A PUBLICATION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Supreme Court Report

VOLUME 27, ISSUE 8 ■ MARCH 25, 2020

This *Report* summarizes opinions issued on March 23, 2020 (Part I).

I. Opinions

● *Allen v. Cooper*, 18-877. Without dissent, the Court held that Congress did not validly abrogate state sovereign immunity in the Copyright Remedy Clarification Act (CRCA). The dispute's origins were the 1996 discovery by a marine salvage company of Blackbeard's ship, *Queen Anne's Revenge* off the North Carolina coast. North Carolina contracted with a company to take charge of the recovery activities, which in turn hired petitioner Frederick Allen, a videographer, to document the operation. He created videos and photos of the divers' efforts and registered copyrights in his works. A dispute arose over North Carolina's publication of some of Allen's videos and photos. As relevant here, Allen contended that North Carolina impermissibly posted five of his videos and used one of his photos in a newsletter. Allen sued the state for copyright infringement in federal district court. The state moved to dismiss based on sovereign immunity. Allen replied that the CRCA provides that a state "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement. 17 U.S.C. §511(a). The district court, relying on the CRCA, held that the suit could proceed. The Fourth Circuit reversed, holding that Congress lacked the authority to abrogate the states' sovereign immunity from copyright infringement actions. In an opinion by Justice Kagan, the Court affirmed.

Under now-settled law, Congress can abrogate state sovereign immunity only if it points to a specific provision of the Constitution granting Congress that power. Allen pointed to the Intellectual Property Clause, Art. I, §8, cl. 8, and Section 5 of the Fourteenth Amendment. The Court held that *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999), forecloses both claims. In *Florida Prepaid*, the Court held that the Intellectual Property Clause did not authorize Congress to abrogate the states' sovereign immunity from claims of patent infringement. The Court relied on its conclusion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that "Article I cannot be used to circumvent" the limits sovereign immunity "place[s] upon federal jurisdiction." The Court here rejected Allen's contention that a later case, *Central Va. Community College v. Katz*, 546 U.S. 356 (2006), changed things. *Katz* "exempted the Bankruptcy Clause from *Seminole Tribe*'s general rule that Article I cannot justify haling a State into federal court." Allen claimed that *Katz* prescribes "a clause-by-clause approach to evaluating whether a particular clause of Article I" allows the abrogation of state sovereign immunity. The Court disagreed, finding that "everything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism." Indeed, noted the Court, *Katz* ruled "that *the Bankruptcy Clause itself* did the abrogating," not a federal law. In short, held the Court, *Katz* "points to a good-for-one-clause-only holding." On top of that, ruled the Court, "*Florida Prepaid*, together with *stare decisis*, would still doom Allen's argument" for no special justification exists for overruling *Florida Prepaid*.

The Court next held that the CRCA cannot be justified as appropriate legislation under Section 5 of the Fourteenth Amendment. Although Congress can invoke that authority to proscribe "a somewhat broader swath of conduct" than acts that are themselves unconstitutional, "Congress cannot use its 'power to enforce' the Fourteenth Amendment to alter what that Amendment bars." Under *City of Boerne v. Flores*, 521 U.S. 507 (1997), "[f]or Congress's action to fall within its Section 5

authority, . . . '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" And so the Court must look to "the evidence Congress had before it of a constitutional wrong" and "the scope of the response Congress chose to address that injury." That leads to a predicate question: "When does the Fourteenth Amendment care about copyright infringement?" Relying on precedent, the Court found that a state violates the Due Process Clause when it intentionally, or at least recklessly, infringes a copyright and does not offer an adequate state remedy for the infringement. Applying that same test to patent infringement, the Court in *Florida Prepaid* found that "Congress did not identify a pattern of unconstitutional patent infringement." The Court found no basis for a different outcome here. Although Congress, before enacting the CRCA, solicited a report on this issue, that report identified only a dozen acts of state copyright infringement and only two appeared intentional. Although the report supported abrogating states' immunity, its author acknowledged that the real problem was "honest mistakes" or "innocent misunderstandings"—which don't amount to constitutional violations. Thus, as in *Florida Prepaid*, "the law's 'indiscriminate scope' is 'out of proportion' to any due process problem." The Court closed by noting that Congress presumably could enact a more "tailored" statute that is proportionate to state due process violations.

Justice Thomas joined the opinion except for two paragraphs, and wrote an opinion concurring in part and in the judgment. Reiterating what he wrote in *Gamble v. United States*, 587 U.S. ___ (2019) (concurring), he stated that the Court should not defer under *stare decisis* to a prior opinion that is "demonstrably erroneous." But *Florida Prepaid* is not. Second, he thought the Court should not have discussed potential future copyright legislation. And third, he considered it an "open question" whether copyrights are property within the meaning of the Due Process Clause.

Justice Breyer issued an opinion concurring in the judgment, which Justice Ginsburg joined. He reiterated his belief that the entire line of cases starting with *Seminole Tribe* was wrongly decided. But he concurred in the judgment, "recognizing that my longstanding view has not carried the day, and [ ] the Court's decision in *Florida Prepaid* controls this case."

● *Kahler v. Kansas*, 18-6135. Under Kansas law, a defendant cannot be wholly exonerated "on the ground that his [mental] illness prevented him from recognizing his criminal act as morally wrong." But a defendant "can invoke mental illness to show that he lacked the requisite *mens rea* (intent) for a crime"; and "to justify either reduced term of imprisonment or commitment to a mental health facility." By a 6-3 vote, the Court held that the Due Process Clause permits this regime. This case arose from James Kahler's murder of his wife, two teenage daughters, and his grandmother-in-law. Before trial, he asserted that the state had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong." The trial court denied the motion, though Kahler was still permitted to show that a mental illness prevented him from forming the intent to kill. A jury convicted him and sentenced him to death, following a sentencing proceeding at which he was permitted to offer additional evidence of his mental illness. The Kansas Supreme Court affirmed, holding that "[d]ue process does not mandate that a State adopt a particular insanity test." In an opinion by Justice Kagan, the Court affirmed.

The Court began by saying that Kahler had to "surmount a high bar." He had to show that Kansas's rule "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" The Court noted that in *Powell v. Texas*, 392 U.S. 514 (1968), it explained that states have the "paramount role" in setting "standards of criminal responsibility," by "balancing and rebalancing over time complex and oft-competing ideas about 'social policy' and 'moral culpability'—about the criminal law's 'practical effectiveness' and its 'ethical foundations.'" And the Court had several times expressly stated that it was not for the Court to define a specific constitutionally required insanity test. See *Leland v. Oregon*, 343 U.S. 790 (1952); *Clark v. Arizona*, 548 U.S. 735 (2006). The Court then turned to Kahler's claim. Although he asserted that the state "abolished the insanity defense," that's not quite accurate. "It is that Kansas impermissibly jettisoned the moral-incapacity test for insanity." Kansas, after all, "has an insanity defense negating criminal liability," if the defendant can show that a mental illness prevented him from forming the needed intent. And a defendant can use mental health evidence at sentencing. So Kansas follows the long historical tradition of recognizing insanity as relieving responsibility for a crime. The issue here, explained the Court, is whether Kansas must use a specific insanity test that asks "whether mental illness prevented a defendant from understanding his act as immoral."

Kahler relied on the historical record to show that Kansas—and all states—must use that test, but the Court found the historical record "complex—even messy." The Court observed that "[e]arly commentators on the common law proposed various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach." Likewise, the Court pointed to old common-law cases that focused on cognitive (as opposed to moral) capacity. Those "decisions' overall focus was less on whether a defendant thought his act moral than on whether he had the ability to do much thinking at all." "Taken as a whole," found the Court, "the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule." It wasn't until *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843), that "a court articulate[d], and momentum grew toward accepting, an insanity defense based independently on moral incapacity." And even after *M'Naghten*, noted the Court, the states varied in their approaches, with different tests gaining favor in different time periods. Indeed, observed the Court, even states that adopted *M'Naghten* divided on whether the moral incapacity test focuses on the ability to tell right from wrong or—as 16 states now provide—"focus on the defendant's understanding that his act was *illegal*." This means that "constitutionalizing the moral-incapacity standard, as Kahler requests, would require striking down not only the five state laws like Kansas's . . . , but the 16 others as well." All told, ruled the Court, "it is not for courts to insist on any single criterion going forward." "Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law."

Justice Breyer filed a dissenting opinion, which Justices Ginsburg and Sotomayor joined. In his view, Kansas "has eliminated the core of a defense that has existed for centuries: that the defendant, *due to mental illness*, lacked the mental capacity necessary for his conduct to be considered morally blameworthy. Seven hundred years of Anglo-American legal history, together with basic principles

long inherent in the nature of the criminal law itself, convince me that Kansas' law 'offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Justice Breyer walked through the writings of Bracton, Coke, Hale, and Blackstone and concluded that "each linked criminality to the presence of reason, free will, and moral understanding." And although some commentators and courts referred to intent and *mens rea*, "[a]t common law, the term *mens rea* ordinarily incorporated the notion of 'general moral blameworthiness' required for criminal punishment." Justice Breyer believed that "[t]hese fundamental principles of criminal responsibility were incorporated into American law from the early days of the Republic." And although states have adopted different tests over the years, both before and after *M'Naghten*, they generally retained the moral incapacity test. Finally, and fundamentally, Justice Breyer concluded that to narrow the insanity defense as Kansas had is to defeat the core objective of "ensur[ing] a rough congruence between the criminal law and widely accepted moral sentiments." Just as a state cannot do away with the defenses of duress or self-defense, he said, it cannot transgress the longstanding limit placed by the moral incapacity strand of the insanity defense.

● *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 18-1171. The Court unanimously held that a plaintiff asserting a claim of race discrimination in making and enforcing contracts under 42 U.S.C. §1981 must plead and prove race was a but-for cause of his injury. African-American entrepreneur Byron Allen owns Entertainment Studios Network (ESN), which operates seven television stations. For years, ESN sought to have Comcast carry its networks, but negotiations between the two failed. Comcast cited lack of demand for ESN's programming, bandwith constraints, and other reasons. ESN, alleging that Comcast systematically disfavored "100% African American-owned media companies," sued Comcast in federal court. It asserted that Comcast violated §1981(a), which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." The district court dismissed the action and entered final judgment for Comcast. The Ninth Circuit reversed. It held that the district court erred by using a but-for causation standard "showing that racial animus was a 'but for' cause of the defendant's conduct." Instead, held the court, "a plaintiff must only plead facts plausibly showing that race played 'some role' in the defendant's decisionmaking process." And under that causation standard, ESN pleaded a viable claim. In an opinion by Justice Gorsuch, the Court vacated and remanded.

The Court began by noting that "[i]t is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. Under this standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred. This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." (Citations omitted.) The Court found no basis to find that §1981 is an exception to that general rule. The Court first pointed to text, whose focus on "what would have happened if the plaintiff had been white . . . fits naturally with the ordinary rule that a plaintiff must prove but-for causation." The Court noted that the private right of action under §1981 is judicially implied, and judicially implied private rights must contain "legal elements at least as demanding as those Congress specified for analogous causes of action actually found in the statutory text." Here, criminal sanctions provided for in a neighboring section of the Civil Rights Act of 1866 contains terms that indicate a but-for causation requirement. And "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit."

The Court next found that its precedents support reading §1981 as requiring but-for causation. It spoke of §1981 as providing a remedy against discrimination "on the basis of race." And it read §1982, also enacted as part of the Civil Rights Act of 1866, and using nearly identical language, as barring discrimination in purchasing property "because of color." The Court declined ESN's invitation "to draw on, and then innovate with, the 'motivating factor' causation test found in Title VII of the Civil Rights Act of 1964." After walking through that law's history, the Court said: "Title VII was enacted in 1964; this Court recognized its motivating factor test in 1989; and Congress replaced that rule with its own version two years later. Meanwhile, §1981 dates back to 1866 and has never said a word about motivating factors. So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard." Finally, ESN suggested that the Court apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court declined the invitation, finding that "*McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination. Because *McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards." (Citations omitted.) The Court therefore declined to create an exception to its usual rule requiring but-for causation, or for the usual rule that a plaintiff must allege but-for causation at the outset of the case.

Justice Ginsburg filed an opinion concurring in part and in the judgment. She wrote to address an argument Comcast and the government raised, which the Court discussed but did not resolve: namely, that §1981 "covers only the final decision whether to enter a contract, but not earlier stages of the contract-formation process." That view, said Justice Ginsburg, "cannot be squared with the statute." "An equal 'right . . . to make . . . contracts,' §1981(a), is an empty promise without equal opportunities to present or receive offers and negotiate over terms. . . . It is implausible that a law 'intended to . . . secure . . . practical freedom,' would condone discriminatory barriers to contract formation." (Citation omitted.)

● *Davis v. United States*, 19-5421. The Court summarily reversed a Fifth Circuit decision that declined to employ plain-error review under Federal Rule of Criminal Procedure 52 because the defendant raised factual, as opposed to legal, arguments. In 2016, Charles Davis was indicted for being a felon in possession of a firearm and for possessing drugs with the intent to distribute them. After Davis pleaded guilty, the federal district court sentenced him to four years and nine months in prison, to run consecutively to any sentence the state courts might impose for separate drug and gun charges stemming from a separate 2015 arrest. Davis did not object to the sentence. On appeal to the Fifth Circuit, he argued for the first time that his sentence should run consecutively to any sentence state courts might impose for his 2015 state offenses. "Davis contended that his 2015 state offenses and his 2016 federal offenses were part of the 'same course of conduct,' meaning under the Sentencing Guidelines that the sentences should have run concurrently, not consecutively." Because he had not raised that argument in the district court, Davis invoked Rule 52(b), which allows appellate courts to review unpreserved arguments for plain error. The Fifth Circuit refused to entertain the claim on the ground that it raised factual issues. And under Fifth Circuit precedent, "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Through a *per curiam* opinion, the Court vacated and remanded.

The Court noted that almost every other circuit conducts plain-error review of unpreserved factual arguments. The Court agreed with Davis that the Fifth Circuit's "outlier" rule is unwarranted. Stated the Court: "Rule 52(b) states in full: 'A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.' The text of Rule 52(b) does not immunize factual errors from plain-error review. Our cases likewise do not purport to shield any category of errors from plain-error review. Put simply, there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error." (Citations omitted.)

● *Guerrero-Lasprilla v. Barr*, 18-776. Under the Immigration and Nationality Act, an alien "may file one motion to reopen" removal proceedings. Under the criminal-alien bar, however, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain crimes, including aggravated felonies. That bar is subject to an exception if the alien is seeking judicial review of a "constitutional claim" or is presenting a "question of law" for review. 8 U.S.C. §1252(a)(2)(D). By a 7-2 vote, the Court held that "the phrase 'question of law' . . . includes the application of a legal standard to undisputed or established facts."

The two petitioners, Pedro Pablo Guerrero-Lasprilla and Ruben Ovalles, are aliens who lived in the United States, committed a drug crime that made them removable, were ordered removed, and left the country. Several months after their removal orders became final, the 90-day time-period for filing a motion to reopen the removal proceedings expired. Years later, however, both petitioners asked the Board of Immigration Appeals to reopen their removal proceedings on the ground that they are now eligible for discretionary relief. They relied on a 2016 Fifth Circuit ruling finding that the 90-day time limit could be equitably tolled. Guerrero-Lasprilla filed his motion to reopen a month after that Fifth Circuit decision; Ovalles filed his eight months after. The Board denied their requests for equitable tolling, concluding they failed to demonstrate due diligence. The Fifth Circuit denied their requests for review, concluding they lacked jurisdiction because "whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question." In an opinion by Justice Breyer, the Court vacated and remanded.

As noted, 8 U.S.C. §1252(a)(2)(D) provides that, in cases involving aliens who are removable for having committed certain crimes, a court of appeals may consider only "constitutional claims or questions of law." (The Court called this the Limited Review Provision.) The Court described the issue before it as "whether the statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts. If so, the Fifth Circuit erred in holding that it 'lack[ed] jurisdiction' to consider the petitioners' claims of due diligence for equitable tolling purposes." The Court concluded that "questions of law" do include that type of issue. It began with the statutory language. The Court found that it has "at times referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry." For example, "[d]o the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" Or "[d]id a Government official's alleged conduct violate clearly established law?" At the very least, this tells us that "the term can reasonably encompass questions about whether settled facts satisfy a legal standard."

The Court also found that "a longstanding presumption, the statutory context, and the statute's history all support the conclusion that the application of law to undisputed or established facts

is a 'questio[n] of law' within the meaning of §1252(a)(2)(D)." First, the Court relied on "the presumption favoring judicial review of administrative action." The Court has "consistently applied" that presumption to immigration statutes. Next, the Court found that the phrase "question of law" necessarily has the meaning the Court is ascribing to it here in a different provision of the same statutory section as the Limited Review Provision. And there is "every reason to think that Congress used the phrase 'questions of law' to have the same meaning in both provisions." Third, the statutory history shows that Congress enacted the Limited Review Provision to serve as an "adequate substitute" for the procedure mandated by *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr*, applying the doctrine of constitutional doubt, interpreted the Provision's predecessor as not barring habeas corpus proceedings. And after the decision came down, "numerous Courts of Appeals held that habeas review included review of the application of law to undisputed facts." The Court assumed that Congress was aware of that relevant judicial precedent when it enacted the Limited Review Provision. Finally, the House Conference Reports stated that the new law "would not change the scope of review that criminal aliens currently receive."

Justice Thomas filed a dissenting opinion, which Justice Alito joined except for one subsection. In their view, "due diligence in the equitable-tolling context is not a 'question of law.'" That issue, said Justice Thomas, is a mixed question of law and fact; and "longstanding historical practice indicates that the phrase does not encompass mixed questions of law and fact." For that proposition, the dissent cited numerous cases distinguishing between pure "questions of law" and mixed questions. In the dissent's view, the majority's contrary reading "transform's §1252(a)(2)(D)'s narrow exception into a broad provision permitting judicial review of all criminal aliens' challenges to their removal proceedings except the precious few that raise only pure questions of fact." Justice Thomas then responded to the majority's arguments. He first (in a section of the dissent not joined by Justice Alito) expressed his "doubts" about the presumption of reviewability. Next, even accepting the presumption, the dissent found "it does not work in these cases" because the statute's broad ban on judicial review (subject to the Limited Review Provision) "provides clear and convincing evidence that judicial review of mixed questions is barred." Finally, on statutory purpose, the dissent read *St. Cyr* far more narrowly than the majority, and did not accept that Congress was aware of lower court decisions "expanding on *St. Cyr*'s dicta."

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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