

The Criminal Justice Section
of the
American Bar Association

2020 Annual Meeting, August 4, 2020
Via Zoom during the Pandemic Lockdown

ANNUAL REVIEW
of the
SUPREME COURT'S TERM,
CRIMINAL CASES
(2019-2020)

Summaries of all Opinions (including Concurrences and Dissents),
in argued and non-argument cases and Orders;
certiorari grants for the upcoming Term;
a chart of “Who Wrote What;”
and a brief Overview of the Term,
regarding all
Criminal Law and related cases before the U.S. Supreme Court
October Term 2019 (Oct. 2019-July 2020)
(with clickable links to the cases)

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**CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
2019 “Pandemic” Term (Oct. 2019- July 2020)**

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VI. Criminal Law Certiorari grants for next Term (OT '20)

VII. CHART: Who wrote What in OT '19

The ABA's Criminal Justice Section proudly presents a panel discussion:

**Annual Review of the
Criminal Law (and Related) Opinions of the
United States Supreme Court
Issued During the October 2019 Term**

**2020 Annual Meeting Panelists
(Remote by Zoom – August 4, 2020)**

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Brief Overview of the 2019-20 Term, Criminal Cases

DRAFT outline:

First, a truly unprecedented Term – the (hopefully singular) “Pandemic Term.” Two months of arguments cancelled; 12 cases “kicked over” to next Term. Ten oral arguments in May (usually end in April). Conducted by telephone (note: still no video). And most unusually, **live contemporaneous audio** of all the May arguments. Gave oral arguments a very different “feel” (questions in order or seniority; no visual of Justices or advocates faces; AND Justice Thomas questioned far more actively than ever before. Shows that he means it when he has said that he doesn’t ask questions because he doesn’t like interrupting lawyers. In May, no need to interrupt, and plenty of time (except for Breyer, smile) to ask questions.

Finally, decisions issued right up through July 9, the latest end of Term in ___ years (decades).

Stats: very low number of cases, 61 “merits” decisions, only 53 “signed.” So less than seven majority opinions per justice – don’t most trial and appellate judges wish they had such an essay job!

On the merits:

“Big” cases. Trump “Presidential subpoena” cases. And it turns out one of the hardest and most interesting cases of the Term was one in which the result was simple and easy: Ramos. Unanimity requirement for criminal jury convictions; yet odd split of Justices, many separate

opinions, and huge debate regarding *stare decisis*. Pretty clearly the Justices are trying to sort out, and stake out, their views on that topic prior to having to spell it them out in the actual case – which is coming soon we think – asking for overruling of *Roe v. Wade*.

Others: Hernandez (and why immigration is so important to criminal law). Kahler. Glover. Kelly. McKinney.

And don't forget McGirt: Native American law BUT case is about who has criminal jurisdiction, State or federal. Huge impact, and a complicated jurisdictional area.

And others. Monosky. Lomax. Banister.

A VERY unusual number of opinions filed in connection with Orders. In particular (as others have noted, Vladek), the Court has allowed a large increase in the number of “Stays” that it grants, and opinions in connection with those have accordingly also increased.

And cert grants for next year, some big ones. And the final page, a Chart showing workload in a different, graphic way: “Who Wrote What” opinions.

LAST YEAR'S OVERVIEW:

What we now know is that, contrary to the general picture of the prior Term, the Justices divided in a remarkably large number of different variations. Overall, there were 57 argued cases (as of 7/5/2020, including *Chiafalo*, *Baca*, *McGirt* and *Trump x3*), plus 2 summary reversals (*Andrews* and *Davis*), for a total of 59 (as of 7/5/2020, excluding *Walker* and *Mathena*). I count 30 of the 59 as “criminal law and related,” or 30 of the 59 argued. Of the 59, there were 7 decisions decided by a 5-4 vote – and of these, there were **10 different variations of which Justices made up the five**. This is an unusually high number. It seems that the current Justices are still trying to find their way, and (happily) are not cemented to always-predictable results. I count 7 of the 5-4 decisions as criminal; in two of those the “liberal” bloc prevailed. If we think of the four liberal Justices as Ginsburg, Breyer, Sotomayor and Kagan, the question becomes: **who was the fifth Justice? Interestingly, it was Gorsuch in three, Roberts in one, and Alito in one.** (Kavanaugh was not the fifth vote in any 5-4 liberal criminal win, but he did write the **strong majority opinion in *Flowers*, see below, a pro-defendant *Batson* death penalty decision.**)

Justice Gorsuch's pro-defense votes in at least four cases (*Davis* and *Haymond*, plus dissents in *Gamble* and *Mitchell*) indicate that he continues the “libertarian” streak that his predecessor Justice Scalia sometimes exhibited. At the same time, Justice Gorsuch's majority opinion in *Bucklew*, a death penalty case in which he boldly wrote that “last-minute stays should be the extreme exception,” demonstrates a strong pro-government position on capital punishment. Interestingly, despite their common appointment source, Justices Gorsuch and Kavanaugh did not always agree (they had only a 56-70% overall agreement rate), and were on opposite sides in six or more criminal cases. Is there a lesson here? Wait and see, is my advice.

Substantively, because **23 of the 56 argued cases (or 25 of the 72 total) were criminal law-or-related decisions**, we can see that over a third of the docket is “criminal.” This is about normal for the Supreme Court's docket. With 25 criminal-and-related decisions, of which I'd

say 17 were “pure criminal,” there is a lot to digest (as the following 38 pages demonstrate). Only a few highlights can be summarized here.

What was the “biggest” criminal law decision of the Term?

Our fantastic panelists will have more to say about these cases, as well as others not mentioned here. A video of the session may also be available on the Criminal Justice Section’s [website](#). Stylistically, I hope that the “clickable” links in the electronic version of this booklet are useful to you: to get an electronic copy, please email Professor Little or the staff at the Criminal Justice Section. I am always grateful to the ABA and the Criminal Justice Section -- and most prominently to its hard-working and unheralded staff – for the opportunity to organize this panel every year. Kevin Scruggs, our Executive director, is an active thinker as well as doer; feel free to email him with any questions or concerns. Meanwhile, Carol Rose has been staffing this panel for, I think, about 20 years. Please thank her if you have occasion to see her at any number of great Criminal Justice Section events. The [website](#) for the Criminal Justice Section can give you a wealth of information.

I look forward to sharing more fascinating and significant rulings with you next summer. Meanwhile, remember to “Do Justice” in whatever you do!

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Explanatory Notes for these Materials

In the pages that follow, we provide detailed summaries of all of the U.S. Supreme Court’s criminal law decisions (and civil cases that the author deems “related”) that were issued during the most recent Term of the Court, grouped by subject matter. **For a quick review** of the Term’s work, the “Detailed Table of Contents” provides one-sentence descriptions for each decision and the later page number where its more detailed summary is located.) Some decisions address more than one subject, and the lead author has placed them in the category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how doctrine and the Justices’ thinking develop as a Term progresses.

The goal of these summaries is to be broadly inclusive for the fully-informed criminal law practitioner. For this reason, civil cases that even mildly relate to criminal law topics or fact-areas are included. For example, we include civil “qualified immunity” cases, securities law cases, and immigration law decisions, because such “civil” issues often arise in a criminal context, or they can be useful for applying the criminal law (if not immediately, then in the future). The similarities between civil securities fraud and criminal fraud are (or should be) well-known to the competent criminal lawyer.

Each summary below begins with the case name, its date and publication cite, the Justices' votes, who wrote what type of decision within the case, and citation to the lower court's opinion. A "**Headline**" description of the holding is then immediately provided. Then follows a somewhat detailed summary of the case's facts, majority opinion(s), and any separate opinions (concurrences as well as dissents). We believe that all the opinions in any case, including concurrences and dissents, are necessary to have a sophisticated understanding of what the case does, or does not, hold – as well as to see what issues are reserved or are likely to be addressed in future cases.

In each summary, the name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. While we try to be succinct, providing an accurate representation of each opinion's content is the goal, rather than "sound-bite" brevity. Sometimes we **bold certain important phrases** in the summaries, to aid the time-pressed "skimming" reader. We also try to use quotes from the decisions (not just paraphrases) wherever possible, because we firmly believe that the words of the Justices themselves best reflect the substance of their opinions. Finally, comments that appear in [brackets] are the (sometimes opinionated) thoughts of Professor Little, not the Court's. We signal most of these with a bolded "[**Ed. note...**]," unless that signal interferes with the "flow" of the summary.

Following the Summaries of Opinions in argued cases, we provide brief descriptions of interesting dissents or concurrences regarding Orders issued this Term (most often, dissents from denial of *certiorari* or from stays of executions).

At the end of this booklet, we provide a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, so that you can get a preview of what may be coming. Finally, the last page of this booklet is a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions) in criminal and related cases. This can provide a useful "snapshot" of which Justices are writing, what sort of opinions they are spending their time on, and how much work they are devoting, in the field of criminal law.

These materials are the product of Professor Little alone (with drafting assistance from his research assistant). Professor Little, not the ABA or the panelists, bears full responsibility for any errors, and opinions expressed. Please be aware that even in "quoted" sentences, minor changes from the Court's original opinion may have been made for ease of reading or understanding. For example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation and even verb tenses or singular-plurals, as well as other non-substantive changes, may have been made. Finally, remember that what follows are merely **summaries**. **Readers should always review the actual opinions in full** and arrive at their own interpretations, rather than rely on the Editor's.

The Detailed Summaries follow on the next page.

**DETAILED SUMMARIES of the COURT'S
CRIMINAL LAW (and related) OT 2018 OPINIONS**

I. CONSTITUTIONAL DECISIONS

A. ARTICLE II

[Chiafalo v. Washington](#), together with *Colorado v. Baca* (July 6, 2020), 9 (7-1-1) to 0 (**Kagan**; *Thomas* concurring in the judgment, joined in Part II only by Gorsuch), [affirming](#) 193 Wash. 2d 380 (2019) and [reversing](#) 935 F.3d 887 (10th Cir. 2019).

Headline: A State may enforce an elector's pledge to vote for the candidate that is the choice of the State's voters, **by imposing legal sanctions on a "faithless" Elector.**

Facts: In this case and its companion case, *Colorado v. Baca*, persons selected as Presidential "Electors" were fined and referred for criminal investigation for voting, or announcing that they intended to vote, for a Presidential candidate different from the one that they were pledged to vote for. Chiafalo and two other Washington electors were fined \$1,000; Baca was removed as an elector and referred to the State Attorney General for potential criminal perjury charges. The Washington Supreme Court affirmed the sanctions; but the Tenth Circuit ruled that sanctions were invalid because (the Court said) the Constitution provides that electors can vote "with discretion."

Kagan (for 7): The Constitution's Article II, sec. 1, cl. 2, reflects an "eleventh-hour compromise" that produced the indirect "Electoral College" method of selecting the President. It says that "**Each State shall appoint, in such Manner as the Legislature thereof may direct, ... Electors.**" The Twelfth Amendment left Electors to "**vote by ballot**" but separated the President from the Vice-President in "distinct ballots." The "party system" gradually "became the means of translating popular preferences within each State into Electoral College ballots. ...[B]allots increasingly did not even list the electors, and the party whose candidate was preferred by voters appointed electors pledged to support that candidate." Most states now prohibit "faithless" elector voting, and 15 states have "sanctions-backed pledge laws."

In *Ray v. Blair* (1952), we upheld State laws that mandated Electors to pledge to vote for the State's selected candidate. But we reserved the question whether legal sanctions for violating such pledges might violate an elector's "constitutional freedom" to "vote as he may choose." Today we answer the question and "uphold Washington's penalty-backed pledge law." States have "far-reaching authority over presidential electors, absent some other constitutional constraint." Nothing in the constitution's text prohibits this – "The Constitution is barebones about electors." And three words in the Constitution – Electors, vote, and ballot – "do not connote independent choice" – "they can signify a mechanical act." Even if some Framers "shared that outlook," they "did not reduce their thoughts ... to the printed page." And "almost immediately, electors became trusty transmitters of other people's decisions." Over time, there have been only "180 faithless votes ... out of over 23,000" (and over one-third came in 1872, when the Democratic nominee Horace Greeley died just after Election day). And "faithless votes have never come close to affecting an outcome." The Elector's argument "has neither text nor history on its side." "[H]ere, We the People rule."

Thomas concurring in the judgment (Gorsuch joins only Part II): I would resolve this case on Tenth Amendment grounds, that "all powers" not delegated to the federal government

nor prohibited to the States “are controlled by the people of each State” (Thomas, dissenting, in *U.S. Term Limits v. Thornton*, 1995). The Court’s “cursory analysis ... erroneously conflates” the duty of States to appoint Electors with the granting of a power to sanction.” The pledge-penalty laws “have nothing to do with elector appointment,” and Article II does not answer this case.

[Part II, joined by Gorsuch]: “When the Constitution is silent, authority resides with the States or the people.” This is clear from the structure and history of the Constitution as well as the text of the Tenth Amendment. I would affirm the States’ power here “based on that fundamental principle.”

Trump v. Vance, District Attorney, 140 S.Ct. ____ (July 9, 2020), 7 (5 +2) to 2 (**Roberts** for 5; *Kavanaugh* concurring in the judgment with Gorsuch; Thomas dissenting; Alito dissenting), **affirming and remanding** 941 F.3d 631 (CA2 2019).

Headline: The Constitution (Article II; the Supremacy Clause) do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

Facts: In 2019, the Manhattan, NY, DA, Cyrus Vance Jr., served a grand jury documents subpoena on the accounting firm (Mazars) for Donald J. Trump, seeking documents including Trump’s tax returns, “from 2011 to the present,” for a criminal investigation. “Acting in his personal capacity,” Trump sued the DA in federal court, arguing that under the Constitution, a President while in office should be absolutely immune from such subpoena. (The accounting firm took no position.). The district court dismissed, citing *Younger* (1971) abstention, but ruled in the alternative that the President was not entitled to an injunction. The U.S. Solicitor General joined the suit as amicus, arguing that at least a “heightened standard” should apply. On appeal, the Second Circuit ruled that federal court abstention was not required, but it affirmed denial of an injunction, saying that a document request relating to records “solely to the President in his personal capacity” could be subpoenaed in the normal course with no heightened standard.

Roberts (joined by Ginsburg, Breyer, Sotomayor & Kagan): We affirm, and remand for further proceedings regarding whether the subpoena should be enforced. “The public has a right to every man’s evidence” and that has included the President “since the earliest days of the Republic.” In 1807, Chief Justice John Marshall enforced (as Circuit Justice) a subpoena directed at President Thomas Jefferson in the Aaron Burr prosecution. At least five “successive Presidents have accepted Marshall’s ruling.” And in 1974, this Court enforced a subpoena against President Nixon for the Watergate tapes (*Nixon* 1974), and the President complied.

We reject any claim of absolute immunity. Of course a State has “no power to impede the President’s execution” of federal laws. But we do not think any *categorical* rule against State criminal grand jury subpoenas follows. It would not distract so much from official duties, “if properly managed” by a supervising court, that absolute immunity is required (see *Fitzgerald* 1982; *Clinton v. Jones* 1997). Trump “concedes ... that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term.” A subpoena’s “additional distraction” will be, we think, “light[.]” Nor does “stigma” support absolute immunity, even if “the consequences” of compliance may be damaging. A subpoena itself does not “magnify the harm,” and “longstanding rules of grand jury secrecy” will also shield the President.

Finally, we rejected the “harassment” argument in *Clinton*, and normal court supervision can “protect against predicted abuse” – and federal courts can intervene “where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith” (*Huffman*, 1975). “Any effort to manipulate a President’s policy decisions or to retaliate against a President ... through issuance of a subpoena, would ... be an unconstitutional attempt” and “[w]e generally ‘assume[] that state courts and prosecutors will observe constitutional limitations.’” Significantly, on the rejection of absolute immunity, “the Court is unanimous.”

Neither is a “heightened standard” of “critical need” categorically required, when the subpoena is for “private papers” as opposed to those protected by Executive privilege. Again we see no “unwarranted burdens” if the subpoena is properly supervised. Public interests are served by the grand jury process, and if necessary, “a President may avail himself of the same protections available to every other citizen.” And as we said in *Clinton*, “the high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding.” Moreover, “a President can raise subpoena-specific constitutional challenges, in either a state or federal forum;” and a court can “use its inherent authority to quash or modify the subpoena” to prevent undue interference with Presidential duties.\

In conclusion, “no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding.” The case is “returned to the District Court, where the President may raise further arguments as appropriate.” (And on this point, there is not that much “daylight” between our opinion and Justice Thomas’s.)

Kavanaugh, concurring with Gorsuch: We agree with the unanimous court that “a President does not possess absolute immunity from a state criminal subpoena,” and also that the case must be remanded for further proceedings. “This Court has often stated, no one is above the law. That principle applies, of course, to a President.” Still the President is “no ordinary litigant,” and we think that the higher standard of “demonstrated, specific need” for documents, from *Nixon* (1974), should apply. The majority does not say this, but its opinion does say that many of the same concerns should be taken into account. We think these are Article II concerns, not just statutory or practice concerns. But “in the end, much may depend on how the majority opinion’s various standards are applied in future years and decades. It will take future cases to determine precisely how much difference exists.”

Thomas dissenting: While I agree with the Court that the President has no absolute immunity from “*issuance*” of a subpoena – which unlike the majority I believe is clear from the text and original understanding of the Constitution – the President “may be entitled to relief against its *enforcement*.” I draw this distinction from the 1807 *Burr* decision. Thus we should vacate, not affirm, and then remand. Enforcing courts must “take pains to respect the demands on the President’s time” and not “conduct a searching review of the President’s assertion that he is unable to comply.” [A lengthy historical and textual exegesis and functional discussion of a strong Executive role is omitted here.]. I reject (n.3) any “heightened standard” because that is “logically independent” of the impact of a subpoena on the President’s performance.”

Alito dissenting: Our decision is not restricted to “the current President” and it will affect “all future Presidents,” so it is “a matter of great and lasting importance to the Nation.” First, the “nature and role of the President” is very important, and singular. Second, States cannot constitutionally interfere with the federal government, see *McCullough* (1819, enjoining a State tax on the federal bank). Thus a scenario in which a sitting President can be prosecuted is

“farcical.” As in *Fitzgerald*, we should adopt a rule regarding state grand jury subpoenas “for all such cases,” not case by case. We know that subpoenas can burden a President in performing his important duties; and that they could be used by the over 2,300 state and local prosecutors around the nation for harassment. So at the very least, a “critical and urgent need” for subpoenaed documents should be demonstrated, before one is enforced. [Alito proposes a three-part test, page 18.]. There are strong reasons to question the particular subpoena in this case. Without a strong heightened test, “the opinion of the Court provides no real protection for the Presidency.” In prior cases, the “usual procedures” have in reality been altered for Presidents. A “sitting President” should not be in the “unenviable position” of normal folks whose documents are subpoenaed [ed note: recall that Alito is a former hard-charging federal prosecutor with much grand jury experience]. The Court’s decision will “allow[] a State’s prosecutorial power to run roughshod over the functioning of a branch of the Federal Government.” This “unprecedented” subpoena “threatens to impair the functioning of the Presidency.”

[Trump v. Mazars USA, LLP, et al.](#), 140 S.Ct. ____ (July 9, 2020), 7 to 2 (**Roberts**; Thomas dissenting; Alito dissenting), **vacating and remanding** 940 F.3d 710 (CADDC 2019) and 943 F.3d 627 (CA2 2019).

Headline: While a President is not immune from Congressional subpoenas, in this case the lower courts did not take adequate account of the significant separation of powers concerns, so the decision below is vacated and remanded for further consideration under our analysis.

Facts: In 2019, three different House of Representatives Committees issued subpoenas to third-parties for documents relating to “a decade’s worth of transactions by the President and his family.” While differing in their details, the Committees said the documents would “help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U.S. elections.” The President (and his family) “in his personal capacity” and without invoking any Executive privilege, filed lawsuits to enjoin enforcement. The third-party firms took no position, and the House intervened to defend its subpoenas. The district courts rejected the President’s arguments and the Circuits affirmed.

Roberts (for 7): “We have never addressed a congressional subpoena for the President’s information.” Instead, “the political branches” have always “hashed out” their disputes “in the hurly-burly, the give-and-take of the political process,” without our involvement. It has been “a tradition of negotiation and compromise.” This began with George Washington [an interesting historical discussion is omitted]. We have “a duty of care to ensure that we not needlessly disturb ‘the compromises and working arrangements that [those] branches ... have reached.’” Although Congress has “no enumerated power” to issue subpoenas, we have ruled that they may “secure needed information in order to legislate.” But a congressional subpoena must “serve a valid legislative purpose,” and cannot be issued for a purpose of “law enforcement” because that is an Executive, not Legislative, role – there is no Congressional power merely to “expose” or to “punish.” Moreover, normal evidentiary rules, such as attorney-client and executive privileges, apply.

We reject the “categorical” argument that the higher, “demanding standards” of *Nixon* (1974) and Executive privilege cases apply here. The President has not asserted a privilege challenge. But neither should this case be treated just “like any other” – that approach “fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President’s information.” Unlike private parties, the President and Congress

have “an ongoing institutional relationship” and the considerations “differ markedly.” Congress cannot have a “limitless subpoena power” when it comes to the President. That the subpoenas here involved only “personal papers” does not reduce the political danger. Nor does it matter that the subpoenas were directed to third-parties—it is “an interbranch conflict no matter where the information is held.”

So “A balancing approach is necessary,” and “courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake.” Here are four “special concerns” to consider, although “other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.”

First, “if other sources could reasonably provide Congress the information it needs,” then the President should not be used as a “case study” for Congressional inquiries. Second, a Congressional subpoena for a President’s records “should be no broader than reasonably necessary.” Third, courts must be “attentive” to whether there is “detailed and substantial evidence” of a valid legislative purpose. And fourth, “courts should be careful to assess the burdens imposed on the President,” because a Congressional subpoena could be used to gain “institutional advantage” by Congress. “The courts below did not take adequate account of those concerns,” so the Circuit judgments are “vacated, and the cases are remanded for further proceedings consistent with this opinion.”

Thomas dissenting: “I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not.” Moreover, if Congress wants such documents to investigate a President, “it must proceed under the [Constitution’s] impeachment power.”

“The power to subpoena private, nonofficial documents” was not understood to be “necessary and proper ... at the time of the founding.” Instead, it was not perceived by this Court until *McGrain* (1927); and Congressional subpoenas in general were not recognized by this Court until *Kilbourn* (1881), and that case rejected congressional “investigative” subpoenas. The British view of “parliamentary supremacy” was not adopted here; Constitutional text that forbids certain things to Congress makes this clear. Even in 1827, congressional subpoenas for private, unofficial documents was viewed as “unprecedented.” The functional analysis “in *McGrain* lacks any foundation in text or history with respect to subpoenas for private, nonofficial documents.” [Much historical discussion is omitted here.]

Alito dissenting: While “Justice Thomas makes a valuable argument,” I will “assume” that subpoenas like these “are not categorically barred.” Still issuing such subpoenas to a President is “inherently suspicious” and “courts must be very sensitive to separation of powers issues.” “Congress should be required to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing.” Here, “there is disturbing evidence of an improper law enforcement purpose.” Congress must “show more than has been put forward to date.” “Because I find the terms of the Court’s remand inadequate, I must respectfully dissent.”

B. FIRST AMENDMENT

Agency for Int’l Development et al. v. Alliance for Open Society Int’l, ___ S.Ct. ___ (June 29, 2020), 5 (4-1) to 3 (**Kavanaugh**; *Thomas* concurring; Sotomayor dissenting; Kagan recused and took no part in the decision), reversing 911 F.3d 104 (2nd Cir. 2018).

Headline:

Facts:

C. SECOND AMENDMENT

New York State Rifle & Pistol Assn., Inc. v. City of New York, 140 S.Ct. 1525 (April 27, 2020) (*per curiam* (6 (5+1) to 3); *Kavanaugh* concurring; *Alito* dissenting with Gorsuch (and Thomas except for Part IV-B), *vacating* 883 F.3d 45 (2nd Cir. 2018).

Headline: Certiorari is dismissed as moot in Second Amendment challenge to New York City gun transportation regulation after State and City laws were changed.

Per curiam (for 6): Because the case is now moot, the decision below is vacated and remanded for “such proceedings as are appropriate.” This is “our ordinary practice” (*Diffenderfer*, 1972). “On remand, the [lower courts] may consider whether petitioners may still add a claim for damages in this lawsuit with respect to New York City’s old rule.”

Kavanaugh, concurring: “I agree with the per curiam opinion’s resolution.” But “I also agree with Justice Alito’s general analysis of *Heller* and *McDonald*” and “I share [his] concern that some federal and state courts may not be properly applying” those decisions. “This Court should address that issue soon.”

Alito dissenting, with Gorsuch, and Thomas except for Part IV-B: The Court “incorrectly” dismisses this case as moot, and “permits our docket to be manipulated.” The changes in law were done only after we granted review. But that does not mean it is “*impossible*” for [the lower] court to grant *any effectual relief whatever*” (*Chafin*, 2013). The changes do not give petitioners all the injunctive relief they sought; and damages for past violations might be awarded in any case. Petitioners sought “*unrestricted* access” to shooting facilities outside the City limits; but the new law allows only “continuous and uninterrupted” travel, permitting only “reasonably necessary” stops (such as bathroom and coffee shop breaks). Also, if the old law violated the Second Amendment, petitioners could win “nominal,” and perhaps even compensatory, damages. On the merits, that the law violated the Second Amendment is “not a close question.” [Alito’s theory of the 2nd A is then offered.] The lower court accepted the City’s justifications “with no serious probing.” I would reverse and remand for appropriate relief under a correct constitutional analysis.

D. FOURTH AMENDMENT

Hernandez v. Mesa, 140 S.Ct. 735 (Feb. 25, 2020), 5 to 4 (**Alito**; *Thomas* concurring; *Sotomayor* dissenting), *affirming* 885 F.3d 811 (5th Cir. 2018).

Headline: Even if no other remedy at law exists for an allegedly unconstitutional shooting death of a juvenile across the border by a federal agent, **no claim for damages under *Bivens* (1971)**, arising directly under the Fourth and Fifth Amendments, will be recognized.

Facts: In this “tragic case,” a 15-year-old Mexican national, Sergio Adrian Hernandez Guereca was with a group of friends (either playing, or throwing rocks) in a concrete culvert that separates El Paso, Texas from Ciudad Juarez, Mexico. Federal Border Patrol Agent Mesa detained one friend, and then shot and killed Hernandez as Hernandez in the Mexican area. Hernandez was unarmed and, it was alleged (which must be taken as true at this stage, “no threat to Mesa or others.” The killing became an “international incident”: the United States refused to extradite the Agent for legal proceedings, and determined that the Agent should not be disciplined or charged. No U.S. criminal proceedings were filed. So Hernandez’s parents sued Mesa in federal court for damages under *Bivens* (1971), alleging that Agent Mesa had violated Hernandez’s Fourth and Fifth Amendment rights. The District Court granted Mesa’s motion to dismiss and the Fifth Circuit twice affirmed. The court initially ruled that Mesa was entitled to qualified immunity on Hernandez’s Fifth Amendment claim, and that the Fourth Amendment did not apply to Hernandez because he had “no significant voluntary connection to the United States and was on Mexican soil at the time he was shot.” We remanded the case for reconsideration in light of *Ziglar v. Abbasi* (2017), saying it was “imprudent” to resolve the Fourth Amendment question without addressing the applicability of “*Bivens* in the first instance.” The Fifth Circuit then ruled that *Bivens* should not apply in this “new [international] context.”

Alito: *Bivens* is the “product of an era when the Court routinely inferred causes of action that were not explicit in the text.” *Bivens* found a right to sue federally under the 4th Amendment; *Passman* (1979) under the 5th; and *Carlson* (1980) under the 8th. However, we have since recognized the “tension between this practice and the Constitution’s separation of legislative and judicial power.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) held that “[t]here is no federal common law” and “therefore federal courts today cannot fashion new claims.” Finding that a damages remedy is implied by a text that makes no reference to that remedy may “upset the careful balance of interests struck by the lawmakers” and “risks arrogating legislative power.” Thus we have stated that “extension of *Bivens* is “a disfavored judicial activity” (*Abbasi*, quoting *Iqbal*, 2009).”

Thus, before we extend *Bivens*, we engage in a two-step analysis. First, does the claim arise in a “new context” or involve a “new category of defendants.” Second, if so, are there “any special factors that counsel hesitation.” “[I]f we have reason to pause We reject the request.”

This case is “assuredly ... a new context.” There is a “world of difference” in this international context, where “the risk of disruptive intrusion by the Judiciary into the functioning of other branches” is significant. For example, “we presume that Border Patrol policy and training” reflects the Executive’s understanding of the constitution and assessment of the international situation. “Both the united States and Mexico have legitimate and important interests,” and “it is not our task to arbitrate between them.” Moreover, “there are multiple, related factors that raise warning flags:” a potential effect on foreign relations, and issues that implicate national security. Congress has already taken steps in related areas – refraining from authorizing damages actions for injury inflicted abroad by Government officers, while providing some alternative avenues for compensation – gives us further reason to hesitate. “The most important question is who should decide” to provide a damages remedy.... The correct answer most often will be Congress” and “that is undoubtedly the decision here.”

Thomas concurring with Gorsuch: I join the Court’s opinion, and write separately to say that “**the time has come to consider discarding the *Bivens* doctrine altogether.**” It is a “misguided approach” and a “usurpation of legislative power.” “For nearly 40 years, the Court

has ‘consistently refused to extend *Bivens* liability to any new context or new category of defendants.’ “Nothing is left to do but overrule” *Bivens*.

Ginsburg dissenting with Breyer, Sotomayor, and Kagan: “Rogue U.S. officer conduct falls within a familiar, not “new,” *Bivens* setting. *Bivens* itself involved allegations of “rogue federal law enforcement. And even if it were new, the lack of “alternative remedies” counsel for it and “no ‘special factors’ counsel against” it. This is a domestic, not international, question: “plaintiffs seek the application of U.S. law to conduct occurring inside our borders. *Abassi* is not to the contrary; the Court expressly stated that its opinion was “not intended to cast doubt on the continued force, or ... necessity, of *Bivens* in the search-and-seizure context.”

Plaintiffs here allege “the rogue actions of a rank-and-file law enforcement officer acting in violation of rules controlling his office.” And “the purpose of *Bivens* is to deter the officer.” This damages action would be the same if the bullet, fired from the U.S., had struck Hernandez on the U.S. side of the border – it would be the application of regular federal judicial standards. Moreover, courts routinely address, “concurrently with whatever diplomacy may” be ongoing, activities like cross-border smuggling that also spark bilateral Mexico-U.S. discussions. This would also “honor our Nation’s international commitments” under the International Covenant on Civil and Political Rights” which the U.S. has ratified. Indeed, “[w]ithholding a *Bivens* suit here threatens to exacerbate bilateral relations.” “Regrettably, the death of Hernandez is not an isolated incident; ... One report reviewed over 800 complaints of alleged physical, verbal, or sexual abuse lodged against Border Patrol agents between 2009 and 2012.” Former Customs and Border Patrol amici say that no one has ever been extradited for trial in Mexico. “[I]t is *Bivens* of nothing.”

Kansas v. Glover, 140 S.Ct. 1183 (April 6, 2020) 8 (6-1) to 1 (**Thomas**; *Kagan* concurring with Ginsburg; *Sotomayor* dissenting), reversing 308 Kan. 590 (Kan. 2018).

Headline: Applying the Fourth Amendment, **it is not unreasonable for an officer to infer that the registered owner of a car is the current driver of that car** (absent information negating the inference), and to stop the car when a license plate check says the registered owner has a suspended license.

Facts: Glover was charged with being an “habitual offender” when he was found driving with a revoked license. His motion to suppress alleging an unconstitutional stop of the car, proceeded on the following stipulated facts without an evidentiary hearing: A deputy sheriff ran the license of a truck, and it showed the owner, Charles Glover, had revoked license. Assuming that the driver was Glover, the deputy stopped the truck without any further investigation or other traffic violation. Glover was indeed the driver.

The state trial court granted suppression, the intermediate court reversed, but the Kansas Supreme Court reinstated suppression, ruling that the deputy’s assumption was “unreasonable without further factual basis.” Over a dozen state and federal courts had split on the reasonableness of an assumption that the driver of a car is likely the registered owner.

Thomas (for 8): The Fourth Amendment permits “seizures” based on “reasonable suspicion” (*Terry*, 1968), and “[a]lthough a mere ‘hunch’ does not create reasonable suspicion,” [it] requires “considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause” (*Navarette*, 2014). Law enforcement

may “make ‘commonsense judgments and inferences about human behavior,’ and “need not rule out the possibility of innocent conduct.” Applying these standards, the deputy’s suspicion that the registered owner was “likely” driving his car at that time, was reasonable. “The fact that the registered owner of a vehicle is not always the driver” does not undercut this; “the reasonable suspicion inquiry ‘falls considerably short’ of 51% accuracy.” Moreover, “empirical studies demonstrate what common experience readily reveals: drivers with revoked licenses frequently continue to drive,” posing safety risks.” “Officers, like jurors, may rely on probabilities.” And “the State’s license-revocation scheme covers [**ed. note: not** “is limited to”] drivers who have already demonstrated a disregard for the law....” These facts “lend further credence to the inference that a registered owner with a revoked Kansas driver’s license **might be** [emphasis added by the Editor] the one driving the vehicle.”

Whether the deputy had “training and experience” to support his commonsense inference is irrelevant; this was “a reasonable inference made by ordinary people on a daily basis.” Requiring (as opposed to permitting) every officer to testify as to training and experience “defies the ‘common sense’ understanding of common sense.” And the officer here did have “individualized suspicion,” not (as the dissent asserts) “demographic” profiling.

“We emphasize the narrow scope of our holding.” Because the 4th Amendment takes into account “the totality of the circumstances” (*Navarette*), “the presence of additional facts might dispel reasonable suspicion.” But the deputy here had no “information to rebut the reasonable inference that Glover was driving his own truck.”

Kagan, concurring, with Ginsburg: Although “[f]amilies share cars [and] friends borrow them,” it is not unreasonable to assume that the driver of a car is its registered owner. But when you add the fact that the owner’s license has been revoked, “what are the odds that someone who has lost his license would continue to drive?” “[L]et’s be honest, you just wouldn’t know. ... If you’ve not had your own license taken away, your everyday experience has given you little basis to assess the probabilities. Your common sense can therefore no longer guide you.” Yet “crucially for me,” the deputy here “knew one more thing:” that “Kansas almost never revokes a license except for serious or repeated driving offenses,” so in Kansas “a person with a revoked license has already shown a willingness to flout driving restrictions.” I think this was “enough to warrant an investigatory stop.” But if Kansas allowed revocation for less serious reasons, such as failing to pay various fees or unrelated judgments, “I would find this a different case.” Many license suspensions relate mostly “to being poor.” In addition, a defendant can always try to show that other information known to the officer made an inference unreasonable. But “in this strange case,” conducted with no evidentiary hearing or rebuttal evidence but on just “a barebones stipulation,” I agree with the Court. However, in “more fully litigated cases,” a “license-revocation alert” will “not end the inquiry.”

Sotomayor dissenting: The Court “impermissibly and unnecessarily reduces the State’s burden of proof.” The State put in no evidence of its own, beyond the bare stipulation. “The majority’s approach ... absolve[s] officers from any responsibility to investigate the identity of a driver where feasible.” Also, “simply labeling an inference ‘common sense’ does not make it so, no matter how many times the majority repeats it.” We have repeatedly stressed that it is the suspicion of a reasonable officer, based on training and experience, that must be assessed – Here, “allowing judges to offer their own brand of common sense where the State’s proffered justifications for a search come up short also shifts police work to the judiciary.” The empirical studies the majority relies on are not precise, either as to Kansas or to the facts here. And there is “danger” in allowing reliance on large-scale data alone:” “demographic profil[ing].” But the

Fourth Amendment requires individualized and particularized suspicion. In the end [like the concurrence], I think the majority's reasoning may not hold up "outside Kansas."

E. SIXTH AMENDMENT

Ramos v. Louisiana, 140 S.Ct. 1390 (April 20, 2020), 6 (4-1-1) to 3 (**Gorsuch for 4; Thomas concurring in judgment; Sotomayor concurring; Kavanaugh concurring; Alito dissenting with Roberts and Kagan**), reversing 231 So.3d 44 (La.Ct.App. 2017).

Headline: Sixth Amendment right to jury trial requires a unanimous verdict to convict of serious offenses; this requirement is "incorporated" against the States; *Apodaca* (1972) overruled.

Facts: Ramos was convicted of second-degree murder by a 10-2 jury verdict. Louisiana, and Oregon, are the only two States which still allow non-unanimous jury conviction verdicts. The origin of this rule is "clear" – "race was a motivating factor," to prevent minority jurors from holding up convictions. Meanwhile, the federal Sixth Amendment right to "trial by an impartial jury" includes, in light of "text and structure," a jury unanimity requirement. It was a "vital right protected by the common law" as far back as the 14th century; and it was "the original public meaning" in 1791 when the Bill of Rights was ratified. Nevertheless, "in a badly fractured set of opinions" in 1972, the Supreme Court ruled (by an unusual 4-1-4 vote) in *Apodaca* that the unanimity requirement was not "incorporated" against the States via the 14th Amendment's Due Process Clause. The question today is whether *Apodaca*'s rule is correct, and should it be followed.

Gorsuch (for four Justices in large part, including Ginsburg, Breyer, & Sotomayor).

The various votes and opinions are complex regarding what parts are joined by whom; and there is no doubt that it is Justice Thomas's separate concurrence that provides the necessary fifth vote for the "fully incorporated" result today): "There can be no question" that the Sixth Amendment jury trial right has been "incorporated" to apply to the States via the 14th Amendment's Due Process Clause; and that the right includes a unanimity requirement for convictions. It's true that Madison's initial draft of the Sixth Amendment said "unanimity;" but the fact that the final adoption dropped this could "easily" mean that unanimity was "plainly included" in the concept of criminal jury trial. We are not going to "walk away" from our repeated statement of "the Constitution's meaning."

"This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." "Despite these seemingly straightforward principles," the "strange turn" that *Apodaca* took in 1972 persists. Justice Powell's fifth vote agreed that the Sixth Amendment requires unanimity, but he stuck to a "dual track" theory of incorporation, that a Constitutional right can mean one thing for the federal government and a different thing among States. But the Court has repeatedly "rejected that notion." "Really, no one has found a way to make sense of it." The "breezy cost-benefit analysis" of *Apodaca* inspires no confidence, and it ignores "the racially discriminatory reasons" for the States' non-unanimous rules. Moreover, we have no right to functionally re-assess the balance the Framers struck (and "the people themselves" have since adopted other amendments that prohibit invidious discrimination that the Framers might have endorsed (women, race, etc.)

Stare decisis does not require us to follow *Apodaca*. First, its 4-1 majority does not represent a “governing precedent” – it “yields no controlling opinion at all” (and so is not a *Marks* (1977) problem – but Sotomayor and Kavanaugh do not join this, part, so it is just a plurality). Otherwise “a single Justice writing only for himself” could “bind” the Court to inconsistent constitutional rules. And second, *stare decisis* cannot demand that *Apodaca* be followed, because “no one on the Court today is prepared to say it was rightly decided.” The four factors we “traditionally consider” all weigh against *Apodaca* now. [Ed. Note: and at this point, *Ramos* becomes a “stalking horse” for the role of *stare decisis* in the abortion cases that seem sure to come some Term soon.). We think a “tsunami of follow-on litigation” is “overstatement,” and even if a thousand persons might be entitled to new trials (which we doubt), [Ed. note that a new case, *Edwards v. Vannoy*, has already been granted to ask whether *Ramos* is retroactive], this “cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties.”

[Ed. Note: Gorsuch concludes with a ringing civil-libertarian’s flourish:]. It is no objection to say that perhaps courts will have apply *Ramos* to “others.” “[W]here is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. **But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.**” [Ed. Note: This closing is reminiscent of Justice Brennan’s famous dissent in *McClesky v Kemp* (1986): the majority appears to “fear too much justice.” We’ll see if this sentence is used against Justice Gorsuch’s interests in future cases.]

Sotomayor concurring in all but Part IV-A: I agree with almost everything, but want to emphasize that (1) *stare decisis* is “at its nadir” when it comes to protecting criminal constitutional rights (as opposed to property and contract rights); and (2) “the legacy of racism that generated Louisiana’s and Oregon’s laws” is important and these States “never truly grappled with” it.

Kavanaugh concurring in part: “I agree ... that the time has come to overrule *Apodaca*.” But I do think it deserves “precedential force,” and because Justice Sotomayor also does not join Part IV-A, that part is not a majority – six Justices agree that *Apodaca* is a precedent.. Also, “I write separately to explain my view of how *stare decisis* applies....” [Ed. Note: Justice Kavanaugh then writes out, for 18 pages, his own theory of *stare decisis* – I think because he wants to establish it before *Roe v. Wade* is directly presented.]. The Court has applied at least seven *stare decisis* factors in the past, and “that muddle leaves a problem for the rule of law.” I identify “three broad considerations” to apply (following something Justice Jackson once wrote): (1) “not just wrong, but grievously or egregiously wrong;” (2) “significant negative jurisprudential or real-world consequences;” and (3) “unduly upset reliance interests”? It’s “not a mechanical exercise.” But these considerations should “set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings....”

Justice Kavanaugh also discusses at some length the “pervasive racial discrimination woven into” some jury practices, including this one. [Ed. Note: this is reminiscent of Kavanaugh’s longer-than-required – and I think praiseworthy -- discussion of racism in last Term’s *Mississippi v. Flowers* decision.] He notes that “non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors.” He quotes what “Justice Thurgood Marshall forcefully explained in dissent in *Apodaca*.” He concludes that “the Jim Crow origins and racially discriminatory effects ... of non-unanimous juries in Louisiana and Oregon should matter and should count heavily.”

Also, “assuming that the Court faithfully applies *Teague*, today’s decision will not apply retroactively.”

Thomas concurring in the judgment: We should rely on the 14th Amendment’s “Privileges and Immunities” clause, not some vague Due Process theory, to reach today’s result. I’ve said this before; “I do not adhere to this Court’s decisions applying due process incorporation.” It is a “legal fiction” (*Timbs*, 2019). It is “not demonstrably erroneous” that the Sixth Amendment requires unanimity for felony convictions, and “understanding” that “persisted up to the time of the 14th Amendment’s ratification.” But it is time for “us to put an end to this Court’s due process prestidigitation, which no one is willing to defend on the merits.” “Close enough is for horseshoes and hand grenades, not constitutional interpretation. The textual difference between protecting “citizens” (in the Privileges or Immunities Clause) and “person[s]” (in the Due Process Clause) will surely be relevant in another case. . . . Our judicial duty—not to mention the candor we owe to our fellow citizens—requires” that we adopt the P&I theory.

Alito dissenting, with Roberts and (for all but Part III-D) Kagan: “The doctrine of *stare decisis* gets rough treatment in today’s decision” and may “mark an important turn.” Relying on *Apodaca*, which no Justice has ever suggested reconsidering, Oregon and Louisiana “have tried thousands of cases.” Today’s decision will put a “crushing burden” on them. And “tar[ring] those states with “a charge of racism” is unnecessary “rhetoric” (even if the “deplorable” history is true) that makes it worse. If another State – or the British, which did this recently – were to adopt non-unanimous verdicts entirely free of racism, the Court says it constitutionally cannot. So racism “has no bearing on” the constitutional question. “We should set an example of rational and civil discourse instead of contributing to the worst current trends.” So: whether *Apodaca* is right or wrong, I would not overrule it. It is a precedent that requires analysis to overrule; only “three colleagues” think it is not. [The dissent is 25 pages long.]

Different Justices should not apply different standards for *Stare decisis* – or “the effects of the doctrine will not be neutral.” And the “harsh criticism” of Justice White’s opinion in *Apodaca* is “unwarranted.” *Apodaca*’s reasoning was not different from many “landmark criminal procedure decisions” from that time – “are they all now up for grabs?”

The “massive, concrete reliance” of the two States on *Apodaca* “weighs decisively against overruling it.” [In Part III-D, which Kagan does not join, Alito discusses *stare decisis* in a number of cases in which Kagan dissented (e.g., *Citizens United*; *Janus*).]. In conclusion: “By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.” [Ed. Note: *i.e.*, “*Roe* is coming.”]

F. EIGHTH AMENDMENT

McKinney v. Arizona, 140 S.Ct. 702 (February 25, 2020), 5 to 4 (**Kavanaugh**; Ginsburg dissenting), affirming 245 Ariz. 225 (Ariz. 2018).

Headline: When an *Eddings* (1982) error occurs (that is, a death penalty jury is not permitted to consider relevant mitigating evidence), a state appellate court may reweigh the aggravating and mitigating evidence itself, rather than grant a new sentencing hearing, under *Clemmons v. Mississippi* (1990).

Facts: McKinney and an associate shot and killed two persons in two different burglary-robberies, and in 1992 McKinney was convicted by a jury of both first-degree murders. As was then permitted, the trial judge then considered aggravating and mitigating evidence, and imposed a death sentence. Nearly 20 years later, on habeas, the Ninth Circuit (“by a 6 to 5 vote”) found that *Eddings* was violated when the sentencing judge failed to consider McKinney’s posttraumatic stress disorder (PTSD) as mitigating evidence. On remand, McKinney requested that a new jury sentencing proceeding be conducted, but Arizona Supreme Court ruled that it could reweigh the evidence itself under *Clemons* (1990), adding in the PTSD evidence. It then upheld McKinney’s death sentences. The case is on review directly from that Court.

Kavanaugh (for 5): McKinney’s argument “does not square with *Clemons*, where we decided that, after a jury had sentence *Clemons* to death but one of two aggravating factors was invalid, the Mississippi Supreme Court “could itself reweigh the permissible aggravating and mitigating evidence.” “This Court explained that a *Clemons* reweighing is not a resentencing but instead is akin to harmless-error review.” This did not hinge “on any unique effect of aggravators as distinct from mitigators” -- “there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side.”

The fact that we have subsequently decided (in *Ring* (2002) and *Hurst* (2016)) that “capital defendants are entitled to a jury determination of ... an aggravating circumstance,” does not require that appellate courts may now not conduct reweighing. “A jury is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision” in a death penalty case. “What today’s decision says is that the jury must find the existence of the fact that an aggravating factor existed.” Of course, no jury found that fact in McKinney’s case. But his case became “final” in 1996, “long before *Ring* and *Hurst* were decided; and we have decided that *Ring* does not apply retroactively (*Schriro*, 2004). Arizona has said that its review here was “collateral,” not “direct.” So *Ring* and *Hurst* do not apply.

Ginsburg dissenting (with Breyer, Sotomayor and Kagan): *Ring* applies because the Arizona Supreme Court’s decision was a “direct” review of McKinney’s sentence. The State requested “a *new* independent review,” and the Arizona Supreme Court examined the trial court’s findings afresh, treating the court’s 1996 decision as though it never issued. The Ninth Circuit itself conducted a harmless-error review, and concluded that the *Eddings* error was harmful. On remand, “the Arizona Supreme Court was not conducting garden variety harmless-error review of a lower court decision; it was rerunning direct review to correct its own prior harmful error.” This is a question of federal constitutional law, not state procedure.

G. FOURTEENTH AMENDMENT

Kahler v. Kansas, 140 S.Ct. 1021 (March 23, 2020), 6 to 3 (**Kagan; Breyer dissenting** with Ginsburg and Sotomayor), affirming 307 Kan. 374 (Kan. 2018).

Headline:

Facts: “Under Kansas law a [criminal] defendant may raise mental illness to show that he ‘lacked the culpable mental state required as an element of the offense charged’” (§21–5209). However, Kansas law also directs that “[m]ental disease or defect is not otherwise a defense.”

Kahler shot and killed his estranged wife, her mother, and his two daughters (while allowing his son to flee) – “a terrible crime.” He sought to present a traditional insanity defense, and argued that Kansas’s restrictions violated constitutional Due Process because they “abolished” the insanity defense. His motion to strike the Kansas law was denied, and at trial Kahler was permitted to “attempt to show through psychiatric and other testimony that severe depression had prevented him from forming the intent to kill.” The jury convicted him of capital murder and, after hearing “additional evidence of his mental illness,” sentenced Kahler to death. His constitutional arguments were rejected on appeal, and [according to the Court] his cert petition asked the Court to decide whether Due Process requires that a defendant be allowed to argue that mental illness prevented him from knowing right from wrong – the “moral incapacity” test.

Kagan (for 6): In *Clark v. Arizona* (2006), we “catalogued” various versions of insanity defenses, and “even that taxonomy fails to capture the field’s complexity.” Traditionally sanity has been said to have two components: cognitive capacity, and moral capacity; and the lack of either could provide a defense. The “moral incapacity” component provides a defense if mental illness prevents a person from distinguishing between right and wrong. And even that component has been changed, in some jurisdictions, to a “legal incapacity” test, allowing conviction “when a mentally ill defendant knew that his act violated the law” even if he “believed it morally justified.”

Kansas, and four other states, “exonerate a mentally ill defendant only when he cannot understand the nature of his actions and so cannot form the requisite *mens rea*.” This might be viewed as adoption of the “cognitive prong” of *M’Naughten*. Otherwise, “a defendant’s moral incapacity cannot exonerate him, as it would if Kansas had adopted both original prongs of *M’Naughten*.” However, Kansas does allow wide-ranging mental illness evidence at the sentencing stage, after guilt has been decided. Thus the defense of insanity has not been completely abolished in Kansas – the state has simply adopted a version more restrictive than some others. In *Clark*, we ruled that Due Process does not require a State to adopt the cognitive prong of *M’Naughten*. Today we rule that it similarly does not require a State to adopt the “moral incapacity” prong. “Uncertainties about the human mind loom large.” “Crafting those doctrines [regarding mental states as they impact criminal guilt] involves balancing and rebalancing over time complex and oft-competing ideas about ‘social policy’ and ‘moral culpability’—about the criminal law’s ‘practical effectiveness’ and its ‘ethical foundations.’” *Powell v. Texas* (1968) (Black, J., concurring). “That ‘constantly shifting adjustment’ could not proceed in the face of rigid ‘[c]onstitution[al] formulas.’” *Id.* (plurality opinion). “‘Nothing could be less fruitful’ than to define a specific ‘insanity test in constitutional terms.’” Thus “[w]ithin broad limits, ‘doctrine[s] of criminal responsibility’ must remain ‘the province of the States.’”

It is true that “for hundreds of years, jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime.” But Kansas does not “depart from that broad principle.” It simply has not adopted “the type that Kahler demands.” “Significantly,” the fact that Kahler can offer mental health evidence at sentencing, and perhaps “receive the same treatment in Kansas [mental health commitment rather than prison] as in States that would acquit,” “defeats” his claim. The “complex” and “messy” “historical record” does not show that Kahler’s specific type of insanity defense is “so rooted in the traditions and conscience of our people so as to be ranked fundamental,” and that is the test for Constitutional Due Process. A lengthy exegesis is omitted here.]. *M’Naughten* was not until 1843, and even that “failed to unify State insanity defenses,” and “the moral incapacity test has never commanded the day.” “It

is not for the courts to insist on any single criterion going forward. ... It is a project for State governance, not constitutional law.”

Breyer dissenting, joined by Ginsburg and Sotomayor: [Much of this interesting, 23-page opinion, and Appendix cataloguing all 50 States, is omitted here.]. I agree “that the Constitution gives the States broad leeway.... But here, Kansas has not simply redefined the insanity defense. Rather, it has eliminated the core of a defense that has existed for centuries: that the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy.” This fundamental component should be a part of Due Process.

II. FEDERAL CRIMINAL STATUTES

A. Native American Law

McGirt v. Oklahoma, (July 9, 2020), 5-4 (**Gorsuch**; *Roberts* dissenting for 4 (although Thomas does not join ftnt 9); *Thomas* dissenting), *affirming* (OK Crim.App. 2019).

Headline: Land that was reserved for the Creek Nation by treaty in 1833 (as limited by subsequent developments – roughly 43% of the State of Oklahoma), **remains “Indian country” today because Congress has never formally “disestablished” the reservation.**

Facts: First sentence: “On the far end of the Trail of Tears was a promise.” By 1832 and 1833 Treaties, the United States promised the “Creek Indians” a “permanent home to the whole Creek Nation” in what later (1907) became Oklahoma. “[No] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” In 1997, McGirt, “an enrolled member of the Seminole Nation,” was convicted in state court of serious sexual offenses committed in a suburb of Tulsa, Oklahoma, and sentenced to life without parole. In post-conviction proceedings he argued that the state lacked jurisdiction to prosecute him because his crimes were committed in Creek territory (Indian country), such that only the federal government has criminal jurisdiction under the Major Crimes Act (18 U.S.C. §1153(a)). (Note: the argument is “limited: nothing we might say today could unsettle Oklahoma’s authority to try non-Indians for crimes against non-Indians on the lands in question (*McBratney* 1882).” The Oklahoma state courts rejected McGirt’s argument, and in a *pro se* petition, McGirt sought U.S. Supreme Court review. (But in 2017 the Tenth Circuit accepted the argument in *Murphy*, and when the Court could not resolve the question on review of that case – many think the vote was 4-4 with Gorsuch recused – the Court granted McGirt’s petition as the vehicle.

Gorsuch (for 5): It “should be obvious” that the 1832 and ’33 treaties “established a reservation for the Creeks.” This reservation was in return for the Creeks’ promise to move westward from their tribal homelands. Although the word “reservation” was not used, Congress later repeatedly referred to “the Creek reservation.” And although “it’s equally clear that Congress has since broken more than a few of its promises to the Tribe,” Congress has never disestablished the reservation. Only Congress can do this; “[u]nder our Constitution, States have no authority to reduce federal reservations lying within their borders.” And the presumption is against disestablishment of an Indian reservation (*Solem*, 1984). “History shows that Congress knows how to withdraw a reservation when it can muster the will” – but it has never done so

regarding the Creek lands (despite trying around the 1890s “allotment era” and the time Oklahoma became a State in 1907). Congress hoped that the Indian reservation system would end; but “just as wishes are not laws, future plans aren’t either.” Similarly, although “Congress intruded on the Creek’s promised right to self-governance” in a number of ways, “there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.” Indeed, that Congress did these other things simply “serve[s] to prove” that in fact the reservation itself continued. Subsequent legislation also recognized, and increased, the Creek’s authority.

“Historical practices and demographics” cannot prove disestablishment. And there is no “ambiguous language” in statutes that suggests it. “Extratextual considerations [cannot] supply [a] blank check.” We will not ignore “the perils of substituting stories for statutes.” Even if “everyone” thought it, that does not make it so. Nor does the fact that Oklahoma has misapplied its jurisdictional powers over the years. “To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country.” [Ed. note: this presages, perhaps, massive effects of the McGirt decision in other States, forthcoming.]. This is at bottom a straightforward case of “statutory interpretation; and “only one message rings true” here.

We also reject the arguments, that even the dissent does not advocate, that (1) only a “dependent Indian community” was ever established; or that (2) the Eastern half of Oklahoma is somehow exempt from the Major Crimes Act (for which there is no “clear expression of Congressional intent”). Any “jurisdictional gap” can be filled by Congress.

Finally, as for the “transformative effect” that our ruling may have on many things, “the magnitude of a legal wrong is no reason to perpetuate it.” See [my opinion in] *Ramos*. It provides no “license for us to disregard the law.” “We do not pretend to foretell the future,” and “we are well aware of the potential” for future costs and disruption. “But it is unclear why pessimism should rule the day.” Indian tribes and States have “worked together” in many contexts. **“To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”**

Roberts dissenting (with Thomas, Alito and Kavanaugh); & **Thomas dissenting: Ed. note:** In the interests of space, and because the Court’s majority ruling appeals to completely settle the question for Oklahoma, the rationale of the Chief Justice’s 37-page dissent, and Justice Thomas’s 4-page assertion that the Court should not address this issue because the decision below rested alternately on state law, are omitted here.]

B. Mail/Wire Fraud

Kelly v. United States, 140 S.Ct. 1565 (May 7, 2020) 9 to 0 (**Kagan**), reversing 909 F.3d 550 (3rd Cir. 2018).

Headline: Federal mail/wire fraud does not reach deceptive reasons given by public officials for exercising their regulatory power; the object of the deception was not to obtain “money or property.”

Facts: In a 2013 incident now referred to as “Bridgegate,” Kelly and other public officials arranged to “realign” two lanes of traffic serving the G.W. Bridge from Fort Lee, New Jersey, into Manhattan, NY, causing traffic to “gr[i]nd to a halt” and resultant delays, frustration, and monetary costs (like “extra toll-collectors”). Bridge officials said publicly that they were conducting a “traffic study,” but this was false. In fact, their intention was to punish the Fort Lee mayor for failing to support New Jersey then-Governor Chris Christie’s re-election bid. Kelly (Christie’s deputy chief of staff) and a bridge official (Baroni) were convicted in a jury trial of federal wire fraud, fraud on a federally-funded program, and conspiracy to commit those offenses. The Third Circuit affirmed, rejecting the argument that the conduct was not wire fraud.

Kagan (for 9; and remarkably, no separate opinions!): “The wire fraud statute [18 U.S.C. §1343] ... prohibits only deceptive ‘schemes to deprive [the victim of] money or property’” (*McNally*, 1988). The federal program fraud statute (§666) similarly refers to “property.” The “property” requirement “prevents these statutes from criminalizing all acts of dishonesty by state and local officials” (*Cleveland*, 2000). Even though Congress responded to *McNally* by criminalizing frauds to deprive others of “honest services,” we have ruled that this is limited to “schemes involving bribes or kickbacks” (*Skilling*, 2010), neither of which at alleged here. Finally, in *Cleveland*, we held that “a scheme to alter ... a regulatory choice is not one to appropriate the government’s property.” And here, the “realignment” of bridge traffic “was a quintessential exercise of [the Port Authority’s] regulatory power.” Because the “object” of defendant’s fraud was not “property,” their convictions must be reversed. Paying for extra toll-collectors was not an “object” of the scheme, but rather merely an “incidental (even if foreseen) by-product.” This is also true of any costs incurred by setting up bogus “traffic study” data collection. These “cannot count” as the “taking of property” (citing an opinion by 7th Circuit Judge Frank Easterbrook). “If U.S. Attorneys could prosecute as property fraud **every lie a state or local official tells in making such a decision**, the result would be a ‘sweeping expansion of federal criminal jurisdiction’” (*Cleveland*). “Ballooning federal power would follow.” This case may indeed “involve an abuse of power. ... But not every corrupt act by state or local officials is a federal crime.”

C. Sentencing

Holguin-Hernandez v. United States, 140 S.Ct. 762 (February 26, 2020) 9 (8-1) to 0 (**Breyer**; *Alito* with Gorsuch concurring), vacating and remanding 746 Fed.Appx. 403 (5th Cir. 2018).

Headline:

Facts:

Armed Career Criminal Act

Shular v. United States, 140 S.Ct. 779 (February 26, 2020) 9 (8-1) to 0 (**Ginsburg**; *Kavanaugh* concurring), affirming 736 Fed.Appx. 876 (11th Cir. 2018).

D. Prison Litigation Reform Act

Lomax v. Ortiz-Marquez, 140 S.Ct. 1721 (June 8, 2020) 9 to 0 (**Kagan**, but Thomas does not join footnote 4), affirming 754 Fed.Appx. 756 (10th Cir. 2018).

Headline: Section 1915(g) of the Prison Litigation Reform Act, which bars prisoners from filing in forma pauperis if they have three prior dismissed “strikes” (meritless filings) **applies to any dismissal for failure to state a claim, even if without prejudice**

Facts: Arthur Lomax, an inmate at a Colorado prison, filed an *in forma pauperis* (“IFP,” meaning indigent and receiving a waiver of filing fees and costs) lawsuit against prison officials, challenging his expulsion from the prison’s sex offender treatment program. Lomax had previously filed three unsuccessful legal actions while imprisoned. The District Court denied Lomax’s motion for IFP status (to avoid a \$400 filing fee) citing 28 U.S.C. §1915(g)’s “three strikes” provision. §1915(g) bars prisoners from filing IFP if they have had three or more prior IFP lawsuits dismissed on grounds that they were “frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted. Lomax appealed, arguing that two of the dismissals should not count as strikes because they had been dismissed without prejudice. The Tenth Circuit Court rejected that argument, furthering a 4-2 Circuit court split.

Kagan (unanimous, although Justice Thomas does not join ftnt 4): “This case begins, and pretty much ends, with the text of Section 1915(g),” which established “what has become known as the three-strikes rule.” **[Ed. Note:** Kagan, known to be a baseball fan, includes a number of baseball references. This is likely not so entertaining for indigent prisoners and their supporters.] “The courts below ruled that Lomax had struck out.” This case is “an easy call.” We now affirm [i]n line with our duty to call balls and strikes.”

The broad language of section 1915(g) covers all dismissals, including those done with or without prejudice. Under *Virginia Uranium* (2019), we may not narrow a statute’s reach by inserting words Congress chose to omit. So we cannot read the simple word “dismissed” in Section 1915(g) as “dismissed with prejudice.” In addition, “[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.” The Prison Litigation Reform Act (“PLRA”) includes three other provisions that mention dismissals for failure to state a claim, which undisputedly allow courts to dismiss prisoner suits without prejudice. We cannot read these provisions to not include “without prejudice” dismissals. If we read only the three strikes provision to apply solely to dismissals with prejudice, we “would introduce inconsistencies into the statute.” Finally, F.R.Civ.P. 41(b) supports our reading. It is necessary precisely because “dismissal” would otherwise be read to include dismissals without prejudice. Dismissal need not have a meaning similar to §1915(g)’s other two words (frivolous or malicious); it is intended to reach dismissals beyond those concepts.

E. International Child Abduction

Monasky v. Taglieri, 140 S.Ct. 719 (February 25, 2020) 9 (7-2) to 0 (**Ginsburg** with Thomas (joining parts I,III and IV; *Thomas* and Alito concurring), affirming 907 F.3d 404 (6th Cir. 2018).

Headline: A child’s habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction depends on the totality of the circumstances.

Facts: Petitioner Monasky, a U.S. citizen married the respondent, Taglieri in the United States. Two years later, the couple relocated to Italy where they both began working. However, after a year of living together, their marriage soon began to deteriorate. Monasky claims that Taglieri became physically abusive and “forced himself upon her multiple times.” Shortly thereafter, Monasky became pregnant in May of 2014. Monasky looked into returning to the United States and applied for jobs there. At the same time, she and Taglieri made arrangements to care for their child in Italy. Nevertheless, two months after the birth of their daughter in Italy, Monasky fled with the child to Ohio.

Taglieri filed a petition with the U.S. District Court for the Northern District of Ohio for the child’s return to Italy under the Convention on the ground that the child had been wrongfully removed from her country of “habitual residence.” The District Court granted Taglieri’s petition and the child was returned to Italy. On appeal, the Sixth Circuit Court of Appeals affirmed, noting that an infant’s habitual residence depends on the parents’ shared intent. The Court of Appeals found no clear error in the District Court’s order and rejected Monasky’s argument that Italy could not qualify as the child’s “habitual residence” in the absence of an actual agreement by the parents.

Ginsburg: Locating a child’s home is a fact driven inquiry where courts must be sensitive to the unique circumstances of each case. For older children, facts indicating **acclimatization** will be highly relevant. On the other hand, for children too young or otherwise unable to acclimate, relevant factors will include the intentions of the children’s parents. However, **no single fact is dispositive across all cases.**

The views of our treaty partners support our conclusion that a child’s habitual residence depends on the circumstances of each case. The Supreme Court of the United Kingdom, the Court of Justice of the European Union, the Supreme Court of Canada, and the High Court of Australia all agree that a child’s habitual residence depends on various factors “with the purpose and intentions of the parents being merely one of the relevant factors.”

Monasky’s proposal of an actual-agreement requirement to establish a child’s habitual residence would **thwart** the Convention’s “objectives and purposes.” Her proposal would allow parents to withhold agreement and thereby block any finding of habitual residence for infants. Moreover, agreements between parents will be difficult to obtain whenever parents’ relations are **acrimonious**. This, in turn, would create a presumption that no habitual residence for infants exists.

Monasky’s counterarguments are similarly unpersuasive. First, a wide range of facts other than an actual agreement can help a court determine whether an infant’s residence in that place has the quality of being “habitual.” Second, allowing courts to make “a quick impression gained on a **panoramic view of the evidence**” is more **expeditious** than adjudicating a “winner-takes-all” evidentiary dispute over whether an agreement existed. Moreover, “when all the circumstances are in play, **would-be abductors should find it more, not less, difficult to manipulate the reality.**”

Moreover, the Hague Convention provides a mechanism for protecting children from the effects of domestic violence. Article 13(b) gives courts discretion from ordering a child’s return to her habitual residence when there’s a risk that the child’s return would expose them to harm. However, the District Court found no evidence that Taglieri ever abused the child. Accordingly, we reject the argument that an actual-agreement is necessary to protect children born into domestic-violence.

Finally, this case presents mixed questions of law and fact and should be judged on appeal by a clear-error standard of review, deferential to the District Court’s order. However, we decline to disturb the judgment below. The District Court heard all facts relevant to the dispute and found that Monasky had **sufficient ties** to Italy, and that the child was born into “a marital home in Italy” established by her parents “with no definitive plan to return to the United States. Remanding this case would consume time when “swift resolution is the Convention’s objective.”

Thomas concurring: This case could have been decided on the plain meaning of the text of the convention without turning to the decisions of sister signatories. Although there’s a “clear trend” in the interpretation of “habitual residence” by foreign courts, this consensus has only developed within the past decade. “By relying too heavily on the judicial decisions of the treaty’s other signatories, rather than on a more thorough textual analysis, we risk being persuaded to reach the popular answer, but perhaps not the correct one.”

Alito concurring: The standard of review on appeal should be abuse of discretion because the interpretation of “habitual residence” is not a pure question of fact. However, “the important point is that great deference should be afforded to the District Court’s determination.”

F. Foreign Sovereign Immunities Act

Opati v. Republic of Sudan, 140 S.Ct. 1601 (May 18, 2020) 8 to 0 (**Gorsuch**; Kavanaugh took no part in the decision), vacating and remanding 864 F.3d 751 (D.C. Cir. 2017).

Headline: Plaintiff’s in a federal cause of action under §1605A(c) may seek punitive damages for preenactment conduct.

Facts: Plaintiffs and their family members sued the Republic of Sudan under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (“FSIA”), after al Qaeda operatives detonated truck bombs outside the U.S. Embassies in Kenya and Tanzania in 1998. The plaintiffs alleged that Sudan had assisted al Qaeda in committing the attacks. However, the

time, the plaintiffs were unable to recover punitive damages for suits brought under any of the FSIA exceptions.

In 2008 Congress amended the FSIA in the National Defense Authorization Act (“NDAA”). Under section 1083(c)(3) of the NDAA, Congress moved 28 U.S.C. §1605(a)(7) to a new section and created an express cause of action that provided punitive damages. Section 1083(c)(2) of the NDAA also effectively converted existing lawsuits that had been “adversely affected” by prior law as if they had been originally filed under the new §1605A(c). Section 1083(c)(3) of the NDAA also allowed plaintiffs to file new actions “arising out of the same act or incident” as an earlier action and claim punitive damages.

The original plaintiff’s amended their complaint to include the new federal cause of action under §1605A(c) and the District Court awarded approximately \$10.2 billion in damages, including \$4.3 billion in punitive damages. However, the Court of Appeals held that the plaintiffs were not entitled to punitive damages because Congress had included no statement in NDAA §1083 that clearly authorized punitive damages for conduct that occurred before the enactment of the NDAA.

Gorsuch: The Constitution disfavors retroactive lawmaking. However, even assuming that Sudan may claim the benefit of the presumption of prospectivity, foreign immunity is a gesture of grace and comity that may be withdrawn retroactively. After all, foreign sovereign immunity’s principal purpose has never been to permit foreign states to shape their conduct in reliance on the promise of future immunity from suit in United States courts.

Moreover, “**congress was as clear as it could have been** when it authorized plaintiffs to seek and win punitive damages for past conduct using §1065A(c)’s new federal cause of action.” Essentially, Congress proceeded in two steps: 1) “It expressly authorized punitive damages under a new cause of action; and 2) it explicitly made that new cause of action available to remedy certain past acts of terrorism.”

While §1083(c) contains no express authorization for punitive damages, “**it’s hard to see what difference that makes.**” Except for the words “punitive damages,” Sudan accepts that **every other jot and title** of §1605A(c) applies to actions properly brought under §1083(c) for past conduct. Moreover, we are not persuaded by Sudan’s argument that §1605 fails to authorize retroactive punitive damages with sufficient clarity. As this Court has previously observed, the word “may” clearly connotes discretion. Lastly, **we decline Sudan’s invitation** to create and apply a new rule that would require Congress to provide a super-clear statement when it wishes to authorize punitive damages.

G. Appellate Procedure

United States v. Sineneng-Smith, 140 S.Ct. 1575 (May 7, 2020) 9 (8-1) to 0 (**Ginsburg;** *Thomas* concurring), vacating and remanding 910 F.3d 461 (9th Cir. 2018).

Headline:

Facts:

III. IMMIGRATION

Kansas v. Garcia, 140 S.Ct. 791 (March 3, 2020) 5 (4-1) to 4 (**Alito**; *Thomas* with Gorsuch concurring; *Breyer* dissenting with Ginsburg, Sotomayor and Kagan), reversing 306 Kan. 1113 (Kan. ___), 306 Kan. 1100 (Kan. ___), and 306 Kan. 1107 (Kan. ___).

Headline: The Kansas statute under which respondents were prosecuted for fraudulently using another person’s social security number on federal and state tax withholdings forms is not preempted by the Immigration Reform and Control Act.

Facts: Respondents, three unauthorized aliens were tried for fraudulently using another person’s Social Security number on state and federal tax withholding forms they submitted upon obtaining employment. Respondents were convicted and the Kansas Court of Appeals affirmed. However, the Supreme Court of Kansas reversed, finding that a provision of the Immigration Reform and Control Act of 1986 (IRCA) expressly preempts the Kansas statute that allows a state to use information contained within an I-9 as the basis for a state law identity theft prosecution.

Alito: The Kansas statute under which Respondents were convicted is not expressly preempted. Section §1324a(b)(5) provides that I-9 forms and any information contained in or appended to such forms may not be used for purposes other than for enforcement of the INA or other specified provisions of federal law including those prohibiting the making of a false statement in a federal matter, identity theft, immigration document fraud, and perjury. However, the IRCA expressly regulates the use of I-9s – it does not directly address the use of other documents like federal and state tax withholding forms.

Instead, the IRCA expressly preempts a state from imposing criminal sanctions *upon those who employ, or recruit or refer for a fee for employment*, unauthorized aliens.” 8 U.S.C. §1324a(h)(2). This provision does not mention anything about state laws that impose criminal sanctions on **employees or applicants**. Accordingly, the IRCA is **plainly inapplicable here** because it only applies to employers and those who receive a fee for recruiting or referring prospective employees.

The Kansas Supreme Court’s interpretation of §1324a(b)(5) that no information “contained in” an I-9 could ever be used by any entity is **flatly contrary to standard English usage**. For example, under the Kansas Supreme Court’s interpretation, if a person truthfully states their name on their I-9 and later robs a bank, prosecutors would not be able to use the name in the indictment. The point need not be belabored any further: The argument that §1324a(b)(5) expressly bars respondents’ prosecutions cannot be defended.

We also reject Respondents’ argument that the Kansas statute is preempted by implication. Respondents argue that the IRCA preempts the field of fraud on employment verification **but this argument fails**. The submission of tax withholding documents is **fundamentally unrelated** to federal employment verification. The employment verification system is used to prevent the employment of unauthorized aliens while tax withholding documents are used to enforce income tax laws.

There likewise isn’t any ground for holding that the Kansas statutes conflict with federal law. In *Arizona*, the Court concluded that IRCA implicitly conferred a right to be free of criminal penalties for working unauthorized but **nothing is similar[ly] involved here**. Even though the Kansas statute overlaps to some degree with federal criminal laws, that is not sufficient for preemption. “Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap.”

Thomas with Gorsuch concurring: Our “purposes and objectives” preemption jurisprudence should be abandoned. Our task would be straightforward if we interpreted the Supremacy Clause as the founding generation did. Our current doctrine of “impermissibly rests on judicial guesswork” on generalized notions of congressional intent that are not contained in the text of federal law.

Breyer with Ginsburg, Sotomayor and Kagan concurring in part and dissenting in part: I do not agree with the majority’s conclusion about implied preemption. It is “clear and manifest” that Congress occupies the field of fraud committed to demonstrate work authorization based on the IRCA’s text, together with its structure, content and purpose. The IRCA, creates a “comprehensive scheme” for combatting unauthorized employment and contains two carefully calibrated sets of sanctions for noncompliance. The Act subjects employers to criminal penalties. As for employees, the IRCA “is somewhat more lenient.” While they may suffer adverse immigration consequences, unauthorized work does not subject them to federal criminal prosecution.

In *Arizona*, we explained that states may not make criminal laws that Congress did not create and held that the state law was preempted because it conflicted with federal law. Similarly, here the state law is also preempted because the IRCA “makes clear that only the Federal Government may prosecute people for misrepresenting their federal work authorization status.” First, the IRCA provisions that prohibit states from using the I-9 to police work authorization fraud strongly suggest the Act occupies that field. Second, in *Arizona* we concluded that the federal statute that established a federal alien registration system “left no room” for state laws to police violations of that system. Similarly, the IRCA’s intricate procedures and penalties show that criminal enforcement “falls to the Federal Government alone.”

Guerrero-Lasprilla v. Barr, 140 S.Ct. 1062 (March 23, 2020) 7 to 2 (**Breyer**; Thomas dissenting with Alito), vacating and remanding 737 Fed.Appx. 230 (5th Cir. 2018) and 741 Fed.Appx. 259 (5th Cir. 2018).

Headline:

Facts:

Barton v. Barr, 140 S.Ct. 1442 (April 23, 2020) 5 to 4 (**Kavanaugh**; Sotomayor dissenting with Ginsburg, Breyer and Kagan), affirming 904 F.3d 1294 (11th Cir. 2018).

Headline: An offense that precludes cancellation of removal under 8 U.S.C. §1182(a)(2) need not be one of the offenses of removal.

Facts: A Jamaican national and lawful permanent resident (“LPR”) of the U.S was convicted of a state firearms offense, a drug offense, and an aggravated assault offense over the span of 12 years. In September 2016, an Immigration Judge determined that Barton was removable and Barton applied for cancellation of removal under 8 U.S.C. §1182(a)(2).

To qualify for cancellation of removal under §1182(a)(2), the applicant: 1) must have been a lawful permanent resident for at least five years; 2) must have continuously resided in the United States for at least seven years after lawful admission; 3) must not have been convicted of an aggravated felony as defined in the immigration laws, and; 4) during the initial seven years of continuous residence, must not have committed certain other offenses listed in 8 U.S.C. §1182(a)(2).

The Immigration Judge (“IJ”) and the Board of Immigration Appeals (“BIA”) found that Barton was precluded from applying for cancellation of removal due to his commission of offenses listed in §1182(a)(2) – namely his aggravated assault offenses from 1996. On appeal, Barton argued that the offenses that preclude him from applying for cancellation of removal must be the same offenses that triggered his removal. However, the Eleventh Circuit Court of Appeals agreed with the BIA’s interpretation of §1182(a)(2) and held that the offense that precludes cancellation of removal need not be one of the offenses of removal.

Kavanaugh: We agree with the Second, Third, Fifth and Eleventh Circuits’ interpretation of 8 U.S.C. §1182(a)(2) that a noncitizen’s offense that precludes cancellation of removal need not be one of the offenses of removal.

The law fashions two distinct ways in which an LPR’s prior crimes can preclude cancellation of removal. First, cancellation of removal is precluded when an LPR has been convicted of an “aggravated felony” at any time. Second, cancellation of removal is precluded when an LPR commits an offense referred to in §1182(a)(2) during their initial seven years of residence that renders the LPR inadmissible to the U.S. These crimes include crimes involving moral turpitude (“CIMT”) and various other violations.

Section 1182(a)(2) functions a lot like a traditional criminal recidivist statute. For example, in an ordinary criminal case, a defendant may be convicted of a particular criminal offense and at sentencing, the defendant’s past criminal offenses may come into play. Similarly, a noncitizen may be found removable based on a certain criminal offense, and at the cancellation of removal stage, it is entirely ordinary to look beyond the offense of removal and determine if the noncitizen has committed an §1182(a)(2) offense during the initial seven years of residence that would preclude cancellation.

Here, Barton’s 1996 aggravated assault offenses were committed during his initial seven years of residence. These offenses are referred to in §1182(a)(2) because they are crimes involving moral turpitude. Moreover, he was rendered “inadmissible” when he was convicted. The BIA and all Courts of Appeals have except the Ninth Circuit interpreted §1182(a)(2) this way and we agree.

We reject Barton’s argument that an §1182(a)(2) offense may preclude cancellation of removal only if that §1182(a)(2) offense is one of the offenses removal. First, this is a recidivist statute that uses §1182(a)(2) offenses as cross-reference for a category of offenses that will preclude cancellation of removal. For example, §1227(a)(2) offenses – not §1182(a)(2) offenses – are typically the basis for removal of LPR’s. However, Barton has no good argument why the statute doesn’t also include offenses referred to in §1227(a)(2). If he were correct, the statute would have specified offenses “referred to in section 1182(a)(2), or section 1227(a)(2).

Second, “inadmissibility” is a status that can result from a noncitizen’s commission of certain offenses. Section 1182(a)(2) states that a noncitizen who commits and is convicted of a CIMT “is inadmissible.” Congress would have avoided using such a convoluted term if they intended that only the offense of removal preclude cancellation of removal. Accordingly, we reject Barton’s argument that a noncitizen is rendered inadmissible only when denied admission to the U.S.

Third, redundancies are common in statutory drafting. Redundancy in statutory reference should not cause us to entirely rewrite §1229b to require that an offense that precludes cancellation of removal also be one of the offenses of removal. Accordingly, we reject Barton’s argument that the Government’s interpretation cannot be correct because they would treat the phrase “or removable...under section 1227(a)(2) or (a)(4)” as surplusage.

Removal of an LPR from the U.S is a “wrenching process.” However, we are bound by Congress’ decision to preclude cancellation of removal for noncitizens that have committed certain offenses.

Sotomayor dissenting: Inadmissibility refers to noncitizens seeking admission while deportability refers to noncitizens already admitted but removable from the U.S. The majority conflates these two terms and we disagree.

A noncitizen who has already been admitted and is not seeking readmission cannot be charged with any ground of inadmissibility.

Nasrallah v. Barr, 140 S.Ct. 1683 (June 1, 2020) 7 to 2 (**Roberts**; **Thomas** dissenting with Alito), reversing 762 Fed.Appx. 638 (11th Cir. 2019).

Headline: Sections 1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen’s factual challenges to a CAT order.

Facts: Petitioner, Nidel Khalid Nasrallah, a native and citizen of Lebanon came to the United States when he was 12 years of age and later became a lawful permanent resident. In 2013, he pled guilty to two counts of receiving stolen property. He was sentenced to 364 days in prison and placed in deportation proceedings. Nasrallah applied for CAT relief and alleged that he was a member of the Druze religion and that he had been tortured by Hezdollah before coming to the U.S. The Immigration Judge granted Nasrallah’s CAT application and found that he would likely be tortured again if returned to Lebanon. Although the Immigration Judge ordered Nasrallah removed due to his convictions, the grant of his CAT application blocked his deportation to Lebanon.

On appeal, the Board of Immigration Appeals (“BIA”) disagreed with the Immigration Judge. The BIA vacated Nasrallah’s CAT order and ordered him removed. Nasrallah filed a petition for

review with the U.S. Court of Appeals for the Eleventh Circuit, raising factual challenges to the BIA’s CAT order. However, the Eleventh Circuit denied to review Nasrallah’s factual challenges. The Court explained that Nasrallah was convicted of a crime involving moral turpitude and that noncitizens convicted of these crimes may not obtain judicial review of factual challenges to a “final order of removal.” Nasrallah contends that the Eleventh Circuit erred because a CAT order is not a “final order of removal.”

Kavanaugh: The statutory text precludes judicial review of factual challenges to final orders of removal—**and only to final orders of removal**. A CAT order is not a final order of removal because it does not conclude that the alien is deportable, or order the alien’s deportation. Instead, a CAT order simply means that the noncitizen may not be removed to the designated country of removal. Still, CAT orders do not merge into final orders of removal. Under *INS v. Chadha*, review of final orders of removal include all matters on which the validity of the final order is contingent. However, neither the IJ’s nor the BIA’s ruling on a CAT claim affect the validity of the final order of removal.

First, the government’s argument that term “final order of deportation” as interpreted under *Fati v. INS* applies here is incorrect because a final order of removal is now defined as a final order “concluding that the alien is deportable or ordering deportation.”

Second, section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”) and section 1252(a)(4) of the 2005 REAL ID Act now provide for judicial review of CAT claims. Therefore, the government’s argument that CAT claims can only be reviewed if they merge into a final order of removal under §1252(a)(1) is incorrect.

Third, it “makes sense that Congress would provide an opportunity for judicial review” of factual challenges to CAT claims. Congress intended to bar review of factual challenges to **final orders** of removal to prevent relitigation of the underlying facts used to convict noncitizens. On the other hand, issues related to CAT orders have typically not been litigated before. Therefore, the government’s congressional intent argument fails.

Fourth, we reject the government’s policy argument that judicial review of factual challenges to CAT claims would unduly delay removal proceedings. Noncitizen’s facing removal **may already seek judicial review of constitutional and legal claims**. Our holding merely adds that in some cases, the court may also review factual challenges to CAT claims.

Lastly, section 1252(a)(2)(B) already states that noncitizen’s may not bring factual challenges to orders denying discretionary relief. This includes cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers and other determinations. Therefore, our holding has no effect on these discretionary determinations.

Thomas, joined by Alito dissenting: Petitioner’s CAT claims are barred from review under the criminal-alien bar in §1252(a)(2)(C) because they fall within the zipper clause of section 1252(b)(9). Section 1252(b)(9) states that “all questions of law or fact...arising from any action taken or proceeding brought to remove an alien” shall be consolidated and “available only in judicial review of a final order.” Here, Petitioner’s CAT claims *arose* directly *from* the Government’s initiation of removal proceedings against him. Accordingly, petitioner’s CAT order was consolidated into a final

order of removal. Thus, under §1252(a)(2)(C) no court shall have jurisdiction to review any final order of removal where, as here, petitioner was convicted of a crime involving moral turpitude.

The majority also attempts to alter the scope of Congress' definition of an order of removal by arguing that §1252(b)(9) only consolidates "rulings that affect the validity of the final order of removal." However, as shown above, "arising from" covers a broader category of claims than those that simply impact the validity of the order. Therefore, the majority's reliance on Congress' definition of a final order of removal is misplaced.

Lastly, Congress enacted §1252(a)(2)(C) to strip jurisdiction away over certain claims of criminal aliens. Although this case only involved CAT claims, **there is good reason to think** that the majority's rule will apply to statutory withholding claims as well. As a result, the decision today will "**continue to systematically chip away at [§1252(a)(2)(C)] and other jurisdictional limitations on immigration claims, thus thwarting Congress' intent.**"

Dept. of Homeland Security v. Regents of the University of California, __ S.Ct. __ (June 25, 2020) 5 to 4 (**Roberts**; *Sotomayor* concurring; *Thomas*, *Kavanaugh* and *Alito* dissenting), affirming in part and remanding 295 F.Supp.3d 127 (E.D. N.Y. 2017); vacating and remanding 279 F.Supp.3d 401(E.D. N.Y. 2018); reversing in part 291 F.Supp.3d 260 (E.D. N.Y. 2018); affirming 298 F.Supp.3d (D.C. Dist. 2018); reversing in part 908 F.3d 476 (9th Cir. 2018).

Headline:

Facts:

Dept. of Homeland Security v. Thuraissigiam, __ S.Ct. __ (June 25, 2020) 7 (5-2) to 2 (**Alito**; *Thomas* and *Breyer* concurring; *Sotomayor* dissenting with *Kagan*), reversing 917 F.3d 1097 (9th Cir. 2019).

Headline:

Facts:

IV. CIVIL CASES RELATED TO CRIMINAL TOPICS

A. Securities Law

Intel Corp. Investment Policy Comm. v. Sulyma, 140 S.Ct. 768 (February 26, 2020) 9 to 0 (**Alito**), affirming 909 F.3d 1069 (9th Cir. 2018).

Headline:

Facts:

Liu v. SEC, ___ S.Ct. ___ (June 22, 2020) 8 to 1 (**Sotomayor**; **Thomas** dissenting), vacating and remanding 754 Fed.Appx. 505 (9th Cir. 2018).

Headline: The SEC may seek “disgorgement” as permissible “equitable relief” so long as the award does not exceed the wrongdoer’s net profits and is awarded for victims.

Facts: Charles Liu and Lisa Wang operated a fraudulent scheme to solicit \$27 million from foreign investors seeking permanent residence under a government program for “Immigrant Investors.” They spent “far more than what the[ir] offering memorandum permitted,” and “diverted a sizeable portion to personal accounts.... Only a fraction” was put toward the cancer treatment center they had promised. (Footnote 4: the Liu’s “transferred the bulk of their misappropriated funds to China, ... and fled the United States.”)

The District court imposed the highest civil penalty authorized and “also ordered disgorgement equal to the full amount ... raised from investors, less \$234,899 that remained in the” project’s account. The Liu’s objected that their legitimate business expenses should also have been deducted, but the district judge ruled (based on Ninth Circuit authority) that it would be “unjust to permit the defendants to offset the expenses of running the very business they created to defraud.” In 2017 (*Kokesh*), the Supreme Court had reserved the question of “whether, and to what extent,” the statutory authority for “equitable relief permits “disgorgement,” since that power “historically excludes punitive sanctions.”

Sotomayor (for 8): The 1938 Securities Act permits the SEC to seek “disgorgement” in administrative proceedings, and “equitable relief” in federal district court civil actions. In 1971 the SEC began seeking “restitution” – “profits that deprive a defendant of the gains of wrongful conduct” -- in civil actions (“later referred to as disgorgement”). In *Kokesh* we concluded that disgorgement is a “penalty” for purposes of the 5-year statute of limitations. While equity has “long authorized ... strip[ping] wrongdoers of their ill-gotten gains,” disgorgement must be “restricted ... to an individual wrongdoer’s net profits” “to avoid transforming an equitable remedy into a punitive sanction.” This is “the teaching of equity treatises,” “equity courts,” and prior cases. Thus “legitimate expenses” should be deducted, and disgorgement “assessed against only culpable actors and for victims.” Thus directing disgorgement funds into the U.S. Treasury, and imposing joint-and-several liability, is “in considerable tension with equity practices.” Congress’s use of “disgorgement” for administrative actions “did not silently rewrite the scope” of “equitable” remedies in court.

So while we endorse disgorgement as an equitable remedy, we describe some limiting “principles that may guide the lower courts ... on remand.” (1) It “must do more than simply benefit the public at large;” it “generally requires ... return [of] a defendant’s gain to wronged investors.” Whether this is “feasible” is for the lower courts to work out. (2) “Individual liability” is generally required, but “partners” may also be liable. “We leave it to the Ninth Circuit on remand.” (3) “legitimate expenses” must be deducted, but *Goodyear* (1870) and *Root* (1882) suggest that sometimes expenses are “merely wrongful gains under another name.” “We leave it to the lower court”

Thomas dissenting: I would rule that “disgorgement is not a traditional equitable remedy.” [11-page history and analysis is omitted here.]

B. Habeas Petitions

Banister v. Davis, 140 S.Ct. 1698 (June 1, 2020) 7 to 2 (**Kagan, summary reversal; Alito** dissenting, with Thomas), reversing [unpublished] (CA5 2018).

Headline: A Rule 59(e) motion to alter or amend a district court’s judgment on a habeas petition is not a “second or successive” petition under 28 U.S.C. §2244(b); rather, it is “part and parcel of the first habeas proceeding.”

Facts: [Ed. note: This case involves a typically intricate habeas procedural history, although the question ultimately presented is simple. Interestingly, the cert petition was filed in the Supreme Court by Banister *pro se*. The Court granted review 9 months later, after it called for a response (“CFR”) from Texas and experienced counsel appeared for Banister. While undiscussed by the Justices, the facts of Banister’s conviction and his lawyers’s errors raise substantive questions. The Justices have strong feelings about habeas (no surprise), and the resulting opinions are lengthy.]

In 2002, Gregory Banister struck and killed a bicyclist while driving a car. He was convicted (on “sharply contested facts) of aggravated assault with a deadly weapon and sentenced to 30 years in prison. After exhausting state appeals, Banister filed a federal habeas petition arguing ineffective assistance of counsel. After the District Court denied Banister’s petition, Banister filed a timely Rule 59(e) “motion to alter or amend judgment” asking the district court to correct “manifest errors of law and fact.” The District Court issued another order saying in one paragraph that it stood by its denial.

Banister then filed a notice of appeal that was “[i]n accordance with the timeline for appealing a [Rule 59(e)] judgment. But the 5th Circuit held that Banister’s appeal was untimely, saying his Rule 59(e) motion, “although captioned as such, was not really a Rule 59(e) motion at all.” Instead, the Circuit viewed Banister’s Rule 59(e) motion to be a “successive” habeas application because it attacked the District Court’s resolution of his claims. Unlike a Rule 59(e) motion, successive habeas applications do not postpone the time to appeal. (The 1996 AEDPA habeas statute “sets stringent limits on second or successive habeas applications.” Under its interpretation, the Circuit dismissed Banister’s appeal as untimely, furthering a Circuit split on the meaning of a 59(e) motion filed in the habeas context.

Kagan: “The phrase ‘second or successive application’ [in AEDPA], on which all this rides, is a ‘term of art,’ which ‘is not self-defining.’” Meanwhile, in 1978, we ruled in *Browder* that a timely Rule 59(e) motion suspends the finality of any judgment, including habeas judgments. Nothing in AEDPA indicates that Congress intended to redefine or change the *Browder* ruling. If Congress had intended to effect such a change, it would have provided a clear statement of that objective. Meanwhile, Rule 59(e)’s adoption in 1946, through *Browder* in 1978, and AEDPA’s enactment in 1996, all courts but one have treated Rule 59(e) motions as part of the initial habeas application. They have resolved those motions on the merits and not treated them as “successive.”

Rule 59(e) motions are not inconsistent with AEDPA’s purposes. They do not allow a petitioner to raise new grounds. Instead they efficiently allow a district court to “fix mistakes” and “consolidates appellate proceedings,” avoiding “piecemeal review.” “Rather than allowing repeated attacks on a decision, [Rule 59(e) helps produce a single final judgment for appeal.”

It is true that under a different rule, 60(b), a motion for relief from a final judgment denying habeas counts as a second or successive habeas application (*Gonzales*, 2005). But **“Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here,”** and lower courts applying it have acted accordingly. It can be filed long after a final judgment, while Rule 59(e) motions must be filed within 28 days. Thus the Fifth Circuit should not have dismissed Banister’s appeal as untimely, and the case is remanded.

Alito dissenting, with Thomas: After describing [ed. note: irrelevantly] Banister’s underlying district court habeas as “almost 300 pages and feature[ing] an imagined retelling of the jury deliberations in the form of stage dialogue,” Justice Alito describes this case: “The question ... is whether a state prisoner can evade the federal habeas statute’s restrictions on second or successive habeas petitions by affixing a Rule 59(e) label.” He answers no, at length. (Interestingly, part of Alito’s opinion asks the reader to “imagine a case.”)

“Habeas petitions occupy an outsized place on federal dockets. Their efficient resolution not only preserves federal judicial capacity but removes the cloud of federal review from state-court judgments. The federal habeas provisions create a procedural regime that differs sharply from the regime that generally applies in civil cases.” In *Gonzalez*, the Court unanimously recognized that a Rule 60(b) motion should be characterized as a habeas petition “depending on ... the relief [sought], not the label slapped onto it.” Rule 59(e) motions should not be treated differently; both allow a litigant to change a judgment after entry. Giving prisoners “a second chance to have the merits determined favorably” is in contravention of AEDPA. The Court’s reasons for distinguishing *Gonzalez* are “unsound” and the Court’s reliance on *Browder* is “misleading.” Even if the Court’s ruling “makes habeas proceedings more efficient” – and I am “dubious” -- “today’s decision will give prisoners an incentive to file Entirely meritless Rule 59(e) motions.” Banister’s motion was a “second or successive habeas” petition, and the 5th Circuit was correct to dismiss his appeal, filed beyond the limits of F.R.App.P. 4, as untimely.

V. WRITINGS RELATING TO ORDERS (such as dissents from denial of *certiorari*)

A. Applications for Stay of Execution

Rhines v. Young (November 4, 2019): Sotomayor “respecting” the denial of *certiorari*, where Rhines’ execution was imminent and state court refused to allow experts in prison because Rhines had already been evaluated by psychiatric experts in a different context.

B. Other Death Penalty writings

Isom v. Arkansas (November 25, 2019): Sotomayor “respecting” the denial of *certiorari* in case regarding allegations of judicial bias, though “concerning” are “complicated” by the fact Isom did not raise the issue at his capital trial or for nearly 15 years thereafter during postconviction proceedings.

C. Miscellaneous

Peithman v. United States (November 18, 2019): Sotomayor dissenting from denial of certiorari, in case where the Government concedes that the rationale of *Honeycutt v. United States* applies equally to §981(a)(1)(C) as it does to §853(a)(1) but maintains there is an independent ground for the imposition of joint-and-several liability under §981(a)(1)(C).

Paul v. United States (November 25, 2019): Kavanaugh “respecting” the denial of certiorari in a case raising the same issue resolved last Term in *Gundy v. United States*, but writing separately because Justice Gorsuch’s analysis of the Constitution’s nondelegation doctrine in his dissent in *Gundy*, “may warrant further consideration in future cases.”

Barr v. Roane (December 6, 2019): Alito with Gorsuch and Kavanaugh “respecting” the denial of an application to stay an injunction preventing the Federal Government from executing four prisoners because the Court of Appeals will render its decision “with appropriate dispatch.”

Cottier v. United States (December 9, 2019): Sotomayor “respecting” the denial of certiorari in case of improper presentation of factual-basis statements to jury that implicated Petitioner’s involvement in murder.

Schexnayder v. Vannoy (December 9, 2019): Sotomayor “respecting” the denial of certiorari regarding Louisiana’s Fifth Circuit Court of Appeal’s secret 13-year old policy of summarily denying *pro se* appeals.

McKeever v. Barr (January 21, 2020): Breyer “respecting” the denial of certiorari in case regarding the authority of district courts to release grand jury information.

Dep’t of Homeland Security v. New York (January 27, 2020): Gorsuch and Thomas concurring in the grant of stay of an injunction against the Department of Homeland Security from enforcing a new definition of “public charge” as applied in 8 U.S.C. § 1182(a)(4)(A), except in the State of Illinois.

Wolf v. Cook County (February 21, 2020): Sotomayor dissenting from a grant of stay of DHS’ Illinois-specific public charge injunction.

Baldwin v. United States (February 24, 2020): Thomas dissenting in denial of writ of certiorari in case regarding the timely filing of an amended tax return.

Reed v. Texas (February 24, 2020): Sotomayor “respecting” the denial of certiorari in case of newly discovered evidence in habeas application regarding rape and murder of a woman.

Guedes v. Bureau of Alcohol Tobacco and Firearms (March 2, 2020): Gorsuch respecting the denial of certiorari in a case regarding the Bureau of Alcohol Tobacco and Firearm’s new interpretive rule forbidding ownership of bump stocks.

Avery v. United States (March 23, 2020): Kavanaugh “respecting” the denial of

certiorari in case regarding second or successive applications for postconviction relief filed by federal prisoners.

Halprin v. Davis (April 6, 2020): Sotomayor “respecting” the denial of certiorari Regarding prisoner’s habeas petition raising a judicial bias claim.

Valentine v. Collier (May 14, 2020): Sotomayor and Ginsburg respecting the denial of application to vacate stay regarding Fifth Circuit’s suspension of injunction requiring Texas prison to follow extensive protocol in protecting prisoners from COVID-19.

Wexford Health v. Garrett (May 18, 2020): Thomas dissenting from denial of certiorari in case regarding the PLRA’s exhaustion requirement of inmate’s post-release filing.

South Bay Unified Pentecostal Church v. Newsom (May 29, 2020): Kavanaugh, Thomas and Gorsuch dissenting from denial of Petitioner’s application for temporary stay of injunction limiting attendance in California religious worship services to 25% in response COVID-19.

Hubert v. United States (June 8, 2020): Sotomayor respecting the denial of certiorari in case where inmate sought to file a second or successive habeas petition.

Baxter v. Bracey (June 15, 2020): Thomas dissenting from the denial of certiorari in case of qualified immunity where police officers released dog after Petitioner had already surrendered and sat on floor with hands raised in the air.

Rogers v. Grewal (June 15, 2020): Thomas and Kavanaugh dissenting from the denial of certiorari in case where state denied Petitioner license to carry concealed weapon while servicing teller machines in high crime neighborhoods.

Kansas v. Boettger (June 22, 2020): Thomas dissenting from the denial of certiorari in case asking whether the First Amendment prohibits a state from criminalizing threats to commit violence that are communicated in a reckless disregard for placing another in fear.

Raysor v. DeSantis (July 16, 2020). **Sotomayor, joined by Ginsburg and Kagan, dissenting from denial of application to vacate stay.** In 2018, Florida amended its State Constitution to restore the right to vote for persons with felony convictions (excluding murder and sexual offenses), if they have completed “all terms” of their sentences. This includes payment of all fines, fees and restitution, which means over 1 million Floridians cannot vote “unless they pay money.” In May 2020, after an 8-day bench trial and in a 125-page opinion, the District Court found a number of constitutional violations and enjoined state officials from preventing persons from registering to vote or voting simply because they cannot pay their sentence obligations. A month later (July 1), the Eleventh Circuit stayed the effect of this ruling, pending appeal, without opinion. This interferes with an August 18 primary

election. It ‘disrupts a legal status quo and risks immense disenfranchisement.’” The Court errs in not vacating the 11th Circuit’s stay.

Walker v. United States (petition for writ of cert. dismissed): Whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a “violent felony” under the Armed Career Criminal Act?

VI. CRIMINAL LAW *CERTIORARI* GRANTS FOR UPCOMING (Oct. ’20) TERM

As of **August 3, 2020**, the Court has granted review in 37 cases for the OT ’20 Term (the actual number is lower as some will be consolidated). By my broad definition, 12 of these are criminal or quasi-criminal (such as immigration cases). This is normal – roughly one-third of cases decided by the Court every year have some relationship to criminal law. Here are brief descriptions (either the parties’ or my own) of the questions presented in the criminal-and-related cases that have been granted:

Cases already scheduled for argument:

1. **U.S. v. Briggs** (consolidated with *U.S. v. Collins*), set for argument Tuesday, Oct. 13, 2020: Whether the U.S. Ct. App. for the Armed Forces erred in concluding – contrary to its own longstanding precedent – that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if discovered and charged within five years; (and if so, is the military death penalty for rape unconstitutional as it is on the civilian side).
2. **Pereida v. Barr**, set for argument Wednesday, Oct. 14, 2020: Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is ambiguous regarding whether it corresponds to an offense listed in the Immigration and Nationality Act.
3. **Torres v. Madrid**, set or argument on Wednesday, Oct. 14, 2020: Fourth Amendment: whether an unsuccessful attempt to detain a suspect by use of physical force is a “seizure” or whether physical force must be successful in detaining a suspect to constitute a “seizure”?

Cases granted but not yet scheduled for argument:

4. **Borden v. United States** (No. 19-5410: Whether the “use of force” clause in the Armed Career Criminal Act encompasses crimes with a *mens rea* of mere recklessness (a flow-on to *Walker v. U.S.* which was granted and half-briefed in OT 19 but then dismissed when the defendant died).
5. **Jones v. Mississippi** (No. 18-1259), Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

6. **Brownback v. King** (No. 19-546), Whether a final judgment in favor of the United States in an action brought under Section 1346(b)(1) of the Federal Tort Claims Act, on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.
7. **Van Buren v. United States** (No. 19-783), Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.
8. **Edwards v. Vannoy** (No. 19-5807), Whether the Supreme Court's decision in *Ramos v. Louisiana* applies retroactively to cases on federal collateral review.
9. **CIC Services, LLC v. Internal Revenue Service** (No. 19-930), Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.
10. **Niz-Chavez v. Barr** (No. 19-863), Whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in Section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.
11. **Albence v. Chavez** (No. 19-897), Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. § 1231, or instead by 8 U.S.C. § 1226.
12. **Federal Republic of Germany v. Philipp** (No. 19-351), (1) Whether the "expropriation exception" of the Foreign Sovereign Immunities Act, which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human-rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing states' responsibility for takings of property; and (2) whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even when the foreign nation has a domestic framework for addressing the claims.
13. **Nestlé USA v. Doe I** (No. 19-416), (1) Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where the plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity; and (2)

whether the judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

14. **Cargill v. Doe I** (No. 19-453), (1) Whether the presumption against extraterritorial application of the Alien Tort Statute is displaced by allegations that a U.S. company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in – and the plaintiffs suffered their injuries in – a foreign country; and (2) whether a domestic corporation is subject to liability in a private action under the Alien Tort Statute.
15. **Republic of Hungary v. Simon** (No. 18-1447), Whether a district court may abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity, in a matter in which former Hungarian nationals sued the nation of Hungary to recover the value of property lost in Hungary during World War II but the plaintiffs made no attempt to exhaust local Hungarian remedies.
16. **Department of Justice v. House Committee on the Judiciary** (No. 19-1328), Whether an impeachment trial before a legislative body is a “judicial proceeding” under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure.

WHO WROTE WHAT
in CRIMINAL-and-related Cases in the 2020-19 Term
(all writings, not just majorities, in argued cases)
Majority opinions are in **Bold**; *Concurrences are in italics*; Dissents are underlined

ROBERTS

THOMAS

GINSBURG

BREYER

ALITO

SOTOMAYOR

KAGAN

GORSUCH

KAVANAUGH

Per curiam summary reversals (no individual author)

Total Criminal-and-Related Decisions in argued cases:

Total Writings in argued Criminal Law-and-Related cases:

Criminal Law Workhorses: