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Supreme Court Report

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This *Report* summarizes opinions issued on March 30 and April 6, 2020 (Part I); and cases granted review on March 30, 2020 (Part II).

I. Opinions

● *Kansas v. Glover*, 18-556. By an 8-1 vote, the Court ruled that a police officer does not "violate[] the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license." The Court held "that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable." A police officer was on a routine patrol when he ran the license plate of a pickup truck. The records showed that the truck was registered to Charles Glover Jr. and that Glover had a revoked driver's license in Kansas. The officer assumed Glover was driving the truck, initiated a traffic stop, and then identified the driver as Glover. Glover was charged with driving as a habitual violator. The district court granted Glover's motion to suppress, the court of appeals reversed, but the Kansas Supreme Court reversed in turn. It held that the officer lacked reasonable suspicion to initiate the stop because he had "only a hunch" that the registered owner (Glover) was the driver of the truck, and wrongly assumed that "the owner will likely disregard the suspension or revocation order and continue to drive." In an opinion by Justice Thomas, the Court reversed.

The Court began by reaffirming that reasonable suspicion is a "less demanding" standard than probable cause or preponderance of the evidence, and "must permit officers to make 'commonsense judgments and inferences about human behavior.'" The Court found that the officer here drew just such a commonsense inference—"that Glover was likely the driver of the vehicle." The Court noted empirical studies which show that "[d]rivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians." And the Court observed that Kansas's "license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive."

The Court rejected Glover and the dissent's contention that the officer's "inference was unreasonable because it was not grounded in his law enforcement training experience." The Court declared that "[n]othing in [its] Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience." To the contrary, the Court has recognized that officers can use ordinary common sense based on "knowledge they have acquired in their everyday lives." Although law enforcement experience can play a significant role in investigations, it "is not *required* in every instance." The Court next rejected Glover and the dissent's objection that its ruling would allow police to "rely exclusively on probabilities." First, probabilities are relevant to the reasonable-suspicion assessment. Second, the officer here relied on more: on facts specific to the car Glover was driving. Finally, the Court cautioned that its holding is narrow, for "the presence of additional facts might dispel reasonable suspicion." For example, a stop would be inappropriate if the registered owner is in his mid-60s but the officer sees that the driver is in her mid-20s.

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Justice Kagan wrote a concurring opinion, which Justice Ginsburg joined. She stated that whether "someone who has lost his license will continue to drive" is "by no means obvious." She emphasized that Glover's license had been *revoked*, "and Kansas almost never revokes a license except for serious or repeated driving offenses." She "would find this a different case if Kansas had barred Glover from driving on a ground that provided no similar evidence of his penchant for ignoring driving laws." For example, Kansas *suspends* licenses "for matters having nothing to do with road safety, such as failing to pay parking tickets, court fees, or child support." She found no basis to believe that a person whose license is suspended for such a reason would be likely to violate the law by driving. Finally, she added that drivers like Glover can challenge stops by introducing evidence that might dispel reasonable suspicion, such as facts about the stop itself, statistical evidence, and officers' hit rates.

Justice Sotomayor dissented. In her view, "reasonable suspicion eschews judicial common sense in favor of the perspectives and inferences of a reasonable officer viewing 'the facts through the lens of his police experience and expertise.'" (Citation omitted.) She faulted the Court for "flip[ping] the burden of proof" by permitting the stop unless the driver can point to additional facts that might dispel the suspicion. She also feared that "[i]f courts do not scrutinize officer observation or expertise in the reasonable-suspicion analysis, then seizures may be made on large-scale data alone—data that says nothing about the individual save for the class to which he belongs."

● *Babb v. Wilkie*, 18-882. By an 8-1 vote, the Court held that the federal-sector provision of the Age Discrimination in Employment Act "demands that personnel actions be untainted by any consideration of age"—and therefore imposes liability even when age is not a "but-for cause" of the personnel action. Noris Babb is a clinical pharmacist at a U.S. Department of Veterans Affairs medical center. She contends that the medical center took several adverse personnel actions against her based at least in part on her age. The district court granted summary judgment to the Department after applying the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Babb appealed, asserting that the *McDonnell Douglas* framework is not suited for "mixed motives" claims such as hers. The Eleventh Circuit affirmed based on circuit precedent. In an opinion by Justice Alito, the Court reversed and remanded.

The ADEA provides in relevant part: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. §633a(a). The Court carefully reviewed those words and concluded that their "plain meaning . . . shows that age need not be a but-for cause of an employment decision in order for there to be a violation of §633a(a)." In particular, the provision's construction means that "age must be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself." The Court emphasized that the phrase "free from discrimination" modifies the verb "made," and so "describes how a personnel action must be 'made,' namely, in a way that is not tainted by differential treatment based on age. If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination." In footnote 3, the Court added that age still has to have played a part in the

actual decision. If, for example, the decisionmaker rebukes a subordinate for taking age into account, disregards the subordinate's recommendation, and acts independently," §633a(a) is not violated.

The Court distinguished several of its cases that interpreted civil rights and other statutes as requiring but-for causation. Each of those statutes, the Court found, used different terminology—including the private-sector provision of the ADEA. The Court did not find it anomalous that the statute treats federal workers differently than private employees, noting that Congress expressly chose to use different language in the federal provision. Finally, and importantly, the Court held that "but-for causation is important in determining the appropriate remedy." Without a showing of but-for causation, a §633a(a) plaintiff "cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of the employment decision." The Court found that result required by its precedents and "by traditional principles of tort and remedies law"—for "[r]emedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination." The Court added that a plaintiff who cannot show but-for causation "can seek injunctive or other forward-looking relief."

Justice Ginsburg joined all of the opinion except footnote 3. Justice Sotomayor filed a brief concurring opinion, which Justice Ginsburg joined. She wrote to observe that (1) "the Court does not foreclose §633a(a) claims arising from discriminatory processes"; and (2) §633a(a) may permit damages remedies in some cases even when age was not the but-for cause of the personnel action.

Justice Thomas dissented. He faulted the Court for ignoring that but-for causation is the default rule, which Congress is presumed to incorporate absent express language to the contrary. In his view, §633a(a) does not contain express language to the contrary. Rather, it "is also susceptible to the Government's interpretation, *i.e.*, that the entire phrase 'discrimination based on age' modifies 'personnel actions.'" Justice Thomas asserted that the Court purported to limit the sweep of its holding through its remedial ruling, but found no basis in text for that ruling. Finally, he pointed to the many affirmative action programs applicable to federal hiring and found that they "always taint personnel actions with consideration of a protected characteristic." The Court's decision, therefore, could lead to "a flood of investigations by the EEOC or litigation from dissatisfied federal employees."

● *Citgo Asphalt Refining Co. v. Frescati Shipping Co.*, 18-565. By a 7-2 vote, the Court held that under federal maritime law a safe-berth clause in a voyage charter contract is a guarantee of a ship's safety—and does not merely create a duty of due diligence. Respondent Frescati Shipping Company owned *Athos I*, a large oil tanker. It contracted with Star Tankers, an operator of tanker vessels, to charter the tanker. Petitioner CITGO Asphalt Refinery Company (CARCO) then contracted with Star Tankers to subcharter the tanker for a voyage. Star Tankers and CARCO entered into the standard industry form contract, which included the "safe-berth" clause. The clause provided that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, ..." Pursuant to the contract, CARCO designated as the berth of discharge its asphalt refinery in Paulsboro, New Jersey. In the final 900-foot stretch of its journey an abandoned ship anchor in the

Delaware River pierced two holes in the vessel's hull, causing 264,000 gallons of heavy crude oil to spill into the river. Under federal law, Frescati had to initially pay for the cleanup of the oil spill, with the Federal Government paying cleanup costs exceeding a statutory limit. They paid $45 million and $88 million respectively. They then sued CARCO seeking recovery of those costs. After lengthy proceedings, the Third Circuit ruled for Frescati and the United States. It held that the safe-berth clause amounted to an express warranty of safety—that applied irrespective of CARCO's diligence—which CARCO breached. In an opinion by Justice Sotomayor, the Court affirmed.

The Court found the language of the safe-berth clause conclusive. The Court explained that "the clause plainly imposes on the charterer" an "absolute" duty to select a "safe" berth. And, to quote Webster's Collegiate Dictionary, a "safe" berth means a berth "'free from harm or risk.'" Plus, the clause says that the "berth must allow the vessel to come and go 'always' safely afloat." In short, held the Court, "[t]he safe-berth clause . . . binds the charterer to a warranty of safety." The Court found it irrelevant that the clause did not use the term "warranty," for "[i]t is well settled as a matter of maritime contracts that '[s]tatements of fact contained in a charter party agreement relating to some material matters are called warranties' regardless of the label ascribed in the" contract. And "[h]ere, the safety of the selected berth is the entire root of the safe-berth clause. It is the very reason for the clause's inclusion in the" contract. The Court rejected CARCO's contention that the clause merely imposes a "duty of diligence in the selection of the berth." This is a contract dispute not a torts dispute; and "[u]nder elemental precepts of contract law, an obligor is 'liable in damages for breach of contracts even if he is without fault.'" The Court found no language in the contract to counter that precept. Indeed, noted the Court, the contract expressly limits obligations to due diligence elsewhere—but not in the safe-berth clause.

The Court dismissed the dissent's contention that "if the safe-berth clause binds the charterer to a warranty of safety, the clause must bind the vessel master to effectively the same warranty," which would create contradictory warranties of safety. Not so, found the Court, for "the vessel master's duty is only to 'load and discharge' at the chosen safe berth," a duty that "creates no tension with the charterer's duty." The Court rejected CARCO's reliance on a leading admiralty treatise (Gilmore & Black's, Law of Admiralty), stating that whatever those authors "sought to prevail upon courts to adopt as a prescriptive matter does not alter the plain meaning of the safe-berth clause here." Finally, the Court held that one of its precedents upon which CARCO relied—*Atkins v. Disintegrating Co.*, 18 Wall. 272 (1874)—did not issue a holding on the issue.

Justice Thomas issued a dissenting opinion, which Justice Alito joined. They noted that the contract contained many express warranties, which suggests that the Court should not have implicitly read the safe-berth clause as creating a warranty. They added that the majority's reading creates "competing warranties of safety—one from the charterer and one from the vessel master—that could impose conflicting obligations." And they disagreed that the clause should be read as constituting a material statement of fact that creates a warranty. The clause, said Justice Thomas, "says nothing about the safety of the port actually selected by CARCO (the Paulsboro berth)"; it "states only that the charter 'shall . . . designat[e]' a place or wharf." That CARCO believed the Paulsboro berth was safe

"is not a statement of fact; it is an inference." Plus, said the dissent, it is far from clear that any statement of fact in the clause is material. The dissent would have remanded for factfinding on whether the majority's reading reflects longstanding industry custom.

II. Cases Granted Review

● *Brownback v. King*, 19-546. The Court will resolve "whether a final judgment in favor of the United States in an action brought under Section 1346(b)(1) [of the Federal Tort Claims Act], on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim." The case arises from a violent encounter between respondent James King and petitioners Douglas Brownback and Todd Allen, who were members of a joint fugitive task forced between the FBI and the City of Grand Rapids. The task force was searching for a fugitive named Aaron Davison, who had allegedly committed felony home invasion. In plainclothes, the officers went to a particular gas station at a time Davison was known to frequent it and saw respondent, who fit Davison's physical description. The officers approached King and began questioning him. After they removed a pocketknife and wallet from his pockets, King asked if they were mugging him and attempted to run away. Detective Allen tackled King and put him in a chokehold. King bit Allen in the arm; Allen then began punching King in the head and face. King was eventually subdued. Although law enforcement later realized that King was not Davison, they tried him on charges of assault and resisting arrest. A jury acquitted him. King then sued the United States under the FTCA, alleging six torts under Michigan law. He also sued Brownback and Allen under *Bivens* and §1983. The district court dismissed the FTCA claims, finding that King failed to show, as the FTCA required (at 28 U.S.C. §1346(b)(1)), that the officers' actions could support "liab[ility] to the claimant in accordance with the law of the place where the act or omission occurred." That was both because the officers would have immunity under Michigan law and because the officers used reasonable force in subduing King. The district court also rejected King's individual capacity claims under Bivens and §1983, finding that both officers were federal officers for purposes of the case (ruling out the §1983 claim) and because the officers didn't violate King's constitutional rights because they used reasonable force. King did not appeal the FTCA ruling, seeking review only of his *Bivens* claims. The Sixth Circuit reversed. 917 F.3d 409.

On appeal, the officers relied on the FTCA's judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. §2676. The court found the judgment bar inapplicable. It reasoned that King failed to state an FTCA claim, which means the district court lacked subject-matter jurisdiction over his FTCA claim. And, concluded the court, a dismissal for subject-matter jurisdiction does not trigger that FTCA judgment bar because "in the absence of jurisdiction, the court

lacks the power to enter judgment." The court went on to reverse the district court's ruling on the *Bivens* claims, finding that the officers weren't entitled to summary judgment on some of them.

The officers contend in their petition (prepared by the U.S. Solicitor General's office) that "the court of appeals' holding—which would effectively nullify the judgment bar whenever the United States prevails in an FTCA suit—is contrary to the plain text of Section 2676, cannot be reconciled with this Court's explanation of the judgment bar in *Simmons* [*v. Himmelreich*, 136 S. Ct. 1843 (2016)], and creates a direct conflict among the courts of appeals on a recurring issue of federal law." The officers maintain that "[a] straightforward application of the text of the judgment bar requires dismissal of respondent's claim against [them] under *Bivens*[.]" And they point out that in *Simmons*, the Court stated that the judgment bar applies when, for example, a plaintiff "simply failed to prove his claim." That is exactly what occurred here, say the officers. They add that the purpose of the judgment bar, as recognized in *Simmons*, is to prevent plaintiffs from getting a second bite at the apple. Yet the Sixth Circuit judgment allows just that.

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