Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN and Mr. Justice WHITE join, concurring.

I dissented in *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 [1307] (1974), and I continue to believe that the Court's decision in that case unduly limited the federal courts' broad equitable power to provide effective remedies for official segregation. In this case the Court distinguishes *Milliken* and paves the way for a remedial decree directing the Department of Housing and Urban Development to utilize its full statutory power to foster housing projects in white areas of the greater Chicago metropolitan area. I join the Court's opinion except insofar as it appears to reaffirm the decision in *Milliken.*

425 U.S. 308, 47 L.Ed.2d 810

Joseph BAXTER et al., Petitioners,

v.

Nicholas A. PALMIGIANO.

Jerry J. ENOMOTO et al., Petitioners,

v.

John Wesley CLUTCHETTE et al.

Nos. 74-1187 and 74-1194.

Argued Dec. 15, 1975.

Decided April 20, 1976.

Actions were brought by state prison inmates alleging that procedures used in prison disciplinary proceedings violated their constitutional rights. In one action, the District Court, 328 F.Supp. 767, granted substantial relief, and the Court of Appeals, 497 F.2d 809, 510 F.2d 613, affirmed. In the other, the district court denied relief and the Court of Appeals, 487 F.2d 1280, reversed. On remand by the Supreme Court, 418 U.S. 908, 94 S.Ct. 3200, 41 L.Ed.2d 1155, the Court of Appeals, 510 F.2d 534, affirmed prior decision but modified opinion, and the Supreme Court granted certiorari in both actions. The Supreme Court, Mr. Justice White, held that prison inmates do not have right to either retained or appointed counsel in disciplinary hearings; that permitting adverse inference to be drawn from inmate's silence at his disciplinary proceeding is not, on its face, invalid practice; that mandating confrontation and cross-examination of witnesses at prison disciplinary proceedings effectively preempts area that has been left to sound discretion of prison officials; and that where there was no evidence that prison inmates in one action were subject to "lesser penalty" of loss of privileges, but rather it appeared that all were charged with "serious misconduct," requiring procedures such as notice and opportunity to respond even when inmate is faced with temporary suspension of privileges was premature.

Judgments of Courts of Appeals reversed.

Mr. Justice Brennan filed opinion concurring in part and dissenting in part in which Mr. Justice Marshall joined.

1. Federal Civil Procedure ⇐161

Without certification of action as class action and identification of class, action is not properly a class action. Fed.Rules Civ. Proc. rule 23(c)(1, 3), 28 U.S.C.A.

2. Constitutional Law ⇐42.2(1, 2)

Although one of named plaintiffs in action by state prison inmates alleging that procedures used in disciplinary proceedings at prison violated their rights to due process and equal protection had been paroled and other had died, where parties stipulated to intervention of another inmate as named party plaintiff and further stipulated that such inmate had been brought before disciplinary committee for infraction that could have also lead to state criminal proceedings,

that he asked for and was denied attorney, and that he was assigned to "segregation" for unspecified number of days for infraction, such inmate had standing to raise issues involved in action before Supreme Court. U.S.C.A.Const. Amend. 14.

3. Courts ⇐101.5(4), 383(1)

Where state adult correction authority regulations, although concededly state law, did not even mention right to counsel when charges brought were also crimes under state law and did not suggest whether inmate's silence might be used against him in proceeding itself, complaint by prison inmate claiming that disciplinary hearing violated his due process rights did not mention or challenge any rule or regulation of authority but asked that disciplinary decision be declared invalid and its enforcement enjoined, statute requiring convening of three judge court did not appear to be applicable and thus Supreme Court was not deprived of jurisdiction on ground that case involved issues that should have been heard by three-judge court subject to review on direct appeal. 28 U.S.C.A. § 2281.

4. Prisons ⇐13

Prison inmates do not have right to either retained or appointed counsel in disciplinary hearings.

5. Prisons ⇐13

State authorities were not in error in failing to advise prison inmate that he was entitled to counsel at disciplinary hearing and that state would furnish counsel if he did not have one of his own since inmates do not have right to either retained or appointed counsel in disciplinary hearings.

6. Prisons ⇐13

Prison disciplinary hearings are not criminal proceedings, but if inmates are compelled in such proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered whatever immunity is required to supplant privilege and may not be required to waive such immunity. U.S.C.A. Const. Amend. 5.

7. Prisons ⇐13

Where no criminal proceedings were pending against state inmate, state did not insist or ask that inmate waive his Fifth Amendment privilege against self-incrimination but notified him that he was privileged to remain silent if he chose, although his silence could be used against him, and his silence in and of itself was insufficient to support adverse decision by disciplinary board, permitting adverse inference to be drawn from his silence was not invalid practice. U.S.C.A.Const. Amends. 5, 14.

8. Prisons ⇐13

Disciplinary proceedings in state prisons involve correctional process and important state interests other than conviction for crime.

9. Constitutional Law ⇐266.1(1)

Aside from privilege against compelled self-incrimination, in proper circumstances silence in face of accusation is relevant fact not barred from evidence by the due process clause. U.S.C.A.Const. Amends. 5, 14.

10. Prisons ⇐13

Permitting adverse inference to be drawn from prison inmate's silence at disciplinary proceeding is not, on its face, invalid practice.

11. Prisons ⇐13

Mandating confrontation and cross-examination of witnesses at prison disciplinary proceedings, except where prison officials could justify their denial of such privileges on grounds that would satisfy court of law, effectively preempted area that had been left to sound discretion of prison officials.

12. Prisons ⇐13

Since there is no general right to confront and cross-examine adverse witnesses at prison disciplinary proceedings, and since due to particular environment of prison setting it may be that certain facts relevant to disciplinary determination may not come to light until after formal hearing, such facts need not be excluded from consideration;

however, allowing consideration of such facts in no way diminishes requirement that there be written statement by fact finder as to evidence relied upon and reason for disciplinary action.

13. Prisons ⇐13

Record in action by state prison inmates alleging that procedures used in prison disciplinary proceedings violated their rights to due process and equal protection contained no evidence of abuse of discretion by state prison officials in connection with confrontation and cross-examination of witnesses at disciplinary proceedings. U.S.C. A.Const. Amend. 14.

14. Prisons ⇐13

Where there was no evidence that named state prison inmates, who alleged that procedures used in prison disciplinary proceedings violated their rights to due process and equal protection, were subject to "lesser penalty" of loss of privileges but rather were charged with "serious misconduct," Court of Appeals acted prematurely to extent it required procedures such as notice and opportunity to respond even when inmate is faced with temporary suspension of privileges. U.S.C.A.Const. Amend. 14.

Syllabus *

Respondent state prison inmates in No. 74–1194 filed an action for declaratory and injunctive relief alleging that procedures used in prison disciplinary proceedings violated their rights to due process and equal protection of the laws under the Fourteenth Amendment. The District Court granted relief, and the Court of Appeals affirmed, holding that minimum notice and a right to respond are due an inmate faced even with a temporary suspension of privileges, that an inmate at a disciplinary hearing who is denied the privilege of confronting and cross-examining witnesses must receive written reasons or the denial will be deemed prima facie evidence of abuse of discretion, and that an inmate facing prison discipline for a violation that might also be punishable in state criminal proceedings has a right to counsel (not just counsel-substitute) at the prison hearing. Respondent state prison inmate in No. 74–1187, upon being charged with inciting a prison disturbance, was summoned before prison authorities and informed that he might be prosecuted for a violation of state law, that he should consult an attorney (although the attorney would not be permitted to be present during the disciplinary hearing), and that he had a right to remain silent during the hearing but that if he did so his silence would be held against him. On the basis of the hearing, at which respondent remained silent, he was placed in "punitive segregation" for 30 days. He then filed an action for damages and injunctive relief, claiming that the disciplinary hearing violated the Due Process Clause of the Fourteenth Amendment. The District Court denied relief, but the Court of Appeals reversed, holding that an inmate at a prison disciplinary proceeding must be advised of his right to remain silent, that he must not be questioned further once he exercises that right, that such silence may not be used against him at that time or in future proceedings, and that where criminal charges are a realistic possibility prison authorities 309 should consider whether defense counsel, if requested, should be permitted at the proceeding. *Held:* The procedures required by the respective Courts of Appeals are either inconsistent with the "reasonable accommodation" reached in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935, between institutional needs and objectives and the constitutional provisions of general application, or are premature on the basis of the case records. Pp. 1556–1561.

(a) Prison inmates do not "have a right to either retained or appointed counsel in disciplinary hearings." *Wolff, supra*, at 570, 94 S.Ct. at 2981, 41 L.Ed.2d at 959. P. 1556.

(b) Permitting an adverse inference to be drawn from an inmate's silence at his

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

disciplinary proceedings is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as applied to respondent in No. 74–1187. Pp. 1556–1559.

(c) Mandating that inmates should have the privilege of confrontation and cross-examination of witnesses at prison disciplinary proceedings, except where prison officials can justify their denial of such privilege on grounds that would satisfy a court of law, effectively pre-empts the area that *Wolff, supra*, left to the sound discretion of prison officials, and there is no evidence of abuse of such discretion by the prison officials in No. 74–1194. Pp. 1559–1560.

(d) Where there was no evidence that any of the respondents in No. 74–1194 were subject to the "lesser penalty" of loss of privileges, but rather it appeared that all were charged with "serious misconduct," the Court of Appeals acted prematurely to the extent it required procedures such as notice and an opportunity to respond even when an inmate is faced with a temporary suspension of privileges. Pp. 1560–1561.

No. 74–1187, 510 F.2d 534; No. 74–1194, 510 F.2d 613, reversed.

Ronald A. Dwight, Providence, R. I., for petitioners.

Stephen J. Fortunato, Jr., Pawtucket, R. I., for respondent. 310

Mr. Justice WHITE delivered the opinion of the Court.

These cases present questions as to procedures required at prison disciplinary hearings and as to the reach of our recent decision in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

I

A. *No. 74–1194*

[1, 2] Respondents are inmates of the California penal institution at San Quentin. They filed an action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief and alleging that the procedures used in disciplinary proceedings at San Quentin violated their rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution.[1] After an evidentiary hearing, the District Court granted substantial relief. *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D.Cal.1971). The Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed, 497 F.2d 809 (1974), holding that an inmate facing a disciplinary proceeding at San Quentin was entitled to notice of the 311

1. Respondents John Wesley Clutchette and George L. Jackson brought suit "on their own behalf, and, pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other inmates of San Quentin State Prison subject to defendants' jurisdiction and affected by the policies, practices or acts of defendants complained of herein." Plaintiffs' Amended Complaint, 1 Record 33 (No. 74–1194). The District Court treated the suit as a class action, *Clutchette v. Procunier*, 328 F.Supp. 767, 769–770 (N.D.Cal.1971), but did not certify the action as a class action within the contemplation of Fed.Rules Civ. Proc. 23(c)(1) and 23(c)(3). Without such certification and identification of the class, the action is not properly a class action. *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). We were advised at oral argument in No. 74–1194 that respondent Clutchette was paroled in 1972, two years after the suit was filed; counsel for respondents conceded that the case is moot as to him. Tr. of Oral Arg. (No. 74–1194), p. 34. We were further advised that respondent Jackson died after the suit was filed. However, the parties stipulated on June 21, 1972, to the intervention of Alejandro R. Ferrel as a named party plaintiff in the suit. 3 Record 285 (No. 74–1194). The parties further stipulated the facts that, like Clutchette and Jackson, Ferrel was an inmate at San Quentin who was brought before a disciplinary committee for an infraction that could have also led to state criminal proceedings, that he asked for and was denied an attorney at the hearing, and that he was assigned to "segregation" for an unspecified number of days for the infraction. Ferrel, we were told at oral argument, is still incarcerated at San Quentin. Tr. of Oral Arg. 34 (No. 74–1194). He thus has standing as a named plaintiff to raise the issues before us in No. 74–1194.

charges against him, to be heard and to present witnesses, to confront and cross-examine witnesses, to face a neutral and detached hearing body, and to receive a decision based solely on evidence presented at the hearing. The court also held that an inmate must be provided with counsel or a counsel-substitute when the consequences [312] of the disciplinary action are "serious," such as prolonged periods of "isolation." *Id.*, at 821. The panel of the Court of Appeals, after granting rehearing to reconsider its conclusions in light of our intervening decision in *Wolff, supra,* reaffirmed its initial judgment—again with one judge dissenting—but modified its prior opinion in several respects. 510 F.2d 613 (1975). The Court of Appeals held that minimum notice and a right to respond are due an inmate faced even with a temporary suspension of privileges, that an inmate at a disciplinary hearing who is denied the privilege of confronting and cross-examining witnesses must receive written reasons for such denial or the denial "will be deemed prima facie evidence of abuse of discretion," *id.*, at 616, and—reaffirming its initial view—that an inmate facing prison discipline for a violation that might also be punishable in state criminal proceedings has a right to counsel (not just counsel-substitute) at the prison hearing. We granted certiorari and set the case for oral argument with No. 74–1187. 421 U.S. 1010, 95 S.Ct. 2414, 44 L.Ed.2d 678 (1975).

B. *No. 74–1187*

Respondent Palmigiano is an inmate of the Rhode Island Adult Correction Institution serving a life sentence for murder. He was charged by correctional officers with "inciting a disturbance and disrupt[ion] of [prison] operations, which might have resulted in a riot." App. 197 (No. 74–1187). He was summoned before the prison Disciplinary Board and informed that he might be prosecuted for a violation of state law, that he should consult his attorney (although his attorney was not permitted by the Board to be present during the hearing), that he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him. Respondent availed himself of the counsel-substitute provided for by prison rules and remained silent during the hearing. The [313] Disciplinary Board's decision was that respondent be placed in "punitive segregation" for 30 days and that his classification status be downgraded thereafter.

[3] Respondent filed an action under 42 U.S.C. § 1983 for damages and injunctive relief, claiming that the disciplinary hearing violated the Due Process Clause of the Fourteenth Amendment of the Constitution.[2] The District Court held an evidentia- [314]

2. The United States as *amicus curiae* suggests that No. 74–1187 is not properly before the Court because the case involves the constitutionality of regulations of the Rhode Island Adult Corrections Authority and hence should have been heard by a three-judge court, subject to review here on direct appeal. The applicable regulations of the Authority when this case was brought had been promulgated as the result of a negotiated settlement of litigation in the District Court for the District of Rhode Island. *Morris v. Travisono,* 310 F.Supp. 857 (1970). It is conceded that they have become state law, and it would appear that they are of statewide effect. The rules on their face, however, although regulating in some detail the procedures required in prison disciplinary hearings, do not expressly grant or deny, or even mention, the right to counsel where charges brought are also a crime under state law. Nor do they suggest, one way or the other, whether an inmate's silence may be used against him in the proceeding itself. Palmigiano's complaint did not mention or challenge any rule or regulation of the Authority; nor did it seek an injunction against the enforcement of any identified rule. What it asked was that the Board's disciplinary decision be declared invalid and its enforcement enjoined. Neither Palmigiano nor the State asked or suggested that a three-judge court be convened. It would not appear that the District Court considered the validity of any of the Authority's rules to be at stake. That court ruled Palmigiano was not entitled to be represented by counsel, not because the applicable rules forbade it but because it considered the controlling rule under the relevant cases was to this effect. The Court of Appeals, although quite aware that constitutional attacks on the Rhode Island prison rules might necessitate a three-judge court, see *Souza v. Travisono,* 498 F.2d 1120, 1121–1122 (CA1

ry hearing and denied relief. The Court of Appeals for the First Circuit, with one judge dissenting, reversed, holding that respondent "was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." 487 F.2d 1280, 1292 (1973). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded to that court for further consideration in light of *Wolff v. McDonnell, supra,* decided in the interim, 418 U.S. 908, 94 S.Ct. 3200, 41 L.Ed.2d 1155 (1974). On remand, the Court of Appeals affirmed its prior decision but modified its opinion. 510 F.2d 534 (1974). The Court of Appeals held that an inmate at a prison disciplinary proceeding must be advised of his right to remain silent, that he must not be questioned further once he exercises that right, and that such silence may not be used against him at that time or in future proceedings. With respect to counsel, the Court of Appeals held:

> "[I]n cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda [v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] requires it in light of future criminal prosecution." *Id.*, at 537.

We granted certiorari and heard the case with No. 74–1194. 421 U.S. 1010, 95 S.Ct. 2414, 44 L.Ed.2d 678 (1975).

[redacted]

Palmigiano was advised that he was not required to testify at his disciplinary hearing and that he could remain silent but that his silence could be used against him. The Court of Appeals for the First Circuit held that the self-incrimination privilege of the Fifth Amendment, made applicable to the States by reason of the Fourteenth Amendment, forbids drawing adverse inferences against an inmate from his failure to testify. The State challenges this determination, and we sustain the challenge.

[6] As the Court has often held, the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274, 281 (1973). Prison disciplinary hearings are not criminal proceedings; but if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity." *Id.,* at 85, 94 S.Ct., at 326, 38 L.Ed.2d, at 286; *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); *Gardner v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). In this line of cases from *Garrity* to *Lefkowitz,* the States, pursuant to statute, sought to interrogate individuals about their job performance or about their contractual relations with the State; insisted upon waiver of the Fifth Amendment privilege not to respond or to object to later use of the incriminating statements in criminal prosecutions; and, upon refusal to waive, automatically terminated employment or eligibility to contract with the State. Holding that the State could not constitutionally seek to compel testimony that had not been immunized by threats of serious economic reprisal, we invalidated the challenged statutes. 317

The Court has also plainly ruled that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This holding paralleled the existing statutory policy of the United States, *id.,* at 612, 85 S.Ct., at 1232, 14 L.Ed.2d, at 108, and the governing statutory or constitutional rule in the overwhelming majority of the States. 8 J. Wigmore, Evidence 425–439 (McNaughton rev. 1961).

[7] The Rhode Island prison rules do not transgress the foregoing principles. No criminal proceedings are or were pending against Palmigiano. The State has not, contrary to *Griffin,* sought to make evidentiary use of his silence at the disciplinary hearing in any criminal proceeding. Neither has Rhode Island insisted or asked that Palmigiano waive his Fifth Amendment privilege. He was notified that he was privileged to remain silent if he chose. He was also advised that his silence could be used against him, but a prison inmate in Rhode Island electing to remain silent during his disciplinary hearing, as respondent Palmigiano did here, is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. Under Rhode Island law, disciplinary decisions "must be based on substantial evidence manifested in the record of the disciplinary proceeding." *Morris v. Travisono,* 310 F.Supp. 857, 873 (R.I.1970). It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different 318 from the circumstances before the Court in

the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.

Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution. Had this occurred and had Palmigiano nevertheless refused to answer, it surely would not have violated the Fifth Amendment to draw whatever inference from his silence that the circumstances warranted. Insofar as the privilege is concerned, the situation is little different where the State advises the inmate of his right to silence but also plainly notifies him that his silence will be weighed in the balance.

[8] Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a *civil cause*." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, 1319 where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.

[9] It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. *Adamson v. California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 153–154, 44 S.Ct. 54, 56, 68 L.Ed. 221, 223 (1923); *Raffel v. United States,* 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed.2d 1054 (1926); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908). See also *United States v. Hale,* 422 U.S. 171, 176–177, 95 S.Ct. 2133, 2136, 45 L.Ed.2d 99, 104 (1975); *Gastelum-Quinones v. Kennedy,* 374 U.S. 469, 479, 83 S.Ct. 1819, 1824, 10 L.Ed.2d 1013, 1020 (1963); *Grunewald v. United States,* 353 U.S. 391, 418–424, 77 S.Ct. 963, 981–984, 1 L.Ed.2d 931, 950–954 (1957). Indeed, as Mr. Justice Brandeis declared, speaking for a unanimous court in the *Tod* case, *supra,* which involved a deportation: "Silence is often evidence of the most persuasive character." 263 U.S., at 153–154, 44 S.Ct., at 56, 68 L.Ed., at 224. And just last Term in *Hale, supra,* the Court recognized that "[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question." 422 U.S., at 176, 95 S.Ct., at 2136, 45 L.Ed.2d, at 104.[3]

3. The Court based its statement on 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970), which reads as follows:

"Silence, omissions, or negative statements, as inconsistent: (1) Silence, etc., as constituting the impeaching statement. A *failure to assert*

320 [10] The short of it is that permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice; and there is no basis in the record for invalidating it as here applied to Palmigiano.[4]

[redacted]

a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence (§ 1071 *infra*). There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is 'prima facie' an inconsistency.

"There are several common classes of cases:

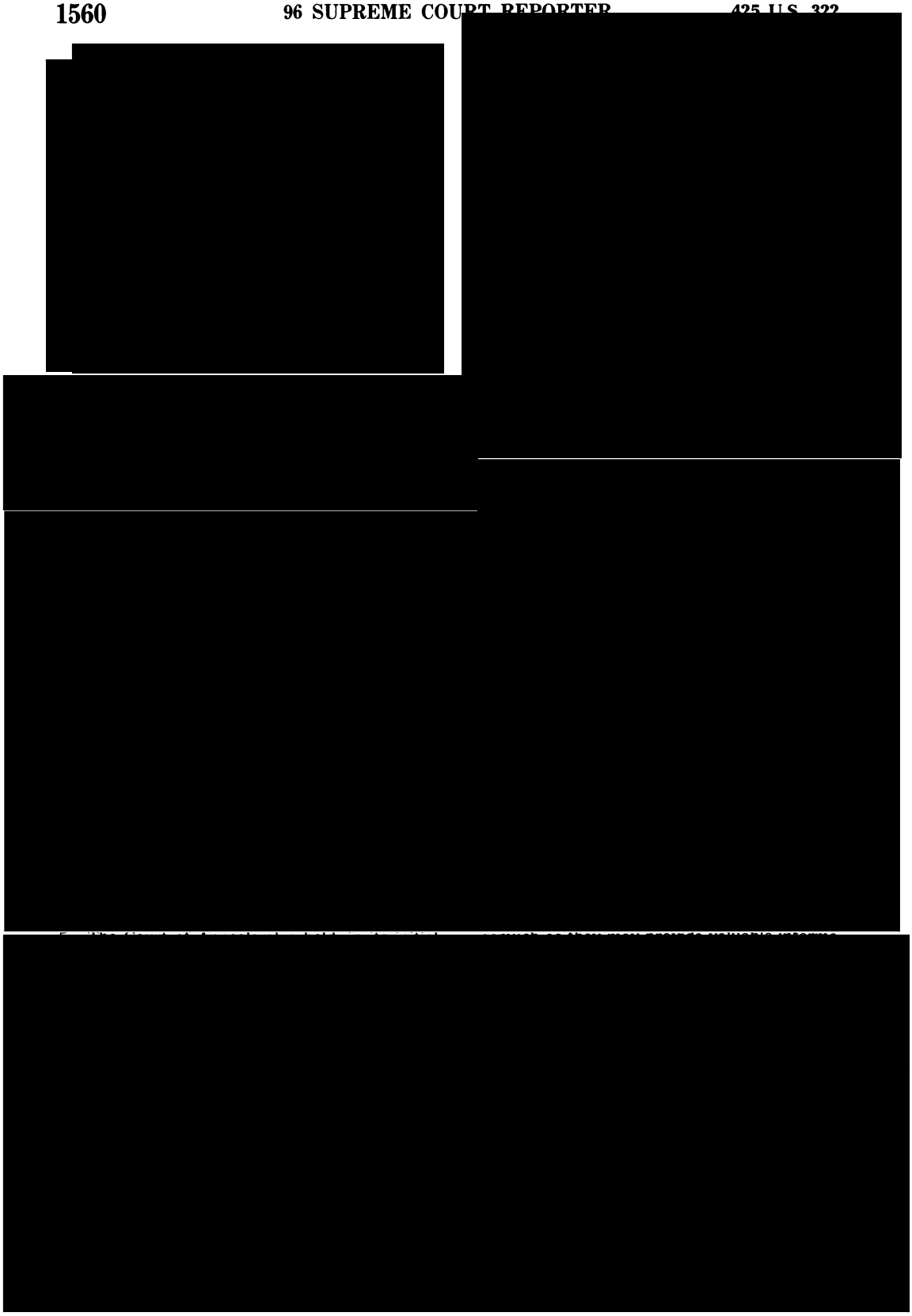
"(1) Omissions *in legal proceedings* to assert what would naturally have been asserted under the circumstances.

"(2) Omissions to assert anything, or to speak with such detail or positiveness, *when formerly narrating,* on the stand or elsewhere, the matter now dealt with.

"(3) *Failure to take the stand* at all, when it would have been natural to do so.

"In all of these much depends on the individual circumstances, and in all of them the underlying test is, would it have been natural for the person to make the assertion in question?" (Emphasis in original.) (Footnotes omitted.)

4. The record in No. 74–1187 shows that Palmigiano was provided with copies of the Inmate Disciplinary Report and the superior's investigation report, containing the charges and primary evidence against him, on the day before the disciplinary hearing. At the hearing, Captain Baxter read the charge to Palmigiano and summarized the two reports. In the face of the reports, which he had seen, Palmigiano elected to remain silent. The Disciplinary Board's decision was based on these two reports, Palmigiano's decision at the hearing not to speak to them, and supplementary reports made by the officials filing the initial reports. All of the documents were introduced in evidence at the hearing before the District Court in this case. App. 197–202 (No. 74–1187).



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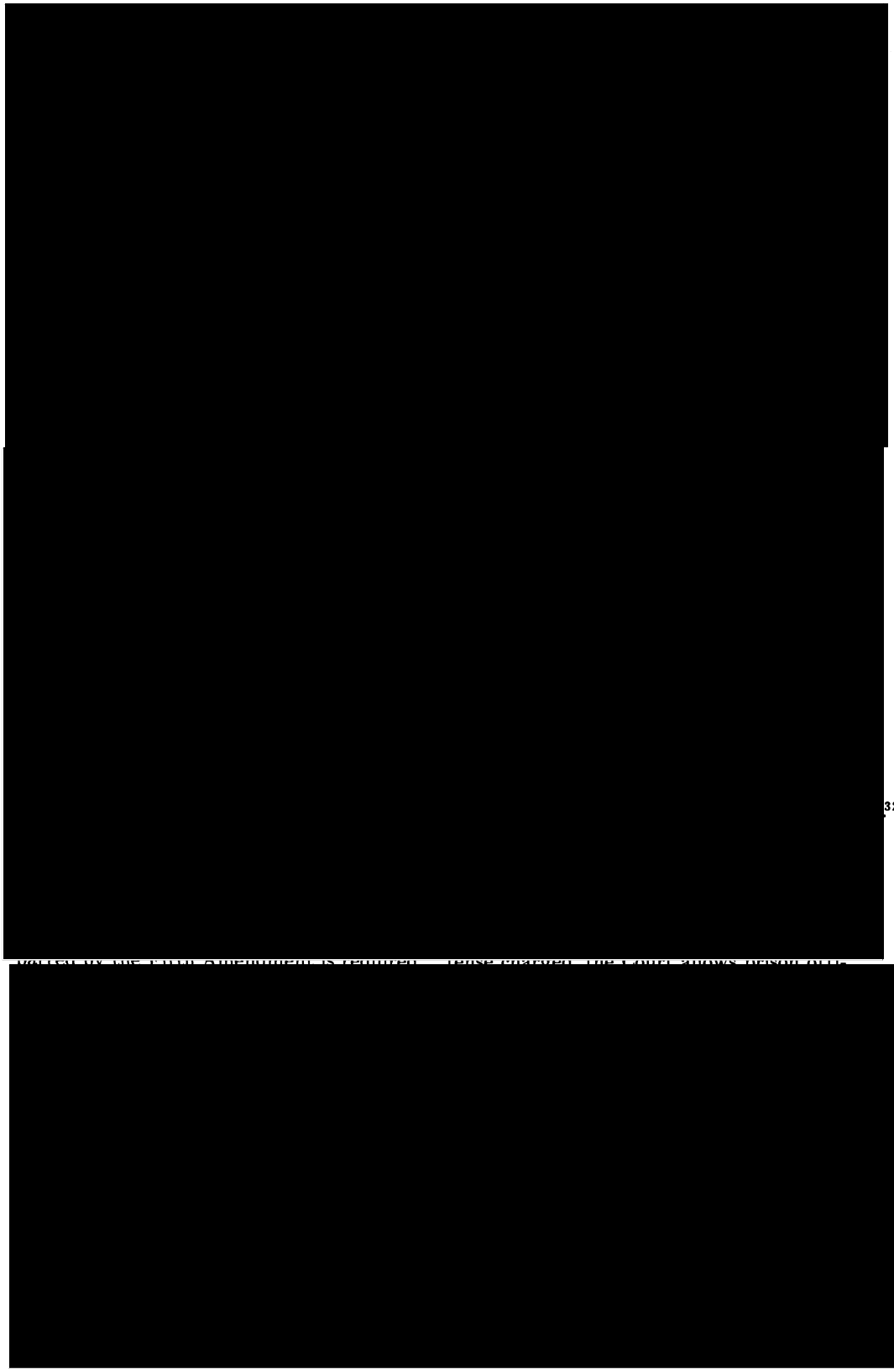

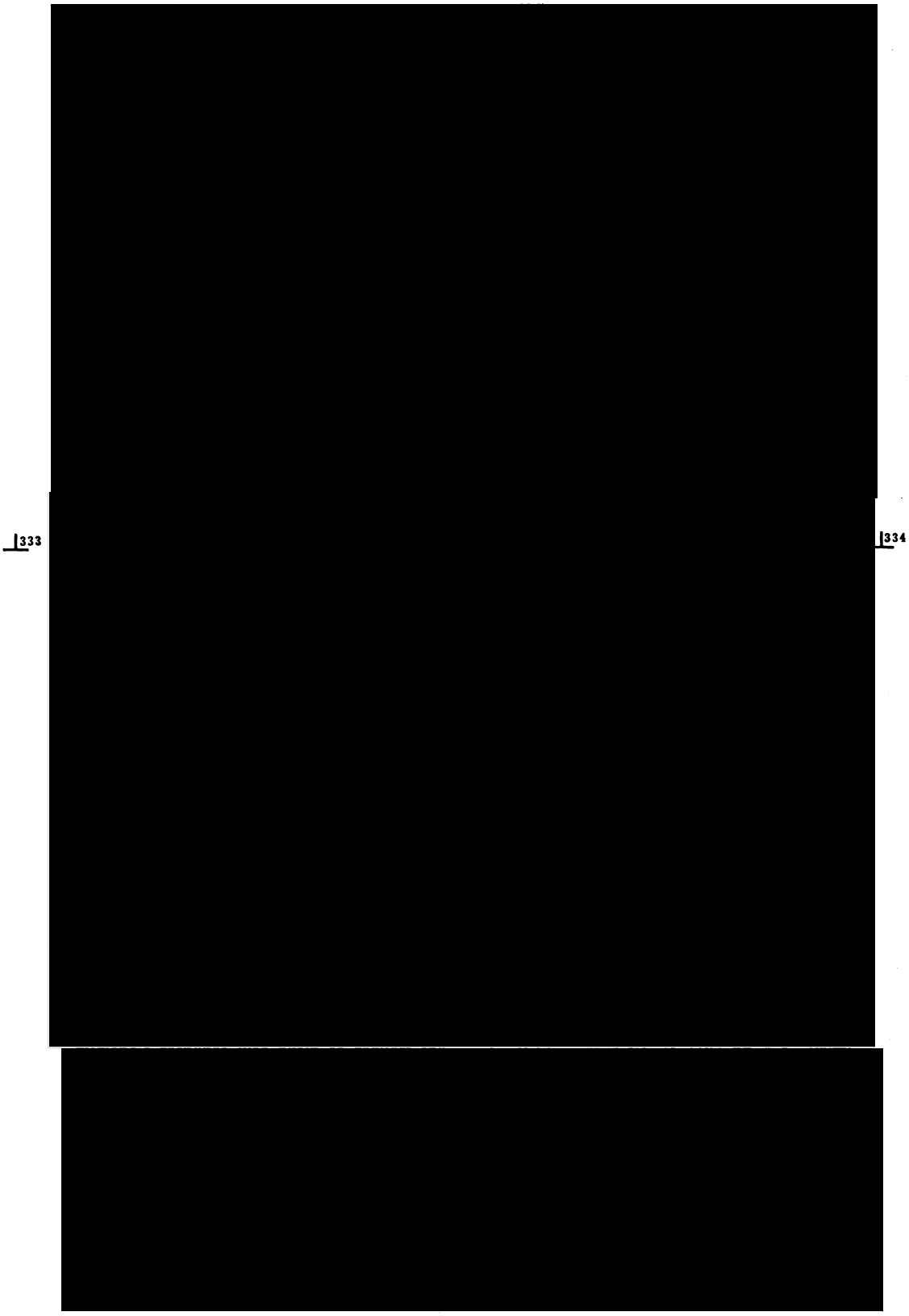

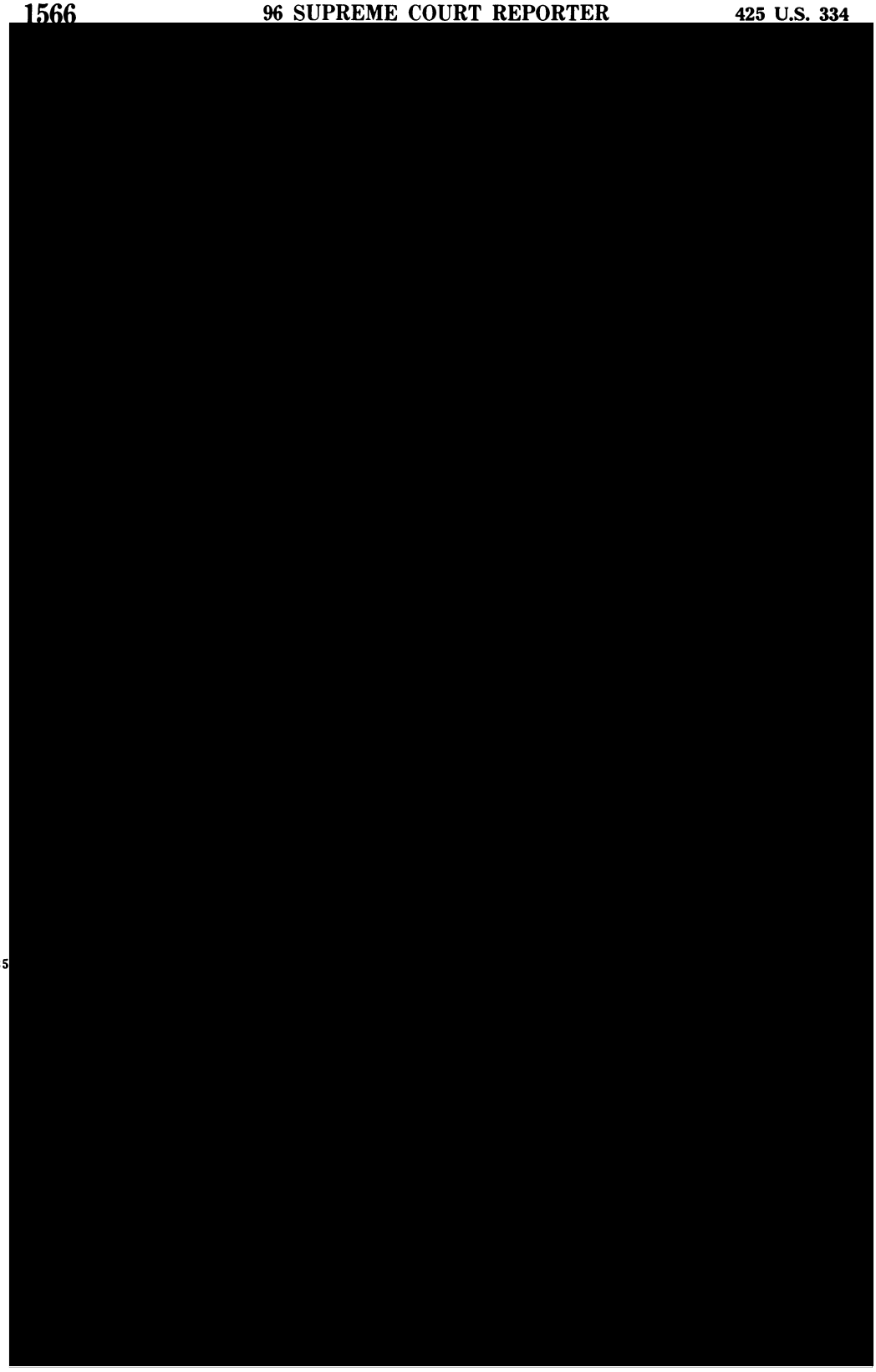

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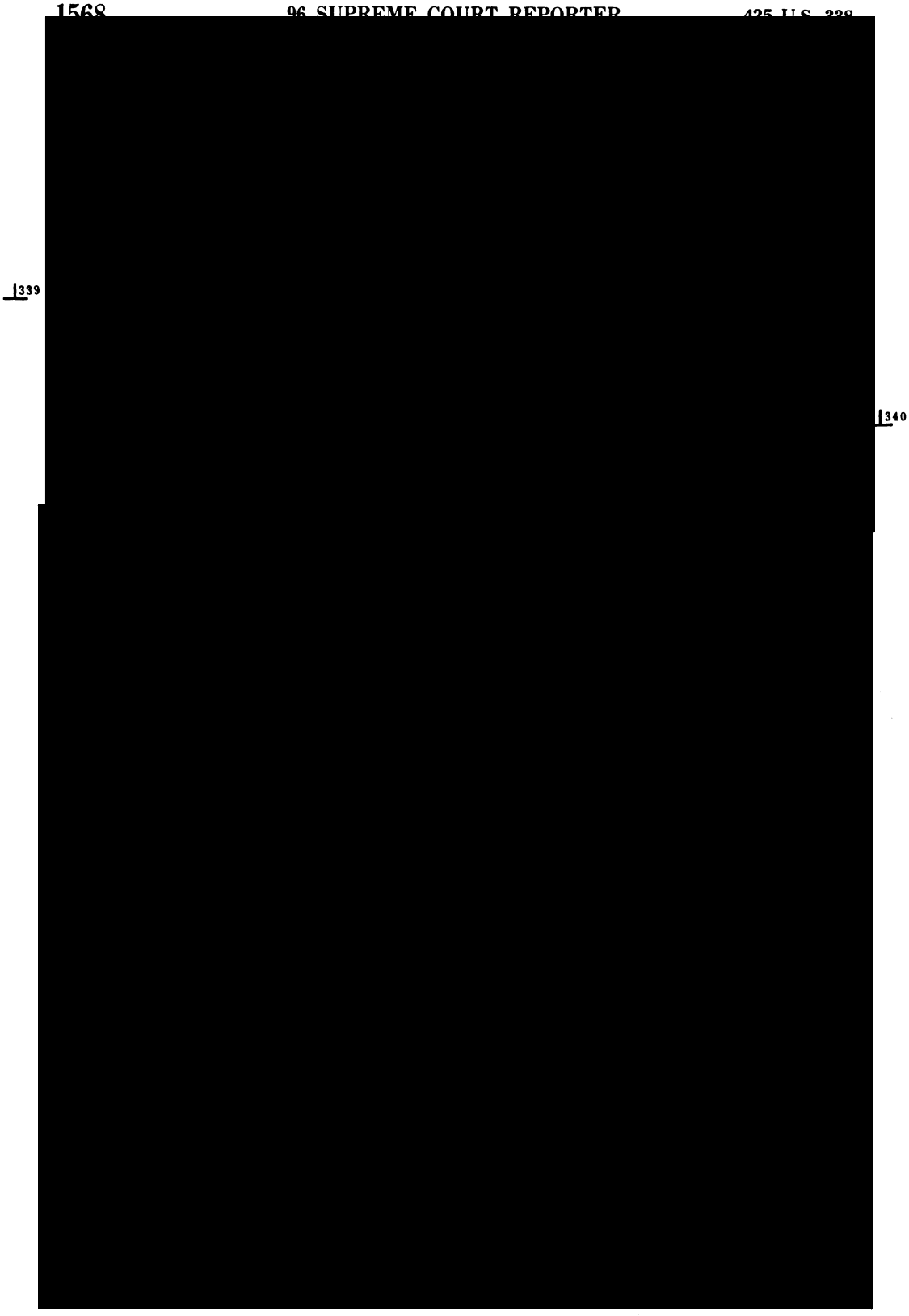
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