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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

January 27, 1992

Re: Collins v. Harker Heights, No. 90-1279

Dear John:

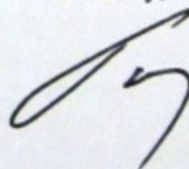
I am pleased to join your opinion.

I do ask you to consider one suggestion. Page three of your opinion discusses the "governmental power" standard used by the Court of Appeals. The standard distinguishes between employees and non-employees, as you observe in the first sentence of the third paragraph on page three. This is wrong, as you observe in the next sentence, because "[t]he employment relationship ... is not of controlling significance." Given these observations about the opinion below, with which I agree, I do not understand the third sentence of the paragraph. It seems to be a *non sequitur*. CA5's distinction between employees and non-employees suggests that a pedestrian stepping into an open manhole might be a different case; yet this third sentence describes it as barring both claims.

~~Copied~~ Your earlier two drafts phrased it in a different way. I can see why you had to change the earlier formulation because it intimated there would be a valid cause of action in the pedestrian hypothetical. But the present draft has the *non sequitur* flaw.

You might consider changing the third sentence to read as follows: "On the one hand, if the city had pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury, the Court of Appeals' holding would not speak to this situation at all, although a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner." This would provide a more accurate description of the opinion below, as well as offer greater support for the proposition that "[t]he employment relationship ... is not of controlling significance." Alternatively, you might consider deleting the troublesome sentence.

Sincerely,



Justice Stevens
Copies to the Conference