A PUBLICATION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Supreme Court Report

VOLUME 26, ISSUE 7 ■ MARCH 11, 2019

This *Report* summarizes opinions issued on February 19, 20, 25, and 26, 2019 (Part I); and cases granted review on February 15, 19, and 25, 2019 (Part II).

I. Opinions

● *Timbs v. Indiana,* 17-1091. The Court unanimously held that the Eighth Amendment's Excessive Fines Clause is incorporated so as to apply to the states. Petitioner Tyson Timbs pleaded guilty in state court to conspiracy to commit theft and dealing in a controlled substance. In connection with his crime, Indiana sought civil forfeiture of Timbs's vehicle—a Land Rover SUV Timbs purchased for $42,000 with money he received from an insurance policy when his father died. The trial court denied the state's request for forfeiture of the vehicle, noting that the Land Rover is four times the maximum $10,000 monetary fine assessable against him for his drug conviction. The court found that seizing the vehicle would be grossly disproportionate to the gravity of Timbs's offense and thus unconstitutional under the Excessive Fines Clause. The court of appeals affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause does not apply to the states. In an opinion by Justice Ginsburg, the Court reversed and remanded.

The Court ruled that the Excessive Fines Clause is "fundamental to our scheme or ordered liberty" with "dee[p] root[s] in [our] history and tradition" and is therefore incorporated by the Fourteenth Amendment's Due Process Clause. The Court explained the origins of the Excessive Fines Clause, tracing it back to at least 1215 when Magna Carta guaranteed that "a[] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement." On our side of the pond, eight of the 13 original states forbade excessive fines in 1787; and 35 of the 37 states did so in 1868 (when the Fourteenth Amendment was ratified). Today, all 50 States have a constitutional provision prohibiting imposition of excessive fines. These provisions serve a critical purpose, found the Court: "Excessive fines can be used, for example, to retaliate or chill the speech of political enemies," or be used "out of accord with the penal goals of retribution or deterrence."

The Court rejected Indiana's argument that the Clause "does not apply to its use of civil *in rem* forfeitures." In *Austin v. United States*, 509 U.S. 602 (1993), the Court unanimously held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. Because incorporated rights apply "identically to both the Federal Government and the States," *Austin* defeats Indiana's argument unless the Court overrules it or "because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted." The Court declined to consider overruling *Austin*, finding the issue not properly before it. And the Court rejected the state's theory that the Excessive Fines Clause cannot be incorporated as applied to civil *in rem* forfeitures. The Court explained that in considering whether a protection is incorporated, the Court asks whether the right guaranteed is fundamental or deeply rooted, not whether each and every application of that right is fundamental and deeply rooted. Here, "regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeiture is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchangted."

Justice Gorsuch filed a concurring opinion. He stated that, "[a]s an original matter, . . . the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than . . . the Due Process Clause." But he found that "nothing in this case turns on that question." Justice Thomas concurred in the judgment. He agreed that the Excessive Fines Clause applies to the states, but would hold that the right is one of the "privileges and immunities of citizens of the United States," protected by the Fourteenth Amendment. He disagreed with the majority that the Due Process Clause encompasses a substantive right that "has nothing to do with 'process.'"

● *Dawson v. Steager,* 17-419. The Court unanimously held that West Virginia violates the intergovernmental tax immunity doctrine by granting a tax exemption to some retired state law enforcement officers that it does not grant to retired federal law enforcement officers. Petitioner James Dawson spent his career with the U.S. Marshals Service. Upon his retirement from federal service, West Virginia taxed his federal pension benefits; it does not tax the pension benefits of certain state law enforcement employees. Dawson sued, arguing that the state violated the intergovernmental tax immunity doctrine, codified at 4 U.S.C. §111. In that statute, the United States "has consented to state taxation of the 'pay or compensation' of 'officer[s] or employee[s] of the United States,' but only if the 'taxation does not discriminate against the officer or employee because of the source of the pay or compensation.'" The state trial court concluded that there were "no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" exempted from taxation. The court therefore concluded that the state statute violates §111's anti-discrimination provision. The West Virginia Supreme Court of Appeals reversed on the grounds that the state tax exemption applies only to a narrow class of state retirees and was not intended to discriminate against former federal marshals. In an opinion by Justice Gorsuch, the Court reversed.

The Court held that a state "violates §111 when it treats retired state employees more favorable than retired federal employees and no 'significant differences between the two classes' justify the differential treatment." On undisputed facts, the court had "little difficulty concluding that West Virginia's law unlawfully 'discriminate[s]' against Mr. Dawson 'because of the source of [his] pay or compensation,' just as §111 forbids." The Court was unpersuaded by the state's "ambitious rejoinder" that the favored class of state retirees is "very small." The Court explained that "Section 111 disallows *any* state tax that discriminates against a federal officer or employee—not just those that seem to us especially cumbersome." The Court refused to "adorn §111 with a new and judicially manufactured qualification that cannot be found in its text." That said, the Court acknowledged that the breadth and scope of tax exemption is relevant to a §111 analysis. For instance, if the state were to exempt a narrow subset of state retirees, the state can still comply with §111 by exempting the comparable class of federal retirees.

The Court also rejected West Virginia's argument that the statute is valid "because it isn't intended to harm federal retirees, only to help certain state retirees." "'The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant.'" Stated differently, "[u]nder §111 what matters isn't the intent lurking behind the law but whether the letter of the law 'treat[s] those who deal with' the federal government 'as well as it treats those with whom [the State] deals itself.'" Lastly, the Court concluded that the federal and state retirees are "similarly situated

persons" being treated differently. What counts as similarly situated "depends on how the State has defined the favored class." Here, the state "singles out for preferential treatment retirement plans associated with West Virginia police, firefighters, and deputy sheriffs." The distinguishing characteristic of these plans is the "nature of the jobs previously held by retirees who may participate in them." Thus, looking to how the state chose to define its favored class "only seems to confirm that it has treated similarly situated persons differently because of the source of their compensation." The Court declined West Virginia's request that it at least remand the matter because the state statute may favor state retirees because their pensions are less generous than their federal counterparts. The Court explained that, "[w]hether the unlawful classification found in the text of a statute might serve as some sort of proxy for a lawful classification hidden behind it is neither here nor there. No more than a beneficent legislative intent, an implicit but unlawful distinction cannot save an express and unlawful one."

● *Moore v. Texas,* 18-443. By a 6-3 vote, the Court summarily reversed a Texas Court of Criminal Appeals decision which held that a death row inmate was *not* intellectually disabled and therefore *was* eligible for the death penalty. Petitioner Bobby Moore was sentenced to death. In a state habeas proceeding, the trial court received affidavits and heard testimony revealing that Moore had significant mental and social difficulties. Starting at age 13, he lacked basic understanding of the days of the week and the months of the year; he could scarcely tell time. Due to his limited abilities, he could not keep up with school lessons. He eventually dropped out of high school after failing every subject in the ninth grade. Based on that evidence, the trial court found Moore was intellectual disabled and was therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). In 2015, the Texas Criminal Court of Appeals reversed. The Supreme Court vacated that decision and remanded for further consideration. *Moore v. Texas*, 581 U.S. ___ (2017). In that opinion, the Court found that Moore had demonstrated intellectual functioning deficits (low IQ scores) sufficient to require consideration of "adaptive deficits." The Court then held that the Texas Court of Criminal Appeals committed five errors in assessing Moore's adaptive deficits: focusing on adaptive *strengths*, not *deficits*; stressing his improved behavior in prison; finding that childhood trauma detracted from a finding of adaptive deficits; requiring Moore to show that his adaptive deficits caused his wrongful behavior; and relying on factors (the "*Briseno* factors") that "had no grounding in prevailing medical practice." On remand, the Texas Court of Criminal Appeals again concluded that Moore was not intellectually disabled because he did not have adaptive deficits. Through a *per curiam* opinion, the Court reversed and remanded.

The Court found that the Texas court "repeats the analysis" the Court had "previously found wanting." Specifically, the Texas court again relied on adaptive strengths; again relied on Moore's improvements in prison; again required Moore to show that his adaptive deficits caused his wrongful behavior; and again used some of the *Briseno* factors. The Court acknowledged that the Texas court's opinion "is not identical to the opinion we considered in *Moore*." But the new opinion "rests upon analysis too much of which too closely resembles what we previously found improper." Chief Justice Roberts filed a concurring opinion to note that, although he dissented in *Moore*, the Texas court plainly failed to abide by the majority opinion. Justice Alito filed a dissenting opinion, which Justices Thomas and Gorsuch joined. In their view, "each of the errors that the majority ascribes to the state court's decision is traceable to *Moore*'s failure to provide a clear rule." The dissent also faulted the majority for engaging in factfinding, which is not the Court's "role."

● *Yovino v. Rizo,* 18-272. Without dissent, the Court summarily held that a federal court may not count the vote of a judge who dies before a decision is issued. Respondent Aileen Rizo sued the Fresno County Office of Education alleging, among other things, that the county violated the Equal Pay Act of 1963. After the district court denied the county's motion for summary judgment, the Ninth Circuit vacated that decision on interlocutory review. The Ninth Circuit then granted en banc review. Judge Stephen Reinhardt authored the en banc opinion, which was issued on April 9, 2018—11 days after his death on March 29. The court's decision noted that all voting was completed and the opinion and all concurrences were final before this death. Had Judge Reinhardt's vote had not been counted, only 5 of 10 living judges would have joined the opinion, making it a non-majority. Through a *per curiam* decision, the Court vacated and remanded.

The Court stated that the Ninth Circuit's view that Judge Reinhardt's vote was "inalterably fixed at least 12 days prior to the date on which the decision was 'filed,'" "is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent." The Court said that it is "not aware of any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released." The Court observed that in a related case concerning a judge taking senior status, it held that a case is determined when it is decided. *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 688-92 (1960). The Court also pointed to 28 U.S.C. §§46(c)-(d), which require a majority of judges authorized to participate to constitute a quorum. The Court stated that it is "aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time." The Court vacated the judgment of the Ninth Circuit for further proceedings, concluding that "federal judges are appointed for life, not for eternity."

● *Nutraceutical Corp. v. Lambert,* 17-1094. The Court unanimously held that the 14-day deadline to appeal a decision granting or denying class certification may not be equitably tolled such that a late appeal is deemed timely. Respondent Troy Lambert sued petitioner Nutraceutical Corporation, alleging that it deceptively marketed a dietary supplement. The court initially granted class certification, but on February 20, 2015 revisited that decision and ordered the class decertified. On March 2 (10 days later), Lambert told the court at a status conference that he wanted to file a motion for reconsideration. The court gave him until March 12 to file the motion; he filed on that date (20 days after the decertification order). The district court denied the motion on June 24. Fourteen days later, Lambert petitioned the Ninth Circuit for permission to appeal the February 20 decertification order. This petition was more than four months after that order. The Ninth Circuit deemed the petition timely. It acknowledged Federal Rule of Civil Procedure 23(f), which requires that a petition for permission to appeal an order granting or denying class-action certification must be filed "within 14 days after the order is entered." But it held that the 14-day deadline should be tolled under the circumstances because the rule "is non-jurisdictional, and . . . equitable remedies softening the deadline are therefore generally available." Such a remedy is appropriate here "because Lambert informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a motion for reconsideration with which Lambert complied." In an opinion by Justice Sotomayor, the Court reversed.

The Court agreed that Rule 23(f) is not jurisdictional, but found that it is not subject to equitable tolling. "The mere fact that a time limit lacks jurisdictional force [ ] does not render it malleable in every respect"; "[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." The Court concluded that "the governing rules speak clearly to the issue of Rule 23(f)'s flexibility and make clear that its deadline is not subject to equitable tolling." The Court noted that the rule's language makes the 14-day limit a condition on seeking an appeal. And the Court observed that Federal Rule of Appellate Procedure 26(b)(1) expressly says that a court of appeals "may not extend the time to file . . . a petition for permission to appeal." The Court also pointed to its precedent holding that courts are prohibited from accepting an untimely notice of appeal. See, *e.g.*, *Carlisle v. United States*, 517 U.S. 416 (1996).

The Court rejected Lambert's three counterarguments. First, it rejected the contention that Rule 26 prohibits only extending the time to file *ex ante*, and doesn't bar courts from excusing late filings for equitable reasons. The Court held that it rejected "an indistinguishable argument in [*United States v. Robinson*, 361 U.S. 220 (1960)]." Second, the Court found unavailing a committee note indicating that a petition may be granted or denied on the basis of any consideration the court of appeals finds persuasive. The Court found that the comment relates to granting a petition on its merits, not accepting a late filing. Finally, Lambert pointed out that courts have accepted petitions for appeal that are filed within 14 days of the resolution of a motion for reconsideration. The Court held that the issue there is the starting point for the 14-day deadline, not the availability of tolling.

II. Cases Granted Review

● *Department of Commerce v. New York,* 18-966. The Court will resolve whether the Secretary of Commerce's decision to include a question about citizenship in the 2020 census violated the Administrative Procedures Act (APA). The Census Act delegates the responsibility to conduct a census every 10 years to the Secretary of Commerce. 13 U.S.C. §141. In March 2018, the Secretary issued a memorandum directing that the census include a question about citizenship status. He reported that this was the result of a request by the Department of Justice related to enforcement of the Voting Rights Act. Eighteen states and various other governmental and non-profit organizations sued, alleging that the Secretary's decision was arbitrary and capricious in violation of the APA and violated the Enumeration Clause. Following much wrangling over discovery (including disputes over whether the plaintiffs could depose the Secretary of Commerce), the district court conducted an eight-day trial. The court then issued a 277-page opinion holding that the Secretary's decision to add a citizenship question violated the APA. 351 F. Supp. 3d 282. The Supreme Court granted certiorari before judgment (*i.e.*, before the Second Circuit could hear the appeal).

The district court held as a threshold matter that the plaintiffs had standing. The court reasoned that a citizenship question would result in a significant reduction in self-response rates among noncitizen and Hispanic households. That would cause the governmental plaintiffs—which have large populations of noncitizens and Hispanics—to lose political representation and federal funding. That would also harm the nongovernment plaintiffs, whose members would receive fewer funds from federal programs. On the merits, the court ruled that the Secretary violated the APA in multiple ways. The Secretary's order was arbitrary and capricious, the court held, because (in New York's words)

"the Secretary had provided explanations that ran counter to the evidence before him, failed to consider important aspects of the problem, and failed to justify extensive departures from required standards and procedures." The Secretary's order was also contrary to law, held the court, because (again in New York's words) "it violated two statutes: one requiring the Secretary to acquire citizenship data using administrative records where possible rather than a direct inquiry to all households, 13 U.S.C. §6; and another precluding the Secretary from altering the topics on the census questionnaire after making a report to Congress unless he first makes and reports certain findings, 13 U.S.C. §141(f)." Finally, the court held that the Secretary violated the APA because his stated rational was pretextual—*i.e.*, wasn't truly based on Voting Rights Act enforcement.

In his petition, the Secretary argues that the plaintiffs do not have standing because any injury is conjectural and hypothetical, and dependent on the unlawful non-response by individuals, which is not fairly traceable to inclusion of the question. He also argues that the decision to include the citizenship question is not reviewable under the APA because the determination "is committed to agency discretion by law." 5 U.S.C. §701(a)(2). The Census Act directs the Secretary to "take a decennial census . . . in such form and content as he may determine," 13 U.S.C. §141(a)—an instruction that fails to "contain[] any 'meaningful standard' to guide the Secretary's determination." Even if it were reviewable, the Secretary argues, the decision is not arbitrary and capricious. He maintains that there is a long history of including a citizenship question, the Secretary considered risks and benefits of the question, and the question is not a pretext but an important item of data for Voting Rights Act enforcement. The Secretary further argues that the district court erred by permitting discovery outside of the administrative record because judicial review of administrative decisions are confined to the record and not the mental processes of the decision maker. The Secretary argues that there was no strong showing of bad faith or improper behavior that would justify opening the review to extra-record material.

● *County of Maui, Hawaii v. Hawaii Wildlife Fund,* 18-260. The Clean Water Act prohibits the "discharge of any pollutant" unless authorized by a permit issued in accordance with the Act. The Act defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." At issue is whether, as the Ninth Circuit held here, the Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." Petitioner operates a wastewater reclamation facility. Treated wastewater known as effluent is injected into wells; the effluent then immediately mixes with groundwater and disperses. The groundwater, like nearly all groundwater in Hawaii, migrates toward the ocean. Respondents sued, alleging that the injection of effluent without a permit violates the Act. Petitioner defended on multiple grounds, including that the wells are not a point source because the effluent enters ground water, not navigable water. The subsequent migration of groundwater to the ocean, it claimed, is nonpoint source pollution that falls outside the permitting requirement. The district court granted summary judgment for the respondents, finding that the wells are point sources that indirectly discharge a pollutant into the ocean. The Ninth Circuit affirmed. 886 F.3d 737.

The Ninth Circuit held that "an indirect discharge from a point source to a navigable water suffices for CWA liability to attach." The court relied on Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), stating that "Justice Scalia recognized the CWA does not forbid

the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" Based on that reasoning, the court held petitioner liable under the Act because "(1) [it] discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*." Petitioner faults "the Ninth Circuit's radical expansion of point source permitting beyond the scope long given by this Court and several courts of appeals." It argues that the statutory language creates a clear rule: "the difference between point source and nonpoint source pollution should turn on whether the pollution is 'conveyed' by one or more point sources into navigable waters." And it insists that "there are numerous other regulatory programs that address nonpoint source pollution, including groundwater pollution and its effects on navigable waters." Petitioner also points to practical problems with the court's approach, such as the difficulty of measuring indirect pollution sources.

● *Rotkiske v. Klemm,* 18-328. At issue is whether the statute of limitations under the Fair Debt Collection Practices Act (FDCPA) begins to run at the time of a violation or at the time of discovery of the violation. Petitioner Kevin Rotkiske had credit card debt. The debt was referred to respondent for collection. Respondent sued for the credit card debt and obtained a judgment. Rotkiske asserts that he was unaware of the collection effort and discovered the judgment years later when he applied for a mortgage. He sued respondent for alleged violations of the FDCPA. Respondent moved to dismiss under the FDCPA statute of limitations, which provides that an action for liability may be brought "within one year from the date on which the violation occurs." 15 U.S.C. §1692k(d). Rotkiske argued that a discovery rule implicitly applies. The district court disagreed and dismissed the case, holding that the statute of limitations began to run at the time of the violation under the "actual statutory language." The Third Circuit affirmed, stating that "the Act says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.'" 890 F.3d 422.

Rotkiske argues that the Third Circuit's decision conflicts with Fourth and Ninth Circuit decisions applying the discovery rule to the FDCPA. On the merits, he contends that *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), counsels in favor of applying a discovery rule. There, the Court ruled that the Fair Credit Reporting Act is not subject to a discovery rule because it contained a provision expressly providing for the discovery rule in one discrete situation (implicitly meaning the discovery rule did not otherwise apply). Rotkiske argues that the FDCPA does not contain a similar embedded discovery exception, so a general discovery rule should apply.

The Supreme Court Report is published biweekly during the U.S. Supreme Court Term by the NAAG Center for Supreme Court Advocacy.

SUPREME COURT CENTER STAFF

Dan Schweitzer
Director and Chief Counsel
NAAG Center for Supreme Court Advocacy
(202) 326-6010

Michael S. Murphy
Supreme Court Fellow
(202) 326-6265

Karli Eisenberg
Supreme Court Fellow
(202) 326-6048