

Supreme Court Report

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This *Report* summarizes opinions issued on June 21, 2019 (Part I); and cases granted review on June 24, 2019 (Part II).



I. Opinions

- *Knick v. Township of Scott, Pa.*, 17-647. Voting 5-4, the Court held that a plaintiff does not need to seek just compensation in state court before bringing a federal takings claim, reversing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Rose Mary Knick owns a 90-acre property containing a small family graveyard. The Township of Scott, Pennsylvania notified her that she was violating its ordinance requiring that “[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours.” Knick filed an action in state court seeking declaratory and injunctive relief on the grounds that the ordinance effected a taking, but she did not bring an inverse condemnation action for compensation. After the township stayed enforcement of the ordinance, the state court declined to rule on Knick’s request for equitable relief. Knick then filed an action in federal court under 42 U.S.C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The district court dismissed this action under *Williamson County* on the ground that Knick had not first sought just compensation in state court; the Third Circuit affirmed. In an opinion by Chief Justice Roberts, the Court overruled *Williamson County*.

The Court began by describing the pertinent holding of *Williamson County*: “that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.” This ruling was complicated, the Court went on to explain, by *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), which held that a plaintiff who had first sought compensation in state court and was denied was precluded by the full faith and credit statute, 28 U.S.C. §1738, from seeking relief in federal court. This “*San Remo* preclusion trap,” the Court said, “should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment.” Otherwise, the Takings Clause is relegated “to the status of a poor relation’ among the provisions of the Bill of Rights,” because other constitutional claims can be brought in federal court, while takings claims must be brought in state court.

The Court held that, “[c]ontrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.” To support this ruling the Court cited *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which understood “that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it.” Although a “later payment of compensation may remedy the constitutional violation . . . that does not mean the violation never took place.” The Court concluded that “because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.”

The Court next described the ruling in *Williamson County* as a jurisprudential outlier, not in keeping with its other takings cases. It traced the case's holding to a statement in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), that until a property owner has used an available state procedure and been denied just compensation, the property owner has no claim against the government for a taking. The Court distinguished *Monsanto* as a case seeking equitable relief, to which the plaintiff was not entitled with an available and unused procedure for compensation. The Court explained that the other principal case on which *Williamson County* relied, *Parratt v. Taylor*, 451 U.S. 527 (1981), concerned due process, not takings. The Court then distinguished statements in prior cases that the Takings Clause does not require compensation being made in advance of a taking as concerning the availability of injunctive relief, not when a constitutional injury occurs. Lastly, the Court examined the history of takings litigation, which it described as a shift from equitable actions for the return of property taken without compensation to actions for damages. Although equitable relief is generally not available today, that does not mean a taking has not occurred. Rather, the Court explained, the compensation "procedure is a remedy for a taking that violated the Constitution"; "the availability of the procedure" did not "somehow prevent[] the violation from occurring in the first place." Therefore, the Court concluded "that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under §1983 at that time." The Court noted that this does not mean equitable relief usually would be available where a taking was made without contemporaneous compensation: "[g]iven the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate."

In a final section, the Court determined that *stare decisis* did not require it to adhere to *Williamson County*. In the Court's view, the case "was not just wrong," but "[i]ts reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As well, the Court viewed the "justification for the state-litigation requirement" as "continu[ing] to evolve," which is another factor undermining *stare decisis*' force. And it reasoned that *stare decisis* was not warranted because the "state-litigation requirement has . . . proved to be unworkable in practice," given the preclusive effect of state-court litigation as held in *San Remo*. Finally, the Court determined that there are no reliance interests on *Williamson County*, because suits will just shift from state to federal courts and because "[g]overnments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional" so long as they provide compensation remedies.

Justice Thomas wrote a concurrence. He criticized the position taken by the United States as amicus that "requiring a payment to accompany a taking would allow courts to enjoin or invalidate broad regulatory programs." Justice Thomas opined that just compensation is a "prerequisite" to a taking, and that an exercise of the eminent-domain power is "'invalid' unless the government 'pays just compensation before or at the time of its taking.'" "If this requirement makes some regulatory programs 'unworkable in practice,' so be it—our role is to enforce the Takings Clause as written."

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. She viewed the Court's opinion as rejecting far more than *Williamson County*, but "transgress[ing] all usual principles of *stare decisis*" by upending "precedent after precedent" interpreting the Takings Clause "stretching back to the late 1800s." Justice Kagan also criticized the Court's holding as having "no basis in the Takings Clause" and "channel[ing] a mass of quintessentially local cases involving complex state-law issues into federal courts." She began her dissent by discussing the right afforded by the Takings

Clause. In her view, the clause “is unique among the Bill of Rights’ guarantees” because it does not prohibit a governmental activity but permits takings “provided the government gives just compensation.” She observed that for “over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner to later obtain just compensation.” “All that *Williamson County* did,” in the dissent’s view, “was to put the period on an already-completed sentence about when a takings claim arises,” which “does not occur until an owner has used the government’s procedures and failed to obtain just compensation.” Justice Kagan objected that “today’s opinion smashes a hundred-plus years of legal rulings to smithereens.”

Next, the dissent rebutted several “ideas” on which it viewed the Court’s decision as resting. Justice Kagan wrote that *Williamson County* does not treat takings claims worse than other claims founded in the Bill of Rights, but merely “reflect[s] the distinctive aspects of the constitutional right,” which requires a failure to pay just compensation before an injury occurs. And Justice Kagan critiqued the Court’s distinguishing precedents as concerning injunctive relief: “the equity/law distinction played little or no role in our analyses. Instead, the decisions addressed directly what the Takings Clause requires (or not).” The dissent contended that the “majority’s overruling of *Williamson County* will have two damaging consequences.” First, “today’s decision means that government regulators will often have no way to avoid violating the Constitution,” given the number of ways in which regulations affect property interests. She further objected that the Court’s ruling “betrays judicial federalism” because it “channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts” given that the cases typically turn on state-law definitions of property interests. Finally, Justice Kagan wrote that no “special justification” warrants departing from *stare decisis*. In particular, she observed that Congress could fix the “*San Remo* preclusion trap” by amending the full faith and credit statute. She also criticized the majority’s reliance on “‘evolution’ in the way a decision is described [as] a ground for abandoning *stare decisis*” as originating in last year’s decision in *Janus v. State, County, and Municipal Employees*, 585 U.S. ____ (2018). “If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all.”

- *Flowers v. Mississippi*, 17-9572. In a 7-2 vote, the Court held that the state’s exercise of peremptory challenges against black prospective jurors in Curtis Flower’s prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in light of the unusual facts and circumstances of the case. Flowers was tried by the same prosecutor six times for the murder of four employees of a Mississippi furniture store. The first two times, the state used its peremptory challenges to strike all of the qualified black prospective jurors, one of whom the trial court seated after finding the state’s strike against that juror was motivated by race. Flowers’ convictions and death sentences in both proceedings were overturned based on unrelated prosecutorial misconduct. At the third trial, Flowers was convicted and sentenced to death after the state used all 15 of its peremptory strikes against black prospective jurors; the Mississippi Supreme Court reversed under *Batson*. At the fourth trial, the state used all 11 of its peremptory strikes against black prospective jurors, but the relatively large number of black prospective jurors resulted in five being seated after the state exhausted its strikes. The proceeding ended in a hung jury, as did the fifth trial, at which three black jurors were seated. At the sixth trial—the trial at issue in this case—Flowers was convicted and sentenced to death after the state exercised five of its six peremptory strikes against black prospective jurors and allowed one black juror to be

seated. Flowers argued that the state exercised its peremptory strikes in a racially discriminatory manner, but the trial court accepted the state's race-neutral explanations. The Mississippi Supreme Court affirmed. After granting Flowers's petitioner for certiorari, the Court vacated and remanded for further consideration in light of *Foster v. Chatman*, 578 U.S. __ (2016). The Mississippi Supreme Court again affirmed. In an opinion by Justice Kavanaugh, the Court reversed and remanded.

After reviewing the history of racial discrimination in jury selection and the development of the Court's precedent regarding such discrimination, the Court discussed the "[f]our critical facts" that, "taken together, require reversal." The first fact was historical: over the six trials, the state "employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck." The Court said that "[t]he State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history." The remaining three facts were specific to the sixth trial: First, the state struck five of six black prospective jurors. The Court noted that in a prior case it "skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors. The overall record of this case suggests that the same tactic may have been employed here." (Citation omitted.)

Second, "in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors." The Court pointed out that "[t]he State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror." And the Court rejected the state's claim that it "questioned black and white prospective jurors differently only because of differences in the jurors' characteristics." The Court then explained that "[t]he prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent."

Lastly, the Court found that the state struck at least one black juror "who was similarly situated to white prospective jurors who were not struck by the State." The Court noted that "[c]omparing prospective jurors who were struck and not struck . . . can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination." The Court did not "decide that any one of those four facts alone would require reversal." Specifically, the Court noted that "disparate questioning or investigation alone does not constitute a *Batson* violation," and that the prosecution's mistakes in explaining its exercise of strikes "should not be confused with racial discrimination" given the fact that "the back and forth of a *Batson* hearing can be hurried." The Court emphasized that it broke "no new legal ground," but "simply enforce[d] and reinforce[d] *Batson* by applying it to the extraordinary facts of this case."

Justice Alito concurred. "[V]iewing the totality of the circumstances present here," Justice Alito agreed that Flowers's conviction must be overturned. But he noted that "[w]ere it not for the unique combinations of circumstances present here, [he] would have no trouble affirming the decision of

the Mississippi Supreme Court, which conscientiously applied the legal standards applicable in less unusual cases.”

Justice Thomas dissented, joined by Justice Gorsuch in part. The dissent saw “no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below,” finding none of the struck black jurors “remotely comparable” to seated white jurors and dismissing the state’s factual errors in explaining its strikes and “supposedly disparate questioning” as providing no evidence of purposeful racial discrimination. The dissent also discounted the state’s use of peremptory challenges in Flowers’s five previous trials, concluding that “49 of the State’s 50 peremptory strikes in Flowers’ previous trials were race neutral” because Flowers either did not challenge them under *Batson* or the Mississippi state courts rejected *Batson* challenges to them. In the final part of the dissent (not joined by Justice Gorsuch), Justice Thomas questioned *Batson*’s requirement “that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on a jury” as “suspect when it was announced”; he was “even less confident of it today.” Justice Thomas stated that a defendant lacks standing to assert a prospective juror’s claim that the juror was excluded based on race, and rejected “undoing the valid conviction of another” as an improper remedy for any injury suffered by the excluded juror. Justice Thomas saw the Court’s path as ending with the elimination of peremptory strikes, which he predicted would disadvantage black defendants who would use such strikes to remove “potentially hostile white jurors.”

- *North Carolina Dep’t of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 18-457. The Court unanimously held that the presence of an in-state beneficiary is insufficient for a state to tax trust income, where the income has not been distributed and the beneficiary has no right to demand—and is uncertain to ever receive—the income. Joseph Lee Rice III established a trust for the benefit of his children. Rice was a resident of New York, the trust was governed by New York law, and Rice appointed a New York resident as trustee. That trustee was given “absolute discretion” to distribute the trust’s assets. One of Rice’s children, Kimberley Rice Kaestner, moved to North Carolina, after which North Carolina assessed a tax on proceeds the trust accumulated during the years Kaestner lived in the state. The trustee paid this tax under protest and sued in North Carolina court, arguing that the application of North Carolina income tax to the trust violated the Due Process Clause. The trial court ruled in the trustee’s favor, and North Carolina’s appellate courts affirmed. In an opinion by Justice Sotomayor, the Court affirmed.

The Court explained that the Due Process clause limits states’ ability to impose taxes. For a tax to be permissible, “there must be ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’” Whether the necessary “minimum connection” exists turns on the familiar test established in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), of “‘minimum contacts’ . . . such that the tax ‘does not offend traditional notions of fair play and substantial justice.’” Applying these standards to a tax based on a trust’s in-state beneficiary, the Court announced a limited holding: “the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it.” The Court noted that it was “limiting [its] holding to the specific facts presented” and was not implying “approval or disapproval of trust taxes that are premised on the residence of beneficiaries whose relationship to trust assets differs from that of the beneficiaries here.”

Relying on two cases from the 1920s, the Court observed that “[i]n the context of beneficiary contacts specifically, the Court has focused on the extent of the in-state beneficiary’s right to control, possess, enjoy, or receive trust assets.” This entails a “pragmatic inquiry into what exactly the beneficiary controls or possesses and how that interest relates to the object of the State’s tax.” If the resident lacks “some degree of possession, control, or enjoyment of the trust property,” the Court reasoned, “the State’s relationship to the object of its tax is too attenuated to create the ‘minimum connection’ that the Constitution requires.” Applying this standard to the Kaestner trust, the Court concluded that Kaestner’s residence in North Carolina alone did not supply the “minimum connection” due process requires for several reasons. “First, the beneficiaries did not receive any income from the trust during the years in question.” Second, the beneficiaries “had no right to demand trust income or otherwise, control, possess, or enjoy the trust assets”; the distribution of the assets “was left to the trustee’s ‘absolute discretion.’” Nor could the beneficiaries make investment decisions about the assets or assign any interest in the trust. And third, the beneficiaries “could not count on necessarily receiving any specific amount of income from the trust in the future.”

The Court rejected North Carolina’s arguments in defense of its tax. It dismissed the state’s reliance on *Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947), which recognized the close connection between a trust and its constituents and noted that beneficiaries have an “equitable interest” in trust assets. In particular, the state had argued that the trust benefitted from North Carolina law “by way of the beneficiaries, who enjoy secure banks to facilitate asset transfers and also partake of services (such as subsidized public education) that obviate the need to make distributions.” These arguments, the Court determined, fail “to grapple with the wide variation in beneficiaries’ interests.” Although sometimes beneficiaries have a close relationship with trust assets, the beneficiary’s interest may also be future, contingent, or subject to the trustee’s discretion. Next, the Court dismissed North Carolina’s objection that ruling for the Trust would undermine numerous state taxation regimes. It noted that only “a small handful of states rely on beneficiary residency as a sole basis for trust taxation.” Finally, the Court allayed concerns that adopting the Trust’s position “will lead to opportunistic gaming of state tax systems.” It reasoned, among other things, that “mere speculation about negative consequences cannot conjure the ‘minimum connection’ missing between North Carolina and the object of its tax.”

Justice Alito wrote a concurrence, which Chief Justice Roberts and Justice Gorsuch joined. He wrote “separately to make clear that the opinion of the Court merely applies our existing precedent and that its decision not to answer questions not presented by the facts of this case does not open for reconsideration any points resolved by our prior decisions.” Specifically, Justice Alito opined that two cases “provide a clear answer” to the question presented: *Brooke v. Norfolk*, 277 U.S. 27 (1928), and *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 280 U.S. 83 (1929). Under these precedents, he reasoned, where “the resident beneficiary has neither control nor possession of the intangible assets in the trust,” that is “sufficient to establish that North Carolina cannot tax the trust or the trustee on the intangible assets held by the trust.”

- *Rehaif v. United States*, 17-646. By a 7-2 vote, the Court held that in a prosecution for unlawful possession of a firearm under 18 U.S.C. §922(g) and 18 U.S.C. §924(a)(2), the government must prove both that the defendant knew he possessed a firearm and knew he belonged to the relevant

category of persons barred from possessing a firearm. Section 922(g) prohibits nine categories of individuals, including felons and aliens who are “illegally or unlawfully in the United States,” from possessing firearms. Section 924(a)(2) provides that a person who “knowingly violates” §922(g) shall be fined or imprisoned for up to ten years. Hamid Rehaif entered the United States on a nonimmigrant student visa to attend university. The university dismissed him for poor grades and informed him that his “immigration status” would be terminated unless he transferred to another university or left the country. After Rehaif went to a firing range, he was convicted of possessing a firearm as an alien unlawfully in the United States, in violation §§922(g) and 924(a)(2). The jury was instructed that the prosecution need not prove that Rehaif knew he was unlawfully in the United States. Rehaif argued on appeal that the jury instructions were erroneous, but the Eleventh Circuit concluded that the instruction was correct and affirmed. In an opinion by Justice Breyer, the Court reversed and remanded.

Considering the text of §924(a)(2)—that whoever “knowingly violates” §922(g) is subject to penalty—the Court observed that “knowingly” modifies “violates”; and a defendant cannot know that he has violated §922(g)’s prohibition against possessing a firearm as a member of a particular category unless he knows both that he possesses a firearm and that he belongs to that category. The Court proceeded from the “longstanding presumption” that Congress intends to require a defendant to possess a culpable mental state with respect to each element of an offense. The Court found that applying §924(a)(2)’s scienter requirement to §922(g)’s status element “helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts” and is therefore consistent with “the basic principle that underlies the criminal law” that an injury is criminal only if inflicted knowingly. The Court acknowledged that it sometimes declines to read a scienter requirement into criminal statutes in cases involving provisions that are part of public welfare programs and carry only minor penalties, but explained that §924(a)(2) does not fall within this exception due to the severity of its penalty.

The Court was not convinced by the government’s argument that Congress does not normally require defendants to know their own status. The statutes upon which the government relied for this proposition prohibited conduct that “would be wrongful irrespective of the defendant’s status,” unlike firearm possession. Nor did the Court believe that Congress would have expected defendants under §§922(g) and 924(a)(2) to necessarily know their own status, since some people are brought to the United States unlawfully as small children and are therefore unaware of the unlawfulness of their presence here. Similarly, some people sentenced to probation may not be aware that their offenses were “punishable by imprisonment for a term exceeding one year,” such as to bar them from possessing firearms under §922(g)(1). The Court also rejected the argument that the unlawfulness of an alien’s presence in the United State is a question of law rather than fact, such that ignorance of that status was ignorance of the law and therefore no defense. The Court explained that the maxim that ignorance of the law is no defense applies to cases “where a defendant has the requisite mental state in respect to the elements of the crime” but claims ignorance that the conduct was proscribed—not to cases where a defendant has a mistaken impression concerning the legal effect of a collateral matter that results in his misunderstanding the full significance of his conduct, “thereby negating an element of the offense.”

Justice Alito dissented, joined by Justice Thomas. The dissent expected the Court’s decision would “open the gates to a flood of litigation that is sure to burden the lower courts with claims for

relief in a host of cases where there is no reasonable basis for doubting the defendant’s knowledge.” The dissent found “any attempt to combine the relevant language of §924(a)(2) with the language of §922(g) necessarily entails significant choices that are not dictated by the text of those provisions.” After reviewing four possible readings of §924(a)(2)’s knowledge requirement, the dissent concluded that “the statutory text alone does not tell us with any degree of certainty the particular elements of §922(g) to which the term ‘knowingly’ applies.” But between possible readings imposing either a very high *mens rea* requirement on the status element or no *mens rea* requirement at all, the dissent found it more likely that Congress intended the latter. The dissent stated that the Court had never before inferred that Congress intended to impose a *mens rea* requirement on a status element, and argued that no such requirement should be imposed here because the lawfulness of an immigrant’s status in the United States involves complicated legal issues. “[R]equiring proof of such knowledge would threaten to effectively exempt almost everyone but students of constitutional law from the statute’s reach.” Because prior to the addition of “knowingly” to §924(a)(2), courts did not interpret §922(g) as requiring proof that a defendant knew his status, the dissent presumed that Congress added §924(a)(2)’s *mens rea* requirement to clarify that knowledge is required with respect to the conduct element. Absent clear statutory text, the dissent thought that the judgments of the courts of appeals and highest state courts that §922(g) and similar state laws do not require proof that defendants knew their status “should count for something,” especially where the Court’s reading was not compelled by either the doctrine of constitutional avoidance or the rule of lenity.



II. Cases Granted Review

- Maine Community Health Options v. United States*, 18-203; *Moda Health Plan, Inc. v. United States*, 18-1028; *Land of Lincoln Mutual Health Ins. Co. v. United States*, 18-1038. This case concerns whether Congress must make payments to health insurers under the Affordable Care Act’s “risk corridor” program, despite appropriations bill riders barring such payments. As part of its effort to extend health care coverage to previously uninsured or underinsured individuals, the Affordable Care Act established new “health benefit exchanges.” To encourage insurers to offer policies on the new exchanges, the ACA included the “risk corridors” program under which the government shared part of risk of providing insurance through the exchanges. Among other things, the program provided that for the first three years of the exchanges’ operation the government would partially reimburse participating insurers whose costs exceeded 103% of their premiums received. Conversely, insurers whose costs of providing coverage were less than 97% of their premiums “shall pay” the government a portion of those excess profits. HHS regulations did not require the program to be budget neutral; government payments to insurers under the program could exceed payments by insurers. As it turned out, and due in part to transitional changes dampening ACA enrollment by healthier individuals, participating insurers incurred greater losses than anticipated. But in December 2014—after the insurance companies had provided insurance on the exchanges for 2014 and had set rates for 2015—Congress inserted a rider into HHS’ annual appropriations bill for 2015 declaring that “[n]one of the funds made available by this Act . . . may be used” for payments under the risk corridor program. Congress included identical riders for the following two fiscal years. Based on those riders, HHS refused to make risk corridor payments to insurers for losses incurred in 2014, 2015, and 2016. Petitioner insurers filed dozens of suits in the U.S. Court of Federal Claims to recover the

payments. Different judges on that court reached different results. A divided panel of the Federal Circuit ruled for the government. 892 F.3d 1311.

In its lead opinion (in *Moda*), the Federal Circuit agreed that the provision establishing the risk corridor program (§1342 of the ACA) is “unambiguously mandatory” and “obligated the government to pay the full amount of risk corridors payments according to the formula it set forth.” The court further concluded, however, that the appropriations riders “repealed or suspended [that] obligation.” The court found that the riders’ explicit language “adequately expressed Congress’s intent to suspend payments on the risk corridors program beyond the sum of payments in.” The court found support for its conclusion in the legislative history. The court also rejected *Moda*’s contention that Congress had “simply intended to limit the use of a single source of funding while leaving others available.” And the court rejected *Moda*’s implied-in-fact contract claim, holding that “[a]bsent clear indication to the contrary, legislation and regulation cannot establish the government’s intent to bind itself in a contract.” The court found that §1342—standing alone or in combination with HHS regulations and statements—did not “evinced[] an intention to form a contract.”

Petitioners argue that the Federal Circuit ruling “gives judicial imprimatur to a \$12 billion bait-and-switch.” They emphasize the principle that repeals by implication are disfavored—a rule that “applies with even greater force when the claimed repeal rests solely on an Appropriations Act.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). That is because “[u]nlike substantive provisions in authorizing legislation, appropriations measures ‘have the limited and specific purpose of providing funds for authorized programs,’ and lawmakers voting on them are ‘entitled to operate under the assumption’ that they will be interpreted as addressing how to pay for authorized programs, rather than reopening or revisiting the underlying authorization itself. *Id.*” Petitioners insist that the riders did not overcome that presumption, for it contained no language specifically stating that it was repealing or suspending §1342. They agree with a judge who wrote that the riders “do not address whether the obligation remains payable,” but “at most, only address from whence the funds to pay the obligation may come.” And they disagree with the Federal Circuit that the legislative history supports a repeal of §1342. Petitioners also contend that, “[i]f Congress really did unilaterally disclaim its mandatory payment obligation under §1342, then the government committed a clear breach of contract”: “it would be nothing short of bizarre if Congress itself were not bound when it makes a clear and binding promise, induces beneficial reliance and reciprocal performance based on that promise, and then breaks that promise with impunity.”

- *Georgia v. Public.Resource.org, Inc.*, 18-1150. The Court had previously held as a matter of public policy that judicial opinions are not copyrightable. (That is known as the “government edicts” doctrine.) The question presented is whether that doctrine “extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.” In 1997, the Georgia General Assembly created the Code Revision Commission to oversee recodifying Georgia’s laws. The Commission contracted with Michie Company, which produced a compilation of Georgia’s statutes, as well as annotations “consisting of history lines, repeal lines, cross references, commentaries, case notations, editor’s notes, excerpts from law review articles, summaries of opinions of the Attorney General of Georgia, summaries of advisory opinions of the State Bar, and other research references.” A provision of the Georgia Code clarifies that the annotations “do not constitute part of the law.” The Commission now contracts with Matthew Bender & Co.

(part of the LexisNexis Group) to maintain and publish the Official Code of Georgia and to prepare annotations to the Code's provisions. The State of Georgia holds a registered copyright in the Code's annotations; it grants Lexis an exclusive license to publish and sell the Code. The license agreement requires Lexis to create a free unannotated online version of the Code, limits the price that Lexis can charge for the annotated Code, and grants Lexis an exclusive right to produce and sell print, CD-ROM, and online versions of the annotated Code. Public.Resource.Org (PRO) is a non-profit organization that strives to improve public access to government records and primary legal materials by publishing them online. It scanned Georgia's annotated Code and posted it online. After PRO refused to comply with cease and desist letters sent by Georgia, the state filed an infringement action in federal district court. PRO counterclaimed. The district court held that the Code annotations were copyrightable because they do not have the force of law. The Eleventh Circuit reversed. 906 F.3d 1229.

The Eleventh Circuit interpreted the 19th-century cases creating the government edicts doctrine as "establish[ing] that, with respect to certain governmental works, the term 'author' should be construed to mean 'the People,' so that the general public is treated as the owner of the work. This means that a work subject to the rule is inherently public domain material and thus not eligible for copyright protection." According to the court, then, "[t]he ultimate inquiry" is "whether a work is attributable to the constructive authorship of the People, which is to say whether it was created by an agent of the People in the direct exercise of sovereign authority." Although statutory texts most obviously fit that description, found the court, they are not the only works falling within the government edicts doctrine. The court then analyzed three factors that determine whether a work is "sufficiently law-like" to fall within the doctrine: who created it, whether it is "authoritative"; and the process by which it was created. The court found that all three factors pointed in favor of the doctrine applying to the annotations. As to the second factor, the court acknowledged that the annotations do not carry the force of law, but found that the annotations were "merged" with the statutory codification and are therefore part of "the authoritative embodiment of the laws of the State of Georgia." That is, "their combination with the statutory text imbues them with an official, legislative quality." The court therefore "conclude[d] that the annotations in the OCGA are attributable to the constructive authorship of the People"—and thus are not copyrightable under the government edicts doctrine.

Georgia argues that the Eleventh Circuit ruling conflicts with rulings by the Second, Sixth, and Ninth Circuits that have upheld the copyrightability of "works bearing the state's imprimatur." On the merits, Georgia first asserts that the Copyright Act expressly provides that "annotations" are copyrightable. 17 U.S.C. §§101, 103. And it specifically exempts "works of the United States Government"—not of state governments—from "[c]opyright protection." Georgia points out that Congress rejected efforts to extend the prohibition to state and local government works. And it notes that "the Copyright Office continues to recognize that state-government-created 'annotations that summarize or comment upon legal materials' are copyrightable, 'unless the annotations themselves have the force of law.'" Georgia also insists that the Eleventh Circuit decision conflicts with the Court's precedents, which (in its view) establish only that "binding law (such as statutes and judicial decisions) cannot be copyrighted." Among other decisions, it points to *Callaghan v. Myers*, 128 U.S. 617 (1888), which held that "the Illinois Supreme Court's official reporter could copyright annotations that the reporter himself (rather than the judges) had authored for his reports of the court's decisions."

- *Banister v. Davis*, 18-6943. The Court agreed to resolve “[w]hether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzales v. Crosby*, 545 U.S. 524 (2005).” Gregory Banister was convicted of aggravated assault with a deadly weapon and sentenced to 30 years’ imprisonment. He filed a federal habeas petition under 28 U.S.C. §2254 asserting a variety of claims. The district court denied the petition. Twenty-eight days later, Banister filed a Motion to Alter or Amend judgment under Federal Rule of Civil Procedure 59(e). The motion contested the district court’s interpretation of the evidence and resolution of his claims. The district court considered but denied the motion. One month later, Banister filed a notice of appeal. The Fifth Circuit denied the motion for a certificate of appealability as untimely on the ground that Banister’s Rule 59(e) motion should be considered a successive petition, which cannot toll the time for filing a notice of appeal.

In *Gonzales*, the Court held that a prisoner’s Rule 60(b) motion to reopen his case counts as a second or successive petition under AEDPA if the motion asserts substantive claims; if the motion does not assert a “claim” (e.g., it goes to the statute of limitations) it does not count as second or successive. Banister maintains that the courts are divided over whether and when, under *Gonzales*, Rule 59(e) motions constitute second or successive petitions. For example, the Second Circuit holds that Rule 59(e) motions are not second or successive if “the initial petition remain[s] pending”—which includes “appellate proceedings.” The Ninth Circuit holds that a Rule 59(e) motion will not be recharacterized as a second habeas petition if it “asks the district court to correct manifest errors of law upon which the judgment rests” and does not raise “entirely new claims.” By contrast, the Fifth, Eighth, and Tenth Circuit have held that “Rule 59(e) motions are second or successive if they include one or more habeas ‘claims’ within the meaning of *Gonzalez*.” On the merits, Banister asserts that Rule 59(e) motions differ in relevant ways from Rule 60(b) motions: “A timely Rule 59(e) motion is not a new collateral attack; it is ‘part and parcel’ of the initial habeas proceeding, with a petitioner invoking the district court’s traditional authority to correct its own mistakes ‘immediately after judgment is entered.’ By contrast, a Rule 60(b) motion, like the motion in *Gonzalez*, seeks to set aside a judgment ‘after the time to appeal has expired and the judgment has become final.’” (Citations omitted.) Texas counters that “the difference between a Rule 59(e) and Rule 60(b) motion is not remarkable.” Both seek “the same relief—a change in judgment.” According to Texas, *Gonzales* “intended its holding to apply to any postjudgment motion or filing that raises substantial claims on the merits which could have been or was filed in a previous petition.”

- *Guerrero-Lasprilla v. Barr*, 18-776; *Ovalles v. Barr*, 18-1015. Under the Immigration and Nationality Act, an alien “may file one motion to reopen” removal proceedings. A motion to reopen must be “filed within 90 days of the date of entry of a final administrative order of removal,” but (according to every circuit to address the issue) that time limit is subject to equitable tolling. 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. 8 U.S.C. §1252(a)(2)(C). 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). In these two cases, aliens subject to the criminal alien bar seek to equitably toll their motions to reopen. At issue is whether such a request for equitable tolling is judicially reviewable as a “question of law.”

For the sake of brevity, only the facts of *Guerrero-Lasprilla* will be set out. Petitioner Pedro Guerrero-Lasprilla entered the United States as a lawful permanent resident in 1986. In 1988, he was convicted of several drug offense. (That made him subject to the criminal alien bar.) A decade later, following service of his sentence, he was removed from the country. Nearly 18 years later, petitioner filed a motion to reopen his proceeding on the ground that he was eligible for discretionary relief. An immigration judge denied his motion as “untimely” because it was not “filed within 90 days of a final . . . order of removal.” The immigration judge rejected his request for equitable tolling because his request for relief rested on a 2014 decision by the Board of Immigration Appeals, which clarified his right to seek relief from removal—yet he waited another two years to file his motion. Petitioner appealed to the Board, which affirmed and denied a motion for reconsideration. Petitioner then appealed to the Fifth Circuit, which dismissed for lack of jurisdiction based on the criminal alien bar. It concluded that the question whether petitioner “acted with the required diligence to warrant equitable tolling” is a factual question and therefore does not fall within the §1252(a)(2)(D) exception for questions of law. Defending that ruling, the United States points to the Court’s statement in *Holland v. Florida*, 560 U.S. 631, 654 (2010), that equitable tolling is a “fact-intensive inquiry” that turns on “the facts in th[e] record.”

Petitioner notes that the Ninth Circuit exercises jurisdiction under §1252(a)(2)(D) to review an alien’s diligence “so long as the relevant facts are undisputed,” “even if our inquiry would entail reviewing an inherently factual dispute.” On the merits, he maintains that “[t]he Fifth Circuit’s approach on diligence is overly rigid and contrary to the Court’s ‘tradition’ on the ‘exercise of a court’s equity powers.’” He notes that the Court in *Holland* stated only that equitable tolling is an “often fact-intensive inquiry.” (Emphasis added in petition.) And he cites his own case as one of those “where his facts are not in dispute, but only the legal significance of regulations and case law are at question.” He maintains that his diligence should be measured not by the 2014 decision by the Board of Immigration Appeals, but rather by a 2016 Fifth Circuit decision that first recognized equitable tolling on statutory motions to reopen. Whether that is correct, he says, is a matter of law, not fact.

- *Dex Media, Inc. v. Click-to-Call Technologies, LP*, 18-916. The America Invents Act (AIA) created “inter partes review,” a procedure for challenging a patent before the Patent Trial and Appeal Board. The Board may institute an inter partes review (IPR) proceeding if it concludes “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. §314(a). Section 314(d) provides that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” Under review is a Federal Circuit ruling that, notwithstanding §314(d), a party may appeal a Board decision that an IPR proceeding was not barred by the AIA’s one-year limitations period and therefore may be instituted.

In 2011, respondent Click-to-Call Technologies (CTC) obtained a patent known as the ‘836 Patent. The next year, it filed suit alleging that various parties infringed the patent. Some of those defendant parties merged into petitioner Dex Media. In 2013, some of the sued parties filed an IPR petition challenging the ‘836 patent on grounds of anticipation and obviousness. CTC responded by asserting that the proceeding was time barred under §315(b), which provides that “[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner . . . is served with a complaint alleging infringement of the patent.”

The Board rejected CTC's time-bar challenge, which had been premised on a 2001 infringement action that was voluntarily dismissed. The Board later issued a final decision holding that 13 specified claims were unpatentable. CTC appealed the Board's decision, only "seek[ing] review of the Board's initial decision to institute IPR." While that appeal was pending, the Federal Circuit issued a divided en banc decision in *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (2018), holding that time-bar determinations under §315(b) are appealable. The majority relied on "the 'strong presumption' favoring judicial review of administrative actions, including the Director's IPR institution decisions." It found "no clear and convincing indication in the specific statutory language in the AIA, the specific legislative history of the AIA, or the statutory scheme as a whole that demonstrates Congress's intent to bar judicial review of §315(b) time-bar determinations." Based on *Wi-Fi One*, the Federal Circuit ruled in this case that CTC's appeal could proceed and that it had merit—petitioner's IPR petition was time-barred. 899 F.3d 1321.

Petitioner argues that "[t]he plain language of §314(d), read in the context of the statute as a whole, refutes the Federal Circuit's holding" in *Wi-Fi One*. As one dissenting judge put it, the AIA "calls out a specific agency determination, and expressly *prohibits* courts from reviewing that decision." Congress not only directed that "[t]he determination . . . whether to institute an inter partes review . . . shall be final and nonappealable," 35 U.S.C. §314(d), but Congress affirmatively authorized judicial review only of "the final written decision . . . under section 318(a)." Petitioner also asserts that the Federal Circuit ruling conflicts with *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), which held that a patent owner could not appeal a Board decision to institute an IPR proceeding on the ground that the petition had not (as required by the AIA) identified "with particularity" all of the claims on which the Board ultimately instituted review. Finally, petitioner argues that the *Wi-Fi One* decision "undermines" the "mechanism through which Congress intended to ensure the efficiency of the IPR process."

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