A PUBLICATION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Supreme Court Report

VOLUME 27, ISSUE 3 ■ DECEMBER 17, 2019

This *Report* summarizes opinions issued on December 10 and 11, 2019 (Part I); and cases granted review on December 6 and 13, 2019 (Part II).

I. Opinions

● *Rotkiske v. Klemm*, 18-328. By an 8-1 vote, the Court ruled that, absent application of an equitable doctrine, the one-year statute of limitations in the Fair Debt Collection Practices Act (FDCPA) begins to run on the date the alleged violation occurs, not the date on which the violation is discovered. The FDCPA, which authorizes private civil actions against debt collectors who commit certain prohibited acts, provides that an action may be brought "within one year from the date on which the violation occurs." 15 U.S.C. §1692k(a). Petitioner Kevin Rotkiske brought suit against respondent Klemm & Associates under the FDCPA more than six years after the default judgment that gave rise to the suit, but argued that equitable tolling excused the untimeliness because Klemm intentionally served process in a manner intended to prevent Rotkiske from receiving service. Rotkiske asserted that he was not aware of the default judgment until less than a year before he filed suit, when he was denied a mortgage as a result of the judgment. He argued that a "discovery rule" should apply, under which the limitations period begins when a plaintiff knows or should have known of the alleged FDCPA violation. The district court rejected this view, holding that the plain language of the statute makes clear that no discovery rule applies. The Third Circuit *sua sponte* reviewed the case *en banc* and unanimously affirmed, rejecting any default presumption of a discovery rule as to all federal limitations periods. In an opinion by Justice Thomas, the Court affirmed.

The Court concluded that the text of §1692k(a) is unambiguous in setting the date of the violation as the triggering event for the limitations period. The Court rejected Rotkiske's suggestion that it should interpret the statute to include a general discovery rule, warning that courts should not read absent provisions into statutes, particularly where—as here—Congress has explicitly included the absent provision in other statutes. The Court declined to consider Rotkiske's alternative argument—that his filing is timely under an equitable, fraud-specific discovery rule—finding that he failed to preserve this argument before the Third Circuit and failed to raise it in his petition for certiorari.

Justice Sotomayor wrote a brief concurrence to explain her view that Rotkiske could have relied on an equitable, fraud-specific discovery rule, but (as the Court found) he failed to preserve that argument and it was not before the Court. Justice Ginsburg dissented in part. She agreed with the majority that the one-year statute of limitations in the FDCPA is not generally subject to the discovery rule. But she would have found that Klemm's knowing service of the complaint at an address where Rotkiske did not live, and subsequent false affidavit of that service, "warrants application of the discovery rule to time Rotkiske's FDCPA suit from the date he learned of the default judgment against him." In her view, the fraud-based discovery rule has deep historical roots, "operates as a statutory presumption," and "is distinct from the general discovery rule in that it governs only cases of fraud." It differs from equitable tolling in that, rather than pausing the statutory limitations period at some point, it commences the limitations period anew from the time of discovery of the fraud. Justice Ginsburg would reject the government's argument that "the fraud-based discovery rule applies only when the fraudulent conduct is itself the basis for the plaintiff's claim for relief." She would

hold instead that "the rule governs if either the conduct giving rise to the claim is fraudulent, or if fraud infects the manner in which the claim is presented."

● *Peter v. NantKwest, Inc.*, 18-801. The Court unanimously held that the Patent and Trademark Office (PTO) may not recover attorney's fees in an action brought against it by an unsuccessful patent applicant. The Patent Act provides that an applicant "dissatisfied with the decision of the Patent Trial and Appeal Board" may sue the PTO in federal district court. 35 U.S.C. §145. The statute also provides that "[a]ll the expenses of the proceedings shall be paid by the applicant." The district court decided that "expenses" do not include attorney's fees. A divided panel of the Federal Circuit reversed, but the en banc Federal Circuit affirmed the district court. The en banc majority held that the "American Rule"—which creates a background presumption that each party is responsible for its own attorney's fees—controls in the absence of "specific and explicit" statutory language to the contrary. In an opinion by Justice Sotomayor, the Court affirmed.

The Court began by reiterating the longstanding "bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." The Court rejected the government's contention that the American Rule applies only to statutes that award fees to the "prevailing party," not to statutes that require "one party to pay all expenses regardless of outcome," as the Patent Act does. The Court explained that it had previously found the American Rule applies to fee-shifting statutes that sometimes award fees to nonprevailing parties, citing *Sebelius v. Cloer*, 569 U.S. 369 (2013). The Court also rejected the position of the en banc dissent, which "characterized the proceeding [in the district court] as an intermediate step in obtaining a patent and the payment of legal fees as a portion of the application costs." The Court found, instead, that the district court proceeding "has all the marks of the kind of adversarial litigation in which fee shifting, and the presumption against it, is common; the statute authorizes filing a separate civil action where new evidence can be introduced for *de novo* review by a district judge." The Court therefore ruled that the American Rule applies to §154 of the Patent Act.

Next, the Court determined that Congress did not intend to depart from the presumption of the American Rule. First, the Court examined the text of the statute, and found that the word "expenses . . . does not invoke attorney's fees with the kind of clarity we have required to deviate from the American Rule." Rather, the full phrase "expenses of the proceeding" suggested to the Court a historical category of costs that did not include attorney's fees. The Court next found that "expenses" and "attorney's fees" are generally "distinct and not inclusive of each other" as they are used by Congress across a variety of statutes. The Court looked to the history of the Patent Act and found no evidence to support including attorney's fees, but found instead that "when Congress intended to provide for attorney's fees in the Patent Act, it stated so explicitly."

II. Cases Granted Review

● *Trump v. Vance*, 19-635. The Court will resolve whether the custodian of the President's tax returns must comply with a state grand-jury subpoena seeking production of about 10 years' worth of the President's financial papers and tax returns. The County of New York District Attorney (the DA) has been investigating, among other matters, whether "hush money" payments

made on behalf of the President to two women with whom the President allegedly had extra-marital affairs violated state law. In connection with that investigation, the DA—on behalf of a grand jury that had been convened—issued a subpoena to the Trump Organization "seeking records and communications relating to, among other transactions, the 'hush money' payments made on behalf of Petitioner, [and] how those payments were reflected in the Trump Organization's books and records." After a dispute arose over the subpoena's scope, the DA issued a subpoena to the President's accounting firm, Mazars USA. The Mazars subpoena "seeks financial and tax records of several individuals and entities, including [the President] and entities owned by [the President] before he became President, from January 1, 2011 to the present."

In September 2019, the President filed a civil lawsuit in federal district court challenging the Mazars subpoena. Asserting "a broad presidential immunity from state criminal process," the President sought a declaration that the subpoenas are invalid and a permanent injunction staying the subpoenas while he is in office. The district court held it had to abstain from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), and, alternatively, denied the President's motion on the merits. The Second Circuit affirmed. 2019 WL 5687447. Relying on *United States v. Nixon*, 418 U.S. 683 (1974), the Second Circuit concluded that the President's claim of "temporary absolute presidential immunity" lacks any basis in "historical and legal precedent." The court found, specifically, that "'the exercise of jurisdiction [over the President] has been held warranted' when necessary 'to vindicate the public interest in an ongoing criminal prosecution'" (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)). The court noted that it was "not faced . . . with the President's arrest or imprisonment, or with an order compelling him to attend court at a particular time or place, or, indeed, with an order that compels the President himself to do anything." And it "seek[s] no privileged information and bear[s] no relation to the President's performance of his official functions." Given all that, the court held, the President failed to "explain why any burden or distraction the third-party subpoena causes would rise to the level of interfering with his duty to faithfully execute the laws." By contrast, the court said, it would "exact a heavy toll on our criminal justice system to prohibit a state from even investigating potential crimes committed by [a President] for potential later prosecution, or by other persons . . . simply because the proof of those alleged crimes involves the President." Finally, the court rejected the U.S. Department of Justice's contention as amicus curiae that a heightened showing of need is required to subpoena documents relating to a President.

The President maintains that "[u]nder Article II, the Supremacy Clause, and the overall structure of our Constitution, the President of the United States cannot be 'subject to the criminal process' while he is in office." He asserts as an initial matter "that the President cannot be indicted, prosecuted, or imprisoned while in office." Criminal prosecution would "hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs"; would "undermin[e] the President's leadership and efficacy both here and abroad"; and "would allow a single prosecutor to circumvent the Constitution's specific rules for impeachment." The President then insists that "[t]he rationale for presidential immunity from indictment and prosecution applies equally when, as here, the President is targeted for criminal investigation and then served with compulsory process." (Quotation marks and citations omitted.) That is because, first, "[a]llowing the sitting President to be targeted for criminal investigation—and to be subpoenaed on that basis—would, like an indictment itself, distract him from the numerous and important duties of his office, intrude on and impair Executive Branch operations, and stigmatize the presidency." And "allowing a single prosecutor to investigate

a sitting President through the issuance of criminal process no less invades Congress's impeachment authority than the filing of a criminal charge." The President adds that these concerns are "especially strong when applied to state and local governments," for to "[s]ubject[ ] a sitting President to state criminal process would 'prostrat[e]' the federal government 'at the foot of the states.'" The President distinguishes *United States v. Nixon* as involving federal, not state, process; involving "someone else's criminal proceeding"; "involv[ing] another person's criminal *trial*—not a grand jury investigation"; and not considering a claim of presidential immunity. Finally, the President argues that the Mazars subpoena is invalid even if *Nixon* controls because that decision still requires a "demonstrated, specific need" for the requested material—a showing the DA cannot make because the subpoena is "grossly overbroad."

● *Trump v. Mazars USA, LLP*, 19-715; *Trump v. Deutsche Bank AG*, 19-760. These two cases address whether congressional committees may issue subpoenas to the accountant for President Trump and several of his business entities demanding private financial records belonging to the President. The Court consolidated them and set them for argument in the March 2020 argument session.

Mazars: In April 2019, the House Oversight Committee issued a subpoena to Mazars USA, the accounting firm for President Trump and several Trump entities, seeking eight years of financial and accounting information "related to work performed for President Trump and several of his business entities both before and after he took office." The subpoena came in connection with the Committee's investigation of (1) the "hush money" payments, which were not reported as a liability on the President's filings with the Office of Government Ethics; and (2) Michael Cohen's testimony that the President had "inflated his total assets when it served his purposes" in some situations and had "deflated his assets" in others. After failing to obtain relevant documents voluntarily from the White House Counsel and Mazars, the Committee issued the subpoena to Mazars. In a memorandum to the committee, its Chairman set forth four purposes for the subpoena: whether the President (1) "may have engaged in illegal conduct before and during his tenure in office"; (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; (3) "is complying with the Emoluments Clauses of the Constitution"; and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities."

The President and his business organizations filed suit in federal court alleging that the subpoenas were unconstitutional and lacked statutory authority. The district court ruled for the committee. A divided panel of the D.C. Circuit affirmed. 941 F.3d 710. The court held that, under Supreme Court precedent, to be constitutional a subpoena from a congressional committee must have a "legitimate legislative purpose"—that is, the committee is "pursuing a legislative, as opposed to a law-enforcement, objective" and "is investigating a subject on which constitutional legislation 'could be had.'" The court, relying on the Chairman's memorandum, concluded that the subpoena met that standard. That legislative justification was not "an insubstantial, makeweight assertion of remedial purpose. . . . Simply put, an interest in past illegality can be wholly consistent with an intent to enact remedial legislation." The D.C. Circuit majority also held that the committee had statutory authority to issue the subpoena, stating that it would not "interpret the House Rules narrowly to deny the Committee the authority it claims"

Deutsche Bank: In April 2019, the House "Committee on Financial Services and the Permanent Select Committee on Intelligence each issued identical subpoenas to Deutsche Bank, seeking a broad range of financial records of Donald J. Trump, members of his family, and affiliated entities. On the same date, the Committee on Financial Services issued a subpoena of narrower scope to Capital One Financial Corporation." The Financial Services Committee contends that its subpoenas are part of an effort to "inform pending and future legislative solutions to the serious money-laundering problems that continue to plague U.S. financial institutions and the international banking system and to inform itself about the processes in place at financial institutions to ensure that their lending practices are safe and sound." The Intelligence Committee contends that its subpoenas will assist its investigation into "the counterintelligence risks from efforts by Russia and other foreign powers to influence the U.S. political process during and since the 2016 election, including potential leverage that foreign actors may have over President Trump, his family, and his businesses. . . . Driving that investigation is the risk that hostile state actors will continue to interfere in the American electoral process and the possible need for legislative reforms to address that risk." The President, his three oldest children, the Trump Organization, and affiliated entities (petitioners) filed suit in federal district court seeking a declaration that the subpoenas are invalid and an injunction quashing them. The district court denied their motion for a preliminary injunction. A divided panel of the Second Circuit affirmed. As in *Mazars*, the court found that a congressional inquiry into private affairs is permissible if it relates to a "valid legislative purpose," and concluded that the subpoenas meet that test. Responding to petitioners' contention that the committees had improper motives, the court quoted a Supreme Court decision stating that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." The court then weighed the committees' legislative purposes against petitioners' privacy interests, finding that the public's interest in the subjects the committees are investigating outweighs petitioners' interest in "nondisclosure of financial documents concerning their businesses." And like the *Mazars* court, the Second Circuit rejected petitioners' contention that the committees were engaged in impermissible law enforcement, ruling that "a permissible legislative investigation does not become impermissible because it might reveal evidence of a crime."

The President's arguments. The President and his co-petitioners begin by noting that this "is the first time that Congress has subpoenaed personal records of a sitting President" and expressing concern that under the court of appeals' decisions, "Congress can subpoena any private records it wishes from the President on the mere assertion that it is considering legislation that might require presidents to disclose that same information. Given the obvious temptation to investigate the personal affairs of political rivals, subpoenas concerning the private lives of presidents will become routine in times of divided government." More specifically, the President maintains that the Supreme "Court 'has not hesitated' to invalidate a subpoena where 'Congress was acting outside its legislative role,'—*i.e.*, acting without a 'legitimate legislative purpose.'" (Citations omitted.) Connected to that, Congress cannot exercise law-enforcement powers, which are reserved to the executive branch; and Congress cannot investigate a subject matter "on which Congress is forbidden to legislate." The subpoenas, the President argues, violate both principles. On the former, the President says: "That the Committee is investigating whether the President broke the law is not seriously contested." This can be gleaned from the face of the "dragnet" subpoenas—which are "framed like criminal subpoenas, demanding documents that suggest [petitioners] have engaged in 'suspicious activity' or violations of the law." And this can be seen by the committees and their lawyers' statements, which "repeatedly

emphasized their law-enforcement purposes." By contrast, argues the President, "[t]he legislative explanation for the Committee's subpoena *is* makeweight." At the very least, he says, the subpoenas' "gravamen" is "the President's wrongdoing." More generally, the President insists that, "while a legislative investigation is not illegitimate because it might incidentally expose illegal conduct, a law-enforcement subpoena does not become legitimate just because it might incidentally inspire remedial legislation." (Citation omitted.)

The President further maintains that the *Mazar* subpoena could not result in constitutional legislation, for "[i]mposing financial disclosure requirements on the President intrudes into an area that the Constitution fences off" and "would change or expand the enumerated qualifications for serving a President." And in *Deutsche Bank*, the President argues that the broad subpoenas do not "meet the heightened showing of need the Court requires before approving subpoenas that demand presidential and White House records." The President argues that there is no need to reach these constitutional issues because the committees lack statutory authority to issue them. Specifically, he contends that "House Rules do not expressly authorize the Committee to subpoena the President—let alone for personal records," and those rules should be interpreted narrowly to deny committees that power. Such a narrow interpretation would avoid serious constitutional issues and would avoid "the serious 'threat to presidential autonomy and independence' the subpoena[s] pose[]."

● *Carney v. Adams*, 19-309. At issue is the constitutionality under the Free Speech Clause of a Delaware constitutional provision requiring political party balance among state judges. With respect to Delaware's three highest courts, the provision requires judges to be affiliated with one of two "major political part[ies]," and limits to a "bare majority" the number of judges affiliated with a particular political party. With respect to Delaware's two lower constitutional courts, the bare majority requirement applies without the major party affiliation requirement. Respondent James Adams, who identifies as an Independent voter, wanted to apply to become a Delaware state judge, but did not do so because of the provisions described above. He filed suit challenging those provision. The district court ruled for Adams, and the Third Circuit affirmed. 922 F.3d 166. The Third Circuit held that Adams has standing to challenge the provisions relating to the three highest courts but not the two lower courts, because his political affiliation rendered it futile for him to apply for a judgeship only on the higher courts. On the merits, the Third Circuit concluded that the major party affiliation requirement is unconstitutional because the First Amendment prohibits the government from hiring or firing an employee based on political affiliation unless the employee will have a "policymaking" role. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). And, the court held, judicial officers are not policymakers. The court also held that the bare majority provision is not severable from the major party affiliation provision because the two provisions were not intended to operate separately. In granting certiorari, the Supreme Court agreed to review not only the First Amendment holding, but also whether the major party affiliation requirement is severable from the bare majority requirement and whether Adams has Article III standing.

Petitioner, the governor of Delaware, argues that the Third Circuit erred because common law judging has an inherent policymaking component and therefore falls within the policymaking exception to *Elrod* and *Branti*. He argues that the role of Delaware judges includes some policymaking at least when they develop common law, decide certain statutory questions, administer the courts, and regulate the legal profession. The governor also contends that states may consider partisan balance

in an attempt to create an effectively functioning judiciary. And he argues that the Third Circuit erred in assuming that the policymaking exception is intended only to allow decisionmakers to hire loyal employees; it also applies, he asserts, to using political affiliation to insulate decisionmaking from politics by ensuring multiple viewpoints. The Third Circuit's holding, he argues, raises constitutional concerns as to political balance requirements that currently apply to many state and federal regulatory commissions. In addition, he maintains that federal courts should be required to respect states' sovereign authority to structure their own governments. Finally, the governor challenges the Third Circuit's non-severability holding, noting that the bare majority provision operated on its own for many decades and still operates on its own with respect to the two lower state courts. That shows, he says, that the bare majority requirement can stand alone and is severable from the major party affiliation requirement.

Adams argues that deciding cases does not require policymaking and that identifying judges as policymakers damages the judiciary's credibility. He asserts that the First Amendment policymaking exception is intended to ensure that an employee promotes the agenda of a particular administration, and argues that this goal is not served by the challenged provision. Adams also argues that the governor has not established that the challenged provisions are narrowly tailored to advance a vital government interest.

● *McGirt v. Oklahoma*, 18-9526. This case presents the same issue as *Sharp v. Murphy*, 17-1107, on which the Court heard oral argument last Term but did not issue a decision: Whether the Tenth Circuit erred in holding that Congress never disestablished the 1866 boundaries of the Creek Nation, meaning that all 3,079,095 acres within those boundaries—including most of the City of Tulsa—are "Indian country." An Oklahoma jury convicted petitioner Jimcy McGirt of rape, lewd molestation, and forcible sodomy of his wife's four-year-old granddaughter. The Oklahoma courts affirmed his conviction on direct appeal in 1998. In 2017, the Tenth Circuit held in *Murphy v. Royal*, 866 F.3d 1164, that Congress had never disestablished the Creek Reservation and that the state therefore lacked jurisdiction under the Major Crimes Act (18 U.S.C. §1153) to convict an Indian offender for a murder committed on that land. McGirt filed a state habeas petition arguing that he was entitled to the benefit of that decision. The Oklahoma state courts declined McGirt's applications as untimely.

On the same day the Oklahoma Supreme Court declined to assume jurisdiction over the case, the U.S. Supreme Court granted certiorari in *Murphy*. The Court heard oral argument in *Murphy* on November 27, 2018. But rather than issuing an opinion in the case, the Court issued an order on June 27, 2019 restoring the case to its calendar. Two differences between this case and *Murphy* are that (1) whereas Justice Gorsuch was recused from participating in *Murphy*, he is participating in this case; and (2) this case does not arise on federal habeas corpus review, as *Murphy* did.

As to the legal issues, here is how they were described in the *Supreme Court Report*'s summary of the *Murphy* cert grant: Applying the three-part framework of *Solem v. Bartlett*, 465 U.S. 463 (1984), the Tenth Circuit held that Congress never disestablished the 1866 boundaries of the Creek territory, which encompass over 4,600 square miles (including the land where the murder occurred) in which more than 750,000 people currently live. The *Solem* test looks at the statutory text, surrounding circumstances, and subsequent history. The Tenth Circuit held that "Congress never expressly terminated the Creek Reservation in any of the statutes, nor did it use the kind of language

recognized by the Supreme Court as evidencing disestablishment." And it found that neither the historical context nor Congress' subsequent treatment of the land could "overcome the absence of statutory text." The state argues that the Tenth Circuit's decision strikes at the core of Oklahoma's sovereignty and places in doubt thousands of convictions and pending prosecutions. Indeed, notes the state, the Tenth Circuit's reasoning would "reincarnate the historical boundaries of all 'Five Civilized Tribes'—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles"—whose "combined area encompasses the entire eastern half of the State," with a population of 1.8 million people. Deeming all that land to be Indian country would affect not only criminal prosecutions, but would "open up a Pandora's Box of questions regarding the State's regulatory power."

On the merits, the state contends that "[b]eginning in 1893, Congress engaged in an extensive and systematic legislative campaign to abolish tribal courts, eliminate tribal law, and dissolve tribal government—all to pave the way for Oklahoma's entry to the Union." "Oklahoma's accession to statehood in 1907 marked the culmination of Congress's elimination of the boundaries of the Five Tribes' territories. Congress did not retain, in the form of 'Indian Country' under Section 1151, a replica of the Indian Territory that Congress spent the prior twenty years dismantling." Based on this understanding, Oklahoma has exercised criminal jurisdiction over all of its citizens, Indians and non-Indians alike, since joining the union in 1907. In the state's view, the *Solem* framework does not fit Oklahoma's situation. Rather, the "Court's *Solem* cases involve whether land designated by the federal government as Indian reservations within a pre-existing State retained reservation status when Congress opened the area for non-Indian settlement of surplus lands remaining after allotment." In that context, the "Court has held that land presumptively retains reservation status 'until Congress explicitly indicates otherwise.'" But, says the state, "[t]his case is markedly different" because "[t]he General Allotment Act that spawned surplus land acts excluded the Five Tribes. . . . In short, Oklahoma prosecuted Mr. Murphy not because he committed a crime on a parcel of land that Congress opened to non-Indian settlement, but because the exterior and internal boundaries of Indian Territory had evaporated by the formation of Oklahoma." The state alternatively argues that the Tenth Circuit misapplied the *Solem* factors.

● *U.S. Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 19-177. "Respondents are United States-based organizations that receive federal funds to fight HIV/AIDS abroad. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) [*Alliance for Open Society I*], th[e] Court held that the First Amendment bars enforcement of Congress's directive that respondents 'have a policy explicitly opposing prostitution and sex trafficking' as a condition of accepting those funds. 22 U.S.C. 7631(f). The question presented is whether the First Amendment further bars enforcement of that directive with respect to legally distinct foreign entities operating overseas that are affiliated with respondents."

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. §7601 *et seq*., established a comprehensive strategy to combat the spread of HIV/AIDS around the world, including by authorizing the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. Among its requirements, the Act provides that no funds may be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking." §7631(f). (This is known as "the Policy Requirement.") Respondents are "a group of domestic organizations engaged in combating HIV/AIDS overseas." They applied for

Leadership Act funds, but they "fear[ed] that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS." They filed suit in 2005 alleging that the Policy Requirement violated their First Amendment rights. In *Alliance for Open Society I,* the Court agreed with them by a 6-2 vote. The Court explained that "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." It concluded that the Policy Requirement "falls on the unconstitutional side of the line": "By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient."

Following that decision, the Department of Health and Human Services and the U.S. Agency for International Development stated that they would continue to apply the Policy Requirement to non-U.S. recipients, including foreign affiliates of U.S. recipients such as respondents. Respondents filed suit again. A district court permanently enjoined that application of the Policy Requirement. A divided panel of the Second Circuit affirmed. 911 F.3d 104. The Second Circuit concluded that *Alliance for Open Society I* resolved the issue by making "clear" that respondents are harmed when a "clearly identified" affiliate must comply with the Policy Requirement and that "forcing an entity's affiliate to speak the Government's message unconstitutionally impairs that entity's own ability to speak." The court found it irrelevant that foreign organization lack their own First Amendment rights because the injunction protects "the First Amendment rights of the *domestic plaintiffs*."

The United States argues that "[f]oreign recipients of federal funds operating overseas have no First Amendment right to object to conditions on those funds. Nor can they acquire such a right by affiliating with a domestic entity. And while a domestic entity can object to a condition on its own speech, it has no basis to object to a condition on the speech of a legally separate foreign organization operating overseas. The First Amendment rights of a U.S. entity belong to that entity alone; they cannot be borrowed, shared, or exported." The United States asserts that the Second Circuit misread "a few sentences" from *Alliance for Open Society I*, which addressed domestic organizations that combat HIV/AIDs overseas but did not specifically address "legally distinct foreign entities operating overseas." The United States adds that the issue "will affect billions of taxpayer dollars distributed through one of America's most significant and successful foreign-aid programs."

The Supreme Court Report is published biweekly during the U.S. Supreme Court Term by the NAAG Center for Supreme Court Advocacy.

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