SUPREME COURT OF THE UNITED STATES

No. 91–1188

JAMES ROWLAND, FORMER DIRECTOR, CALI-FORNIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL

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

[January 12, 1993]

JUSTICE THOMAS, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY join, dissenting.

The parties agree that the interpretive point of departure in deciding whether an association is a "person" for purposes of the *in forma pauperis* statute, 28 U. S. C. §1915, is the first section of the United States Code. The question presented in this case may thus be formulated as follows: Must the presumption codified in 1 U. S. C. §1—namely, that "[i]n determining the meaning of any Act of Congress," the word "person" should be construed to include an association—be given effect in determining the meaning of the *in forma pauperis* statute, or has the presumption been overcome because the context "indicates otherwise"? The answer to that question ultimately turns on the meaning of the phrase "unless the context indicates otherwise." In my view, the Court's holding rests on an impermissibly broad reading of that language. I see no basis for concluding that an association is not entitled to *in forma pauperis* status.

The Court states that the word "context" in 1 U. S. C. §1 "means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Ante*, at 4–5. The Court then goes on to say that the word "indicates" has a broader scope than the word "context"; that it "imposes less of a burden than, say, `requires' or

`necessitates'"; and that "a contrary `indication' may raise a specter short of inanity, and with something less than syllogistic force." *Ante*, at 5, 6. I share the Court's understanding of the word "context."[1] I do not share the Court's understanding of the word "indicates," however, because its gloss on that word apparently permits (and perhaps even requires) courts to look beyond the words of a statute, and to consider the policy judgments on which those words may or may not be based. (It certainly enables the

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[1]I should note, however, that the majority departs from that understanding in its discussion of *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), which presented the question whether a corporation is a "person" for purposes of a statute apportioning the burden of proof in property disputes between an Indian and a "white person." Instead of relying on the text surrounding the word "person," as it purports to do in this case, the majority defends *Wilson* on the ground that a narrow construction of "person" would frustrate the "purpose" of the statute at issue in that case. *Ante*, at 15. This is perhaps understandable, since it would be exceedingly difficult to defend *Wilson* on textual grounds. But if the word "context" in 1 U. S. C. §1 refers only to the text that surrounds a word, either *Wilson* was wrongly decided or this case has been wrongly decided. They cannot both be correct. A strong argument can be made that the Court misinterpreted 1 U. S. C. §1 in *Wilson*. But if it did not—if it was correct in holding that the statutory term "white person" includes a corporation (because the "context" does not "indicat[e] otherwise")—the conclusion that an association is a "person" for *in forma pauperis* purposes is inescapable. There is no language surrounding the word "person" in §1915 that is even remotely comparable to the word "white," which, as the majority observes, is "one of the strongest contextual indicators imaginable," since a corporation "has no color, and belongs to no race." *Ante*, at 15.

Court to do so in this case.) I agree that the exception to the rule of construction codified in 1 U. S. C. §1 is not susceptible of precise definition, and that determining whether "the context indicates otherwise" in any given case is necessarily "a matter of judgment." *Ante*, at 5. Whatever "unless the context indicates otherwise" means, however, it cannot mean "unless there are sound policy reasons for concluding otherwise."

The *in forma pauperis* statute authorizes courts to allow "[1] the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who [2] makes affidavit that he is [3] unable to pay such costs or give security therefor." 28 U. S. C. §1915(a). Section 1915(a) thus contemplates that the "person" who is entitled to the benefits of the provision will have three characteristics: He will have the capacity to sue or be sued, to make an affidavit, and to be unable to pay court costs. An association clearly has the capacity to do each of these things, and that, in my view, should be the end of the matter.

An artificial entity has the capacity to sue or be sued in federal court as long as it has that capacity under state law (and, in some circumstances, even when it does not). See Fed. Rule Civ. Proc. 17(b).[2] An artificial entity can make an affidavit through an agent. See, *e.g.*, *Davidson* v. *Jones, Sullivan & Jones*, 196 S. W. 571, 572 (Tex. Civ. App. 1917) (partnership); *Sime* v. *Hunter*, 50 Cal. App. 629, 634, 195 P. 935, 937 (1920) (partnership); *In re McGill's Estate*, 52 Nev. 35, 44, 280 P. 321, 323 (1929) (corporation); *Payne* v. *Civil Service Employees Assn., Inc.*, 27 Misc. 2d 1006, 1006–1007, 218 N. Y. S. 2d 871, 872 (Sup.) (association), aff'd, 15 A. D. 2d 265, 222 N. Y. S. 2d 725 (1961); *Kepl* v. *Manzanita Corp.*,

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[2]Under Rule 17(b), the capacity of a corporation to sue or be sued is determined by the law under which it was organized, and the capacity of an unincorporated association is determined by the law of the State in which the district court is located. An unincorporated association that lacks the capacity to sue or be sued under the law of the forum State may still litigate in federal court when the action is brought for the enforcement of a federal right.

246 Ore. 170, 178, 424 P. 2d 674, 678 (1967) (corporation); *Federal Land Bank of St. Paul* v. *Anderson*, 401 N. W. 2d 709, 712 (N. D. 1987) (corporation).[3] And an artificial entity, like any other litigant, can lack the wherewithal to pay costs.

Permitting artificial entities to proceed *in forma pauperis* may be unwise, and it may be an inefficient use of the Government's limited resources, but I see

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[3]Before acknowledging that an agent can make an affidavit on behalf of an artificial entity, the majority pauses to say that such an entity cannot make an affidavit itself. *Ante*, at 9. I suppose this distinction has some metaphysical significance, but I fail to see how it is otherwise relevant, since *any* action an artificial entity takes must be done through an agent. (It is noteworthy that two of the cases cited by the majority for the proposition that an artificial entity cannot make an affidavit recognize that an agent can make an affidavit on an entity's behalf. See *In re Empire Refining Co.*, 1 F. Supp. 548, 549 (SD Cal. 1932) ("On its behalf some representative must speak"); *Strand Restaurant Co.* v. *Parks Engineering Co.*, 91 A. 2d 711, 712 (D. C. 1952).) In any event, there is authority for the view that at least under some circumstances, there is no distinction at all—theoretical or otherwise—between an affidavit made on behalf of an artificial entity and an affidavit of the entity itself. See *Utah Farm Production Credit Assn.* v. *Watts*, 737 P. 2d 154, 157 (Utah 1987) ("Where an affidavit is made by an officer, it is generally considered to be the affidavit of the corporation itself"); *American Soda Fountain Co.* v. *Stolzenbach*, 75 N. J. L. 721, 734, 68 A. 1078, 1083 (1908) ("[W]here it becomes necessary for a corporation . . . to make an affidavit, the affidavit may be made in its behalf by an officer thereof . . . ; . . . such affidavit is, in legal contemplation, the affidavit of the corporation, and not of an agent").

nothing in the text of the *in forma pauperis* statute indicating that Congress has chosen to exclude such entities from the benefits of that law. While the "context indicates" that an artificial entity is not a "person" for purposes of a statute providing benefits to individuals with disabilities,[4] the same cannot be said of 28 U. S. C. §1915, which provides benefits to impecunious litigants—a class encompassing both natural and artificial "persons."[5]

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[4]See, *e.g.*, 42 U. S. C. §6001(5) (1988 ed., Supp. II) ("The term `developmental disability' means a severe, chronic disability of a person"); 2 U. S. C. §135b(a) ("[P]reference shall at all times be given to the needs of the blind and of the other physically handicapped persons").

[5]The context also "indicates otherwise" in statutes dealing with marriage, see, *e.g.*, 38 U. S. C. §101(31) ("The term `spouse' means a person of the opposite sex who is a wife or husband"); §103(a) ("any claim filed by a person as the widow or widower of a veteran"), the military, see, *e.g.*, 18 U. S. C. §244 ("any person wearing the uniform of any of the armed forces of the United States"); 38 U. S. C. §101(2) ("The term `veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable"), drug addiction, see, *e.g.*, 42 U. S. C. §201(k) ("The term `addict' means any person who habitually uses any habit-forming narcotics drugs"), drunk driving, see, *e.g.*, 18 U. S. C. §3118(a) (1988 ed., Supp. II) ("such person's driving while under the influence of a drug or alcohol"), kidnaping, see, *e.g.*, §1201(a) ("[w]hoever unlawfully seizes, confines, . . . kidnaps, abducts, or carries away and holds for ransom . . . any person"), sexual assault, see, *e.g.*, §2241(a) ("[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes

The Court's holding rests on the view that §1915 has four "contextual features," *ante*, at 6, indicating that only a natural person is entitled to *in forma pauperis* status. These "features" include a few select words in §1915 and a number of practical problems that may arise when artificial entities seek to proceed *in forma pauperis*. I do not believe that §1915 contains any language indicating that an association is not a "person" for purposes of that provision, and I do not think it is appropriate to rely upon what are at bottom policy considerations in deciding whether "the context indicates otherwise." In my view, none of the "contextual features" discussed by the Court, either alone or in combination with the others, can overcome the statutory presumption that an association is a "person."

The first "contextual feature" identified by the Court is the portion of the *in forma pauperis* statute

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another person to engage in a sexual act"), language, see, *e.g.*, 28 U. S. C. §1827(b)(1) ("persons who speak only or primarily a language other than the English language"), jury duty, see, *e.g.*, §1865(a) ("The chief judge . . . shall determine . . . whether a person is unqualified for, or exempt, or to be excused from jury service"), "missing persons," see, *e.g.*, §534(a)(3) ("The Attorney General shall . . . acquire, collect, classify, and preserve any information which would assist in the location of any missing person . . . and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person"), and "homeless persons," see, *e.g.*, 42 U. S. C. §12705(b)(2)(C) (1988 ed., Supp. II) ("helping homeless persons make the transition to permanent housing and independent living").

providing that "[t]he court may request an attorney to represent any such person unable to employ counsel." 28 U. S. C. §1915(d). Because a corporation, partnership, or association may appear in federal court only through licensed counsel, and because the permissive language of §1915(d) suggests that Congress assumed that there would be many cases in which the court would not appoint counsel, Congress, the Court says, "was thinking in terms of `persons' who could petition courts themselves and appear *pro se*, that is, of natural persons only." *Ante*, at 8.

This does not follow at all. Congress' use of the word "may" is entirely consistent with an intent to include artificial entities among those "persons" entitled to the benefits of the *in forma pauperis* statute, and it does not necessarily rest on an "assumption that litigants proceeding *in forma pauperis* may represent themselves." *Ibid.* Section 1915 gives courts discretion both with respect to granting *in forma pauperis* status and with respect to appointing counsel. When a natural person seeks the benefits of §1915, a court will often allow that person to proceed *in forma pauperis* but refuse to appoint counsel. Under such circumstances, the person may either obtain counsel elsewhere or proceed *pro se*. When an *artificial* person seeks the benefits of §1915, a court might likewise permit that "person" to proceed *in forma pauperis* but refuse to appoint counsel. Under these circumstances, the artificial person has fewer options than a natural person: It can either obtain counsel elsewhere or lose the opportunity to appear in federal court. That an artificial entity without funds may in some circumstances be unable to have its case heard in federal court, however, does not prove that Congress intended to exclude such an entity from the benefits of the *in forma pauperis* statute. An artificial entity's inability to proceed *pro se* bears upon the *extent* to

which such an entity may benefit from §1915, but it has no bearing upon *whether* it may benefit. And that, after all, is the question presented in this case.

The second "contextual feature" on which the Court focuses is the use of the word "poverty" in §1915(d). "Poverty," in the Court's view, is a "human condition"; artificial entities "may be insolvent, but they are not well spoken of as `poor.'" *Ante*, at 8, 9.

I am not so sure.[6] "Poverty" may well be a human condition in its "primary sense," *ante*, at 8, but I doubt that using the word in connection with an artificial entity departs in any significant way from settled principles of English usage. One certainly need not search long or far to find examples of the use of "poor" in connection with nonhuman entities—and, indeed, in connection with the very entities listed in 1 U. S. C. §1. No less a figure than Justice Holmes had occasion to write that the issuance of stock dividends renders a corporation "no poorer" than it was before their distribution, *Towne* v. *Eisner*, 245 U. S. 418, 426 (1918), and other judges have used the word "poor" (or one of its derivatives) in a similar fashion, see, *e.g.*, *Ordinetz* v. *Springfield Family Center, Inc.*, 142 Vt. 466, 468, 457 A. 2d 282, 283 (1983) ("[A] nonprofit corporation may be . . . wealthy or impoverished"); *In re Whitley* v. *Klauber*, 51 N. Y. 2d 555, 579, 416 N. E. 2d 569, 581 (1980) (Fuchsberg, J., dissenting) ("[T]he corporation is no richer or poorer for the transaction"). More important

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[6]Nor, apparently, are petitioners. At oral argument counsel for petitioners was asked whether the word "poverty" in §1915(d) "helps" him, since one does not "usually think of a corporation as making an affidavit of poverty." Tr. of Oral Arg. 11. In response, petitioners' counsel said that he "really d[id] believe that a bankrupt corporation could make an affidavit of poverty," *id.*, at 11–12, and conceded that he did not "pin much" on the word "poverty," *id.*, at 12.

for our purposes, *Congress itself* has used the word "poor" to describe entities other than natural persons, referring in at least two provisions of the United States Code to the world's "poorest countries"—a term that is used as a synonym for the least developed of the so-called "developing" countries. See 22 U. S. C. §§262p-4f(a)(3), 2151d(d)(4). If Congress has seen fit to describe a country as "poor," I see no reason for concluding that the notion of a "poor" corporation, partnership, or association ought not to be "imputed to Congress." *Ante*, at 9.[7]

The third "contextual feature" is §1915's affidavit requirement, which, in the Court's view, raises a number of "difficulties." *Ante*, at 10. One such "difficulty" is the "problem of establishing an affiant's authorization"; a court may have trouble determining whether a member of an unincorporated association "has any business purporting to bind it by affidavit." *Ibid.* Another "difficulty" is that the affidavit

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[7]The majority says that we established the "standard of eligibility" for *in forma pauperis* status in "distinctly human terms," *ante*, at 8, in *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331 (1948), and then quotes the following language from our opinion in that case: "We think an affidavit is sufficient which states that one cannot because of his poverty `pay or give security for the costs . . . and still be able to provide' himself and dependents `with the necessities of life.'" *Id.*, at 339. But the "standard of eligibility" was cast in "distinctly human terms" in *Adkins* only because the parties seeking *in forma pauperis* status in that case were natural persons, and the language quoted by the Court was taken from their affidavits. See *id.*, at 334. Thus, contrary to the majority's suggestion, *Adkins* established no *a priori* standard of "poverty," and is in no way inconsistent with the view that an artificial entity may be "poor."

requirement's deterrent function cannot be served "fully" when the litigant is an artificial entity. *Ibid.* This is because "[n]atural persons can be imprisoned for perjury, but artificial entities can only be fined," *ante*, at 11, and because the possibility of prosecuting the entity's perjurious agent is only a "`second-best' solution," *ante*, at 11, n. 7.

But these are classic policy considerations—the concerns of a legislature, not a court. Unlike the majority, I am perfectly willing to assume that in adding the word "person" to §1915 Congress took into account the fact that it might be difficult to determine whether an association's member has the authority to speak on its behalf, and that the possibility of a perjury prosecution might not deter artificial entities sufficiently. In deciding that "the context indicates otherwise," the Court has simply second-guessed Congress' policy judgments.[8]

The fourth "contextual feature" identified by the

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[8]The majority also gives "some weight," *ante*, at 10, to §1915(a)'s requirement that the affidavit state the "affiant's belief that he is entitled to redress." If the "affiant" is "an agent making an affidavit on behalf of an artificial entity," according to the majority, "it would wrench the rules of grammar to read `he' as referring to the entity." *Ibid.* This may be so, but only if the majority's premise is correct. Since an "affiant" is simply a person who makes an affidavit, see Black's Law Dictionary 79 (4th ed. 1951), and an artificial entity can make an affidavit through an agent, it is hardly unreasonable to understand the word "affiant" in §1915(a) as a reference not to the agent but to the entity on whose behalf the affidavit is made. Such an understanding is all the more reasonable when the agent is an officer of the entity, since courts have held that under such circumstances the affidavit is considered to be the affidavit of the entity itself. See n. 3, *supra*.

Court is the difficulty of the "issues raised by applying an `inability to pay' standard to artificial entities," *ante*, at 11, and the difficulty of determining "when to look beyond the entity to its owners or members in determining ability to pay," *ante*, at 12. These, too, are policy matters that Congress should be presumed to have considered when it inserted the word "person" into §1915. As with the difficulties associated with the affidavit requirement, any difficulties associated with the "inability to pay" test are relevant to the issue of why Congress might have chosen to include artificial entities among those "persons" entitled to *in forma pauperis* status, but they are not relevant to the issue of whether Congress has in fact made this choice.[9]

Petitioners essentially concede that this argument is ultimately one of policy when they say that the "test for indigency" will create "procedural problems"

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[9]In discussing the difficulty of determining whether an artificial entity is unable to pay costs, the majority says that the "context of congressional silence" on this issue "indicates the natural character of a §1915 `person.'" *Ante*, at 14. See also *ante*, at 12. In relying upon "congressional silence" as a "contextual indicator," however, the majority once again departs from the definition of "context" set out at the beginning of its opinion: Rather than relying upon the words surrounding "person," the majority accords significance to the *absence* of words surrounding "person." Cf. n. 1, *supra*. But even if reliance on statutory silence is consistent with the majority's definition of "context," it is not apparent to me why the absence of a statutory "ability to pay" standard for artificial entities demonstrates that the *in forma pauperis* statute covers natural but not artificial persons, since §1915 contains no such standard for *any* kind of "person."

and will have "practical effects . . . on the administration of justice." Brief for Petitioners 17. Today the Court accepts this argument, but a unanimous Court rejected a similar argument only four Terms ago in a case involving another provision of the *in forma pauperis* statute. *Neitzke* v. *Williams*, 490 U. S. 319 (1989), presented the question whether a complaint that fails to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is necessarily "frivolous" for purposes of 28 U. S. C. §1915(d). Rejecting the argument that an affirmative answer to that question would help to lighten the burden that the *in forma pauperis* statute imposes on "efficient judicial administration," we stated that "our role in appraising petitioners' reading of §1915(d) is not to make policy, but to interpret a statute," and that the proposed reading might be appealing "as a broadbrush means of pruning meritless complaints from the federal docket," but "as a matter of statutory construction it is untenable." 490 U. S., at 326.

The Court suggests that a reading of §1915 under which an artificial entity is entitled to *in forma pauperis* status would force it to confront "difficult issues of policy and administration." *Ante*, at 14. Far from *avoiding* policy determinations, however, the Court effectively *engages* in policymaking by refusing to credit the legislative judgments that are implicit in the statutory language. Any reading of the phrase "unless the context indicates otherwise" that permits courts to override congressional policy judgments is in my view too broad. Congress has spoken, and we should give effect to its words.

Congress has created a rule of statutory construction (an association is a "person") and an exception to that rule (an association is not a "person" if the "context indicates otherwise"), but the

Court has permitted the exception to devour the rule. In deciding that an association is not a "person" for purposes of 28 U. S. C. §1915(a), the Court effectively reads 1 U. S. C. §1 as if the presumption ran the other way—as if the statute said that "in determining the meaning of any Act of Congress, unless the context indicates otherwise, the word `person' does *not* include corporations, partnerships, and associations." While it might make sense as a matter of policy to exclude associations and other artificial entities from the benefits of the *in forma pauperis* statute, I do not believe that Congress has done so.

I respectfully dissent.