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Supreme Court Report

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This *Report* summarizes opinions issued on April 27 and May 7, 2020 (Part I); and cases granted review on May 4, 2020 (Part II).

I. Opinions

● *New York State Rifle & Pistol Ass'n v. City of New York*, 18-280. By a 6-3 vote, the Court dismissed as moot a Second Amendment challenge to New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits. After certiorari was granted, "the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city, which is the precise relief that petitioners requested in the prayer for relief in their complaint." The Court held that this mooted petitioners' claim for declaratory and injunctive relief with respect to the old rule. Any dispute over the scope of the new rule could be addressed on remand. So too could any claim for damages, which petitioners did not seek in their complaint.

Justice Kavanaugh filed a short concurring opinion which noted his agreement with the Court's disposition of the case but also his agreement with Justice Alito's concern about how lower courts have been applying *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010). Justice Alito filed a 31-page dissenting opinion that Justice Gorsuch joined in full and Justice Thomas joined in large part. He began by stating that, "[b]y incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced." Justice Alito described mootness as a "'demanding standard,'" one parties ought not easily by allowed to manufacture. Here, the new laws did not give petitioners complete prospective relief because they sought "unrestricted access" to ranges and second homes outside New York City, yet the new city ordinance requires "direct" travel outside the city to ranges and homes. But what counts as "direct"? Could the driver stop to pick up groceries or visit a friend? In short, "the City still withholds from petitioners something that they have claimed from the beginning is their constitutional right. It follows that the case is not moot." The case also isn't moot, according to Justice Alito, because the district court on remand could award damages. Although the amended complaint did not expressly request them, it sought "[a]ny other such further relief as the [c]ourt deems just and proper." And at the very least, petitioners "would be eligible for nominal damages," a claim for which "precludes mootness." Finally, one of the petitioners might be eligible for compensatory damages. Justice Alito noted that a finding of mootness is especially ill-advised because "the City's litigation strategy caused petitioners to incur what are surely very substantial attorney's fees."

The dissent then turned to the merits and said it "is not a close question." That the New York City ordinance violated the Second Amendment "followed directly from *Heller*." Justice Alito stated that the Court "based this decision on the scope of the right to keep and bear arms as it was understood at the time of the adoption of the Second Amendment." And "history provided no support for laws like the District's" in *Heller.* Here, "a necessary concomitant of" the right to keep a handgun in the home for self-defense are the rights "to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly." The city therefore had to justify its restrictions on that right. But, found the dissent, the city "points to no evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits." Finally, in a

part of the dissent not joined by Justice Thomas, Justice Alito found that the city's public-safety justifications for its ordinance were unpersuasive.

● *Maine Community Health Options v. United States*, 18-203. By an 8-1 vote, the Court held that appropriations riders did not extinguish Congress's obligation to make risk corridor payments to insurers under the Affordable Care Act and that the insurance companies can sue the Government for damages in the Court of Federal Claims. To encourage insurers to offer policies on the newly created health benefit exchanges, the Affordable Care Act provided that for the first three years of the exchanges' operation the government would partially reimburse participating insurers whose costs exceeded their premiums. (This was known as the "risk corridors" program.) The relevant provision, 42 U.S.C. §1342, said that insurance plans that make a certain profit "shall pay" the Secretary of HHS and that the Secretary "shall pay" the eligible unprofitable plans. In each of its first three years, the risk corridor program showed a significant loss. Yet at the end of each year, Congress included a rider in HHS's annual appropriations bills providing that "[n]one of the funds made available by this Act . . . may be used" for payments under the risk corridor program. Four health insurance companies that participated in the healthcare exchanges sued the federal Government in the Court of Federal Claims under the Tucker Act. They obtained mixed results in the trial courts. The Federal Circuit ruled for the Government, holding that the appropriations riders impliedly "repealed or suspended" the Government's obligation under §1342. In an opinion by Justice Sotomayor, the Court reversed and remanded.

The Court first held that "[t]he Risk Corridors statute created a Government obligation to pay insurers the full amount set out in §1342's formula". Although Congress typically creates payment obligations through appropriations, "Congress can also create an obligation directly by statute, without also providing details about how it must be satisfied." And §1342's express language did just that by using the "mandatory language" "shall pay." The Court found that neither the Appropriations Clause nor the Anti-Deficiency Act "qualified" that obligation by making HHS's obligation contingent on appropriations. Neither provision, found the Court, "addresses whether Congress itself can create or incur an obligation directly by statute. Rather, both provisions constrain how federal employees and officers may make or authorize payments without appropriations." Nor did Congress have to expressly provide "budget authority" to create an obligation by statute. By contrast, noted the Court, other provisions of the Affordable Care Act explicitly limited obligations to available appropriations or specific dollar amounts. But not §1342.

The Court next held that Congress did not impliedly repeal the obligation through its appropriations riders. Starting with the well-worn proposition that repeals by implication are disfavored, the Court found that "especially" so "'in the appropriations context.'" And looking at the closest precedents, the Court found that §1342 did not clearly modify the obligation—merely appropriating a lesser amount does not do the trick. Indeed, noted the Court, neither HHS nor CMS interpreted the riders as having done so, stating subsequently that "the Affordable Care Act requires the Secretary to make full payments to issuers." This left one question: "Where does petitioners' lawsuit belong, and for what relief?" The Court concluded that "petitioners properly relied on the Tucker Act to sue for damages in the Court of Federal Claims." The Court had previously held that a statutory claim falls within

the Tucker Act's waiver of sovereign immunity if a statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." (Quotation marks omitted.) The Court found that §1342's "shall pay" language met that test and did not fall within either of two exceptions to the Tucker Act.

Justice Alito dissented on that final ground. He stated that "we have basically gotten out of the business of recognizing private rights of action not expressly created by Congress." Yet the Court here "infers a private right of action that has the effect of providing a massive bailout for insurance companies that took a calculated risk and lost." He disagreed with the Court that §1342 itself creates a private right of action, noting that the phrase "Secretary shall pay" appears in many federal statutes. Justice Alito agreed that the Court's precedents set out the test the Court applied ("can be fairly interpreted as mandating compensation") but questioned whether the Court should continue to adhere to it. In his view, that test bears too close a resemblance to the Court's old, now-abandoned method for deciding whether to infer a private right of action. In the end, Justice Alito would call for additional briefing and argument on the issue.

● *Georgia v. Public.Resource.Org, Inc.*, 18-1150. By a 5-4 vote, the Court held that the annotations in the Official Code of Georgia Annotated may not be copyrighted. The State of Georgia's official code is the Official Code of Georgia Annotated (OCGA), which includes the text of every Georgia statute and various non-binding supplemental materials, including the annotations. The annotations contain summaries of judicial decisions applying specific provisions, summaries of AG opinions, lists of relevant law review articles, and more. The OCGA is created by the Code Revision Commission, a majority of whose members are Georgia legislators and which is staffed by the Office of Legislative Counsel, which provides services for the legislative branch. Each year, the Commission submits its proposed statutory text and annotations to the legislature for approval. The annotations are prepared by a division of the LexisNexis Group, under a work-for-hire agreement with the Commission that vests any copyright with "the State of Georgia, acting through the Commission." Public.Resource.Org (PRO) is a nonprofit organization that seeks to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites and distributed copies to various organizations. Eventually, the Commission sued PRO for copyright infringement. PRO counterclaimed, seeking a declaratory judgment that the OCGA and its annotations fell in the public domain. The district court ruled for the Commission. The Eleventh Circuit reversed. In an opinion by Chief Justice Roberts, the Court affirmed.

The Court traced the history of the "government edicts" doctrine, under which judicial opinions are not copyrightable. The Court interpreted the key 19th-century cases as establishing that a judge who writes opinions in his official capacity cannot "be regarded as their author" within the meaning of the Copyright Act. And an 1888 opinion extended that to non-binding explanatory materials prepared by judges. By contrast, explanatory materials prepared by non-judges (such as court reporters) could be copyrighted. From these cases the Court discerned the following "straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the 'author' of the works they prepare 'in the discharge of their judicial duties.' This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). It does not apply,

however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters." (Citation omitted.) The Court found the "animating principle behind this rule [to be] that no one can own the law." The Court then took the next critical step: "If judges, acting as judges, cannot be 'authors' because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials." For that reason, "legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills." The Court concluded that the same is true of Georgia's annotations. The Court first found that the author of the annotations qualifies as a legislator. The Commission is the sole "author" and it is an arm of the Georgia Legislature. Second, "the Commission creates the annotations in the 'discharge' of its legislative 'duties.'"

The Court then rejected Georgia's counterarguments. Yes, §101 of the Copyright Act lists "annotations" as copyrightable. But the government edicts doctrine says that judges and legislators cannot "serve as authors when they produce works in their official capacity." Second, the Act's express exclusion of works prepared by federal employees or officers does not create a negative inference helpful to Georgia here. The Court noted that the federal bar "sweeps much more broadly than the government edicts doctrine does" and "does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States." Third, rejecting Georgia's call to limit the doctrine because it was based on public policy, not statutory language, the Court noted that "Congress has repeatedly reused that term [author] without abrogating the doctrine." Fourth, the Court rejected Georgia's insistence that the doctrine applies only to works that have "the force of law." That can't be squared with the Court's application of the doctrine to concurrences and dissents in legal opinions, which "carry no legal force." Nor can it be squared with the Court's application of the doctrine to explanatory materials such as headnotes prepared by judges.

Justice Thomas filed a dissenting opinion, which Justice Alito joined in full and Justice Breyer joined in large part. He agreed with the Court that the three foundational 19th-century cases establish that judicial opinions cannot be copyrighted. But he posited three possible grounds for that conclusion, none of which support extending the government edicts doctrine to statutory annotations. One possible ground goes to the binding legal effect that judicial opinions have. Second, in England, "the property of all laws books is in the king"; translated to our Government, "sovereignty lies with the people." Third, is the concern for "fair notice" of what the law is. In Justice Thomas's view, "[a]llowing annotations to be copyrighted does not run afoul of any of these possible justifications for the government edicts doctrine." Annotations do not reflect binding law, do not represent the will of the people, and do not impede fair notice of the law. Justice Thomas also found no support for the majority's rule in the text of the Copyright Act, which makes no reference to the government edicts doctrine. The dissent added that "[t]he majority's understanding of the government edicts doctrine seems to have been lost on dozens of States and Territories," which own copyrights in their annotations. Finally, the dissent faulted the majority for looking at a number of factors for deciding that the "Commission is really part of the legislature," which provides little guidance to other states.

Justice Ginsburg also filed a dissenting opinion, which Justice Breyer also joined. She saw the "core question" as: "Are the annotations in the [OCGA] done in a legislative capacity?" She answered that question no. The role of the legislator is "'making law'—not construing statutes after their enactment." More specifically, she found three reasons why the OCGA annotations "do not rank as part of the Georgia Legislature's *lawmaking process*." "First, the annotations are not created contemporaneously with the statutes to which they pertain; instead, the annotations comment on statutes already enacted." "Second, the OCGA annotations are descriptive rather than prescriptive." And third, "the OCGA annotations are 'given for the purpose of convenient reference' by the public." Their placement "in the OCGA does not alter their auxiliary, nonlegislative character."

● *Kelly v. United States*, 18-1059. The Court unanimously reversed two convictions that arose out of the New Jersey "bridgegate" scandal, holding that the two public officials did not—as required by the relevant federal statutes—seek to obtain money or property. In 2013, Republican Governor Chris Christie hoped to obtain endorsements from Democratic mayors. When Fort Lee Mayor Mark Sokolich refused to endorse Christie, Christie's Deputy Chief of Staff, petitioner Bridget Anne Kelly, decided to wreak revenge. She reached out to David Wildstein, the Chief of Staff to William Baroni. Baroni was appointed by Christie as Deputy Executive Director of the Port Authority, a bi-state agency that manages bridges, tunnels and other transportation facilities in New York and New Jersey. Wildstein suggested eliminating four lanes on the 12-lane George Washington Bridge that were dedicated to traffic from Fort Lee. Kelly agreed, stating that she wanted to "create[e] a traffic jam that would punish" Mayor Sokolich and "send him a message." Baroni signed off on the plan. Wildstein, Baroni, and Kelly then devised a "cover story," that the lane change was part of a traffic study. They even told Port Authority engineers to collect information on how bad the traffic delay was. Wildstein, Baroni, and Kelly also agreed to incur the cost of extra toll collectors, which were needed to pursue their plan. The plan went into effect on September 9, caused massive traffic problems, and remained in place for three days, until the Port Authority Executive Director discovered what happened. The three plotters soon lost their jobs. And they were soon charged with federal crimes. Wildstein pleaded guilty to conspiracy charges and agreed to cooperate with the government. Baroni and Kelly went to trial on charges of wire fraud, fraud on a federally funded program or entity, and conspiracy to commit those crimes. The jury found both of them guilty on all counts. The Third Circuit affirmed. In an opinion by Justice Kagan, the Court reversed and remanded.

The Court reaffirmed that the two substantive federal crimes both required the government to prove that the object of Kelly and Baroni's dishonesty was to obtain money or property. See *Cleveland v. United States*, 531 U.S. 12 (2001). It explained that this requirement means that federal prosecutors won't "'set[] standards of disclosure and good government for state and local officials.'" And that's why the Court interpreted the federal honest-services law to ban only schemes involving bribes or kickbacks. "The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify." The government contended that Baroni and Kelly's scheme sought to obtain the Port Authority's money or property, but the Court disagreed.

First, the government claimed that Baroni and Kelly sought to take control of the bridge itself, its "physical lanes." The Court found instead that the realignment of the lanes "was a quintessential

exercise of regulatory power." The two defendants didn't physically move the lanes; they regulated their use. And the Court held in *Cleveland* "that a scheme to alter such a regulatory choice is not one to appropriate the government's property." And, true, "a scheme to usurp a public employee's paid time is one to take the government's property. But Baroni's and Kelly's plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes." This contrasts to a case where, say, a mayor deceptively gets city workers to renovate his daughter's home. In short, "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'" The Court noted that "[e]very regulatory decision . . . requires the use of some employee labor. But that does not mean every scheme to alter a regulation has that labor as its object." The Court concluded by harkening back to its earlier theme: "If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be . . . 'a sweeping expansion of federal criminal jurisdiction.' . . . The property fraud statutes do not countenance that outcome."

● *United States v. Sineneng-Smith,* 19-67. The Court unanimously vacated a Ninth Circuit judgment for "depart[ing] so drastically from the principle of party presentation as to constitute an abuse of discretion." At issue was 8 U.S.C. §1324, which makes it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." §1324(a)(1)(A)(iv). Respondent Evelyn Sineneng-Smith ran afoul of the provision in her immigration consulting business, which purported to assist her clients in applying for a "labor certification" that once allowed certain aliens to become lawful permanent residents. To qualify for the certification, an alien had to be in the United States by December 21, 2000, and apply for certification before April 30, 2001. Sineneng-Smith knew her clients didn't meet those deadlines, but still charged them $6800 to file applications with federal agencies. She "collected more than $3.3 million from her unwitting clients." In 2010, a grand jury indicted Sineneng-Smith of (among other things) three counts of violating §1324. Before trial, she moved to dismiss the §1324 counts on the ground that her conduct was not proscribed by the provision and, alternatively, that clause (iv) was unconstitutionally vague. The district court denied the motion. And after she was convicted, the court denied a motion for a judgment of acquittal that made the same arguments. Sineneng-Smith appealed to the Ninth Circuit, where "she reasserted the self-regarding arguments twice rehearsed." Then the appeals panel intervened. It ordered further briefing from three organizations as amicus curiae on three issues, including "[w]hether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?" Sineneng-Smith had never raised that argument. Counsel for the parties were permitted to file briefs responding to the amici briefs. And the invited amici received 20 minutes of argument to Sineneng-Smith's counsel's 10 minutes. The panel eventually held that §1324(a)(1)(A)(iv) was facially overbroad under the First Amendment. In an opinion by Justice Ginsburg, the Court vacated and remanded.

The Court did not reach the merits. It instead criticized the Ninth Circuit for its "takeover of the appeal," which was not justified by any "extraordinary circumstances." The Court observed that "[i]n our adversarial system of adjudication, we follow the principle of party presentation," which "rel[ies] on parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter

of matters the parties present." While "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate, . . . this case scarcely fits that bill." "Electing not to address the party-presented controversy, the panel projected that §1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother's plea to her alien grandchild to remain in the United States. Nevermind that Sineneng-Smith's counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that 'invalidation for [First Amendment] overbreadth is 'strong medicine' that is not to be 'casually employed.'" (Citation omitted.) In short, "the Ninth Circuit's radical transformation of this case goes well beyond the pale."

Justice Thomas filed a concurring opinion to "highlight the troubling nature of this Court's overbreadth doctrine." He stated that "[i]t appears that the overbreadth doctrine lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles. [He] would therefore consider revisiting this doctrine in an appropriate case."

II. Cases Granted Review

● *Edwards v. Vannoy*, 19-5807. The Court granted certiorari to resolve "[w]hether this Court's decision in *Ramos v. Louisiana*, 590 U.S. ___ (2020), applies retroactively to cases on federal collateral review." In *Ramos*, the Court held that the Sixth Amendment guarantee of a unanimous verdict in criminal cases is incorporated against the states through the Fourteenth Amendment. Petitioner Thedrick Edwards was convicted by a Louisiana jury of aggravated rape, aggravated kidnapping, and armed robbery. The jury vote was 11-1, which under Louisiana law at the time authorized a conviction. On state post-conviction review, he asserted that the non-unanimous verdict violated his Sixth and Fourteenth Amendment rights. The court denied his claim, and further review was denied in 2015. Edwards then sought federal habeas relief, asserting (among other things) his non-unanimous jury claim. The district court rejected his claim, finding that no "clearly established federal law" supported it. The Fifth Circuit declined to issue a certificate of appealability.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court—in a fractured opinion—held that the Constitution permitted Louisiana to convict defendants through non-unanimous verdicts. Last month, in *Ramos*, the Court overruled *Apodaca* and held that the unanimous-jury requirement applies to the states. At issue here is whether that new rule applies to prisoners whose convictions became final before *Ramos* was issued. Louisiana argues that AEDPA forecloses applying *Ramos* to such prisoners when the state court issued a ruling on the merits. Under 28 U.S.C. §2254(d)(1), a prisoner can obtain habeas relief only if he shows that the state court's adjudication of the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." And courts making that assessment look at what law was clearly established at the time of the state court decision. Here, that law was *Apodaca*. So, Louisiana argues, Edwards cannot show that his conviction violated clearly established law within the meaning of §2254(d)(1); and he therefore cannot obtain habeas relief. (Edwards' cert petition did not mention AEDPA, and he did not file a reply brief.)

● *CIC Services, LLC v. IRS*, 19-930. The question presented is "[w]hether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of *taxes* also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes." The IRS published a guidance document, Notice 2016-66, which imposes reporting requirements on "section 831(b) micro-captive transactions." CIC Services' attorneys and accountants advise taxpayers engaging in micro-captive transactions and is therefore subject to the reporting and recordkeeping requirements of Notice 2016-66. In March 2017, CIC filed a pre-enforcement challenge to Notice 2016-66 in federal district court, arguing that it was promulgated in violation of the Administrative Procedure Act. The IRS moved to dismiss for lack of subject matter jurisdiction on the ground that the complaint was barred by the Anti-Injunction Act, 26 U.S.C. §7421(a). The district court granted the motion, and a divided panel of the Sixth Circuit affirmed. 925 F.3d 247.

The Sixth Circuit acknowledged that challenges to tax-reporting requirements don't typically implicate the Anti-Injunction act because "information reporting is a separate step in the taxation process that occurs before assessment or collection." (Citing *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015)). But the Court held that CIC's complaint "is properly characterized as a 'suit for the purpose of restraining the assessment or collection of any tax,'" the relevant tax being "the penalties imposed for violation of the Notice's requirements." Seven judges dissented from the denial of rehearing en banc. CIC maintains that "*Direct Marketing* makes clear that a challenge to a regulatory reporting requirement is not an attempt to restrain the assessment or collection of a tax." CIC argues that the tax penalty "is not an affirmative, stand-alone tax for the purpose of 'protection of the revenues'"; indeed, its very purpose "it to help ensure that it never needs to be collected." More fundamentally, "CIC challenges the reporting requirements—not some hypothetical tax penalty." And, says CIC, the consequences are significant: "the decision below threatens to snuff out any practical ability for affected individuals to challenge a wide swath of agency actions. Moreover, the decision undermines the core purposes of the Administrative Procedure Act, namely ensuring that regulated parties have an ability to obtain pre-enforcement review of administrative mandates."

The IRS responds that "[t]he civil monetary penalties imposed for noncompliance with the reporting and recordkeeping requirements are 'tax[es]' within the meaning of the Anti-Injunction Act." In particular, the IRS says that "[t]he penalties the Code imposes on a taxpayer or material advisor who refuses to report such information or to provide required records upon request can be viewed as embodying a presumption that—in the absence of exonerating information reported (or records supplied) by the taxpayer or material advisor—the suspicious transaction is in fact an instance of tax avoidance or evasion, and some tax liability should be imposed." "In all events," asserts the IRS, "the Code unambiguously classifies a penalty for noncompliance with the statutory reporting and recordkeeping requirements as a tax for purpose of the Anti-Injunction Act." And nothing in the Court's precedents, it claims, says that a regulatory tax cannot come within the scope of the Act. Here, petitioner is challenging IRS guidance requiring it and its industry to comply with reporting and information-gathering requirements, violations of which are subject to (among other things) a tax penalty.

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