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This *Report* summarizes opinions issued on November 2, 2020 (Part I); and cases granted review on November 9 and 13, 2020 (Part II).

I. Opinions

● *Taylor v. Riojas*, 19-1261. By a 6-1-1 vote, the Court summarily reversed a Fifth Circuit judgment and held that correctional officers were not entitled to qualified immunity from a lawsuit brought by a prisoner who complained that the officers "confined him in a pair of shockingly unsanitary cells." Petitioner Trent Taylor alleged that, while an inmate in September 2013, Texas "correctional officers confined him in a pair of shockingly unsanitary cells." The first cell was covered in "massive amounts of feces: all over the floor, the ceiling, the window, the walls, and even packed inside the water faucet." (Quotation marks omitted.) Taylor, fearing his food and water would be contaminated, did not eat or drink for his nearly four days in that cell. Officers then moved Taylor to a second cell. This cell was frigidly cold and "was equipped with only a clogged drain in the floor to dispose of bodily wastes." When Taylor relieved himself, it caused the drain to overflow and raw sewage to spill across the floor. "Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage." The Fifth Circuit "properly" held that this violated the Eighth Amendment's prohibition on cruel and unusual punishment. But it held that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." It therefore granted qualified immunity to the correctional officers. Through a *per curiam* opinion, the Court vacated that judgment and remanded.

The Court held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." The Court added that, "although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells." Closing, the Court stated that "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."

Justice Alito filed an opinion concurring in the judgment. He agreed with the Court that the officers were not entitled to qualified immunity. But he did not believe the case—"which turns entirely on an interpretation of the record in one particular case"—was suitable for the Court's review. In the end, he said, the Court simply disagreed with the lower court's application of settled law to the facts, "a quintessential example of the kind [of case] that we almost never review." Justice Thomas dissented without opinion. Justice Barrett did not participate in the case.

● *Mckesson v. Doe*, 19-1108. By a 7-1 vote, the Court directed the Fifth Circuit to certify two questions of state law to the Louisiana Supreme Court in this case that arises at the intersection of tort law and the First Amendment. Black Lives Matters protestors objecting to a shooting by a local police officer occupied the highway in front of police headquarters in Baton Rouge, Louisiana. As officers started making arrests to clear the highway, an unknown individual threw a rock, severely injuring an officer (Officer Doe). Officer Doe sued the organizer of the protest, petitioner DeRay Mckesson, under Louisiana tort law "on the theory that he negligently staged the protest in a manner

that caused the assault." The district court dismissed the negligence claim as barred by the First Amendment's Free Speech Clause. A divided panel of the Fifth Circuit reversed. It first interpreted Louisiana law to allow a jury to find that Mckesson breached his "duty not to negligently precipitate the crime of a third party" because "a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest" onto the highway. The Fifth Circuit then rejected Mckesson's argument that *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982), bars "liability for speech-related activity that negligently causes a violent act unless the defendant specifically intended that the violent act would result." The panel majority ruled that "the First Amendment imposes no barrier to tort liability so long as the rock-throwing incident was one of the consequences of tortious activity, which itself was authorized, directed, or ratified by Mckesson in violation of his duty of care." (Quotation marks omitted.) The Fifth Circuit deadlocked 8 to 8 on Mckesson's petition for rehearing en banc. Through a *per curiam* opinion, the Court vacated and remanded.

The Court stated "that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented," namely, whether the Fifth Circuit's theory of liability violates the First Amendment. That constitutional issue, the Court said, "is implicated only if Louisiana law permits recovery under these circumstances in the first place." The Court therefore found it appropriate to obtain guidance from the Louisiana Supreme Court by certifying two state-law questions to that court. The Court noted that federal courts are generally capable of addressing state-law issues and that certification is not "obligatory." But if found that "two aspects of this case" warrant certifying the following two questions to the Louisiana Supreme Court: "(1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists." "First," the Court stated, "the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts." That is because the claimed duty at issue implicates "various moral, social, and economic factors"; it would be difficult for federal courts to speculate how a state court would assess them. Second, "certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." The Court therefore granted Mckesson's cert petition, vacated the Fifth Circuit's judgment, and remanded the case for further proceedings consistent with its opinion. Justice Thomas dissented without opinion. Justice Barrett did not participate in the case.

II. Cases Granted Review

● *Cedar Point Nursery v. Hasid*, 20-107. At issue is whether a California law that requires agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year effects a *per se* physical taking under the Fifth Amendment. The California Agricultural Labor Relations Board promulgated a rule based on the statement in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), that "[w]hen alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer." The Board concluded that this principle generally applies in the context of agricultural employment and therefore provided that the rights of employees to organize and engage in collective action "include the right of access by union organizers to the premises of an agricultural

employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs., tit. 8, §20900(e). The rule specifically grants union organizers the right to enter agricultural property for one hour before the start of work, one hour after the completion of work, and one hour during employees' lunch break for up to "four (4) thirty-day periods in any calendar year."

Petitioners Cedar Point Nursery and Fowler Packing Plant are agricultural employers in California that are subject to the access regulation. They sued the Board in federal district court alleging, among other things, that the regulation constituted a *per se* physical taking without just compensation in violation of the Fifth Amendment. The district court rejected the claim, and a divided panel of the Ninth Circuit affirmed. 923 F.3d 524. The Ninth Circuit observed that in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 426 (1982), the Court held that there is a *per se* physical taking "where government requires an owner to suffer a permanent physical invasion of her property—however minor." But, held the Ninth Circuit, the physical invasion here is not permanent. The court reasoned that decisions such as *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), "indicate that not all limitations on the right to exclude constitute a permanent physical occupation under *Loretto*." And it distinguished the easement found to be a taking in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), finding that the regulation here "significantly limits organizers' access to [petitioners'] property" and "does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year." Eight judges dissented from the denial of rehearing en banc.

Petitioners argue that the Ninth Circuit decision conflicts with the "core" Takings Clause "requirement that the government pay just compensation when it physically takes possession of an interest in property." And, petitioners say, the Supreme "Court has never allowed government to evade the robust protections of the physical takings framework simply by placing time limitations on direct appropriations of property." In short, "[a]n easement remains an interest in property even where it does not permit third-party access to private property all day, every day—it does not morph into a regulatory use restriction when limited in time." In addition to pointing to *Loretto*, petitioners rely on *Nollan*, which held "that California could not compel a property owner to dedicate a beach access easement without compensation." Petitioners also rely on cases such as *United States v. Causby*, 328 U.S. 256 (1946), which held that government aircraft flights over private land can be "so low and so frequent" as to take an easement and therefore be a categorical taking. Finally, petitioners criticize the Ninth Circuit for failing to recognize that "the denial of the right to exclude is the quintessential element that triggers application of the physical takings doctrine."

● *Carr v. Saul*, 19-1442; *Davis v. Saul*, 20-195. These consolidated cases present the question "[w]hether claimants seeking disability benefits under the Social Security Act must exhaust Appointments Clause challenges before the Administrative Law Judge as a prerequisite to obtaining judicial review." Petitioners are six individuals who sought disability benefits under Title II of the Social Security Act and/or supplemental security income under Title XVI. Each followed the four-step process for seeking such benefits. They sought an initial determination as to eligibility for benefits; sought reconsideration after that initial determination denied their claim; obtained a hearing conducted by an ALJ; and sought review of the ALJ's adverse decision by the Appeals Council. At that point, each sought

judicial review in federal district court. At the time each appeared before an ALJ, the ALJs were appointed by Social Security Administration (SSA) staff members based on a merit-selection process, with no involvement by the Commissioner of Social Security. After the Appeals Council denied five of the six petitioners' claims, the Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which held that ALJs of the SEC were "Officers of the United States" who must be appointed by the President, a court of law, or a head of a department. About a month after *Lucia* issued, the Acting Commissioner of Social Security "ratified" the appointment of SSA ALJs and Appeals Council judges and "approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims." There is no dispute that the ALJs who heard petitioners' claims were appointed in violation of the Appointments Clause.

In federal district court, each of the petitioners asserted an Appointment Clause challenge to their ALJ and asked that he or she be allowed to appear before a properly appointed ALJ. The district courts issued varying opinions, with some ruling for petitioners and others holding that petitioners forfeited their Appointments Clause challenge because they did not raise it before the ALJ. On appeal, the Eighth and Tenth Circuits held that petitioners forfeited their challenges. 963 F.3d 790; 961 F.3d 1267. The Tenth Circuit, which issued its decision first, "acknowledged the government's concessions that the SSA ALJs who denied petitioners' disability benefits applications were unconstitutionally appointed, and that neither the Social Security Act nor regulations require issue exhaustion. And the court acknowledged that under this Court's decision in *Sims* [*v. Apfel*, 530 U.S. 103 (2000)], claimants need not raise issues before the Appeals Council to preserve them for judicial review." (Citation omitted.) But the Court distinguished *Sims* as limited to the Appeals Council, and relied on the "general rule" of administrative law that "an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." The court noted that, "[e]ven if corrective action was unlikely 'at the behest of a single benefits claimant,'" a series of objections would have put the agency "'on notice of the accumulating risk of wholesale reversals.'" (Brackets and citations omitted). The Eighth Circuit reasoned similarly.

Petitioners argue that, "[w]hile *Sims* expressly reserved the issue '[w]hether a claimant must exhaust issues before the ALJ,' 530 U.S. at 107, ALJ proceedings share all the same dispositive features" as Appeals Council proceedings. Both proceedings are inquisitorial, not adversarial. "Claimants are not required to present written arguments, let alone exhaust each of the issues they wish the ALJ to consider. And claimants fill out a materially similar one-page form to request ALJ review; regulations similarly inform claimants that they must exhaust administrative remedies, but not individual issues; and regulations expressly note that ALJs can raise issues *sua sponte*. These features and others 'strongly suggest[] that [ALJs] do[] not depend much, if at all, on claimants to identify issues for review.' 530 U.S. at 112 (plurality op.)." (Citations omitted.) Therefore, argue petitioners, "it would be manifestly unreasonable, and contrary to the nature of the proceedings the agency chose to employ, to require claimants to raise issues before ALJs or forfeit them." Further, say petitioners, the "Court has long held that litigants are not required to exhaust particular issues where"—as here—"the decision maker who would consider their claim 'lack[s] authority to grant the type of relief requested.'"

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