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This *Report* summarizes an opinion issued on November 25, 2019 (Part I); and cases granted review on November 1, 8, 15, and 22, 2019 (Part II).

I. Opinions

● *Thompson v. Hebdon*, 19-122. Through a *per curiam* opinion, the Court unanimously vacated a Ninth Circuit decision that had upheld Alaska's $500 per year limit on campaign contributions to candidates for political office or election-oriented groups (other than a political party). Two Alaska residents filed suit alleging that Alaska's contribution limits violate the First Amendment. The district court upheld the contribution limits, and the Ninth Circuit affirmed. The court found "that the individual-to-candidate contribution limit 'focuses narrowly on the state's interest,' 'leaves the contributor free to affiliate with a candidate,' and 'allows the candidate to amass sufficient resources to wage an effective campaign,' and thus survives First Amendment scrutiny." But the court declined to apply *Randall v. Sorrell*, 548 U.S. 230 (2006), which invalidated low Vermont contribution limits ($400 for candidates for statewide offices; $300 for state senator; $200 for state representative) and "identified several 'danger signs' about Vermont's law that warranted closer review." The Court held that the Ninth Circuit erred in declining to apply *Randall* and therefore vacated its judgment and remanded so that the court could "revisit whether Alaska's contribution limits are consistent with [the Court's] First Amendment precedents."

The Court explained that Alaska's contribution limit "shares some of those characteristics" that were "danger signs" for Vermont's limits. Specifically, first, "Alaska's $500 individual-to-candidate contribution limit is 'substantially lower than . . . the limits we have previously upheld'"—which is $1,075 per two-year election cycle ($1600 in today's dollars). "Second, Alaska's individual-to-candidate contribution limit is 'substantially lower than . . . comparable limits in other States.'" The Court noted that "[o]nly five other States have any individual-to-candidate contribution limit of $500 or less per election," and all of those states have limits above $500 for candidates for Governor and Lieutenant Governor. And third, noted the Court, "Alaska's contribution limit is not adjusted for inflation." Indeed, observed the Court, "Alaska's $500 contribution limit is the same as it was 23 years ago, in 1996." The Court remanded to allow the parties to litigate whether Alaska can show (in *Randall*'s words) "any special justification that might warrant a contribution limit so low."

II. Cases Granted Review

● *Tanzin v. Tanvir*, 19-71. The Court will resolve whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq.* (RFRA), allows suits for money damages against federal employees sued in their individual capacities. RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." The statute also provides that a person who has experienced a violation under RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." Respondents are Muslim men who allege that petitioners—several agents of the Federal Bureau of Investigation—retaliated against them for refusing, at least in part due to their religious beliefs, to serve as informants in terrorism-related investigations. In particular, respondents allege that the FBI agents placed or retained them on the federal No Fly list in retaliation for their decision not to serve as FBI informants. The district court dismissed the complaint, but the Second Circuit reversed with respect to respondents' damages claims against petitioners in their individual capacities, remanding to determine if respondents were entitled to qualified immunity. 894 F.3d 449.

The Second Circuit held that RFRA permits claims against federal officials in their individual capacity. The court then turned to the issue of money damages. Although the court found the statutory phrase "appropriate relief" to be ambiguous, it concluded that the legal backdrop for RFRA supported a finding that the phrase encompasses money damages. In particular, the Second Circuit pointed to *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), a decision issued a year before RFRA's enactment, which held that money damages were encompassed within the scope of the phrase "all appropriate remedies." The Second Circuit distinguished *Sossamon v. Texas*, 563 U.S. 277 (2011), which held that the phrase "appropriate relief" in a sister statute to RFRA, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), does not permit claims for money damages against state officers sued in their official capacities. *Sossaman*, the Second Circuit held, was based on a presumption favoring sovereign immunity, but that presumption was inapplicable here because sovereign immunity does not apply to individual-capacity suits. The Second Circuit also found that the legislative history did not evince any clear indication that Congress intended to exclude individual-capacity damages claims from the scope of RFRA.

The petition (filed by the Solicitor General) argues that the Second Circuit's decision is inconsistent with the text of RFRA, read in light of the statute's broader context and the Court's decision in *Sossamon*. Petitioners argue that individual-capacity money damages are not "appropriate relief against a government," since such damages do not generally come out of the federal treasury. Petitioners also raise separation-of-powers concerns associated with a court imposing personal damages liability on federal executive officers. These concerns, they argue, counsel against the Second Circuit's interpretation, given the ambiguity of the statutory text. Petitioners also point to the potentially significant impact of personal damages liability, and argue that Congress is in a better position than courts to determine if such liability is appropriate. Petitioners point to other statutes in which Congress was explicit in creating an individual-capacity damages remedy, and note the lack of such language in RFRA. And petitioners argue that although *Sossamon* relied in part on a sovereign immunity rationale, it also relied on the plain meaning of the RLIUPA phrase "appropriate relief against a government"—the same phrase used in RFRA. Petitioners also rely on RFRA's purpose and history, arguing that the statute was intended to restore the status quo prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), not to create a new First Amendment money damages claim against individual federal officers. Petitioners reject the view that Congress looked to *Franklin* in drafting RFRA, arguing, among other things, that the phrase "appropriate relief against a government" appears nowhere in *Franklin*, and that the phrase "appropriate relief" was introduced into a draft of RFRA several years before *Franklin* was decided.

● *Google LLC v. Oracle America Inc.*, 18-956. The Court will resolve whether copyright protection extends to certain types of computer code (labeled "software interfaces" by petitioner Google—a label rejected by respondent Oracle) that allow software developers to operate specific prewritten coding subprograms, and whether Google's use of such code in creating a computer program is fair use under copyright law. The dispute relates to Google's use of Oracle's Java platform to build Android, Google's operating system for its mobile devices. The Java platform is computer software that makes it easier to run applications written in the Java programming language, and contains thousands of prewritten subprograms that can be used for this purpose. Each of these subprograms, which are packaged into "application programming interfaces," or API packages, contains two types of code: "declaring code," which names and describes the subprogram, and "implementing code," which actually performs the relevant task. Oracle claims that Google violated copyright laws by copying significant portions of the Java platform's "declaring code," as well as by adopting elements of the structure, sequence, and organization of Java's API packages. The district court set aside a jury's finding of infringement on the ground that the relevant material was not copyrightable. The Federal Circuit reversed in part, holding that the material was entitled to copyright protection, and remanded for a trial on fair use. 750 F.3d 1339. On remand, a jury found that the fair use doctrine applied, but the Federal Circuit reversed, holding that Google's conduct was not fair use as a matter of law. 886 F.3d 1179. In both appeals, the Federal Circuit applied Ninth Circuit precedent because copyright law is not within the Federal Circuit's exclusive jurisdiction.

In the first appeal, on copyrightability, the Federal Circuit emphasized that both parties agreed that the elements of code at issue were creative and original. On the declaring code, the court found that (1) the merger doctrine—which provides that an idea can merge with its expression to make the expression uncopyrightable if there are a limited number of ways to express the idea—does not apply because alternative expressions were available; (2) that the declaring code consists of short phrases does not make it uncopyrightable because the selection and arrangement of the phrases exhibit creativity; and (3) Google failed to establish that the "scenes a faire" doctrine, which bars certain expressions from copyright protection if they are indispensably associated with a given idea, applies. With respect to the structure and organization of the API packages, the court rejected the district court's conclusion that copyright was unavailable because these elements constituted a system or method of operation, holding that expression embodied in a system or method of operation can be copyrighted. The Federal Circuit also held that whether copying was necessary to interoperability was not relevant to the copyrightability question, but only to whether the copying constituted fair use.

In the second appeal, the Federal Circuit applied the four-factor fair use test and concluded that Google had not established that its copying constituted a fair use. The court found that the first factor—the purpose and character of the use—weighed against a finding of fair use because Google's use of the relevant elements of the Java platform was "highly commercial and non-transformative." The court found that the second factor—the nature of the copyrighted work—weighed in favor of a finding of fair use because "reasonable jurors could have concluded that functional considerations were both substantial and important" to the Java API packages. Under the third factor—the amount and substantiality of the portion of the copyrighted work used—the court found that Google copied 11,330 more lines of code than necessary to write in Java, and this weighed against a finding of fair use. Finally, the court determined that the fourth factor—the effect on the potential market—weighed heavily against a finding of fair use because the evidence of actual and potential harm caused by Google's conduct was "overwhelming." Balancing these four factors, the court found that Google had not demonstrated fair use; the court opined that "[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform." The court noted, however, that its ruling did not imply that a fair use defense could never be successful in a case involving computer code.

In its petition, Google argues that the Java declaring code constitutes uncopyrightable methods of operation, because it tells developers "how to access the prewritten methods to perform tasks carried out by the implementing code." Google also asserts that the Federal Circuit incorrectly applied the merger doctrine, arguing that the question is not whether alternative expressions theoretically exist, but whether alternative expressions were feasible. Here, Google argues, the merger doctrine applies because the declaring code "could be written only in one way to permit Java-fluent developers to use the familiar shorthand commands." Google also critiques the Federal Circuit's fair use holding, arguing that the Federal Circuit improperly set aside the jury's holding on this issue. Google argues that the Federal Circuit failed to account for the functional nature of the relevant material, did not correctly apply the doctrine of transformative use, and rendered the fourth factor of the fair use test—the effect on the potential market—essentially circular. Google also argues that the Federal Circuit's emphasis on the fact that the Java declaring code serves the same purpose in Android as in the Java system was improper; this cannot defeat a fair use defense because computer code essentially always performs the same function wherever it is used. More broadly, Google argues that the Federal Circuit's reasoning would have a "devastating impact on the development of computer software" because software developers would not be able to use their traditional approach of reusing preexisting code, and that the decision would disturb the delicate balance between copyright and patent law.

● *Lui v. Securities and Exchange Comm'n*, 18-1501. At issue is whether a federal court may order disgorgement in a civil enforcement action brought by the Securities and Exchange Commission. Petitioners Charles Liu and Xin Wang obtained nearly $27 million from foreign investors who sought to take advantage of the EB-5 Immigrant Investor Program, which provides a means for foreign nationals to obtain visas if they invest money in certain United States enterprises. The SEC brought an enforcement action against petitioners alleging fraud and misappropriation. The district court award summary judgment to the SEC on the claim that petitioners had violated §17(a)(2) of the Securities Act. The district court enjoined petitioners from participating in any additional EB-5 investments, and imposed fines on each of the petitioners based on their personal gains (approximately $6.7 million for Liu and $1.5 million for Wang). The district court also ordered disgorgement of roughly $26.4 million, based on the amount that petitioners had raised from investors. On appeal to the Ninth Circuit, petitioners argued in part that the district court lacked statutory authority to order disgorgement. Petitioners relied on the Supreme Court's decision in *Kokesh v. SEC,* 137 S. Ct. 1635 (2017), which held (in the context of applying a statute of limitations) that disgorgement is a penalty. The Ninth Circuit rejected this argument and affirmed. 754 Fed. Appx. 505. The Ninth Circuit relied on pre-*Kokesh* circuit precedent, and noted that *Kokesh* expressly refused to reach the question whether courts may order disgorgement in SEC enforcement proceedings.

In their petition, Liu and Wang argue that Congress has expressly identified by statute the forms of relief available to the SEC in civil enforcement proceedings—civil monetary penalties, injunctions, and equitable relief—and that disgorgement does not fall within any of those categories. They argue that disgorgement is not equitable relief because equity is intended to restore the status quo rather than to penalize, and *Kokesh* made clear that disgorgement is a penalty. Petitioners assert that the disgorgement order in this case, for example, does not restore the status quo, but rather puts them nearly $16 million into debt. Petitioners also argue that disgorgement is imposed for violation of public laws, while equity restores justice between private parties. In addition, petitioners assert that, during oral argument in *Kokesh*, five justices raised the question whether there is authority for a disgorgement remedy in SEC civil enforcement proceedings.

The SEC responds that judicial authority to order disgorgement in enforcement actions derives from two sources. First, the Securities Act and Exchange Act both authorize courts to "enjoin" violations, an authorization the SEC argues encompasses disgorgement of profits acquired in violation of the statutes. Second, the SEC argues that disgorgement is an equitable remedy and thus falls under Congress's authorization under the Sarbanes-Oxley Act for courts to order "any equitable relief that may be appropriate or necessary for the benefit of investors" in SEC enforcement actions. The SEC asserts that the Court has repeatedly characterized disgorgement as equitable, and that Congress has enacted statutes that assume the availability of disgorgement as an equitable remedy in SEC enforcement actions. The SEC also argues that *Kokesh* does not govern because it held that disgorgement is a penalty only within the meaning of one particular statute relating to a statute of limitations, and that the *Kokesh* Court explicitly declined to decide the issue petitioners raise here. The SEC adds that a remedy may be equitable even if it is also considered a penalty for some purposes.

● *U.S. Patent and Trademark Office v. Booking.com B.V.*, 19-46. At issue is whether the addition of ".com" to an otherwise generic term can result in a protectable trademark. A PTO examiner rejected trademark applications for "Booking.com" filed by Booking.com, a company that operates a website for booking travel and hotel accommodations. The Trademark Trial and Appeal Board affirmed, but the federal district court reversed in part on summary judgment, ordering the PTO to register two of the marks and remanding as to two others. On appeal, a divided panel of the Fourth Circuit affirmed, agreeing with the district court that "Booking.com" is protectable as a trademark. 915 F.3d 171.

A mark cannot be trademarked unless it is "distinctive." Courts categorize marks into three categories, in increasing levels of distinctiveness: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. As the Fourth Circuit described, marks in the third and fourth category are always distinctive, marks in the first category are never distinctive, and marks in the second category may be distinctive under certain circumstances. Here, the dispute related to the first two categories; the PTO argued that "Booking.com" is a generic mark, while Booking.com argued that it is descriptive. Both parties agreed that if the mark is descriptive, it satisfies the additional requirements to be a trademark.

The Fourth Circuit held that the PTO did not meet its burden to establish that "Booking.com" is a generic mark. The court based this holding largely on the district court's finding that the public understands "Booking.com" to refer to the company rather than to online hotel reservation services generally—a factual finding that the Fourth Circuit determined was not clearly erroneous. The Fourth Circuit also held that the district court, in making its factual findings, did not err in relying in part on a consumer survey finding that 74.8% of respondents identified "Booking.com" as a brand name. The court rejected the PTO's argument that a mark created by adding ".com" to a generic domain like "booking" is necessarily generic. The court found inapplicable *Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888), which held that the addition of "Company" to a generic term does not make it capable of being trademarked. The court also rejected the PTO's position that "Booking.com" must be generic because its composite parts are generic. The key question, the Fourth Circuit held, is not whether the components of a mark are generic on their own, but how the public understands the mark as a whole, and that inquiry must be conducted on a case-by-case basis.

In its petition, the PTO argues that the addition of ".com" to a generic term can never render a term distinctive for purposes of trademark law. It cites *Goodyear's Rubber* and argues that, just as a company could not trademark "Booking Company" or "Booking Inc." under that decision, it may not trademark "Booking.com." The PTO also asserts that the Fourth Circuit's reliance on public understanding to find a mark descriptive eliminates the distinction between generic and descriptive terms, since descriptive terms may be trademarked if they become publicly associated with a particular brand, while generic terms may not. The PTO argues that the Fourth Circuit therefore should have found error in the district court's reliance on a consumer survey.

- *Walker v. United States*, 19-373. At issue is whether a felony that can be committed with a *mens rea* of recklessness qualifies as a "violent felony" for purposes of a mandatory sentencing enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). ACCA defines "violent felony" as a crime that includes, as an element, the "use . . . of physical force against the person of another." Petitioner James Walker was convicted of possession of ammunition by a felon in violation of 18 U.S.C. §922(g)(1). The government sought a sentence of 15 years to life under ACCA based on three prior convictions. The parties disputed, however, whether one of those prior convictions—under a Texas robbery statute, Texas Penal Code §29.02—was for a "violent felony." Texas Penal Code §29.02 defined the offense as "intentionally, knowingly, or recklessly caus[ing] bodily injury to another" during the course of committing theft. Relying on its own precedent, a panel of the Sixth Circuit determined that "using" physical force within the meaning of ACCA can occur recklessly. 796 Fed. App'x 195. The full Sixth Circuit denied rehearing en banc, but four judges dissented, acknowledging a circuit split. 931 F.3d 467.

Walker emphasizes that, prior to the Court's 2016 decision in *Voisine v. United States*, 136 S. Ct. 2272, all courts of appeals to consider the issue concluded that "violent felony" does not include those crimes that can be committed recklessly. In *Voisine*, however, the Court held that a statute that defines a "misdemeanor crime of domestic violence" as involving the "use of physical force" includes crimes committed recklessly. The Court reasoned that "use" must be volitional, but need not be knowing, intentional, or purposeful. Walker explains that three courts of appeals have distinguished the statute at issue in *Voisine* by noting that the ACCA violent-felony definition specifies "use . . . of physical force *against the person of another*," while the *Voisine* statute does not require that force be used "against the person of another." Some courts of appeals have found that the additional language precludes recklessness, because the defendant must necessarily have a purpose that his or her action impact a person.

The government quotes *Voisine* as holding that the word "use" requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." The word "use" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." And the government maintains that the interpretation of "use" in *Voisine* is not affected by the addition of "against the person of another," noting that *Voisine* itself assumed that the use of force at issue there—in the context of domestic violence—would be against a person. Thus, in the government's view, a "violent felony" as defined by ACCA includes crimes that can be committed recklessly.

● *United States v. Briggs*, 19-108; *United States v. Collins*, 19-184. At issue in these consolidated cases is whether the Uniform Code of Military Justice (Code) requires that prosecution of a rape be charged within five years of when it occurred, for any rape that occurred between 1986 and 2006. Prior to 2006, Article 43 of the Code had a default five-year limitations period but stated that any offense punishable by death had no statute of limitations; a different article provided that rape may be punishable by death. In 2006, Article 43 was amended to explicitly provide that rape has no statute of limitations. In 2018, the Court of Appeals for the Armed Forces reconsidered its own precedent from 2005 and 1998 and decided that, because the Supreme Court held in *Coker v. Georgia* in 1977 that the Eighth Amendment prohibits capital punishment for the rape of an adult woman, the offense was not "punishable by death" under the pre-2006 version of Article 43, and the five-year statute of limitations should apply. *United States v. Mangahas*, 77 M.J. 220. Respondents were each convicted of rapes that occurred prior to 2006, where each charge was brought more than five years after the respective rape occurred. In the decision below, the court of appeals concluded that charges for rapes occurring prior to 2006 should be subject to a five-year statute of limitations. 78 M.J. 289. In the case of respondent Briggs, the court also concluded—based on statutory text and presumptions against retroactivity and in favor of lenity—that the 2006 amendment did not apply retroactively to conduct occurring before its enactment, even where the previous five-year statute of limitations had not yet run.

The government asserts that, at the time the rapes occurred, the text of the Code and binding precedent of the court of appeals held that rape was not subject to a statute of limitations. In the government's view, the pre-2006 statute of limitations should be interpreted to apply to those crimes for which the death penalty was statutorily authorized, even if it was not constitutional, as civilian courts have held in similar contexts. The government adds that the Court has declined to address whether military prosecutions are constrained by the Eighth Amendment, which means that rape may well be subject to capital punishment in the military context. The government also notes that Congress views military rape as a particularly serious problem and has always intended to punish it strictly and without time limitations. From a policy perspective, the government notes that the court of appeals' approach could make many late-reported rapes unpunishable. Finally, the government argues that, in any event, the 2006 amendment applies to Briggs's prosecution—the only respondent for whom the five-year statute of limitations was unexpired in 2006. The presumption against retroactivity should not apply, according to the government, because it is based on respecting expectations at the time a crime is committed. But the expectation under settled law at the time Briggs committed rape was that there was no statute of limitations for rape in the military.

Respondents argue that military rape was not punishable by death prior to 2006. In their view, whether a crime is punishable by death—*i.e.*, whether the death penalty may ever be imposed—is different from whether the death penalty is authorized by statute. If the death penalty is forbidden by the Eighth Amendment in certain circumstances, it may not be imposed. And according to respondents, it does not matter whether the Eighth Amendment applies to the military as a matter of constitutional law, because the Code explicitly incorporates the Eighth Amendment in Article 55. Respondents additionally challenge the Supreme Court's jurisdiction to decide the issues in the petition, noting that the Court's jurisdiction is limited with respect to decisions of the military court of appeals, see 28 U.S.C. §1259, and that the Court should not have the power in this appeal to undo the *Mangahas* decision of 2018. Respondent Briggs also argues that the 2006 amendment to Article 43 did not retroactively extend the statute of limitations. He argues that the presumption against retroactivity applies to him in particular because his expectation on direct appeal was that he would get the benefit of the *Mangahas* decision.

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