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Supreme Court Report

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This *Report* summarizes opinions issued on May 13, 2019 (Part I); and cases granted review on May 20, 2019 (Part II).

I. Opinions

● *Franchise Tax Board of Cal. v. Hyatt*, 17-1299. By a 5-4 vote, the Court held that states have sovereign immunity from private suits brought in the courts of other states, overruling *Nevada v. Hall*, 440 U.S. 410 (1979). This litigation, which was on its third trip to the Court, arose out of California's tax audit of Gilbert Hyatt. California suspected that Hyatt was skirting state income taxes by claiming Nevada residence while living in California. Hyatt sued California's Franchise Tax Board, alleging that it committed torts during the tax audit. The Board sought a writ of mandamus from the Nevada Supreme Court directing that the Nevada court apply, under the Full Faith and Credit Clause, California's statute immunizing the Board from liability stemming from tax collection. After the Nevada Supreme Court denied this petition, the Court granted certiorari and affirmed. On remand, Hyatt obtained a $490 million judgment. Although this judgment was reduced on appeal, the Nevada Supreme Court still permitted a greater judgment than would have been allowed against a Nevada agency under Nevada law. Granting certiorari a second time, the Court reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant another state's agency the same immunity as it would afford its own state agencies. On remand, the Nevada Supreme Court directed the trial court to enter a $100,000 judgment in accordance with this ruling. For the third time, the Court granted certiorari—this time to decide whether a state may be sued by a private party in another state's court. In an opinion by Justice Thomas, the Court answered that question no and overruled *Hall*.

The Court began by noting that *Hall* "rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do, meaning that immunity is available . . . as a matter of comity." Quoting then-Justice Rehnquist's dissent, the Court concluded that *Hall* "misreads the historical record and misapprehends the 'implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter.'" While the Constitution preserved states' "sovereign immunity . . . it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." The Court next examined evidence of how state immunity was understood at the founding. It determined that, "[a]fter independence, the States considered themselves fully sovereign nations" that had "immunity from private suits." This immunity, in the Court's account, had two facets: common law sovereign immunity and law-of-nations sovereign immunity. Common law sovereign immunity derived from the immunity enjoyed by kings, over whom "no court can have jurisdiction." "The law-of nations rule followed from the 'perfect equality and absolute independence of sovereigns.'" Based on these two bodies of law, the Court concluded, "[t]he founding generation . . . took as given that States could not be haled involuntarily before each other's courts." And, thus, the "Constitution's use of the term 'States' reflects both these kinds of traditional immunity."

The Court explained that these traditional aspects of state sovereignty survived the founding "'except as altered by the plan of the Convention or certain constitutional Amendments.'" For example, Article III abrogated immunity for suits brought in federal court by the federal government or by other states. And while *Chisholm v. Georgia*, 2 Dall. 419 (1793), allowed suits in federal courts by

citizens of other states against a state, the Eleventh Amendment "remed[ied] the Court's blunder." By rejecting the *Chisholm* decision, the Eleventh Amendment not only restored immunity for actions brought by citizens of other states against states in federal court, it "confirmed that the Constitution was not meant to 'rais[e] up' any suits against the States that were 'anomalous and unheard of when the Constitution was adopted.'" Rather, "'the Constitution was understood . . . to preserve the States' traditional immunity from private suits.'"

Hyatt and *Nevada v. Hall* made the mistake, in the Court's view, of concluding that interstate sovereign immunity "exists only as a 'matter of comity' and can be disregarded by the forum State." "The problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the states, so that they no longer related to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional 'limitation[s]" on the sovereignty of all of its sister States.' One such limitation is the inability of one State to hale another into its courts without the latter's consent." That is because the Constitution "embeds interstate sovereign immunity within the constitutional design." The Court pointed to several provisions in the Constitution that reflect this design: Article I's divestment of "diplomatic and military tools" from states; the Full Faith and Credit and Privileges and Immunities clauses in Article IV; the requirement to honor extradition requests, also in Article IV; and the implicit requirement to apply federal rules of law to interstate disputes. These provisions, and the Constitution generally, transformed "the States from a loose league of friendship into a perpetual Union based on the 'fundamental principle of *equal* sovereignty among the States.'" As a result, "[i]nterstate immunity . . . is 'implied as an essential component of federalism.'" The Court rejected any need for an explicit textual basis for interstate sovereign immunity: "this is precisely the type of 'ahistorical literalism' that we have rejected when 'interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*.'" It noted that "[t]here are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice," such as judicial review, intergovernmental tax immunity, executive privilege, executive immunity, and the President's removal power.

Lastly, the Court ruled that *stare decisis* did not prevent it from overruling *Nevada v. Hall*. The doctrine "is 'not an exorable command'" and is "at its weakest" when the Court interprets the Constitution. The Court then concluded that three of the factors considered when determining whether to overturn precedent—the quality of the decision's reasoning, its consistency with related decisions, and legal developments since the decision—supported overruling *Hall*. The fourth factor, reliance on the decision, is only Hyatt's "loss of litigation expenses and a favorable decision below." The Court concluded that those "case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question."

Justice Breyer wrote a dissenting opinion, which Justices Ginsburg, Sotomayor, and Kagan joined. In his view, the question presented by the case was "whether the Federal Constitution *requires* each State to grant its sister States immunity, or whether the Constitution instead *permits* a State to grant or deny its sister States immunity as it chooses." He opted for the latter conclusion. Justice Breyer disagreed with the majority's criticism of "*Hall*'s historical conclusion regarding state immunity before ratification and its conclusion that the Constitution did not alter that immunity." First, the majority's conclusion that interstate immunity existed before ratification did not address the pertinent

question here: whether states "were accorded immunity as a matter of consent rather than absolute right" in each other's courts. In his view, the historical record does not refute *Hall's* determination that immunity was a matter of comity. Next, Justice Breyer disagreed with the Court's reasoning that the Constitution altered the relationship among the states and established a right-based immunity. "The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other's courts." He criticized the Court's finding of an implicit right, based on "concepts like the 'constitutional design' and 'plan of the Convention.'" "Such concepts 'invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases' such as 'due process' and 'liberty,' and 'they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.'" And the Constitution's protection of equal state sovereignty does not create a right to immunity, in the dissent's view, because "sovereignty interests here lie on both sides of the constitutional equation."

The dissent concluded by stating that "*stare decisis* requires us to follow *Hall*, not overrule it." There is no "special justification" that justifies departing from this principle; "'an argument that we got something wrong'" is not enough. The dissent also disputed the majority's application of the *stare decisis* factors it identified. *Hall* is not "a relic of an abandoned doctrine," "[n]or has our understanding of state sovereign immunity evolved to undermine *Hall*." Justice Breyer also observed that the "practical implications" feared by *Hall*'s dissenters were unfounded, because he "identified only 14 cases in 40 years in which one State has entertained a private citizen's suit against another State in its courts." The dissent believed that states will "normally grant sovereign immunity voluntarily" and if this isn't sufficient, can enter into interstate compacts to ensure immunity. Finally, the dissent criticized the majority for overruling a case based on what the dissent perceived as a mere disagreement with precedent. "Today's decision," Justice Breyer warned, "can only cause one to wonder which cases the Court will overrule next."

● *Apple, Inc. v. Pepper*, 17-204. The Court held, in a 5-4 decision, that purchasers of applications sold through Apple's "App Store" may sue Apple for monopolization under the Clayton Act. In so deciding, the Court concluded that the plaintiffs' claims were not barred by the prohibition on antitrust damages actions by indirect purchasers recognized in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). A class of consumers sued Apple, alleging that Apple had monopolized the market for selling iPhone apps to consumers by allowing sales only through its App Store and charging developers who sell their apps through the App Store a uniform 30% commission. The district court granted Apple's motion to dismiss, holding that under *Illinois Brick* the consumers were not direct purchasers of the apps from Apple. The Ninth Circuit reversed, concluding that the consumers were direct purchasers from Apple, and therefore that *Illinois Brick's* prohibition on antitrust claims by indirect purchasers did not apply. In an opinion by Justice Kavanaugh, the Court reversed and remanded.

The Court described the appeal as addressing a single question: "whether the consumers were 'direct purchasers' from Apple." In the Court's view, this question has a simple answer. Because "the iPhone owners bought the apps directly from Apple," they "were direct purchasers who may sue Apple for alleged monopolization." The Court said this "straightforward conclusion follows from the text of the antitrust laws and from our precedents." First, Section 4 of the Clayton Act, 15 U.S.C. §15(a), provides that "*any person* who shall be injured in his business or property by reason of any-

thing forbidden in the antitrust laws may sue . . . the defendant." This language "readily covers consumers who purchase goods" from a monopolistic retailer. Second, the Court, quoting *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), noted that it has "consistently stated that 'the immediate buyers from the alleged antitrust violators' may maintain a suit against the antitrust violators." Per the Court's description, "*Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." In a footnote, the Court noted that it had no occasion to consider whether, as suggested by 31 amici states, *Illinois Brick* should be overruled.

The Court rejected Apple's "theory . . . that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party." It saw "three main problems" with the theory. First (as earlier explained), the theory contravenes the statutory text of Section 4 of the Clayton Act and the Court's precedent. In the Court's account, "*Illinois Brick* . . . was not based on an economic theory about who set the price"; it "sought to ensure an effective and efficient litigation scheme in antitrust cases." Second, the Court reasoned that Apple's "'who sets the price' rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers." By basing liability on "how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission," Apple's rule would "elevate form over substance." Third, the Court rejected Apple's theory because it "would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers." The Court "refuse[d] to rubber-stamp such a blatant evasion of statutory text and judicial precedent."

Lastly, the Court refuted Apple's contention that the rationales in *Illinois Brick* for adopting the direct-purchaser rule apply in this case. It summarized *Illinois Brick* as setting forth "three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." These rationales, found the Court, "cut strongly in the plaintiffs' favor here, not Apple's." First, allowing only app developers to sue Apple would "leave consumers at the mercy of monopolistic retailers . . . and directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases." Next, complicated damages calculations are "hardly unusual in antitrust cases." "*Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated." And finally, this case does not involve conflicting claims to a common fund because the "overcharge has not been passed on by anyone to anyone." That Apple may be sued by both consumers and developers is of no moment because "*Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution." "A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs."

Justice Gorsuch wrote a dissent, which Chief Justice Roberts and Justices Thomas and Alito joined. The dissent described this as a "pass-on case" that relies on "convoluted 'pass on' theories of damages [that] violate traditional principles of proximate causation." In the dissent's view, the Court has recast "*Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant," and replaced "a rule of proximate cause and economic reality with an

easily manipulated and formalistic rule of contractual privity." The dissent began with a lengthy discussion of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which rejected an antitrust defendant's defense that the plaintiff had passed on the overcharge to its customers. Justice Gorsuch described *Hanover Shoe* as interpreting the Clayton Act's statutory "language against the backdrop of the common law." "And under ancient rules of proximate causation, the 'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" And "[w]ith *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages."

The dissent concluded that "[t]he lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids." Whereas the majority described the plaintiffs as having made purchases from Apple, the dissent described them as having "bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers." And any overcharge—in the form of Apple's 30% commission—"falls initially on the developers," who "are the parties . . . directly injured by it." The dissent then described the case as involving the same concerns that animated the Court's ruling in *Illinois Brick*. First, the district court will have to confront complex questions of causation—"whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers." Also, the court will be required to undertake the "massive efforts to apportion the recovery among all potential plaintiffs" that were feared in *Illinois Brick*. This apportionment task is doubly complicated, Justice Gorsuch continued, because the Court's opinion "surely must mean that *Hanover Shoe*" doesn't govern the case, and Apple can raise a pass-on defense to any claims by app developers. Finally, the dissent criticized the Court as "exalt[ing] form over substance": "Instead of focusing on the traditional proximate cause question [of] where the alleged overcharge is first felt, the Court's test turns on who happens to be in privity of contract with whom." Maybe the Court came to this conclusion, the dissent posited, "because it just disagrees with *Illinois Brick*."

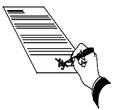
● *Cochise Consultancy Inc. v. United States ex rel. Hunt,* 18-315. The Court unanimously held that the limitations period of §3731(b)(2) of the False Claims Act—three years from the government's discovery of the fraud—applies to *qui tam* actions in which the government does not intervene. Under §3730 of the False Claims Act, civil actions may be brought against persons who knowingly present the United States government with fraudulent claims for payment. Such actions may be brought by either the government or a private person, known as a relator, who brings the action in the name of the government and collects a share of the proceeds. If a relator brings such a *qui tam* action, the government may intervene and assume primary responsibility for prosecuting the action. Section 3731(b) requires that "civil action[s] under section 3730" be filed within the later of two limitations periods: under subsection (b)(1), within six years of the violation; or under subsection (b)(2), within three years of when "the official of the United States charged with responsibility to act" knew or should have known the relevant facts (but in no event later than ten years after the violation). The question was whether (b)(2)'s limitations period applies to relator-initiated actions in which the government does not intervene and, if so, whether a relator who brings such an action is deemed the United States official whose knowledge of the violation triggers the three-year period. The Eleventh Circuit held that §3731(b)(2) applies to relator-initiated actions when the government does not intervene and that relators cannot be deemed United States officials. It therefore held that respondent's

False Claims Act action against petitioner Cochise was not time-barred under (b)(2). In an opinion by Justice Thomas, the Court affirmed.

Section 3731 provides that §3731(b)'s limitations periods apply to "civil action[s] under section 3730." Because "[b]oth Government-initiated suits under §3730(a) and relator-initiated suits under §3730(b) are 'civil action[s] under section 3730,'" the Court found that "the plain text of the statute makes the two limitations periods applicable in both types of suits." Under Cochise's reading of the provisions, a relator-initiated suit in which the government does not intervene is a "civil action under section 3730" for purposes of (b)(1) but not (b)(2). That reading is "at odds with fundamental rules of statutory interpretation"—namely, that "a single use of a statutory phrase must have a fixed meaning." The Court distinguished *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005), which held that §3731(b) does not supply the limitations period for §3730(h) retaliation suits. *Graham County* reasoned that the phrase "civil action[s] under section 3730" in §3731(b) refers only to actions that have as an element a violation of §3729—*i.e.*, §§3730(a) and (b) actions but not §3730(h) retaliation actions. That reasoning provided no help to Cochise here. Nor, found the Court, did *Graham County*'s reading of §3731(c)—which contains the phrase "action brought under 3730"—as limited to §3730(a) actions, not §3730(b) actions. *Graham County* gave §3731(c) that reading based on considerations that do not apply here.

The Court next turned to the question whether a relator is a United States official under (b)(2), such that the relator's knowledge of a violation triggers the limitations period. It found that "the statute provides no support for reading 'the official of the United States' to encompass a private relator." A relator "is neither appointed as an officer of the United States . . . nor employed by the United States," and the provision that authorizes relator-initiated *qui tam* actions is entitled "Actions by Private Persons," §3730(b). Moreover, noted the Court, (b)(2) refers to "the official of the United States charged with responsibility to act," and "private relators are not 'charged with responsibility to act' in the sense contemplated by §3731(b), as they are not required to investigate or prosecute a False Claims Act action."

II. Cases Granted Review



● *Ritzen Group, Inc. v. Jackson Masonry, LLC,* 18-938. At issue is "[w]hether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. §158(a)(1)." Under 28 U.S.C. §158(a), district courts have jurisdiction to hear appeals from "final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings." Ritzen Group's state-court suit against Jackson Masonry for breach of contract was automatically stayed under 11 U.S.C. §362 by Jackson Masonry's bankruptcy petition. Ritzen Group then moved to lift the stay on the ground that Jackson Masonry filed for bankruptcy in bad faith. The bankruptcy court denied the stay-relief motion, but rather than appeal from that denial, Ritzen Group brought a claim against the bankruptcy estate, which the bankruptcy court later denied on the merits. Ritzen Group then filed two appeals in district court, one from the bankruptcy court's order denying the stay-relief motion and the other from the order denying the claim against the estate. The district court held that the order denying the stay-relief motion was a final order and that Ritzen Group's appeal from that order was therefore untimely. The Sixth Circuit affirmed. 906 F.3d 494.

The Sixth Circuit's holding turned on a textual analysis of §158(a)'s grant of jurisdiction to hear "final" orders entered in bankruptcy "cases and proceedings." Relying on legal dictionaries, the Sixth Circuit found that a "proceeding" under §158(a) is "a discrete dispute within the overall bankruptcy case, resolved through a series of procedural steps." The Sixth Circuit then found that an order entered in a bankruptcy proceeding is "final" under §158(a) if it "ends [the] proceeding, fixes the rights of the parties, and has significant consequences for them." Applying these definitions, the Sixth Circuit concluded that the bankruptcy court's order denying Ritzen Group's stay-relief motion was a final order entered in a proceeding. A bankruptcy court's adjudication of a stay-relief motion is a "proceeding" because "there is a discrete claim for relief, a series of procedural steps, and a concluding decision based on the application of a legal standard." Furthermore, §157 lists stay-relief motions among the "core proceedings" arising under the Bankruptcy Code. And an order denying a stay-relief motion, unless it denies the motion without prejudice, is final because it resolves all of the rights and obligations at issue in the stay-relief proceedings and has significant and irreparable consequences for the movant. The Sixth Circuit rejected the case-by-case, totality-of-the-circumstances approach taken by the First and Third Circuits as atextual and failing to "look to or articulate principles that can be applied to other times of orders."

Ritzen Group challenges the Sixth Circuit's "blanket rule" that orders denying stay-relief motions are final and appealable as inconsistent with the Court's decisions establishing that finality in bankruptcy is a flexible concept that must be viewed practically, rather than technically. Specifically, Ritzen Group argues that the Sixth Circuit's decision conflicts with *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015), which held that a denial of plan confirmation that allows the debtor to propose a new plan is not final. Ritzen Group maintains that an order denying stay relief is not final unless it resolves not only whether relief is granted, but the underlying claim on which the request for stay relief was premised. It contends that because its stay-relief motion "presented issues going to the very merits" of the breach-of-contract dispute and Jackson Masonry's ongoing bad faith, the order denying that motion did not resolve all of the issues between the parties and therefore was not final.

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