in 1918.[1] See 12 U. S. C. § 92 (1952 ed.) (note). Though the provision has also been left out of the subsequent editions of the United States Code, including the current one (each containing in substance the same note that appeared in 1952, see United States Code editions of 1958, 1964, 1970, 1976, 1982, and 1988), the parties refer to it as "section 92," and so will we.

Despite the absence of section 92 from the Code, Congress has assumed that it remains in force, on one occasion actually amending it. See Garn-St. Germain Depository Institutions Act of 1982, § 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, § 201(b)(5), 101 Stat. 583 (imposing a 1-year moratorium on section 92 activities). The regulators concerned with the provision's subject, the Comptroller of the Currency and the Federal Reserve Board, have likewise acted on the understanding that section 92 remains

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[1] The note states that "[t]he provisions of this section, which were added to R. S. § 5202 by act Sept. 7, 1916, ch. 461, 39 Stat. 753, were omitted in the amendment of R. S. § 5202 by act Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512, and therefore this section has been omitted from the Code." 12 U. S. C. § 92 (1952 ed.) (note). We do not know what prompted the 1952 codifiers to reverse the judgment of their predecessors. The 1952 codifiers' decision, along with legislation that treated section 92 as valid law, apparently prompted a House of Representatives Committee to take a look at the status of section 92 in 1957. See Financial Institutions Act of 1957: Hearings on S. 1451 and H. R. 7206 before the House Committee on Banking and Currency, 85th Cong., 2d Sess., pt. 2, pp. 989–990, 1010–1025, 1036–1040, 1060–1071 (1957). After hearing conflicting testimony, the Committee took no action. See *id.*, at 1090, 1199. Several years later, congressional staffers explored the issue again and concluded, with the codifiers, that Congress had repealed section 92 in 1918. See Consolidation of Bank Examining and Supervisory Functions: Hearings on H. R. 107 and H. R. 6885 before the Subcommittee on Bank Supervision and Insurance of the House Committee on Banking and Currency, 89th Cong., 1st Sess., 391 (1965). Though the conclusion was published in a House Subcommittee Report, see *ibid.*, neither the Subcommittee nor full Committee took up the matter, and at no time has Congress attempted to reenact what staff thought had been repealed.

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Whereas Idaho courts used to proportionately tax the "costs" against all parties to a water right adjudication at the time final judgment was entered, many of the items formerly taxed as "costs" are now denominated as "fees," and required to be paid into court at the outset. Moreover, although the amendment's language making "the State laws" applicable to the United States submits the Government generally to state procedural law, as well as to state substantive law of water rights, it does not subject the United States to payment of the fees in question. This Court has been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for monetary exactions in litigation. See, *e. g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21. The amendment's language is not sufficiently specific to meet this requirement. Pp. 5–9.

122 Idaho 116, 832 P. 2d 289, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 9.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Bryson*, *Acting Assistant Attorney General O'Meara*, *Edwin S. Kneedler*, *Peter C. Monson*, *Robert L. Klarquist*, and *William B. Lazarus*.

Clive J. Strong, Deputy Attorney General of Idaho, argued the cause for respondent. With him on the brief were *Larry EchoHawk*, Attorney General, and *David J. Barber*, *Peter R. Anderson*, and *Steven W. Strack*, Deputy Attorneys General.*

**Robert T. Anderson*, *Melody L. McCoy*, *Walter R. Echo-Hawk*, *Patrice Kunesh*, *Carl Ullman*, *Henry J. Sockbeson*, and *Dale T. White* filed a brief for the Nez Perce Tribe et al. as *amici curiae* urging reversal.

Theodore R. Kulongoski, Attorney General of Oregon, *Virginia L. Linder*, Solicitor General, and *Jerome S. Lidz*, *Stephen E. A. Sanders*, and *Rives Kistler*, Assistant Attorneys General, filed a brief for the State of Alaska et al. as *amici curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication. 66 Stat. 560, 43 U. S. C. § 666(a). This case arises from Idaho's joinder of the United States in a suit for the adjudication of water rights in the Snake River. Under Idaho Code § 42–1414 (1990), all water right claimants, including the United States, must pay "filing fees" when they submit their notices of claims. Idaho collects these fees to "financ[e] the costs of adjudicating water rights," § 42–1414; the United States estimates that in its case the fees could exceed $10 million. We hold that the McCarran Amendment does not waive the United States' sovereign immunity from fees of this kind.

Discovered by the Lewis and Clark expedition, the Snake River—the "Mississippi of Idaho"—is 1,038 miles long and the principal tributary to the Columbia River. It rises in the mountains of the Continental Divide in northwest Wyoming and enters eastern Idaho through the Palisades Reservoir. Near Heise, Idaho, the river leaves the mountains and meanders westerly across southern Idaho's Snake River plain for the entire breadth of the State—some 400 miles. On the western edge of Idaho, near Weiser, the Snake enters Oregon for a while and then turns northward, forming the Oregon-Idaho boundary for 216 miles. In this stretch, the river traverses Hells Canyon, the Nation's deepest river gorge. From the northeastern corner of Oregon, the river marks the Washington-Idaho boundary until Lewiston, Idaho, where it bends westward into Washington and finally flows into the Columbia just south of Pasco, Washington. From elevations of 10,000 feet, the Snake descends to 3,000 feet and, together with its many tributaries, provides the only water for most of Idaho. See generally T. Palmer, The Snake River (1991).

This litigation followed the enactment by the Idaho Legislature in 1985 and 1986 of legislation providing for the Snake River Basin Adjudication. That legislation stated that "the director of the department of water resources shall petition the [state] district court to commence an adjudication within the terms of the McCarran [A]mendment." Idaho Code § 42–1406A(1) (1990). The 1985 and 1986 legislation also altered Idaho's methods for "financing the costs of adjudicating water rights"; it provided that the Director of the Idaho Department of Water Resources shall not accept a "notice of claim" from any water claimant unless such notice "is submitted with a filing fee based upon the fee schedule." § 42–1414. "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." *Ibid.* Idaho uses these funds "to pay the costs of the department attributable to general water rights adjudications" and "to pay for judicial expenses directly relating to the Snake river adjudication." §§ 42–1777(1) and (2).

The Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District naming the United States and all other water users as defendants. The District Court entered an order commencing the adjudication, which was affirmed by the Supreme Court of Idaho. *In re Snake River Basin Water System*, 115 Idaho 1, 764 P. 2d 78 (1988), cert. denied *sub nom. Boise-Kuna Irrigation Dist.* v. *United States*, 490 U. S. 1005 (1989). When the United States attempted to submit its notices of claims unaccompanied by filing fees, the director refused to accept them. The United States then filed a petition for a writ of mandamus with the state court to compel the director to accept its notices without fees, asserting that the McCarran Amendment does not waive federal sovereign immunity from payment of filing fees. The District Court granted Idaho summary judgment on the immunity issue: "The ordinary, contemporary and common meaning of the

language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general adjudication of all water rights . . . which is being conducted in accordance with state law." App. to Pet. for Cert. 86a (emphasis in original).

The Supreme Court of Idaho affirmed by a divided vote. 122 Idaho 116, 832 P. 2d 289 (1992). It concluded that the McCarran Amendment "express[es] a 'clear intent' of congress to subject the United States to all of the state court processes of an 'adjudication' of its water rights with the sole exception of costs." *Id.*, at 121, 832 P. 2d, at 294. The court also "decline[d] to read the term judgment for costs as including the term filing fees." *Id.*, at 122, 832 P. 2d, at 295. Whereas "costs" are charges that a prevailing party may recover from its opponent as part of the judgment, "fees are compensation paid to an officer, such as the court, for services rendered to individuals in the course of litigation." *Ibid.* Two justices wrote separate dissents, asserting that the McCarran Amendment does not waive sovereign immunity from filing fees. We granted certiorari, 506 U. S. 939 (1992), and now reverse.

The McCarran Amendment provides in relevant part:

> "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain

> review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit." 43 U. S. C. § 666(a).

According to Idaho, the amendment requires the United States to comply with *all* state laws applicable to general water right adjudications. Idaho argues that the first sentence of the amendment, the joinder provision, allows joinder of the United States as a defendant in suits for the adjudication of water rights. It then construes the amendment's second sentence, the pleading provision, to waive the United States' immunity from all state laws pursuant to which those adjudications are conducted. Idaho relies heavily on the language of the second sentence stating that the United States shall be "deemed to have waived any right to plead that the State laws are inapplicable." Because the "filing fees" at issue here are assessed in connection with a comprehensive adjudication of water rights, Idaho contends that they fall within the McCarran Amendment's waiver of sovereign immunity.

The United States, on the other hand, contends that the critical language of the second sentence renders it amenable only to state substantive law of water rights, and not to any of the state adjective law governing procedure, fees, and the like. The Government supports its position by arguing that the phrase "the State laws" in the second sentence must be referring to the same "State law" mentioned in the first sentence, and that since the phrase in the first sentence is clearly directed to substantive state water law, the phrase in the second sentence must be so directed as well.

There is no doubt that waivers of federal sovereign immunity must be "unequivocally expressed" in the statutory text. See *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 95 (1990); *Department of Energy* v. *Ohio,* 503 U. S. 607, 615 (1992); *United States* v. *Nordic Village, Inc.,* 503 U. S. 30,

33–34 (1992). "Any such waiver must be strictly construed in favor of the United States," *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991), and not enlarged beyond what the language of the statute requires, *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686 (1983). But just as "'we should not take it upon ourselves to extend the waiver beyond that which Congress intended[,] . . . [n]either, however, should we assume the authority to narrow the waiver that Congress intended.'" *Smith* v. *United States*, 507 U. S. 197, 206 (1993) (quoting *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979)).

We are unable to accept either party's contention. The argument of the United States is weak, simply as a matter of grammar, because the critical term in the second sentence is "the State law*s*," while the corresponding language in the first sentence is "State law." And such a construction would render the amendment's consent to suit largely nugatory, allowing the Government to argue for some special federal rule defeating established state-law rules governing pleading, discovery, and the admissibility of evidence at trial. We do not believe that Congress intended to create such a legal no-man's land in enacting the McCarran Amendment. We rejected a similarly technical argument of the Government in construing the McCarran Amendment in *United States* v. *District Court, County of Eagle*, 401 U. S. 520, 525 (1971), saying "[w]e think that argument is extremely technical; and we decline to confine [the McCarran Amendment] so narrowly."

We also reject Idaho's contention. In several of our cases exemplifying the rule of strict construction of a waiver of sovereign immunity, we rejected efforts to assess monetary liability against the United States for what are normal incidents of litigation between private parties. See, *e. g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21 (1926) (assessment of costs); *Library of Congress* v. *Shaw*, 478 U. S. 310, 323 (1986) (recovery of interest on judg-

ment); *Ohio, supra,* at 619–620 (liability for punitive fines). And the McCarran Amendment's "cost proviso," of course, expressly forbids the assessment of costs against the United States: "[N]o judgment for costs shall be entered against the United States."

The Supreme Court of Idaho pointed out in its opinion that "fees" and "costs" mean two different things in the context of lawsuits, 122 Idaho, at 122, 832 P. 2d, at 295, and we agree with this observation. "Fees" are generally those amounts paid to a public official, such as the clerk of the court, by a party for particular charges typically delineated by statute; in contrast, "costs" are those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against the losing party. See 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2666, pp. 173–174 (1983). Before Idaho altered its system for recovering its expenses in conducting comprehensive water right adjudications in 1985 and 1986, Idaho courts, at the time of entry of final judgment, used to proportionately tax the "costs" of the adjudication against all parties to the suit, and not simply against the losing parties. Idaho Code § 42–1401 (1948). When Idaho revised this system, many of the items formerly taxed as "costs" to the parties at the conclusion of the adjudication were denominated as "fees," and required to be paid into court at the outset. This suggests that although the general distinction between fees and costs may be accurate, in the context of this proceeding the line is blurred, indeed.

While we therefore accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here. The cases mentioned above dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to re-

quire a specific waiver of sovereign immunity before the United States may be held liable for them. We hold that the language of the second sentence making "the State laws" applicable to the United States in comprehensive water right adjudications is not sufficiently specific to meet this requirement.

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

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

As the Court points out, *ante*, at 8, before 1985 "fees" comparable to those at issue in this litigation were taxed as "costs" in Idaho. Because I am persuaded that these exactions are precisely what Congress had in mind when it excepted judgments for "costs" from its broad waiver of sovereign immunity from participation in water rights adjudications, I concur in the Court's judgment.

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CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ALPINE RIDGE GROUP ET AL.

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

No. 92–551. Argued March 30, 1993—Decided May 3, 1993

The so-called Section 8 housing program under the United States Housing Act of 1937 (Housing Act) authorizes private landlords who rent to low-income tenants to receive "assistance payments" from the Department of Housing and Urban Development (HUD) in an amount calculated to make up the difference between the tenants' rent payments and a "contract rent" agreed upon by the landlords and HUD. Section 1.9b of the latter parties' "assistance contracts" provides that contract rents are to be adjusted annually by applying the latest automatic adjustment factors developed by HUD on the basis of particular formulas, while § 1.9d specifies that, "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government . . . ." In the early 1980's, HUD began to conduct independent "comparability studies" in certain real estate markets where it believed that contract rents, adjusted upward by the automatic adjustment factors, were materially higher than prevailing market rates for comparable housing, and to use the private market rents as an independent cap limiting assistance payments. In this litigation, respondent Section 8 landlords allege that § 801 of the Department of Housing and Urban Development Reform Act of 1989 (Reform Act)—which, *inter alia*, authorizes HUD to limit future automatic rent adjustments through the use of comparability studies—violates the Due Process Clause of the Fifth Amendment by stripping them of their vested rights under the assistance contracts to annual rent increases based on the automatic adjustment factors alone. In separate lawsuits, the District Courts each granted summary judgment for respondents. The Court of Appeals affirmed the judgments in a consolidated appeal.

Held: This Court need not consider whether § 801 of the Reform Act unconstitutionally abrogated a contract right to unobstructed formula-based rent adjustments, since respondents have no such right. The assistance contracts do not prohibit the use of comparability studies to impose an independent cap on such adjustments. Indeed, § 1.9d's plain

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language clearly mandates that contract rents "shall not" be adjusted so as to exceed materially the rents charged for "comparable unassisted units" on the private rental market, "[n]otwithstanding" that § 1.9b might seem to require such a result. This limitation is consistent with the Housing Act itself, 42 U. S. C. § 1437f(c)(2)(C). Moreover, it is clear that § 1.9d—which by its own terms clearly envisions some comparison of assisted and unassisted rents—affords HUD sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate, since the section expressly assigns to "the Government" the determination of whether material rent differences exist. Respondents' contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty and misleading comparisons, is irrelevant to the question whether HUD had contractual authority to employ such studies at all. If respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons. Pp. 17–21.

955 F. 2d 1382, reversed.

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

Michael R. Dreeben argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Wallace*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Douglas Letter*, *Howard M. Schmeltzer*, and *Barton Shapiro*.

Warren J. Daheim argued the cause for respondents. With him on the brief for respondent Alpine Ridge Group was *Donald W. Hanford*. *Milton Eisenberg* and *Leonard A. Zax* filed a brief for respondents Acacia Villa et al.*

**Robert M. Weinberg* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Charter Federal Savings Bank by *Thomas M. Buchanan;* for the National Association of Home Builders et al. by *Ronda L. Daniels;* for Southwind Acres Associates et al. by *Larry Derryberry;* and for Statesman Savings Holding Corp. et al. by *Charles J. Cooper*, *Robert J. Cynkar*, and *Michael A. Carvin*.

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether § 801 of the Department of Housing and Urban Development Reform Act of 1989, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating respondents' contract rights to certain rental subsidies.

I

A

In 1974, Congress amended the United States Housing Act of 1937 (Housing Act) to create what is known as the Section 8 housing program. Through the Section 8 program, Congress hoped to "ai[d] low-income families in obtaining a decent place to live," 42 U. S. C. § 1437f(a) (1988 ed., Supp. III), by subsidizing private landlords who would rent to low-income tenants. Under the program, tenants make rental payments based on their income and ability to pay; the Department of Housing and Urban Development (HUD) then makes "assistance payments" to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the landlord and HUD. As required by the statute, this contract rent is, in turn, to be based upon "the fair market rental" value of the dwelling, allowing for some modest increase over market rates to account for the additional expense of participating in the Section 8 program. See § 1437f(c)(1).

The statute, as originally enacted, further provided that monthly rents for Section 8 housing would be adjusted at least annually as follows:

> "(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling

units or, if the Secretary determines, on the basis of a reasonable formula.

. . . . .

"(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U. S. C. §§ 1437f(c)(2)(A) and (C) (1982 ed.).

The respondents in this case are private developers who entered into long-term contracts with HUD—known as Housing Assistance Payments (HAP) Contracts or "assistance contracts"—to lease newly constructed apartment units to Section 8 tenants. Their contracts established initial contract rents for each unit and provided, consistent with the statutory authorization, that these rents would be adjusted regularly, on the basis of a reasonable formula, to keep pace with changes in rental values in the private housing market. Section 1.9b of their contracts provides:

"b. *Automatic Annual Adjustments*

"(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. . . .

"(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract." App. to Brief for Petitioners 8a.

The Automatic Annual Adjustment Factors to which the contracts refer are developed by HUD based upon market

trends recorded by the Consumer Price Index and the Bureau of the Census American Housing Surveys.

Section 1.9d of the contracts, in part tracking the language of § 8(c)(2)(C) of the Housing Act, 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III), provides:

> "d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." App. to Brief for Petitioners 8a–9a.

B

In the early 1980's, HUD began to suspect that the assistance payments it was making to some landlords under the Section 8 program were well above prevailing market rates for comparable housing. Accordingly, the agency began to conduct independent "comparability studies" in certain real estate markets where it believed that contract rents, adjusted upward by the automatic adjustment factors, were materially out of line with market rents. Under these studies, HUD personnel would select between three and five other apartment buildings they considered comparable to the Section 8 building and compare their rents. The private market rents would then serve as an independent cap limiting the rent payments HUD would make under the Section 8 contracts.

After several landlords brought suit, the Court of Appeals for the Ninth Circuit ruled in 1988 that the standard assistance contracts described above prohibited the use of comparability studies as an independent cap on rents. In *Rainier View Associates* v. *United States*, 848 F. 2d 988, the Court of

Appeals reasoned that HUD, having contracted to increase rents automatically each year based upon a reasonable formula (the second of the two alternative approaches permitted by § 8(c)(2)(A) of the Housing Act, see *supra*, at 12–13), could not thereafter limit those increases by means of a market survey (the first of the two statutory alternatives). "Having made its choice," the court wrote, "HUD cannot now change its mind." 848 F. 2d, at 991.

After this Court denied certiorari to review the *Rainier View* decision, 490 U. S. 1066 (1989), HUD made clear its intention not to adhere to that decision's interpretation of its contracts outside the Ninth Circuit. Faced with the prospect of inconsistent application of Government contracts depending solely upon geography, Congress attempted to resolve the matter through amendments to the Housing Act in late 1989. Section 801 of the Department of Housing and Urban Development Reform Act (Reform Act), 103 Stat. 2057, amended § 8(c)(2)(C) of the Housing Act to provide explicitly that HUD may limit automatic rent adjustments in the future through the use of independent comparability studies. In an apparent compromise, however, the same section also sought to restore to Section 8 project owners a portion of the automatic rent adjustments they had been denied through the use of comparability studies prior to the enactment of the 1989 amendments. The amendments thus offered Section 8 project owners a partial retroactive remedy for lost rent attributable to comparability studies while at the same time affirming HUD's authorization to employ such studies to cap future rent adjustments.[1]

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[1] Section 8(c)(2)(C) of the Housing Act, as amended by § 801 of the Reform Act, now provides: "(C) Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability

C

In this litigation, respondents have alleged that § 801 of the Reform Act violates the Due Process Clause of the Fifth Amendment by stripping them of their vested rights under

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studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months

the assistance contracts to annual rent increases based on the automatic adjustment factors alone. In separate lawsuits, the United States District Courts for the Western District of Washington and the Central District of California each granted summary judgment for respondents. The Court of Appeals for the Ninth Circuit, in a consolidated appeal, affirmed both judgments. *Alpine Ridge Group* v. *Kemp*, 955 F. 2d 1382 (1992). Refusing to reconsider its earlier holding in *Rainier View*, *supra*, the court first reaffirmed that the assistance contracts prohibited HUD from capping rents based on independent comparability studies. See 955 F. 2d, at 1384–1385. The court then held that Congress' attempt to authorize such caps through the Reform Act unconstitutionally deprived respondents of their "vested property interest in formula-based rent adjustments pursuant to their section 8 contracts." *Id.*, at 1387.

We granted certiorari, 506 U. S. 984 (1992), and now reverse.

II

We begin our analysis of respondents' due process claim with the assistance contracts. Because we find that those contracts do not prohibit the use of comparability studies to impose an independent cap on the formula-based rent adjustments, our analysis ends there as well.

In our view, respondents' claimed entitlement to formula-based rent adjustments without regard to independent comparisons to private-market rents is precluded by the plain language of the assistance contracts. To be sure, § 1.9b(2) of those contracts provides that the contract rents "shall be adjusted [annually] by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." Section 1.9d of the contracts, however, im-

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that the reduced maximum monthly rents were in effect." 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III). HUD has now published proposed regulations governing the future use of comparability studies, as required by this provision. See 57 Fed. Reg. 49120 (1992).

poses what is labeled an "[o]verall [l]imitation" on the formula-based adjustments provided by § 1.9b. It provides that "*[n]otwithstanding any other provisions of this Contract*, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government" (emphasis added). As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. See *Shomberg* v. *United States*, 348 U. S. 540, 547–548 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that '"[a] clearer statement is difficult to imagine."'" *Liberty Maritime Corp.* v. *United States*, 289 U. S. App. D. C. 1, 4, 928 F. 2d 413, 416 (1991) (quoting *Crowley Caribbean Transport, Inc.* v. *United States*, 275 U. S. App. D. C. 182, 184, 865 F. 2d 1281, 1283 (1989) (in turn quoting *Illinois National Guard* v. *FLRA*, 272 U. S. App. D. C. 187, 194, 854 F. 2d 1396, 1403 (1988))); see also *Bank of New England Old Colony, N. A.* v. *Clark*, 986 F. 2d 600, 604 (CA1 1993); *Dean* v. *Veterans Admin. Regional Office*, 943 F. 2d 667, 670 (CA6 1991), vacated and remanded on other grounds, 503 U. S. 902 (1992); *In re FCX, Inc.*, 853 F. 2d 1149, 1154 (CA4 1988), cert. denied *sub nom. Universal Cooperatives, Inc.* v. *FCX, Inc.*, 489 U. S. 1011 (1989); *Multi-State Communications, Inc.* v. *FCC*, 234 U. S. App. D. C. 285, 291, 728 F. 2d 1519, 1525, cert. denied, 469 U. S. 1017 (1984); *New Jersey Air National Guard* v. *FLRA*, 677 F. 2d 276, 283 (CA3), cert. denied *sub nom. Government Employees* v. *New Jersey Air National Guard*, 459 U. S. 988 (1982). Thus, we think it clear beyond peradventure that § 1.9d provides that contract rents "shall not" be adjusted so as to exceed materially the rents charged for "comparable unassisted units" on the private rental market—even if other provisions of the contracts might seem to

require such a result. This limitation is plainly consistent with the Housing Act itself, which provides that "[a]djustments in the maximum rents," whether based on market surveys or on a reasonable formula, "shall not result in material differences" between Section 8 rents and the rents for comparable housing on the private market. 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III).

In its *Rainier View* decision, the Court of Appeals read § 1.9d's "overall limitation" as empowering HUD only to make prospective changes in the automatic adjustment factors where it discovered that those factors were producing materially inflated rents; under the court's view, § 1.9d would not permit "abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents." 848 F. 2d, at 991. But this reading of the contract—under which Section 8 project owners could demand payment of materially inflated rents until the Secretary could publish revised automatic adjustment factors aimed at curing the overpayment—is almost precisely backwards. It would entitle project owners to collect the formula-based adjustments promised by § 1.9b *notwithstanding* that those adjustments were resulting in the sort of material differences in rents prohibited by § 1.9d.

Reading § 1.9d's "overall limitation" as allowing rent caps based on comparability studies does not, as the *Rainier View* court supposed, "render the formula method authorized by the statute and elected in the contract a nullity." *Ibid.* The rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract. It is only in those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue. Because the automatic adjustment factors are themselves geared to reflect trends in the local or regional housing market, theoretically it should not be often that the comparability studies would

suggest material differences between Section 8 and private-market rents.[2]

Respondents assert that "the automatic adjustment provision was a central provision of the HAP Contracts and that the owners would not have signed contracts that expressly contained the [comparability] provision HUD asks the Court to imply." Brief for Respondents Acacia Village et al. 22. They urge us to eschew any interpretation of the contracts that would allow the displacement of the "automatic" adjustments for which they bargained by a "project-by-project comparability process" that "would leave [project owners] at the mercy of minor HUD officials." Brief for Respondent Alpine Ridge Group 30–31. At bottom, many of respondents' arguments in support of the decision below seem to circle back to their vigorous contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty and misleading comparisons. But the integrity with which the agency has carried out its comparability studies is an entirely separate matter from its contractual authority to employ such studies at all. Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD to cap rents based on accurate and fair comparability studies. If respondents have been denied formula-based rent in-

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[2] The *Rainier View* court also suggested that HUD's own regulations had interpreted the assistance contracts as barring adjustments to contract rents independent of the published factors. The court quoted 24 CFR § 888.204 (1987), which states that the agency "'will consider establishing separate or revised Automatic Annual Adjustment Factors for [a] particular area'" if project owners can demonstrate that application of the formula would result in Section 8 rents substantially below market rents for comparable units. See 848 F. 2d, at 991. Although this regulation is certainly consistent with respondents' view of the contracts, we do not believe that it is inconsistent with our understanding of the contracts' plain language: The regulation acknowledges revision of the adjustment factors as a means of remedying material differences in rents but it does not foreclose corrective adjustments independent of the factors.

creases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons.[3]

In sum, we think that the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units. We also think it clear that § 1.9d—which by its own terms clearly envisions some comparison "between the rents charged for assisted and comparable unassisted units"—affords the Secretary sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate. In this regard, we observe that § 1.9d expressly assigns to "the Government" the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units. Because we find that respondents have no contract right to unobstructed formula-based rent adjustments, we have no occasion to consider whether § 801 of the Reform Act unconstitutionally abrogated such a right.

III

For these reasons, the judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

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[3] Petitioners acknowledge that "[a] comparability study must . . . satisfy requirements of administrative reasonableness and 'is reviewable under administrative law principles.'" Reply Brief for Petitioners 16, n. 23 (quoting *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738, 745, n. 3 (Colo. 1991)).

Syllabus

MOREAU ET AL. *v.* KLEVENHAGEN, SHERIFF, HARRIS COUNTY, TEXAS, ET AL.

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

No. 92–1. Argued March 1, 1993—Decided May 3, 1993

Under subsection 7(o)(2)(A) of the Fair Labor Standards Act (FLSA or Act), a state or local government agency may provide its employees compensatory time off, or "comp time," instead of the generally mandated overtime pay, so long as, *inter alia,* it is done pursuant to "(i) applicable provisions of a collective bargaining agreement or any other agreement . . . between the . . . agency and representatives of such employees . . . " or "(ii) in the case of employees not covered by subclause (i), an agreement . . . arrived at between the employer and the employee before the performance of the work . . . ." Department of Labor (DOL) regulations provide that, where employees have designated a representative, a comp time agreement must be between that representative and the agency, 29 CFR § 553.23(b); according to the Secretary of Labor, the question whether employees have a "representative" is governed by state or local law and practices, 52 Fed. Reg. 2014–2015. Petitioners are a group of deputy sheriffs in a Texas county who sought, unsuccessfully, to negotiate a collective FLSA comp time agreement by way of their designated union representative. Petitioners' employment terms and conditions are set forth in individual form agreements, which incorporate by reference the county's regulations providing that deputies shall receive comp time for overtime work. Petitioners filed this suit alleging, among other things, that they were "covered" by subclause (i) of subsection 7(o)(2)(A) by virtue of their union representation, and that the county therefore was precluded from providing comp time pursuant to individual agreements under subclause (ii). The District Court disagreed, relying on its conclusion that Texas law prohibits collective bargaining in the public sector, and entered summary judgment for the county. The Court of Appeals affirmed.

Held: Because petitioners are "employees not covered by subclause (i)," subclause (ii) authorized the individual comp time agreements challenged in this litigation. The phrase "employees . . . covered by subclause (i)" is most sensibly read as referring to employees who have designated a representative with the authority to negotiate and agree with their employer on "applicable provisions of a collective bargaining agreement" authorizing comp time. This reading accords significance

to both the focus on the word "agreement" in subclause (i) and the focus on "employees" in subclause (ii); is true to subsection 7(o)'s hierarchy, which favors subclause (i) agreements over individual agreements by limiting use of the latter to cases in which the former are unavailable; and is consistent with the DOL regulations, interpreted most reasonably. Although 29 CFR §553.23(b), read in isolation, would support petitioners' view that selection of a representative—even one without lawful authority to bargain—is sufficient to bring the employees within subclause (i)'s scope, that interpretation would prohibit entirely the use of comp time in a substantial portion of the public sector and would be inconsistent with the Secretary's statement that the "representative" determination is a local matter. The latter clarification establishes that when the regulations identify representative selection as the condition necessary for subclause (i) coverage, they refer only to those representatives with lawful authority to negotiate agreements. In this case, both lower courts found that Texas law prohibits petitioners' representative from entering into an agreement with their employer. Accordingly, petitioners did not have a representative with such authority. Pp. 31–35.

956 F. 2d 516, affirmed.

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

Michael T. Leibig argued the cause for petitioners. With him on the briefs were *Laurence Gold* and *Walter Kamiat.*

Harold M. Streicher argued the cause for respondents. With him on the brief were *Murray E. Malakoff* and *Mike Driscoll.**

JUSTICE STEVENS delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA or Act) generally requires employers to pay their employees for overtime work at a rate of 1½ times the employees' regular wages.[1] In 1985, Congress amended the FLSA to provide a limited

*Briefs of *amici curiae* urging affirmance were filed for the State of Missouri by *William L. Webster*, Attorney General, *Bruce Farmer*, Assistant Attorney General, *Jack L. Campbell*, and *William E. Quirk;* for the National Association of Counties et al. by *Richard Ruda* and *Charles J. Cooper;* and for the Texas Municipal League et al. by *Susan M. Horton.*

[1] 52 Stat. 1063, as amended, 29 U. S. C. §207(a).

exception to this rule for state and local governmental agencies. Under the Fair Labor Standards Amendments of 1985 (1985 Amendments), public employers may compensate employees who work overtime with extra time off instead of overtime pay in certain circumstances.[2] The question in this case is whether a public employer in a State that prohibits public sector collective bargaining may take advantage of that exception when its employees have designated a union representative.

Because the text of the 1985 Amendments provides the framework for our entire analysis, we quote the most relevant portion at the outset. Subsection 7(o)(2)(A) states:

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[2] The relevant portion of the 1985 Amendments, 99 Stat. 790, is codified at 29 U. S. C. § 207(o). It provides:

"§ 207. Maximum hours.

. . . . . .

"(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

"In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection."

"(2) A public agency may provide compensatory time [in lieu of overtime pay] only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . ."

Petitioners are a group of employees who sought, unsuccessfully, to negotiate a collective FLSA compensatory time agreement by way of a designated representative. The narrow question dispositive here is whether petitioners are "employees not covered by subclause (i)" within the meaning of subclause (ii), so that their employer may provide compensatory time pursuant to individual agreements under the second subclause.

I

Congress enacted the FLSA in 1938 to establish nationwide minimum wage and maximum hours standards. Section 7 of the Act encourages compliance with maximum hours standards by providing that employees generally must be paid on a time-and-one-half basis for all hours worked in excess of 40 per week.[3]

Amendments to the Act in 1966[4] and 1974[5] extended its coverage to most public employers, and gave rise to a series of cases questioning the power of Congress to regulate the

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[3] 29 U. S. C. § 207(a).

[4] Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 830, 29 U. S. C. §§ 203(d) and (r).

[5] Fair Labor Standards Amendments of 1974, §§ 6(a)(1) and (6), 88 Stat. 58, 60, 29 U. S. C. §§ 203(d) and (x).

compensation of state and local employees.[6] Following our decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), upholding that power, the Department of Labor (DOL) announced that it would hold public employers to the standards of the Act effective April 15, 1985.[7]

In response to the *Garcia* decision and the DOL announcement, both Houses of Congress held hearings and considered legislation designed to ameliorate the burdens associated with necessary changes in public employment practices. The projected "financial costs of coming into compliance with the FLSA—particularly the overtime provisions"—were specifically identified as a matter of grave concern to many States and localities. S. Rep. No. 99–159, p. 8 (1985). The statutory provision at issue in this case is the product of those deliberations.

In its Report recommending enactment of the 1985 Amendments, the Senate Committee on Labor and Human Resources explained that the new subsection 7(o) would allow public employers to compensate for overtime hours with compensatory time off, or "comp time," in lieu of overtime pay, so long as certain conditions were met: The provision of comp time must be at the premium rate of not less than 1½ hours per hour of overtime work, and must be pursuant to an agreement reached prior to performance of the work. *Id.*, at 10–11. With respect to the nature of the necessary agreement, the issue raised in this case, the Committee stated: "Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective

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[6] *Maryland* v. *Wirtz*, 392 U. S. 183 (1968); *Fry* v. *United States*, 421 U. S. 542 (1975); *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985).

[7] See S. Rep. No. 99–159, p. 7 (1985). The Department of Labor also announced that it would delay enforcement activities until October 15, 1985; that date was later extended to November 1, 1985. *Ibid.*

bargaining or through a memorandum of understanding or other type of agreement." *Id.*, at 10.

The House Committee on Education and Labor was in substantial agreement with the Senate Committee as to the conditions under which comp time could be made available. See H. R. Rep. No. 99–331, p. 20 (1985). On the question of subsection 7(o)'s agreement requirement, the House Committee expressed an understanding similar to the Senate Committee's: "Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer . . . ." *Ibid.*

Where the Senate and House Committee Reports differ is in their description of the "representative" who, once designated, would require that compensatory time be provided only pursuant to an agreement between that representative and the employer. While the Senate Report refers to a "recognized" representative, the House Report states that the representative "need not be a formal or recognized collective bargaining agent." *Supra* this page. The Conference Report does not comment on this difference, see H. R. Conf. Rep. No. 99–357 (1985), and the 1985 Amendments as finally enacted do not adopt the precise language of either Committee Report.

The issue is addressed, however, by the Secretary of Labor, in implementing regulations promulgated pursuant to express legislative direction under the 1985 Amendments.[8] The relevant DOL regulation seems to be patterned after the House Report, providing that "the representative need not be a formal or recognized bargaining agent."[9] At the

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[8] 99 Stat. 790, § 6, 29 U. S. C. § 203.

[9] "(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either

same time, in response to concerns expressed by the State of Missouri about the impact of the regulation in States where employee representatives have no authority to enter into enforceable agreements, the Secretary explained:

> "The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. *It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*" 52 Fed. Reg. 2014–2015 (1987) (emphasis added).

II

Petitioner Moreau is the president of the Harris County Deputy Sheriffs Union, representing approximately 400 deputy sheriffs in this action against the county and its sheriff, respondent Klevenhagen. For several years, the union has represented Harris County deputy sheriffs in various matters, such as processing grievances and handling workers' compensation claims, but it is prohibited by Texas law from

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through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act." 29 CFR § 553.23(b) (1992).

entering into a collective-bargaining agreement with the county.[10] Accordingly, the terms and conditions of petitioners' employment are included in individual form agreements signed by each employee. These agreements incorporate by reference the county's regulations providing that deputies shall receive 1½ hours of compensatory time for each hour of overtime work.[11]

Petitioners filed this action in 1986, alleging, *inter alia*,[12] that the county violated the Act by paying for overtime work with comp time, rather than overtime pay, absent an agreement with their representative authorizing the substitution. Petitioners contended that they were "covered" by subclause (i) of subsection 7(o)(2)(A) by virtue of their union represen-

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[10] As the Court of Appeals stated: "Tex. Rev. Civ. Stat. Ann. art. 5154c prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Harris County has not adopted that Act; thus, under article 5154c the County has no authority to bargain with the Union." 956 F. 2d 516, 519 (CA5 1992). The court went on to clarify that "Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into *any* agreement with the Union." *Id.*, at 520 (emphasis in original).

The District Court interpreted Texas law the same way. *Merritt* v. *Klevenhagen*, Civ. Action No. 88–1298 (SD Tex., Sept. 5, 1990), pp. 3–4, reprinted in App. to Pet. for Cert. 18a. Our decision is premised on the normal assumption that the Court of Appeals and the District Court have correctly construed the relevant rules of Texas law. See *Bishop* v. *Wood*, 426 U. S. 341, 346, and n. 10 (1976) (citing cases).

[11] *Merritt*, Civ. Action No. 88–1298, p. 2, reprinted in App. to Pet. for Cert. 17a.

[12] The District Court granted summary judgment for the county on two additional claims: that the county failed to include longevity pay in its overtime pay calculations, and that the county excluded nonmandated firearms qualification time from the calculation of number of hours worked. The Court of Appeals affirmed with respect to the former and remanded for further proceedings with respect to the latter claim. 956 F. 2d, at 520–523. Neither claim is before us today.

tation, and that the county therefore was precluded from providing comp time pursuant to individual agreements (or pre-existing practice)[13] under subclause (ii).

The District Court disagreed and entered summary judgment for the county. The court assumed that designation of a union representative normally would establish that employees are "covered" by subclause (i), and hence render subclause (ii) inapplicable, but went on to hold that subclause (i) cannot apply in States, like Texas, that prohibit collective bargaining in the public sector. *Merritt* v. *Klevenhagen*, Civ. Action No. 88–1298 (SD Tex., Sept. 5, 1990), p. 5, reprinted in App. to Pet. for Cert. 19a–20a. Reaching the same result by an alternative route, the court also reasoned that petitioners were not "covered" by subclause (i) because their union was not "'recognized'" by the county, a requirement it grounded in the legislative history of the 1985 Amendments. *Id.*, at 6, reprinted in App. to Pet. for Cert. 21a.

The Court of Appeals affirmed, but relied on slightly different reasoning. It seemed to agree with an Eleventh Circuit case, *Dillard* v. *Harris*, 885 F. 2d 1549 (1989), cert. denied, 498 U. S. 878 (1990), that the words "not covered" in subclause (ii) refer to the absence of an *agreement* rather than the absence of a representative. 956 F. 2d 516, 519–520 (CA5 1992). Under that theory, the fact that Texas law prohibits agreements between petitioners' union and the employer means that petitioners can never be "covered" by sub-

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[13] Respondents in this case sought to provide comp time pursuant to both a "regular practice in effect on April 15, 1986," for deputies hired before that date, and individual agreements, for deputies hired later. *Merritt*, Civ. Action No. 88–1298, p. 2, reprinted in App. to Pet. for Cert. 17a. Like subclause (ii) individual agreements, "regular practice" is available as an option only for employees "not covered by subclause (i)." 29 U. S. C. § 207(o)(2); n. 2, *supra*. Accordingly, our analysis is the same with respect to both forms of agreement, and we refer to them here collectively as individual agreements.

clause (i), making subclause (ii) available as an alternative vehicle for provision of comp time.

Because there is conflict among the Circuits over the scope of subclause (i)'s coverage,[14] we granted certiorari. 506 U. S. 813 (1992).

III

Respondents find the language of the statute perfectly clear. In their view, subclause (ii) plainly authorizes individual agreements whenever public employees have not successfully negotiated a collective-bargaining agreement under subclause (i). Petitioners, on the other hand, contend that ambiguity in the statute itself justifies resort to its legislative history and the DOL regulations, and that these secondary sources unequivocally preclude individual comp time agreements with employees who have designated a representative. We begin our analysis with the relevant statutory text.

At least one proposition is not in dispute. Subclause (ii) authorizes individual comp time agreements only "in the case of employees not covered by subclause (i)." Our task, therefore, is to identify the class of "employees" covered by subclause (i). This task is complicated by the fact that sub-

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[14] See, *e. g., International Assn. of Fire Fighters, Local 2203* v. *West Adams County Fire Dist.*, 877 F. 2d 814 (CA10 1989) (employees covered by subclause (i) upon designation of representative); *Abbott* v. *Virginia Beach*, 879 F. 2d 132 (CA4 1989) (employees covered by subclause (i) upon designation of recognized representative), cert. denied, 493 U. S. 1051 (1990); *Dillard* v. *Harris*, 885 F. 2d 1549 (CA11 1989) (employees covered by subclause (i) upon entry of agreement regarding compensatory time), cert. denied, 498 U. S. 878 (1990); *Nevada Highway Patrol Assn.* v. *Nevada*, 899 F. 2d 1549 (CA9 1990) (employees covered by subclause (i) upon designation of representative unless state law prohibits public sector collective bargaining).

For discussion of the division in the Courts of Appeals, see generally Note, The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity, 75 Minn. L. Rev. 1807 (1991).

clause (i) does not purport to define a category of employees, as the reference in subclause (ii) suggests it would. Instead, it describes only a category of agreements—those that (a) are bargained with an employee representative, and (b) authorize the use of comp time.

Respondents read this shift in subject from "employees" in subclause (ii) to "agreement" in subclause (i) as susceptible of just one meaning: Employees are covered by subclause (i) only if they are bound by applicable provisions of a collective-bargaining agreement. Under this narrow construction, subclause (i) would not cover employees who designate a representative if that representative is unable to reach agreement with the employer, for whatever reason; such employees would remain "uncovered" and available for individual comp time agreements under subclause (ii).

We find this reading unsatisfactory. First, while the language of subclauses (i) and (ii) will bear the interpretation advanced by respondents, we cannot say that it will bear no other. Purely as a matter of grammar, subclause (ii)'s reference to "employees" remains unmodified by subclause (i)'s focus on "agreement," and "employees . . . covered" might as easily comprehend employees with representatives as employees with agreements. See *International Assn. of Fire Fighters, Local 2203* v. *West Adams County Fire Dist.*, 877 F. 2d 814, 816–817, and n. 1 (CA10 1989).

Second, respondents' reading is difficult to reconcile with the general structure of subsection 7(o). Assuming designation of an employee representative, respondents' theory leaves it to the employer to choose whether it will proceed under subclause (i), and negotiate the terms of a collective comp time agreement with the representative, or instead proceed under subclause (ii), and deal directly with its employees on an individual basis. If the employer is free to choose the latter course (as most employers likely would), then it need only decline to negotiate with the employee representative to render subclause (i) inapplicable and authorize

individual comp time agreements under subclause (ii).[15] This permissive interpretation of subsection 7(o), however, is at odds with the limiting phrase of subclause (ii) at issue here. See *supra*, at 31. Had Congress intended such an open-ended authorization of the use of comp time, it surely would have said so more simply, forgoing the elaborate subclause structure that purports to restrict use of individual agreements to a limited class of employees. Respondents' broad interpretation of the subsection 7(o) exception is also in some tension with the well-established rule that "exemptions from the [FLSA] are to be narrowly construed." See, *e. g.*, *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295–296 (1959).

At the same time, however, we find equally implausible a reading of the statutory text that would deem employees "covered" by subclause (i) whenever they select a representative, whether or not the representative has the ability to enter into the kind of agreement described in that subclause. If there is no possibility of reaching an agreement under subclause (i), then that subclause cannot logically be read as applicable. In other words, "employees . . . covered by subclause (i)" must, at a minimum, be employees who conceivably could receive comp time pursuant to the agreement contemplated by that subclause.

The most plausible reading of the phrase "employees . . . covered by subclause (i)" is, in our view, neither of the extreme alternatives described above. Rather, the phrase is

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[15] Indeed, even an employer who is party to a collective-bargaining agreement with its employees may be permitted to take advantage of subclause (ii) under respondents' construction. Because subclause (i) describes only those agreements that authorize the use of comp time, see *supra*, at 31–32, a collective-bargaining agreement silent on the subject, or even one prohibiting use of comp time altogether, would not constitute a subclause (i) agreement. Accordingly, employees bound by such an agreement would not be "covered by subclause (i)" under respondents' theory, and their employer would be free to provide comp time instead of overtime pay pursuant to individual employee agreements.

most sensibly read as referring to employees who have designated a representative with the authority to negotiate and agree with their employer on "applicable provisions of a collective bargaining agreement" authorizing the use of comp time. This reading accords significance to both the focus on the word "agreement" in subclause (i) and the focus on "employees" in subclause (ii). It is also true to the hierarchy embodied in subsection 7(o), which favors subclause (i) agreements over individual agreements by limiting use of the latter to cases in which the former are unavailable.[16]

This intermediate reading of the statutory text is consistent also with the DOL regulations, interpreted most reasonably. It is true that 29 CFR § 553.23(b), read in isolation, would support petitioners' view that selection of a representative by employees—even a representative without lawful authority to bargain with the employer—is sufficient to bring the employees within the scope of subclause (i) and preclude use of subclause (ii) individual agreements. See *supra*, at 27, and n. 9. So interpreted, however, the regulation would prohibit entirely the use of comp time in a substantial portion of the public sector. It would also be inconsistent with the Secretary's statement that "the question . . . whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices." See *supra*, at 28. This

[16] So read, we do not understand subsection 7(o) to impose any new burden upon a public employer to bargain collectively with its employees. Subsection 7(o) is, after all, an exception to the general FLSA rule mandating overtime pay for overtime work, and employers may take advantage of the benefits it offers "only" pursuant to certain conditions set forth by Congress. 29 U. S. C. § 207(o)(2); see n. 2, *supra*. Once its employees designate a representative authorized to engage in collective bargaining, an employer is entitled to take advantage of those benefits if it reaches a comp time agreement with the representative. It is also free, of course, to forgo collective bargaining altogether; if it so chooses, it remains in precisely the same position as any other employer subject to the overtime pay provisions of the FLSA.

clarification by the Secretary convinces us that when the regulations identify selection of a representative as the condition necessary for coverage under subclause (i), they refer only to those representatives with lawful authority to negotiate agreements.[17]

Thus, under both the statute and the DOL regulations, employees are "covered" by subclause (i) when they designate a representative who lawfully may bargain collectively on their behalf—under the statute, because such authority is necessary to reach the kind of "agreement" described in subclause (i), and under the regulation, because such authority is a condition of "representative" status for subclause (i) purposes. Because we construe the statute and regulation in harmony, we need not comment further on petitioners' argument that the Secretary's interpretation of the 1985 Amendments is entitled to special deference.

Petitioners in this case did not have a representative authorized by law to enter into an agreement with their employer providing for use of comp time under subclause (i). Accordingly, they were "not covered by subclause (i)," and subclause (ii) authorized the individual agreements challenged in this litigation.

The judgment of the Court of Appeals is affirmed.

So ordered.

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[17] Accordingly, public employers need not fear that they will find themselves dealing with a different representative for each employee, should each of their employees choose to select his or her own representative. See Brief for the National Association of Counties et al. as *Amici Curiae* 17. Unless such individual designations were "in accordance with State or local law and practices," the designees would not be "representatives" for purposes of subclause (i).

Syllabus

STINSON *v.* UNITED STATES

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

No. 91–8685. Argued March 24, 1993—Decided May 3, 1993

After petitioner Stinson pleaded guilty to a five-count indictment resulting from his robbery of a bank, the District Court sentenced him as a career offender under United States Sentencing Commission, Guidelines Manual § 4B1.1, which requires, *inter alia*, that "the instant offense of conviction [be] a crime of violence." The court found that Stinson's offense of possession of a firearm by a convicted felon, 18 U. S. C. § 922(g), was a "crime of violence" as that term was then defined in USSG § 4B1.2(1). While the case was on appeal, however, the Sentencing Commission promulgated Amendment 433, which added a sentence to the § 4B1.2 commentary that expressly excluded the felon-in-possession offense from the "crime of violence" definition. The Court of Appeals nevertheless affirmed Stinson's sentence, adhering to its earlier interpretation that the crime in question was categorically a crime of violence and holding that the commentary to the Guidelines is not binding on the federal courts.

Held: The Guidelines Manual's commentary which interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. Pp. 40–48.

(a) The Court of Appeals erred in concluding that the commentary added by Amendment 433 is not binding on the federal courts. Commentary which functions to "interpret [a] guideline or explain how it is to be applied," § 1B1.7, controls, and if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] . . . from the wrong guideline range," *Williams* v. *United States*, 503 U. S. 193, 203, that sentence would constitute "an incorrect application of the . . . guidelines" that should be set aside under 18 U. S. C. § 3742(f)(1) unless the error was harmless, see *Williams*, *supra*, at 201. Guideline § 1B1.7 makes this proposition clear, and this Court's holding in *Williams*, *supra*, at 201, that the Sentencing Commission's policy statements bind federal courts applies with equal force to the commentary at issue. However, it does not follow that commentary is binding in all instances. The standard that governs whether particular interpretive or explanatory commentary is binding is the one that applies to an agency's interpretation of its own legislative rule: Provided it does not violate the Constitu-

tion or a federal statute, such an interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets. See, *e. g., Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414. Amended commentary is binding on the courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Sentencing Commission from adopting a conflicting interpretation that satisfies the standard adopted herein. Pp. 40–46.

(b) Application of the foregoing principles leads to the conclusion that federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing § 4B1.1's career offender provision as to those defendants to whom Amendment 433 applies. Although the guideline text may not compel the Amendment's exclusion of the offense in question from the "crime of violence" definition, the commentary is a binding interpretation of the quoted phrase because it does not run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent with § 4B1.2. P. 47.

(c) The Court declines to address the Government's argument that Stinson's sentence conformed with the Guidelines Manual in effect when he was sentenced, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the Manual's provisions. The Court of Appeals did not consider this theory, and it is not fairly included in the question this Court formulated in its grant of certiorari. It is left to be addressed on remand. Pp. 47–48.

943 F. 2d 1268, vacated and remanded.

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

William Mallory Kent argued the cause and filed a brief for petitioner.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Keeney,* and *John F. DePue.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this case we review a decision of the Court of Appeals for the Eleventh Circuit holding that the commentary to the

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**Robert Augustus Harper* filed a brief for the Florida Association of Criminal Defense Lawyers as *amicus curiae.*

Sentencing Guidelines is not binding on the federal courts. We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.

Petitioner Terry Lynn Stinson entered a plea of guilty to a five-count indictment resulting from his robbery of a Florida bank. The presentence report recommended that petitioner be sentenced as a career offender under the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual §4B1.1 (Nov. 1989). Section 4B1.1 provided that a defendant is a career offender if:

> "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

All concede that petitioner was at least 18 years old when the events leading to the indictment occurred and that he then had at least two prior felony convictions for crimes of violence, thereby satisfying the first and third elements in the definition of career offender. It is the second element in this definition, the requirement that the predicate offense be a crime of violence, that gave rise to the ultimate problem in this case. At the time of his sentencing, the Guidelines defined "crime of violence" as, among other things, "any offense under federal or state law punishable by imprisonment for a term exceeding one year that . . . involves conduct that presents a serious potential risk of physical injury to another." §4B1.2(1). The United States District Court for the Middle District of Florida found that petitioner's conviction for the offense of possession of a firearm by a convicted felon, 18 U. S. C. §922(g), was a crime of violence, satisfying the second element of the career offender definition. Al-

though the indictment contained other counts, the District Court relied only upon the felon-in-possession offense in applying the career offender provision of the Guidelines. In accord with its conclusions, the District Court sentenced petitioner as a career offender.

On appeal, petitioner maintained his position that the offense relied upon by the District Court was not a crime of violence under USSG §§ 4B1.1 and 4B1.2(1). The Court of Appeals affirmed, holding that possession of a firearm by a felon was, as a categorical matter, a crime of violence. 943 F. 2d 1268, 1271–1273 (CA11 1991). After its decision, however, Amendment 433 to the Guidelines Manual, which added a sentence to the commentary to § 4B1.2, became effective. The new sentence stated that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."[1] USSG App. C, p. 253 (Nov. 1992). See § 4B1.2, comment., n. 2. Petitioner sought rehearing, arguing that Amendment 433 should be given retroactive effect, but the Court of Appeals adhered to its earlier interpretation of "crime of violence" and denied the petition for rehearing in an opinion. 957 F. 2d 813 (CA11 1992) *(per curiam)*.

Rather than considering whether the amendment should be given retroactive application, the Court of Appeals held that commentary to the Guidelines, though "persuasive," is of only "limited authority" and not "binding" on the federal courts. *Id.*, at 815. It rested this conclusion on the fact

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[1] Amendment 433 was contrary to a substantial body of Circuit precedent holding that the felon-in-possession offense constituted a crime of violence in at least some circumstances. See, *e. g., United States* v. *Williams*, 892 F. 2d 296, 304 (CA3 1989), cert. denied, 496 U. S. 939 (1990); *United States* v. *Goodman*, 914 F. 2d 696, 698–699 (CA5 1990); *United States* v. *Alvarez*, 914 F. 2d 915, 917–919 (CA7 1990), cert. denied, 500 U. S. 934 (1991); *United States* v. *Cornelius*, 931 F. 2d 490, 492–493 (CA8 1991); *United States* v. *O'Neal*, 937 F. 2d 1369, 1374–1375 (CA9 1990); *United States* v. *Walker*, 930 F. 2d 789, 793–795 (CA10 1991); 943 F. 2d 1268, 1271–1273 (CA11 1991) (case below).

that Congress does not review amendments to the commentary under 28 U. S. C. § 994(p). The Court of Appeals "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a 'crime of violence.'" 957 F. 2d, at 815. The various Courts of Appeals have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines,[2] so we granted certiorari. 506 U. S. 972 (1992).

The Sentencing Reform Act of 1984 (Sentencing Reform Act), as amended, 18 U. S. C. § 3551 *et seq.* (1988 ed. and Supp. III), 28 U. S. C. §§ 991–998 (1988 ed. and Supp. III), created the Sentencing Commission, 28 U. S. C. § 991(a), and charged it with the task of "establish[ing] sentencing policies

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[2] With the decision below compare, *e. g., United States* v. *Weston*, 960 F. 2d 212, 219 (CA1 1992) (when the language of a guideline is not "fully self-illuminating," courts should look to commentary for guidance; while commentary "do[es] not possess the force of law," it is an "important interpretive ai[d], entitled to considerable respect"); *United States* v. *Joshua*, 976 F. 2d 844, 855 (CA3 1992) (commentary is analogous to an administrative agency's interpretation of an ambiguous statute; courts should defer to commentary if it is a "reasonable reading" of the guideline); *United States* v. *Wimbish*, 980 F. 2d 312, 314–315 (CA5 1992) (commentary has the force of policy statements; while courts "must consider" commentary, "they are not bound by [it] as they are by the guidelines"), cert. pending, No. 92–7993; *United States* v. *White*, 888 F. 2d 490, 497 (CA7 1989) (commentary constitutes a "contemporaneous explanatio[n] of the Guidelines by their authors, entitled to substantial weight"); *United States* v. *Smeathers*, 884 F. 2d 363, 364 (CA8 1989) (commentary "reflects the intent" of the Sentencing Commission); *United States* v. *Anderson*, 942 F. 2d 606, 611–613 (CA9 1991) (en banc) (commentary is analogous to advisory committee notes that accompany the federal rules of procedure and evidence; commentary should be applied unless it cannot be construed as consistent with the Guidelines); *United States* v. *Saucedo*, 950 F. 2d 1508, 1515 (CA10 1991) (refuses to follow amendment to commentary that is inconsistent with Circuit precedent; "our interpretation of a guideline has the force of law until such time as the Sentencing Commission or Congress changes the actual text of the guideline").

and practices for the Federal criminal justice system," § 991(b)(1). See *Mistretta* v. *United States*, 488 U. S. 361, 367–370 (1989). The Commission executed this function by promulgating the Guidelines Manual. The Manual contains text of three varieties. First is a guideline provision itself. The Sentencing Reform Act establishes that the Guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U. S. C. § 994(a)(1). The Guidelines provide direction as to the appropriate type of punishment—probation, fine, or term of imprisonment—and the extent of the punishment imposed. §§ 994(a)(1)(A) and (B). Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them. § 994(p). The second variety of text in the Manual is a policy statement. The Sentencing Reform Act authorizes the promulgation of "general policy statements regarding application of the guidelines" or other aspects of sentencing that would further the purposes of the Act. § 994(a)(2). The third variant of text is commentary, at issue in this case. In the Guidelines Manual, both guidelines and policy statements are accompanied by extensive commentary. Although the Sentencing Reform Act does not in express terms authorize the issuance of commentary, the Act does refer to it. See 18 U. S. C. § 3553(b) (in determining whether to depart from a guidelines range, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission"). The Sentencing Commission has provided in a Guideline that commentary may serve these functions: commentary may "interpret [a] guideline or explain how it is to be applied," "suggest circumstances which . . . may warrant departure from the guidelines," or "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." USSG § 1B1.7.

As we have observed, "the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta* v. *United States*, *supra*, at 391. See also *Burns* v. *United States*, 501 U. S. 129, 133 (1991). The most obvious operation of this principle is with respect to the Guidelines themselves. The Sentencing Reform Act provides that, unless the sentencing court finds an aggravating or mitigating factor of a kind, or to a degree, not given adequate consideration by the Commission, a circumstance not applicable in this case, "[t]he court shall impose a sentence of the kind, and within the range," established by the applicable guidelines. 18 U. S. C. §§ 3553(a)(4), (b). The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements. In *Williams* v. *United States*, 503 U. S. 193, 201 (1992), we said that "[w]here . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline." There, the District Court had departed upward from the Guidelines' sentencing range based on prior arrests that did not result in criminal convictions. A policy statement, however, prohibited a court from basing a departure on a prior arrest record alone. USSG § 4A1.3, p. s. We held that failure to follow the policy statement resulted in a sentence "imposed as a result of an incorrect application of the sentencing guidelines" under 18 U. S. C. § 3742(f)(1) that should be set aside on appeal unless the error was harmless. 503 U. S., at 201, 203.

In the case before us, the Court of Appeals determined that these principles do not apply to commentary. 957 F. 2d, at 814–815. Its conclusion that the commentary now being considered is not binding on the courts was error. The commentary added by Amendment 433 was interpretive and explanatory of the Guideline defining "crime of violence." Commentary which functions to "interpret [a] guideline or explain how it is to be applied," USSG § 1B1.7, controls, and

if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] . . . from the wrong guideline range," *Williams* v. *United States*, *supra*, at 203, that sentence would constitute "an incorrect application of the sentencing guidelines" under 18 U. S. C. § 3742(f)(1). A Guideline itself makes this proposition clear. See USSG § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal"). Our holding in *Williams* dealing with policy statements applies with equal force to the commentary before us here. Cf. USSG § 1B1.7 (commentary regarding departures from the Guidelines should be "treated as the legal equivalent of a policy statement"); § 1B1.7, comment. ("Portions of [the Guidelines Manual] not labeled as guidelines or commentary . . . are to be construed as commentary and thus have the force of policy statements").

It does not follow that commentary is binding in all instances. If, for example, commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline. See 18 U. S. C. §§ 3553(a)(4), (b). Some courts have refused to follow commentary in situations falling short of such flat inconsistency. Thus, we articulate the standard that governs the decision whether particular interpretive or explanatory commentary is binding.

Different analogies have been suggested as helpful characterizations of the legal force of commentary. Some we reject. We do not think it helpful to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the guideline, having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence. Quite apart from the usual difficulties of attributing meaning to a statutory or regulatory command by refer-

ence to what other documents say about its proposers' initial intent, here, as is often true, the commentary was issued well after the guideline it interprets had been promulgated. The guidelines of the Sentencing Commission, moreover, cannot become effective until after the 6-month review period for congressional modification or disapproval. It seems inconsistent with this process for the Commission to announce some statement of initial intent well after the review process has expired. To be sure, much commentary has been issued at the same time as the guideline it interprets. But neither the Guidelines Manual nor the Sentencing Reform Act indicates that the weight accorded to, or the function of, commentary differs depending on whether it represents a contemporaneous or *ex post* interpretation.

We also find inapposite an analogy to an agency's construction of a federal statute that it administers. Under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has "left a gap for the agency to fill," courts must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.*, at 842–843. Commentary, however, has a function different from an agency's legislative rule. Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute. *Id.*, at 843, n. 9. Rather, commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.

Although the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule. Brief for United States 13–16. The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, see

Mistretta v. *United States,* 488 U. S., at 371–379, and through the informal rulemaking procedures in 5 U. S. C. § 553, see 28 U. S. C. § 994(x). Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414 (1945). See, *e. g., Robertson* v. *Methow Valley Citizens Council,* 490 U. S. 332, 359 (1989); *Lyng* v. *Payne,* 476 U. S. 926, 939 (1986); *United States* v. *Larionoff,* 431 U. S. 864, 872–873 (1977); *Udall* v. *Tallman,* 380 U. S. 1, 16–17 (1965). See also 2 K. Davis, Administrative Law Treatise § 7:22, pp. 105–107 (2d ed. 1979).

According this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute. The Commission has the statutory obligation "periodically [to] review and revise" the guidelines in light of its consultation with authorities on and representatives of the federal criminal justice system. See 28 U. S. C. § 994*(o)*. The Commission also must "revie[w] the presentence report, the guideline worksheets, the tribunal's

sentencing statement, and any written plea agreement," *Mistretta* v. *United States*, *supra*, at 369–370, with respect to every federal criminal sentence. See 28 U. S. C. § 994(w). In assigning these functions to the Commission, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U. S. 344, 348 (1991). Although amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, if the guideline which the commentary interprets will bear the construction. Amended commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today.

It is perhaps ironic that the Sentencing Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary. The commentary to the Guideline on commentary provides:

> "[I]n seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." USSG § 1B1.7, comment.

We note that this discussion is phrased in predictive terms. To the extent that this commentary has prescriptive content, we think its exposition of the role of interpretive and explanatory commentary is inconsistent with the uses to which the Commission in practice has put such commentary and the

command in § 1B1.7 that failure to follow interpretive and explanatory commentary could result in reversible error.

We now apply these principles to Amendment 433. We recognize that the exclusion of the felon-in-possession offense from the definition of "crime of violence" may not be compelled by the guideline text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not "plainly erroneous or inconsistent" with § 4B1.2, *Bowles* v. *Seminole Rock & Sand Co.*, *supra*, at 414. As a result, the commentary is a binding interpretation of the phrase "crime of violence." Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.

The Government agrees that the Court of Appeals erred in concluding that commentary is not binding on the federal courts and in ruling that Amendment 433 is not of controlling weight. See Brief for United States 11–19. It suggests, however, that we should affirm the judgment on an alternative ground. It argues that petitioner's sentence conformed with the Guidelines Manual in effect when he was sentenced, *id.*, at 22–29, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the provisions in the Manual, *id.*, at 19–22. The Government claims that petitioner's only recourse is to file a motion in District Court for resentencing, pursuant to 18 U. S. C. § 3582(c)(2). Brief for United States 33–35. It notes that after the Court of Appeals denied rehearing in this case, the Sentencing Commission amended USSG § 1B1.10(d), p. s., to indicate that Amendment 433 may be given retroactive effect under § 3582(c)(2). See Amendment 469, USSG App. C, p. 296 (Nov. 1992).

We decline to address this argument. In refusing to upset petitioner's sentence, the Court of Appeals did not consider

the nonretroactivity theory here advanced by the Government; its refusal to vacate the sentence was based only on its view that commentary did not bind it. This issue, moreover, is not "fairly included" in the question we formulated in the grant of certiorari, see 506 U. S. 972 (1992). Cf. this Court's Rule 14.1(a). We leave the contentions of the parties on this aspect of the case to be addressed by the Court of Appeals on remand.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL. *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

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

No. 91–1043. Argued November 2, 1992—Decided May 3, 1993

Although those who petition government for redress are generally immune from antitrust liability, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly" with a competitor's business relationships, *id.*, at 144. Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), which held copyrights to the motion pictures recorded on PRE's videodiscs and licensed the transmission of those motion pictures to hotel rooms, sued PRE for alleged copyright infringement. PRE counterclaimed, alleging that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade in violation of §§ 1 and 2 of the Sherman Act. The District Court granted summary judgment to PRE on the copyright claim, and the Court of Appeals affirmed. On remand, the District Court granted Columbia's motion for summary judgment on PRE's antitrust claims. Because Columbia had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the lawsuit was a sham because Columbia did not honestly believe its infringement claim was meritorious, the court found that the existence of probable cause precluded the application of the sham exception as a matter of law and rendered irrelevant any evidence of Columbia's subjective intent in bringing suit.

Held:

1. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining govern-

mental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Id.*, at 140. Thus, neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, *e. g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 503. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, *Noerr, supra,* at 144, through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 380. This two-tiered process requires a plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Pp. 55–61.

2. Because PRE failed to establish the objective prong of *Noerr*'s sham exception, summary judgment was properly granted to Columbia. A finding that an antitrust defendant claiming *Noerr* immunity had probable cause to sue compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Here, the lower courts correctly found probable cause for Columbia's suit. Since there was no dispute over the predicate facts of the underlying legal proceedings—Columbia had the exclusive right to show its copyrighted motion pictures publicly—the court could decide probable cause as a matter of law. A court could reasonably conclude that Columbia's action was an objectively plausible effort to enforce rights, since, at the time the District Court entered summary judgment, there was no clear copyright law on videodisc rental activities; since Columbia might have won its copyright suit in two other Circuits; and since Columbia would have been entitled to press a novel claim, even in the absence of supporting authority, if a similarly situated reasonable litigant could have perceived some likelihood of success. Pp. 62–65.

3. The Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation, because such matters were rendered irrelevant by the objective legal reasonableness of Columbia's infringement suit. Pp. 65–66.

944 F. 2d 1525, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined.

SOUTER, J., filed a concurring opinion, *post*, p. 66. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 67.

Patrick J. Coyne argued the cause for petitioners. With him on the briefs was *James R. Loftis III.*

Andrew J. Pincus argued the cause for respondents. With him on the brief were *Richard J. Favretto*, *Roy T. Englert, Jr.*, and *Stephen A. Kroft.**

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), as that doctrine applies in the litigation context. Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.*, at 144. We hold that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's hotel rooms and assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room

Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, Michael R. Dreeben, Catherine G. O'Sullivan, and *James M. Spears* filed a brief for the United States as *amicus curiae* urging affirmance.

viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–2,[1] and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see 17 U. S. C. § 109(a), and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see 17 U. S. C. § 101 (1988 ed. and Supp. III). As a result, summary judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to

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[1] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. § 1. Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

"perform the copyrighted work[s] publicly." § 106(4). Ruling that such rental did not constitute public performance, the District Court entered summary judgment for PRE. 228 USPQ 743 (CD Cal. 1986). The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. 866 F. 2d 278 (CA9 1989). See 17 U. S. C. § 101 (1988 ed. and Supp. III).

On remand, Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*. Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990–1 Trade Cases ¶ 68,971, p. 63,242 (CD Cal. 1990), the District Court granted the motion:

> "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.*, at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F. 2d 1525 (CA9 1991). After rejecting PRE's other allegations of anticompetitive conduct, see *id.*, at 1528–1529,[2] the court focused on

[2] The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. 944 F. 2d, at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from

PRE's contention that the copyright action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either " 'misrepresentations . . . in the adjudicatory process' " or the pursuit of " 'a pattern of baseless, repetitive claims' " instituted " 'without probable cause, and regardless of the merits.' " 944 F. 2d, at 1529 (quoting *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513, 512 (1972)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's finding that the infringement action was brought with probable cause, i. e., that the suit was not baseless." 944 F. 2d, at 1530. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" because "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine." *Id.*, at 1531, 1532. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id.*, at 1533. It accordingly rejected PRE's request for further discovery on Columbia's intent.

Columbia's other allegedly anticompetitive acts. *Id.*, at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962).

The Courts of Appeals have defined "sham" in inconsistent and contradictory ways.[3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 508, n. 10 (1988). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

II

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite

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[3] Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co.* v. *Mapco, Inc.*, 958 F. 2d 1552, 1560, and n. 12 (CA11 1992); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F. 2d 785, 809–812 (CA2 1983), cert. denied, 464 U. S. 1073 (1984); *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F. 2d 1171, 1177 (CA10 1982); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.*, 214 U. S. App. D. C. 76, 85, 89, 663 F. 2d 253, 262, 266 (1981), cert. denied, 455 U. S. 928 (1982). Still other courts have held that successful litigation by definition cannot be sham. See, *e. g.*, *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, 914 F. 2d 556, 564–565 (CA4 1990), cert. denied, 499 U. S. 947 (1991); *South Dakota* v. *Kansas City Southern Industries, Inc.*, 880 F. 2d 40, 54 (CA8 1989), cert. denied *sub nom. South Dakota* v. *Kansas City Southern R. Co.*, 493 U. S. 1023 (1990); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154, 161 (CA3 1984).

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc.* v. *Smith*, 797 F. 2d 313, 318 (1986) (emphasis added), cert. denied, 479 U. S. 1035 (1987). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F. 2d 466, 472 (1982), cert. denied, 461 U. S. 958 (1983). Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.*, 822 F. 2d 518, 528 (1987), cert. denied *sub nom. Union Pacific R. Co.* v. *Energy Transportation Systems, Inc.*, 484 U. S. 1007 (1988).

. . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under which either "indifference to . . . outcome," *ibid.*, or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability under the sham exception. We decline PRE's invitation.

Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.*, at 136. Accord, *Mine Workers* v. *Pennington*, 381 U. S. 657, 669 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U. S., at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. *Id.*, at 138.

Noerr, however, withheld immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.*, at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), we elaborated on *Noerr* in two rele-

vant respects. First, we extended *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U. S., at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." *Id.*, at 512 (internal quotation marks omitted). We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.[4]

Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U. S., at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the . . . campaign to influence governmental action." *Id.*, at 143.

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[4] *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive . . . competitors of meaningful access to the . . . courts." 404 U. S., at 512. See also *id.*, at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts"); *id.*, at 518 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.