body of Oscar L. Baldwin. The petition for *habeas corpus* in this case was presented to JOSEPH P. BRADLEY, an associate justice of the supreme court of the United States, allotted to the Third circuit, on the thirtieth of December, 1886, and alleges that the petitioner, Oscar L. Baldwin, is imprisoned in the state's prison of the state of New Jersey, in custody of John H. Patterson, the keeper thereof, under judgment, sentence, and commitment thereon of the district court of the United States for the district of New Jersey, said judgment being rendered on the thirty-first day of January, 1882, upon petitioner's plea of guilty to three indictments found against him under section 5209 of the Revised Statutes of the United States, — one for misapplying the funds of the Mechanics' National Bank of Newark, of which he was cashier, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers; that, being set at the bar of said district court for sentence, the same was pronounced against him in the following words, as recorded in the records of said court, to-wit:

> "The court do order and adjudge that the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey , for the term of five (5) years upon each of the three indictments above named, said terms not to run concurrently; and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

— That, immediately upon the rendition of said judgment and sentence, the petitioner was committed to the custody of the keeper of said state's prison, and that from thence hitherto he has been and is now kept in said state's prison, at hard labor, according to all the rules and regulations of said prison, the same established and carried on in the case of all persons convicted under the laws of New Jersey, and sentenced to hard labor by its courts; that by the laws of said state the keeper of the state's prison is required to have kept a correct, impartial, daily record of the conduct of each prisoner, and of his labor, whether satisfactory or otherwise, and to lay the same before the inspectors as often as they may require; that the said inspectors, being satisfied that the record is properly kept, shall di-

rect the keeper, for every month of faithful performance of assigned labor by any convict, to remit to him two days of the term for which he was sentenced; for every month of manifest effort at intellectual improvement and self-control, to be certified by the moral instructors, one day; provided, that in any month in which a convict shall have merited and received punishment no such remission shall be made, and, in case of any flagrant misconduct, the inspectors may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just; that, on the recommendation of the keeper and moral instructor, it shall be lawful for the inspectors to remit an additional day per month to every convict who for 12 months preceding shall have merited the same by his continuous good conduct, and for each succeeding year, progressively, to increase the remission one day per month for that year.

The petitioner states that, by virtue of the 5544th section of the Revised Statutes of the United States, he is entitled to the benefit of these regulations; and that by reason of his good behavior he became entitled to and has been awarded such credits; and that by force thereof such deductions have been made from the said term of five years, for which he was sentenced, that said term expired and came to an end on the twenty-fifth day of January, 1886, a remission of 372 days having been allowed to him; also that the costs of prosecution of said indictments have been fully paid. The petitioner further states that he is advised by his counsel that he is not now detained in custody in said state's prison by virtue of any sentence; that a second term of five years' imprisonment has not begun, and will not begin, till the thirty-first day of January, 1887; and that he is therefore unlawfully detained in prison. He also, upon the same advice, contends that the judgment was unlawful, because it sentenced him to imprisonment at hard labor, whereas section 5209 of the Revised Statutes of the United States, under which he was indicted, imposed the punishment of imprisonment only. Also that no more than one sentence of five years' imprisonment could lawfully be imposed upon him under the said section, inasmuch as said offenses were each acts forming part of one act of misapplication of moneys. Also that the said sentence is unlawful for uncertainty, except as to the first term of five years' imprisonment, which has expired, and that the court had no lawful right or authority to impose any more than one term of five years' imprisonment on him. A duly-exemplified copy of the three indictments, and the proceedings thereon, and of the sentence pronounced against the petitioner, and of the award of remission of penalty by the inspectors of the state's prison, as stated in the petition, was annexed thereto, confirming the statement of facts set forth therein.

Upon this petition being presented to the said justice of the supreme court he allowed a writ of *habeas corpus* as prayed, and on the seventh

day of January, 1887, the same was duly returned before the said justice, at his chambers, in the city of Washington. The return set forth as the cause of imprisonment the warrant of commitment by virtue of which the petitioner was detained in custody, and which consists of a statement of the three indictments, by their several titles, with a copy of the sentence as set out in the petition, duly certified by the clerk of the said district court. The return further states that it appears by the receipt of said clerk, under his seal, that the costs of the prosecution have been paid; also that, upon the books of the prison, the petitioner appears entitled to a remission from the first of the three terms of imprisonment of 372 days, whereby the period of his punishment under the same expired on the twenty-fifth day of January, 1886.

Annexed to the return is a writing signed by the petitioner and his counsel, waiving all right to the production of his body according to the command of the writ, before the judge issuing the same, and requesting the said judge to proceed to inquire into the cause of his detention, and give judgment thereon without such production. And a supplemental return of the keeper was presented, containing a copy of said waiver and consent, and certifying that in consequence thereof the refrains from producing the said body, but avows his readiness, and submits, to produce the same to answer any order which may be made by said judge.

Cortlandt Parker, for petitioner.

Job H. Lippincott, U.S. Dist. Atty., *contra*.

BRADLEY, Justice. I have duly considered the matter aforesaid, and will proceed to state the conclusion to which I have come, and the reasons thereof. It is manifest that the judgment or sentence in this case is uncertain in this respect: it imposes the penalty of imprisonment at hard labor in the state's prison for the term of five years upon each indictment, and adds that the said terms shall not run concurrently, but does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he, nor the keeper of the prison, nor any other person, knows, or can possibly know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell

whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

The words used are undoubtedly equivalent to the words, 'the said terms shall follow each other successively.' But, if these words had been used, the case would not have been different. The inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.

If this were a mere error, it could not be considered on *habeas corpus*. The judgments of the district and circuit courts in criminal cases are final, and cannot be reviewed by writ of error, and a mere error of law, if in fact committed, is irremediable; as much so as are the decisions of the supreme court. But if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless, and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus*.

I do not say that the judgment in this case is void. It is a good judgment for the term of five years' imprisonment on each indictment. Perhaps these terms might have been lawfully made to take effect successively, if the order of their succession had been specified, although there is no United States statute authorizing it to be done. But this was not done. No distinction was made between them in this respect, and, as neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment. The additional words as to non-concurrence are void, because they are inca-

pable of application. It is as if a man should be sentenced to successive terms of imprisonment on each of several indictments, and to hard labor, or to be kept on bread and water, during one of the terms, without specifying which. The latter part of such a sentence would clearly be void, for it could not be allowed to the jailer to exercise his discretion as to the application of the aggravated penalties.

If there were any way in which the district court could amend its judgment, the case might perhaps be different. But I see no way in which it could do so without passing a new sentence, and that it could not do now, after the term has passed, and after one term of imprisonment has been suffered. What right would the court have now to determine that the expired term was due to any particular indictment more than to either of the others?

I have carefully read the able opinion of the supreme court of New Jersey in the case of *Gibbs* v. *State*, 45 N.J. Law, 379, and agree to all that the court there says as to the right of a criminal court to extend its judgment and proceedings on the record in proper form, regardless of imperfections in the minutes of its clerk. But in the present case there are no materials in existence for altering the form of the judgment under consideration, — at least nothing but what may rest in the bosom of the judge; and for him to resort to his memory at this day to alter the judgment would be to render a new judgment. It is unnecessary to say that the honorable judge of the district court would not adopt a proceeding so questionable and hazardous. The district attorney has supplied me with a certified copy, *literatim*, with all the erasures and interlineations of the rough minutes; but they exhibit nothing upon which the court could base any substantial alteration in the judgment as recorded.

In this view of the case, it is unnecessary to consider the other questions raised by the petition, and by the prisoner's counsel on the argument. But it does suggest another question which cannot be entirely overlooked. When the *habeas corpus* was allowed, the first term of five years had not expired by lapse of time, although at least one of the sentences had been satisfied by means of the remissions allowed for good conduct. Considering the three terms of imprisonment as by law running concurrently, do those remissions apply to all three of the sentences, or to only one of them? If to only one, and I had to decide this case, as in ordinary civil actions, according to the state of things when the writ was issued, I might be obliged to remand the petitioner into custody, and put him to the expense and trouble of another writ. But I think that on a *habeas corpus*, where the personal liberty of the citizen is involved, the decision should be made upon the actual *status* of the case. And as the five years have now entirely elapsed, and all the concurring terms have been fulfilled, the question of the applicability of the remission for good conduct to all the

sentences may be waived, and the prisoner be lawfully discharged, without deciding it. He is discharged accordingly.

[Publisher's note: This case should be captioned *In re Heath*. Chief Justice Fuller's handwritten opinion (signed in his hand) is referred to but not quoted in a "Statement by Mr. Chief Justice Fuller" at the beginning of the Supreme Court's decision in the case. From the Melville Weston Fuller Papers, Box 16, Manuscript Division, Library of Congress, Washington, DC; *see also In re Heath*, 144 U.S. 92 (1892).]

Supreme Court of the United States.
October Term 1891

In the matter of the petition of
Thomas ~~James~~ H Heath

for a writ of error to the
Supreme Court of the District
of Columbia

It appearing upon an examination of the petition, assignment of errors and record, that upon this application for a writ of error, a question arises in respect to the jurisdiction of this court, of sufficient gravity to render it proper that the application should be made to the court in session: It is ordered that the petitioner have leave and he is hereby directed to present his application to the court in open session on Monday next, January 25th, for argument upon the question of jurisdiction, and that notice of this order be at once given to the United States, and ~~it is ordered that~~ a copy of the brief for the petitioner be served not later than Friday, January 22d.

/s/ Melville W. Fuller
Chief Justice of the
United States

January 18, 1892

[Publisher's note: This case should be captioned *In re Richardson*. The opinion is in typescript, with "(copy)" handwritten at the top of the first page, and Justice Harlan's signature in his own hand at the end. From the Melville Weston Fuller Papers, Box 5, Manuscript Division, Library of Congress, Washington, DC; *see also* Letters from John M. Harlan to Chief Justice Fuller, Aug. 17 & 24, 1896, *in* Melville Weston Fuller Papers, Box 5, Manuscript Division, Library of Congress, Washington, DC; *State v. Richardson*, 24 S.E. 1028 (S.C. 1896).]

Washington, D.C., August 24th, 1896.

Dear Mr. Barrett:

I have your letter of the 21st, in which it is said that you were specially desirous that I should act on the application for the allowance of an appeal in the case of Aleck Richardson from the order of the Circuit Court of the United States denying his application for the writ of *habeas corpus*. The members of our court do not, in the first instance, unless in some cases requiring immediate action, pass upon applications for writs of error or appeals in cases beyond their respective circuits. In accordance with that custom, the papers you sent to me were transmitted to the Chief Justice, who, as I learn from your latter, has refused to allow an appeal.

You have the technical legal right to apply for your client to each one of the Justices of the Supreme Court, and I therefore take your letter to be substantially an application to me. Before the papers were sent to the Chief Justice, I examined them, and reached the same conclusion that he did. The only ground assigned in the papers sent by you for granting the writ is that your client was tried by a jury composed entirely of white men. It is not claimed that this resulted from any statute of the State excluding blacks from serving on juries, because of their race. If, therefore, any black man was, because of his race, excluded from the jury in Richardson's case, it was error on the part of the court in the trial, which was to be remedied by writ of error, not by *habeas corpus*. The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded, because of his race, any citizen, otherwise qualified, of the same race as that of the accused. *Ex parte Royall, 117 U.S. 241, 252, 252; In re Wood* [Publisher's note: "*In re Wood*" should be "*Wood v. Brush*"]*, 140 U.S. 278, 289; Gibson v. Missippii* [Publisher's note: "*Missippii*" should be "*Mississippi,*"] 162 U.S. 565. If you will read these cases you will perceive that there was not the slightest reason for the interference by the Circuit Court of the United States upon *habeas corpus* with the final action of the State Court, and

therefore the application for an appeal from the order of the Circuit Court denying the application made to it ought not to be granted. I should feel otherwise about this application if I could perceive that there was any possibility whatever that the Supreme Court would entertain jurisdiction of the case and consider it upon its merits. If the appeal were allowed, it would be dismissed on motion. The careless allowance of appeals in such cases has no other effect than to interfere with the ordinary administration of the criminal laws of the State. If the State court in the trial of the case has denied to the accused any right secured to him by the Constitution and laws of the United States, his remedy is not by *habeas corpus*. *Pepke vs Cronan, 155 U.S. 100; Andrews vs Swartz, 155* [Publisher's note: "*155*" should be "*156*"] *U.S. 272* [Publisher's note: There should be a period at the end of this sentence.]

Yours truly,
/s/ John M. Harlan

Mr. C.P. Barrett,
Spartanburgh, S.C.

[Publisher's note: This case should be captioned *Haack v. Brooklyn Labor Lyceum Association*. The original of this opinion was typed and recorded, with Justice Day's signature, in a letterbook. From the Papers of William R. Day, Box 2, Manuscript Division, Library of Congress, Washington, DC; *see also Haack v. Brooklyn Labor Lyceum Association*, 87 N.Y.S. 814; 87 N.Y.S. 814; 89 N.Y.S. 888 (Sup. Ct. 1904); 97 N.Y.S. 1136 (Sup. Ct.); 78 N.E. 1104 (N.Y. 1906); 107 N.Y.S. 1128 (Sup. Ct. 1907).]

Canton O. June, 29, 1906

Mr. Percival S. Menken, Counsellor etc.
c/o Menken Brothers,
87 Nassau St. New York

Dear sir:-

I am in receipt of your letter of the 26 inst. Also by express records in cases Haak V. [Publisher's note: "Haak V." should be "Haack v."] Brooklyn Labor Lyceum Association.

I note your statement of the cases and grounds upon which you claim to have the right of a writ of error to the Supreme Court of the United States.

After examination of the records I am of the opinion that no federal question appears upon the record in suchwise as to entitle you to an allowance of thewrit. [Publisher's note: "thewrit." should be "the writ."]

I therefore return to you by express today the records and papers received from you.

very truly yours,

/s/ William R. Day

[Publisher's note: This case should be captioned *Fairbanks Steam Shovel Co. v. Wills*. The originals of the two letters that make up this opinion were typed and recorded, with Justice Day's signature on each, in a letterbook. From the Papers of William R. Day, Box 3, Manuscript Division, Library of Congress, Washington, DC; *see also Fairbanks Steam Shovel Co. v. Wills*, 240 U.S. 642 (1916).]

Feb. 20, 1914.

My dear Sir:

I have your favor of the 18th inst., asking for allowance of appeal in the case of The Fairbanks Steam Shovel Co. v. William V. Wills, Trustee in Bankruptcy of the Estate of the Federal Contracting Co. The papers which you sent are evidently made out for allowance by the presiding Judge of the Circuit Court of Appeals for the Seventh Circuit, in which the case was decided. That Circuit is assigned to Justice Lurton, and ordinarily you would be required to make the application to him. Owing to the fact that Justice Lurton is temporarily absent, I am willing to consider your petition for allowance of appeal, although myself assigned to the Sixth Circuit.

I am inclined to allow the appeal, and suggest that you revise your papers to that it will appear that the allowance is made by me as a Justice of the United States Supreme Court, and reform the other papers accordingly. I notice that you have given person surety on the bond; I think it would be better if you would have it signed by some responsible surety company.

I herewith return the paper which, upon revision, you may send to me again.

Very truly yours,

/s/ William R. Day

E.B. Durfee, Esq.
Scofield, Durfee & Scofield
Marion, Ohio.

[Publisher's note: A handwritten "539" and a check mark appear at the top of the February 23 letter.]

Feb. 23, 1914.

My dear Sir:

I am in receipt of yours of the 21st inst., enclosing papers for allowance of appeal in the case of The Fairbanks Steam Shovel Co. v. Willis

[Publisher's note: "Willis" should be "Wills".], Trustee, etc. I return them herewith, with order allowing appeal and citation signed and bond approved, as requested.

Very truly yours,

/s/ William R. Day

E.B. Durfee, Esq.
Scofield, Durfee & Scofield
Marion, Ohio.

[Publisher's note: This opinion was typed on a sheet of plain paper, with "OFFICE OF THE CLERK SUPREME COURT, U.S." stamps dated "Aug 30 1956" in the upper left and right corners, and an autograph signature of Justice Reed and "August 29th 1956" written at the bottom. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 29 (OT56 St-Z; OT57 A-Hig); *see also Stanley v. United States*, 245 F.2d 427 (2d Cir. 1957).]

SUPREME COURT OF THE UNITED STATES

Jack Stanley, Thomas A. Warren, Isom Meyers and Hubert Stanley, Appellants,	)	
vs.	)	On Motion for Bail
United States of America, Appellee	)	

The appellants were convicted for violation of 18 U.S.C. § 1992 for setting fire to a bridge with intent to derail, disable or wreck interstate trains or other transportation units of an interstate railroad. Transcript of Testimony, Vol. I, p. 52 et seq. The District Court denied their motion for bail pending appeal on the grounds that the appeal is "frivolous and for delay." Motion for Bail, Ex. B. Circuit Judge Miller subsequently denied the same motion on the same grounds. Motion for Bail, Ex. C.

The principal point urged by appellants is that burning the bridge did not necessarily mean with intent to disable or derail a transportation unit. The defense contends that it knew the railroad was inspected before trains passed and therefore they could not have intended to wreck or disable a train. See Motion for Bail, p. 3.

Under the instructions, Transcript of Testimony, Vol. V, p. 636, Judge Ford instructed that an essential factor was "the purpose, the object to be attained, to derail or to disable or to wreck a railroad train that was used in interstate commerce." There was no objection to this instruction and the point now made was not brought out by appellants, see Transcript of Testimony, Vol. V, pp. 648-649, as well as the objections of Mr. Brown, p. 653 et seq.

The effort for review here seems frivolous and merely for delay. Cf. Ward and Bowers v. United States, on petition for admission to bail, opinion August 8, 1956, Mr. Justice Frankfurter as Circuit Justice.

August 29th
1956

/s/ Stanley Reed
Associate Justice

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Burton on the motion itself and dated "December 22, 1956". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 28 (OT56 Fil-Sch); *see also In re Portell*, 245 F.2d 183 (7th Cir. 1957).]

December 26, 1956.

Morris A. Shenker, Esquire,
408 Olive Street, Suite 802,
St. Louis, Missouri.

RE: UNITED STATES OF AMERICA V. PORTELL

Dear Mr. Shenker:

This letter is in confirmation of the action in the above-entitled case by Justices Burton and Douglas, respectively, and in confirmation of telegrams dispatched to you by this office on December 22nd and 24th, with respect to such action.

On December 22nd, Mr. Justice Burton denied the application for admission to bail in the following language:

> "December 22, 1956 -
>
> Upon consideration of the within motion, filed December 17, 1956, to admit to bail to appellant, who is now in custody pursuant to a commitment for civil contempt, and the brief in support of such motion, together with the memorandum for the United States, filed to-day, in opposition and a transcript of the contempt proceedings in the District Court of November 29 and December 6, 1956, and noting the denial by the District Court and the Court of Appeals on similar motions for bail, oral argument here is deemed unnecessary, and the motion for admission to bail is denied.
>
> Treating such motion also as an application to stay the execution of the civil contempt order, such application is denied.
>
> HAROLD H. BURTON
> Associate Justice assigned as Circuit
> Justice to the Seventh Judicial Circuit."

On December 24th, Mr. Justice Douglas denied the application, referred to herein, with the simple endorsement

"Denied - Wm. O. DOUGLAS - 12/24/56."

Very truly yours,
JOHN T. FEY, Clerk
BY

CJDG:tw Deputy.

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the application itself and dated "Aug. 7/57". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 28 (OT56 Fil-Sch); *see also Oerlikon Machine Tool Works Buehrle & Co. v. United States*, 151 F. Supp. 332 (Ct. Cl. 1957).]

August 7, 1957

Ralph A. Gilchrist, Esq.
1200 - 18th Street, N.W.
Washington 6, D.C.

RE: OERLIKON MACHINE TOOL WORKS
BUEHRLE & CO. v. UNITED STATES:

Dear Sir:

Confirming our telephone conversation, I quote below the endorsement of Mr. Justice Frankfurter on your application for an extension of time within which to file a petition for certiorari in the above-entitled cause:

> "To change counsel the last day for filing a petition for certiorari — particularly since no suggestion is even offered that original counsel were incompetent — is, for me, a wholly inadmissible reason for granting an extension."
>
> Aug. 7/57 Frankfurter, J.

Yours truly,
JOHN T. FEY, Clerk
By

E.P. Cullinan,
Deputy.

EPC:ht

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the motion itself and dated "July 16/58". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 35 (OT58 Ne-Tu); *see also Ramirez-Pabon v. Board of Personnel of Puerto Rico*, 254 F.2d 1 (2d Cir. 1958).]

July 16, 1958

Santos P. Amadeo, Esq.
Professor of Law
University of Puerto Rico
San Juan, Puerto Rico

RE: PASON [Publisher's note: "PASON" should be "PABON".] v. BOARD OF PERSONNEL OF PUERTO RICO, ETC., No. ---, October Term, 1958:

Dear Sir:

Your application for an extension of time to file a petition for certiorari, together with a certified copy of the record, was presented to Mr. Justice Frankfurter who has today endorsed thereon:

> "Petitioner is asking for an extension of time to file a certiorari at a time when she had thirty days remaining within which to file such a petition. The reason for the request is 'inability' to get counsel other than the one who represented petitioner in the Court of Appeals. This is not, in my view, considering the merits of the case, a sufficient reason to extend the statutory period of ninety days. The most plausible grounds for a petition for certiorari can be briefly stated. Application denied."

The certified record accompanying your application is returned herewith.

Very truly yours,
JOHN T. FEY, Clerk
By

E.P. Cullinan,
Deputy.

Encl.
EPC:ht
AIRMAIL

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a typewritten version (signed and dated "1/31/59 1^{30} pm" in Chief Justice Warren's hand) inserted at the bottom of the motion itself. Also inserted on the motion was an intermediate order (signed and dated "1/30/59 1^{am}" in Chief Justice Warren's hand) that reads as follows:

> This motion does not conform to our Rule 35 in that it fails to state the grounds on which it is based and is not accompanied by proof of service on respondents. If counsel desire they may supply these defects by five o'clock p.m. today. Respondents may, if they desire, file a response by eleven o'clock tomorrow morning, and the motion will be decided on the papers.

From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 33 (OT58 A-Dar); *see also Hamm v. County School Bd. of Arlington County, Va.*, 263 F.2d 226 (4th Cir. 1959).]

February 2, 1959

Frank L. Ball, Esq.
Ball Building
Court House Road
Arlington, Va.

RE: COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL. v. DESKINS, ET AL.

Dear Mr. Ball:

Confirming our telephone conversation of Saturday, January 31, I quote below the order entered by the Chief Justice on January 31 in the above-captioned cause:

> "Upon consideration of the memorandum in support of the application and of the opposition thereto, I conclude that the test of extraordinary showing required in these circumstances by Magnum Import Co. v. Coty, 262 U.S. 159, 164, has not been met.

"The 'Motion for Recall and Stay of Mandate of the United States Court of Appeals for the Fourth Circuit' is denied."

1/31/59 1^{30} p.m. /S/ Earl Warren
C.J.

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan,
Deputy.

EPC:ht
cc: James H. Simmonds, Esq.
1500 N. Court House Road
Arlington, Va.

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Whittaker on the motion itself and dated "June 29, 1959". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 35 (OT58 Ne-Tu); *see also Shelton v. Tucker*, 364 U.S. 479 (1960).]

June 29, 1959

Robert L. Carter, Esquire
20 West 40th Street
New York 18, N.Y.

RE: SHELTON, ET AL. v. McKINLEY, ET AL.

Dear Sir:

Your application for stay in the above-entitled case was presented to Mr. Justice Whittaker, who was returned it to this office with the following endorsement:

"The challenged portion of the Judgment rejected appellants contention that Act 10 is unconstitutional and thus left that Act standing. The requested "stay" of that portion of the Judgment, if granted, would still leave that Act standing and be fruitless. What appellants appear, inferentially and in effect, to ask is that I, a single Justice, issue an injunction, enjoining not the challenged portion of the Judgment but Act 10 itself pending determination by this court of appellants appeal. That I decline to do. This application is therefore denied. Charles E. Whittaker. June 20 [Publisher's note: "20" should be "29".], 1959."

Very truly yours,
JAMES R. BROWNING, Clerk
By

Michael Rodak, Jr.
Assistant

MRjr:jmh

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Black on the application itself and dated "July 20, 59". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 38 (OT59 Gu-Na); *see also Keith v. New York*, 1 Rapp 218 (Harlan, J., in chambers); 359 U.S. 998 (1959).]

July 20, 1959

Nathan Kestnbaum, Esquire
110 East 42nd Street
New York 17, New York

RE: LEROY KEITH VS. NEW YORK

Dear Sir:

This is the advise you that Mr. Justice Black today denied the application for stay of execution in the above case with the following endorsement thereon:

> "Application for stay denied. The questions presented here in this new independent proceeding were apparently all presented to the court in the original petition for certiorari and I am unable to find any circumstances that lead me to believe four votes for certiorari here could be enlisted.
>
> July 20, 1959 Hugo L. Black"

Mr. Justice Stewart has also denied the application for stay with the endorsement "Denied. July 20, 1959."

Yours truly,
JAMES R. BROWNING, Clerk
By

R. J. Blanchard
Deputy

RJB:erl
cc: Irving Anolik, Esq.
Assistant Dist. Attorney
County of Bronx
New York, New York

[Publisher's note: This opinion was typed on a sheet of plain paper. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 37 (OT59 Bunn-Gr).]

September 28, 1959

Fred Crane, Esquire
P.O. Box 200
Fairbanks, Alaska

RE: DEERE v. UNITED STATES

Dear Sir:

This will confirm my telegram of today's date, and advise you that your application for stay of execution in the above-entitled cause was presented to Mr. Justice Black, who returned it to this office with the following endorsement thereon:

> "Petition for stay of execution denied since the facts set out in the present application fail to show that certiorari is available under timeliness provisions of Rule 22. Hugo L. Black, Associate Justice. September 25, 1959."

Very truly yours,
JAMES R. BROWNING, Clerk
By

R.J. Blanchard
Deputy

RJB:jmh

AIR MAIL

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a typewritten version (initialed in Justice Harlan's hand and dated "April 4, 1960") attached the motion itself. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 37 (OT59 Bunn-Gr); *see also United States v. Guterma*, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960); *Guterma v. United States*, 1 Rapp 245 (1960).]

April 5, 1960

Emanuel Eschwege, Esquire
200 West 57th Street
New York 19, New York

RE: EVELEIGH v. UNITED STATES

Dear Sir:

I write to advise that Mr. Justice Harlan on April 4th denied the application for bail pending appeal in the above case. The Justice has attached the following memorandum to the application:

> "Petitioner's application for bail pending appeal was considered by the District Court and the Court of Appeals in conjunction with that of petitioner's co-defendant Guterma. Having considered the papers submitted by both sides, I am constrained to deny this application for the reasons stated in my Memorandum of March 18, 1960, denying a similar application of Guterma.
>
> (S) JMH
> J.M.H.
> April 4, 1960."

I am enclosing a copy of the Justice's memorandum in the case of Guterma v. United States.

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan
Deputy

EPC:vmg
Enclosure

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Frankfurter on the application itself and dated "July 5/60". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also In re Harvey*, 168 N.E.2d 715 (N.Y. 1960).]

July 5, 1960

Ralph L. Ellis, Esq.
Manning, Harnisch, Hollinger & Shea
41 East 42nd Street
New York 17, N.Y.

IN THE MATTER OF ROBERT E. HARVEY

Dear Mr. Ellis:

I write to advise you that Mr. Justice Frankfurter has today endorsed the following upon your application for stay In the Matter of Robert E. Harvey:

> "Careful consideration leaves me with the firm conviction that the grounds on which a petition for certiorari is to be made are so unmeritorious that balancing the remoteness of its being granted with the threatened mooting for the State of Washington's proceedings, for which the books, etc. are found to be necessary, the application for stay is denied."

The records and briefs accompanying your letter are returned herewith.

Very truly yours,
JAMES R. BROWNING, Clerk
By

Encl.
EPC:ht

E.P. Cullinan,
Deputy.

[Publisher's note: This opinion was handwritten by Justice Frankfurter on a piece of his chambers stationary. Typed copies were distributed to counsel for the parties and to Justice John Marshall Harlan. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Long Island R. Co. v. New York Cent. R. Co.*, 281 F.2d 379 (2d Cir. 1960).]

The Long Island Railroad Company, et al.	)	
Petitioners	)	
vs.	)	Application for a stay
The New York Central R.R.	)	

The issue which will be tendered by the petition for certiorari to be filed has been decided against the petitioners by the Interstate Commerce Commission, the District Court and the Court of Appeals for the Second Circuit. Having fully considered the issue, I cannot bring myself to believe that a petition for certiorari will be granted to review the judgment below or that it would be reversed. Accordingly, I do not feel justified to overrule the Court of Appeals in denying a stay.

Felix Frankfurter
Associate Justice

August 1, 1960

[Publisher's note: This opinion was typed on a sheet of plain paper, quoting a version handwritten by Justice Harlan on the motion itself and dated "12/12/60". From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Hirsch v. Bruchhausen*, 284 F.2d 783 (2d Cir. 1960).]

December 12, 1960

Leonard W. Wagman, Esquire
60 East 42d Street
New York 17, N.Y.

RE: MYRTLE G. HIRSCH, ET AL. v. UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Dear Sir:

Your application for stay, together with opposition thereto, in the above-captioned cause was presented to Mr. Justice Harlan, who has today denied the application with the following endorsement thereon:

> "I can find no equity in this application nor any other reason for granting the stay which the Court of Appeals has denied. Application denied.
>
> 12/12/60 JMH."

Very truly yours,
JAMES R. BROWNING, Clerk
By

E.P. Cullinan
Deputy

EPC:jmh

cc: Martin Rosen, Esquire
170 Broadway
New York 38, N.Y.

A. Daniel Fusaro, Esquire
Clerk, U.S. Court of Appeals
for the Second Circuit
New York 7, N.Y.

[Publisher's note: This opinion was typed on a sheet of plain paper. From RG 267, Records of the Supreme Court of the United States, Entry 30 – Applications for Actions by the Court, 1929-1989, Box 42 (OT60 G-Lon); *see also Local 1545, United Broth. of Carpenters and Joiners of America, AFL-CIO v. Vincent*, 286 F.2d 127 (2d Cir. 1960).]

February 1, 1961

Charles H. Tuttle, Esquire
15 Broad Street
New York 5, N.Y.

RE: LOCAL 1545, UNITED BROTHERHOOD OF
CARPENTERS, ETC. v. VINCENT, ET AL.

Dear Sir:

Your application for a stay of the enforcement of the Decision and Direction of Election by the N.L.R.B., dated August 24, 1960, in the above-entitled cause was presented to Mr. Justice Frankfurter, who denied the application on January 31, 1961 with the following endorsement thereon:

> "With due regard to the merits of the decision proposed to be reviewed on a petition for certiorari and balancing the respective equities of the parties, on a claim of "irreparable damage", granting the application for a stay would, under the particular circumstances here, in effect give the losing litigant what it would have had had the Court of Appeals decided in its favor. Stay denied.
>
> January 31/61 Frankfurter, J."

Very truly yours,
JAMES R. BROWNING, Clerk
By

R.J. Blanchard
Deputy

RJB:jmh
cc: Mr. Justice Harlan
The Honorable Archibald Cox
The Honorable Henry J. Friendly
Martin Raphael, Esquire

[Publisher's note: See 559 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 09A807)

HARRY R. JACKSON ET AL. *v.* DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS ET AL.

ON APPLICATION FOR STAY

[March 2, 2010]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Petitioners in this case are Washington D.C. voters who would like to subject the District of Columbia's Religious Freedom and Civil Marriage Equality Amendment Act of 2009 to a public referendum before it goes into effect, pursuant to procedures set forth in the D. C. Charter. See D.C. Code §§ 1-204.101 to 1-204.107 (2001-2006). The Act expands the definition of marriage in the District to include same-sex couples. See D.C. Act 18-248; 57 D.C. Reg. 27 (Jan. 1, 2010).

The D.C. Charter specifies that legislation enacted by the D.C. Council may be blocked if a sufficient number of voters request a referendum on the issue. D. C. Code § 1-204.102. The Council, however, purported in 1979 to exempt from this provision any referendum that would violate the D. C. Human Rights Act. See §§ 1-1001.16(b)(1)(C), 2-1402.73 (2001-2007). The D.C. Board of Elections, D.C. Superior Court, and D.C. Court of Appeals denied petitioners' request for a referendum on the grounds that the referendum would violate the Human Rights Act.

Petitioners argue that this action was improper, because D.C. Council legislation providing that a referendum is not required cannot trump a provision of the D.C. Charter specifying that a referendum *is* required. See *Price* v. *District of Columbia Bd. of Elections*, 645 A. 2d 594, 599-600 (D.C. 1994). They point out that if the Act does become law, they will permanently lose any right to pursue a referendum under the Charter. See § 1-204.102(b)(2) (2001-2006). Petitioners ask the Court for a stay that would prevent the Act from going into effect, as expected, on March 3, 2010.

This argument has some force. Without addressing the merits of petitioners' underlying claim, however, I conclude that a stay is not warranted. First, as "a matter of judicial policy" — if not "judicial power" — "it

has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen* v. *United States*, 445 U. S. 684, 687 (1980); see also *Fisher* v. *United States*, 328 U. S. 463, 476 (1946).

Second, the Act at issue was adopted by the Council and placed before Congress for the 30-day period of review required by the D.C. Charter, see § 1-206.02(c)(1). A joint resolution of disapproval by Congress would prevent the Act from going into effect, but Congress has chosen not to act. The challenged provision purporting to exempt certain D.C. Council actions from the referendum process, § 1-1001.16(b)(1)(C), was itself subject to review by Congress before it went into effect. While these considerations are of course not determinative of the legal issues, they do weigh against granting petitioners' request for a stay, given that the concern is that action by the Council violates an Act of Congress.

Finally, while petitioners' challenge to the Act by way of a referendum apparently will become moot when the Act goes into effect, petitioners have also pursued a ballot initiative, under related procedures in the D.C. Charter, that would give D.C. voters a similar opportunity to repeal the Act if they so choose. See §§ 1-204.101 to 1-204.107; *Jackson* v. *District of Columbia Bd. of Elections and Ethics*, Civ. A. No. 2009 CA 008613 B (D.C. Super., Jan. 14, 2010). Their separate petition for a ballot initiative is now awaiting consideration by the D.C. Court of Appeals, which will need to address many of the same legal questions that petitioners have raised here. Unlike their petition for a referendum, however, the request for an initiative will not become moot when the Act becomes law. On the contrary, the D.C. Court of Appeals will have the chance to consider the relevant legal questions on their merits, and petitioners will have the right to challenge any adverse decision through a petition for certiorari in this Court at the appropriate time.

The foregoing considerations, taken together, lead me to conclude that the Court is unlikely to grant certiorari in this case. Accordingly, the request for a stay is denied.

It is so ordered.

[Publisher's note: See 561 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 10A273)

PHILIP MORRIS USA INC. ET AL. *v.* GLORIA SCOTT ET AL.

ON APPLICATION FOR STAY

[September 24, 2010]

JUSTICE SCALIA, Circuit Justice.

Respondents brought this class action against several tobacco companies on behalf of all Louisiana smokers. The suit alleged that the companies defrauded the plaintiff class by "distort[ing] the entire body of public knowledge" about the addictive effects of nicotine. *Scott* v. *American Tobacco Co.*, 2004-2095, p. 14. (La. App. 2/7/07) 949 So. 2d 1266, 1277. The Fourth Circuit Court of Appeal of Louisiana granted relief on that theory, and entered a judgment requiring applicants to pay $241,540,488 (plus accumulated interest of about $29 million) to fund a10-year smoking cessation program for the benefit of the members of the plaintiff class. *Scott* v. *American Tobacco Co.*, 2009-0461, p. 21-23 (5/5/10) 36 So. 3d 1046, 1059-1060. (Still to be determined are the allowable attorney's fees, which will likely be requested in the tens of millions of dollars.) The Supreme Court of Louisiana declined review. *Scott* v. *American Tobacco Co.,* 2010-1361 (9/3/10), ___ So. 3d ___. The applicants have asked me, in my capacity as Circuit Justice for the Fifth Circuit, to stay the judgment until this Court can act on their intended petition for a writ of certiorari.

A single Justice has authority to enter such a stay, 28 U. S. C. § 2101(f), but the applicant bears a heavy burden. It is our settled practice to grant a stay only when three conditions are met: First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed. *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (SCALIA, J., in chambers). I conclude that this standard is met.

Applicants complain of many violations of due process, including (among others) denial of the opportunity to cross-examine the named representatives of the class, factually unsupported estimations of the number of class members entitled to relief, and constant revision of the legal basis for the plaintiffs' claim during the course of litigation. Even though the judgment that is the alleged consequence of these claimed errors is massive — more than $250 million — I would not be inclined to believe that this Court would grant certiorari to consider these fact-bound contentions that may have no effect on other cases.

But one asserted error in particular (and perhaps some of the others as well) implicates constitutional constraints on the allowable alteration of normal process in class actions. This is a fraud case, and in Louisiana the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations. 949 So. 2d, at 1277. Accordingly, the Court of Appeal indicated that members of the plaintiff class who wish to seek individual damages, rather than just access to smoking cessation measures, would have to establish their own reliance on the alleged distortions. *Ibid.* But the Court of Appeal held that this element need *not* be proved insofar as the class seeks payment into a fund that will *benefit* individual plaintiffs, since the defendants are guilty of a "distort[ion of] the entire body of public knowledge" on which the "class as a whole" has relied. *Id.,* at 1277-1278. Thus, the court eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.

Applicants allege that this violates their due-process right to "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (internal quotation marks omitted) (quoting *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932)). Respondents concede that due process requires such an opportunity, but they contend that the intermediate state court's pronouncement means that, as a matter of Louisiana's substantive law, applicants *have* no nonreliance defense. That response may ultimately prove persuasive, but at this stage it serves to describe the issue rather than resolve it. The apparent consequence of the Court of Appeal's holding is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action.

The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question. National concern over abuse of the class-action device induced Congress to permit removal of most major class actions to federal court, see 28 U. S. C.

§ 1332(d), where they will be subject to the significant limitations of the Federal Rules. Federal removal jurisdiction has not been accorded, however, over many class actions in which more than two-thirds of the plaintiff class are citizens of the forum State. See §1332(d)(4). Because the class here was drawn to include only residents of Louisiana, this suit typifies the sort of major class action that often will not be removable, and in which the constraints of the Due Process Clause will be the only federal protection. There is no conflict between federal courts of appeals or between state supreme courts on the principal issue I have described; but the former seems impossible, since by definition only state class actions are at issue; and the latter seems implausible, unless one posits the unlikely case where the novel approach to class-action liability is a legislative rather than judicial creation, or the creation of a lower state court disapproved by the state supreme court on federal constitutional grounds. This constitutional issue ought not to be permanently beyond our review.

Given those considerations, I conclude applicants have satisfied the prerequisites for a stay. I think it reasonably probable that four Justices will vote to grant certiorari, and significantly possible that the judgment below will be reversed. As for irreparable harm: Normally the mere payment of money is not considered irreparable, see *Sampson* v. *Murray*, 415 U. S. 61, 90 (1974), but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable. See, *e.g.*, *Mori* v. *Boilermakers*, 454 U. S. 1301, 1303 (1981) (Rehnquist, J., in chambers). Here it appears that, before this Court will be able to consider and resolve applicants' claims, a substantial portion of the fund established by their payment will be irrevocably expended. Funds spent to provide anti-smoking counseling and devices will not likely be recoverable; nor, it seems, will the $11,501,928 fee immediately payable toward administrative expenses in setting up the funded program.

That does not end the matter. A stay will not issue simply because the necessary conditions are satisfied. Rather, "sound equitable discretion will deny the stay when 'a decided balance of convenience'" weighs against it. *Barnes, supra*, at 1304-1305 (SCALIA, J., in chambers) (quoting *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 164 (1923)). Here, however, the equities favor granting the application. Refusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents. Applicants allege that similar smoking-cessation measures are freely and readily available from other sources in Louisiana, and respondents have not disputed that. Under those circumstances, the equitable balance favors issuance of the stay.

The application for a stay of the execution of the judgment of the Court of Appeal of Louisiana, Fourth Circuit, is granted pending appli-

cants' timely filing, and this Court's disposition, of a petition for a writ of certiorari.

It is so ordered.

[Publisher's note: See 561 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 10A298

HERB LUX ET AL. *v.* NANCY RODRIGUES, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE VIRGINIA BOARD OF ELECTIONS, ET AL.

ON APPLICATION FOR INJUNCTION

[September 30, 2010]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Herb Lux has filed with me as Circuit Justice for the Fourth Circuit an application for an injunction pending appeal. Lux seeks an injunction requiring the Virginia State Board of Elections to count signatures that he collected in an effort to place himself on the congressional ballot. The application is denied.

Lux is an independent candidate for the U.S. House of Representatives in Virginia's Seventh Congressional District. Under Virginia law, an independent candidate for Congress must obtain 1,000 signatures from voters registered in the relevant congressional district in order to appear on the ballot. Va. Code Ann. § 24.2-506 (Lexis 2010 Cum. Supp.). That same provision requires, among other things, that each signature be witnessed by a resident of that district. *Ibid.*

Although Lux is a candidate for the Seventh District, he is a resident of Virginia's First District. As a result, he cannot serve as a witness for signatures from Seventh District residents. Despite that fact, Lux witnessed 1,063 of the 1,224 signatures collected on his behalf. The State Board of Elections refused to count those signatures. Lux unsuccessfully sought an injunction requiring the Board to do so from the District Court for the Eastern District of Virginia and from the Court of Appeals for the Fourth Circuit.

To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that "the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting System, Inc.* v. *FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers)). A Circuit Justice's issuance of an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been with-

held by lower courts," and therefore "demands a significantly higher justification" than that required for a stay. *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers).

Lux does not meet this standard. He may very well be correct that the Fourth Circuit precedent relied on by the District Court — *Libertarian Party of Va.* v. *Davis*, 766 F.2d 865 (1985) — has been undermined by our more recent decisions addressing the validity of petition circulation restrictions. See *Meyer* v. *Grant*, 486 U.S. 414, 422, 428 (1988) (invalidating a law criminalizing circulator compensation and describing petition circulation as "core political speech"); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-187 (1999) (holding unconstitutional a requirement that initiative petition circulators be registered voters). At the same time, we were careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were before the Court, and residency requirements, which were not. *Id.,* at 197. Lux himself notes that the courts of appeals appear to be reaching divergent results in this area, at least with respect to the validity of state residency requirements. Application 13-14. Accordingly, even if the reasoning in *Meyer* and *American Constitutional Law Foundation* does support Lux's claim, it cannot be said that his right to relief is "indisputably clear."

It is so ordered.