No. 05-1209

# In the Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO., PETITIONER

*v.*

P. LYNN SCARLETT,
ACTING SECRETARY OF THE INTERIOR, ET AL.

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

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner, a phosphate mining company located in Utah, has standing to bring a National Environmental Policy Act challenge to an environmental impact statement assessing the environmental effects of a fertilizer manufacturer's proposed phosphate mining operation in Idaho, when petitioner alleges injury only to its competitive economic interests.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Tab 4) is reported at 420 F.3d 934. The opinion of the district court (Pet. App. Tab 1) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. A petition for rehearing was denied on October 28, 2005 (Pet. App. Tab 5). The petition for a writ of certiorari was filed on January 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Congress enacted the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to ensure that federal agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. 4321; 40 C.F.R. 1501.1(c). NEPA is a procedural statute. It promotes Congress's goal by prescribing the process through which an agency must make its decisions; it does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Inland Empire Pub. Lands Council* v. *United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996); see *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980) ("[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'") (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

Under NEPA, an agency must prepare a detailed, comprehensive environmental impact statement (EIS) only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Regulations promulgated by the Council on Environmental Quality provide that an agency may prepare an environmental assessment to determine whether a proposed action is likely to have a significant impact on the environment. 40 C.F.R. 1501.3, 1501.4. If the agency determines through the preparation of an environmental assessment that the proposed action will not have a significant effect on the quality of

the human environment, the agency issues a finding of no significant impact, and it does not need to prepare an EIS. 40 C.F.R. 1501.4(e), 1508.13.

2. According to petitioner's complaint, Agrium Conda Phosphate Operations manufactures fertilizer at its plant near Soda Springs, Idaho. Agrium obtained the phosphate it used to make the fertilizer from its nearby Rasmussen Ridge phosphate mine. When the Rasmussen Ridge mine was nearing depletion, Agrium began looking for other sources of phosphate for its fertilizer plant. Agrium investigated the possibility of obtaining phosphate from deposits near Vernal, Utah, which are under lease to petitioner Ashley Creek Phosphate Company (Ashley Creek), and are some 250 miles away. Agrium ultimately rejected that option as too expensive and decided instead to pursue an expansion of its existing mining operations at North Rasmussen Ridge. Pet. App. Tab 4, at 6, 11.

In order to carry out its expansion plan, Agrium had to submit a mine and reclamation plan to the Bureau of Land Management (BLM), which manages the relevant mineral rights on North Rasmussen Ridge. BLM determined that an EIS was necessary to evaluate the environmental impacts of the project. The draft EIS evaluated the proposed action and two alternatives, including a "no action" alternative. Pet. App. Tab 4, at 6-7.

Petitioner submitted a letter to BLM commenting that the draft EIS was deficient because it did not consider mining the Vernal, Utah, deposits under lease to petitioner as an alternative to the proposed action. BLM, however, did not add the Vernal deposits to its set of alternatives in the final EIS, reasoning in part that its responsibilities under NEPA did not require it to compare alternate sources of phosphate, but to analyze only

the impacts of (1) the proposal as submitted, (2) the proposal as modified by reasonable alternatives, and (3) the "no action" alternative (in other words, rejecting the proposal). Pet. App. Tab 4, at 6-8.

3. Petitioner filed a complaint in the United States District Court for the District of Idaho, alleging that the EIS violated NEPA because it did not consider as an alternative supplying Agrium's fertilizer plant with phosphate from petitioner's Vernal, Utah, deposits. Pet. App. Tab 1, at 2. The district court dismissed the complaint for lack of jurisdiction. *Id.* at 4. The court held that petitioner failed to allege an injury to an interest within NEPA's zone of interests and that NEPA's zone of interests "does not include purely economic interests." *Id.* at 3-4. The district court relied on the facts that "[petitioner] concedes that it 'does not have an interest in the local Idaho environment'" and that petitioner's only alleged injury was the loss of profits it would have earned from the mining of its own phosphate if BLM had denied the proposal to expand Agrium's phosphate mining operations. *Ibid.* (quoting Pet. Br., No. 03 Civ. 0499 (D. Idaho)).

4. The court of appeals affirmed. Pet. App. Tab 4. The court held that petitioner's alleged injury was insufficient to satisfy the concrete "injury in fact" requirement of Article III because petitioner's Vernal, Utah, phosphate leases did not have a sufficient geographic nexus to Agrium's proposed expanded mining operation. *Id.* at 11-12. The court explained that, because petitioner's phosphate leases are so far away from the site for which the EIS was prepared, petitioner could not "show[] that its phosphate fields are tied to the location of the proposed mining or that the impacts of the mining will affect its property interests." *Id.* at 11. There was

no "legally sufficient link between [petitioner's] interest—getting the BLM to analyze unrelated phosphate deposits 250 miles away from the proposed mines—and NEPA's procedural requirement that agencies analyze the environmental impact of the proposed mining at a specific site, North Rasmussen Ridge." *Id.* at 12. The court noted that, if petitioner's theory of standing were accepted, "any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS." *Ibid.* Indeed, under the same reasoning, "the BLM would be obligated not only to analyze the environmental suitability of unrelated phosphate deposits, but also phosphate substitutes that might be more eco-friendly." *Ibid.*

Although the court of appeals noted that its holding that petitioner could not show injury in fact "is determinative of this appeal," Pet. App. Tab 4, at 9, the court also held in the alternative that petitioner lacked prudential standing, because petitioner asserted only a purely economic injury—"selling phosphate to Agrium"—and thus did not fall within NEPA's zone of interests. *Id.* at 15. The court reasoned that the zone of interests must be defined "with reference to the specific provision of the statute at issue," and concluded that the provision on which petitioner relied, Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), "does not set out a *purely* economic factor, unconnected to environmental concerns." Pet. App. Tab 4, at 19. It concluded that the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (1999), "can be persuasively distinguished" because the plaintiffs in that case had alleged an environmental injury—a hampered ability to enjoy the area—and "conducted business on and relied upon the lands that would be af-

fected by the agency action." Pet. App. Tab 4, at 19. The court of appeals noted its disagreement with subsequent Eighth Circuit decisions that, in *dicta*, broadly interpreted *Friends of the Boundary Waters* to mean that a plaintiff with purely economic injuries could have standing to challenge an EIS. *Ibid.* (citing *Rosebud Sioux Tribe* v. *McDivitt*, 286 F.3d 1031, 1038 (2002), cert. denied, 537 U.S. 1188 (2003), and *Central S.D. Coop. Grazing Dist.* v. *Secretary of the U.S. Dep't of Agric.*, 266 F.3d 889, 895-896 (2001)).

**ARGUMENT**

The court of appeals ruled that petitioner lacked both constitutional and prudential standing to challenge the EIS. As an initial matter, further review is unwarranted because the court's holding that petitioner lacked standing under Article III is sufficient to dispose of this case and is not challenged in the question presented by petitioner. In any event, both the court of appeals' prudential and constitutional standing analyses are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The court of appeals noted that "a plaintiff asserting a procedural injury," such as a claim that an EIS was not properly prepared, "does not have standing absent a showing that the 'procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing'" under Article III. Pet. App. Tab 4, at 10 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). The court held that "[w]hat is missing in this case is a legally sufficient link between [petitioner's] interest—getting the BLM to analyze unrelated phosphate deposits 250 miles away from the proposed mines—and NEPA's pro-

cedural requirement that agencies analyze the environmental impact of the proposed mining at a specific site, North Rasmussen Ridge." *Id.* at 12. The court concluded that "[n]ot only is the geographic link missing, the substantive concrete injury is wholly absent." *Ibid.*

Petitioners do not challenge that holding. The "question presented" section of the petition seeks reversal of the court of appeals' decision only on the ground that it allegedly conflicts with three decisions of the Eighth Circuit and *Bennett* v. *Spear*, 520 U.S. 154 (1997). The argument section of the petition argues only that the court of appeals' application of the "zone of interest" test—a prudential, not constitutional, standing requirement—was contrary, in petitioner's view, to the application of that test by the Eighth Circuit in the cited cases and by this Court in *Bennett*. Neither the question presented nor the argument in the petition challenges the court of appeals' independent holding that petitioner lacks constitutional standing to assert its alleged procedural injury due to the absence of a concrete injury.

That holding is dispositive of this case, regardless of the correctness of the court of appeals' application of the "zone of interests" test. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) (court must resolve threshold Article III standing issue before merits). Accordingly, because petitioner does not challenge the court of appeals' holding that petitioner lacked Article III standing, resolution of the question of prudential standing presented in the petition could not affect the outcome of this case. See, *e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (dismissing writ of certiorari as improvidently granted because court of appeals denied

intervention to petitioner and petition did not seek review of the adverse intervention decision). Further review is therefore unwarranted.

b. Even if the constitutional issue had not been waived, it would in any event not warrant further review. The court of appeals' holding on Article III standing does not conflict with any decision of any other court of appeals, and it does not present an issue of sufficient recurring importance to warrant this Court's review in the absence of such a conflict. Moreover, the court of appeals' Article III standing holding is correct.

In *Lujan*, this Court made clear that a plaintiff asserting a violation of a procedural right can establish standing "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." 504 U.S. at 573 n.8. The Court noted that

> under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

*Id.* at 572 n.7. The Court warned, however, that the alleged violation of a procedural rule by itself cannot satisfy the concrete injury requirement and that the Court would not accept "standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam." *Ibid.*

Applying *Lujan*, the court of appeals found that petitioner lacked a sufficient "geographic nexus" with the project that is the subject of the challenged EIS. Pet. App. Tab 4, at 11. To be sure, *Lujan* did not specifically consider whether a plaintiff asserting an alleged economic injury, rather than an environmental injury, would have to show a sufficient geographic nexus with a project to establish a concrete injury. But the NEPA procedures that petitioner alleges were violated in this case are clearly not, in *Lujan*'s terms, "designed to protect" an economic interest of a property holder like petitioner, whose property is hundreds of miles from the project in question and whose only interest is in selling an alternative product in the event Agrium's application for the North Rasmussen Ridge site is denied. 504 U.S. at 573 n.8. Accordingly, the court of appeals correctly held that petitioner has not shown a cognizable injury under *Lujan*.

In any event, petitioner lacks Article III standing for an additional reason: its injury is not redressable. Neither the agency decisionmaker nor the reviewing court has the authority to control Agrium's choice of a source to obtain phosphate. BLM has authority only to approve, approve with modifications, or reject Agrium's mine and reclamation plan for the proposed expanded mining operation on North Rasmussen Ridge. See Pet. App. Tab 4, at 6-7. BLM has no power to require Agrium to obtain phosphate from petitioner's Utah deposits. Even if BLM rejected Agrium's plan on the basis of a revised EIS evaluating petitioner's proposed alternative, at best Agrium might have an economic incentive to obtain phosphate from petitioner; it would not be bound to do so. Rather than purchasing phosphate from petitioner, which Agrium has already rejected as too

expensive, Agrium could choose another source of phosphate for its plant, or it could choose to close its Idaho plant entirely. See *id.* at 6.

Where redress of a plaintiff's injury depends entirely on the response of third parties to government economic incentives of the sort that petitioner sought to create here by urging BLM to deny Agrium's mine and reclamation plan, this Court has held that those third parties' probable responses to the incentives are too speculative to satisfy the constitutional redressability requirement.[1] *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43-44 (1976); see *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.) (holding that plaintiffs could not establish standing because whether their "claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors * * * whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict"); *Allen* v. *Wright*, 468 U.S. 737 (1984) (holding that the chain of causation between tax incentives and school desegregation based on the choices of private individuals responding to those

[1] Moreover, even if Agrium decided to consider petitioner as a possible phosphate supplier, by petitioner's own assessment, it is speculative at this point whether petitioner could obtain the approvals necessary to mine its Vernal, Utah, phosphate deposits. See Pet. Resp. to Mot. to Dismiss 7 (Dist. Ct. Docket #15) (conceding that "[a]pplication for necessary mining roads on the Vernal leases were filed * * * years ago, and remain pending" and that "approval of a mining plan for the Vernal leases remains pending"). Because further approvals would be needed for the mining of petitioner's Vernal deposits, it is even more speculative whether BLM's denial of Agrium's North Rasmussen Ridge plan would redress petitioner's alleged economic injury.

incentives was too attenuated for plaintiffs to have standing). The same conclusion follows here.[2]

2. Even if petitioner could establish constitutional standing, it would still lack prudential standing to challenge the EIS. Among the prudential principles "that bear on the question of standing" is the requirement that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 520 U.S. at 162 (quoting *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982)). "Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * , but by reference to the particular provision of law upon which the plaintiff relies." *Id*. at 175-176 (internal quotation marks and alterations omitted).

a. The court of appeals' decision reflects a straightforward application of the test for prudential standing established in *Bennett*. This Court's cases establish that the purpose of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), the provision under which petitioner bases

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[2] In *Bennett* v. *Spear*, *supra*, this Court concluded that the redressability requirement was satisfied because the challenged Biological Opinion and Incidental Take Statement had a "virtually determinative effect" on the Bureau of Reclamation's conduct. 520 U.S. at 170. Thus, the challenged Biological Opinion was likely to cause the Bureau to reduce water deliveries to the plaintiff farmers, and an order setting aside the Biological Opinion was likely to redress that injury. *Id*. at 170-171. Here, in contrast, even if BLM were to deny Agrium a permit to mine at North Rasmussen Ridge, it remains entirely speculative whether Agrium would then turn to petitioner to obtain phosphate.

its claim, is to protect environmental concerns. *E.g.*, *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (holding that an EIS need only assess impacts of a project with a "reasonably close causal relationship" to "a change in the physical environment"); *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (holding that Section 102(2)(C)'s two goals are "to inject environmental considerations into the federal agency's decisionmaking process" and "to inform the public that the agency has considered environmental concerns"); *Andrus* v. *Sierra Club*, 442 U.S. 347, 350 (1979) (holding that the "thrust of § 102(2)(c) is * * * that environmental concerns be integrated into the very process of agency decisionmaking"); see Pet. App. Tab 4, at 11. Accordingly, the courts of appeals have consistently ruled that NEPA's zone of interests does not include purely economic concerns. *E.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.* v. *United States Dep't of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005); *Taubman Realty Group Ltd. P'ship* v. *Mineta*, 320 F.3d 475, 481 (4th Cir. 2003); *Town of Stratford* v. *Federal Aviation Admin.*, 285 F.3d 84, 89 (D.C. Cir. 2002); *Nevada Land Action Ass'n* v. *United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *Port of Astoria* v. *Hodel*, 595 F.2d 467, 475 (9th Cir. 1979). The court of appeals in this case applied that same principle. See Pet. App. Tab 4, at 13-15.

b. Despite petitioner's contention (Pet. 16-19), the court of appeals' decision is consistent with *Bennett*. As explained above, the court of appeals applied the *Bennett* zone of interests test to the particular statutory provision at issue, Section 102(2)(C) of NEPA, and con-

cluded that the provision did not protect purely economic interests like petitioner's.

*Bennett* interpreted Section 7 of the Endangered Species Act of 1973 (ESA), which imposes the substantive requirements that each federal agency shall "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of" a species listed as threatened or endangered under the ESA or "result in the destruction or adverse modification of" designated critical habitat. 16 U.S.C. 1536(a)(2); see generally *Bennett*, 520 U.S. at 157-158 (giving an overview of the ESA). Section 7 of the ESA also requires that agencies "use the best scientific and commercial data available" when fulfilling those requirements. 16 U.S.C. 1536(a)(2). *Bennett* held that at least one purpose of the data requirement is "to prevent uneconomic (because erroneous) jeopardy determinations," and thus economic interests are included in Section 7's zone of interests. 520 U.S. at 177.

In contrast, it is well established that NEPA is a procedural statute that requires agencies to consider the environmental impacts of major federal actions, but does not require them to reach any particular substantive result when making a decision. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Section 102(2)(C) of NEPA requires an EIS to include analysis of, *inter alia*, "alternatives to the proposed action." Contrary to petitioner's assertion (Pet. 15-16), there is no indication that the alternatives requirement is intended to protect the economic interests of a competing supplier of raw materials. Accordingly, the court of appeals' conclusion that Section 102(2)(C) of NEPA does not protect the purely economic interests of petitioner is consistent with *Bennett*.

c. Petitioner also errs in contending (Pet. 7, 10, 19-21) that the court of appeals' decision conflicts with rulings of the Eighth Circuit. Petitioner cites no decision in which that court held that an injury solely to a plaintiff's purely economic interests was sufficient to establish prudential standing to challenge an EIS or an environmental assessment (EA) and finding of no significant impact (FONSI). Contrary to petitioner's argument (Pet. 8-9, 20-21), the Eighth Circuit in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115, 1126 (1999), was not faced with that question, because the plaintiff wilderness outfitters in that case alleged injury to their own aesthetic interest in enjoying the area affected by the agency decision, in addition to harm to their economic interests. Those plaintiffs, unlike petitioner, also conducted their business on the very land that would be affected by the agency action.[3] *Ibid.* As the court of appeals noted, *Friends of the Boundary Waters* can be "persuasively distinguished" on those grounds. See Pet. App. Tab 4, at 19.

Subsequent Eighth Circuit decisions interpreting *Friends of the Boundary Waters* also do not hold that an injury to purely economic interests establishes standing

[3] Petitioner explicitly disavows (Pet. 7 n.1) any reliance upon 40 C.F.R. 1508.14, the regulation cited by *Friends of the Boundary Waters*. Thus, neither the meaning of that regulation nor the question whether regulations may be used to determine the zone of interests of a statutory provision are presented by the petition. In any event, as the court of appeals recognized (Pet. App. Tab 4, at 22), even if the regulation could be used to determine Section 102(2)(C)'s zone of interests, it does not support petitioner's contention that the statute protects economic interests completely divorced from environmental effects, because the regulation requires analysis of economic effects only when they "are interrelated" with "natural or physical environmental effects." 40 C.F.R. 1508.14.

to challenge an EIS, despite petitioner's assertion to the contrary (Pet. 9-10). Rather, both *Central South Dakota Cooperative Grazing District* v. *Secretary of Agriculture,* 266 F.3d 889, 895-897 (8th Cir. 2001), and *Rosebud Sioux Tribe* v. *McDivitt*, 286 F.3d 1031, 1039 (8th Cir. 2002), cert. denied, 537 U.S. 1188 (2003), hold only that purely economic injuries are *insufficient* to establish standing to challenge an EA and FONSI. See *Grazing Dist.*, 266 F.3d at 895 ("Economic interests alone are 'clearly not within the zone of interests to be protected by [NEPA].'") (citation omitted); *id.* at 896-897 ("[I]f its interests are only economic, [plaintiff] is not within the zone of interests of the provision under which it has asserted its claim and thereby lacks prudential standing."); *Rosebud*, 286 F.3d at 1037 ("The Intervenors argue [that plaintiff] lacks standing under NEPA because the interests it seeks to protect are solely economic. We agree."); *id.* at 1038-1039. Accordingly, any statements in those opinions interpreting *Friends of the Boundary Waters* to mean that purely economic injury might in other circumstances establish standing to challenge an EIS are *dicta*. See *id.* at 1038; *Grazing Dist.*, 266 F.3d at 895-896. Although the court of appeals here expressed disagreement with the broad construction of *Friends of Boundary Waters* suggested by the *dicta* in *Grazing District* and *Rosebud Sioux Tribe* (Pet. App. Tab 4, at 18-19), there is no actual conflict among the circuits over whether injury only to purely economic interests is within NEPA's zone of interests.[4]

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[4] The court of appeals' decision does not create an intra-circuit conflict with *Sausalito* v. *O'Neill*, 386 F.3d 1186 (9th Cir. 2004), because, as petitioner acknowledges (Pet. 10), *Sausalito* did not address the zone of interests test under NEPA. In any event, such a conflict, even if it existed, would not warrant this Court's review. *Wisniewski*

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2006

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v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).