THE CRIMINAL JUSTICE SECTION
OF THE
AMERICAN BAR ASSOCIATION

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ANNUAL REVIEW
of the
U.S. SUPREME COURT'S CRIMINAL LAW CASES (2022-2023)

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 2022 Term (Oct. 2022-July 2023)
(with clickable links to the cases).

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THE 2022 TERM (OCT. 2022 – JULY 2023)

CRIMINAL LAW (AND RELATED) DECISIONS OF THE U.S. SUPREME COURT

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

Annual Review of the Criminal Law (and Related) Opinions of the U.S. Supreme Court Issued During the October 2022 Term

2023 Annual Meeting Panelists

(Denver Grand Hyatt, Denver, Colorado)

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Editor's Brief Overview of the 2022-23 Term, Criminal Cases

With most public attention this past Term focused on the Court's civil docket (affirmative action, same-sex marriage discrimination, student loan forgiveness, etc.), this was not a "blockbuster Term" for criminal law. Still, there were some major decisions – and others revealed some unpredicted ideological differences between the Justices (who, on the civil side, almost always voted in line with the predictable 6-3 or 5-4 ideological split). Individually, the rapid emergence of Justice Jackson as an outspoken and fearless questioner, writer and voter is perhaps the "biggest story" of the Term. In a similar if more muted way, Justice Gorsuch continues to occasionally vote for individuals he feels have been unfairly treated (for example, his concurring opinion in ***Axon Enterprise***; or his defendant-friendly majority in ***Bittner***).

The ***Counterman*** decision received perhaps the most public attention, a 7-2 decision for the defendant in a "true threats" case, ruling that at least a reckless intent to threaten must be present to prove criminal threat charges. I will dispute, however, that this was a wholly "liberal" result, as here a man who repeatedly acted in a plainly threatening manner toward a woman who made her disinterest clear receives a new trial – offering women/persons who are victims of online stalking or harassment perhaps less protection than otherwise.

Two other constitutional cases went solidly against the defendant. In ***Samia*** the 6-3 majority ruled that a vague identifier (substituting "other person" for the defendant's name) solves a Confrontation Clause problem when a non-testifying co-defendant's alleged confession will be

admitted at a joint trial. (A *Bruton* issue, for the uninitiated.). And in ***Smith***, the Court ruled, surprisingly unanimously, that when a person is tried in a venue that is unconstitutional, it is no Double Jeopardy problem to try them again, for the same crime, in the correct venue.

Federal statutory decisions really dominated this Term's criminal docket, comprising a third of all the cases in this booklet. There were two major "mail/wire fraud decisions (***Ciminelli*** and ***Percoco***), both from New York (of course) and both further limiting the scope of those broad and longstanding fraud statutes. ***Dublin***, ***Lora*** and ***Bitner*** all ruled for the defendant, so the Term was not all pro-prosecution – and I'd add two habeas decisions (***Cruz*** and ***Reed v. Goertz***) to that list. However, the ruling in ***Jones v. Hendrix*** was an astounding adverse decision (6-3, just who you;'d expect) for convicted defendants, ruling that a successive petition cannot be filed even if a subsequent Supreme Court ruling has re-defined the criminal law to make the defendant legally innocent (!!).

Immigration law continues to receive much Court attention, and two rulings were remarkably pro-immigrant. In ***Hansen***, the Court limited the reach of the expansive "cannot encourage unlawful residence" statute, to purposeful and specific lawbreaking. And in ***U.S. v. Texas***, the Court ruled 8-1 that States lack <u>standing</u> to challenge Executive Brach arrest and removal priorities, even if those policies are seemingly in violation of a federal "shall arrest and remove" statute. Recognizing a long tradition of prosecutorial discretion here may produce reverberations in other contexts where discretionary prosecution policies have been challenged.

This "ABA Summaries" booklet has been produced by me for almost 30 years. I collect my own statistics and write my own "Criminal Law and Related" Summaries. (*You are currently reading the 2023 version*). I use a broad definition of "criminal" cases which counts, in addition to purely criminal (state and federal) cases, civil cases that are obviously about criminal prosecutions (habeas corpus, for example), or are civil cases with potential implications for criminal prosecutions (immigration, for example); and other civil cases that can have reverberations in criminal contexts.

Using my broad definition, this year there were 27 (out of 56 total) cases granted for oral argument in the U.S. Supreme Court that addressed "Criminal-law-and-related" issues. This includes two ultimately non-substantive rulings (in ***Google*** and ***In re Grand Jury***) and one quiet dismissal after the scheduled oral argument was canceled (***Arizona v. Mayorkas*** – check out Justice Gorsuch's dramatic "I told you so" Statement there). This number represents about half the Court's full docket (which is more than last Term, and at or slightly above the average for Terms over the past 30 years). The DIG ("dismissed as improvidently granted) in ***In re Grand Jury*** after oral argument was held, was unusual, and avoided a disturbing attack on the attorney-client privilege – the ABA filed an Amicus brief in that case which I urge you to read (link in the Summary, p. 24, below).

Twelve of the 27 cases were "pure criminal" -- and when you add five Immigration and three Habeas decisions, it is fair to say that **criminal law issues represent at least one-third of the Justices' merits work**. Such a substantial percentage of the Court's docket is consistent year after year – the U.S. Supreme Court remains the "supreme" decider in virtually all areas of criminal law, nationwide. **At the same time, the total number of cases the Court annually decides, of any kind, is <u>miniscule</u> compared to the work of lower courts.** "Justice" in this country is done largely without the Supreme Court's attention, and the Justices continue to have the lightest – think about it! – workload of any judiciary in the United States. And they get the summer off!

Even though the Court was back to normal argument times and styles, after three pandemic-altered Terms), the Justices are still apparently agreed to defer to Justice Thomas (the Senior Justice on the Court) for the first question in every oral argument (if he chooses to take it). The years of a silent Justice Thomas are now a dim and fading memory – he is actively engaged and his questions often set the tone for following questions and arguments. However, Justice Jackson is giving him a run for his money – by some counts she spoke more at oral argument than any other Justice -- in this her FIRST Term on the Court. Hers was not just gasbag conversation – Court observers uniformly recognize that Justice Jackson is adding much substantive force and energy to the Court, and a foil to Justice Thomas in more ways than one.

Meanwhile, the Court has already put at least one "blockbuster" case on its criminal law docket for next Term: ***U.S. v. Rahimi*** will require the Court to apply, and hopefully further explain, its delphic Second Amendment analysis announced in a year ago in ***Bruen*** (2022). The question presented is whether the federal statute that denies firearms possession to persons subject to a civil domestic violence restraining order, violates the Second Amendment. The Fifth Circuit ruled that it does, because the government failed to satisfy its burden (supposedly required by ***Bruen***) to show that there were "historical analogues" to such a statute at the time of the Second Amendment's adoption [a time when, of course, women lacked virtually all civil rights!]

A final aspect I hope you will not miss in this booklet: **the final page,** providing a chart that shows, among the Justices individually, **"Who Wrote What"** in this Term's criminal-and-related cases. I am not aware of any other public source that gathers and presents information about what work each Justice has done over the Term with regard to criminal law issues. That page offers some further thoughts about the work, workload, and "workhorses" among the Justices, regarding the Court's criminal law docket.

This overview could go on; however, we will leave further details, commentary, and entertainment to our fantastic panelists at this year's Annual Meeting in Denver, Colorado. Stylistically, I hope that the "clickable" links in the electronic version of this booklet are useful to you. The ABA also post these Summaries on its Criminal Justice Section webpage (and you can also always request a copy by emailing the staff at the Criminal Justice Section, or Professor Little directly). I am always happy to receive your comments, good bad or (I hope not) indifferent. Once again, I am 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. I particularly want to thank Carol Rose, whose now-decades of experience of working with the ABA, and me in particular, entitles her to at least a Lifetime Achievement award. Finally, the ***website*** for the Criminal Justice Section can give you a wealth of information on a multitude of other criminal law-related topics!

I look forward to sharing more fascinating and significant rulings with you next summer, as well as in this one. Meanwhile, remember to Do Justice ("*Fiat Justicia*," my law school's motto since 1878, even if the school's name changed this year) in whatever you do!

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August 2023

Explanatory Notes for these Materials

The pages that follow provide detailed summaries of all the U.S. Supreme Court's criminal law decisions (as well as other types of cases that the author deems "related"), issued during the most recent Term of the Court, grouped by subject matter. **For a quick review of the Term's work, the "LIST of Cases Summarized" above, provides one-sentence descriptions for each decision**, and provides the page number below where its more-detailed summary is located. Some decisions address more than one subject, or an unusual subject (such as the ***Cruz v. Arizona*** decision), and Professor Little has placed them in a category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how the Justices' thinking has developed as the Term progressed.

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 facts are included. For example, we include civil securities law cases, habeas cases, immigration law decisions (and others), because such "civil" cases often arise in a criminal factual milieu, or can be useful to practitioners and judges to later apply to, or in, criminal law contexts. Thus immigration law is often relevant to criminal liability and sentencing; civil securities fraud is often related to criminal investigations; etc. Such decisions should be known to the competent criminal lawyer.

The title of each case now has a "clickable" link to the actual opinion of the Court; and we cannot stress enough that knowledgeable lawyers should read the Court's opinions as written, not rely on anyone's summary or description. Each Summary below provides the case name, its date and publication cite, the Justices' votes, who wrote what type of opinion within the case, and citation to the lower court's opinion. The name of the majority-writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. A "**Headline" description of the holding** is immediately provided. Then follows a more 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, not addresses, or are likely to be raised in future cases and *cert* petitions.

While we try to be succinct (most of the actual Court opinions are dozens and dozens of pages long), our goal is to provide the reader with an accurate representation of each opinion's content, not "sound-bite" brevity. Sometimes we **bold 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 -- we firmly believe that the words of the Justices themselves best reflect the meaning of their opinions. But please be aware: we take some editorial liberties, eliding or abbreviating quotes, combining two sentences into one, changing spelling or tenses without indication, etc. Again, read the Court's opinions in full!

Finally, comments in the Summaries that are placed in [brackets] are the (sometimes opinionated) thoughts of Professor Little, not the Justices. So pay attention to any brackets [ ] you see; and we try to signal such editorial asides by also preceding them with a bolded "**[Ed. note**…]."

Following the Summaries of Opinions in argued cases, we provide brief descriptions of "Other Writings" by Justices, usually interesting dissents or concurrences attached to Orders of the Court

(such as dissents from denial of stays, or of *certiorari*, or other authored writings). We do not show the dozens of "shadow docket" Orders issued by the Court all Term if they are unaccompanied by any Justice writing.

The booklet ends with a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, for a preview of what may be coming. And the final page of the booklet is always a chart showing which Justices wrote which opinions this Term (including separate concurring and dissenting opinions). This provides a "snapshot" of which Justices are writing, what sort of opinions they are spending their time on, and how much work they are devoting to criminal law topics.

These materials are the product of Professor Little alone (with some drafting and substantial formatting 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" phrases or 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 are usually omitted; and changes in capitalization and punctuation, verb tenses, singular-plurals, or other non-substantive spots, 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 begin on the next page.

DETAILED SUMMARIES OF THE COURT'S CRIMINAL LAW (AND RELATED) OT 2022 OPINIONS

I. CONSTITUTIONAL DECISIONS

A. First Amendment — "True Threats" as Unprotected Speech

Counterman v. Colorado, No. 22-138, 143 S.Ct. 2106 (June 27, 2023), 7 (5+2) to 2. **Kagan**; *Sotomayor* concurring; Thomas dissenting; Barrett dissenting; vacating 497 P.3d 1039 (Colo. App. 2021).

Headline: For **"true threats"** to be prosecuted and not be First Amendment protected speech, the government **must prove the defendant had "some subjective understanding of the threatening nature of his statements," albeit with "recklessness,"** rather than a "knowledge" *mens rea*.

Facts: Billy Counterman sent hundreds of Facebook messages over two years to a local woman ("CW") he had never met. Counterman evaded her "blocks" on his messages, and a number of his messages reasonably created fear in CW. They suggested that this "total stranger" was physically surveilling CW, and (for example) said "staying in cyber life is going to kill you" and "You're not being good for human relations. Die." CW limited her daily activities and felt great stress. Colorado ultimately charged Counterman criminally with "stalking," based solely on his messages to CW. The Colorado trial court applied an "objectively reasonable person" standard and found that Counterman's messages were unprotected "true threats." The jury convicted and was not required to find that Counterman had "any kind of subjective intent to threaten" CW. The Colorado appellate court affirmed, and the Colorado Supreme Court denied review.

Kagan (for 5; Sotomayor, joined by Gorsuch, concur only in part): "True threats of violence are outside the bounds of the First Amendment." But to avoid chilling protected speech, the government in "must prove in true-threats cases that the defendant had some understanding of his statements' threatening character." However, "a recklessness standard is enough," not "specific intent." This means that the government must prove that the defendant was aware of the content of his words, and "consciously disregarded a substantial and unjustifiable risk that the conduct will cause harm to another." ***Voisine*** (2016).

Whether words are threatening "depends not on the mental state of the author, but on what the statement conveys to the person on the other end." ***Elonis*** (2015). However, to penalize the speaker, "the First Amendment may still demand a subjective mental-state requirement," to prevent a "chilling effect" on protected speech close to the line. "No doubt" that this "makes prosecution of otherwise proscribable, and often dangerous, communications harder." But the First Amendment requires such a "balance" in many contexts (Kagan cites cases about defamation, incitement, and obscenity).

As for the level of intent, "recklessness offers the right path." [**Ed. note:** the Court adopts the "*mens rea* ladder" of the Model Penal Code – purpose, knowledge, recklessness, and negligence – without citing the MPC. This has been a repeated theme of Kagan's *mens rea* opinions, and her project to have the MPC adopted seems complete with this opinion.]. "Recklessness is morally culpable conduct," but it will "impede true-threat prosecutions" less than requiring knowledge or purpose would. Reckless defendants "have consciously accepted a substantial risk of inflicting serious harm." It is true that our incitement decisions demand more," but we think the need to protect "mere advocacy" is higher, or harder to separate, than here. Our "balance" between the positions of

the dissents and the concurrence — between fully objective, and a more protective *mens rea* levels, is "just right" (see n.7, a "Goldilocks" position).

Sotomayor *concurring in part and concurring in the judgment,* ***Gorsuch*** *joining:* I agree with much in the Court's opinion, including that recklessness is "amply sufficient" in this case. Counterman was prosecuted for "stalking" not just for his, or a single, speech, but also for "repeated, unwanted, direct contact" with CW. Recklessness is fine for that; "stalking can be devastating and dangerous." But recklessness for all true-threats cases was not argued by the parties or the courts below. I would not rule more generally that it will be sufficient for all true-threats prosecutions. Precedent and history and the First Amendment may require more. And "First Amendment vigilance is especially important when speech is disturbing, frightening, or painful." We should be wary of "overcriminalizing upsetting or frightening speech," or "charged political speech." "Inadvertently threatening speech" should not be punished. Ultimately, we think knowledge or purpose, the "traditional definition" of "intent," should generally be required to prosecute true threats. [Further lengthy content is omitted here.]

Thomas *dissenting:* I join Barrett's dissent in full, but write here to criticize [only two pages] the majority's reliance on ***NY Times v. Sullivan*** (1964), which I really dislike. A "policy-driven decision masquerading as constitutional law."

Barrett *dissenting, Thomas joining:* "Nearly every other category of unprotected speech may be restricted using an objective standard." I would do that here, too. The majority "unjustifiably grants true threats preferential treatment." The majority "installs a prophylactic buffer zone" around true threats, for reasons that are flawed at every step. [Further detail omitted here; Justice Barrett relies heavily on prior dissents written by Justice Thomas, for example in ***Elonis***.]. Our "precedent does not set a baseline ban on an objective standard," as the majority says. Courts must consider the full context to determine of speech is a "true threat." But most states use an objective standard, and history supports that. Further, the Court's recklessness rule will make civil enforcement orders against threatening conduct, like domestic violence restraining orders, harder to obtain.

[Ed. note: The various opinions in this case show that the Justices do not agree on the meaning of many First Amendment precedents, or doctrines. This suggests more First Amendment precedent reinterpretations in the future.]

B. Fifth Amendment – Double Jeopardy

Smith v. United States, No. 21-1576, 143 S.Ct. 1594 (Jun. 15, 2023). **Alito** (9-0), affirming 22 F. 4th 1236 (11th Cir. 2022).

Headline: The **Constitution does not bar retrial following a trial that took place in an improper venue and before a jury chosen from the wrong district**.

Facts: Timothy Smith was indicted in the Northern District of Florida for theft of trade secrets. An "avid angler" who lived in Alabama, Smith had allegedly taken data, "surreptitiously" via "a web application," from the website of a company that provides coordinates form underwater fishing reefs. Smith moved to dismiss the indictment, alleging that neither his actions nor the company's servers were in the Northern District of Florida (although the company's headquarters was there). The district court allowed the case to go to trial, saying that there were factual disputes regarding the proper venue. The Eleventh Circuit reversed, saying that venue had been improper, but remanded the case for a new trial and rejected an argument that remanding would constitute Double Jeopardy under the Sixth Amendment.

Alito (9-0): The Venue Clause of the Constitution (Art. III, sec. 2, cl. 3) provides that "Trial of all Crimes ... shall be held in the State where the ... Crimes shall have been committed." The Sixth Amendment similarly grants defendants a "right to an impartial jury of the State and district wherein

the crime shall have been committed" (the "Vicinage" clause). Finally, the Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Unless prohibited by the Double Jeopardy Clause it "has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. ***Ewall*** (1966). "Therefore, the appropriate remedy for prejudicial trial error, in almost all circumstances, is simply the award of a retrial, not a judgment barring reprosecution." The "one exception to this general rule" is for violations of the Sixth Amendment's Speedy Trial right. ***Barker v. Wingo*** (1972).

We now apply the general rule to the Venue and Vicinage clauses. Nothing in their text suggests that retrial is not an adequate remedy for error. "The mere burden of a second trial has never justified an exemption from the retrial rule." Both clauses are tied to where the crime is committed, not the "convenience of the accused." And "we have repeatedly acknowledged that retrials are the appropriate remedy for violations of other jury-trial rights" ("most analogous" is the "fair cross-section of the community" jury trial right. ***Glasser*** (1942).). Neither does any common law or other history "justify an exception to the retrial rule." History shows that the rights were "highly prized by the founding generation"; but does not speak to remedy. In fact, common law precedents support "the opposite inference," retrial. E.g., ***Arundel's Case*** (Brit. 1593); ***Jackalow*** (1862). We have found no contrary decisions.

As for double jeopardy, "a judicial decision on venue is fundamentally different from a jury's general verdict of acquittal." "Culpability is the touchstone," but retrial is permissible when the error is "unrelated to factual guilt or innocence." ***Scott*** (1978). For example, retrial is permitted "when a trial ends in juror deadlock," ***Blueford*** (2012). [**Ed. note**: a 6-3 decision in which Justices Kagan and Sotomayor dissented – why no dissent here?]. A venue or vicinage decision does "not adjudicate culpability." So, the Eleventh Circuit's decision here is affirmed [Note that the government failed to cross-appeal on the venue issue, and vicinage was not examined, so those issues may remain open on remand, presumably subject to the Eleventh Circuit's own opinion below on venue].

C. Sixth Amendment — Confrontation Clause, Co-Defendant Confessions

Samia v. United States, No. 22-196, 143 S.Ct. 2004 (June 23, 2023). **Thomas** (6 (5+1) - 3); *Barrett* concurring; Kagan dissenting; Jackson dissenting; affirming 2022 U.S. App. LEXIS 10632 (2d Cir. Apr. 20, 2022).

Headline: Using **a non-identifying neutral descriptor ("other person") in place of defendant's name adequately resolves** the constitutional *Bruton* concern **for admission of a non-testifying co-defendant's confession.**

Facts: Adam Samia and two others (Stillwell and Hunter) were charged with murder for hire of Catherine Lee. The government alleged that Samia and Stillwell (hired by Hunter) were driving in a van with Lee, when Samia shot and killed Lee. The three men were tried jointly. Stillwell allegedly waived his Miranda rights and told a DEA agent that he and Samia had been in the van when Lee was killed, and also that Samia shot Lee while Stillwell was only the driver. Prior to trial, the government moved to admit Stillwell's alleged confession via a DEA agent, who would say to the jury that Stillwell told him about "a time when *the other person* he was with pulled the trigger on that woman in the van that he and Mr. Stillwell was driving." Because Stillwell had a right to not testify, Samia could not cross-examine him about this alleged confession. The district court, affirmed by the Second Circuit, ruled that the confession could be admitted, so long as a neutral descriptor was substituted for Samia's name and a limiting instruction was given to direct the jury that it could consider the confession against only Stillwell, not Samia. At trial, "the 'other person' descriptor" was used multiple times in place of Samia's name, to put Stillwell's full confession before the jury. Samia's

jury conviction was affirmed, rejecting the argument that substituting a "neutral" descriptor did not remedy the Sixth Amendment Confrontation Clause problem.

Thomas (for 5½): The admission of a non-testifying codefendant's confession that implicates a codefendant creates a Confrontation Clause concern for the defendant who cannot cross-examine the alleged confessing co-defendant. ***Bruton*** (1968). "This Court has never opined as to whether rewriting a confession may serve as a proper method of redaction," and we don't resolve that separate question here (n.1). But we do rule that "longstanding historical practice" and "the general presumption that jurors follow their instructions" supports the rule that **using a non-identifying neutral descriptor adequately resolves the constitutional concern.**

Samia argues that other evidence in the case allowed the jury to "immediately infer" that Stillwell was referring to Samia when "the other person" was used. **[Ed. note:** this seems true, and very clear, to me. Justice Kagan also says it was "obvious."] "Nevertheless, the Confrontation Clause applies only to witnesses 'against the accused' (***Crawford***, 2004), and "ordinarily" a witness is not "a witness 'against' a defendant if the jury is instructed to consider the testimony only against a codefendant." ***Richardson*** (1987); ***Sparf*** (1895); ***Ball*** (1896). A limiting instruction, combined with use of a non-identifying descriptor, suffices. "Evidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction," and "jurors can be relied upon the follow the trial judge's instructions." [**Ed. note:** nothing is cited to support this last assertion; and other contexts do not involve the Constitutional Confrontation Clause. I confess my bias against the holding here.]. For example, we have allowed Miranda violation statements to be admitted against a defendant, when the jury is instructed to consider it for impeachment only. ***Harris*** (1971). Thus the "presumption credits jurors." ***Roy*** (1880). ***Bruton*** "recognized a narrow exception" to the "follows instructions" presumption; and ***Richardson*** "declined to extend Bruton further." Our precedents "distinguish between confessions that directly implicate a defendant and those that do so indirectly." "The defendant is entitled to a fair trial but not a perfect one." ***Lutwack*** (1953).

We have held that substituting a defendant's name with just a blank space or "deleted," violates *Bruton*, because the confession remains "directly accusatory, pointing directly to the defendant." ***Gray***, 1998. But this gives defendants no "license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference." Reference to an "other person" is "not akin to an obvious blank or the word 'deleted.'" **[Ed. note:** Why not?]. "We decline to endorse" a burdensome "impractical" process requiring "extensive pretrial hearings." The practical consequence would be to mandate severance" in all such situations, but forbidding joint trials is "too high a price to pay" (quoting ***Richardson***); they are "crucial" to our system (***Wheat***, 1827, Story J.; Justice White's dissent in ***Bruton***). And the government need not forego using a confession entirely, because confessions are essential to society's compelling interest in finding, convicting, and punishing those who violate the law" (***Richardson*** again). "The Confrontation Clause does not provide a freestanding guarantee against the risk of prejudice that may arise inferentially in a joint trial."

Barrett *concurring in all but Part 11-A*: I agree with the Court's ruling. However, "the historical evidence ... is beside the point," because it is "from the late 19th and early 20th centuries -- far too late to inform the meaning of the Confrontation Clause at the time of the founding." They also address rules of evidence, not the constitutional question. The Court should not "overclaim," and "we should be discriminating in" the use of history, or "we risk undermining the force of historical arguments when they matter most."

Kagan *dissenting, joined by Sotomayor and Jackson*: Here "the agent's testimony ... pointed a finger straight at Samia, no less than if the agent had used Samia's name or called him 'deleted.'" This violates ***Bruton***, and "warps our ***Bruton*** precedent." Moreover, ***Bruton*** expressly rejected the

idea of limiting instructions. The Court's distinctions "make nonsense of the ***Bruton*** rule" and the majority's "inexplicable line-drawing ... cannot command respect." **[Ed. note:** Here Kagan subtly (or not-so-subtly) invokes the current critique of the Court, that its decisions are placing public respect for the Court in great danger.] The majority's "practical concerns" are "flimsy" and the government has cited no lower court decision in which applying a more protective rule has created problems. The majority is not really trying to distinguish Bruton on a principled basis; it's real "point is to say why ***Bruton*** should go." "One might" now "wonder ... whether ***Bruton*** is ... next ... on this Court's chopping block." However, "there is now no need for formal overruling," because ***Bruton*** can now "always [be] circumvented."

Jackson *dissenting*: I agree with Kagan's dissent, the majority clearly wants to overrule ***Bruton***. Importantly, the majority's approach "inverts the constitutional principles" that should govern, and "turns our ***Bruton*** Cases on their head." The presumption should be that admitting a codefendant's incriminating confession always violates the Confrontation Clause; the only question is whether a particular device "cures" the problem. By changing the rule to be that confessions are presumed admissible, the majority "sets the stage for considerable erosion of the Confrontation Clause right."

II. FEDERAL STATUTES

A. Federal Wire/Mail Fraud

Ciminelli v. United States, No. 21-1170, 143 S.Ct. 1121 (May 11, 2023). **Thomas** (9-0), *Alito* concurring; reversing 13 F. 4th 158 (2d Cir. 2021).

Headline: A **"right to control valuable economic information"** is **not a "traditional property interest" on which a wire fraud prosecution may be based.**

Facts: In a "wide-ranging" scheme among various politically-connected individuals, Louis Ciminelli's construction company paid a lobbyist and others to ensure they would be designated a "preferred developer" for state-funded projects in New York state's "Buffalo Billion" initiative. Ciminelli and others were indicted under the federal wire fraud statute. The prosecution relied on a "right to control" theory, alleging that the victim (a nonprofit agency that distributed state contracts) was deprived of "potentially valuable economic information needed to make economic decisions." Wire fraud requires a scheme to defraud of "property," and the district court instructed that property includes "intangible interests such as the right to control ... economic information that it would consider valuable in deciding how to use its assets." The jury convicted and the Second Circuit affirmed, applying its "longstanding right-to-control precedents" — "rigging the [process] to favor their companies deprived" the nonprofit agency "of potentially valuable economic information." Two other circuits have rejected this theory.

Thomas (for 9): The federal wire (and mail) fraud statutes criminalize "schemes ... for obtaining money or property, by means of false or fraudulent pretenses ...." **[Ed. note:** This is a summary of the law today, atextual as it might seem if the statutes were quoted in full.]. We have ruled [in a series of cases] that these crimes apply "only ... to ... traditional property interests," even if intangible. **[Ed. note:** Justice Thomas cites to ***Cleveland*** (2000). Although some might argue with his characterization, it is the law now.]. "The fraud statutes do not vest a general power in the Federal Government to enforce its view of integrity in broad swaths of state and local policymaking" (***Kelly***, 2020). We reject the "right to control" theory because it "cannot be squared with the text of the federal fraud statutes", and a right to control information necessary to make economic decisions, "while perhaps useful for protecting and making use of one's property," "is not an interest that had long been recognized as property when the wire fraud statute was enacted." **[Ed. note:** This combines quotes found in both text and footnotes of Thomas' poorly organized (in my opinion) decision.]. "We

have consistently rejected federal fraud theories that stray" from our [limited] understanding of these statutes. After ***McNally*** (1987), which "confined" the statutes to "property rights," Congress restored only one type of "intangible rights" for fraud protection, the "intangible right of honest services." We think this "forecloses the expansion of wire fraud to the intangible right to control." Otherwise, "almost any deceptive act could be criminal," and we cannot "expand federal jurisdiction without ... a clear statement by Congress."

We also reject the government's "cherry-picking" of the record to argue that Ciminelli's conviction should be affirmed under a deprivation of traditional property fraud theory. Remanded.

Alito concurring: Very briefly, I do not understand the Court's opinion to address various issues that may be presented to preserve this conviction or prosecution (he lists four).

Percoco v. United States, No. 21-1158, 143 S.Ct. 1130 (May 11, 2023). **Alito** (9 (6/7+2) to 0); Gorsuch concurring in the judgment); reversing 13 F.4th 180 (2d Cir. 2021).

Headline: "Honest-services" prosecutions may extend to private-parties IF they are truly, government agents; but here the Second Circuit's *Margiotta* theory went too far, and not harmless.

Facts: During "an eight-month interval between two stints as a top aide to the Governor of New York," Percoco was paid by a private company seeking state funding to use his influence to stop an expensive labor union "peace" requirement. He called the government agency and they "reversed course the next day. Both before and after this, Percoco was the Executive Deputy Secretary" to the Governor with a "wide range of influence over state decision-making." Percoco's eight-month hiatus was to manage the Governor's reelection campaign. Percoco was charged with conspiring to commit honest-services fraud under § 1346. (Louis Ciminelli, see case above, was also named in this indictment, but not in the count at issue). Percoco moved to dismiss, arguing that a private citizen cannot commit honest services fraud because he has no duty to the public. The district court rejected that, saying Percoco had "continued to function in a senior and supervisory role" with the State. At the close of trial, the jury was instructed that Percoco could be convicted if he "dominated and controlled any government business" while in his non-governmental position, and that government "people actually relied on him because of a special relationship he had with the government." Percoco was convicted on the wire fraud honest-services count and was acquitted on other counts. The Second Circuit affirmed, on its own 1982 precedent (***Margiotta***), extending honest services fraud to "informal political or other influence over governmental decisionmaking."

Alito (for 6, plus Jackson concurring in all but Part II-C-2): Well before **McNally** (1987), many Circuits, including the Second in ***Margiotta***, applied an "honest services" theory to mail and wire fraud. When ***McNally*** ruled that the statutes are limited to the "protection of [only] property rights," Congress then enacted § 1346, continuing to permit fraud prosecution under those statutes for deprivation of "the intangible right of honest services." In ***Skilling*** (2010) we ruled that § 1346 applies only to the "'core' of pre-***McNally*** honest services case law, ... not ... to *all* intangible rights of honest services." ***Skilling*** makes clear that prosecutions for honest services fraud are still limited and that the concept "must be defined with clarity."

Percoco's arguments that the statutes cannot extend to any non-governmental person "sweep too broadly." If private parties act pursuant to "agreements that make them actual agents of the government," they have an agent's "fiduciary duty to ... the public" and can violate § 1346. This is a "well-established principle." But it "plainly does not extend ... to *all* private persons."

While rejecting Percoco's "absolute rule," we find that the jury instructions in this case were not correct. (**Justice Jackson** does not join this part, but did not file a separate writing.). The "*Margiotta* standard is too vague." "Well-connected and effective lobbyists" have no public obligation to provide disinterested service. And giving the *Margiotta* instruction here was not harmless error. The

government's two "new theories," were not reflected in the jury instructions below, and the Second Circuit did not affirm on them. So, remanded for further proceedings consistent with this opinion.

Gorsuch concurring in the judgment, joined by Thomas: I agree that the jury instructions here were too vague — but "no set of instructions could have made things any better. … [N]o one knows what honest services fraud encompasses." We should hold the honest services statute (§ 1346) unconstitutionally vague **[Ed. note:** Justice Gorsuch almost, but not quite, says this], despite Congress's "high and worthy intentions when it enacted" it. We noted this in ***McNally*** and again in ***Skilling***. We should follow the three dissenters there (Scalia, Kennedy, and Thomas). Instead, "lower courts and prosecutors … must continue guessing." "This Court should decline further invitations;" "the Legislative Branch must do the hard work."

B. Federal Identity Theft

Dubin v. United States**,** No. 22-10, 143 S.Ct. 1557 (June 8, 2023). **Sotomayor** (9 (8+1) to-0); *Gorsuch* concurring, vacating 27 F. 4th 1021 (5th Cir. 2022).

Headline: Federal **"identify theft" requires that use of another's identification be "at the crux" of the criminal conduct**, not just incidental "use" in connection with some other crime.

Facts: David Fox Dubin helped manage his father's psychological services company. Dubin undoubtedly overbilled Medicaid by overstating the qualifications of the psychological associate (and also changing the date on which an exam occurred). A jury convicted Dubin of healthcare fraud under 18 U.S.C. § 1347, as well as federal "aggravated identity theft" under 18 U.S.C. § 1028(a)(1), (triggering a mandatory consecutive two-year imprisonment term). That statute applies when a person "*during and in relation to* any [predicate offense, like healthcare fraud], knowingly transfers, possesses, *or uses*, without lawful authority, a *means of identification* of another person" [italics added].

Sotomayor (for 8): The "text and context" of this statute do not support the "boundless" interpretation the government posits. It goes "well beyond the ordinary understanding of identity theft." Merely "using" identifying information, that "happens to be a part of" a government form, would turn reimbursement (and many other) government forms into identify theft "virtually all of the time" — "all manner of everyday overbilling offenses." Even the government concedes that its reading "does not fairly capture the ordinary meaning of identity theft." **Fraud going to identity**, not misrepresentation about services, is the sort of crime intended by Congress — **where "misrepresentation about who was involved" was "the crux of the fraud."** Where "the means of identification is **a key mover** in the criminality," where the identity is "*used* to deceive others." This is consistent with the other words, in the statute, "transfers" or "possesses" identification "without lawful authority," connoting theft.

Text alone "does not conclusively resolve this case;" the terms are "particularly sensitive to context." "Uses" has many "different meanings" in our precedents, see ***Bailey*** (1995). Same with "in relation to," which would "stop nowhere." "A narrower reading" is suggested by other terms in the statute, and its title. "Theft of identity" does not mean mere use that is tangential to criminal conduct. The harsh mandatory imprisonment penalty, for predicate offenses that do not require imprisonment at all, further supports our conclusion. "The staggering breadth of the Government's reading" counsels prudence in interpreting this crime. We generally do not rely on prosecutorial discretion to rein in such readings. (And, n.10 at the end, we think the concurrence is "adrift in a blizzard of its own hypotheticals" **[Ed:** is that a mixed metaphor?]. We think our definition is precise enough, and we ought not "hastily resort to vagueness doctrine." Our contextual "rule of thumb" may require drawing "nuanced lines" in some cases, but that is "part of the judicial job description.")

***Gorsuch** concurring in the judgment:* This statute is "not much better than a Rorschach test," and we ought to strike it down as unconstitutionally vague." [Further summary of Gorsuch's typically assertive and entertaining writing is omitted here.]

C. Federal Sentencing

***Lora v. United States*,** No. 22-49, 143 S.Ct. 1713 (June 16, 2023). **Jackson** (9-0); vacating and remanding 11 F.4th 518 (2d Cir. 2022).

Headline: Under **§ 924(j), sentences for multiple convictions can run either concurrently or consecutively;** §924(c)'s consecutive sentence mandate does not control (j).

Facts: Under 18 U.S.C. § 3584, a federal court can normally choose to impose multiple prison sentences either concurrently or consecutively. § 924(c) provides an exception for some gun crimes, saying that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment." Efrain Lora, leader of a drug-dealing group from the Bronx, was convicted under subsection (j)(1) of §924 (criminalizing murder by use of a gun), when members of his group shot dead a rival drug dealer. Subsection (j) has no explicit consecutive sentence mandate. Lora was also convicted of conspiracy to distribute drugs under 21 U.S.C. §§ 841 and 846. The district court ruled that §924(c) controlled the sentence for Lora's § 924(j) conviction, so that sentence had to run consecutively (relying on Second Circuit precedent. So Lora was sentenced to 25 years for the drug distribution conspiracy and a consecutive five years under subsection (j). The court of appeals affirmed, in conflict with other Circuits.

Jackson (for 9): § 924(c) limits concurrent sentencing for sentences imposed under *"this subsection"* (emphasis in original). Subsection (j) was added "decades after" subsection (c)." the 924(c) restriction does not apply to subsection (j), for a number of "straightforward" reasons. "To state the obvious again, subsection (j) is not located within subsection (c)," and "Congress put subsection (j) in a different subsection of the statute." Third, although "subsection (j) references subsection (c), it only does so only with respect to offense elements, not penalties," and (j) provides its own penalties. The government tries ... blending subsections (c) and (j) together." But "the actual statute bears no resemblance to the government's vision." In fact, "a sentencing court cannot follow both subsections" if combined: ... "the maximum sentence" [under (j), in some cases] would be lower than the minimum sentence" under (c). For example, a killing with machine gun requires a minimum of 30 years under (c), but if voluntary manslaughter it cannot be more than 15 years under (j). To get around this conflict, the government contends suggests that the court apply subsection (c) penalties, then add subsection (j) penalties, and then jump back to subsection (c) to impose the consecutive-sentence mandate. "But nothing in subsection (j) calls for such calisthenics."

The Government further contends that subsection (j) "amounts to the 'same offense' as [subsection (c)] for the purposes of the Double Jeopardy Clause," and thus requires that a defendant can be punished under one subsection or the other, but not both. **The Court declines to decide this argument** but finds it not dispositive even if accurate. The subsections are not the same offense; "subsection (j) merely reflects the seriousness of the offense using a different approach than subsection (c)…." Congress could have done things differently, "bur Congress did not do any of the[] things" that the government suggests. We remand Lora for further proceedings [presumably, resentencing], because the district court had discretion to impose Lora's sentence concurrently.

D. Bank Secrecy Act

***Bittner v. United States*,** No. 21-1195, 143 S.Ct. 713 (February 28, 2023). **Gorsuch** (5 (2+3) to 4); Barrett dissenting; reversing 19 F.4th 734 (5th Cir. 2021). **[Ed. note: Odd ideological lineup**, the dissenters are Barrett, Thomas, Sotomayor and Kagan].

Headline: Non-willful violations of the Bank Secrecy Act should be charged per report, not per account (so multiple accounts covered by one noncompliant report equals one count).

Facts: The Bank Secrecy Act ("BSA") requires US citizens with foreign bank accounts containing more than $10,000 to file annual forms (called "FBARs"). A nonwillful violation of the Act is subject to a maximum penalty of $10,000. Alexandru Bittner emigrated to the US from Romania "at a young age" in 1982. He worked blue-collar jobs and became a US citizen. After the fall of the Soviet Union, Bittner moved to Romania and had a successful business career. He did not know that he had to report his Romanian bank accounts. When he returned to the Us in 2011, he hired an account to file late BSA reports for the prior five years (2007-2011 [presumably driven by a five-year statute of limitations]). His accountant mistakenly left out some accounts, so Bittner filed corrected late reports for each of the five years, listing between 51 and 60 accounts per year. The government agreed that Bittner's violations (late reports) were accurate and non-willful, but instead of a $50,000 fine (for five reports, one for each year), the government levied at $2,720,000 fine for a total of 272 accounts. The district court agreed with Bittner, but the Fifth Circuit reversed and agreed with the government. This split with the Ninth Circuit's opposite ruling.

Gorsuch (for 5, although only **Jackson** joins in full, **Roberts**, **Alito** and **Kavanaugh** do not join Part II-C): "Best read, **the BSA treats the failure to file a legally compliant report as one violation ..., not a cascade of penalties calculated on a per-account basis."** The statute, 31 U.S.C. § 5314 and 5321 does not contain the word "account" – it authorizes the Secretary to impose a maximum $10,000 penalty for "any violation," and does not draw any distinction between violations related to one account versus multiple accounts. 5321 does authorize per account penalties for willful violations. But we think Congress's omission of such particular language for nonwillful violations implies the opposite. Indeed, IRS forms and regulations repeatedly say that "for the failure to file [an FBAR, non-wilfully], the penalty cannot exceed $10,000." While not "controlling," this "seemed to tell the public that the failure to file a report represents a single violation." The regulatory "drafting history" also supports us. And Congress has said that the "purpose" of the BSA is "to require reports" and record-keeping, not to "maximize penalties." And while the dissent stresses that Congress also had a purpose to "crack down on criminal and terrorists," that has no bearing on non-wilfull violations. [Gorsuch also discusses other "anomalies."]. Perhaps the IRS *could* write a per-account" regulation, but that does not answer the statutory question.

Our final point **[joined only by Jackson** -- Justices Roberts, Alito and Kavanaugh do not join this part.] is that the "venerable rule of lenity" resolves any ambiguity in the statute. "Statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals." ***Acker***, 1959. **[Ed. note:** I find it odd that Justices Sotomayor and Kagan do not join this majority opinion, on this point at least. More oddly, the dissent does not address lenity at all? Perhaps this section was added late, so seven of the nine Justices just ignored it? **A mystery.**] "Fair warning" is required, and the BSA's penalties are "next door" to criminal penalties; a penalty statute is "penal" in nature."

***Barrett** dissenting*: **"The answer lies in the text** of the relevant statutes." **[Ed. note:** Speculation? Could Barrett have started with a majority, and then lost it? Her opinion is structured more like a majority opinion, not addressing the dissent until she is halfway through. Might help explain the odd ultimate ideological split among the Justices.] § 5321 describes per-account penalties for "wilfull" and "reasonable cause" provisions; it is odd for a statute then to switch its standard

without expressly saying so. "The most natural reading of the statute establishes that each failure to report a qualifying foreign account constitutes a separate reporting violation, so the government can levy penalties on a per-account basis." "[E]ach relation with a foreign bank triggers the requirement to file reports," so each failure to file violates the requirement. The reports require "account specific" information such as identity and address of participants. "Throughout, Congress used the term 'violation' in an account-specific way." It is odd to rely on administrative guidance materials; plus, the majority "neglects to mention" some that go the per-account way. "The Court's core error is to conflate the *reports* referred to in § 5314 with the annual FBAR *form*."

E. Federal Sovereign Immunities Act (no criminal immunity)

***Turkiye Halk Bankasi v. United States*,** No. 21-1450, 143 S.Ct. 940 (April 19, 2023). **Kavanaugh** (7-2); *Gorsuch* concurring in part, dissenting in part, affirming in part, vacating and remanding 16 F.4th 336 (2d Cir. 2021).

Headline: General **federal criminal jurisdiction extends to prosecution of foreign instrumentalities, and FSIA provides no immunity** from criminal prosecutions.

Facts: The United States criminally indicted Halkbank in 2019 for conspiring to evade economic sanctions against Iran. "Billions of dollars of Iranian oil and gas proceeds" were allegedly "laundered" through (in part) the U.S. financial system, and the bank allegedly lied to U.S. Treasure officials to hide it. The bank allegedly had assistance from high-ranking Turkish officials — two individuals have already been convicted for the conspiracy and others remain at large. Halkbank is owned by the Republic of Turkey (that is, a majority of its shares are owned by the Turkish Wealth fund, which is in turn owned by the Republic). Halkbank moved to dismiss the indictment arguing statutory immunity for foreign owned entities (as well as an alleged common-law immunity). The district court denied the motion and the Second Circuit affirmed, ruling that (1) § 3231 gives the federal court general subject matter jurisdiction, and (2) although the Foreign Sovereign Immunities Act of 1976 (FISA) does grant immunities, § 1607 has an exemption for "commercial activities" that applies to Halkbank.

Kavanaugh (for 7): First, 18 U.S.C. § 3231 gives federal district courts "sweeping" jurisdiction over "all offenses against the laws of the United States." We decline to find an "atextual" implicit exception for "foreign states and their instrumentalities." The 1789 predecessor to § 3231 also did not include any such exception. The ***Schooner Exchange*** decision of 1812 addressed a civil case and concerned substantive principles as a matter of common law (and we remand the common law arguments back for consideration on remand.). § 3231 gives the district court "jurisdiction ... over this criminal prosecution."

Next, FSIA "does not provide foreign states and their instrumentalities with immunity from criminal proceedings." **[Ed. note:** Like the foregoing sentence, Justice Kavanaugh's opinions often start with useful straightforward statements, whatever else might be said.]. Until 1976, foreign sovereign immunity was governed by common law development was "sometimes led to inconsistency." "Congress sought to standardize the judicial process" in this area in the "comprehensive" 1976 FSIA statute. The statute provides a "baseline principle of immunity for foreign states," define to include their "instrumentalities." But this has never been applied to criminal prosecutions. The statute refers expressly only to civil actions and suggests an "exclusively civil focus." It is "unlikely" that Congress intended immunity for criminal prosecutions "without saying a word about such proceedings." And FSIA is located in Title 28, which is mostly civil procedure, not Title 18, which is for criminal matters. Meanwhile, a broad immunity sentence found in § 1604 must, by our precedent, be read to apply only to civil proceedings. And the statute contains an "exception for commercial activities, §§1605-1607." It would be a "mangled ... flip-flop" for Congress to write a

number of statutory sections for civil cases, but then silently include criminal immunity in one section. **[Ed. note:** Oddly, the Court's opinion never returns to the "commercial activities" exception found in § 1605, although that was the basis for the Second Circuit's ruling, other than to say that it supports the idea that all of FSIA applies only to civil matters. Perhaps the Court did not want to evaluate what is a "commercial activity," or perhaps that ground was not well presented below or here? Or perhaps the Court just wanted to make the broader ruling it makes? I am too ignorant to know the answer.].

We reject Halkbank's remaining arguments. ***Amerada Hess*** (1989) was a civil case, and its "general language" can't be applied conclusively to this different context. The Federal Rules of Criminal Procedure will give courts enough guidance about how to handle such criminal cases. And even if our ruling today could give state prosecutors ability to indict foreign states and instrumentalities — something we do not hold — there is no history of this happening, and Congress and the Executive can act if it becomes a problem. Various common-law immunity arguments were not "fully considered" below, and we leave them for remand.

Gorsuch *concurring in part and dissenting in part, Alito joining:* I agree that §3231 gives federal courts subject matter jurisdiction over criminal cases like this one. But beyond that, the Court's decision "overcomplicates the law." FSIA provides "simple rules" to govern cases like this, there is no need for lower courts to explore common law. Halkbank is entitled to general immunity under §1604, but it is then subject to the exception for commercial activities in §1605. That is "all we need to know to resolve" this case. FISA "must be applied ... in every action against a foreign sovereign." ***Verlinden*** (1983). This is "plain statutory text" and there is no need for the majority's more complicated "contextual" reasoning to hold that FISA does not apply to criminal proceedings at all. Meanwhile, leaving further common law arguments for remand "leaves litigants and our lower court colleagues" with "thorny questions," and the majority "fails to supply guidance." [Gorsuch does a good job of suggesting confusing and disquieting questions for the future; he seems to say that Congress has acted in FISA to provide answers for all. I'm not sure that is correct.]

F. Securities Law

Slack Technologies v. Pirani**,** No. 22-200, 142 S.Ct. 1433 (June 1, 2023). **Gorsuch** (9-0); vacating and remanding 13 F. 4th 940 (9th Cir. 2021).

Headline: In order for a plaintiff to sue for a material misstatement or omission made in a registration statement under §11 of the 1933 Act, the plaintiff must show that they acquired securities pursuant to the allegedly misleading statement.

Facts: The Securities Act of 1933 and the Securities Exchange Act of 1934 "form the backbone of American securities law." The 1933 Act focuses mostly on regulation of new public offerings, requiring companies to provide a registration statement and imposing strict liability when their statements contain material misstatements or omissions. The 1934 Act is broader, allowing suit if a plaintiff can prove that any material misleading statement or omission was made with scienter.

In 2019, Slack Technologies LLC ("Slack"), an instant messaging platform, went public on the New York Stock Exchange. Instead of doing so as an Initial Public Offering ("IPO"), Slack did so through a direct listing. Slack filed a registration statement but had no underwriter backing the offering and no lockup agreement with current investors (a lockup agreement requires existing owners of shares to hold their shares for a certain period of time after the company goes public, in order to avoid a drop in stock price). Mr. Fiyyaz Pirani bought 250 thousand Slack shares within a few months of Slack going public. Slack's stock price dropped sometime thereafter, and Mr. Pirani filed a class action against the company. Mr. Pirani alleged that Slack violated §§11 and 12 of the 1933 Act by filing a material misleading registration statement when going public. Slack moved to

dismiss, arguing that Mr. Pirani failed to allege, as required under the 1933 Act, that he purchased shares pursuant to that statement. Slack acknowledged that the 1934 Act allows suit for scienter or fraud, but Mr. Pirani notably did not bring suit under that law. The district court denied the motion, and the Ninth Circuit accepted interlocutory appeal. A divided panel affirmed, creating split authority between the Ninth Circuit and other lower courts on the issue.

Gorsuch (for 9): Slack argues that §11(a) of the 1933 Act, which authorizes a party to sue for a material misstatement or omission in a registration statement when the party has acquired "such security," refers to security issued pursuant to a particular registration statement alleged to be misleading. On the other hand, Mr. Pirani argues that "such security" can refer to security not issued pursuant to a particular registration statement. First, looking at the text of the statute, the statute: (1) imposes liability tied to "*the* registration statement" that is allegedly misleading and (2) utilizes the term "such" to narrow the law's focus in other ways, i.e., "such acquisition" and "such untruth or omission." Next, §5 of the 1933 Act refers to security pursuant to an allegedly misleading registration statement, and § 6 specifies security "therein" the particular statement. Lastly, §11(e) refers to the maximum available damages as being tied only to the value of shares that are registers. If liability under §11(a) were to extend beyond registered shares, then one would assume recovery would too — but it does not. Therefore, Slack's interpretation is the correct one, and "[t]o bring a claim under §11, the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading." The Ninth Circuit has also taken the same view. ***Hertzberg*** (1999).

Mr. Pirani's arguments to the contrary are unavailing. Mr. Pirani directs the court to § 5 of the 1933 Act, which speaks to "any security with respect to which a registration statement has been filed." If Congress intended for § 11(a) liability to attach only to limited securities, Mr. Pirani contends, it would have used the same language as it did in § 5. Although Congress could have been clearer, the court does not find this argument convincing. Additionally, Mr. Pirani argues that the 1933 Act's purpose was to have broad liability, but the court finds it "equally possible" for Congress to have intended liability to be more balanced. Therefore, § 11 of the 1933 Act "requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement…."

G. False Claims Act

***United States, ex rel. Polansky v. Executive Health Resources*,** No. 21-1052, 143 S.Ct. 2834 (June 16, 2023). **Kagan** (8-1); Kavanaugh concurring; Thomas dissenting), affirming 17 F. 4th 376 (CA3 2021).

Headline: The **Government may move to dismiss an FCA action filed by a private party whenever the government has intervened**, whether during the initial 60-day sealed period or later.

Facts: Dr. Jesse Polansky worked for Executive Health Resources (EHR), a company that helped hospitals bill the federal government for services covered by Medicare. Polansky (the plaintiff or FCA "relator") filed a *qui tam* action against HER under the False Claims Act ("FCA"), alleging that EHR charged incorrect rates and helped its clients "cheat the Government." The Government did not intervene during the initial 60-day period while the action was sealed. But seven years later the Government filed to dismiss the action, and the district court granted it, finding the government's decision was based on a "through[] investigation." The FCA allows the Government to dismiss the action without approval of the relator, after notice and opportunity for hearing; the statute is silent on whether the Government may dismiss after the seal period has ended. The Third Circuit affirmed the dismissal of Polansky's FCA lawsuit, finding that the motion to dismiss implicitly included a motion to intervene and that the district court's ruling implicitly found "good cause" for that – and **Polansky has not challenged that ruling on intervention, here.**

Kagan (for 8): "The Government may move to dismiss an FCA action ... whenever it has intervened—whether during the seal period or later." We reject the government's argument that a motion to dismiss is always permissible; it can be granted only if the government has intervened. However, the timing of the intervention makes no difference. Even when the government does not initially intervene, it continues to have rights, including the ability to intervene later on "good cause." Once the government is granted permission to intervene, then its right as a party to move to dismiss is present, whenever intervention occurs. The statute reveals that "Congress decided not to make seal-period intervention an on-off switch." The appropriate standard to address a motion to dismiss is from FRCP 41(a), requiring that it be based "'on terms that the court considers proper.'" "Nothing in the FCA suggests that Congress meant to except *qui tam* actions from the usual voluntary dismissal rule." To meet this standard the Government must show what it did here: "good grounds for thinking that this suit would not do what all *qui tam* actions are supposed to do: vindicate the Government's interests."

***Kavanaugh** concurring, **Barrett** joining:* "I add only that I agree with Justice Thomas that '[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation.'"

***Thomas** dissenting:* I don't think the FCA allows the government to "unilaterally dismiss" a relator's lawsuit when the government has declined to intervene during the sealed period. The statute says intervention may be granted later, but "without limiting the status and rights of the [relator]." The Court is wrong to think that other provisions give the government a "secret pass" to dismiss later. But more importantly, I believe the federal qui tam statute presents "serious constitutional questions." For example, "what is the source of Congress' power to effect partial assignments of the United States' damages claims?" I would remand for the Third Circuit to consider those questions, and so I dissent from affirmance here.

United States, ex re. Schutte v. Supervalue Inc., No. 21-1326, 143 S.Ct. 1391 (June 1, 2023). **Thomas** (9-0); vacating and remanding 9 F. 4th 455 (7th Cir. 2021).

Headline: "Knowledge" in the False Claim Act refers to the defendant's subjective understanding, not to what an objectively reasonable person might have known or believed.

Facts: The False Claims Act imposes civil liability on anyone who "knowingly" submits a false claim to the government. Meanwhile, Medicare and Medicaid require that companies bill the government for reimbursement of their "usual and customary" drug prices. Claimants (petitioners here) claimed that two major pharmaceutical-distributor companies presented reimbursement claims for the retail price of their drugs to the government, describing that as their "usual and customary" price, but actually ("usually and customarily") sold the drugs to pharmacies at lower, discounted prices. On summary judgment, the district court ruled that these were "false" claims, but found that the claims were not "knowingly" false because claiming the retail price was an "objectively reasonable" interpretation of the law, even if the companies understood and subjectively believed that their discounted prices were what the government would consider to be their "usual and customary" prices. The Seventh Circuit affirmed this "objectively reasonable" theory of falsity. Taking claimants allegations as true, the only question here is whether the companies' "subjective" knowledge of inaccuracy renders a claim "knowingly" false, even if their interpretation of the law would be objectively reasonable in the eyes of others.

Thomas (for 9): **The subjective knowledge of the billing company controls.** "If respondents ... believed their claims were false," they can be liable for "knowing" they were false, no matter what an objectively reasonable person might have believed. Textually, the FCA defines knowledge as "reckless disregard" or "deliberate ignorance" of the truth. Thus "actual knowledge" suffices for

liability. This tracks the common-law scienter for fraud; the FCA refers to "false *or fraudulent* claims." We do not address whether or how recklessness or deliberate ignorance plays out for the FCA. "Usual and customary" is undoubtedly "less than clear." But the allegations here are not that the companies made an honest or understandable mistake. The allegation here (yet to be proved) are that the companies were well-informed and knew that their discounted prices, which they actually received for the majority of the drugs sold, were considered by the government to be the "usual and customary" price. The allegation is that respondents "did not believe or have reason to believe" that the interpretation they now offer was correct. If claimants can prove this, the claims may have been "false" for the FCA. That's all we decide; everything else is open on remand. The subjective knowledge of the billing company controls. "If respondents ... believed their claims were false," they can be liable for "knowing" they were false.

H. Tax Law

Polselli v. Internal Revenue Service, No. 21-1599, 143 S.Ct. 1231 (May 18, 2023). **Roberts** (9-0); *Jackson* concurring; affirming 23 F. 4th 616 (6th Cir. 2022).

Headline: Under 28 U.S.C. § 7602(c**), the IRS can issue summons to third parties without providing notice, even if the taxpayer has no legal interest** in the records sought.

Facts: Under 28 U.S.C. § 7602(a), the IRS has the power to issue summonses to both determine whether a taxpayer is liable for unpaid taxes and to collect on that liability. The IRS must generally give notice to those "identified in the summons." However, §7609(c)(2)(D) provides exceptions to the notice requirement. Relevant here, the IRS does not need to provide notice when they have begun "collecting any such liability."

The IRS determined that Remo Polselli owed $2 million in unpaid taxes and other penalties. The IRS officer assigned to collect determined that Polselli was potentially concealing assets, including bank accounts belonging to his wife. So the officer issued summonses to third-party account holders, and did not give notice to the targets of the summons. The district court dismissed moptions to quash the summons, finding that an exception in §7609(c)(2)(D) applied (IRS need not give notice when they have begun "collecting any ... liability"). The Sixth Circuit affirmed, rejecting the Ninth Circuit's ruling that the notice exception does not apply when the target has no "legal interest or title in the object of the summons."

Roberts (for 9): Interpreting the statute, **the exception to the notice requirement applies even if the delinquent taxpayer has no "legal interest in the accounts of records summoned."** Section 7609 provides only three conditions to the notice requirement exception: (i) "the summons must be 'issued in aid of … collection'"; (ii) the summons "must aid the collection of an 'assessment made or judgement rendered'"; and (iii) the summons "must aid the collection of assessments or judgements 'against the person with respect to whose liability the summons is issued.'" The next provision, §7610, adds a "proprietary interest" requirement. Congress's addition of the "proprietary interest" in §7610 "strongly suggests" that Congress intentionally omitted any similar requirement in §7609. Even accounts in which the taxpayer has no "legal interest" may still be "in aid of the collection." Moreover, "clause (i) is applicable upon an *assessment*, while clause (ii) is applicable upon a finding of *liability*." We acknowledge "apprehension" regarding the scope of IRS summons authority, and the Government "concedes that the phrase 'in aid of the collection' is not limitless." But the instant action does not concern the precise definition of the phrase.

Jackson *concurring, Gorsuch joining*: "Notice is not a mere formality," and our *"default* rule" should be notice. Here, the statutory exception balances interests, but it is not a "blank check." If § 7609(c)(2)(D)(i) is read too broadly, the IRS would have the power to summon *"anyone"* without notice. I don't read the majority to endorse that.

I. Bankruptcy

***Bartenwerfer v. Buckley*,** No. 21-908, 143 S.Ct. 665 (February 22, 2023). **Barrett** (9-0); *Sotomayor concurring*; affirming 860 Fed. Appx. 544 (9th Cir. 2021).

Headline: A **person who is technically a debtor cannot discharge a "debt obtained by fraud," even if the person is not individually culpable** for the underlying fraud.

Facts: Kate Bartenwerfer and her then-boyfriend, David, purchased a house in San Francisco, which they decided to "flip" and sell for a profit. David managed the remodeling project, and Kate was "largely uninvolved." The eventual buyer sued the Bartenwerfers, alleging that the Bartenwerfers had failed to disclose defects, and a jury ruled for the buyer, awarding $200,000 in damages. The Bartenwerfers filed for Chapter 7 bankruptcy. That Chapter does not allow the discharge of "any debt … for money … obtained by … false pretenses, a false representation, or actual fraud." The house buyer filed an adversary complaint, arguing that the Bartenwerfers' debt to the buyer fell into this non-dischargeable fraud category. The Bankruptcy Court agreed, finding that David's knowing fraud could be attributed to Kate because of their legal partnership, but the Bankruptcy Appellate Panel remanded, ruling that Kate could be barred from discharging the debt only "if she knew or had reason to know of David's fraud." The Ninth Circuit ultimately reversed, relying on ***Strang v. Bradner*** (1885) to hold that "a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability."

Barrett (for 9): We affirm the Ninth Circuit [often a victim of our reversals]. "The passive voice" in the statute "removes the actor altogether" – it simply says that a debt obtained by fraud cannot be discharged. The common law of fraud has "long maintained that fraud liability is not limited to the wrongdoer" (***Mans*** (1995). We will not "artificially narrow" the "ordinary meaning" of the statute's words. In ***Strang*** (1885) we said that "[t]he fraud of one partner … is the fraud of all…."

Lastly, Kate invokes the Bankruptcy Code's policy that debtors get a "fresh start." But Congress may have decided to protect "particularly deserving creditors," and it is not the Court's role to second-guess Congress's judgement. Perhaps Kate has remedies under California state law; "we are sensitive to the hardship she faces."

***Sotomayor** concurring, Jackson joining*: The Bankruptcy Court found the Bartenwerfers had an agency relationship, which Kate does not dispute. This case does not concern fraud by a person who has no agency or partnership relationship. With that understanding I join the Court's opinion.

III. ATTORNEY CLIENT PRIVILEGE

***In re Grand Jury*,** 143 S.Ct. 543 (January 23, 2023): **Per curiam,** dismissing the case after oral argument as improvidently granted, without written opinion or dissent.

[Ed. note: This case involved a question of the scope of attorney-client privilege when a client's communications with a lawyer are for legal as well as non-legal advice. Some lower courts have ruled, almost always in tax or large corporate litigation settings, that the privilege does not apply unless the "primary purpose" of the client communication is for legal advice. Some years ago, Justice Kavanaugh wrote an opinion while on the D.C. Circuit advocating a "substantial legal purpose" test, which is slightly more protective of the privilege. Significantly, however, the ABA (and ***others***) filed ***an Amicus brief*** suggesting that neither test is correct, and that a broader, more protective, privilege should be honored, when a non-frivolous purpose of the client is to seek legal advice. [Full disclosure: your Editor serves on the ABA's Standing Committee on Amicus Briefs, which approved the Amicus in this case -- and ***also published an essay*** warning, prior to oral argument, about the implications of the case.] Once full briefing and oral argument revealed the complexities of the case, the Court DIG-

ed it: Dismissed as Improvidently Granted. Stay tuned for the Court seeking to grant in some other case presenting the same issues in the near future.]

IV. HABEAS CORPUS AND RELATED

***Cruz v. Arizona*,** No. 21-846, 143 S.Ct. 650 (February 22, 2023). **Sotomayor** (5-4); Barrett dissenting (for four), vacating and remanding 251 Ariz. 203 (2021).

Headline: A **novel and unforeseeable interpretation** of a **state procedural rule is not an "adequate and independent" state law ground** to foreclose consideration of error (in this capital case).

Facts: John Montenegro Cruz was sentenced to death after an Arizona jury trial during which Cruz was denied permission to inform the jury (under ***Simmons*** (1994)) that a life sentence would be without possibility of parole. The Arizona Supreme Court ruled that Simmons did not apply to Arizona's parole setup. Years later, in a different case (***Lynch*** (2016)), the Court ruled it was fundamental error to hold that ***Simmons*** does not apply in Arizona. Cruz filed a motion for post-conviction relief under Arizona Rule 32.1(g), which permits a successive petition for relief if there has been "a significant change in the law that ... would probably overturn the defendant's judgment or sentence." The Arizona Supreme Court rejected Cruz's argument, ruling that Lynch was not a "significant change in the law." The State now argues that this was correct and is therefore an "adequate and independent state-law ground" precluding Supreme Court federal question jurisdiction.

Sotomayor (for 5): First, we have repeatedly reaffirmed the ***Simmons*** holding. Arizona repeatedly said its system was distinguishable, but "the only 'release' available to capital defendants convicted after 1993 was, and remains, executive clemency. We summarily rejected Arizona's interpretation in ***Lynch*** (2016).

Four jurors in Cruz's case, soon after returning a death verdict, said they would have voted for life without parole had that been an option. But they had been told that parole after 25 years was an option; that was "plainly wrong." Cruz's ***Simmons*** argument was rejected on direct appeal. Then, we decided *Lynch*, but the Arizona Supreme Court ruled that ***Lynch*** was not "a significant change in the law" that would allow a successive collateral petition for relief. The Court said that ***Simmons*** had already been clear, even though Arizona courts had consistently "misapplied" it. So ***Lynch*** was not a significant change in the law, only the application of ***Simmons*** had changed.

Arizona's argument is ridiculous [**Ed.:** my word, not the Court's; the Court generously says "novel," "unforeseeable," "unfounded," an "abrupt depart[ure]" and a "catch 22"]. It is not an "adequate" state law ground; and that is a question of federal, not state, law. We ruled in 2009 (***Beard***) that a state law ruling may be held "inadequate" in an "exceptional" case. This is one of those. *See* ***Bouie*** (1964); ***NAACP v. Patterson*** (1958); ***Enterprise Irrigation*** (1917). "It is hard to imagine a clearer break from the past" than ***Lynch*** was for Arizona. The fact that ***Lynch*** was a summary reversal does not change this (in fact, it strengthens our conclusion). ***Lynch*** may have been obvious under federal law, but it was a huge change in Arizona. ***Simmons*** was not "regularly followed" in Arizona.

[Ed. note: Cruz's case is remanded for "further proceedings not inconsistent with this opinion," which is standard language for direct review of state court decisions. Because the majority rules only that Arizona misapplied its state procedural rule here to foreclose review, the remand appears to mean only that the State must permit Cruz to invoke his right for review under that rule. It does not necessarily mean that Cruz will prevail on his ***Simmons***/***Lynch*** claim. Arizona's courts seem quite uncharitable to capital defendants; and Cruz did kill a cop. So... stay tuned.]

Barrett** dissenting, Thomas, Alito, and Gorsuch joining:* Federal courts have no power to revise a state court's interpretation of its own law. The decision here was not "disingenuous" or revealing "hostility" to federal rights; it was a "new question" and the state court answer was "reasonably consistent with its precedent." (Although Barrett does acknowledge that, "in isolation," a prior Arizona decision would say this was a "significant change in the law."). This case is different from ***NAACP v. Patterson. **[Ed. note**: Barrett's characterization of this case seems diametrically opposite in interpretation to Sotomayor's, even though it accepts the "exceptional case" theory for not applying "independent and adequate state grounds.] Arizona's "application of law" distinction did not evince "a purpose to evade constitutional guarantees" (***Beard***, 2009, Kennedy concurring). In federal habeas law we would make the same distinction. **[Ed. note**: that seems like a speculative assertion; no Supreme Court precedent is cited to support it.]. And "we owe the utmost deference to" state courts interpreting their own rules.

***Jones v. Hendrix*,** No. 21-857, 143 S.Ct. 1857 (June 22, 2023). **Thomas** (5-4(3+1)); Sotomayor dissenting with Kagan; Jackson dissenting, affirming 8 F. 4th 683 (8th Cir. 2021).

Headline: "A prisoner asserting an intervening change in statutory interpretation" **cannot overcome §2255's bar on successive habeas corpus petitions** by invoking the statute's "inadequate remedy" clause (**even if the prisoner is possibly "legally innocent"[!!]).**

Facts: This case involves the sometimes-complex interaction between two federal habeas statutes, 28 U.S.C. §§ 2255 and 2241. Marcus DeAngelo Jones was convicted federally in 2000 as a felon in possession of a firearm (and sentenced to some 36 years imprisonment). This was affirmed on direct appeal and also when Jones filed a petition for federal habeas relief under §2255 (which requires a federal defendant to file for relief with the original sentencing court). Years later, the Court ruled that, contrary to prior Eighth Circuit decisions, the federal felon-in-possession statute (§922(g)) requires the government to prove the defendant had knowledge of his prior felony conviction. ***Rehaif*** (2019). Claiming a failure of proof under ***Rehaif***, Jones filed a new petition for habeas relief under §2241, the general (original) federal habeas statute which permits a defendant to petition in the district where they are currently imprisoned. Jones invoked a "savings clause" in §2255 which permits a federal prisoner to file for habeas under §2241 only if the §2255 "remedy is inadequate or ineffective to test the legality of detention." Jones argued that because §2255 prohibits the filing of a "second or successive" petition based on a new statutory interpretation, 2255 was "inadequate" for his case, allowing the 2241 filing. The district court and Eighth Circuit rejected this, finding no subject matter jurisdiction over the 2241 petition merely because Jones could not file under 2255 (deepening a Circuit split on that question).

Thomas (for 5): "A prisoner asserting an intervening change in statutory interpretation" cannot attempt an "end-around" 2255's bar on successive petitions by invoking the "inadequate remedy" clause. When Congress imposed 2255's "successive petition" bar in 1996 (AEDPA), it intended finality. Congress wrote only two exceptions — for newly discovered evidence or new constitutional rules — and neither applies here. Not including statutory changes does not render the 2255 path "inadequate," as Congress intended that term. Finality limits on federal habeas were intended by Congress. **[Ed. note:** Thomas's opinion uses (p. 11) the words "impossible or impracticable" to describe the statutory terms "inadequate or ineffective." So much for 'plain language'?]. Our reading is "straightforward." "Any other reading would make AEDPA curiously self-defeating." Jones and others like him (with a change in statutory law claim) "cannot bring it at all." "Congress has chosen finality over error correction in [such] case[s]."

We reject various constitutional arguments [including the Solicitor General's; here is a brief recap of some 12 pages]: Our denial of habeas relief here does not violate the Constitution's

"Suspension Clause" — habeas corpus never extended to claims like Jones's at the time of the founding, and indeed not until the "innovation" of ***Davis*** (1974), see ***Brown v. Davenport*** (2022) [**Ed. note:** ***Brown*** represented adoption of Justice Gorsuch's revisionist view of habeas corpus law in this regard. It is also worth noting that the holding in this case is opposite to every Circuit but one: a 2011 10th Circuit opinion written by Gorsuch, J.]. In addition, constitutional Due Process (and the proof-beyond-reasonable-doubt rule) does not guarantee correction of legal errors in successive collateral attacks, and the Eighth Amendment constrains punishments, and does not create a freestanding entitlement to a second round of post-conviction reviews. Finally, the Solicitor General's "Rube Goldberg contrivance" comparison to doctrines governing state prisoner habeas claims, including a "colorable showing of factual innocence" requirement, are simply inapposite to this federal prisoner habeas statutory claim. **We will not "adopt a presumption against finality as a substantive value" in habeas corpus law.**

Sotomayor *and* ***Kagan*** *[apparently writing jointly] dissenting:* It is "disturbing" that the Court denies any opportunity for relief to a person "who is actually innocent [and] imprisoned for conduct that Congress did not criminalize." We agree with Justice Jackson that "this is not the scheme Congress designed." But the Solicitor General is also right: Long before 1996, federal prisoners could seek habeas relief if they could colorably show they were actually innocent under an intervening statutory interpretation. Nothing in AEDPA purported to change that existing remedy.

Jackson *dissenting:* **[Note:** 39 pages, very briefly and inadequately summarized here. This is the "principal dissent," presumably initially assigned to Jackson by Sotomayor; but then Sotomayor and Kagan decided they needed to write their additional concurrence, to support the Solicitor General's view.]: Two parts: Jones's claim should either be proper under §2241, or under §2255.

First, the primary aim of 2255's exceptions [in 1996] was to preserve claims that were available prior to enactment of 2255. ***Hayman*** (1952); ***Davis*** (1974). If 2255 does not permit consideration of factual innocence claims based on changed statutory interpretations, then it is "inadequate or ineffective," allowing filing under 2241. "Inadequate or ineffective" need not be construed as "stingily," and "entirely atextual[ly]," as the majority does, and we should require a "clear statement" from Congress before endorsing changes in habeas rights.

Second, the majority reasons by "negative inference" and it is "far from straightforward" that 2255 was intended to prohibit second petitions based on "newly available legal innocence" claims. In fact, the legislative history supports the view that Congress only unintentionally left out "new statutory legal innocence" claims and did not actively "choose" finality for them. Of course, such a claim is permissible under 2255 on the first petition. It is a "quirky anomaly" if it is barred on a second petition when the new Supreme Court statutory ruling is new and was not available on the first petition. We apply "clear statement" rules when interpreting *other* Congressional enactments (habeas as well as others). We should apply that here.

Finally, "I also am deeply troubled by the constitutional implications of the [majority's] nothing to see here approach," affirming the incarceration of "potential legal innocents." Both statutory and constitutional concerns lead to the conclusion that Jones's claim "should have been considered on the merits." The majority opinion is "euphemistic" and "nonsense." Its position is **"stunning in a country where liberty is a constitutional guarantee."** The majority's "legally dissonant, arbitrary, and untenable outcome ... **appears to stem from the Court's own views concerning finality, not the will of Congress."** Also [in a Ginsburg-like ending], Congress could now act to "fix this problem."

Reed v. Goertz, No. 21-442, 143 S.Ct. 955 (April 19, 2023). **Kavanaugh** (6-3 (2+1)); Alito dissenting for two; Thomas dissenting alone, reversing 995 F.3d 425 (5th Cir. 2021).

Headline: The **statute of limitations** for a §1983 procedural due process claim, premised on denial of post-conviction access to **potentially exculpatory DNA testing**, **begins to run at the <u>end</u> of state-level appellate litigation**, not when the trial court denies the motion.

Facts: Rodney Reed was convicted in Texas of the 1996 murder of Stacey Stites and was sentenced to death. The court of appeals affirmed, and Reed's later state and federal habeas petitions were unsuccessful. In 2014, Reed filed under Texas's post-conviction DNA testing statute, asking that over 40 pieces of evidence be tested. State prosecutor Bryan Goertz agreed to test some, but not most, of the evidence; for example, testing of the belt used to strangle Ms. Stites was not approved. The state trial court denied Reed's motion for further DNA testing, and the Texas Court of Appeals affirmed and then denied Reed's motion for rehearing. Reed then sued federally under §1983, alleging that a stringent "chain of custody" requirement for DNA evidence testing denied Reed constitutional due process. The Fifth Circuit affirmed dismissal of this lawsuit, ruling that the 2-year statute of limitations had begun to run when the state trial court had denied Reed's testing motion, and so was now expired.

Kavanaugh (for 6): First we reject procedural objections to this lawsuit. Reed has standing; "denial of access to the requested evidence" is sufficient <u>injury</u>. The prosecutor's refusal and application of the statute of limitation denied Reed access to the evidence and "thereby <u>caused</u> Reed's injury;" and a favorable conclusion that the statute violates due process would <u>redress</u> the injury. Second, ***Ex parte Young*** (1908) allows this lawsuit against state officer's acting in their official capacities. Third, although the ***Rooker-Feldman*** (1923) doctrine might "prohibit federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments, under ***Skinner*** (2011), a "statute or rule governing" such a decision <u>is</u> reviewable.

On the merits, a constitutional due process claim "is 'complete' only when 'the State fails to provide due process' (***Zinerman***, 1990)." Here **the alleged failure to provide due process was complete only "when the state litigation ended," which encompasses the denial of the motion for rehearing**. So, Reed's §1983 claim was timely" filed.

<u>Thomas</u> dissenting [In the interest of brevity, much of Thomas's 20-page dissent is omitted here]*:* This case should be dismissed for lack of subject-matter jurisdiction. Federal district courts can't review state-court judgements, and Reed has no standing. Reed's alleged injuries, that state law or the appellate court violated his due process rights, are not redressable by the district attorney. "The aggrieved party cannot simply substitute an executive officer as a defendant, charge the state court's errors to that officer, and [then] seek redress for a court-inflicted injury." Moreover, "redressing [Reed's claim] would require an exercise of [federal] jurisdiction over the [Texas Court of Appeals]—jurisdiction that the District Court does not have." Finally, the Court is wrong about when the due process claim was complete, and ***Zinerman*** is inapposite.

<u>Alito</u> dissenting, <u>Gorsuch joining</u>: "I cannot agree … that the [appellate court's] interpretation did not become "authoritative" until rehearing was denied." "If our decisions did not become authoritative and binding as soon as they are issued, this practice would be impermissible." The Court contends that Reed was not deprived of due process until "state litigation ended," and while I see the logic in this argument, "it is well-established that a §1983 plaintiff need not exhaust state remedies." Thus the Court's ruling here could lead to the conclusion that "a due process challenge to the denial of a request for DNA testing is not ripe until state remedies have been exhausted." We have not held that before, and "[i]nstead of clarifying the law, the Court's decision may sow confusion."

IV. IMMIGRATION LAW

***Pugin v. Garland*,** No. 22-23, 143 S.Ct. 1833, (June 22, 2023). **Kavanaugh** (6 (5+1) - 3); Jackson concurring; Sotomayor dissenting (Gorsuch joining in part and Kagan joining in part); affirming 19 F.4th 437 (4th Cir. 2021); reversing 44 F.4th 1181 (9th Cir. 2022).

Headline: An **offense "relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S) does not require that an investigation or proceeding be pending**.

Facts: Immigration statutes make noncitizens removable if convicted of state crimes constituting an "aggravated felony," defined in part as offenses "relating to obstruction of justice." Cordero-Garcia was convicted in California of "dissuading a witness from reporting a crime;" Pugin was convicted in Virginia of "being an accessory after the fact to a felony." The US Department of Homeland Security ("DHS") charged them as removable. The Ninth Circuit ruled against DHS in Cordero-Garcia's case because the state offense "did not require that an investigation or proceeding be *pending*.;" the Fourth Circuit ruled oppositely in Pugin's case.

Kavanaugh (for 6): "Dictionary definitions, federal laws, state laws, and the Model Penal Code" show that **an offense can relate to the obstruction of justice even if there was no pending investigation**. Further, 18 U.S.C. "proscribe[s] various obstruction offenses that do not require a pending investigation or proceeding." All of this authority "reflects common sense." If a pending investigation were required, many obstruction of justice offenses would not count as aggravated felonies, and "[w]e should not lightly conclude that Congress enacted a self-defeating statute."

Cordero-Garcia and Pugin contend that authority from the 1700s and 1800s shows that obstruction of justice has historically required a pending investigation. But the historical context "does not back up their broad claim," and the modern understanding of obstruction does not have the same requirement. Third, Cordero-Garcia and Pugin argue that if a pending investigation is not required, then §1101(a)(43)(s) is redundant in listing both offenses relating to (1) obstruction of justice and to (2) perjury, subornation of perjury, and bribery of a witness. This does not fix their problem, as redundancies can be common in legislation and finding some overlap is "not surprising." Although they offer the rule of lenity, it would not apply here because there is no "grievous ambiguity." ***Ocasio*** (2016).

***Jackson** concurring*: One reason that an offense need not require a pending investigation or proceeding, to relate to obstruction of justice, should be highlighted here: "when Congress inserted the phrase 'offense relating to obstruction of justice' ... it [was likely] referencing a ... category of offenses ... that are grouped together in Chapter 73 of Title 18 …. [N]ot all of th[ose] offenses … contain a pending-proceeding requirement." Congress's intent is important; if Congress has already decided which convictions constitute aggravated felonies, then the Court doesn't need to invent its own "platonic, judicially divined meaning."

Sotomayor** dissenting, (joined by **Gorsuch**, and in all but Part III by **Kagan**):* [Much detail in this 23-page dissent is omitted here]: "From early American law, to dictionaries, to modern federal and state obstruction statutes, interference with an ongoing investigation or proceeding is at the core of what it means to be 'an offense relating to obstruction of justice.'" In ***Pettibone (1893) the Court held that a statute that "laid the foundation" for obstruction of justice required an investigation be pending. "Congress was aware of this settled interpretation" when it codified obstruction of justice as an aggravated felony in the INA. The majority claims that Merriam-Webster's Dictionary omits a pending-proceeding requirement, but the definition actually includes *"in or otherwise impeding an investigation or legal process."* Black's Law Dictionary defines offense of obstruction of justice as "obstructing the administration of justice in any way," but "'administration of justice,' both historically and currently, refers to court proceedings." As for the MPC, it was "fundamentally a

reform movement" and "involve[d] a definitive break from the state of the law at the time in question," so it "is of limited value in discerning generic meaning."

As for lenity [Justice **Kagan** does not join this Part], the complexity of the task at hand leaves lingering ambiguity. In light of the severity of removing non-citizens, the Court should not assume that Congress intended to "trench on a [non-U.S. citizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." ***Fong Haw Tan*** (1948). The Court "provid[es] zero affirmative guidance as to what sorts of offenses" will qualify here.

Santos-Zacaria v. Garland, No. 21-1436, 143 S.Ct. 1103 (May 11, 2023). **Jackson** (9-0); *Alito* concurring; vacating in part 22 F.4th 570 (5th Cir. 2022).

Headline: §1252(d)(1)'s exhaustion requirement, which requires that noncitizens pursue all "administrative remedies available … as of right" before challenging an order of removal, **is not jurisdictional.** Additionally, §1252(d)(1) **does not require noncitizens to seek discretionary forms of review,** like reconsideration by the Board of Immigration Appeals.

Facts: Estrella Santos-Zacaria is a noncitizen (n.1: a term I use as equivalent to "alien" in the statute) sought protection from removal. She lost before an Immigration judge and the Board of Immigration Appeals ("BIA"). The Fifth Circuit the dismissed her appeal, saying that §1252(d)(1)'s exhaustion of administrative remedies requirement was "jurisdictional" – so the Court could raise it *sua sponte* for the first time -- and that Santos-Zacaria had failed to exhaust because she did not file a motion for reconsideration with the BIA.

Jackson (for 9): First, the exhaustion requirement in this statute is not "jurisdictional." We have adopted a "clear statement" rule for this (***Arbaugh***, 2006), and we find no clear statement of Congressional intent here. Exhaustion requirements are "quintessential claim-processing rule[s]." Congress has previously used the language "no court shall have jurisdiction" in immigration laws, but Congress did not use such express language here. **This exhaustion requirement is nonjurisdictional and is therefore subject to waiver and forfeiture.**

Second, Santos-Zacaria was not required to file a reconsideration motion with BIA. Reconsideration is a discretionary remedy, and any exhaustion requirement does not require that the noncitizen request it.

Alito *concurring,* joined by *Thomas*: The Court's ruling that the statute does not require seeking reconsideration "disposes of this case." "I would not decide whether §1252(d)(1) is jurisdictional with respect to the administrative remedies to which it does apply."

United States v. Hansen**,** No. 22-179, 143 S.Ct. 1932 (June 23, 2023). **Barrett** (7 (6+1) to 2); Thomas concurring; Jackson dissenting; reversing 25 F. 4th 1103 (9th Cir. 2022).

Headline: Only the **intentional (purposeful) solicitation or facilitation of unlawful immigration is criminalized** by 8 U.S.C. § 1324(a). Thus, the statute is not unconstitutionally overbroad. "As applied challenges can take it from here" on remand **[Ed. note:** which may not do Mr. Hansen much good, on his egregious facts.]

Facts: Helaman Hansen made nearly $2 million from a scam offering noncitizens in the United States a false path to citizenship he called "adult adoption. He encouraged applicants to "stay in the [fraudulent] program," and thus to remain unlawfully in the United States. He was convicted under a statute that forbids "encouraging or inducing an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law" (8 U.S.C. §1324(a)(1)(A)(iv)). The Ninth Circuit ruled that the statute was invalid as overbroad under the First Amendment. "Overbreadth" doctrine permits a person to challenge a statute, even if it might be applied constitutionally to their facts individually. The Ninth Circuit offered a number of

hypothetical applications and found that the statute could criminalize "an alarming amount of protected speech."

Barrett (for 7): [In a crisp 20-page opinion], **the statute is not overbroad, because we read it to reach narrowly, criminalizing "only purposeful solicitation and facilitation of specific acts known to violate federal law."** First, overbreadth doctrine is a specialized First Amendment doctrine. It's an exception to the normal standing rules, allowing a third party to raise other person's rights. The justification is to allow breathing room for protected speech and deter "chilling effect" of overbroad laws. But it should not be "casually employed (***Williams***, 2008 [written by Justie Scalia, for whom Justice Barrett clerked a decade earlier]). Unconstitutional applications must be "substantial" in number, and be "realistic, not fanciful." Otherwise, only traditional case-by-case "as applied" challenges, with normal standing requirements, are allowed.

To apply the doctrine, we must first determine what the statute actually covers. Applying the Modern Penal Code (MPC) and common law, "criminal solicitation is the intentional encouragement of an unlawful act," and facilitation, "also called aiding and abetting," is providing assistance "with the intent to further an offense's commission." Even though "words may be enough" to commit these crimes, we think Congress intended the "specialized, criminal law" meaning of the terms in this immigration statute. "Encourage" and "induce" are words commonly used to describe these crimes, and Congress and the States have used them repeatedly in criminal contexts, a "longstanding and pervasive" practice. We doubt that Congress intended a more "sweeping and constitutionally dubious meaning" when it amended this 1885 statute. [Barret provides a thorough legislative history of various amendments.] The statute uses the words in their narrow "specialized, criminal-law sense," requiring intention and purpose that the law be broken, not their broader "ordinary" meaning. (Similarly, the word "attempt," also in this statute, means more than just "try" – it requires a "substantial step" toward completion of the crime. **[Ed note**: this seems like *dictum* in this case, useful and correct as it may be.]. The Ninth Circuit should have stuck with this specialized meaning.

The canon of "constitutional avoidance" bolsters our conclusion; an overbroad interpretation that creates an unconstitutional statute should be avoided if "fairly possible," and here Congress's more narrow intent seems clear. "'Encourage' and "induce' are terms of art that carry" the traditional *mens rea*: "purposeful" acts. Meanwhile, many precedents uphold crimes that involve speech, when the speech is "integral to unlawful conduct." Here, "the 'plainly legitimate sweep' [***Williams***] of [this law to obviously unlawful conduct [like Hansen's] is extensive," not overbroad. Hansen offers only "hypotheticals," not "a single prosecution for ostensibly protected expression in 70 years." We do not decide whether criminal penalties can be applied to encouraging civil law violations, because that is a speculative and small category here. We reverse the Ninth Circuit's overbroad reading and remand for further proceedings; individual as-applied challenges are still possible. (But PS: Hansen "concedes that he would lose if clause (iv) covered only solicitation and facilitation of criminal conduct." Still, as Justice Jackson points out (n.9) Hansen's jury instructions may well have been reversibly wrong, as the government itself appeared to concede at oral argument.)

***Thomas** concurring*: I agree with the majority opinion "in full," but I write separately "to emphasize how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role." [8 pages]. "We should carefully reconsider" it. (And by the way (n.3): this is "but one manifestation of the Court's larger drift away from, the limited judicial station envisioned by the Constitution," unnamed doctrines which "resemble the council of revision the Framers rejected.")

***Jackson** dissenting, Sotomayor joining:* [20 pages] The Court "departs from ordinary principles of statutory interpretation" and misinterprets this statute "in order to save it." Thus, the Court allows a substantial "chilling effect" of the statute on the protected speech of people "who operate daily in

the shadow of the law" by lending support and assistance to persons unlawfully present in this country. This "subverts the speech-protective goals" of the overbreadth doctrine.

[Much detail must be omitted in this summary:] "The plain text" of the statute, "in ordinary parlance," would "encompass any and all speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law." Grandmothers, doctors, college counsellors – and significantly, the many groups that support undocumented persons here – could be prosecuted. The government concedes that this would be a huge category of protected speech IF the law were interpreted that way. So, in ***Williams***, the Court expressly ruled that "I encourage you to obtain child pornography" is protected speech, even though possession of child pornography is illegal.

Constitutional avoidance does not permit the Court to "rewrite a law to" uphold it (***Stevens***, 2010). The majority starts by examining "solicitation" and "facilitation" – **but those words "appear nowhere in the encouragement provision" of the statute**. It is "puzzling" to use narrow words to define broad ones that Congress has used, without clear indication that Congress intended the narrower, non-ordinary, meaning. In fact, legislative history shows that Congress has intended to broaden the statute each time it amended it. And in 1986 it deleted the *mens rea* words "willfully or knowingly," at the same time it added "residing" here to the list of unlawful encouragements. **"Congress deleted the very narrowing terms that the majority now reads back into the statute."** The majority "speculate[s]" that Congress "engaged in a cleanup project," but nothing indicates that its changes in language intended no change in meaning – that "gets our ordinary presumption ... backwards." "Other features" also show that Congress never intended the narrow specialized meaning the Court finds. Congress has decided not to criminalize merely remaining in the United States unlawfully; yet the statute to criminalizes encouraging that. Normally, however, the object of criminal solicitation or facilitation must itself be a crime.

Leaving the broad language on the books, will chill much protected speech. "Ordinary people ... will see only its broad, speech-chilling language," not the majority's unusual narrowing interpretation. (And the Court's interpretation still leaves the legality of much speech "up in the air."). Relying on "the purported lack of past prosecutions provides no comfort .. to those living and working with immigrants" – the chill will remain (and we normally reject requests to rely on prosecutorial discretion to save statutes) [Jackson lists a few real-life examples of government "warning" letters or steps.]

***United States v. Texas*,** No. 22-58, 143 S.Ct. 1964 (June 23, 2023). **Kavanaugh** (8 (5+3) to 1); *Gorsuch concurring* in the judgment; *Barrett concurring* in the judgment; Alito dissenting; reversing 606 F. Supp. 3d 437 (S.D. Tex. 2022) on cert before judgment.

Headline: States lack Article III standing to challenge Department of Homeland Security enforcement guidelines **addressing which removable noncitizens to arrest and remove**.

Facts: Two States filed this lawsuit to challenge immigration enforcement Guidelines issued by the Department of Homeland Security, that prioritize which noncitizens should be arrested and removed (prioritizing enforcement against those who, for example, have recently entered the United States, are suspected terrorists, or are suspected dangerous criminals). "As they see it," Texas and Louisiana say that statutes, using the sword "shall," require the arrest and detention of all noncitizens in certain categories. They want the federal arrest and detention of *"more* criminal noncitizens" than DHS says (and the district court found) it has resources to handle. The district court vacated the guidelines, finding the States were injured because they would incur costs from noncitizens they say should be in federal immigration custody. The Fifth Circuit declined to stay that ruling, and we granted *certiorari* before judgement.

Kavanaugh (for 8): Standing is "a bedrock constitutional requirement," and the States do not have Article III standing to bring a lawsuit "of this kind." "The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies. ...On the contrary," ***Linda R.S.*** (1973) is a leading precedent saying "that a citizen lacks standing to context the policies of prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." The "Executive Branch" has "enforcement discretion over whether to arrest or prosecute." "The States' suit here is not the kind redressable by a federal court," for "several good reasons." For example, ***Lujan*** (1992) says "much more is needed" when an asserted injury allegedly arises from "the government's regulation (or lack of regulation) of someone else." The Executive's power to "faithfully execute" the law" (Art. II, sec. 1, cl. 1) gives authority "to prioritize and how aggressively pursue legal actions." ***Transunion*** (2021). "The principle of enforcement discretion" extends to the immigration context. ***Arizona*** (2012). "Inevitable resource constraints and regularly changing public needs" make it very "complicated" and courts lack "meaningful standards" to assess enforcement policies. "Indirect effects on state revenues" make the standing claim "more attenuated." (ftnt 3). "We decline to start the Federal Judiciary down the uncharted path" of reviewing "under-enforcement" of many laws. This does not mean other cases can never be reviewed, for example "if the Executive Branch wholly abandoned its statutory responsibilities." ***Heckler*** (1985). "We address only th[e] issue" of prioritized "arrest and prosecution policies" (ftnt. 5). And "we take no position on whether the Executive Branch here is complying" with the statutes on the merits. We rule only on standing for "this dispute," a "narrow" ruling in this "extraordinary lawsuit" that "simply maintains the longstanding jurisprudential status quo."

[Ed. note: Justice Kavanaugh's majority is a crisp 14 pages (and Justice Barrett's concurrence similar at 5 pages). Justice Gorsuch's concurrence is 19 pages; and Justice Alito's dissent is 29.)

Gorsuch *concurring in judgment* (joined by **Thomas** and **Barrett**)*:* "I agree" that the States lack standing here. However, "the problem here is redressability," not injury or causation. As for injury, this Court has previously allowed States to challenge executive policies that cause States to incur costs (***Department of Commerce v. New York***, 2019) and the district court found such costs here. And in In ***Mass. v. EPA*** (2007), the Court said States get "special solicitude;" while "I have doubts about that move," why does the Court "say nothing about 'special solicitude' in this case"? "Article II does not have an Arrest and Prosecution Clause;" when the Constitution gives the Executive authority to execute all "the Laws," how can the majority's holding be limited?

Redressability is the problem here because an injunction to enforce the law is statutorily "forbidden." 8 U.S.C. § 1252(f)(1) prohibits lower courts from ordering federal officials to ... enforce, implement, or otherwise carry out" the immigration laws. The district court's "clever workaround" of simply vacating the DHS Guidelines "does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion" even without the Guidelines." It is not "likely" that vacatur will redress the States' costs. Also, redressability must be proved "from the outset" of the lawsuit, not on the chance that the case might get to us and we might be able to issue an injunction. Finally, it is not at all clear that the Administrative Procedure Act "empowers courts to vacate agency action." I have previously questioned "universal injunctions," so "[color me skeptical" of the district court's broad vacatur here. [Even more arguments are omitted here.]. The Constitution affords federal courts considerable power but it does not establish 'government by lawsuit'" (quoting *Justice Robert Jackson,* **The Struggle for Judicial Supremacy** (1941)).

Barrett *concurring*, (joined by **Gorsuch**): Justice Gorsuch ably explains why the district court could not order effective relief. [So why write? Apparently, two reasons:] First, I don't think ***Linda R.S.*** "suffices to resolve this dispute;" "the Court is striking new ground" to extend it here. And second, the other cases relied upon are not on point. Instead, we should simply rely on "the familiar

ground that [redress] must be 'likely, as opposed to merely speculative'" [quoting from ***Lujan***, written by Justice Scalia for whom Barrett clerked].

Alito *dissenting* [vehemently, for 29 pages, most of which is omitted here]: "Settled law leads ineluctably to the conclusion that Texas has standing" here. The district court's findings of injury were not 'clearly erroneous,' and its vacation of the Guidelines would "likely" have caused federal officials to better enforce the mandatory statutes. The majority "blaze[s]" an "unfortunate trail" by holding that "the only limit on the power of a President to disobey a law" is "interbranch warfare;" and the Court also "undermines federalism." Today "the majority shuns th[e] virtually unflagging duty" to exercise its jurisdiction to review actions by the other Branches under Article III.

V. CIVIL CASES RELATED TO CRIMINAL TOPICS

Axon Enterprise, Inc. v. FTC, No. 21-86 (consolidated with *SEC v. Cochran*), 143 S.Ct. 890 (April 14, 2023). **Kagan** (9 (7+2) to 0); *Thomas concurring*; *Gorsuch concurring* in the judgment; reversing 986 F.3d 1173 (9th Cir. 2021) and affirming 20 F.4th 194 (5th Cir. 2021).

Headline: District courts have general federal question jurisdiction over constitutional challenges to Agency structure; the normal administrative review process does not displace it.

Facts: The Federal Trade Commission (FTC) brought an enforcement action again Axon; the Securities Exchange Commission (SEC) brought an unrelated enforcement action against Michelle Cochran, an accountant. But after this Court's decision in *Lucia* (2018) — finding that administrative law judges are constitutional "Officers" of the United States and were thereby unconstitutionally appointed by lower-ranking officials — Axon and Cochran filed separate lawsuits in district courts, claiming that the ALJs in their cases were also unconstitutionally appointed. But their lawsuits were dismissed, because each statute (FTC and SEC) requires that the Agency first review the claim, and then any appeal must be filed directly in the appropriate Circuit Court of Appeals. When Axon and Cochran appealed their dismissals (to the Fifth and Ninth Circuits respectively), the Circuits split. The Ninth Circuit affirmed, finding that the FTC's administrative review statute precluded a district court challenge; while the *en banc* Fifth Circuit reversed, ruling that because Cochran's constitutional challenge to the structure of the SEC's ALJs was "outside the expertise" of the agency and would not receive "meaningful judicial review" under the SEC's normal procedures, a district court action was permissible. The two Circuit decisions were consolidated for argument here.

Kagan (for 9, although Gorsuch's concurrence is on a different rationale): The question presented is whether the district courts have jurisdiction to hear th[e]se suits," under 28 U.S.C. § 1331, the general "federal question" statute. "The answer is yes," because these constitutional challenges are "extraordinary" and "fundamental," and our precedent (***Thunder Basin***, 1994) permits claims to be filed outside the statutory administrative structure when the claim would not meet three factors. We ruled this way in ***Free Enterprise Fund*** (2010), which raised quite similar claims to the ones here, challenging the constitutional structure of a regulatory agency itself. "The three ***Thunder Basin*** factors" lead to the same conclusions here. (1) Judicial review of the claim would not be "meaningful" when the claimed harm is constitutional: having to go through the process itself; (2) the challenges here are "collateral" to the statutory violations the agencies claim; and (3) the merits of the constitutional structural claims are" outside the agency's expertise." [Much detail omitted here.] In the end, "the [constitutional] claims [here] are not 'of the type' the statutory review scheme reaches," or that we think Congress intended to preclude. So "a district court can review them."

Thomas *concurring*: "I join the Court's opinion in full," but I also "have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end." During the "first

century of our Nation's existence" the system of mixed review did not exist. **[Ed. note:** This seems like an attack of much of the 20th Century's administrative law structure.] "If private rights are at stake, the Constitution likely requires plenary Article III adjudication." This Court should consider the constitutionality of these statutory appellate review models in an appropriate case.

Gorsuch *concurring in judgment*: Cochran and Axon "are entitled to their day in court, [b]ut ... the reason why has nothing to do with the *Thunder Basin* factors." It "follows directly from 28 U.S.C. § 1331," which states that district courts "*shall"* have jurisdiction over "*all"* claims arising under federal law, "not *may*" and "not *some*" claims. The *Thunder Basin* factors are problematic given their "sheer incoherence." And "what gives courts authority to engage in jurisdiction-stripping-by-implication?" "There is a better way." ***Rosencrans*** (1897) provides a "true rule": "statutes clearly defining the jurisdiction of the courts … must control … in the absence of subsequent legislation." § 1331 "should be the end of the matter." These statutes do not expressly divest district courts of § 1331 jurisdiction, and these claimants do not seek to challenge an agency order — they challenge the constitutional structure of the agencies themselves. "Respectfully, this Court should be done with the *Thunder Basin* project. I hope it will be soon."

Meanwhile, agency review of claims produce "tortuous" paths (much "cost, time, and uncertainty") in processes that are "tilted" against "individuals seeking to vindicate their rights." "From 2010 to 2015, the SEC won 90% of its contested in-house proceedings … some say the FTC has not lost an in-house proceeding in 25 years." [**Ed. Note:** Justice Gorsuch's hostility to administrative bureaucracies seems clear — and anyone who has been caught up in one may understand this feeling. He recounts the facts of Ms. Cochran's case" with great sympathy: "a single mother of two" who has been "dragged" through SEC proceedings "for *seven years*."]

Twitter v. Taamneh**,** 142 S.Ct. 1206 (May 18, 2023). **Thomas** (9-0); Jackson concurring; reversing 2 F. 4th 871 (9th Cir. 2021).

Headline: A plaintiffs fail to state a claim against an online social media platform, when the complaint **does not show that defendants intentionally provided substantial assistance or consciously participated in the relevant act of international terrorism**.

Facts: Nawras Alassaf was a victim of the 2017 ISIS terrorist attack in Istanbul, Turkey. Alassaf's family filed suit against Facebook, Google (owner of YouTube), and Twitter, alleging that defendants knew that ISIS (a known terrorist organization) used their platforms for years but failed to adequately remove ISIS-related content. Thus, the family alleged, defendants had "aided and abetted" ISIS in terrorism, by knowingly allowing them to use their platforms and benefit from their "recommendation" algorithms, "enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits" (and also "profiting from advertisements placed with ISIS' tweets, posts, and videos." The family also alleged, specific to Google, that by its advertising business structure, Google had shared some of its revenue with ISIS. The district court dismissed the complaint for failure to state a claim but the Ninth Circuit reversed, finding that within the meaning of § 2333(d)(2), the complaint had plausibly alleged that defendants had "aided and abetted" ISIS.

Thomas (for 9): § 2333 was enacted as part of the 2016 Antiterrorism Act (ATA); it permits injured persons to sue terrorists directly – but injured persons can also sue anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." The text of § 2333 raises two questions: (1) what does it mean to "aid and abet"?; and (2) what must the defendant have "aided and abetted"?

When it enacted §2333, Congress pointed to ***Halberstam*** (DC Cir. 1983) "as 'provid[ing] the proper legal framework' for 'civil aiding and abetting and conspiracy liability.'" ***Halberstam*** synthesized common law aiding and abetting into three main elements: (1) the principal must perform

some wrongful act, causing an injury; (2) the defendant (aider and abettor) must be "generally aware" of their role as "part of an overall illegal or tortious activity"; and (3) they must "knowingly and substantially assist the principal violation" (applying yet six more factors), or "reasonably foreseeable" acts. But we think the Ninth Circuit misunderstood § 2333 as requiring adherence to *Halberstam*'s "precise formulations." Common law terms used by Congress "bring the old soil with them" (***Sekhar***, 2013). *Halberstam* should be understood in light of the common law: **"The phrase 'aids and abets' in §2333(d)(2), as elsewhere, refers to a conscious, voluntary, and culpable participation in another's wrongdoing."** The aider and abettor doesn't need to know the "particulars" of the principal plan, rather *Halberstam* allows liability for torts that were "a foreseeable risk" of the intended tort. A "close nexus" between the aiding and abetting and the tort might help, but "even more remote support" can suffice under the right circumstances. To summarize, the statute should be "understood in light of the common law and applied as a framework designed to hold defendants liable **when they consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.**'" ***Nye & Nissen*** (1949).

Here, "the only affirmative 'conduct' defendants allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history." Mere creation is not culpable; "a strong showing of assistance and scienter" is required. Otherwise, "cell phones, email, and the internet" would be exposed to "extensive liability." Other than defendants' "agnostic algorithms," the relationship between the platforms and the terrorist attack by ISIS is "attenuated," and plaintiffs do not allege that defendants encouraged, solicited, advised, or otherwise tried to help the attack. Both tort and criminal law are hesitant to impose liability on such passive nonfeasance. Even if defendants had a duty to act (an issue that the Court does not decide), their "distant inaction" doesn't constitute the "knowing and substantial assistance" required to impose liability. **"[W]e cannot rule out the possibility that some set of allegations involving aid to a known terrorist group would justify holding a secondary defendant liable** … In those cases, the defendants would arguably have offered aid that is more direct, active, and substantial than what we review here." **(In addition,** "Knowing" should be considered relative to "substantial," instead of considered to capture the "general awareness" of the defendants.)

The focus must be on the alleged assistance to the principal tort. Where the principal tort and the defendant's assistance share a "direct nexus," liability can more easily be imposed. "But the more attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort." Plaintiffs' allegations here against Twitter fail to rise to the standard we define.

Jackson *concurring*: This decision (and the Court's *per curiam* decision in *Gonzalez v. Google*) "are narrow in important respects." Both cases were resolved at the motion-to-dismiss stage, and the Court's factual analysis was dependent on the allegations present in the complaints. "Other cases presenting different allegations and different records may lead to different conclusions." And more generally, the common law principals that the Court relies on to interpret and apply § 2333 "do not necessarily translate to other contexts."

Gonzalez v. Google**,** 143 S.Ct. 1191 (May 18, 2023), 9-0, **per curiam** (remanding).

The claims here are "materially identical" to those in *Twitter v. Taamneh* [the Gonzalez family did not seek review of the revenue-sharing claims, but the Court states that those claims still failed to meet the standard for direct liability under the ATA]. "Since we hold that the complaint in that case fails to state a claim for aiding and abetting under §2333(d)(2), it appears to follow that the complaint here likewise fails to state such a claim." However, we remand this case for the Ninth Circuit to apply the standards we have outlined today. (The Court notably declined to address the application of

Section 230 of the CDA, stating that "independent of §230" the allegations fail to plausibly state a claim).

Yegiazaryan v. Smagin, No. 22-381, 143 S.Ct. 1900 (June 22, 2023). **Sotomayor** (6-3); Alito dissenting for three (Thomas joining, Gorsuch joining as to Part I; affirming and remanding 37 F. 4th 562 (9th Cir. 2022).

Headline: Under 8 U.S.C. § 1964, a domestic injury is sufficiently alleged under the contextual approach when the circumstances show that the injury arose out of the United States.

Facts: Respondent Ashot Yegiazaryan committed fraud against petitioner Vitaly Smagin in Moscow, Russia. Yegiazaryan fled to Beverly Hills to avoid indictment and has lived there since. Smagin won over $84 million as an arbitration award in London, but Yegiazaryan refused to pay. Subsequently, Smagin filed suit in district court to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The district court granted a preliminary injunction, which froze Yegiazaryan's assets. Smagin informed the court that Yegiazaryan had previously been awarded money in a separate arbitration, and Smagin was worried Yegiazaryan would transfer the money out of reach. Yegiazaryan did just that — he received the $198 million award and concealed the funds through a "complex web of offshore entities." Yegiazaryan further requested others to file fake claims against him in foreign jurisdictions so that he could receive judgements against him up the $198 million he gained from the award. The district court eventually granted summary judgment in favor of Smagin, and held Yegiazaryan in contempt of court (to which Yegiazaryan filed a false doctor's note claiming he was too ill). Further, Yegiazaryan intimidated, threatened, and coerced Smagin when Smagin informed him that he would seek to depose the doctor.

Based on these allegations, Smagin brought a civil Racketeer Influenced and Corrupt Organizations Act (RICO) suit against Yegiazaryan, CMB Bank, and 10 other defendants, asserting substantive RICO claims and RICO conspiracy claims. The district court dismissed Smagin's complaint for failure to sufficiently plead a domestic injury, placing "great weight" on Smagin's Russian citizenship. The Ninth Circuit reversed, "adopting a 'context-specific' approach to the domestic-injury inquiry." Smagin's injury was sufficient because his efforts to "execute on a California judgment in California against a California resident" were halted by racketeering that "occurred in, or was targeted at, California … designed to subvert" judgement in California.

Sotomayor (for 6): RICO, 18 U.S.C. § 1964(c), "provides a private right of action to '[a]ny person injured in his business or property by reason of a violation of' RICO's substantive provisions." The domestic-injury inquiry stems from ***RJR Nabisco*** (2016), where the Court applied the "presumption against extraterritoriality." ***Morrison*** (2010). The presumption states: "absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." ***RJR Nabisco***. The first step of the presumption asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." If so, the presumption is successfully rebutted. If not, the second step asks "whether the case involves a domestic application of the statute," looking at the statute's "focus."

Petitioners advance a bright-line rule "that locates a plaintiff's inquiry at the plaintiff's residence." In support of this rule, petitioners contend that the statute only redresses "economic injuries" which are necessarily suffered at a party's residence. Petitioners argue in the alternative that when the alleged injury is "intangible," "common-law principles" dictate that the injury is located at the party's residence. Therefore, because Smagin's residence is in Russia he does not meet these standards. Respondents (Smagin) argue that "all case-specific facts" concerning where the injury "arises" should be included. The Court agrees with Smagin. "[C]ourts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States." This

approach is in line with *RJR Nabisco*, and it "because of the contextual nature of the inquiry, no set of factors can capture the relevant considerations for all cases." A bright-line rule is insufficient.

Smagin's injury clearly arose in the United States — much of Yegiazaryan's alleged actions took place in the United States, including his alleged creation of shell companies to hide assets, his forgery of a doctor's note, and his intimidation of U.S.-based individuals. The effects of this "largely manifested" in the United States. Smagin's judgment and rights exist only in California. Through the contextual approach, Smagin's claims satisfy the domestic inquiry. (The Court next describes why petitioners argument to the contrary is unavailing, including…) Both petitioners and the dissent argue that the contextual approach is "unworkable." But the contextual approach is consistent with *RJR Nabisco*, and even though a bright-line rule might be applied with more ease, it does not make it the better test.

***Alito** dissenting, Thomas joining, Gorsuch joining as to Part I:* The majority's decision does little to resolve the divide among the lower courts. "Rather … I would dismiss the writ of certiorari as improvidently granted." The Court falls short of bringing clarity to the circuit courts. Under the majority's contextual approach, many features *"could"* be relevant that were not, including Smagin's residence, existence of the arbitration award, and other factors. "Are future courts to infer that these matters have no import?" Furthermore, "the nature of the intangible property" might be relevant under the contextual approach, but the Court fails to address this point too.

We risk significant harm with this decision. "A thrust of our international-comity jurisprudence is that we should not lightly give foreign plaintiffs access to U.S. remedial schemes that are far more generous than those available in their home nations." "In today's decision, the Court countenances that the plaintiff's residence may play no role *at all* in the civil RICO extraterritoriality inquiry." This is departure from "our customary rules," and "we have received no input here from the sovereign states our rules will affect, including the U.S. Government."

SUMMARY REVERSALS (OPINIONS WITHOUT FULL BRIEFING OR ARGUMENT)

It was an unusual Term because there were NO "summary reversals." It has been, I think, many years since that was true.

WRITINGS RELATED TO ORDERS (THE "SHADOW DOCKET" IN CURRENTLY POPULAR TERMS)

The Justices issued separate writings in 31 separate cases on ***its "Opinions related to Orders" docket*** over the past Term. Time has not permitted a thorough listing of all of those that were related to criminal cases or issues. Below is a small sample.

Dismissed as Moot, after scheduled Argument was cancelled

***Arizona v. Mayorkas*,** No. 22-592, 143 S.Ct. 1312 (May 18, 2023), 9-0, **per curiam:** Vacated with orders to dismiss as moot, after cancelling the scheduled oral argument.

***Jackson** dissenting*: I would have dismissed the case as improvidently granted ("DIG").

Gorsuch (8-page statement): "Title 42 orders ... severely restricted immigration ... for the ostensible purpose of preventing the spread of COVID-19." The U.S. tried to end the Title 42 orders in April 2022, as no longer necessary. But two different district courts entered injunctions in opposite directions: the government had to keep Title 42 in place, or not enforce it as unlawful from the start. This Court entered a stay, "effectively extending Title 42 orders indefinitely [over my dissent, Gorsuch neglects to say], granted cert, and set the case for oral argument. Now the Court does a "sudden about-face" and dismisses.

The Court is right to dismiss, but was wrong originally, because "a border crisis is not a COVID crisis." Various Covid orders "since March 2020" may represent "the greatest intrusions on civil liberties in the peacetime history of this country" (followed by a long list and citations). [This statement has been vigorously criticized as overstatement by some.]. "Emergency decrees" are dangerous, even if sometimes also necessary. "Rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow." "At the very least, one can hope that the Judiciary will not soon again allow itself to be part of the problem by permitting litigants to manipulate our docket to perpetuate a decree designed for one emergency to address another."

Denials of Stay Applications

Barber v. Ivey: (July 21, 2023), 6-3: **Sotomayor** (joined by **Kagan** and **Jackson**), dissenting from the denial of application for stay.

Last year, the State of Alabama underwent "top-to-bottom" review of its execution-by-lethal-injection process. This occurred after three executions "failed" by lethal injection, with two individuals surviving and reporting extreme pain ("in one case, nerve pain equivalent to electrocution."). Alabama intends to execute James Barber by lethal injection, and "the Court should not allow Alabama to test the efficacy of its internal review by using Barber as its guinea pig."

Unlike other states who have attempted to review and fix their lethal injection protocol, Alabama has done so in a "secret, internal review." This has included "actively obstruct[ing]" attempts by Barber to uncover the process. This decision should be stayed long enough to allow "full discovery" into last year's failed executions. "Today's decision is another troubling example of this Court stymying the development of Eighth Amendment law by pushing forward executions without complete information."

Johnson v. Missouri: (November 29, 2022): **Jackson** (joined by **Sotomayor),** dissenting from the denial of application for stay.

Kevin Johnson's application to stay his execution has been denied, and "in my view, there was a likelihood that Johnson would have succeeded on the merits of his federal due process claim." Missouri has a three-step review process for state prisoners' final convictions: (1) a prosecutor moves to vacate based on belief that the person "may have been erroneously convicted"; (2) a court orders a hearing and issues findings and conclusions; and (3) the motion is granted upon clear and convincing evidence of "constitutional error." A prosecutor moved to vacate Johnson's convicting, but a mandatory hearing was never held. In denying Johnson's stay, the Missouri Supreme Court "went straight to the third" step, and found that even there had been a hearing, the motion to vacate did not meet the clear and convincing standard.

"[A] State cannot provide a process for postconviction review and then arbitrarily refuse to follow the prescribed procedures." Johnson's execution "irrevocably mooted our consideration of his due process claim." "[M]uch of the evidence that could have been presented at the nonexistent hearing was new evidence relating to the trial prosecutor's racially biased practices and racially insensitive remarks." Now, that evidence will not be heard by *any* court, "much less the one that was supposed to base its conclusions about the validity of Johnson's conviction on such evidence, per the statutory mandate."

CRIMINAL LAW *CERTIORARI* GRANTS FOR UPCOMING (OCT. '23 TERM)

A. Already Scheduled for Argument

1. ***Pulsifer v. U.S.*** (to be argued on October 2, 2023): What satisfies the criteria for the "First Step" drug-sentencing safety-valve statute (18 U.S.C. § 3553(f)(1)).
2. ***Murray v. UBS Securities*** (to be argued on October 10, 2023): Whether the "whistleblower" or the employer bears the burden of proof on "retaliatory intent" under 18 U.S.C. § 1514A.

B. Granted but Not Yet Scheduled for Argument (as of August 2, 2023)

3. ***O'Connor-Ratcliff*** and ***Lindke v. Freed*** (granted together, unclear whether they will be consolidated for one argument): Is it "state action" when a government official blocks person's from the official's social media account?

4. ***Culley v. Marshall:*** What constitutional analysis should be applied to determine whether (and how quickly) a pre-judgment hearing must be held to retain property that has been seized by the government as subject to forfeiture?

5. ***Wilkinson v. Garland***: In immigration cases, whether an agency finding of no "exceptional and extremely unusual hardship" is subject to judicial review (and if so, by what standard)?

6. ***Campos-Chavez v. Garland***: In immigration cases, what constitutes the required notice of a removal hearing?

7. ***Brown v. U.S.:*** Whether the classification of a prior "serious drug offense," for purposes of the Armed Career Criminal Act, should be determined by the federal drug schedules that were in effect at the time of the federal sentencing or the prior state drug offense.

8. ***U.S. v. Rahimi:*** Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment.

9. ***Securities and Exchange Commission v. Jarkesy:*** Three constitutional challenges to the SEC's power to institute civil enforcement proceedings; the Fifth Circuit ruled (2-1) that the SEC proceedings were unconstitutional, and then denied rehearing *en banc* 10-6. The U.S. Solicitor General petitioned for *certiorari*.

10. ***McElrath v. Georgia:*** Is it unconstitutional Double Jeopardy to retry a defendant when the State courts have decided that the jury's verdicts ("guilty but mentally ill", and "not guilty of malic murder") were vacated because they were "repugnant[ly]" incompatible?

"WHO WROTE WHAT"*
in CRIMINAL-and-related Cases in the 2022-23 Term

(*all writings, not just majorities, in argued cases)

Majority opinions are in **Bold**; *Concurrences* are in *italics*; Dissents are underlined

ROBERTS	THOMAS	ALITO	SOTOMAYOR
Polselli	**Samia**	**Smith**	**Dubin**
	Ciminelli	**Percoco**	**Cruz**
	Twitter	*Ciminelli*	**Yegiazaryan**
	Jones v. Hendrix	*Santos-Zacaria*	*Counterman*
	Shutte	Reed	*Bartenwerfer*
	Hansen.	U.S. v. Texas	Jones v. Hendrix
	Axon Enterprise	Yegiazaryan	Pugin
	Counterman		
	Reed		
	Polansky		

KAGAN	GORSUCH	KAVANAUGH	BARRETT	JACKSON
Counterman	**Bittner**	**U.S. v. Texas.**	**Hansen**	**Lora**
Axon Enterprise	**Slack**	**Turkiye**	**Bartenwerfer**	**Santos-Zacaria**
Polansky	*Percoco*	**Reed**	*Samia*	*Polselli*
Samia	*Dubin*	**Pugin**	*U.S. v. Texas*	*Pugin*
	U.S. v. Texas	*Polansky*	Counterman	Hansen
	Axon Enterprises		Bittner	Samia
	Turkiye *(1/2)*		Cruz	Jones v. Hendrix

Total Criminal-and-Related Decisions in argued and unargued cases: 27 (25 argued with decision, 2 argued but then DIG or PC remand, and one dismissed as moot right before argument)

Total WRITINGS in argued Criminal Law-and-Related cases: 56, an unusually high number.

Criminal Law Workload and "Workhorse" Notes

1. The Chief Justice continues to show his disinterest in most criminal cases, assigning 5 majorities to Justice Thomas and writing in only one case (a unanimous civil IRS summons case).

2. Justice Thomas is again the "workhorse" in criminal cases, with the most majorities (5) and the most writings overall (10). But notably, the newest Justice, Jackson, had the second-hughest number of writings (8); and three of those were very vigorous dissents. Justice Jackson has clearly asserted herself as a powerful voice, and in some cases a direct counter to Justice Thomas.

3. Interestingly, the dissents may tell the real story of the "slightly moderate" Court, despite having a clear conservative majority. The three "liberal" Justices (you know who they are) wrote a total of six dissents; while the three arguably most conservative Justices (Thomas, Alito and Barrett) wrote nine dissents. Notably, Justices Roberts and Kavanaugh wrote no dissents, and Justice Gorsuch wrote what I would call only a half-dissent, in the ***Turkiye Halkbank*** case.

4. Finally, the result in 11 of the criminal-and-related cases could be described as "pro-defendant." In addition, 10 of the 25 written decisions were unanimous Thus it is possible to describe the current Court as less polarized on some criminal law issues, and more "moderate," than some might think about the civil side of the docket. Food for discussion!