The Roberts Court 2019-20: Distancing from the Kennedy Era, the Roberts Era Has Begun

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INTRODUCTION[1]

The fifteenth full term of the Roberts Court featured a mix of outcomes where criticism from some voices gave rise to praise from the same voices. But that ambivalence was not expressed when it came to describing the Court. It is no longer the Kennedy Court. The Roberts Era has now officially begun.

The Chief Justice wrote more decisions than any other Justice except Justice Gorsuch (both with seven). He wrote four five-vote majority cases putting his jurisprudential stamp on religious liberty (*Espinosa v. Montana Dept. of Revenue*), separation of powers (*Seila Law LLC v. Consumer Financial Protection Bureau*), administrative law (*Department of Homeland Security v. Regents of the Univ. of Cal.*), and copyright law involving "government edicts" (*Georgia v. Public Resources Org. Inc.*). He provided the fifth vote (concurring only in the judgment) in the Louisiana abortion rights decision (*June Medical Services L.L.C. v. Russo*) and, as discussed below, effectively established the standard of review of abortion restrictions going forward.

In *Trump v. Vance*, he rejected the assertion by President Trump of absolute immunity or a heightened standard of review in the case of a state grand jury subpoena for business records in connection with the investigation of potential criminal conduct. And in *Trump v. Mazars, USA LLP*, a case of first impression involving a congressional subpoena, he established a framework for review, navigating between the "rivalry and reciprocity" that are features of the relationship between a President and Congress under the Constitution.

The Chief Justice also joined in Justice Gorsuch's 6-3 decision confirming that Title VII's prohibition on discrimination "because of" sex applies to both sexual orientation and sexual identity.

Of the 12 authored-five-vote majority decisions, the Chief Justice was in the majority in 11 of them. Indeed, he was in the majority in 51 of the 53 authored opinions and all ten of the *per curiam*

[1] A large "thank you" goes to my SHB colleagues, Katherine Mastrucci and Sergio Pagliery, for reading the document substantively and providing invaluable editorial comments, and Emmalie Silvester who is an indefatigable proofreader.

opinions. It is no surprise that Justices Ginsburg, Kagan, and Sotomayor did not write a five-vote majority decision, and the one written by Justice Breyer (*Russo*) was really controlled by the Chief Justice's concurrence in the judgment.

Dissents? The Chief Justice wrote one and joined in another, his fewest dissents since I have been tracking the Court (five was his previous low). In other words, he wrote or assigned the author in 51 of the 53 authored opinions.

The wheel has turned. The Chief Justice is firmly in control.

An in-depth analysis of the 2019-20 Term follows.[2]

VOTE COUNTS

The table in Appendix I contains a breakdown of the vote counts for the Supreme Court's terms since 2007.

VOTE COUNT TRENDS

Decisions with eight or nine votes dropped by five percentage points in 2017-18 from the 2016-17 Term: to 50.0 percent from 55.7 percent. They dropped again by five percentage points in 2018-19: from 50.0% to 45.2%, although Justice Kavanaugh did not participate in two 7-1 cases. While there were fewer cases heard in 2019-2020 (63) compared to last term (73), the percent of decisions with 8 or 9 votes was about the same at 46.0% (compared to 45.2% last term).

Here are the percentages of decisions with eight or nine votes dating back to the 2006-07 term.

Term	Percentage of Decisions with 8 or 9 Votes
2006-07	48.0%
2007-08	40.2%
2008-09	43.2%
2009-10	49.9%
2010-11	54.7%
2011-12	52.0%
2012-13	51.9%

[2] I discuss (a) 53 of the 63 decisions rendered in the 2019-20 Term (although two of the 53 decisions were *per curiam* one-line opinions *(Colorado Dept. of State v. Baca* and *Sharp v. Murphy*), plus (b) one dissent from an Order denying certiorari in a Section 1983 matter, plus (c) two orders denying an application for injunctive relief in connection with COVID-19 orders by the Governors of California and Nevada that limited the capacity of churches. While I may say so in some instances, all footnotes in the Court's opinions discussed here are omitted, unless specifically referenced. I may quote from opinions at times without quotation marks especially in factual recitations. I may have altered internal quotation marks as well at times without so indicating. None of these affect the substance of the discussion but they do mean that you should look to the opinion if you are looking for exact quotations.

Term	Percentage of Decisions with 8 or 9 Votes
2013-14	63.5%
2014-15	50.0%
2015-16	53.1%
2016-17	55.7%
2017-18	50.0%
2018-19	45.2%
2019-20	46.0%

The 2018-19 Term involved 20-authored decisions with a five-vote majority, or 27.6 percent of the 73 opinions rendered, an increase of just over 1% from the 2017-18 Term. In 2019-20, there were 12-authored decisions and two *per curiam* decisions with a five-vote majority; or 14 such decisions out of 63 opinions, a percentage of 22.2% (5.2% less than last Term, with 10 fewer opinions).[3]

Term	Number of Majority Decisions with 4 or 5 Votes
2006-07	24 (33.3%)
2007-08	10 (18.1%)
2008-09	22 (27.2%)
2009-10	19 (20.7%)
2010-11	17 (20.3%)
2011-12	16 (21.9%)
2012-13	23 (29.1%)
2013-14	11 (14.9%)
2014-15	19 (25%)
2015-16	10 (12.3%)
2016-17	11 (15.7%)
2017-18	20 (26.3%)
2018-19	20 (27.4%)
2019-20	14 (22.2%)

PER CURIAM DECISIONS

In 2019-20, there were 10 *per curiam* decisions:

- four of which were 9-0 votes
- two of which were decided by 6-3 votes (*Andrus v. Texas* and *New York State Rife & Pistol Assn., Inc. v. City of New York*, both of which are discussed below)
- one of which (*Colorado Dept. of State v. Baca*) by a vote of 8-0 (Justice Sotomayor recused herself) reversed the judgment of the Tenth Circuit for the reasons stated in *Chiafalo v. Washington* (discussed below)

[3] Two of the 63 decisions were *per curiam* one-line opinions *(Colorado Dept. of State v. Baca* and *Sharp v. Murphy*) discussed in the text.

- one of which (*Sharp v. Murphy*) by a 6-2 vote (Justice Gorsuch recused himself, and Justices Thomas and Alito dissented without opinions) affirmed the judgment of the Tenth Circuit for the reasons stated in *McGirt v. Oklahoma* (discussed below)
- two of which were decided by a 5-4 vote (*Republican National Committee v. Democratic National Committee* in which the Court refused to allow absentee ballots to be counted beyond election day in response to COVID-19 absentee-ballot-distribution issues, and *Barr v. Lee* in which the Court refused to delay the first federal execution of a death row inmate in 17 years, discussed below)

AUTHORSHIP COUNT

Of the 53-authored opinions of the Court, the Chief Justice and Justice Gorsuch wrote seven of them. Justices Alito, Ginsburg, Kagan, and Kavanaugh each wrote six opinions (one of Justice Kavanaugh's opinions was a plurality opinion). Justices Breyer, Sotomayor, and Thomas each wrote five opinions.

The "dissenting" vote counts for the past ten terms appear in the table below. In Justice Kennedy's last three terms, he wrote or joined in (fully or partially) the fewest dissents. In his first nearly full year on the Court, Justice Kavanaugh won that prize. In 2019-20, the Chief Justice won the award for the fewest dissents. He wrote one and joined in one. Going forward, I expect the Chief Justice to continue to write or join in the fewest dissents.

Justices Thomas and Alito were aligned often in 2019-20. Justice Alito joined in Justice Thomas's dissents four times. Justice Thomas did the same, joining in four of Justice Alito's dissents. Justice Thomas joined a Justice Gorsuch dissent once. Justice Gorsuch joined a Justice Thomas dissent three times. He joined a Justice Alito dissent two times.

Illustratively, of the 11 authored 7-2 cases this term, Justice Thomas wrote five dissents and Justice Alito joined in them wholly or in part three times. Justice Alito wrote three dissents and Justice Thomas joined one of them. They voted the same way in all 11, six as dissenters and five in the majority. Justice Gorsuch did not write an opinion in a 7-2 decision but joined in Justice Kavanaugh's concurring opinion in a 7-2 case (concurring in the judgment in *Trump v Vance*).

To the extent that the number of dissents (again partial or full dissents) a Justice writes or joins in dissents written by others reflects on either strongly held views based on the type of case or ideology, one can see that Justices Thomas and Alito on the one hand, and Justices Sotomayor and Ginsburg, on the other, stand out.

I should note that there were four cases with a recusal: Justices Gorsuch, Kagan, Kavanaugh, and Sotomayor each had one. Justice Kagan's recusal might have been a dissent since hers was in a 5-3 decision (*Agency for Int'l Development v. Alliance for Open Society*) where Justices Ginsburg, Breyer, and Sotomayor dissented.

Full and Partial Dissents by Term

Justice	*2019-20*	*2018-19*	*2017-18*	*2016-17*	*2015-16*	*2014-15*	*2013-14*	*2012-13*	*2011-12*	*2010-11*
Kennedy	-	-	6	3	2	9	4	7	5	5
Roberts	2	11	5	5	7	16	6	11	7	7
Scalia	-	-	-	-	3[4]	23	7	17	15	10
Thomas	19	19	14	16	22	29	7	15	12	10
Alito	18	14	15	12	13	21	8	15	13	11
Gorsuch	8	19	11[5]	4[6]	-	-	-	-	-	-
Kavanaugh	4	7[7]	-	-	-	-	-	-	-	-
Breyer	13	17	19	7	4	6[8]	10	13	17	18
Kagan	14	13	16[9]	5	3	11	7	14	19	11
Sotomayor	17	17	21	8	13	8	14	17	17	14
Ginsburg	16	17	18	11	9	9	11	16	23	18

JUSTICE KAVANAUGH

Justice Kavanaugh has solidified his conservative credentials on the Court. He dissented in *June Medical Services L.L.C. v. Russo*, where the Court struck down Louisiana's credentialing law for doctors that would have shut down Louisiana's abortion clinics (except for perhaps one). While his *Russo* opinion might suggest he is not an advocate of directly overturning *Roe v. Wade*, his views of what constitutes an "undue burden" on a woman's right to have an abortion fall into the "restrictive" camp.

Of the 12 five-vote authored decisions, he was assigned by the Chief Justice to write four of them, the same number as the Chief Justice (but Justice Kavanaugh also wrote a plurality opinion that I include in my discussion below). And of his four dissents, he wrote three of his own, and in one case joined in

[4] Justice Scalia participated in 13 decisions before his death.

[5] Justice Gorsuch did not participate in three decisions: *Chavez-Meza v. United States* (5-3 vote); *Dahda v. United States* (8-0); and *City of Hays v. Vogt* (8-0).

[6] Justice Gorsuch did not take a seat on the Court until late in the Term.

[7] As explained in the text, Justice Kavanaugh did not participate in seven of the 66 authored decisions.

[8] Justice Breyer did not participate in two decisions, *City and County of San Francisco v. Sheehan* (6-2 vote) or *Commil USA, LLC v. Cisco Systems, Inc.* (6-2).

[9] Justice Kagan did not participate in two decisions: *Jennings v. Rodriguez* (5-4 vote) or *Rubin v. Islamic Republic of Iran* (8-0).

the Chief Justice's dissent (*McGirt v. Oklahoma*). He is not a "joiner" in the dissents of others – at least, not so far.

DECISIONS WITH FIVE-VOTE MAJORITIES OR A PLURALITY OF THE COURT

There were 12-authored decisions with five-vote majorities in the 2019-20 Term, plus one plurality opinion written by Justice Kavanaugh that I include here. The Chief Justice wrote four of them, which is a higher number than has been typical for him—perhaps reflecting Justice Kennedy's departure. As noted already, Justice Kavanaugh also wrote four of them—a record of sorts for the first full term on the Court. Justice Alito wrote two five-vote majority decisions. Justice Breyer wrote one (*Russo*), but the Chief Justice's concurrence in the judgment, put the focus on his opinion, not Justice Breyer's.

The combination of Justices Ginsberg, Breyer, Sotomayor and Kagan in dissent or partial dissent in five-vote majority cases occurred in nine out of 14 decisions (two *per curiam* decisions were decided by a 5-4 vote as noted earlier and Justice Kagan recused herself in one of the nine but likely would have dissented based on the issue). They found themselves in the majority in the "Dreamers" decision, *Russo*, and *McGirt v. Oklahoma*, Justice Gorsuch's opinion on the continuing existence of the Creek reservation in northeastern Oklahoma. The Chief Justice's copyright opinion in *Georgia v. Public Resource Org., Inc.* was not decided on what most think of as "ideological lines." Finally, Justice Kavanaugh's opinion in *Barr v. American Assn. of Political Consultants*, was a plurality opinion that generated a number of opinions that added up to six votes.

Justices Ginsburg, Thomas, Kagan, and Sotomayor were shut out on five-vote opinions this Term.

As is my custom, I discuss the five-vote majority cases and one plurality opinion (6-3) in some detail, even though readers may feel no or only a small, connection to some of the issues presented. If you fall into the category, the headings explaining the holdings in each case allow you to choose which of my analyses you wish to review.

Chief Justice Roberts

The Chief Justice wrote four opinions with five-vote majorities.

Georgia v. Public Resource Org., Inc.*: The annotations in the Official Code of Georgia Annotated are not copyrightable under the government edicts doctrine because they are authored by an arm of the Georgia legislature in the course of official duties.*

In one of the rare five-vote majority opinions *not* decided by a bloc of Justices on either side of the ideological divide, the Chief Justice was joined by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh in deciding that the statutory phrase, "original works of authorship" in the Copyright Act, 17 U. S. C. § 102(a), does not extend copyright protection to annotations contained in Georgia's official annotated code. Justice Thomas dissented. He was joined by Justice Alito and in part by Justice Breyer. Justice Ginsburg dissented and was joined by Justice Breyer.

The facts will quickly put this matter into a comprehensible perspective. Georgia's laws are contained in the "Official Code of Georgia Annotated" (OCGA). The State's official seal appears on the first

page of each volume with a legend that reads, "Published Under Authority of the State." That announcement, as you will shortly read, was fatal to Georgia's effort to copyright the annotations contained in the Code.

The OCGA includes the text of every statute in force in Georgia. Beneath each statute is a set of annotations that include summaries of judicial decisions that apply a given statutory provision and of pertinent opinions of the state attorney general, as well as a list of related law review articles and similar reference materials. The annotations also contain editor's notes that provide information on the statutory text.

The OCGA is assembled by the "Code Revision Commission" established in 1977 by the Georgia legislature to recodify Georgia law. The Commission's role in compiling the statutory text and annotations was determined in 1979 by the Georgia Supreme Court to be within the "sphere of legislative authority." (Citation omitted.) Indeed, each year, the Commission submits the OCGA to the legislature for approval.

In the current OCGA, the annotations were prepared by Matthew Bender & Co., a division of the LexisNexis Group, under a "work-for-hire" agreement with the Commission. That agreement vests "any copyright in the OCGA" exclusively in the State of Georgia, acting through the Commission. However, in return for its efforts, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA (for $412.00) with the caveat that Lexis must distribute an unannotated version of the OCGA online for free.

Of course, you know what happened next. Public Resource.Org (PRO) is a nonprofit corporation that facilitates access to government records and legal materials. PRO posted a digital version of the OCGA on various websites where it could be downloaded by the public at no charge. The Commission was not happy about that and sent cease-and-desist letters to PRO to no avail. So the Commission sued under the Copyright Act claiming only that the annotations were "original works of authorship" entitled to copyright protection. The district court agreed with the Commission. The Eleventh Circuit reversed, based on the "government edicts" doctrine—a 19th century common law doctrine that disallows copyright protection to works that are authored by "the People" as embodied by a legislature.

The Chief Justice agreed with the outcome but for reasons "distinct from those relied on by the Court of Appeals." He held:

> *Under the government edicts doctrine, judges— and, we now confirm, legislators— may not be considered the "authors" of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.*

The Chief Justice then traced the contours of the government edicts doctrine in Supreme Court decisions from the 19th century addressing the work product of judges: "Because judges are vested with the authority to make and interpret the law, they cannot be the 'author' of the works they prepare 'in the discharge of their judicial duties.' This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi)." (Citations omitted.)

Translating this common law doctrine to the statutory term, "author," the Chief Justice explained that doctrine "bars the officials responsible for creating the law from being consider the 'author[s]' of '*whatever work* they perform in their capacity' as lawmakers." (Citations omitted.) The logic continues:

> *If judges, acting as judges, cannot be "authors" because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials.*
>
> . . .
>
> *That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the "whole work done by [legislators]," so they must be "free for publication to all."*
>
> *Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.*

Having cast this die, the Commission had no escape. The Commission was the sole "author" of the annotations under the work-for-hire agreement with Lexis, functioned as an arm of the Georgia Legislature and was made up mostly of legislators. It is funded by the legislature and employs legislative staff. And its annotations are approved by the legislature. As noted already, and as the Chief Justice emphasized, the Georgia Supreme Court has also characterized the Commission as "within the sphere of legislative authority." (Citation omitted.) Going to the next step in the analysis, the Chief Justice explained that preparation of the annotations under Georgia law is an act of legislative authority. (Citation omitted.) Thus, the annotations "fall within the government edicts doctrine and are not copyrightable."

With 22 States, 2 Territories, and the District of Columbia engaged in arrangements similar to Georgia's arrangement with Lexis, Justice Thomas dissented, arguing that Congress was the proper forum for defining the scope of copyright protection. Justice Ginsburg's dissent focused on whether the annotations were actually the work of the legislature when they were not created contemporaneously with the statutes to which they pertain, they are descriptive, and they are provided to inform the citizenry at large.

This is a copyrighted annotated version of the three opinions. Enough said.

Department of Homeland Security v. Regents of Univ. of Calif.*: The decision of the Secretary of the Department of Homeland Security to rescind DACA is reviewable and because of the Secretary's failure to consider forbearance from enforcement and reliance interests of Dreamers, was arbitrary and capricious in violation of the Administrative Procedure Act*

In three consolidated cases (also including *Trump v. NAACP*, and *Wolf v. Vidal*), the Chief Justice was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan except as to Part IV of his opinion, where he lost Justice Sotomayor's vote, in remanding for further review the Department of Homeland Security's rescission of "DACA" or the "Deferred Action for Children Arrivals" program. Justice Thomas (joined by Justices Alito and Gorsuch), Justice Alito, and Justice Kavanaugh also filed opinions agreeing with Part IV of the Chief Justice's opinion but otherwise dissenting.

The case was about "Dreamers" the affectionate name given to nearly 700,000 aliens who had entered the United States as children, grown up to live the American Dream, and signed up to DACA after it was promulgated in 2012. DACA provided the Dreamers with a two-year forbearance of removal from the United States, work authorizations, and various federal benefits. Individual aliens who were under age 31 in 2012, had continuously resided in America since 2007, were current students, had completed high school or were honorably discharged veterans, had not been convicted of any serious crimes, and did not threaten national security or public safety, were eligible for DACA.

In 2014, DACA was expanded by removing the age cap and shifting the date-of-entry requirement from 2007 to 2010. The deferred action (on removal) and work authorizations were extended for three more years. The hope was that Congress would then pass legislation that would give the Dreamers permanent status in the United States. Instead, DACA and a related program (DAPA or Deferred Action for Parents of Americans and Lawful Permanent Residents) became the subject of litigation brought by Texas and 25 other states. These plaintiffs argued that DAPA and DACA's expansion violated the Administrative Procedure Act's (APA) notice and comment requirement and the Immigration and Nationality Act (INA), among other claims. The district court agreed and enjoined implementation of both programs. That injunction wound its way to the Supreme Court but because of a 4-4 vote, was remanded for plenary proceedings.

Then Donald Trump became the President after campaigning on, in part, an anti-immigration platform. In June 2017, "DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities." In September 2017, Attorney General Jefferson Sessions III advised DHS's Acting Secretary, Elaine Duke, that DACA was unlawful and urged DHS to "consider an orderly and efficient wind-down process." (Record citation omitted.)

The next day, Duke terminated the program:

> *In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated."*

(Record citations omitted.)[10]

These lawsuits were then brought with two primary arguments that were before the Court: the rescission of DACA was arbitrary and capricious in violation of the APA, and it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. Rulings started to issue including one from the D.C. district court in April 2018 that under the APA, Duke's conclusory statements were insufficient to explain the change in DHS's view of DACA's lawfulness.

Two months later, Duke's successor, Kirstjen Nielsen, issued a memorandum to attempt to fill the gap identified by this decision.

> *She explained that, "[h]aving considered the Duke memorandum," she "decline[d] to disturb" the rescission. Secretary Nielsen went on to articulate her "understanding" of Duke's memorandum, identifying three reasons why, in Nielsen's estimation, "the decision to rescind the DACA policy was, and remains, sound." First, she reiterated that, "as the Attorney General concluded, the DACA policy was contrary to law." Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum.*

(Record citations omitted.) The Government asked the D.C. district court to reconsider its position in light of the Nielsen memorandum, but the district court was not moved by the additional explanations. The Government then appealed the various district court decisions but before any rulings also petitioned the Supreme Court to hear the matter. The Ninth Circuit then ruled in favor of the Dreamers, and the Court granted the petitions for certiorari and consolidated the cases. Three questions were presented: (1) Were APA claims reviewable? (2) If so, was the rescission arbitrary and capricious in violation of the APA? (3) Have the plaintiffs stated an equal protection claim?

The Chief Justice answered the last question "No," in Part IV of his opinion and that part of the opinion had all but Justice Sotomayor's vote. I do not discuss it further here. But he answered the first two questions, "yes" in a redux of his census bureau decision of one year ago, *Department of Commerce v. New York* (determining that the Commerce Secretary's decision to include an inquiry about citizenship on the census questionnaire was reviewable under the APA, but that the reasons

[10] "Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal."

offered to support the inclusion were contrived in violation of the reasoned explanation requirement of administrative law, and thus a remand was required)—even though the opinion is cited only in Justice Sotomayor's dissent.

There was no dispute that DHS could rescind DACA. Did it follow APA procedures in doing so? That was the issue. The Chief Justice was very aware of COVID-19 and of the important role that many Dreamers are playing as first responders in hospitals across America. He was also aware that DACA has been a political football, tossed back and forth and nearly across a goal line, when Donald Trump became President and the Dreamers got caught up in politics. He also knew that a remand would result in a new decision by DHS after the November 2020 elections. None of these facts should be lost on anyone evaluating his analysis.

On the reviewability question, the Chief Justice's response was straightforward:

- There is a presumption of reviewability under the APA.
- The presumption can be rebutted if the governing statute precludes review, 5 U. S. C. §701(a)(1), or the agency's action is committed to agency discretion by law. 5 U. S. C. §701(a)(2).
- The latter exception was in issue here.
- This exception has been read "quite narrowly" by the Court historically.
- The limited category of cases applying the exception includes a decision not to institute enforcement proceedings.
- However, DACA "is not simply a non-enforcement policy." By soliciting applications from eligible aliens, and then granting those applications, the DHS engaged in adjudication or affirmative acts of approval as opposed to a refusal to act.
- DACA also provided benefits, including work authorizations and eligibility for Social Security and Medicare—interests that courts are often called upon to protect.
- Thus rescission of DACA is reviewable.

The Chief Justice then, skillfully, had to determine which explanation – Duke's or Nielsen's – was the appropriate one to be reviewed. Duke rescinded the program in September 2017, but the Government urged consideration of Nielsen's memorandum issued in June 2018. This is where the smorgasbord of administrative case law came in handy for the Chief Justice to pick and choose. But readers must read carefully to navigate the administrative path carved by the Chief Justice. This is a bulleted map to aid you (all citations are omitted).

- It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action."
- However, if those grounds are inadequate, a court may remand to allow the agency to offer a "fuller explanation" of the agency's reasoning.
- Importantly, that fuller explanation must relate to the reasoning "at the time of the agency action."
- If an agency takes this route, the agency may elaborate on the reason or reasons for the agency action, but it may not add new ones.
- Alternatively, a court can remand to allow the agency to "deal with the problem afresh" by taking *new* agency action.
- An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

Still with me?

So the district court's remand presented DHS with the choice of which action to take. Nielsen chose the first alternative.

> *Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. Indeed, the Government's subsequent request for reconsideration described the Nielsen Memorandum as "additional explanation for [Duke's] decision" and asked the District Court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." Contrary to the position of the Government before this Court, and of JUSTICE KAVANAUGH in dissent, post, at 4 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.*

(Record citations omitted.)

As a result, Nielsen was "limited to the agency's original reasons, and her explanation 'must be viewed critically' to ensure that the rescission is not upheld on the basis of impermissible '*post hoc* rationalization." (Citing *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 420 (1971) which the Chief Justice also invoked several times last term in remanding the census questionnaire matter in *Department of Commerce v. New York)*. Despite purporting to explain the Duke Memorandum, "Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. By contrast, Secretary Nielsen's new memorandum offered three 'separate and independently sufficient reasons' for the rescission, only the first of which is the conclusion that DACA is illegal." (Record citations omitted.) The other two reasons (DACA is legally questionable and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation, and there is a preference for legislative fixes and DHS must send a message of robust enforcement) are not contained in the Duke Memorandum. Thus, they "can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us."

Is this approach elevating form over substance, as Justice Kavanaugh argued? The Chief Justice said no.

> *[H]ere the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.*

(Citations omitted.) And in response to Justice Kavanaugh's assertion that the limitation in issue here applies only to lawyer's arguments, not subsequent agency determinations, the Chief Justice was not impressed.

> *While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on* post hoc *rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether* post hoc *justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.*

(Citations omitted.)

And to add an exclamation point, the Chief Justice emphasized that this was not the case to allow the Government to cut corners:

> *Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government."* Rock Island, A. & L. R. Co. v. United States, *254 U. S. 141, 143 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people."* St. Regis Paper Co. v. United States, *368 U. S. 208, 229 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.*

Having identified the Duke Memorandum as the focal point for view, did she act arbitrarily and capriciously?

She did. But not because of her determination that DACA was unlawful. She was bound to accept the Attorney General's decision in this regard. Instead, the Chief Justice focused on Duke's failure to consider important aspects of the program. But to understand the Chief Justice's logic, you have to follow an intricate argument. Here is my summary of it. (All citations are omitted.)

- The Attorney General's opinion on legality focused on DAPA primarily and addressed DACA with this sentence: "the DACA policy has the same legal . . . defects that the courts recognized in DAPA."
- The highest court to address the defects in DAPA was the Fifth Circuit.
- The Fifth Circuit identified the core issue before it as the decision to grant benefits on a class-wide basis to DAPA parents. "The Fifth Circuit's focus on these benefits was central to every stage of its analysis."
- However, the "defining feature" of deferred action "is the decision to defer removal (and to notify the affected alien of that decision)."
- The Fifth Circuit was careful to distinguish between this forbearance and eligibility for benefits.
- In fact, the Fifth Circuit "underscored that nothing in its decision or the preliminary injunction required DHS to remove any alien or to alter enforcement priorities."
- "In other words," the Chief Justice concluded, "the Secretary's forbearance authority was unimpaired."

- Duke's memorandum also characterized the Fifth Circuit's opinion as one about benefits.

Subtle, but outcome determinative.

> *In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U. S. C. §202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.*
>
> . . .
>
> *Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy,*

(Citations omitted.)

The Chief Justice was not done. There was also the issue of "reliance interests." Under the Court's jurisprudence, agencies that change course have to consider reliance interests. The Government and Justice Thomas argued that DACA has no such interests because the DACA Memorandum says that it does not create substantive rights and provides benefits in two-year increments.

> *But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.*

Justice Thomas's dissent focused on the illegality of DACA, which, in his view, was outcome determinative. The Chief Justice had a straightforward rejoinder:

> *But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.*

What happens next depends on the Presidential election and the makeup of the Congress. In the interim, the Dreamers will continue to make positive contributions to the mosaic that is America.

Espinosa v. Montana Dept. of Revenue*: The Montana Supreme Court's decision to invalidate a state scholarship program because it provided aid to sectarian schools barred by the Montana Constitution's no-aid-to-sectarian-schools provision violated the Free Exercise Clause of the First Amendment because it discriminated solely on the basis of the religious character of a school.*

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This case involves the second clause. The Chief Justice was joined by the conservative wing of the Court in determining that the Montana Constitution violated the Free Exercise clause when the Montana Supreme Court invoked it to end a student aid program because a parent sought to use the aid at a sectarian school. Justice Thomas filed a concurring opinion (joined by Justice Gorsuch). Justice Alito filed a concurring opinion. So did Justice Gorsuch. Justice Ginsburg dissented. Justice Kagan joined her opinion. Justice Breyer dissented. Justice Kagan joined Part I of his opinion. And Justice Sotomayor dissented. Whew! The Court has struggled to achieve a consensus on applying the Free Exercise clause. That struggle continues.

Three years ago, the Chief Justice wrote the opinion in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ___, ___ (2017). There he held that Missouri's disqualification of religious organizations from grants to help nonprofit entities pay for playground resurfacing violated the Free Exercise clause because otherwise eligible recipients were excluded from a public benefit "solely because of their religious character." He held that the exclusion imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." So no one who saw that the Chief Justice authored this opinion was surprised by the outcome.

Here are the basic facts. The Montana legislature sought to foster parental and student choice in education by creating a program where a taxpayer received a $150 tax credit for donating to a participating "student scholarship organization." The organization then awards scholarships to children for tuition at a private school. A family that is awarded a scholarship may use it at any "qualified education provider." Virtually every private school in Montana qualified.

The legislature also provided that the program should be administered in accordance with Article X, section 6, of the Montana Constitution, which a contains a "no-aid" provision barring government aid to sectarian schools. It provides in full:

> ***Aid prohibited to sectarian schools****. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.*

Consistent with the amendment, the Montana Department of Revenue promulgated "Rule 1" which prohibited families from using scholarships at religious schools.

Suit was then brought by three mothers whose children attended a sectarian school. The case wound its way to the Montana Supreme Court. That court held that the no-aid provision was applicable and

the scholarship program violated it. The court went a step further and invalidated the entire scholarship program and also determined that the Department of Revenue had exceeded its authority in promulgating Rule 1 since the statute creating the scholarship program defined eligible institutions in a manner that included religious schools.

In reversing the Montana Supreme Court, the Chief Justice, relying on *Trinity Lutheran*, held that Montana's no-aid provision discriminated solely on the basis of religion.

> *Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, §6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character.* Ibid. *And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." 393 Mont., at 464–467, 435 P. 3d, at 612–613. The provision plainly excludes schools from government aid solely because of religious status. See* Trinity Lutheran*, 582 U. S., at ___–___ (slip op., at 9–10).*

In *Trinity Lutheran*, a plurality of the Court declined to address discrimination with respect to religious "use" of funds because the Missouri program at issue expressly discriminated on the basis of religious identity, which was enough to invalidate the program. Montana tried to argue that religious character was not the basis for the no-aid provision. Rather "religious education" was. The Chief Justice was not persuaded.

> *This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." 393 Mont., at 463–467, 435 P. 3d, at 611–613. Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were "religiously affiliated" and "controlled by churches," and the Court ultimately concluded that the scholarship program ran afoul of the Montana Constitution by aiding "schools controlled by churches."* Id.*, at 466–467, 435 P. 3d, at 613–614. The Montana Constitution discriminates based on religious status just like the Missouri policy in* Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity." 582 U. S., at ___ (slip op., at 2).*

And to emphasize the standard of "the strictest scrutiny," the Chief Justice again borrowed heavily from *Trinity Lutheran*.

> *To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights."* Trinity Lutheran, *582 U. S., at ___ (slip op., at 11) (quoting* Sherbert v. Verner, *374 U. S. 398, 405 (1963) (alterations omitted)). The Free Exercise Clause protects against even "indirect coercion," and a State "punishe[s] the free exercise of religion" by disqualifying the religious from government aid as Montana did here.* Trinity Lutheran, *582 U. S., at ___–___ (slip op., at 10–11) (internal quotation marks omitted). Such status based discrimination is subject to "the strictest scrutiny."* Id*., at ___ (slip op., at 11).*

The Chief Justice recognized that Justice Thomas and Gorsuch believe that there is no distinction between discrimination based on "use or conduct" and discrimination based on status. There was no need to examine the issue, he said, because Montana's no-aid provision discriminates based on religious status, triggering strict scrutiny.

The Chief Justice then dealt with *Locke v. Davey*, 540 U. S. 712 (2004), relied on by Justice Breyer and Justice Sotomayor in their respective dissents. *Locke* involved a scholarship program in the State of Washington that prohibited use of scholarship funds by an individual to pursue devotional theology degrees that prepared students for "a calling as clergy." The Court upheld the program. The Chief Justice explain two differences between *Locke* and this matter. First, the scholarship program allowed use of funds at "pervasively religious schools" that incorporated religious instruction in their classes. Its only bar related to use of funds to prepare for ministry.

Second, *Locke* invoked a "historic and substantial" state interest in not funding training for the clergy. "As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy." There was no comparable "historic and substantial" tradition at work in this matter, however. The Chief Justice explained what he described as a "complex" historical record. (All citations and footnotes omitted.)

- In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.
- Local governments provided grants to private schools, including religious ones, for the education of the poor.
- Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools.
- Early federal aid (often land grants) went to religious schools.
- Congress provided support to denominational schools in the District of Columbia until 1848 and Congress paid churches to run schools for American Indians through the end of the 19th century
- After the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau.
- In the second half of the 19th century, more than 30 States—including Montana—adopted no-aid provisions.
- Such a development cannot by itself establish an early American tradition.

- "[W]e see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one."
- Many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding "sectarian" schools. "[I]t was an open secret that 'sectarian' was code for 'Catholic.'"
- The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.
- Many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures.
- "All to say, we agree with the Department that the historical record is 'complex.' Brief for Respondents 41. And it is true that governments over time have taken a variety of approaches to religious schools. But it is clear that there is no 'historic and substantial' tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*."

Justice Sotomayor would give state governments "some room" to single out religious entities based on the "interests embodied in the Religion Clauses." Justice Breyer echoed his opinion in *Trinity Lutheran* that there should be a "flexible, context-specific approach" that could vary from case to case in analyzing Free Exercise claims. The Chief Justice had this response building on his *Trinity Lutheran* foundation:

> *The simplest response is that these dissents follow from prior separate writings, not from the Court's decision in* Trinity Lutheran *or the decades of precedent on which it relied. These precedents have "repeatedly confirmed" the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," we must apply strict scrutiny.* Trinity Lutheran, *582 U. S., at ___–___ (slip op., at 6–10). This rule against express religious discrimination is no "doctrinal innovation."* Post, *at 13 (opinion of* BREYER, *J.). Far from it. As* Trinity Lutheran *explained, the rule is "unremarkable in light of our prior decisions." 582 U. S., at ___ (slip op., at 10).*

The Montana Supreme Court's opinion could not meet the strict scrutiny standard: "To satisfy it, government action 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" (Citation and internal quotation marks omitted). The Establishment Clause already assures separation of Church and State—the argument advanced by the State. The Free Exercise Clause limits a state's ability to widen that separation even more, the Chief Justice explained. Arguments that the no-aid provision actually promoted religious freedom fell on deaf ears, the Chief Justice adding that it actually burdens families whose children attend religious schools or hope to attend them.

At this point, you might be saying to yourself, "But the Montana Supreme Court invalidated the entire scholarship program. So there could not be any discrimination." And that is what Justice Ginsburg advanced in her dissent. Again, the Chief Justice disagreed, ultimately invoking the Supremacy Clause.

> *The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.*
>
> *The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court's error of federal law occurred at the beginning. When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.*
>
> *The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "[T]his Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law[]." Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregard[ed]" the no-aid provision and decided this case "conformably to the [C]onstitution" of the United States. That "supreme law of the land" condemns discrimination against religious schools and the families whose children attend them. They are "member[s] of the community too," and their exclusion from the scholarship program here is "odious to our Constitution" and "cannot stand."* Trinity Lutheran, *582 U. S., at ___, ___ (slip op., at 11, 15).*

(Citations omitted.)

And what is supposed to happen on remand? The Chief Justice answered that question thusly: "Our reversal of [this] decision simply restores the status quo established by the Montana Legislature before the Court's error of federal law. We do not consider any alterations the Legislature may choose to make in the future." Those interested in the next chapter of this story can follow the Montana legislature's response to the decision and other cases winding their way through the courts on the "religious use or conduct" (as opposed to religious character or status) distinction that remains in flux on the Court.

Seila Law LLC v. Consumer Financial Protection Bureau*: The single-Director structure of the Consumer Finance Protection Board created by Congress in 2010, which limited the ability of the President to remove the Director, violates the Constitution's separation of powers, but the removal protection granted the Director was severable from the remainder of the implementing statute.*

In yet another ideology-based vote count, the Chief Justice delivered the opinion of the Court with respect to Parts I, II, and III that was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. In Part IV, the Chief Justice was joined only by Justices Alito and Kavanaugh. Justice Thomas filed an opinion concurring in part and dissenting in part. He was joined again by Justice Gorsuch. Justice Kagan filed an opinion concurring in the judgment with respect to a severability issue but otherwise dissenting. She was joined by the remaining Justices.

The source of this fracturing was the decision by Congress to create the Consumer Financial Protection Bureau (CFPB) led by a single Director without a "boss" or anyone to whom he or she must report, with enormous power yet severe limitations on removal. Does giving so much rulemaking, enforcement, and adjudicatory authority to a single individual violate the Constitution's mandate that executive power is vested in the President who must "take Care that the Laws be faithfully executed," Art. II, §1, cl. 1 and §3? The Chief Justice's answer? "Yes." (On this issue, the vote was 5-4). Does that determination render the entire statutory authority of the CFPB unconstitutional? "No," the Chief Justice answered, because the removal provision is severable from the rest of the statute. (Here the vote was 7-2, since Justices Thomas and Gorsuch disagreed.)

Let me unpack the facts. After the 2007 financial meltdown led by the collapse of the subprime mortgage market, Congress eventually, in 2010, created the CFPB as an independent regulator within the Federal Reserve.

> *Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U. S. C. §5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. See §§5512(a), 5481(12), (14). In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. §5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations. §§5531(a)–(b), 5581(a)(1)(A), (b).*

Congress also vested the CFPB with broad enforcement powers. It can conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. 12 U. S. C. §§5562, 5564(a), (f). "To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. §§5565(a), (c)(2); 12 CFR §1083.1(a), Table (2019)."

The agency may also conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. §5563(a).

> *When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." §5565(a)(1). The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR §1081.104(b). At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order." §§1081.400(d), 1081.402(b); see also §1081.405.*

Instead of the traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. §5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. §5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§5491(c)(1), (3).

As for funding, the CFPB receives it directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems "reasonably necessary to carry out" the agency's duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). §§5497(a)(1), (2)(A)(iii), 2(B).

Seila Law received a civil investigative demand from the CFPB to determine whether the firm had engaged in unlawful acts in the advertising, marketing, or sale of debt relief services. Seila Law refused to comply, arguing that the statute's removal provision violated the separation of powers. The CFPB successfully sought to enforce the demand in the district court and after the Ninth Circuit rejected the separation of powers argument (based on a similar decision from the D.C. Circuit in 2018[11]), the Supreme Court granted certiorari.

The Trump Administration refused to defend the removal provision or severability. Hence, the Court appointed Paul Clement to defend the judgment as *amicus curiae*. After rejecting three procedural jurisdictional questions, the Chief Justice held that the "CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."

The Chief Justice provided a tutorial on the removal power of the President.

> *The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." The First Congress's recognition of the President's*

[11] *PHH Corp.* v. *CFPB*, 881 F. 3d 75 (2018) (*en banc*). Justice Kavanaugh dissented when he was on the court of appeals but found himself in the majority on the Supreme Court.

> *removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," and has long been the "settled and well understood construction of the Constitution."*

(Citations omitted.)

In *Myers v. United States*, 272 U. S. 52 (1926), the Court held that Article II grants to the President the "general administrative control of those executing the laws, including the power of appointment and removal of executive officers." *Id*., at 163-64 (emphasis added). Otherwise, the President would be unable to "take care that the laws be faithfully executed." Id. at 164. Then in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 523 (2010), the Court reiterated the President's removal authority. The Chief Justice explains:

> *Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by two layers of for-cause removal protection. Id., at 483, 514. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties." Id., at 513–514.*

Free Enterprise Fund did not impact two exceptions to the President's unrestricted removal power.

In *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), the Court upheld a statute that protected the Commissioners of the Federal Trade Commission from removal except for "inefficiency, neglect of duty, or malfeasance in office." 295 U. S., at 620 (quoting 15 U. S. C. §41). The Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office." 295 U. S., at 631. The Chief Justice continues, perhaps ominously:

> *Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." Id., at 628. Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid."* Ibid. *It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery.* Ibid. *"To the extent that [the FTC] exercise[d] any executive function[,] as distinguished from executive* power *in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers."* Ibid. *(emphasis added)*

(Footnote omitted.) After describing features of the FTC that supported the Court's 1935 view of the FTC, the Chief Justice concluded:

> Humphrey's Executor *permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied "[t]he philosophy of* Humphrey's Executor*" to uphold for-cause removal protections for the members of*

> *the War Claims Commission—a three-member "adjudicatory body" tasked with resolving claims for compensation arising from World War II. Wiener v. United States, 357 U. S. 349, 356 (1958).*
>
> *While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions,* Humphrey's Executor *reaffirmed the core holding of* Myers *that the President has "unrestrictable power . . . to remove purely executive officers." 295 U. S., at 632. The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration."* Ibid.

In *United States v. Perkins*, 116 U. S. 483 (1886), and *Morrison v. Olson*, 487 U. S. 654 (1988), the Court held that Congress could provide "tenure protections to certain *inferior* officers with narrowly defined duties." (Emphasis in the original.) *Perkins* involved a naval cadet-engineer. 116 U. S., at 485. *Morrison* involved an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. 487 U. S., at 662–663, 696–697. The Chief Justice offered this new view of these decisions.

> *Backing away from the reliance in* Humphrey's Executor *on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." 487 U. S., at 691. Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."* Ibid.

The Chief Justice then explained that the CFPB director is not comparable to the FTC structure and authority, so *Humphrey's Executor* is not controlling. And the director is not an inferior officer whose duties are limited. Hence, *Morrison* was not applicable. So addressing this "new situation," the Chief Justice determined that an agency led by a single director with significant executive power "has no basis in history and no place in our constitutional structure."

The Chief Justice first explained that there is no historical precedent for the removal provision. The Chief Justice was not impressed by four examples given, one of which is the Federal Housing Finance Agency created in 2008 to assume responsibility for Fannie Mae and Freddie Mac.[12] These entities regulate "primarily Government-sponsored enterprises, not purely private actors" and the single-

[12] The other three were the Comptroller of the Currency who enjoyed removal protection for only one year during the Civil War; the Office of Special Counsel (a body that safeguards the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and which itself has been the subject of constitutional debate but unlike the CFPB, does not bind private parties or wield comparable regulatory authority), and the Social Security Administration, which, since 1994, has been run by a single-Director and has also come under constitutional scrutiny, although the SSA lacks authority to bring enforcement actions against private individuals.

Director structure is a source of "ongoing controversy" since the Fifth Circuit declared it unconstitutional in *Collins v. Mnuchin*, 938 F. 3d 553, 587-88 (2019).[13]

The Chief Justice then said that the single-Director structure is incompatible with the Constitution, which "scrupulously avoids concentrating power in the hands of any single individual." To prevent an abuse of power, the Framers divided it into the Executive, Legislative (itself divided into the Senate and House of Representatives), and Judicial branches.

> *The Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified."*
>
> *The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man."*
>
> *To justify and check* that *authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."*

(Citations omitted; emphasis in original.)

It followed easily from this analysis that the single-Director structure of the CFPB contravened "this carefully calibrated system by vesting significant government power in the hands of a single individual accountable to no one," not elected by the people, not "meaningfully controlled" by someone who is, and who does not depend on Congress for appropriations, yet can, unilaterally "issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."

After rejecting a variety of other arguments made by the appointed *amicus*, the Chief Justice then addressed Justice Kagan's dissent by explaining that the Court had already rejected her arguments (in *Free Enterprise Fund*):

> *The dissent, for its part, largely reprises points that the Court has already considered and rejected: It notes the lack of an express removal provision, invokes Congress's*

[13] On July 9, the Court agreed to review this decision in the 2020-21 Term.

> *general power to create and define executive offices, highlights isolated statements from individual Framers, downplays the decision of 1789, minimizes* Myers*, brainstorms methods of Presidential control short of removal, touts the need for creative congressional responses to technological and economic change, and celebrates a pragmatic, flexible approach to American governance.*

However, the Court decided that the removal provision was severable from the remainder of the CFPB's statutory structure. Congress made the job a little easier by including an express severability clause in the governing statute.

> *In* Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of "functioning independently" and "nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 561 U. S., at 509 (internal quotation marks omitted).*
>
> *So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in* Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected." 12 U. S. C. §5302.*

The Chief Justice also responded to Justice Thomas's dissent on this point.

> *JUSTICE THOMAS would have us junk our settled severability doctrine and start afresh, even though no party has asked us to do so. See* post*, at 15–16, 21–24 (opinion concurring in part and dissenting in part). Among other things, he objects that it is sheer "speculation" that Congress would prefer that its consumer protection laws be enforced by a Director accountable to the President rather than not at all.* Post*, at 23–24. We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today.*

The Chief Justice added that Congress might choose to convert the CFPB "into a multimember agency" as an "alternative response to the problem," and perhaps that might happen one day if the Congress can stop the partisanship that now seems to govern all legislative initiatives. But Congress may want also to deal with the single director structure of the Federal Housing Finance Agency (which oversees Fannie Mae and Freddie Mac) that appears now on even thinner ice than after the Fifth Circuit's 2019 decision finding it unconstitutional. Might as well deal with both if you can muster the votes to deal with one of them.

Justice Breyer

Justice Breyer authored a fractured abortion-related decision in 2019-2020, in which the vote was 5-4 but, with Justice Kennedy now gone, his opinion was a plurality opinion.

June Medical Services L.L.C. v Russo*: Louisiana's Act 620, requiring any doctor who performs abortions to hold "active admitting privileges" at a hospital located "not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services," is unconstitutional, but limiting the reach of* Whole Women's Health v. Hellerstedt

In a matter where everyone was watching how the Chief Justice and Justice Kavanaugh would vote, Louisiana's anti-abortion law suffered the same fate as a nearly identical Texas law found unconstitutional in *Whole Women's Health v. Hellerstedt*, 579 U.S. ___ (2016). *Whole Women's Health* was a 5-3[14] decision—Justice Kennedy provided the fifth vote in an opinion authored by Justice Breyer and joined by his liberal colleagues. Justice Breyer also wrote this plurality opinion and was again joined by his liberal colleagues. This time the fifth vote was provided by the Chief Justice, who said that *Whole Women's Heath* was wrongly decided but he still concurred in the judgment—on the basis of *stare decisis*. Yes, the much ignored doctrine in recent years arose in Phoenix-like fashion to prevent the Louisiana legislature from imposing unnecessary health regulations which had the purpose or effect of creating an unconstitutional "undue burden on the right" of a woman to have an abortion. Justice Thomas dissented. Justice Alito dissented and was joined by Justice Gorsuch, Justice Thomas (except as to parts III-C and IV-F), and Justice Kavanaugh (only as to Parts I, II, and III). Justices Gorsuch and Kavanaugh also filed dissenting opinions. In total there were six opinions totaling 133 pages.

Where to start? I begin only briefly with mention of *Roe v. Wade*, 410 U. S. 113 (1973), a decision that Justice Breyer does not even cite in the plurality opinion even though Justice Thomas in his dissent called it "grievously wrong" because, in his view, the text of the Fourteenth Amendment does not support a determination that a woman has a right "to abort her unborn child." While *Roe* gets the headlines, the real focus of a woman's "right to choose" is on the plurality opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992). There, Justice O'Connor held for 4 members of the Court that 'a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id*. at 877. In *Whole Women's Health*, Justice Kennedy then provided a fifth vote to confirm that the principle established in *Casey* merited constitutional stature.

But *Whole Women's Health* added to the "substantial obstacle" standard of *Casey* when the Court wrote that, "Unnecessary health regulations" impose an unconstitutional "undue burden" if they have "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion. 579 U. S., at ___ (slip op., at 19) (quoting *Casey*, 505 U. S., at 878). The use of the word "unnecessary" suggests a burden-benefit evaluation as an *additional* framework to determine Constitutionality beyond the

[14] Justice Scalia had passed away in February 2016 and the Senate successfully scuttled a vote on Justice Scalia's replacement leading ultimately to Justice Gorsuch's appointment to the Court by Donald Trump.

"substantial obstacle" test of *Casey*. And, indeed, in *Whole Women's Health*, the Court held, as Justice Breyer recounts in *Russo*, that

> *We went on to explain that, in applying these standards, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at ___ – ___ (slip op., at 19–20). We cautioned that courts "must review legislative 'factfinding under a deferential standard.'"* Id., *at ___ (slip op., at 20). But they "must not 'place dispositive weight' on those 'findings,'" for the courts "'retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.'" 579 U. S., at ___ (slip op., at 20).*

(Internal citations omitted.)

However, the Chief Justice, without consideration of *stare decisis*, and the four dissenters rejected this interpretation of *Casey*—an interpretation that Louisiana did not ask the Court to revisit—but was in effect revisited by the vote count. Justice Alito's opinion counted four votes in support of this statement:

> Casey *also rules out the balancing test adopted in* Whole Woman's Health. Whole Woman's Health *simply misinterpreted* Casey, *and I agree that* Whole Woman's Health *should be overruled insofar as it changed the* Casey *test. Unless* Casey *is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard.*

And the Chief Justice's spent six pages of his 16-page opinion explaining that the standard that *Casey* used in upholding all but one of Pennsylvania's abortion-related regulations was whether the restriction imposed a "substantial obstacle" in the "path of a woman seeking an abortion of a nonviable fetus." Slip Op. at 9 (quoting *Casey*, 505 U. S. at 877). He concludes, therefore, that there is no reason to evaluate the benefits of a regulation that present such a "substantial obstacle" and that *stare decisis* otherwise dictates the outcome.

> *We should respect the statement in* Whole Woman's Health *that it was applying the undue burden standard of* Casey. *The opinion in* Whole Woman's Health *began by saying, "We must here decide whether two provisions of [the Texas law] violate the Federal Constitution as interpreted in* Casey*." 579 U. S., at ___ (slip op., at 1). Nothing more. The Court explicitly stated that it was applying "the standard, as described in* Casey*," and reversed the Court of Appeals for applying an approach that did "not match the standard that this Court laid out in* Casey*."* Id., *at ___, ___ (slip op., at 19, 20).*
>
> *Here the plurality expressly acknowledges that we are not considering how to analyze an abortion regulation that does not present a substantial obstacle. "That," the plurality explains, "is not this case."* Ante, *at 40. In this case,* Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in* Whole Woman's Health. *In neither case, nor in* Casey *itself, was there call for consideration of a regulation's benefits, and nothing in* Casey *commands such consideration. Under*

> *principles of* stare decisis, *I agree with the plurality that the determination in* Whole Woman's Health *that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of* Casey, *requiring a substantial obstacle before striking down an abortion regulation.*

The reference to Justice Breyer's opinion on the last page of his opinion (p. 40) is to this statement:

> *[T]he State makes several arguments about the standard of review that it would have us apply in cases where a regulation is found not to impose a substantial obstacle to a woman's choice. Brief for Respondent 60–66. That, however, is not this case. The record here establishes that Act 620's admitting-privileges requirement places a substantial obstacle in the path of a large fraction of those women seeking an abortion for whom it is a relevant restriction.*

And, indeed, as was the case in *Whole Women's Health*, the district court's findings of fact were outcome determinative—a testament once again to the importance of developing an evidentiary record that allows a district court to make findings that are not "clearly erroneous." I get to those findings after explaining two other issues critical to an understanding of the outcome.

First, there was the question of standing. This topic received a lot of attention during the oral argument of this matter, but it was put to rest by Justice Breyer for several reasons. First, the State had conceded the issue in the trial court (the State had told the trial court that there was "no question that the physicians had standing to contest the law"). Second, even if the State had merely failed to raise the standing issue previously, the Court was unwilling to discard five years of litigation to require the parties to start over. But then considering two lines of precedent, Justice Breyer explained that the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." (Citations omitted.) And the Court has "generally permitted plaintiffs to assert third-party rights in cases where the "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" (Citations omitted, internal quotations omitted, emphasis in original). Justice Breyer concluded:

> *The case before us lies at the intersection of these two lines of precedent. The plaintiffs are abortion providers challenging a law that regulates their conduct. The "threatened imposition of governmental sanctions" for noncompliance eliminates any risk that their claims are abstract or hypothetical. That threat also assures us that the plaintiffs have every incentive to "resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." And, as the parties who must actually go through the process of applying for and maintaining admitting privileges, they are far better positioned than their patients to address the burdens of compliance. They are, in other words, "the least awkward" and most "obvious" claimants here.*

(Citations omitted.) In a footnote, the Chief Justice quietly endorsed Justice Breyer's logic. "For the reasons the plurality explains, *ante*, at 11–16, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients."

Second, there is *stare decisis*. The words do not appear in Justice Breyer's opinion but were essential to the Chief Justice's fifth vote. Never one to write words idly, the Chief Justice's discussion of *stare decisis* merits attention especially since the Court has not been shy about overruling precedents in Chief Justice Roberts' tenure,[15] typically with the Chief Justice writing or joining the overruling opinion. So what does he say in a case where he invokes the doctrine? He concedes that *stare decisis* is not "an inexorable command" (citation omitted), but acknowledges that "for a precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly." He then identifies other factors before overruling a precedent, "*such as* its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered." (Emphasis added.) Then he adds, with an eye on both *Roe* and *Casey*, the following:

> Stare decisis *principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of* stare decisis *than would following" the recent departure.*

The Chief Justice then points out that the parties had not asked the Court to "reassess the constitutional validity" of *Casey*'s undue burden standard. He proceeds to explain why the discussion in *Whole Women's Health* of a requirement that courts consider "the burdens a law imposes on abortion access together with the benefits those laws confer" is not a faithful reading of *Casey* and would require courts,

> *to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other.* Casey, *505 U. S., at 851 (opinion of the Court);* id.*, at 871 (plurality opinion) (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were.*

The Chief Justice then explains why Louisiana's requirements restrict a women's access to abortion "to the same degree as Texas's law," and thus "cannot stand under our precedent."

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[15] Some would argue that these are the factors, not examples of factors, in Justice Alito's recent opinions. See, *e.g.*, *Janus v. State, County, and Municipal Employees*, 585 U. S. ___, ____–____ (2018)

And this is where I will turn to Justice Breyer's opinion. The law in question, Act 620, requires any doctor who performs abortions to hold "active admitting privileges" at a hospital located "not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." To have "active admitting privileges," a doctor must be a "member in good standing" of the hospital's medical staff "with the ability to admit a patient and to provide diagnostic and surgical services to such patient." Two lawsuits were filed to stop the law's enforcement. Six doctors, referred to as "Doe 1" through "Doe 6," were the plaintiffs. In June 2015, the district court held a six-day bench trial on plaintiffs' request for a preliminary injunction. In January 2016, the trial court declared Act 620 unconstitutional on its face. After *Whole Women's Health*, the matter was remanded to the trial court for further review. The district court then made findings of fact based on the record already developed, as the parties had agreed that the court could do.

Justice Breyer recited those findings in detail, quoting the district court's opinion at length. 250 F. Supp. 3d 27. 64-87 (M.D. La. 2017). The court of appeals rejected the district court's findings, but Justice Breyer explained why the court of appeals erred in doing so. The "clearly erroneous" standard governing a district court's findings of fact does not permit a reweighing of the evidence:

> *We start from the premise that a district court's findings of fact, "whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. Rule Civ. Proc. 52(a)(6). In "'applying [this] standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.'"* Anderson v. Bessemer City, *470 U. S. 564, 573 (1985) (quoting* Zenith Radio Corp. v. Hazeltine Research, Inc., *395 U. S. 100, 123 (1969)). Where "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."* Anderson, *470 U. S., at 573–574. "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."* Cooper v. Harris, *581 U. S. ___, ___ (2017) (slip op., at 4).*

And under this "familiar standard," Justice Breyer wrote, the evidence supported the district court's ultimate conclusion that even if Act 620 "could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden."

Titling the next section of the opinion, "The District Court's Substantial-Obstacle Determination," Justice Breyer then upheld findings that Act 620 would prevent Does 1, 2 and 6 from providing abortions and would bar Doe 5 from working in his Baton Rouge-based clinic, "relegating him to New Orleans." (Doe 4 had retired. Doe 3 worked with Does 1 and 2 and his testimony that he would stop performing abortions if he was the only doctor available was both not contradicted and found to be made in good faith.) I will not repeat all of Justice Breyer's analysis. But the following passage is illustrative of the obstacles created by Act 620:

> *Many Louisiana hospitals require applicants to identify a doctor (called a "covering physician") willing to serve as a backup should the applicant admit a patient and then for some reason become unavailable. The District Court found "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician." 250 F. Supp. 3d, at 49; cf.* Whole Woman's Health, *579 U. S., at ___ (slip op., at 25) (citing testimony describing similar problems faced by Texas providers seeking covering physicians). Doe 5 is a board-certified OB/GYN who had been practicing for more than nine years at the time of trial. Of the thousands of abortions he performed in the three years prior to the District Court's decision, not one required a direct transfer to a hospital. Yet he was unable to secure privileges at three Baton Rouge hospitals because he could not find a covering physician willing to be publicly associated with an abortion provider. Id., at 1335–1336. Doe 3, a board-certified OB/GYN with nearly 45 years of experience, testified that he, too, had difficulty arranging coverage because of his abortion work. Id., at 200–202.*

(Record citations omitted.) The findings and the evidence "taken together" "are sufficient" to support the conclusion that Act 620 "would place substantial obstacles in the path of women seeking an abortion in Louisiana," Justice Breyer concluded.

Justice Breyer's next section of the opinion was entitled, "Benefits," but as we have already seen five members of the Court do not think that "benefits" matter under *Casey* or the part of *Whole Women's Health* that focused on only the issues of the substantiality of the obstacles to an abortion. So I do not dwell on this part of the plurality opinion. After dispatching with additional arguments made by the State, Justice Breyer ended his opinion, the way that the Chief Justice began his[16]: "This case is similar to, nearly identical with, *Whole Woman's Health.* And the law must consequently reach a similar conclusion. Act 620 is unconstitutional."

For his part, Justice Thomas, as noted already would jettison *Roe v. Wade* and its progeny and leave abortion law to state legislatures. Justice Alito would have required a remand to enlist a plaintiff with standing and a new trial to determine whether Louisiana's Act 620 "would diminish the number of abortion providers in the State to such a degree that women's access to abortions would be substantially impaired." Justice Gorsuch found nothing to like in Justice Breyer or the Chief Justice's opinions (saying that the Court had "lost our way") and offered a new path for Louisiana to consider in the trial court based on post-trial evidence:

> *Given the fact-intensive nature of today's analysis, the relief directed might well need to be reconsidered below if, for example, hospitals start offering qualifying admitting privileges to abortion providers, a handful of abortion providers relocate from other States, or even a tiny fraction of Louisiana's existing OB/GYNs decide to begin performing abortions. Given the post-trial developments Louisiana has already identified but no court has yet considered, there's every reason to think the factual context here is prone to significant changes.*

[16] On page 2 of his slip opinion, the Chief Justice wrote: "The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents."

Justice Kavanaugh, who dissented from the stay of the Fifth Circuit's judgment that the Court entered in 2019 with the Chief Justice's vote again dictating the result, would have remanded for a new trial (which would seem to raise a question about why he dissented from the grant of the stay).

> *[T]he factual record at this stage of plaintiffs' facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors (Does 2, 5, and 6) cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law. I expressed the same concern about the incomplete factual record more than a year ago during the stay proceedings, and the factual record has not changed since then. See* June Medical Services, L.L.C. v. Gee, *586 U. S. ___ (2019) (opinion dissenting from grant of application for stay). In short, I agree with JUSTICE ALITO that the Court should remand the case for a new trial and additional factfinding under the appropriate legal standards.*

While the burden – benefit discussion in *Whole Women's Health* and *Russo* does not have five votes, the question remains: Where does the Chief Justice (and perhaps others on the Court) stand on the "substantial obstacle" standard articulated in *Casey* and enshrined in *Whole Women's Health*? That remains a question that will be answered, probably sooner rather than later, as advocates in the lower courts take their cues from the *Russo* opinions.

Justice Kavanaugh

In his first term on the Court, Justice Kavanaugh wrote two decisions in which there was a five-vote majority. The Chief Justice rewarded him this Term by assigning four five-vote majority decisions to him, all of which were decided along ideological lines although in one of them (*Agency for International Development v. Alliance for Open Society*, Justice Kagan took no part in the consideration or decision of the case, so the vote was 5-3). Justice Kavanaugh also wrote a plurality opinion.

***Barton v. Barr**: A permanent resident ordered removed from the United States because of the commission of certain offenses for which he was later convicted is not eligible for "cancellation of removal" even though the offenses that triggered the removal action are not the same as those considered in rejecting his application for cancellation of removal*

In the first of four five-vote majority opinions where in each case Justice Kavanaugh was joined by the Chief Justice and the "conservative" wing of the Court and the "liberal" wing was in dissent (Justice Sotomayor was the author in this case), the Court addressed the removal of an immigrant from the United States because of the commission of a crime.

The facts will help you navigate the maze of immigration law. Barton was a permanent resident of the United States. Over a 12-year period, he had been convicted of a firearms offense, drug offenses, and aggravated assault offenses. The first two of these, by law, allowed the Government to remove Barton and the Government sought to do so on the basis of these two offenses. An immigration judge agreed. The law, however, allows a person in Barton's position to apply for cancellation of removal. An immigration judge has the discretion to cancel removal, but there are strict eligibility requirements set

forth at 8 U. S. C. §§1229b(a), (d)(1)(B), One of those requirements is that the applicant for cancellation has not committed certain offenses listed in 8 U. S. C. §1182(a)(2) within the first seven years of residency.

What happens next? Justice Kavanaugh explains:

> *Under the cancellation-of-removal statute, the immigration judge examines the applicant's prior crimes, as well as the offense that triggered his removal. If a lawful permanent resident has ever been convicted of an aggravated felony, or has committed an offense listed in §1182(a)(2) during the initial seven years of residence, that criminal record will preclude cancellation of removal.*

On the basis of Barton's state firearms and drug offenses, Barton's application for cancellation of removal was rejected by the Immigration Judge and the Board of Immigration Appeals (BIA). While Barton had committed offenses listed in Section 1182(a)(2), those offenses were not the ones that triggered his removal (the firearms and drug offenses did). But the BIA held that an offense that precludes cancellation of removal need not be one of the offenses that triggered the removal in the first instance. The Eleventh Circuit affirmed this holding (joining the Second, Third, and Fifth Circuits in reaching the same conclusion). The Ninth Circuit had taken a different view of the law. The Court resolved this circuit conflict in favor of the Eleventh Circuit.

Justice Kavanaugh explained that cancellation of removal operates much like sentencing in a criminal matter where a court considers the entire criminal record of a defendant.

> *In providing that a noncitizen's prior crimes (in addition to the offense of removal) can render him ineligible for cancellation of removal, the cancellation-of-removal statute functions like a traditional recidivist sentencing statute. In an ordinary criminal case, a defendant may be convicted of a particular criminal offense. And at sentencing, the defendant's other criminal offenses may be relevant. So too in the immigration removal context. A noncitizen may be found removable based on a certain criminal offense. In applying for cancellation of removal, the noncitizen must detail his entire criminal record on Form EOIR–42A. An immigration judge then must determine whether the noncitizen has been convicted of an aggravated felony at any time or has committed a §1182(a)(2) offense during the initial seven years of residence. It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases.*

Justice Kavanaugh adds that the relevant statutory text focuses on when a crime was committed (within the first seven years of residence) but then ties the rendering of inadmissibility to conviction of a crime of moral turpitude (with respect to the category of Section 1182(a)(2) offenses relevant here). Thus Barton lost.

> *In this case, Barton's 1996 state aggravated assault offenses were crimes involving moral turpitude and therefore "referred to in section 1182(a)(2)." Barton committed those offenses during his initial seven years of residence. He was later convicted of*

> *the offenses in a Georgia court and thereby rendered "inadmissible." Therefore, Barton was ineligible for cancellation of removal.*
>
> *As a matter of statutory text and structure, that analysis is straightforward. The Board of Immigration Appeals has long interpreted the statute that way. And except for the Ninth Circuit, all of the Courts of Appeals to consider the question have interpreted the statute that way.*

(Citation omitted.)

Barton made three arguments to attempt to defeat Justice Kavanaugh's analysis. Justice Kavanaugh explained them with a "caution to the reader: These arguments are not easy to unpack." I will not unpack them. Instead, I invite you to read Justice Sotomayor's dissent in which she argues that the majority "conflates" inadmissibility (which pertains to noncitizens seeking admission), and deportability (which relates to noncitizens already admitted but removable). In her view, the "stop-time" rule (commission of a specific offense within seven years of residency) takes into account the Immigration and Nationality Act (INA) which distinguishes between noncitizens seeking admission and those already admitted. Since Barton was already admitted he cannot be considered inadmissible. Instead, the Government had to show an offense that made Barton deportable. The Government could not meet this burden; thus Barton should prevail.

If you followed all of that, you are a loyal reader. In the end, her argument did not prevail. A longstanding rule interpreted the same way by four circuit courts carried the day.

Thole v. U.S. Bank, N.A.*: In a suit against pension plan fiduciaries of a defined contribution plan where they would receive the same pension for life irrespective of investment decisions made by the fiduciaries, Plaintiffs lacked Article III standing to pursue alleged breaches of ERISA's duties of loyalty and prudence by poorly investing the assets of the plan*

The Employee Retirement Income and Security Act of 1974, 29 U. S. C. §1001 *et seq.* (ERISA) provides the backdrop for this case about Article III standing. Justice Kavanaugh was again joined by the Chief Justice and Justices Thomas, Alito, and Gorsuch in affirming the court of appeals that standing did not exist. Justice Sotomayor dissented. She was joined by Justices Ginsburg, Breyer, and Kagan. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined.

The case involved dismissal of a complaint brought against fiduciaries of a defined benefit plan alleging poor management of the plan's assets in violation of their duties of loyalty and prudence under ERISA.

In affirming the dismissal, Justice Kavanaugh's logic was simple. First, he identified how a defined benefit plan works.

> *Of decisive importance to this case, the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan. In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits*

> *are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions.*

Because Thole and Smith would be paid no matter how poorly the assets of the plan were managed, they had not suffered a cognizable injury and thus lacked Article III standing.

> *Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to* lose *this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to* win *this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit. To be sure, their attorneys have a stake in the lawsuit, but an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."* Lewis v. Continental Bank Corp., *494 U. S. 472, 480 (1990); see* Steel Co. v. Citizens for Better Environment, *523 U. S. 83, 107 (1998) (same). Because the plaintiffs themselves have no concrete stake in the lawsuit, they lack Article III standing.*

Petitioners offered four theories to support standing. (By analogy to trust law, they had an equitable interest in the plan; they were representatives of the plan itself; the statute provides a cause of action to participants in a defined benefit plan; and if they may not sue, no one is available to regulate plan fiduciaries). None resonated with Justice Kavanaugh. (Participants in a defined-benefit plan are not similarly situated to beneficiaries of a trust or a defined-contribution plan; plaintiffs do not themselves have a concrete stake in the suit and have not been contractually or legally appointed to represent the plan; having a statutory cause of action does not eliminate the need for a concrete injury; and the Court has rejected a private regulator theory and, in any event, employers, their shareholders, and the Department of Labor all have substantial motives to avoid the financial burden of a failed defined-benefit plan).

But are defined benefits really guaranteed for life? What if the mismanagement is so bad that the plan and employer were unable to pay future benefits? The problem for Thole and Smith here is that they never raised the argument in the Supreme Court. And for pleading gurus out there, Justice Kavanaugh added this sure-to-be-quoted-in-the-future passage:

> *In any event, plaintiffs' complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits. It is true that the plaintiffs' complaint alleged that the plan was underfunded for a period of time. But a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail.*

In his concurring opinion, Justice Thomas felt that the case could be simply decided on the basis that none of the rights that petitioners identified in their complaint belonged to them. The duties of fiduciaries are owed to the plan, Justice Thomas said, not petitioners.

Justice Sotomayor felt that standing existed because petitioners had an interest in the retirement plan's financial integrity since their defined benefits come out of the assets of the plan; a breach of fiduciary duty is a cognizable injury "regardless whether that breach caused financial harm or increased a risk of nonpayment"; and petitioners could sue on behalf of the retirement plan. None of these arguments, however, persuaded any other Justice to move his vote to the other side of the debate.

***McKinney v. Arizona**: After a successful habeas petition to establish that mitigating circumstances were not considered when he was sentenced to death for multiple murders, McKinney's plea to have those circumstances weighed by a jury instead of the Arizona Supreme Court, as allowed by* Clemons v. Mississippi, *494 U. S. 738 (1990), was rejected*

In this matter, Justice Kavanaugh was once again joined by the Chief Justice and the "conservative" wing of the Court. Justice Ginsburg filed a dissenting opinion in which she was joined by the other "liberal" members of the Court.

The case involved the death penalty. In 1992, McKinney was convicted of multiple murders. Nearly 20 years later, he won a federal habeas corpus appeal that established that when he was sentenced to death, the Arizona courts failed to consider his posttraumatic stress syndrome (PTSD). That failure violated the rule in *Eddings v. Oklahoma*, 455 U. S. 104 (1982) ("a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence"). Back to the Arizona courts, McKinney argued that a jury should be convened to resentence him. Instead the Arizona Supreme Court "reviewed the evidence in the record and reweighed the relevant aggravating and mitigating circumstances, including McKinney's PTSD." The court upheld the death sentences.

In *Clemons v. Mississippi*, 494 U. S. 738 (1990), the Court permitted the Mississippi Supreme Court to weigh permissible aggravating and mitigating evidence.

> *This Court stated that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of the aggravating and mitigating evidence or by harmless-error review."* Id.*, at 741. The Court explained that a* Clemons *reweighing is not a resentencing but instead is akin to harmless-error review in that both may be conducted by an appellate court.*

McKinney argued that *Clemons* should not be applied because in his case, mitigating circumstances were ignored, whereas in *Clemons* aggravating circumstances were improperly considered. But Justice Kavanaugh held that in either case, weighing the evidence is involved and *Clemons* permitted an appellate court to reweigh the evidence. McKinney also argued that *Clemons* was no longer good law but the cases cited by McKinney, Justice Kavanaugh said, did not overrule *Clemons*.

Justice Ginsburg argued in dissent that McKinney's case was on direct review and not collateral review. Thus, she argued, under *Ring v. Arizona*, 536 U. S. 584 (2002) (where the Court held that Arizona's capital sentencing regime was unconstitutional), McKinney was entitled to a jury to evaluate aggravating factors. But Justice Kavanaugh rejected the argument.

> *In conducting the reweighing, the Arizona Supreme Court explained that it was conducting an independent review in a collateral proceeding. The court cited its*

> *prior decision in* State v. Styers, *227 Ariz. 186, 254 P. 3d 1132 (2011), which concluded that Arizona could conduct such an independent review in a collateral proceeding. See also Ariz. Rev. Stat. Ann. §13–755 (2010);* State v. Hedlund, *245 Ariz. 467, 470–471, 431 P. 3d 181, 184–185 (2018). Under these* circumstances, *we may not second-guess the Arizona Supreme Court's characterization of state law. See* Mullaney v. Wilbur, *421 U. S. 684, 691 (1975); see also* Jimenez v. Quarterman, *555 U. S. 113, 120, n. 4 (2009);* Styers v. Ryan, *811 F. 3d 292, 297, n. 5 (CA9 2015). As a matter of state law, the reweighing proceeding in McKinney's case occurred on collateral review.*

Agency for Int'l Development v. Alliance for Open Society*: The First Amendment is not applicable to the foreign, legally distinct affiliates of American organizations that had sought to extend a 2013 decision providing First Amendment protection to their objection to a policy requirement that prohibited distribution of Congressionally-appropriated funds to fight HIV/AIDS to organizations that did not accept the policy requirement*

Justice Kavanaugh's opinion rejecting the application of the First Amendment protections to foreign, distinct affiliates of a domestic organization was joined yet again by the Chief Justice and the "conservative" wing of the Court. Justice Thomas wrote a concurring opinion. Justice Breyer filed a dissenting opinion joined in by Justices Ginsburg and Sotomayor. Justice Kagan did not participate in the matter.

The case has a long history. Plaintiffs are American nongovernmental organizations that receive funds under the Leadership Act, a 2003 law designed to fight HIV/AIDS, among other diseases, abroad. The Act contained a prohibition on distribution of funds to organizations that did not agree to a policy opposing prostitution and sex trafficking (referred to as the "Policy Requirement"). Plaintiffs did not agree to the Policy Requirement, but instead espoused a public stance of neutrality on this topic because of the sensitivity of their work in some parts of the world and because of their global effort to prevent HIV/AIDS. Plaintiffs successfully challenged the Policy Requirement as a violation of their First Amendment rights in 2013. They were back before the Court because they wanted to extend that First Amendment protection to their "legally distinct foreign affiliates." This time, they lost.

Plaintiffs conceded that as a matter of American constitutional law, "foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution." (Citations omitted.) Foreign citizens *in the United States* "may enjoy certain constitutional rights" (*e.g.*, "the right to due process in a criminal trial").

> *But the Court has not allowed foreign citizens outside the United States or such U. S. territory to assert rights under the U. S. Constitution. If the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U. S. Constitution.*

And under hornbook corporate law principles, "separately incorporated organizations are separate legal units with distinct legal rights and obligations." (Citations omitted.)

> *Those two bedrock principles of American constitutional law and American corporate law together lead to a simple conclusion: As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment.*

Justice Thomas's concurrence was based on his belief that the Policy Requirement did not "require anyone to say anything," so that the First Amendment was not applicable.

Justice Breyer argued in dissent that the First Amendment rights of American organizations were, in fact, in issue: "This time, the question is whether the American organizations enjoy that same constitutional protection against government-compelled distortion when they speak through clearly identified affiliates that have been incorporated overseas. The answer to that question, as I see it, is yes." But he did not have Justice Kagan's vote and even with it was still one vote short of convincing his colleagues to accept his take on the facts.

Barr v. American Assn. of Political Consultants, Inc.*: A 2015 amendment to the Telephone Consumer Protection Act allowing robocalls to cell phones by government-debt collectors is content-based speech that discriminates against political speech, thereby violating the First Amendment, but the provision is severable from the remainder of the TCPA, thereby eliminating the discrimination and restoring the TCPA to its pre-2015-amendment status of prohibiting all robocalls to cell phones*

Talk about winning the battle, but losing the war. This is not technically a 5-4 decision (the vote was 6-3 or 7-2 depending upon the issue), but because there were not five votes to support an opinion, I discuss it here.

This case is about robocalls—one of the most vilified practices in America by everyone except those who make money on robocalls. The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits robocalls to cell phones and home phones. (Most Americans would never believe this. Working from home during COVID-19, we receive, on average, at least ten robocalls per day, and, it seems, no matter how many numbers we block, there is a replacement number available to the computer dialer.)

However, a 2015 amendment to the TCPA, as Justice Kavanaugh, explains, "allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts." Plaintiffs were political and nonprofit organizations that wanted to make political robocalls to cell phones. They argued that the 2015 exception unconstitutionally favors debt-collection speech over political and other speech. But is there content-based speech involved at all in this amendment? If so, must it be evaluated under strict scrutiny or intermediate scrutiny? And if there is a First Amendment violation, is the offending statutory provision severable from the TCPA so that no robocalls to cell phones may be allowed, or does the violation render the entire prohibition on robocalls unconstitutional?

No one could accurately describe the national reaction had the Court's ruling *removed* the prohibition on robocalls. The Justices certainly understood that. But they could not agree on an opinion supported by five Justices. So, I borrow from Justice Kavanaugh's scorecard.

> *Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment. See* infra, *at 6–9;* post, *at 1–2 (SOTOMAYOR, J., concurring in judgment);* post, *at 1, 3 (GORSUCH, J., concurring in judgment in part and dissenting in part). Applying traditional severability principles, seven Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute. See* infra, *at 10–25;* post, *at 2 (SOTOMAYOR, J., concurring in judgment);* post, *at 11–12 (BREYER, J., concurring in judgment with respect to severability and dissenting in part). As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.*

When you know the bottom line, you may decide to move on to the next case, but I will briefly explain the Justices' various positions.

Justice Kavanaugh's plurality opinion (joined in fully by the Chief Justice and Justice Alito, and joined as to Parts I and II by Justice Thomas) explains in Part II that the Court's First Amendment jurisprudence allows the Government to impose reasonable time, place, and manner restrictions on speech, but prohibit the Government from discriminating in the regulation of speech "based on the content of that expression." (Citation omitted.) He also asserted that content-based laws "are subject to strict scrutiny" while "content-neutral laws are subject to a lower level of scrutiny."

Already you can see how the battle lines were setting up. Is the robocall restriction "content-based" speech? The answer to this question seems to be in the eyes of the beholder, but Justice Kavanaugh articulated a standard: "As relevant here, a law is content-based if a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys. That description applies to a law that 'singles out specific subject matter for differential treatment.'" (Citations and internal quotation marks omitted.) Within this framework, the restriction contained in the TCPA (47 U. S. C. §227(b)(1)(A)(iii)) was content-based speech.

> *[T]he legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.*

After rejecting the Government's arguments to the contrary, Justice Kavanaugh said that the restriction on speech could not withstand strict scrutiny (the Government conceded the point).

Then in Part III (three votes), after rejecting an argument that the original 1991 robocall restriction is unconstitutional under any level of scrutiny (because it was based on consumer privacy and Congress allegedly no longer cared about consumer privacy in passing the 2015 amendment), Justice

Kavanaugh explained why the 2015 amendment was severable, thereby eliminating any exceptions, and thus, any discrimination based on content-based speech.

First, the applicable principle. Congress might expressly address severability "(making clear that the unconstitutionality of one provision does not affect the rest of the law"), or Congress may include a non-severability clause ("making clear that the unconstitutionality of one provision means the invalidity of some or all of the remainder of the law, to the extent specified in the text of the nonseverability clause"). (Citations omitted.) In either case, "absent extraordinary circumstances," the Court will adhere to the text of the clause.

Where the law is silent on severability, the better rule is that "the Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute."

> *The Court's presumption of severability supplies a workable solution—one that allows courts to avoid judicial policymaking or de facto judicial legislation in determining just how much of the remainder of a statute should be invalidated. The presumption also reflects the confined role of the Judiciary in our system of separated powers—stated otherwise, the presumption manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional. Furthermore, the presumption recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge other provisions of that law.*

Before severing the unconstitutional provision and leaving the rest of the law intact, a court must ensure that, the remainder of the statute is "capable of functioning independently" and thus would be "fully operative" as a law. (Citations omitted.)

The TCPA is part of the Communications Act (1934) which contains an express severability clause. That was the end of the argument.

> *"If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the* chapter *and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U. S. C. §608 (emphasis added). The "chapter" referred to in the severability clause is Chapter 5 of Title 47. And Chapter 5 in turn encompasses §151 to §700 of Title 47, and therefore covers §227 of Title 47, the provision with the robocall restriction and the government-debt exception.*

And even if this express severability clause were not applicable, the presumption of severability is applicable, said Justice Kavanaugh, since the remainder of the law "is capable of functioning independently and thus would be fully operative as a law" just as it had operated between 1991 and 2015 before the amendment was adopted.

So you might be saying to yourself, "Hmm. There was unequal treatment here. Government-debt collection robocalls were favored over political and other robocalls. Why not just allow all robocalls to eliminate the discrimination"? And plaintiffs so argued—unsuccessfully to no one's surprise.

> *If the statute contains a severability clause, the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all. In light of the presumption of severability, the Court generally does the same even in the absence of a severability clause. The Court's precedents reflect that preference for extension rather than nullification.*

Justice Gorsuch concurred in the judgment but complained in his dissent that plaintiffs won but obtained no relief.

> *Plaintiffs want to be able to make political robocalls to cell phones, and they have not received that relief. But the First Amendment complaint at the heart of their suit was unequal treatment. Invalidating and severing the government-debt exception fully addresses that First Amendment injury.*

He also raised a standing question (plaintiffs could not challenge the government-debt-collection exception merely because it favors others) and objected that the decision "harms strangers to this suit" (the debt collectors). But his approach did not garner any support.

Justice Sotomayor supported much of Justice Breyer's partial dissent that espoused Justice Breyer's long-held views that content-based distinctions did not merit strict scrutiny. But she did not regard the government-debt exception as satisfying even intermediate scrutiny because it was not "narrowly tailored to serve a significant governmental interest." (Citation omitted.)

For his part, Justice Breyer supported the judgment because he believed that the allowance of robocalls by government debt collectors did not violate the First Amendment. Referring to the rationale of the plurality opinion, he writes:

> *The problem with that approach, which reflexively applies strict scrutiny to all content-based speech distinctions, is that it is divorced from First Amendment values. This case primarily involves commercial regulation—namely, debt collection. And, in my view, there is no basis here to apply "strict scrutiny" based on "content-discrimination."*

After discussing a number of the Court's precedents, he concludes:

> *To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. And in this case, strict scrutiny is inappropriate. Recall that the exception at issue here concerns debt collection—specifically a method for collecting government-owned or-backed debt. Regulation of debt collection does not fall on the first side of the democratic equation. It has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government. It has everything to do with the second side of the equation, that is, with government response to the public will through ordinary commercial regulation. To apply the strictest level of scrutiny to the economically based exemption here is thus remarkable.*

> *I recognize that the underlying cell phone robocall restriction primarily concerns a means of communication. And that fact, as I discuss below, triggers some heightened scrutiny, reflected in an intermediate scrutiny standard. Strict scrutiny and its strong presumption of unconstitutionality, however, have no place here.*

Justice Breyer acknowledged that the exception does "directly impact a means of communication" and therefore required a "closer look" than the traditional "rational basis" test.

> *A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. Narrow tailoring in this context, however, does not necessarily require the use of the least-restrictive means of furthering those objectives.*

Calling this approach "intermediate scrutiny," Justice Breyer concluded that the TCPA exception for government-debt robocalls is constitutional.

> *The upshot is that the government-debt exception, taken in context, inflicts some speech-related harm. But the harm, as I have explained, is related not to public efforts to develop ideas or transmit them to the Government, but to the Government's response to those efforts, which here takes the form of highly regulated commercial communications. Moreover, there is an important justification for that harm, and the exception is narrowly tailored to further that goal. Given those facts, the government-debt exception should survive intermediate First Amendment scrutiny.*

Since six members of the Court felt otherwise, Justice Breyer concluded his opinion by agreeing with Justice Kavanaugh's conclusion that the exception is severable.

Justice Gorsuch agreed that there was a First Amendment violation, but he concurred only in the judgment in this respect because, he said in Part I of his opinion, his reasoning differed from Justice Kavanaugh's. It is not easy to discern the difference. Here is his analysis.

> *In my view, the TCPA's rule against cellphone robocalls is a content-based restriction that fails strict scrutiny. The statute is content-based because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters). Cf.* ante, *at 9–11 (opinion of BREYER, J.) (mistakenly characterizing the content discrimination as "not about" political activities). The statute fails strict scrutiny because the government offers no compelling justification for its prohibition against the plaintiffs' political speech. In fact, the government does not dispute that, if strict scrutiny applies, its law must fall.*

Justice Gorsuch, however, would have permitted an injunction preventing enforcement of the TCPA's prohibition on robocalls against them. Mercifully, only Justice Thomas, who did not concur in Part I of Justice Gorsuch's opinion, supported this view.

Justice Alito

Justice Alito wrote two opinions with a five-vote majority during the 2019-20 Term, both decided along ideological lines.

Hernandez v. Mesa*: Petitioners' request to extend the federal-common-law tort remedy created in* Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) to a claim for the wrongful death of their son who was shot by a U. S. border patrol agent was rejected, primarily based on a separation-of-powers analysis.*

Justice Alito was joined by the Chief Justice and the "conservative" wing of the Court in refusing to create a cause of action under the rubric of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), for damages resulting from a cross-border shooting. Justice Thomas wrote a concurring opinion in which Justice Gorsuch joined. Justice Ginsburg wrote the dissenting opinion in which her liberal colleagues joined.

The facts are quite sad. Sergio Adrián Hernández Güereca, a 15-year-old Mexican national was killed by a border control agent (Mesa). The agent had detained one of Hernández's friends who had run onto the United States' side of a culvert that ran along the border, The boys were either playing a game in the culvert (running to the U.S. side and back – their version) or making a border-crossing attempt and pelting the agent with rocks (the agent's version). Hernandez was running back to the Mexican side of the culvert when he was shot. No action was taken against Mesa by the United States (following a Justice Department investigation). So Hernández's parents sued for damages, claiming in part that Mesa violated their son's Fourth Amendment and Fifth Amendment rights. The district court dismissed the claim and the Fifth Circuit affirmed. In 2017 the Court vacated that decision and told the Fifth Circuit to take another look at the *Bivens* theory. They did and rejected it.

Lawyers who were law students like I was in the early 1970s remember *Bivens* well. Justice Alito provides the summary of the case.

> *In* Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, the Court broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim. The Court subsequently extended* Bivens *to cover two additional constitutional claims: in* Davis v. Passman*, 442 U. S. 228 (1979), a former congressional staffer's Fifth Amendment claim of dismissal based on sex, and in* Carlson v. Green*, 446 U. S. 14 (1980), a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment.*

Thereafter, the Court's implied constitutional tort regime came to an end.

> *In later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power. The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only "judicial Power." Art. III, §1. But when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the*

> *law, the court risks arrogating legislative power. No law "'pursues its purposes at all costs.'" Instead, lawmaking involves balancing interests and often demands compromise. Thus, a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages. For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.*

Common law courts flesh out remedies, of course, as anyone involved in a common law tort case knows. "But *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78 (1938), held that '[t]here is no federal general common law,' and therefore federal courts today cannot fashion new claims in the way that they could before 1938." In reading this sentence, you may be saying to yourself, "Well, then is *Bivens* still good law"? And, indeed, if this thought came to you, you correctly identified the basis of Justice Thomas's concurring opinion ("in my view, the time has come to consider discarding the *Bivens* doctrine altogether").

Justice Alito and the Chief Justice and Justice Kavanaugh were not prepared to go that far—yet. Justice Alito did say that a federal court's authority to recognize a damages remedy "must rest at bottom on a statute enacted by Congress." (Citation omitted.) He added that courts must be cautious, and particularly so in constitutional cases, before creating a new cause of action. So, when asked to extend *Bivens*, the Court asks first whether the request involves a claim in a "new context" or involves a "new category of defendants," and, if so, whether there are any special factors that "counsel hesitation" about granting the extension. (Citations omitted.) And these questions must be answered taking into account (1) "the risk of interfering with the authority of the other branches" of government (the Court must ask whether there are "sound reasons to think Congress might doubt the efficiency or necessity of a damages remedy"), and (2) whether the "Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." (Citations omitted.)

Petitioners lost on every point. In response to the argument that there was no "new context," Justice Alito wrote:

> Bivens *concerned an allegedly unconstitutional arrest and search carried out in New York City, 403 U. S., at 389;* Davis *concerned alleged sex discrimination on Capitol Hill, 442 U. S., at 230. There is a world of difference between those claims and petitioners' cross-border shooting claims, where "the risk of disruptive intrusion by the Judiciary into the functioning of other branches" is significant.*

(Citation omitted.)

Moving then to the factors "that counsel hesitation," there were many: foreign relations, national security, and the Court's "survey of what Congress has done in situations addressing related

matters."[17] In the end, separation of powers was controlling, leaving *Bivens* in a vise in which it may not survive one day.

> *In sum, this case features multiple factors that counsel hesitation about extending, but they can all be condensed to one concern—respect for the separation of powers. "Foreign policy and national security decisions are 'delicate, complex, and involve large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities[,] nor responsibility.'" To avoid upsetting the delicate web of international relations, we typically presume that even congressionally crafted causes of action do not apply outside our borders. These concerns are only heightened when judges are asked to fashion constitutional remedies. Congress, which has authority in the field of foreign affairs, has chosen not to create liability in similar statutes, leaving the resolution of extraterritorial claims brought by foreign nationals to executive officials and the diplomatic process.*

Justice Ginsburg's dissent took the position, as it had to, that "[r]ogue U. S. officer conduct falls within a familiar, not a 'new,' *Bivens* setting. And even if that were not the case, there is no alternative remedy available here and there are no "special factors" that counsel against a *Bivens* remedy. "Neither U. S. foreign policy nor national security is in fact endangered by the litigation. Moreover, concerns attending the application of our law to conduct occurring abroad are not involved, for plaintiffs seek the application of U. S. law to conduct occurring inside our borders." However, unfortunately for the dissenters, once a "new context" is framed by the facts, and not the rogue nature of an officer's conduct, the Court will always proceed to step two of a *Bivens*-extension analysis. And based on Justice Alito's analysis, it seems unlikely, if not impossible, to ever show that in a separation of powers evaluation involved in step two, the Court, rather than Congress, should decide whether to provide a damages remedy to a potential claimant.

Kansas v. Garcia*: The Immigration Reform and Control Act of 1986 does not expressly or impliedly preempt Kansas statutes under which respondents were convicted when they engaged in identity theft in completing tax withholding forms when they obtained employment.*

Justice Alito delivered the opinion of the Court and was again joined by the Chief Justice and the "conservative" wing of the Court. Justice Thomas added a concurring opinion joined by Justice Gorsuch. Justice Breyer filed an opinion concurring in part and dissenting in part, in which the remaining "liberal" Justices joined. The issue? Preemption. Respondents were convicted of using another person's Social Security number on state and federal tax-withholding (W-4) forms that they submitted when they obtained employment. However, the Kansas Supreme Court held that the Immigration Reform and Control Act of 1986 (IRCA) expressly preempts the Kansas statutes upon which the convictions were based. Justice Alito rejected both express preemption, and the alternative

[17] Among other examples, Justice Alito cited 42 U. S. C. §1983 which permits recovery of damages for constitutional violations by officers acting under color of *state* law. Section 1983 is available only to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." *Bivens* has been described as a federal analog of Section 1983, allowing Justice Alito to conclude that it would be "anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action." (Citation and internal quotation marks omitted.)

implied preemption argument offered by respondents. The vote was 9-0 on the express preemption holding, and 5-4 on the implied preemption holding.

A preemption analysis is fairly straightforward.

■ The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute the "supreme Law of the Land." Art. VI, cl. 2.
■ If federal law "imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted." (Citation omitted.)
■ Such restrictions or rights "must stem from either the Constitution itself or a valid statute enacted by Congress."
■ A federal statute may state that it preempts state law.
■ Preemption may also occur by virtue of rights or restrictions "that are inferred from statutory law." This latter form of "implied" preemption may result either because Congress has "preempted" the field of law in issue, or the federal law conflicts with a particular aspect of the state law.

Here, IRCA contained an express preemption provision but "it is plainly inapplicable here." It applies only to the imposition of criminal or civil liability on employers and those who receive a fee for recruiting or referring prospective employees. 8 U. S. C. §1324a(h)(2). "It does not mention state or local laws that impose criminal or civil sanctions on employees or applicants for employment." And another provision in IRCA that the Kansas Supreme Court invoked to demonstrate preemption (§1324(b)(5) relating to limitations on the use of information contained on an "I-9" form) was read incorrectly by the court (Justice Alito called the court's interpretation "flatly contrary to standard English usage").

Preemption of a "field" of conduct reserved exclusively for federal regulation requires a showing that Congress "legislated so comprehensively" in a particular field that it "left no room for supplementary state legislation." (Citation omitted.) "Field" preemption requires first a determination of the field in which Congress has "ousted the States" from regulating. In their initial brief, the respondents had identified the "federal employment verification system" (which establishes that an employee is not barred from working in the United States because of alienage). But the matter before the Court involved tax-withholding forms that have nothing to do with the verification system. Hence that argument, and derivatives of that argument, failed.

> *IRCA certainly does not bar all state regulation regarding the "use of false documents . . . when an unauthorized alien seeks employment." Brief in Opposition 21. Nor does IRCA exclude a State from the entire "field of employment verification."* Id.*, at 22. For example, IRCA certainly does not prohibit a public school system from requiring applicants for teaching positions to furnish legitimate teaching certificates. And it does not prevent a police department from verifying that a prospective officer does not have a record of abusive behavior.*

And what of "conflict" preemption? Respondents argued that "the Kansas statutes, as applied in their prosecutions, stand as 'an obstacle to the accomplishment and execution of the full purposes'" of IRCA—one of which is purportedly that the initiation of any legal action against an unauthorized alien

for using a false identity in applying for employment should rest exclusively within the prosecutorial discretion of federal authorities." Respondents added that, allowing Kansas to bring prosecutions like these "would risk upsetting federal enforcement priorities and frustrating federal objectives, such as obtaining the cooperation of unauthorized aliens in making bigger cases." (Record citations omitted.)

Justice Alito rejected this argument as well. "Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution. On the contrary, federal law makes it a crime to use fraudulent information on a W–4." And the existence of an overlap in criminal enforcement under state and federal law "does not even begin to make a case for conflict preemption." "Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap."

Justice Thomas wrote separately only to urge his longstanding position that the Court should abandon the "purposes and objectives" of pre-emption jurisprudence because it is contrary to the Supremacy Clause. This was the approach relied upon by Justice Breyer in his dissent. Justice Breyer argued that "IRCA's text, together with its structure, context, and purpose, make it 'clear and manifest' that 'Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization." (Citation and internal quotation marks omitted.) But he could not secure the Chief Justice's vote and in the Roberts Era, how the Chief Justice votes–except at least when an Indian treaty is involved–is how the case is determined.

Justice Gorsuch

In his third full year on the Court, Justice Gorsuch wrote one decision with a five-vote majority.

McGirt v. Oklahoma: *Land on which McGirt committed certain crimes was a part of the Creek Indian reservation and thus his conviction in state court was overturned since federal courts have exclusive jurisdiction to try individuals for crimes committed on tribal lands*

Justice Gorsuch was joined by the liberal wing of the Court in deciding that the Creek Indian reservation covering Tulsa and part of eastern Oklahoma was never "disestablished" by Congress and thus remain tribal lands of the Creek Indians (meaning that McGirt had to be tried in federal court and thus his state court convictions could not stand). The Chief Justice filed a dissenting opinion which Justice Alito and Justice Kavanaugh joined, and in which Justice Thomas joined except for footnote 9. Justice Thomas filed a separate dissenting opinion.

Under the Major Crimes Act (MCA), 18 U. S. C. §1153(a), federal courts have exclusive jurisdiction to try individuals for crimes committed within "the Indian country." "Indian country" is defined by the statute to include, "all land within the limits of any *Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U. S. C. §1151(a) (emphasis added). There was no dispute that McGirt committed his crimes on lands described as Creek Reservation in an 1866 treaty and federal statute. The dispute was whether the land given to the Creek Indians by treaty is still a "reservation" today.

Justice Gorsuch set forth a lengthy discussion of the history of treaties with the United States and associated events in holding that the land in question remains a "reservation." With respect to the 1866 treaty, he wrote, "Congress explicitly restated its commitment that the remaining land would 'be forever set apart as a home for said Creek Nation,' which it now referred to as 'the reduced Creek reservation.' Arts. III, IX, *id.*, at 786, 788." In addition, the Treaty of 1856 confirmed that the Creek lands were a reservation.

> *In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV,* id.*, at 704. So the Creek were promised not only a "permanent home" that would be "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.*

But how could there still be a reservation if land, "once undivided," is now "fractured into pieces" and in some cases now belong to persons unaffiliated with the Creek Nation? The answer is that Congress has never "disestablished" the reservation. Let me synthesize Justice Gorsuch's lengthy discussion into manageable pieces.

First, you have to understand the "allotment" acts. In the 1880s, Congress pressured tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. The motives for the allotment acts varied from nefarious to honorable, but it was not until 1901 that the Creek Allotment Agreement was executed, establishing procedures for allotting 160-acre parcels to individual Tribe members. With additional Congressional action, by 1908, individual Tribe members were then allowed to sell their land to Indians or non-Indians.

However, Justice Gorsuch points out, missing in all of the history of the Creek lands, is a statute that documented the total surrender of tribal interests in affected lands. And because there is no statute "terminating what remained, the Creek Reservation survived allotment." Justice Gorsuch adds that Congress does not disestablish a reservation by allowing the transfer of individual plots, as the Court has confirmed in a number of decisions that he cites. Moreover, there is no reason why Congress cannot reserve land for tribes, "allowing them to continue to exercise governmental functions over land even if they no longer own it communally." Or as he separately put it, "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination."

Oklahoma then made a number of arguments that Justice Gorsuch politely eviscerated. Read the opinion if you want to learn them. For my purposes, it is enough to point to Justice Gorsuch's statement that allotment was a first but not a final step toward disestablishment and dissolution. In all of the years following 1901, "Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job." Indeed, in 1936, "Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, §3, 49 Stat. 1967, enabling the Creek government to resume many of its previously

suspended functions. *Muscogee (Creek) Nation* v. *Hodel*, 851 F. 2d 1439, 1442–1447 (CADC 1988)," which, as Justice Gorsuch described, it has done. And, he adds, "in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction."

Oklahoma was unable to point "to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed." (Emphasis in original.) Historical practices or current demographics–both argued by Oklahoma to establish that disestablishment of the reservation had occurred—"also cannot overcome congressional intent as expressed in a statute."

Justice Gorsuch noted that the Chief Justice's dissent "charges that we have failed to take account of the 'compelling reasons' for considering extratextual evidence as a matter of course" to support Oklahoma's claim of "disestablishment." His response was swift.

> *But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor [sic], not against, tribal rights.*

(Citation omitted.)

The opinion goes on for many more pages, but Justice Gorsuch sums up the other arguments thusly.

> *In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.*

Now, you are certainly wondering what the effect is of a declaration that a large part of the geography of northeastern Oklahoma remains an Indian reservation. Oklahoma and the Chief Justice, in dissent, raise that same concern suggesting that such a holding would be devastating. Justice Gorsuch was unfazed.

> *Still, Oklahoma and the dissent fear, "[t]housands" of Native Americans like Mr. McGirt "wait in the wings" to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings.*
>
> *In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, see* Ramos v. Louisiana, *590 U. S. ___, ___–___ (2020) (plurality opinion) (slip op., at 23–26), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.*

Justice Gorsuch pointed out that if a larger federal case load results from the Court's holding that just means that there will be a smaller state court case load, and "while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end."

And what of impacts on civil and regulatory law? The Creek Tribe might qualify for coverage under a variety of federal laws including ones "making the region eligible for assistance with homeland security, 6 U. S. C. §§601, 606, historical preservation, 54 U. S. C. §302704, schools, 20 U. S. C. §1443, highways, 23 U. S. C. §120, roads, §202, primary care clinics, 25 U. S. C. §1616e–1, housing assistance, §4131, nutritional programs, 7 U. S. C. §§2012, 2013, disability programs, 20 U. S. C. §1411, and more." Justice Gorsuch pithily remarked: "But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them."

As for the Chief Justice's fear that the consequences of the decision would be drastic, Justice Gorsuch rejected the claim.

> *More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.*

And what of "reliance interests" – a phrase that found its way into the Chief Justice's DACA opinion on the Dreamers. Justice Gorsuch said that there are a number of legal doctrines available to protect such interests:

> *Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them."* Ramos, *590 U. S., at ___ (plurality opinion) (slip op., at 24).*

Justice Gorsuch then acknowledged that there may be conflicts that result from the Court's decision, but he was optimistic that they could be resolved.

> *In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, §1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as Amici Curiae 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements,* id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.*

And his final sentence echoes the street expression that two wrongs do not make a right: "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."

PER CURIAM DECISIONS WITH A FIVE-VOTE MAJORITY

Republican National Committee v. Democratic National Committee*: The district court erred when, in response to the COVID-19 pandemic and to give election officials time to respond to all of the requests for absentee ballots, it issued an order allowing ballots in Wisconsin's April 7, 2020 primary election to be postmarked after April 7, and still be counted (if received by April 13) because it violated Court precedents that ordinarily district courts should not alter election rules on the eve of an election*

This was a *per curiam* decision but it was a 5-4 decision and the "liberal" wing of the Court dissented (Justice Ginsburg authored the dissent).

COVID-19 not only caused the Court to postpone arguments, have virtual arguments that were broadcast to the public, and feature rotating questions under time constraints, it also resulted in a court order requiring the State of Wisconsin to count absentee ballots postmarked after April 7, 2020, the date of the Wisconsin's primary election. The district court reached this result to allow Wisconsin voters to obtain absentee ballots when the State decided to go forward with the election despite shelter-in-place orders that were outstanding to try to prevent the spread of the virus and fears that voters and poll workers would become infected.

The majority explained that the "wisdom of that decision was not before the Court." What was before the Court was whether "absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so as they are received by April 13." (The deadline to receive absentee ballots had been extended to April 13 from April 7 and that extension was not challenged.)

For whatever reasons, the plaintiffs *in their motion* for preliminary injunction did not ask the district court to allow ballots mailed and postmarked after April 7 to be counted. Rather, the district court unilaterally entered an order to this effect (and later entered an order suppressing disclosure of election results until April 13). This fact combined with Court precedent on altering election rules resulted in this holding.

> *Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters— for an additional six days after the scheduled election day fundamentally alters the nature of the election. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited, but is that the plaintiffs themselves did not see the need to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.*

And to try to address the barrage of criticism that the Court had to know was coming, the Court added this disclaimer:

> *The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.*

Justice Ginsburg argued that the Court should have left the case alone and respected the district court's decision made "in view of the drastically evolving COVID-19 pandemic." She pointed out that the plaintiffs, in fact, sought the order issued by the district court at the preliminary injunction hearing in view of the increasing demand for absentee ballots, which she described in dramatic fashion.

> *While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received. Yet tens of thousands of voters who timely requested ballots are unlikely to receive them by April 7, the Court's postmark deadline. Rising concern about the COVID–19 pandemic has caused a late surge in absentee-ballot requests. ___ F. Supp. 3d, at ___–___, 2020 WL 1638374, *4–*5. The Court's suggestion that the current situation is not "substantially different" from "an ordinary election" boggles the mind.* Ante, *at 3. Some 150,000 requests for absentee ballots have been processed since Thursday, state records indicate. The surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots. ___ F. Supp. 3d, at ___, ___, ___–___, ___–___, 2020 WL 1638374, *1, *5, *9–*10, *17–*18. As of Sunday morning, 12,000 ballots reportedly had not yet been mailed out. It takes days for a mailed ballot to reach its recipient—the postal service recommends budgeting a week—even without accounting for pandemic-induced mail delays.* Id., *at ___, 2020 WL 1638374, *5. It is therefore likely that ballots mailed in recent days will not reach voters by tomorrow; for ballots not yet mailed, late arrival is all but certain. Under the District Court's order, an absentee voter who receives a ballot after tomorrow could still have voted, as long as she delivered it to election officials by April 13. Now, under this Court's order, tens of thousands of absentee voters, unlikely to receive their ballots in time to cast them, will be left quite literally without a vote*

She, too, invoked *Purcell v. Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*), suggesting that if intervention in election rules close to an election is to be discouraged, the majority was guilty of doing just that.

> *[T]the Court's order cites* Purcell, *apparently skeptical of the District Court's intervention shortly before an election. Nevermind that the District Court was reacting to a grave, rapidly developing public health crisis. If proximity to the election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate.*

And since the issue of voter and poll worker safety and voter disenfranchisement is not going to disappear in the Fall when the "second surge" of COVID-19 is predicted to be occurring (or if the first wave continues through the Fall, as the case may be), her closing paragraph is likely to be echoed.

> *The majority of this Court declares that this case presents a "narrow, technical question."* Ante, *at 1. That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. Under the District Court's order, they would be able to do so. Even if they receive their absentee ballot in the days immediately following election day, they could return it. With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation.*

Barr v Lee*: The federal government's planned use of pentobarbital in the execution of four death-row inmates did not constitute cruel and unusual punishment under the Eighth Amendment*

In this 5-4 *per curiam* opinion (Justice Breyer dissented, joined by Justice Ginsburg, and Justice Sotomayor dissented joined by Justices Kagan and Ginsburg) on Tuesday, July 14, the Court paved the way for the first federal execution of a death-row inmate in 17 years. The district court had enjoined the executions but the majority determined that the court erred in finding that the death-row inmates could show a likelihood of success on the merits—one of the burdens of proof to obtain a preliminary injunction. That is because the Court had "yet to hold that a State's method of execution qualifies as cruel and unusual." And the Federal Government was following the States' lead "in selecting a lethal injection protocol—single dose pentobarbital—that has become the mainstay of state executions." Pentobarbital has "been adopted by five of the small number of States that currently implement the death penalty." It has been used to carry out over 100 executions, "without incident." It has been "invoked by prisoners as a less painful and risky alternative" to other protocols. And it was upheld for use just last term in *Bucklew v. Precythe*, 587 U. S. ___, ___ (2019).

Justice Breyer, who has advocated for years that the death penalty itself is cruel and unusual punishment, restated his position even as he highlighted factual conclusions of the district court that, he believed, supported issuance of the preliminary injunction.

Justice Sotomayor was disturbed by the Court's haste in the face of what she regarded as a substantial constitutional challenge.

> *On June 15, 2020, the Government announced respondents' new execution dates. Four days later, respondents filed a joint motion for a preliminary injunction on their remaining claims and filed a motion for expedited discovery the following day. The parties submitted hundreds of pages of briefing and exhibits over two weeks. The District Court decided this record-heavy motion within two weeks, and during a time when two sister courts independently stayed two of the executions. The District Court evaluated respondents' Eighth Amendment challenge and stayed their executions to permit full consideration by the District Court and the Court of Appeals of their claims. The Court of Appeals denied the Government's motion for a stay, noting that respondents' claims involve "novel and difficult constitutional questions" that require the benefit of "further factual and legal development." The court* sua sponte

> *set an expedited briefing schedule to resolve the appeal. Mere hours later, however, this Court now grants the Government's last-minute application to vacate the stay, allowing death-sentenced inmates to be executed before any court can properly consider whether their executions are unconstitutionally cruel and unusual.*

She pointed out that seven months ago, the Court, by order, prohibited the Government from proceeding with executions before respondents' different statutory challenge to the federal execution protocol. She noted that, referring to a statement of Justice Alito, three members of the Court contemplated that the respondents would not be executed before determining the merits of their Administrative Procedure Act claim.

> *These statements now ring hollow. By overriding the lower court's stay, this Court forecloses any review of respondents' APA claims and bypasses the appellate court's review of a novel challenge to the federal execution protocol. It does so despite the fact that, whatever may have been true on the records presented in previous cases, see,* e.g., Zagorski v. Parker, *586 U. S. ___ (2018), the parties here introduced conflicting expert evidence about the likelihood that pentobarbital causes pain and suffering before rendering a person insensate, which no factfinder has adjudicated.*

Justice Sotomayor was also disturbed by the Court's willingness to grant emergency applications from the Government for extraordinary relief, bypassing normal appellate review processes.

> *Today's decision illustrates just how grave the consequences of such accelerated decisionmaking can be. The Court forever deprives respondents of their ability to press a constitutional challenge to their lethal injections, and prevents lower courts from reviewing that challenge. All of that is at sharp odds with this Court's own ruling mere months earlier. In its hurry to resolve the Government's emergency motions, I fear the Court has overlooked not only its prior ruling, but also its role in safeguarding robust federal judicial review. I respectfully dissent.*

Lee was executed the morning of the decision, the first of three executions carried out in four days by the Justice Department.

MAJOR DECISIONS WITH MORE THAN A FIVE-VOTE MAJORITY

Trump v. Vance*: The President of the United States does not have absolute immunity from a state court grand jury subpoena and is not entitled to a heightened standard of review before having to comply with such subpoenas*

No one who read the transcript of the oral argument in *Trump v. Vance* believed that the Court would adopt the President's argument of "absolute immunity" from a subpoena based on Article II (describing the powers of the President) and the Supremacy Clause. Even Justices Thomas and Alito, who separately dissented, rejected that argument. The real question was whether a state prosecutor's grand jury subpoena would be evaluated under a "heightened standard" because it involved the President of the United States. The Chief Justice's answer was "no" and his opinion was joined by the

"liberal" wing of the Court. The two Trump appointees concurred in the judgment. So the vote count was 7-2. Justices Thomas and Alito separately dissented.

The beginning of the opinion presented a clear picture of where the Chief Justice was going to end.

> *In our judicial system, "the public has a right to every man's evidence." Since the earliest days of the Republic, "every man" has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by* federal courts.

(Emphasis added, footnote omitted,) Should the result be any different when the subpoena is issued by a *state* grand jury? The lower courts said it shouldn't be any different, and the Chief Justice agreed.

If you want a history lesson in subpoenas issued to Presidents, read the Chief Justice's opinion. He began with the subpoena issued by Aaron Burr to Thomas Jefferson in connection with the 1807 trial of Burr for treason. Chief Justice John Marshall presided over the trial. He rejected President Jefferson's claim that a President could not be subjected to a subpoena. *United States v. Burr*, 25 F. Cas. 30, 33–34 (No. 14,692d) (CC Va. 1807). The Chief Justice described Marshall's reasoning.

> *At common law the "single reservation" to the duty to testify in response to a subpoena was "the case of the king," whose "dignity" was seen as "incompatible" with appearing "under the process of the court."* Id., *at 34. But, as Marshall explained, a king is born to power and can "do no wrong."* Ibid. *The President, by contrast, is "of the people" and subject to the law.* Ibid. *According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects."* Ibid. *But, in Marshall's assessment, those demands were "not unremitting."* Ibid. *And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena.* Ibid.[18]

Then, in *United States* v. *Nixon*, 418 U. S. 683 (1974), the Court rejected President Nixon's argument that the Constitution provides an absolute privilege of confidentiality to all presidential communications. Two decades later, the Court "unequivocally and emphatically" endorsed Marshall's holding that Presidents are subject to subpoena in *Clinton* v. *Jones*, 520 U. S. 681, 704 (1997), rejecting President Clinton's challenge to a subpoena issued in a civil proceeding brought against him.

Nonetheless, President Trump made "a *categorical* argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment." (Emphasis in the original.) The Chief Justice rejected the claim.

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[18] Marshall also rejected President Jefferson's alternative argument that immunity from a subpoena should be granted because the executive's papers might contain state secrets. "Marshall acknowledged that the papers sought by Burr could contain information 'the disclosure of which would endanger the public safety,' but stated that, again, such concerns would have 'due consideration' upon the return of the subpoena. *Id.*, at 37."

As for diversion from his duties as Chief Executive, the case primarily relied on by Trump, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982), "did not hold that distraction was sufficient to confer absolute immunity, and "we expressly rejected immunity based on distraction alone 15 years later in *Clinton* v. *Jones*." In *Clinton*, the Court "recognized that Presidents constantly face myriad demands on their attention, 'some private, some political, and some as a result of official duty.' *Id.*, at 705, n. 40. But, the Court concluded, '[w]hile such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional . . . concerns.' *Ibid.*" The same conclusion applies to criminal subpoenas, the Chief Justice explained.

> *Just as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of" a President's time or attention, id., at 702, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.*

It was of no moment that the investigation related to potential criminal liability of the President, the Chief Justice added. "[T]the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term."

> *The President's objection therefore must be limited to the additional distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see* Burr, *25 F. Cas., at 34, even when the President is under investigation, see* Nixon, *418 U. S., at 706.*

As for the stigma of being subpoenaed and the claim of undermining his leadership, not even the Solicitor General endorsed this argument—"perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U. S., at 685; *Nixon*, 418 U. S., at 687." And once again, Trump was facing a historical record that disfavored his position.

> *But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation.* Branzburg v. Hayes, *408 U. S. 665, 691 (1972). Nor can we accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these associations in federal*

cases, supra*, at 6–10, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings.*[19]

And as for harassment, the Chief Justice again explained that the Court "rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would 'generate a large volume of politically motivated harassing and frivolous litigation.' *Clinton*, 520 U. S., at 708."

Undeterred by this precedent, the President and the Solicitor General argued that "state criminal subpoenas pose a heightened risk and could undermine the President's ability to 'deal fearlessly and impartially' with the States" (citation omitted), which employ 2,300 district attorneys who "are responsive to local constituencies, local interests, and local prejudices, and might 'use criminal process to register their dissatisfaction with' the President." The Chief Justice acknowledged that harassing subpoenas "could, under certain circumstances, threaten the independence or effectiveness of the Executive." However, in *Clinton* the Court held that the risk of harassment was not "serious" "because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. 520 U. S., at 708."

And in response to Justice Alito's argument that state prosecutors may have political motives, the Chief Justice recited existing legal principles to control abuse. First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" or investigations with an intent to harass. (Citation omitted.). Here, the district attorney wisely acknowledged that these protections "apply with special force to a President, in light of the office's unique position as the head of the Executive Branch." (Record citation omitted.) And federal courts are available to protect against abuse as well, the Chief Justice noted.

Second, again in response to Justice Alito's claim that the holding allows States to run "roughshod" over the Executive Branch, the Chief Justice explained that the Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. Again citing to the district attorney's brief, the Chief Justice said that any effort "to manipulate a President's policy decisions or to 'retaliat[e]' against a President for official acts through issuance of a subpoena, would thus be an unconstitutional attempt to 'influence' a superior sovereign 'exempt' from such obstacles." (Record and case citations omitted.) Again, if state courts and prosecutors do not observe constitutional limitations, federal law "allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here. See 42 U. S. C. §1983; *Ex parte Young*, 209 U. S. 123, 155–156 (1908) (holding that federal courts may enjoin state officials to conform their conduct to federal law)."

After then noting that all nine Justices agreed that absolute immunity is not "necessary or appropriate under Article II or the Supremacy Clause," the Chief Justice then rejected the claim that a "heightened need standard" should apply to a state court subpoena for three reasons.

[19] The Chief Justice added that grand juries conduct their work in secret and those "who make unauthorized disclosures regarding a grand jury subpoena do so at their peril." See, *e.g.*, N. Y. Penal Law Ann. §215.70 (West 2010) (designating unlawful grand jury disclosure as a felony)."

- First, such a heightened standard would extend protection designed for official documents to the President's private papers.
- Second, neither the Solicitor General nor Justice Alito has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions.
- Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire "all information that might possibly bear on its investigation." And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

(Citations omitted.)

The Chief Justice then described the protections available to any subpoena recipient: "the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth." In addition, a President "can raise subpoena-specific constitutional challenges, in either a state or federal forum." The Executive can also argue that compliance with a particular subpoena would impede his constitutional duties. (Record citation omitted.)[20]

There must be a celestial gleam in the eye of Chief Justice Marshall, as Chief Justice Roberts echoed Marshall's conclusion in his conclusion:

> *Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. The "guard[ ] furnished to this high officer" lies where it always has—in "the conduct of a court" applying established legal and constitutional principles to individual subpoenas in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system.* Burr, *25 F. Cas., at 34.*

[20] "Incidental to the functions confided in Article II is 'the power to perform them, without obstruction or impediment.' 3 J. Story, Commentaries on the Constitution of the United States §1563, pp. 418–419 (1833). As a result, 'once the President sets forth and explains a conflict between judicial proceeding and public duties,' or shows that an order or subpoena would 'significantly interfere with his efforts to carry out' those duties, 'the matter changes.' *Clinton*, 520 U. S., at 710, 714 (opinion of BREYER, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such 'interference with the President's duties would not occur.' *Id.*, at 708 (opinion of the Court)."

He then affirmed the court of appeals which had directed that "the case be returned to the District Court, where the President may raise further arguments as appropriate."[21]

While many eyes were on the votes of Justices Gorsuch and Kavanaugh, the Chief Justice's opinion gave them some cover but also allowed them to make a modest declaration of independence. Justice Kavanaugh's opinion concurring in the judgment made the strong statement that, "In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President." But he and his fellow Trump appointee, Justice Gorsuch, felt that the standard applied in the *Nixon* case should be applied here.

> *Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding* Nixon *"demonstrated, specific need" standard to this case. The majority opinion does not apply the* Nixon *standard in this distinct Article II context, as I would have done. That said, the majority opinion appropriately takes account of some important concerns that also animate* Nixon *and the Constitution's balance of powers. The majority opinion explains that a state prosecutor may not issue a subpoena for a President's personal information out of bad faith, malice, or an intent to harass a President, as a result of prosecutorial impropriety; to seek information that is not relevant to an investigation; that is overly broad or unduly burdensome; to manipulate, influence, or retaliate against a President's official acts or policy decisions; or in a way that would impede, conflict with, or interfere with a President's official duties. All nine Members of the Court agree, moreover, that a President may raise objections to a state criminal subpoena not just in state court but also in federal court. And the majority opinion indicates that, in light of the "high respect that is owed to the office of the Chief Executive," courts "should be particularly meticulous" in assessing a subpoena for a President's personal records*

(Citations and footnote omitted.)

Justice Thomas felt that the President should have the right to show that enforcement of the subpoena would interfere with his obligation to devote full time to the needs of the country and, if he could, he would be entitled to relief from the subpoena. Justice Alito rejected the absolute immunity argument as well, but believed that a heightened standard of review was appropriate when a subpoena involves the President of the United States. But they could not get even the two Trump appointees to agree with either of them.

The lower courts had found that the grand jury investigation was legitimately based on evidence of criminal conduct and made in good faith. And if no person is above the law, then there is no need for a heightened standard of review. The Chief Justice charted the same course that the country has followed for over 200 years.

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[21] On July 10, the day after the decision was issued, the federal judge handling the matter issued an order asking counsel to inform him "whether any further action was needed in light of the Supreme Court's ruling." "After Trump's Supreme Court Loss, D.A. Moves Closer to Getting Tax Records." New York Times, July 10, 2020.

Trump v. Mazar USA, LLP*: Remanding, the Court established guideposts for the lowers courts to consider in deciding whether to enforce three Congressional subpoenas issued to a bank and an accounting firm in possession of records and tax returns of President Trump*

In this 7-2 decision (Justice Thomas and Justice Alito filed dissenting opinions), the Chief Justice vacated two lower court decisions enforcing subpoenas issued by three Congressional committees to Deutsche Bank, the Trump organization's banker for many years, or Mazars USA, LLP, the accountants of the President and his business interests. This was a case of first impression. The Chief Justice explained that past congressional subpoena disputes with the Executive Branch had always been resolved by negotiation[22]; so, the Court had not had to face the issue of the appropriate standard of review until now. With an obvious eye not only on the present dispute, but also on setting standards for any such future disputes, and with an undertone that political, not legislative, motives may underlie a congressional subpoena,[23] the Chief Justice established the framework for evaluating the enforceability of a congressional subpoena.

The Chief Justice followed his typical methodical analysis by explaining that Congress does not have an enumerated power in the Constitution to issue subpoenas, but that the Court has held that the "power of inquiry" is an essential component of the power to legislate. (Citation omitted.) Since the power of inquiry is an "adjunct" power, it has limitations. First it must relate to and be in furtherance of "a legitimate task of the Congress." (Citation omitted.) Second, the congressional subpoena must not be issued for the power of "law enforcement," since that power belongs to the Executive Branch and the Judiciary. (Citation omitted.) Third, recipients of legislative subpoenas, "retain their constitutional rights throughout the course of an investigation."

The President and the Solicitor General argued that the House must establish a "demonstrated, specific need" for President Trump's financial information, just as the Watergate prosecutor was required to do to obtain the Nixon tapes during the Watergate investigation. They relied on *United States v. Nixon*, 418 U. S. 683 (1974) (federal prosecutor could obtain information from a President despite assertions of executive privilege); and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F. 2d 725 (CADC 1974) (*en banc*) (court of appeals refused to enforce a subpoena issued to President Nixon for the Nixon tapes, and the Senate did not seek review before the Court). The Chief Justice was unmoved.

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[22] The Chief Justice gave a nod to an old friend: "Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.' Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel)." He then followed up with numerous examples, both historic and recent.

[23] "[W]e recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice 'is a consideration of great weight' in cases concerning 'the allocation of power between [the] two elected branches of Government,' and it imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that [those] branches . . . themselves have reached.'" (Citation omitted, internal quotation marks omitted).

> *We disagree that these demanding standards apply here. Unlike the cases before us,* Nixon *and* Senate Select Committee *involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government."* Nixon*, 418 U. S., at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice."* Id.*, at 715. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations. . . .*
>
> *Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively.*

For its part, the House "would have us ignore that these suits involve the President." Again the Chief Justice was unmoved.

> *The House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see* Vance, ante, *p. ___;* Nixon, *418 U. S. 683. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another. . . .*
>
> *Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared.*

But, you might be saying to yourself, the House was seeking personal papers from third parties. Doesn't that eliminate any conflict between the two branches of government? The Chief Justice again was unmoved.

> *Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisan[t] to the humors of the Legislature." [The Federalist, No. 71, at 483]. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less*

> *significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.*
>
> *In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could side-step constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency.*

So how should the lower courts address the divide between the Executive and the Legislative branches when it comes to subpoenas that are not resolved by negotiation? A "balanced approach" is needed, the Chief Justice explained. "[C]ourts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." And what factors should courts take into account? The Chief Justice provided the menu.

- First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers.
    - "'[O]ccasion[s] for constitutional confrontation between the two branches should be avoided whenever possible." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*, 418 U. S., at 692).
    - Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective.
    - Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U. S., at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U. S., at 384; see *Senate Select Committee*, 498 F. 2d, at 732.
    - While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.
- Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective.
- Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose.
    - The more detailed and substantial the evidence of Congress's legislative purpose, the better.
    - That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency.

- In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation.

- Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena.
  - We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance*, *ante*, at 12–14; *Clinton*, 520 U. S., at 704–705.
  - But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.
- Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

(Citations omitted.)

Since the courts below "did not take adequate account of those concerns," their judgments were vacated and the cases remanded "for further proceedings consistent with this opinion."

Justice Thomas would "hold that Congress has no power to issue a legislative subpoena for private, nonofficial document—whether they belong to the President or not." His 21-page opinion (one page longer that the Chief Justice's opinion) gained no support from anyone on the Court. Justice Alito called Justice Thomas's argument "valuable" but assumed that Congress had the power to issue the subpoenas here. He dissented because he felt that the Court's standards were too lenient.[24] But he, too, could find no one else to join him.

What happens on remand? That may depend upon what happens in the grand jury investigation in New York. But credibility alone should cause the House committee subpoena-issuers to go forward with their proof of both a legitimate legislative purpose and the need for the documents in questions in support of that goal.

Bostock v. Clayton County*: Title VII's prohibition on discrimination "because of" "sex" includes employment decisions based on sexual orientation or sexual identity*

In this important and to some, surprising, decision, that actually involves two other cases, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* and *Altitude Express, Inc. v. Zarda*, the Court addressed whether the proscription of discrimination "because of" "sex" in Title VII of the Civil Rights Act of 1964 includes sexual orientation and sexual identity. Writing for six members of the Court (Justice Alito dissented and was joined by Justice Thomas, and Justice

[24] Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court's remand inadequate, I must respectfully dissent.

Kavanaugh separately dissented), Justice Gorsuch held that the words mean what they say and in so doing ended the ambiguity in the case law over the scope of Title VII's protection of gay and transgender employees.

The statutory text is straightforward. Title VII commands that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, *sex*, or national origin." 42 U. S. C. §2000e–2(a)(1). (Emphasis added.)

This example from Justice Gorsuch sums up his application of this text.

> *Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.*

I cannot emphasize enough the importance to Justice Gorsuch of the phrase "because of" sex. The Court's prior jurisprudence has made it clear that "because of" means "by reason of" or "on account of." *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. 338, 350 (2013) (citing *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009). "In the language of law," as Justice Gorsuch put it,

> *[T]his means that Title VII's 'because of' test incorporates the "'simple'" and "traditional" standard of but-for causation.* Nassar, *570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See* Gross, *557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.*
>
> *If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.*

Justice Gorsuch continued with more examples to illustrate that it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

> *Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer*

> *discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.*

Justice Gorsuch had three precedents that he repeatedly used to support the holding. *Phillips v. Martin Marietta Corp*., 400 U. S. 542 (1971) (per curiam), (company's policy of hiring men with young children but not women with young children discriminated "because of" sex even though there was an additional criterion (young children) and even though the employer tended to hire more women than men); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702 (1978) (requiring women to contribute more to a pension plan than men because they lived longer was discrimination "because of" sex); and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998) (sexual harassment of a male employee by his male co-workers stated a claim for discrimination because of sex because the plaintiff alleged that the harassment would not have occurred if he were female).

Whereas the dissenters focused on the word "sex" and suggested that a homosexual who was discharged would explain the discharge by saying it was because he or she was gay, not that the firing was "because of" sex, Justice Gorsuch explained that "these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause."

> *In* Phillips, *for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in* Phillips *discriminated against the plaintiff because of her sex. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.*

Justice Gorsuch also acknowledged that employers who will not hire gay or transgender applicants may not perceive themselves as motivated by a desire to discriminate based on sex, but held that "nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination."

> *In* Manhart, *the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In* Phillips, *the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole favored women. But in both cases, the Court set all this aside as irrelevant.*

Justice Gorsuch also rejected arguments made by Justice Alito and Justice Kavanaugh in their dissenting opinions that because homosexuality and transgender status can't be found in Title VII's list of protected classes, they are conceptually distinct from sex, and if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

Homosexuality and transgender status are distinct concepts from sex, Justice Gorsuch conceded, but "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

> *Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep.* Oncale, *523 U. S., at 79–80. Same with "motherhood discrimination." See* Phillips, *400 U. S., at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.*

The dissenting Justices also argued that postenactment legislative history (where amendments to add sexual orientation to Title VII's list of protected classes had failed) informed the meaning of "sex" in Title VII. That is walking on thin ice to Justice Gorsuch.

> *There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.* Pension Benefit Guaranty Corporation v. LTV Corp., *496 U. S. 633, 650 (1990); see also* United States v. Wells, *519 U. S. 482, 496 (1997);* Sullivan v. Finkelstein, *496 U. S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").*

The employers' last argument was that because they would fire a man attracted to a man and a woman attracted to a woman, there was not a violation. Justice Gorsuch was not impressed.

> *While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are*

> *mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to* Manhart, *where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in* Phillips, *where motherhood was the added variable.*

The employers tried a variation on their argument. The employers' policies have the same adverse consequences for men and women, so that cannot be discrimination. They failed again to persuade the majority.

> *[W]hen it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can also get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.*
>
> *At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute.*

The final argument made by the employers appealed to "assumptions and policy." With this Justice in particular, that approach fell on deaf ears also.

> *[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.*

(Citations omitted.)

Couching their position in terms of "expected applications" instead of "legislative intent" did not help because, again, the employers were focused on the difference between the concepts of "sex," "sexual identity," and "sexual orientation," instead of the statutory prohibition on discrimination "because of" "sex."

> *Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time.*

And what of extensions of the principle announced by the Court which the employers argued would generate adverse consequences? Justice Gorsuch had this reply.

> *What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are [sic] before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against' " refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.*

Finally, Justice Gorsuch presaged another decision of the Term (*Our Lady of Guadalupe School v. Morrissey-Berru*) when he addressed the intersection between religious beliefs and the Court's holding.

> *Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. §2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers."* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, *565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U. S. C. §2000bb et seq. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See §2000bb–3.*
>
> *But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.*

And, rest assured, there will be future cases.

Our Lady of Guadalupe School v. Morrissey-Berru*: The First Amendment "ministerial exception" to employment discrimination claims articulated* in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012) was "function" based and not title-based and was properly invoked by the district court in granting summary judgments against two Catholic school teachers who were involved in religious formation teaching and other Catholic-mission based training*

This 7-2 decision was written by Justice Alito. Justice Thomas wrote a concurring opinion which was joined by Justice Gorsuch. Justice Sotomayor dissented. Justice Ginsburg joined her opinion.

The facts are straightforward. There were two Catholic schools involved. In the first, Morrissey-Berru filed an age discrimination claim after her annual teaching contract was not renewed. She claimed that the school's decision was designed to replace her with a younger teacher. There was no dispute that she was involved in the religious formation of her students. Indeed, she was a religion teacher and was involved in all other aspects of Catholic school education—including preparation of students for receipt of the Sacraments. The school successfully moved for summary judgment based on the "ministerial exception" created by the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012), which Justice Alito describes.

> *The First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. We did not announce "a rigid formula" for determining whether an employee falls within this exception, but we identified circumstances that we found relevant in that case, including Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities.* Id.*, at 190–191.*

In the second case, Kristen Biel (now deceased) was also involved in the Catholic formation of her students in numerous ways. After one full year at her school, she did not have her contract renewed. She brought suit, claiming that she was not retained because she had requested a leave of absence to obtain treatment for breast cancer. She, too, lost on summary judgment based on the ministerial exception.

In both cases, the Ninth Circuit reversed, putting it at odds with other circuits who focused on the "ministerial function" of the employee in evaluating the application of the "ministerial exception." The Court sided with the other circuits.

> *The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters "'of faith and doctrine'" without government intrusion. State interference in that sphere would obviously violate the free exercise of religion,*

> *and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.*

(Citation omitted.)

One of the key components of the autonomy that religious institutions enjoy is the "selection of the individual who play certain key roles." Ministers, of course, fall into that category, and thus the "ministerial exception" was born. Referring to *Hosanna-Tabor*, Justice Alito explained: "The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government."

Then, after recounting historical facts on requirements placed upon teachers in religious schools and explaining that *Hosanna-Tabor* was not meant to be rigidly anchored to labels ("minister"), and citing to his own concurrence in that case (joined by Justice Kagan) that urged a focus on "function" and not labels, Justice Alito held that what matters is—you guessed correctly—function.

> *What matters, at bottom, is what an employee does. And implicit in our decision in* Hosanna-Tabor *was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. As we put it, Perich had been entrusted with the responsibility of "transmitting the Lutheran faith to the next generation." 565 U. S., at 192. One of the concurrences made the same point, concluding that the exception should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or* teacher of its faith*."* Id*., at 199 (opinion of ALITO, J.) (emphasis added).*

And by this standard Morrissey-Berru and Biel fell within the exception.

> *There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers*

> *of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.*

Justice Thomas wrote separately to emphasize that courts should give deference to a religious institution's "good faith claims that a certain employee's position is 'ministerial.'" Note that Justice Gorsuch, who wrote *Bostock*, joined in this concurrence. Readers will ask themselves if such a subjective standard will find its way into future *Bostock*-related litigation arguments.

Referring to its holding, Justice Sotomayor accused the majority of "skewing the facts":

> *The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable standard of review, and collapses* Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of school-teachers of their legal protections, I respectfully dissent.*

As I said above, you can expect more litigation in which *Bostock* and *Morrissey-Berru* will be cited many, many times.

Ramos v. Louisiana*: The Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense, overruling* Apodaca v. Oregon, *40 U. S. 404 (1972) (plurality opinion)*

You need a scorecard for this one. The vote was 6-3. Justice Gorsuch delivered the opinion of the Court.

- Parts I, II-A, III, and IV-B-1 received five votes (Justice Ginsburg, Breyer, Sotomayor, and Kavanaugh joined him).
- Parts II-B, IV-B-2 and V were joined only by Justices Ginsburg, Breyer, and Sotomayor.
- Part IV-A was joined only by Justices Ginsburg and Breyer.
- Justice Sotomayor filed an opinion concurring in all but Part IV-A. Justice Kavanaugh also filed an opinion concurring in part.
- Justice Thomas filed an opinion concurring in the judgment.
- Justice Alito filed a dissenting opinion. He was joined by the Chief Justice and, except for part III-D, by Justice Kagan.

Whew![25] The issue was Louisiana's rule that a criminal defendant can be found guilty of a serious crime (*e.g.*, a felony) without a unanimous verdict—a 10-2 or 11-1 jury verdict would still result in a

[25] My discussion below draws on only the opinion of the Court, and not the parts of Justice Gorsuch's opinion that garnered only two or three other votes.

conviction. Louisiana and Oregon are the only two states that allow such a result, and both states originally adopted this process decades ago for racist reasons.[26] And Louisiana has now amended its rules to require unanimous verdicts in cases involving serious crimes. But that change would not help Ramos. He had to convince the Court that the Sixth Amendment right to a jury trial[27] requires a unanimous verdict in state courts as well as federal courts. And to do that, he had to convince the Court to overrule *Apodaca v. Oregon*, 40 U S. 404 (1972) (plurality opinion) and a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), where non-unanimous verdicts for serious crimes were allowed but without a majority opinion. Justice Gorsuch describes the outcome in *Apodaca*. To make sense of his explanation, remember that many, but not all, of the rights identified in the Bill of Rights have been applied to the States through "incorporation"—i.e. through the Fourteenth Amendment.

> *Four dissenting Justices would not have hesitated to strike down the States' laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important "function" in "contemporary society." Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon.*
>
> *The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of "history and precedent, . . . the Sixth Amendment requires a unanimous jury verdict to convict." But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in "dual-track" incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.*

Ramos was successful. Louisiana did not try to defend Justice Powell's approach. It instead suggested that the Court should decide that the Sixth Amendment did not require a unanimous verdict in cases involving serious crimes. Justice Gorsuch respected the State's candor but rejected the State's

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[26] "Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements. . . . [T]he delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'" "Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'" (Citations omitted.)

[27] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

argument. Referring to both *Apodaca*'s cost-benefit analysis and Louisiana's effort to rewrite history, he held:

> *Our real objection here isn't that the* Apodaca *plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. And Louisiana asks us to repeat the error today, just replacing* Apodaca*'s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury included a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.*

Justice Alito's dissent emphasized the role of *stare decisis* but Justice Gorsuch (in Part IV-B-1) was having none of that.

> *Even if we accepted the premise that* Apodaca *established a precedent, no one on the Court today is prepared to say it was rightly decided, and* stare decisis *isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But* stare decisis *has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." In this case, each factor points in the same direction.*

I will spare readers Justice Gorsuch's application of *stare decisis* here because you know the outcome: *Apodaca* was overruled.

Justice Sotomayor's concurring opinion emphasizes the wrongness of *Apodaca*, and why the racially biased origins of Louisiana and Oregon's laws "uniquely matter here."

Justice Kavanaugh's opinion can be found at https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf. It is worth reading. He offers a comprehensive look at the origin of the doctrine of *stare decisis* which is derived from the Latin maxim "*stare decisis et non quieta movere*" (stand by the thing decided and do not disturb the calm). After reviewing the Court's precedents, he writes:

> *The* stare decisis *factors identified by the Court in its past cases include:*

- *the quality of the precedent's reasoning;*
- *the precedent's consistency and coherence with previous or subsequent decision;*
- *changed law since the prior decision;*
- *changed facts since the prior decision;*
- *the workability of the precedent;*
- *the reliance interests of those who have relied on the precedent; and*
- *the age of the precedent.*

> *But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply* stare decisis *principles in a neutral and consistent manner.*

In his view, the Court's "varied and somewhat elastic *stare decisis* factors fold into three broad considerations." They are:

1. Is the prior decision not just wrong, but grievously or egregiously wrong?
2. Has the prior decision caused significant negative jurisprudential or real-world consequences?
3. Would overruling the prior decision unduly upset reliance interests?

According to Justice Kavanaugh, *Apodaca* "is egregiously wrong," and causes "significant negative consequences," and overruling it would not "unduly upset reliance interests." This opinion will be studied often by all future advocates in the Court.

Justice Thomas concurred in the judgment on his view that there was no need to conduct an analysis of what it means to have a "trial . . . by an impartial jury" (as Justice Gorsuch conducted) when the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts. And since he is not a fan of the Court's use of the due process clause of the Fourteenth Amendment to incorporate certain rights against state action, he added, as he has done often, that the Privileges and Immunities Clause[28] should be the incorporation vehicle.

Justice Alito, whose respect for *stare decisis* has been a subject of study itself, based his opinion on *stare decisis* and, to be fair, his fear that overruling *Apodaca* "imposes a potentially crushing burden on the courts and criminal justice systems of those States." The majority obviously felt that was hyperbole but more than that, it was important to do the right thing, as Justice Gorsuch concluded.

> *On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests*

[28] The Privileges or Immunities Clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amdt. 14, §1.

that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.

ORDERS DENYING INJUNCTIVE RELIEF

Police Power under COVID-19

South Bay United Pentecostal Church v. Newsom*: In an opinion relating to an order, the Court denied an application for injunctive relief from a COVID-19 order limiting attendance at places of worship to 25% of the building's capacity or a maximum of 100 attendees*

On May 20, 2020, the Chief Justice provided the fifth vote (joining the "liberal wing" of the Court) to deny an application for injunctive relief sought by a church who objected to the decision by the Governor of California to limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. Justice Kavanaugh dissented. He was joined by Justices Thomas and Gorsuch. The issue? Whether the First Amendment barred the alleged discrimination between houses of worship and allegedly "comparable secular businesses."

There was no "majority" opinion. Instead, the Chief Justice offered these illuminating views on the authority of government to impose restrictions in the face of a pandemic. I quote his opinion in full.

> *The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.*
>
> *Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been with- held by lower courts."* Respect Maine PAC v. McKee, *562 U. S. 996 (2010) (internal quotation marks omitted). This power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K.*

Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, *197 U. S. 11, 38 (1905). When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad."* Marshall v. United States, *414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See* Garcia v. San Antonio Metropolitan Transit Authority, *469 U. S. 528, 545 (1985).*

That is especially true where, as here a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

***Calvary Chapel Dayton Valley v. Sisolak**: Order denying application for injunctive relief in connection with Nevada Governor's restriction on the capacity of places of worship to no more than 50 persons*

On July 24, 2020, the Court rejected another application for injunctive relief brought by a church--this time in Nevada--due to a COVID-19 restriction on a place of worship (to no more than 50 persons). This time Justice Alito decided to write a dissent. He was joined by Justice Thomas and Justice Kavanaugh. Justice Gorsuch also dissented. They argued that because casinos could admit 50% of their maximum occupancy, Nevada discriminated against the free exercise of religion. The Chief Justice did not bother to repeat his earlier order. But clearly he was not going to allow the Court to become involved in the politicization of a public health pandemic.

OTHER DECISIONS OF NOTE

The discussion below covers other decisions of note in the 2019-20 Term, some in pithy detail.

Affordable Care Act

Maine Community Health Options v. United States*: The Affordable Care Act's Risk Corridors program created a mandatory Government obligation to pay insurers who took the risk of loss on plans they sold on the healthcare exchanges, that obligation was not repealed by two appropriation riders limiting payments under the program; and the Tucker Act provided an avenue to the insurers to obtain the $12 billion they were owed under the program*

In this 8-1 decision written by Justice Sotomayor (Justice Alito dissented), petitioners were insurers who claimed losses under what is called the "Risk Corridors" program of the Patient Protection and Affordable Care Act (ACA). The ACA ("Obamacare" to many) expanded health care coverage to many Americans who could not otherwise afford it by, among other things, "providing tax credits to help people buy insurance and establishing online marketplaces where insurers could sell plans." Insurers, however, had to be incentivized to provide plans within these marketplaces (called "exchanges"). Why? To set a premium, an insurer has to be able to calculate risk. But there was not "reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage." (Citation omitted.) So the ACA created risk-mitigation programs, including the Rick Corridors program.

And what is the Risk Corridors program? To change the metaphor slightly, think of a floor and a ceiling. The Risk Corridors program was designed to limit profits and losses of an insurer who offered plans for the exchanges' first three years (2014-16) through a formula that computed a plan's gains and losses at the end of each year. Plans with profits above a certain threshold "would pay the Government." However, plans with losses below that threshold would receive payments from the Government. Referring to 42 U. S. C. §18062, Justice Sotomayor wrote:

> *Specifically, §1342 stated that the eligible profitable plans "shall pay" the Secretary of the Department of Health and Human Services (HHS), while the Secretary "shall pay" the eligible unprofitable plans.*

In 2010, Congress did not appropriate funds for the potential payments that the "Secretary" would have to make, however. Nor did the Congressional Budget Office (CBO) calculate the budgetary impact of the Risk Corridors program. Indeed, in 2014, the CBO reported that risk corridor collections would not necessarily equal risk corridor payments and thus would impact the budget deficit. Nine months before the Risk Corridors program started, the Department of Health and Human Services (HHS) provided an assurance that if payments were required to be made under the Risk Corridors program, it would remit them. The Centers for Medicare and Medicaid Services (CMS), which was involved in collecting and remitting payments, confirmed the Government's payment obligation.

You know what happened next. In year one, profitable plans owed the Government $362 billion. However, unprofitable plans *were due* $2.87 billion from the Government. In the second year, the

shortfall was about $5.5 billion. In the final year of the program, the shortfall was $3.95 billion. These shortfalls were never paid by the Government, but each year, CMS recognized the Government's payment obligation in its public statements.

Despite the payment obligation in Section 1342, Congress adopted two appropriation bills (for the 2014-15 and 2015-2016 fiscal years) that contained this rider: "**None of the funds made available by this Act** . . . or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, m**ay be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors**)." (Citation omitted, emphasis added.)

"What!" you probably exclaimed. "Congress made a promise to pay and then reneged on the promise!"

Yep. That's what happened. The insurers who brought Tucker Act[29] claims were told by the Federal Circuit that Congress's riders "impliedly" repealed or suspended the Government's obligations. And the Supreme Court told the Federal Circuit it was wrong.

The Court held that Section 1342 means what it says. The Government had an obligation to pay insurers the full amount set forth in the statutory formula. Now, you may remember that Government expenses are usually paid only after an appropriation is made. But that is not always the case. "Put succinctly, Congress can create an obligation directly through statutory language." And that's what happened here: "Section 1342 imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges." Section 1342 uses the word "shall" three times ("shall establish and administer," "shall provide" and "shall pay"). Other provisions "underscore" the "mandatory nature" of the payment obligation. I will not restate them all here, but you get the gist. The "Government 'shall pay' the sum that §1342 prescribes."

The Government tried to shoehorn the law into an obligation subject to available appropriations, but since that language did not appear in Section 1342 (but did in other provisions of the ACA), Justice Sotomayor rejected the argument.

Justice Sotomayor then quickly rejected an "implied" repeal of Section 1342. Implied repeals are "disfavored" in the Court's jurisprudence and there was no evidence that the appropriations riders "manifestly repealed or discharged the Government's uncapped obligation," as both HHS and CMS confirmed in their public statements.

Finally, the Court held that the Tucker Act was applicable here so as to avoid a governmental claim of sovereign immunity. The Tucker Act permits "claim[s] against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. §1491(a)(1). To determine whether a claim falls within this language, the Court employs a "fair interpretation" test.

[29] The Tucker Act of 1887 is a federal statute by which the U.S. government waives sovereign immunity for certain types of claims, as described more fully below.

> *A statute creates a "right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"*

The Risk Corridors statute "is fairly interpreted as mandating compensation for damages," and possible exceptions to this conclusion were not applicable, Justice Sotomayor explained.

If you are wondering what the prejudgment interest is on $12 billion, I do not know. I do not even know if prejudgment interest would be available here. But the lesson is clear. Congress has to pay what it owes when it unequivocally creates a statutory obligation to pay.

Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*: The relevant Government agencies were authorized by ACA's text to issue religious and "moral" exemptions from contraceptive coverage and, procedurally, did not violate the Administrative Procedures Act in doing so, leaving for resolution on remand whether the exemptions were issued in compliance with the substantive requirements of the APA and how the Religious Freedom and Restoration Act applies to entities affected by the exemptions*

In this 7-2 decision written by Justice Thomas (Justice Kagan concurred in the judgment and was joined by Justice Breyer; Justice Ginsburg dissented and was joined by Justice Sotomayor), the saga of contraceptive coverage under the Affordable Care Act continues.

Those with good Supreme Court memories know that the Government mandated contraceptive coverage under the ACA, was sued, and then through the Departments of Health and Human Services (HHS), Labor, and Treasury, announced that employers who have religious and conscientious objections were exempt from the contraceptive mandate. In general, all they had to do was provide a copy of a certification that they were a nonprofit entity with religious objections and their health insurer would exclude contraceptive coverage from the employers' group health plans and provide payments to beneficiaries for contraceptive services outside of the employers' health plans.

This so-called "self-certification accommodation" was still objectionable to the petitioner and others. They claimed that completing the certification would force them to violate their religious beliefs against contraception, because it would cause others to provide contraceptive coverage. They also invoked the Religious Freedom Restoration Act of 1993 (RFRA). Under it, a law that substantially burdens the exercise of religion must serve "a compelling governmental interest" and be "the least restrictive means of furthering that compelling governmental interest." (Citation omitted.) Then in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682, 696–97 (2014), the Court

> *held that the mandate substantially burdened respondents' free exercise, explaining that "[if] the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price."* Id*., at 691. "If these consequences do not amount to a substantial burden," we stated, "it is hard to see what would."* Ibid*. We also held that the mandate did not utilize the least restrictive means, citing the self-certification accommodation as a less burdensome alternative.* Id*., at 730–731.*

Thereafter, now under the Trump administration, the various Government Departments involved issued two Interim Final Rules (IFRs) that broadened the definition of an exempt religious employer; recognized that the RFRA compelled the creation of, or provided the discretion to create, the religious exemption; and provided a "moral exemption" if an employer had a sincerely held moral objection to providing some or all forms of contraceptive coverage. Publicly-traded and for-profit companies were covered by these IFRs.

You have to understand one more feature of the statute to comprehend the Court's analysis of the regulatory authority to promulgate these exemptions. The Health Resources and Service Administration (HRSA), an agency of HHS, was charged by Congress to develop guidelines for "preventive care and screenings" in health care coverages. ACA, however, does not define "preventive care and screenings," and does not include "an exhaustive or illustrative list of such services." In other words, "the statute itself does not explicitly require coverage for any specific form of 'preventive care.'" (Citation omitted.)

Instead, Congress stated in Section 300gg–13(a)(4) that coverage must include "such additional preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration." (Emphasis added.)

At the time of the ACA's enactment, these guidelines were not written. "As a result, no specific forms of preventive care or screenings were (or could be) referred to or incorporated by reference."

In short, there was this blank slate that had to be completed. Relying on the phrase, "as provided for," in §300gg–13(a)(4) for the authority to fill in this blank slate, the IFRs were made final rules. You should note, as Justice Ginsburg points out, HRSA, the expert in this field, did not craft the exemptions. That was done by the Internal Revenue Service, CMS, and the Employee Benefits Security Administration, despite the statutory reference to guidelines supported by the HRSA.

Suits were then brought by Pennsylvania and New Jersey challenging the rules as procedurally and substantively invalid under the Administrative Procedure Act. They obtained a preliminary injunction against enforcement of the rules. The Third Circuit affirmed. It held that the Departments lacked the authority to craft the exemptions under either 42 U. S. C. §300gg–13(a)(4) or the RFRA. As a result, the court of appeals did not reach the issue of whether the exemptions were arbitrary and capricious in violation of the Administrative Procedures Act (APA).

Before the Court, the Government maintained that that the phrase "as provided for" in 42 U. S. C. §300gg–13(a)(4) allows HRSA "both to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers' religious objections."

Justice Thomas ultimately agreed.

> *By its terms, the ACA leaves the Guidelines' content to the exclusive discretion of HRSA. Under a plain reading of the statute, then, we conclude that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions.*

Now you may be wondering about separation of powers and how *this* Court would allow such a broad delegation of authority to an administrative agency. The answer is simple: No one raised the issue.

> *No party has pressed a constitutional challenge to the breadth of the delegation involved here. The only question we face today is what the plain language of the statute authorizes. And the plain language of the statute clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions.*

And what about the RFRA? Well, Justice Thomas decided that he did not have to decide whether that law either compelled or authorized the Departments' religious and moral exemption solution, but then proceeded, presumably in response to Justice Ginsburg's dissent, to discuss why the RFRA could not be ignored.

> *The Departments also contend, consistent with the reasoning in the 2017 IFR and the 2018 final rule establishing the religious exemption, that RFRA independently compelled the Departments' solution or that it at least authorized it. In light of our holding that the ACA provided a basis for both exemptions, we need not reach these arguments. We do, however, address respondents' argument that the Departments could not even consider RFRA as they formulated the religious exemption from the contraceptive mandate. Particularly in the context of these cases, it was appropriate for the Departments to consider RFRA.*
>
> . . .
>
> *It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as "Federal law" or "the implementation of [Federal] law." §2000bb– 3(a); cf.* Chrysler Corp. v. Brown, *441 U. S. 281, 297–298 (1979). Additionally, we expressly stated in* Hobby Lobby *that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections. 573 U. S., at 736. Thus, the potential for conflict between the contraceptive mandate and RFRA is well settled. Against this backdrop, it is unsurprising that RFRA would feature prominently in the Departments' discussion of exemptions that would not pose similar legal problems.*

There was another issue: whether the 2018 final rules are procedurally invalid. Respondents presented two arguments (there was not a proper notice of proposed rulemaking, and the Departments did not have an "open mind" since the final rule looked basically like the interim rule), but neither was successful (the notice was adequate, and rejecting the "open-mindedness test," the Departments satisfied the APA's objective criteria).

Justice Ginsburg's dissent highlights the authority given to HRSA and the consequences to women resulting from the Court's decision.

> *Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree. Specifically, in the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), 124 Stat. 119; 155 Cong. Rec. 28841 (2009), Congress undertook to afford gainfully employed women comprehensive, seamless, no-cost insurance coverage for*

> *preventive care protective of their health and well-being. Congress delegated to a particular agency, the Health Resources and Services Administration (HRSA), authority to designate the preventive care insurance should cover. HRSA included in its designation all contraceptives approved by the Food and Drug Administration (FDA).*
>
> *Destructive of the Women's Health Amendment, this Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result. Nor does the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb et seq., condone harm to third parties occasioned by entire disregard of their needs. I therefore dissent from the Court's judgment, under which, as the Government estimates, between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services.*

Is this the end? It is not. For the remand, the respondents will still be able to argue that the Departments engaged in arbitrary decision making—i.e., that they lacked a reasoned basis for their decision. This fact set up the battle between Justice Alito's and Justice Kagan's respective opinions.

Justice Alito would have reached the RFRA question to bring this matter to an end based on his view of the scope of the RFRA.

> *If RFRA requires this exemption, the Departments did not act in an arbitrary and capricious manner in granting it. And in my judgment, RFRA compels an exemption for the Little Sisters and any other employer with a similar objection to what has been called the accommodation to the contraceptive mandate.*

That he could not convince his conservative brethren on the Court to go this far at this time may reflect the influence and caution of the Chief Justice.

Justice Kagan questioned whether the exemptions could survive administrative challenge on remand. Out of respect for *Chevron* deference (see *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–43 (1984)), which she favors as we know from her decision in *Kisor v. Wilkie* last term, she was prepared to say the exemptions could be issued. But she felt that, on remand, the exemptions will fail the test of reasoned decisionmaking.

> *Most striking is a mismatch between the scope of the religious exemption and the problem the agencies set out to address. In the Departments' view, the exemption was "necessary to expand the protections" for "certain entities and individuals" with "religious objections" to contraception. 83 Fed. Reg. 57537 (2018). Recall that under the old system, an employer objecting to the contraceptive mandate for religious reasons could avail itself of the "self-certification accommodation." . Upon making the certification, the employer no longer had "to contract, arrange, [or] pay" for contraceptive coverage; instead, its insurer would bear the services' cost. 78 Fed. Reg. 39874 (2013). That device dispelled some employers' objections—but*

> *not all. The Little Sisters, among others, maintained that the accommodation itself made them complicit in providing contraception. The measure thus failed to "assuage[]" their "sincere religious objections." 82 Fed. Reg. 47799 (2017). Given that fact, the Departments might have chosen to exempt the Little Sisters and other still-objecting groups from the mandate. But the Departments went further still. Their rule exempted all employers with objections to the mandate, even if the accommodation met their religious needs. In other words, the Departments exempted employers who had no religious objection to the status quo (because they did not share the Little Sisters' views about complicity). The rule thus went beyond what the Departments' justification supported—raising doubts about whether the solution lacks a "rational connection" to the problem described.*

(Citations omitted.)

She offered other reasons—a roadmap if you will for the district court and the States on remand. Since that chapter will soon be written, and there is a Presidential election in November that might result in still more changes in this arena, I will await the results of what is sure to be another Supreme Court opinion that confronts the application of the RFRA to whatever exemptions end up next before the Court.

Age Discrimination in Employment Act

***Babb v. Wilkie**: Federal employees suing under the Age Discrimination in Employment Act need not show "but-for" causation to prove discrimination, but must show "but-for" causation to secure monetary relief or other forms of relief related to the end result of an employment decision*

The part of the Age Discrimination in Employment Act (ADEA) that applies to federal employees provides: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . *shall be made free from any discrimination based on age*." 29 U. S. C. §633a(a). (Emphasis added.)

You learned all about "but-for" causation in *Bostock*, *supra*. Does this ADEA language quoted above contemplate a but-for test or something less? In this 8-1 decision (Justice Thomas dissented), Justice Alito decided it was something less: The phrases "free from" and "shall be made" were too much for the Government to overcome: "The plain meaning of the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation of §633a(a)."

Employment lawyers know this, but the result means that the Government is held to a higher standard under the ADEA than a private employer is (where the text is the more familiar prohibition of discrimination "because of such individual's age"). But that's the law:

> *We are not persuaded by the argument that it is anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments. That is what the statutory language dictates, and if Congress had wanted to impose the same standard on all employers, it could have easily done so.*

However, "but-for causation" still plays a role in the appropriate remedy.

> *It is bedrock law that "requested relief" must "redress the alleged injury."* Steel Co. v. Citizens for Better Environment, *523 U. S. 83, 103 (1998). Thus, §633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back-pay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome.*
>
> *. . . Remedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination. But this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result.*
>
> *Although unable to obtain such relief, plaintiffs are not without a remedy if they show that age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself. In that situation, plaintiffs can seek injunctive or other forward-looking relief.*

Sound confusing? Well, it is a bit confusing. Try this: If an employer can prove it would have made the personnel decision irrespective of age, then a federal plaintiff is not entitled to relief as a result of the differential treatment (because the decision would have been made anyway), but may still be able to secure injunctive relief.

Arbitration

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC: *The New York Convention does not limit the application of domestic law to an agreement to arbitrate.*

Most lawyers have never heard of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or even its more familiar name, the New York Convention. But to the international arbitration world, the New York Convention was the sparkplug to ignite the explosion in international arbitrations throughout the world as a means to resolve cross-border disputes. But this case is not about enforcing an award, which signatories to the Convention agree to do, subject to certain limited defenses. Rather it is about Article II of the Convention, and specifically the sentence that requires each "Contracting State" to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Now you may be wondering why there would be any difficulty determining whether two parties entered into an agreement in writing to arbitrate. Well, consider these facts. ThyssenKrupp Stainless USA, LLC entered into three contracts with F. L. Industries, Inc. to construct cold rolling mills for a steel plant and to provide motors for the mills. The contract contained an arbitration clause. F. L.

Industries subcontracted the work to GE Energy Power Conversion France SAS, Corp. (GE Energy). GE Energy delivered nine motors to the steel plant. Outokumpu Stainless USA, LLC acquired the plant from ThyssenKrupp. It claimed that the motors failed. Outokumpu sued GE Energy in state court. GE Energy removed the matter to federal court under 9 U. S. C. §205, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement . . . falling under the" New York Convention. GE Energy then moved to compel arbitration. The district court granted the motion because the contracts in issue defined a "Seller" and "Parties" to include subcontractors. Voila! GE Energy was a signatory to a contract in writing that required arbitration.

Not so fast, said the Eleventh Circuit. It held that the New York Convention required that the parties "actually sign" an agreement to arbitrate their disputes. Since GE Energy did not "sign" the agreements in issue, it could not compel arbitration. The Eleventh Circuit further held that a state-law equitable estoppel doctrine could not be relied upon to enforce the arbitration agreement because that doctrine conflicts with the Convention's signatory requirement.

There is no question that equitable estoppel is available to enforce an arbitration clause under the Federal Arbitration Act.

> *Generally, in the arbitration context, "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the non-signatory." In [*Arthur Andersen LLP v Carlisle, *556 U. S. 624 (2009)], we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. 556 U. S., at 631–632.*

(Citation omitted.) Should the result be different under the New York Convention? In this unanimous decision, Justice Thomas gave the answer, "No." His reasoning was straightforward.

- The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it."
- This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines.
- The text of Article II(3) states that courts of a contracting state "shall . . . refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration. The provision, however, does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. That is, Article II(3) provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements. Article II(3) contains no exclusionary language; it does not state that arbitration agreements shall be enforced only in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language.

(Citations omitted.) Justice Thomas also reviewed the drafting history of the Convention, concluding that to the extent it has any relevance, it shows "only that the drafters sought to impose baseline requirements on contracting states." He also looked to decisions from other contracting states, concluding that the "weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements."

Justice Thomas then set forth what should happen on remand.

> *Because the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination. Those questions can be addressed on remand. We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.*

The sole footnote in Justice Sotomayor's concurring opinion, however, describes what is going to happen.

> *I am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy. The contract provided that disputes arising between the buyer and seller in connection with the contract were subject to arbitration. App. 171. It also specified that the seller in the contract "shall be understood" to include "[s]ub-contractors."* Id*., at 88– 89. And it appended a list of potential subcontractors, one of which was GE Energy's predecessor, Converteam.* Id*., at 184–185.*

In other words, "See you in arbitration."

Bankruptcy

Ritzen Group, Inc. v. Jackson Masonry, LLC*: Adjudication of a motion for relief from the automatic stay in bankruptcy is a final appealable order when the bankruptcy court unreservedly grants or denies relief*

I need not dwell long on this opinion. Generally speaking, under 28 U. S. C. §1291, a party may appeal to a court of appeals as of right from "final decisions of the district courts." A "final decision" within the meaning of §1291 "is normally limited to an order that resolves the entire case. Accordingly, the appellant must raise all claims of error in a single appeal." This understanding of the term 'final decision' precludes 'piecemeal, prejudgment appeals' that would 'undermin[e] efficient judicial administration and encroac[h] upon the prerogatives of district court judges.'" (Citations omitted.)

But deciding what is a "final order" in bankruptcy can be tricky because there can be numerous individual controversies in a bankruptcy proceeding that would exist as stand-alone actions "but for the bankrupt status of the debtor." (Citation omitted.) There is, however, a statutory solution. Under 28 U. S. C. §158(a), an appeal of right lies from "final judgments, orders, and decrees" entered by bankruptcy courts "in cases and *proceedings*." (Emphasis added.)

> *By providing for appeals from final decisions in bankruptcy "**proceedings**," as distinguished from bankruptcy "cases," Congress made "orders in bankruptcy cases . . . immediately appeal[able] if they finally dispose of discrete disputes within the larger [bankruptcy] case."*

(Emphasis added.)

This is an area where you have to get things right.

> *Correct delineation of the dimensions of a bankruptcy "proceeding" is a matter of considerable importance. An erroneous identification of an interlocutory order as a final decision may yield an appeal over which the appellate forum lacks jurisdiction. Conversely, an erroneous identification of a final order as interlocutory may cause a party to miss the appellate deadline.*

What happened here? Ritzen had an action against the debtor in state court that was halted by the automatic stay provision of the Bankruptcy Code. He filed a motion for relief from the stay to allow the state court case to proceed. The motion was denied. He never appealed then. After a plan of reorganization was confirmed, Ritzen appealed the order denying relief from the stay. The court of appeals held that the appeal was untimely.

Was the stay-adjudication a "proceeding" and thus appealable as a "final order"? Writing for a unanimous court, Justice Ginsburg said it was. Agreeing with the court of appeals, Justice Ginsburg held that adjudication of a stay-relief motion is a discrete "proceeding."

> *A bankruptcy court's order ruling on a stay-relief motion disposes of a procedural unit anterior to, and separate from, claim-resolution proceedings. Adjudication of a stay-relief motion, as just observed, occurs before and apart from proceedings on the merits of creditors' claims: The motion initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard, i.e., "cause" or the presence of specified conditions. [11 U. S. C.] §362(d), (e); Fed. Rules Bkrtcy. Proc. 4001(a)(1) and (2), 9014 (describing procedure for adjudicating motions for relief from automatic stay). Resolution of stay-relief motions does not occur as part of the adversary claims-adjudication process, proceedings typically governed by state substantive law. See* Butner v. United States, *440 U. S. 48, 54–55 (1979). Under [*Bullard v. Blue Hills Bank, *575 U. S. 496, 501 (2015)], a discrete dispute of this kind constitutes an independent "proceeding" within the meaning of 28 U. S. C. §158(a). 575 U. S., at 502–505.*

It pays to be cautious in the law when it comes to deciding whether an order is final. Ritzen learned that lesson the hard way.

***Rodriguez v. FDIC**: State law, not federal common law, should determine the allocation of a tax refund among multiple claimants.*

This unanimous decision (Justice Gorsuch wrote it) is nominally about the allocation of a tax refund when there are multiple claimants seeking the refund. This issue happened to arise in bankruptcy court but the case is not about bankruptcy issues either.

It is really about the creation of federal common law. To resolve the allocation of the tax refund, the lower courts utilized the *Bob Richards* doctrine. You do not even need to know what the doctrine is. You just have to know that it was created as "federal common law" by a federal judge. And thus it was doomed unless it involved protection of uniquely federal interests—and it did not.

> *Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. See Art. I, §1; Amdt. 10. As this Court has put it, there is "no federal general common law."* Erie R. Co. v. Tompkins, *304 U. S. 64, 78 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision.* Sosa v. Alvarez-Machain, *542 U. S. 692, 729 (2004). These areas have included admiralty disputes and certain controversies between States. See,* e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd., *543 U. S. 14, 23 (2004);* Hinderlider v. La Plata River & Cherry Creek Ditch Co., *304 U. S. 92, 110 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'"* Texas Industries, Inc. v. Radcliff Materials, Inc., *451 U. S. 630, 640 (1981) (quoting* Banco Nacional de Cuba v. Sabbatino, *376 U. S. 398, 426 (1964)).*
>
> *Nothing like that exists here.*

The case was remanded for application of state law to resolve the allocation.

Civil Rights Section 1981

***Comcast Corp. v. National Assn. of African-American Owned Media**: To state a claim under 42 U. S. C. §1981 for damages, a plaintiff must allege "but-for" causation*

Under 42 U. S. C. §1981(a), "All persons" are guaranteed "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." This statutory right was the basis of Entertainment Studios Network (ESN)'s claim that Comcast, the operator of cable television networks, was liable in damages for its failure to agree to carry ESN's various television networks. The complaint alleged that Comcast disfavored 100% African American-owned media companies in violation of Section 1981.

ESN did not dispute that, during negotiations, Comcast offered legitimate business reasons for refusing to carry ESN's channels. But it argued that these reasons were "pretextual." After considerable motion practice, however, the complaint was dismissed.

The Ninth Circuit reversed. It held that under Section 1981, a plaintiff needs to show that race played only "some role" in the defendant's decisionmaking process. In other words—to use a phrase in vogue in the 2019-20 Term—"but-for" causation was not required. Other circuits had reached a different conclusion. Writing for a unanimous court (Justice Ginsburg concurred in the judgment), Justice Gorsuch agreed with the other circuits.

ESN accepted the principle that a plaintiff seeking redress in tort must prove but-for causation. This is also the default rule against which Congress is "normally presumed to have legislated when creating its own new causes of action." ESN did not "seriously dispute" this principle either. Instead it argued that Section 1981 created an exception to these principles.

Looking at the text of the statute, its history, and the Court's precedents, Justice Gorsuch disagreed.

As to text,

> *Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves. Section 1 of that statute included the language found codified today in §1981(a), promising that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." 42 U. S. C. §1981; Civil Rights Act of 1866, 14 Stat. 27.*
>
> *While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation.*

As to history,

> *The larger structure and history of the Civil Rights Act of 1866 provide further clues. Nothing in the Act specifically authorizes private lawsuits to enforce the right to contract. Instead, this Court created a judicially implied private right of action, definitively doing so for the first time in 1975.*

Justice Gorsuch then explained that the criminal provisions of Section 1981 required proof that actions were taken "on account of" or "by reason of" race. "In light of the causation standard Congress specified for the cause of action it expressly endorsed, it would be more than a little incongruous for us to employ the laxer rules ESN proposes for this Court's judicially implied cause of action."

As to precedents, Justice Gorsuch cited to cases that made reference to the Section 1981 remedy as applying when discrimination occurred "on the basis" of race or "because of" race, and to cases under Section 1982, a companion statute (dealing with rights to inherit, purchase, lease, sell, hold, and

convey real and personal property), where the Court had held that a claim arises when a citizen is not allowed to acquire property "because of color."

What prompted Justice Ginsburg's concurrence? She was concerned that there could be discrimination in the contract-formation process that would not be redressed if the Court's opinion extended beyond proof of but-for causation to prove injury. As she put it:

> *Under Comcast's view, §1981 countenances racial discrimination so long as it occurs in advance of the final contract-formation decision. Thus, a lender would not violate §1981 by requiring prospective borrowers to provide one reference letter if they are white and five if they are black. Nor would an employer violate §1981 by reimbursing expenses for white interviewees but requiring black applicants to pay their own way. The employer could even "refus[e] to consider applications" from black applicants at all. Brief of the United States as* Amicus Curiae *21.*

Justice Gorsuch expressly reserved on this issue. So Justice Ginsburg concurred in the judgment.

> *The Court holds today that Entertainment Studios must plead and prove that race was the but-for cause of its injury—in other words, that Comcast would have acted differently if Entertainment Studios were not African-American owned. But if race indeed accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process. The Court has reserved that issue for consideration on remand, enabling me to join its opinion.*

Clean Water Act

County of Maui v. Hawaii Wildlife Fund*: The addition from a point source of a pollutant to groundwater that eventually discharges into a navigable water violates the Clean Water Act if the addition of the pollutant is the "functional equivalent of a direct discharge" into the navigable water*

This 6-3 decision--Justice Breyer delivered the opinion of the Court, with Justice Kavanaugh issuing a concurring opinion, Justice Thomas dissenting joined by Justice Gorsuch, and Justice Alito separately dissenting--was issued in the golden anniversary of the Clean Water Act. You might have thought that after 50 years, any interpretive issues associated with the CWA would have been resolved. Alas, that is not the case.

So what is this case about? I could bore you with prosaic statutory language. But let's try a different approach. Imagine this conversation. . .

Client: Help! I just got this letter from the regulatory agency telling me that the county's wastewater reclamation facility on Maui is violating the Clean Water Act. What does this law say?

Lawyer: I cannot tell you that in plain English, I am afraid. It says that the addition of any pollutant from a point source to navigable waters without a permit is unlawful.

Client: The plant does not discharge to a navigable water! It is about one-half of a mile from the ocean.

Lawyer: But it discharges to groundwater and then the groundwater travels to the ocean.

Client: But you said the law requires there to be an addition of a pollutant "from" a point source. Here the pollution is from groundwater, not the plant. And groundwater is a "nonpoint" source, isn't it?

Lawyer: Well, the pollutants got to the groundwater "from" the plant. And the plant is a point source.

Client: But the "addition" to the ocean comes from groundwater, not the plant.

Lawyer: So let me ask you a question. Suppose your plant was close to the ocean. And suppose you used to discharge directly to the ocean but then drilled a well a few feet from the ocean, and injected the wastewater into the well. You know the wastewater is going to reach the ocean. But you piped it to groundwater first.

Client: Okay. I get it. You are saying that if the discharge to groundwater is the functional equivalent of discharging directly to the navigable water, the plant needs a permit or it is in violation of the law.

Lawyer: You are a quick study. That's the law now. There was a conflict in various courts about how to deal with an addition of a pollutant to a navigable water that passed through groundwater first. Some courts said there was no violation. Other courts said if you can "fairly trace" the pollutants from the point source to the navigable water, you had a violation of the CWA. But the Supreme Court settled the debate in 2020: If the discharge from the point source is the "functional equivalent of a direct discharge" to a navigable water, you need a permit.

Client: This sounds like a gift to lawyers. How is a court supposed to figure out how close is too close?

Lawyer: Don't hear it from me. Here is what Justice Breyer said: "Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply."

Client: Those are not good examples. Even I could decide those cases. That's it? He did not say anything further? How am I supposed to decide if the county needs a permit here?

Lawyer: Calm down. He recognized that this standard does not "cleanly explain how to deal with middle instances."

Client: He is a master of understatement.

Lawyer: They call it the "Supreme" Court, but that does not mean that they have all the answers. But he did offer some guidance to help mere mortals like us try to figure out when there is a risk.

Client: I am all ears.

Lawyer: Got a pencil? He said that the following are "some of the factors that may prove relevant (depending upon the circumstances of a particular case)":

(1) transit time,

(2) distance traveled,

(3) the nature of the material through which the pollutant travels,

(4) the extent to which the pollutant is diluted or chemically changed as it travels,

(5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,

(6) the manner by or area in which the pollutant enters the navigable waters, and

(7) the degree to which the pollution (at that point) has maintained its specific identity.

Client: Wow! This is not only a gift to lawyers; it is a gift to experts too.

Lawyer: Well, he did emphasize that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case." And he added that courts' decisions should not "create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives."

He also suggested that EPA could provide administrative guidance through permits that it issues or through "general rules."

Client: But isn't this going to increase the scope of the Clean Water Act?

Lawyer: Yep. But Justice Breyer said that EPA has been issuing permits for years that took groundwater into account and the sky has not fallen. He also said that courts can mitigate any hardships or injustice if EPA seeks to impose a penalty on a person who polluted a navigable water through a groundwater connection. Here's what he said: "We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required."

Client: That's small comfort. So now what do we do?

Lawyer: Send me the letter and let's line up our experts and let's get to work. And, one more thing. I will need a retainer.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA):

Atlantic Richfield Co. v. Christian*: The Superfund law, which gives EPA sole remedial decision-making authority at a Superfund site, prohibits landowners from imposing their own remedy under state law because they were also liable as "current owners" at the site and thus bound by EPA's remedial decisions*

This is the year for environmental anniversaries. In this, the ruby anniversary of the federal Superfund law (it was adopted in 1980), the Chief Justice delivered the opinion of the court, parts of which were unanimous, and parts of which were decided by a 6-3 vote with Justices Alito and Gorsuch filing separate opinions (Justice Thomas joined in Justice Gorsuch's opinion).

I know. I know. You want to know why I called CERCLA, the "Superfund" law. Well, the statute creates a trust fund used to clean up facilities or "sites" that are contaminated with hazardous substances when there are no "potentially responsible parties" (PRPs) available to pay for the cleanup. Someone named this trust fund, the "Superfund." The name stuck and CERCLA became the "Superfund" law.

The law is quite onerous. It creates strict, retroactive, and joint and several liability. It has withstood due process challenge. Thus, in brief, this liability standard applies to (a) a current owner or operator of a facility; (b) a former owner or operator of facility at the time of disposal; (c) persons who arranged for treatment of disposal of a hazardous substance; and (d) transporters of hazardous substances to a facility chosen by the transporter.

Once EPA designates a site as a Superfund site, EPA has complete control over the investigation and cleanup of the site. There are extensive public involvement provisions built into the process and eventually EPA issues what is called a "Record of Decision" or ROD, announcing the remedy for the site.

And that sets the stage for the Chief Justice's opinion.

Mining has been conducted in Montana for a long time. Between 1884 and 1902, the Anaconda Copper Mining Company built three copper smelters 26 miles west of Butte, Montana. The mine operated until 1980, the same year that CERCLA was adopted.

Three years later, EPA designated more than 300 square miles around the smelter as a Superfund site because of the release of arsenic and lead from the smelter operations. Since that designation, Atlantic Richfield (the successor to Anaconda) has remediated "more than 800 residential and commercial properties" among other response actions. As of 2015, there was more left to do, however. EPA's cleanup plan "anticipated cleanup of more than 1,000 additional residential yards, revegetation of 7,000 acres of uplands, removal of several waste areas, and closure of contaminated stream banks and railroad beds."

What if you were an owner of one of these residences and you wanted more done to clean up your property? Do you have the right to seek restoration of your property under state law? The Chief Justice explained Montana law.

> *Under Montana law, property damages are generally measured by the "difference between the value of the property before and after the injury, or the diminution in value." But "when the damaged property serves as a private residence and the plaintiff has an interest in having the property restored, diminution in value will not return the plaintiff to the same position as before the tort." In that circumstance, the plaintiff may seek restoration damages, even if they exceed the property's diminution in value.*
>
> *To collect restoration damages, a plaintiff must demonstrate that he has "reasons personal" for restoring the property and that his injury is temporary and abatable, meaning "[t]he ability to repair [the] injury must be more than a theoretical possibility." The injured party must "establish that the award actually will be used for restoration."*

He then described how 98 landowners sued Atlantic Richfield in state court demanding a more rigorous cleanup than EPA had selected. They estimated that their cleanup plan would cost $50-58 million that would be placed in a trust and released by a trustee only for restoration work.

The local judge agreed with the landowners, and the Montana Supreme Court affirmed.

No experienced Superfund lawyer believed that the Supreme Court would allow this decision to stand, and it didn't.

Remember that I said above that a "current owner" of a facility is a liable party? That means that the 98 plaintiffs were liable parties, referred to, again, as PRPs. That fact was the death knell of their lawsuit.

> *[T]he [Montana Supreme] Court erred by holding that the landowners were not potentially responsible parties under the Act and therefore did not need EPA approval to take remedial action. Section 122(e)(6), titled "Inconsistent response action," provides that "[w]hen either the President, or a potentially responsible party . . . has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U. S. C. §9622(e)(6). Both parties agree that this provision would require the landowners to obtain EPA approval for their restoration plan if the landowners qualify as potentially responsible parties.*
>
> *To determine who is a potentially responsible party, we look to the list of "covered persons" in §107, the liability section of the Act. §9607(a). "Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they 'shall be liable' for, among other things, 'all costs of removal or remedial action incurred by the United States Government.'"* Cooper Industries, Inc. v. Aviall Services, Inc., *543*

> *U. S. 157, 161 (2004) (quoting §9607(a)(4)(A)). The first category under §107(a) includes any "owner" of "a facility." §9607(a)(1). "Facility" is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." §9601(9)(B). Arsenic and lead are hazardous substances. 40 CFR §302.4, Table 302.4. Because those pollutants have "come to be located" on the landowners' properties, the landowners are potentially responsible parties.*

And, as expected, the Court vacated the Montana Supreme Court's decision that sought to eliminate EPA from the remedial decision-making process.

Contracts: Safe Berth Clause Oil Spill

CITGO Asphalt Refining Co. v. Frescati Shipping Co.: *The safe berth clause in issue represented a warranty of safety, not a duty of diligence, and thus the Charterer, which designated the berth, was responsible for cleanup costs incurred when a vessel allided with an anchor puncturing the hull and releasing 246,000 gallons of diesel fuel into the Delaware River*

Justice Sotomayor delivered this 7-2 opinion (Justice Thomas dissented and was joined by Justice Alito).

It is not often one sees a contract interpretation issue before the Supreme Court. This one involves what is called in admiralty a "safe-berth" clause. I will give you the facts and you get to be the judge.

Charterer:	Citgo Asphalt Refining Co. (CARCO)
Vessel Owner:	Frescati Shipping Company
Safe Berth Clause	The vessel shall load and discharge at any safe place or wharf, . . . which shall be *designated and procured by the Charterer*, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, *any lighterage being at the expense, risk and peril of the Charterer*." (Emphasis added.)
Facts:	The vessel, M/T Athos I, was carrying heavy crude oil. CARCO designated as the berth of discharge of the cargo its asphalt refinery in Paulsboro, New Jersey, on the shore of the Delaware River. The vessel was in the final 900-foot stretch of a 1,900 mile journey from Venezuela when it "allided" (came into contact with a stationary object) with an abandoned ship anchor in the Delaware River that pierced two holes in the vessel's hull resulting in the release of 246,000 gallons of crude oil.

This is what happened next, as Justice Sotomayor explained.

> *[T]he Oil Pollution Act of 1990 (OPA), 104 Stat. 484, 33 U. S. C. §2701 et seq., . . . deems certain entities responsible for the costs of oil-spill cleanups, regardless of*

fault. §2702(a). It then limits the liability of such "responsible part[ies]" if they (among other things) timely assist with cleanup efforts. §2704. Responsible parties that comply with the statutory conditions receive a reimbursement from the Oil Spill Liability Trust Fund (Fund), operated by the Federal Government, for any cleanup costs exceeding a statutory limit. §2708; see also §2704.

Although a statutorily responsible party must pay cleanup costs without regard to fault, it may pursue legal claims against any entity allegedly at fault for an oil spill. §§2710, 2751(e). So may the Fund: By reimbursing a responsible party, the Fund becomes subrogated to the responsible party's rights (up to the amount reimbursed to the responsible party) against any third party allegedly at fault for the incident. §§2712(f), 2715(a).

As owner of the Athos I, Frescati was deemed a "responsible party" for the oil spill under OPA. Frescati worked with the U. S. Coast Guard in cleanup efforts and covered the costs of the cleanup. As a result, Frescati's liability was statutorily limited to $45 million, and the Fund reimbursed Frescati for an additional $88 million that Frescati paid in cleanup costs.

Frescati and the United States then sued CARCO for failing to designate a safe berth, seeking recovery of the $133 million that was spent on the cleanup.

How do you rule?

Did CARCO merely have a duty of diligence, as it claimed it had and satisfied? Or did the safe berth clause represent a warranty of safety?

If you chose the latter, you chose wisely.

Our analysis starts and ends with the language of the safe-berth clause. That clause provides, as relevant, that the charterer "shall . . . designat[e] and procur[e]" a "safe place or wharf," "provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Addendum to Brief for Petitioners 8a. As even CARCO acknowledges, the clause plainly imposes on the charterer at least some "duty to select a 'safe' berth." Brief for Petitioners 21. Given the unqualified language of the safe-berth clause, it is similarly plain that this acknowledged duty is absolute. The clause requires the charterer to designate a "safe" berth: That means a berth "free from harm or risk." Webster's Collegiate Dictionary 1030 (10th ed. 1994); see also New Oxford American Dictionary 1500 (E. Jewell & F. Abate eds. 2001) ("safe" means "protected from or not exposed to danger or risk"). And the berth must allow the vessel to come and go "always" safely afloat: That means afloat "at all times" and "in any event." Webster's Collegiate Dictionary, at 35; see also New Oxford American Dictionary, at 47 ("always" means "at all times; on all occasions"). Selecting a berth that does not satisfy those conditions constitutes a breach. The safe-berth clause, in other words, binds the charterer to a warranty of safety.

With this simple explanation, one has to wonder why there was a 41-day trial followed by a 31-day evidentiary hearing. Not quite $133 million, but a costly exercise to get to this straightforward result.

Criminal Law

Kelly v. United States: *Because they did not have as their object the deprivation of "money or property" of another, defendants' convictions under the federal wire fraud and federal-program fraud statutes were overturned*

I will not dwell long on this unanimous opinion written by Justice Kagan.

Certain public officials (Kelly and Baroni) ordered for four days the closure of three lanes of the George Washington Bridge that connected Fort Lee, New Jersey to New York City. They claimed they did so for a traffic study. In fact, they did so to punish the mayor of Fort Lee for refusing to support Chris Christie's reelection bid.

No doubt there was wrongdoing—"deception, corruption, abuse of power"—as Justice Kagan put it. But was it a crime? More specifically, did Baroni and Kelly's conduct violate 18 U. S. C. §§1343, 666(a)(1)(A)? (A third official, Wildstein pleaded guilty to conspiracy charges and agreed to cooperate with the Government.)

The former statute is the federal wire fraud statute that makes it a crime "to effect (with use of the wires) 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.' 18 U. S. C. §1343." Notice the phrasing here. There is an "or" placed in an odd location. Does "obtaining money or property" also relate to "any scheme or artifice to defraud"? The Court had already held that it did.

> *Construing that disjunctive language as a unitary whole, this Court has held that "the money-or-property requirement of the latter phrase" also limits the former.* McNally v. United States, *483 U. S. 350, 358 (1987). The wire fraud statute thus prohibits only deceptive "schemes to deprive [the victim of] money or property." Id., at 356.*

The latter statute cited above is the "federal-program fraud statute. It "bars 'obtain[ing] by fraud' the 'property' (including money) of a federally funded program or entity like the Port Authority. §666(a)(1)(A)."

Did Kelly and Baroni engage in deception with the object to obtain property of the Port? This was the Government's argument:

> *According to the Government's theory of the case, Baroni and Kelly "used a lie about a fictional traffic study" to achieve their goal of reallocating the Bridge's toll lanes. The Government accepts that the lie itself—i.e., that the lane change was part of a traffic study, rather than political payback—could not get the prosecution all the way home. As the Government recognizes, the deceit must also have had the "object" of obtaining the Port Authority's money or property. The scheme met that requirement, the Government argues, in two ways. First, the Government claims that Baroni and*

> *Kelly sought to "commandeer[ ]" part of the Bridge itself—to "take control" of its "physical lanes." Second, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment. On either theory, the Government insists, Baroni's and Kelly's scheme targeted "a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes."*

(Record and case citations omitted.)

Justice Kagan rejected both theories. What Baroni and Kelly did was a "quintessential exercise of regulatory power." To continue with Justice Kagan's explanation:

> *This Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property. By contrast, a scheme to usurp a public employee's paid time is one to take the government's property. But Baroni's and Kelly's plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes.*

(Citation omitted.) And with that sentence the so-called 'Bridge-gate" scandal came to a jail-free end for Baroni and Kelly.

Death Penalty

Andrus v. Texas*: The Texas Court of Criminal Appeals erred in determining that counsel's failure to present mitigating evidence to the jury when the jury was considering the death penalty did not represent ineffective assistance of counsel, and remanding for a determination of whether that failure prejudiced Andrus*

In this 6-3 *per curiam* opinion (Justice Alito dissented and was joined by Justices Thomas and Gorsuch), the Court's ongoing struggle with decisions of the Texas Court of Criminal Appeals (CCA) continued. Andrus was on death row. When a jury is considering the death penalty, it is supposed to hear any mitigating evidence that the defendant can present. A lawyer who fails to present mitigating evidence engages in ineffective assistance of counsel. *Strickland v. Washington*, 466 U. S. 668 (1984). To show that a lawyer's performance is deficient under *Strickland*, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. And to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

This was the Court's summary of the evidence that the jury never heard because of counsel's misfeasance.

> *Death-sentenced petitioner Terence Andrus was six years old when his mother began selling drugs out of the apartment where Andrus and his four siblings lived. To fund a spiraling drug addiction, Andrus' mother also turned to prostitution. By the time*

> *Andrus was 12, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, Andrus took on the role of caretaker for his four siblings.*
>
> *When Andrus was 16, he allegedly served as a lookout while his friends robbed a woman. He was sent to a juvenile detention facility where, for 18 months, he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized Andrus all but suicidal. Those suicidal urges resurfaced later in Andrus' adult life.*
>
> *During Andrus' capital trial, however, nearly none of this mitigating evidence reached the jury. That is because Andrus' defense counsel not only neglected to present it; he failed even to look for it. Indeed, counsel performed virtually no investigation of the relevant evidence. Those failures also fettered the defense's capacity to contextualize or counter the State's evidence of Andrus' alleged incidences of past violence.*

Counsel has a duty to investigate the defendant's background that is reasonable under all of the circumstances applying "a heavy measure of deference to counsel's judgments." (Citations omitted.) Here, counsel failed to satisfy this standard. The evidence at Andrus's habeas corpus hearing showed the following.

> *First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.*

The Texas trial court agreed with this analysis but the Texas CCA disagreed. So, the Court vacated that decision and remanded it for consideration of whether the second prong of *Strickland* had been satisfied: Was Andrus prejudiced by the failure of his counsel to present mitigating evidence to the jury? The dissenters argued that this issue was already decided by the Texas CCA but the majority disagreed, regarding the lower court's decision as unclear on this point at best.

> *The record before us raises a significant question whether the apparent "tidal wave," 7 Habeas Tr. 101, of "available mitigating evidence taken as a whole" might have sufficiently "'influenced the jury's appraisal' of [Andrus'] moral culpability" as to establish Strickland prejudice. (That is, at the very least, whether there is a reasonable probability that "at least one juror would have struck a different balance.") That prejudice inquiry "necessarily require[s] a court to 'speculate' as to the effect of the new evidence" on the trial evidence, "regardless of how much or*

little mitigation evidence was presented during the initial penalty phase." Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address Strickland prejudice in light of the correct legal principles articulated above.

Defense Preclusion

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.: *Defenses raised in a second lawsuit were not precluded by the resolution of an earlier lawsuit because the second lawsuit involved different claims and different conduct than those involved in the first lawsuit*

Justice Sotomayor wrote another unanimous decision on a topic rarely discussed by the Court: issue preclusion.

The facts are lengthy, so I will skip most of them. You need to know that Lucky Brand and Marcel were engaged in trademark infringement lawsuits over Marcel's mark, "Get Lucky." There were three lawsuits over a number of years, but only the last two were involved. And the question presented was whether a defense raised by Lucky Brand in the third suit was precluded because it was not raised in the second suit.

The Court did not break any meaningful new ground here. Justice Sotomayor described "issue preclusion (sometimes called collateral estoppel)" by reference to earlier precedents: It "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." (Citation omitted.)

It then described "claim preclusion (sometimes itself called res judicata)."

> *Unlike issue preclusion, claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated. If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."*

Justice Sotomayor wrote that the Court had never "explicitly recognized 'defense preclusion' as a standalone category of res judicata, unmoored from the two guideposts of issue preclusion and claim preclusion. Instead, our case law indicates that any such preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion."

Issue preclusion did not apply here. And the parties agreed that a defense can be barred only if the "causes of action are the same in the two suits—that is, where they share a 'common nucleus of operative facts[s].'" (Record citations omitted.)

By that standard, Lucky Brand prevailed.

> *Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts."*

You can read the analysis if you are interested.[30] But it will just take you to Justice Sotomayor's conclusion: "At bottom, Marcel's 2011 Action challenged different conduct—and raised different claims—from the 2005 Action. Under those circumstances, Marcel cannot preclude Lucky Brand from raising new defenses."

Electoral College

Ciafalo v. Washington*: Washington's fine of three Electors for failing to cast their Electoral College votes for Hilary Clinton who had won the majority of the votes in the State in the 2016 Presidential election, as they had pledged to do, was upheld*

The vote in this opinion by Justice Kagan was 9-0 (Justice Thomas concurred in the judgment and was joined by Justice Gorsuch). But the holding is not the most interesting part of the opinion. To be sure, it mattered to three Washington State "Electors" who violated the pledge they took to cast votes for President for the person who received the majority of votes in the 2016 Presidential election in Washington. That was Hilary Clinton. But the three Electors had an idea to try to deprive Donald Trump of the Presidency. They decided to cast their votes for someone other than Ms. Clinton in the hopes that would prompt electors in other States not to cast votes for Mr. Trump, thereby depriving him of enough votes to win the Electoral College vote and throwing the election's outcome into the House of Representatives under the Twelfth Amendment to the Constitution. We all know that the effort failed because Mr. Trump became President. What you may not know is that each of the three Electors was fined $1,000 under Washington law for violating their pledge. Each Elector challenged the fine, which is how the case reached the Supreme Court. Justice Kagan held that the "Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President."

You can read Justice Kagan's explanation for yourself.[31] What you can't miss, however, is how the United States ended up with the Electoral College system, a question I have been asked so many times by many friends around the world, that I now finally know the answer. It is a good story, so I quote Justice Kagan, who is a good storyteller.

> *Our Constitution's method of picking Presidents emerged from an eleventh-hour compromise. The issue, one delegate to the Convention remarked, was "the most difficult of all [that] we have had to decide." 2 Records of the Federal Convention of 1787, p. 501 (M. Farrand rev. 1966) (Farrand). Despite long debate and many votes, the delegates could not reach an agreement. See generally N. Peirce & L. Longley, The People's President 19–22 (rev. 1981). In the dying days of summer, they referred the matter to the so-called Committee of Eleven to devise a solution. The Committee returned with a proposal for the Electoral College. Just two days later, the delegates*

[30] https://www.supremecourt.gov/opinions/19pdf/18-1086_new_5ifl.pdf.
[31] https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf.

accepted the recommendation with but a few tweaks. James Madison later wrote to a friend that the "difficulty of finding an unexceptionable [selection] process" was "deeply felt by the Convention." Letter to G. Hay (Aug. 23, 1823), in 3 Farrand 458. Because "the final arrangement of it took place in the latter stage of the Session," Madison continued, "it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho' the degree was much less than usually prevails in them." Ibid. *Whether less or not, the delegates soon finished their work and departed for home.*

The provision they approved about presidential electors is fairly slim. Article II, §1, cl. 2 says:

> *"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."*

The next clause (but don't get attached: it will soon be superseded) set out the procedures the electors were to follow in casting their votes. In brief, each member of the College would cast votes for two candidates in the presidential field. The candidate with the greatest number of votes, assuming he had a majority, would become President. The runner-up would become Vice President. If no one had a majority, the House of Representatives would take over and decide the winner.

That plan failed to anticipate the rise of political parties, and soon proved unworkable. The Nation's first contested presidential election occurred in 1796, after George Washington's retirement. John Adams came in first among the candidates, and Thomas Jefferson second. That meant the leaders of the era's two warring political parties—the Federalists and the Republicans—became President and Vice President respectively. (One might think of this as fodder for a new season of Veep.) Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr . . . did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College's original voting rules.

The result was the Twelfth Amendment, whose main part provided that electors would vote separately for President and Vice President. The Amendment, ratified in 1804, says:

> *"The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . .; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to [Congress, where] the votes shall then be counted."*
>
> *The Amendment thus brought the Electoral College's voting procedures into line with the Nation's new party system.*

And if you are wondering why the Founding Fathers feared election by popular vote, Justice Kagan did not answer that question. Some of the delegates to the Constitutional Convention felt that the voters lacked the resources to be fully informed about the candidates, especially if they lived in rural areas. They were worried that a "democratic mob" might steer the country astray. And they feared that a populist candidate appealing directly to the people could command dangerous amounts of power. The other choice was to have Congress pick the President but some delegates feared corruption between the executive and legislative branches.[32]

There's your civics lesson for the day!

ERISA

Intel Corp. Investment Policy Comm. v. Sulyma*: For purposes of the trigger of the three-year limitations period to bring a breach of fiduciary claim against an ERISA-plan fiduciary, "actual knowledge" (of a piece of information) as used in 29 U. S. C. §1113(2) means that the plaintiff must be aware of it*

Justice Alito delivered this unanimous opinion for the Court.

The Employee Retirement Income Security Act of 1974 (ERISA) plays a role in the lives of most Americans because it regulates retirement plans, among other things. These plans are managed by fiduciaries who are charged with managing the plan's assets prudently and solely in the interests of plan participants and their beneficiaries. 29 U. S. C. §1104(a). If a fiduciary breaches this duty, the fiduciary can be sued for resulting losses, if any. 29 U. S. C. §1109(a).

This case is not, however, about losses. It is about time. Specifically, the time within which a plan participant claiming a breach of fiduciary duty must bring suit. And why is it difficult to determine the limitations time period? Because ERISA allows for *three* time periods, each with different triggers.

■ Under §1113(1), suit must be filed within six years of "the date of the last action which constituted a part of the breach or violation" or, in cases of breach by omission, "the latest date on which the fiduciary could have cured the breach or violation."

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[32] This recitation comes from the History.com's story on the creation of the Electoral College. https://www.history.com/news/electoral-college-founding-fathers-constitutional-convention.

■ Under §1113(2), suit must be filed within three years of "the earliest date on which the plaintiff had *actual knowledge* of the breach or violation." Section 1113(2) is a statute of limitations, which "encourage[s] plaintiffs to pursue diligent prosecution of known claims."
■ Under Section 1113, which applies "in the case of fraud or concealment," the statute of limitations begins to run when the plaintiff discovers the alleged breach; suit must be filed within six years of "the date of discovery."

(Citations omitted; emphasis added.) I added the emphasis because the outcome turns on the significance of the phrase, "actual knowledge."

Sulyma brought suit more than three years after the Intel retirement plan fiduciaries decided to invest in a variety of asset classes (beyond stocks and bonds) following the 2008 financial crisis. He claimed this decision breached a fiduciary duty to him and a class of similarly situated individuals.

Sulyma had a problem, however.

> *Sulyma received numerous disclosures while working at Intel, some explaining the extent to which his retirement plans were invested in alternative assets. In November 2011, for example, he received an e-mail informing him that a Qualified Default Investment Alternative (QDIA) notice was available on a website called NetBenefits, where many of his disclosures were hosted. This notice broke down the percentages at which his 401(k) fund was invested in stocks, bonds, hedge funds, and commodities. In 2012, he received a summary plan description explaining that the funds were invested in stocks and alternative assets, and referring him to other documents—called fund fact sheets—with the percentages in graphical form. Also in 2012, he received e-mails directing him to annual disclosures that petitioners provided for both his plans, which showed the underlying funds' return rates and again directed him to the NetBenefits site for further information.*

(Record citations and regulations omitted.) And it was established that Sulyma visited the NetBenefits site "repeatedly during this employment."

Sulyma did not remember visiting the website and did not read the various documents provided to him. As a result, the district court granted summary judgment against Sulyma for failing to sue within three years. The court of appeals held that "actual knowledge" in this context meant "knowledge that is actual, not merely a possible inference from ambiguous circumstances." So it *reversed*.

Justice Alito affirmed the court of appeals. He held that the words mean what they say.

> *Although ERISA does not define the phrase "actual knowledge," its meaning is plain. Dictionaries are hardly necessary to confirm the point, but they do. When Congress passed ERISA, the word "actual" meant what it means today: "existing in fact or reality." Webster's Seventh New Collegiate Dictionary 10 (1967); accord, Merriam-Webster's Collegiate Dictionary 13 (11th ed. 2005) (same); see also American Heritage Dictionary 14 (1973) ("In existence; real; factual");* id.*, at 18 (5th ed. 2011) ("Existing in reality and not potential, possible, simulated, or false"). So did the word "knowledge," which meant and still means "the fact or condition of*

> *being aware of something." Webster's Seventh New Collegiate Dictionary 469 (1967); accord, Merriam-Webster's Collegiate Dictionary 691 (2005) (same); see also American Heritage Dictionary 725 (1973) ("Familiarity, awareness, or understanding gained through experience or study");* id.*, at 973 (2011) (same). Thus, to have "actual knowledge" of a piece of information, one must in fact be aware of it.*

Adding to this analysis, in other parts of ERISA, Congress made distinctions between "actual knowledge" and constructive knowledge.

> *Multiple provisions contain alternate 6-year and 3-year limitations periods, with the 6-year period beginning at "the date on which the cause of action arose" and the 3-year period starting at "the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." §§1303(e)(6), (f)(5); accord, §§1370(f)(1)–(2), 1451(f)(1)–(2). ERISA also requires plaintiffs challenging the suspension of benefits under §1085 to do so within "one year after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." §1085(e)(9)(I)(iv). Thus, Congress has repeatedly drawn a "linguistic distinction" between what an ERISA plaintiff actually knows and what he should actually know.*

(Emphasis removed.)

Having lost that battle does not mean that the plan fiduciaries are liable whenever a plaintiff denies actual knowledge of facts that give rise to a claimed breach of fiduciary duty. Justice Alito explained that there are a number of ways to prove "actual knowledge."

> *Nothing in this opinion forecloses any of the "usual ways" to prove actual knowledge at any stage in the litigation.* Farmer v. Brennan, *511 U. S. 825, 842 (1994). Plaintiffs who recall reading particular disclosures will of course be bound by oath to say so in their depositions. On top of that, actual knowledge can be proved through "inference from circumstantial evidence."* Ibid.*; see also* Staples v. United States, *511 U. S. 600, 615–616, n. 11 (1994) ("[K]nowledge can be inferred from circumstantial evidence"). Evidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response to the information contained in them. And though, "[a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party," that is true "only if there is a 'genuine' dispute as to those facts."* Scott v. Harris, *550 U. S. 372, 380 (2007) (quoting Fed. Rule Civ. Proc. 56(c)). If a plaintiff's denial of knowledge is "blatantly contradicted by the record," "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U. S., at 380.*
>
> *Today's opinion also does not preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge." Cf.* Global-Tech Appliances, Inc. v. SEB S. A., *563 U. S. 754, 769 (2011).*

> *In the case before us, however, petitioners do not argue that "actual knowledge" is established in any of these ways, only that they need not offer any such proof. And that is incorrect.*

Fair Debt Collection Practices Act

Rotkiske v. Klemm*: The FDCPA's requirement that a suit against a debt-collector for a statutory violation must be brought within one year from the date "on which the violation occurs" means what it says and Rotkiske's failure to discover the violation until more than one year its occurrence does not excuse the late filing*

In another case involving the statute of limitations, Justice Thomas wrote this 8-1 decision (Justice Ginsburg dissented in part and dissented from the judgment) that Rotkiske waited too long to sue a debt collector, Klemm. In 2009, Klemm had a summons served at an address where Rotkiske did not live. A person there accepted service and never responded to the debt-collection complaint. Klemm secured a default judgment. Five years later Rotkiske was denied a mortgage because of the default judgment against him. So he sued Klemm in 2015, more than six years after the default judgment, under the Fair Debt Collection Practices Act. He alleged that Klemm brought the 2009 action after the state-law limitations period had expired and thus he violated the FDCPA by contacting a debtor without "lawful ability to collect."

Rotkiske just had one problem. The limitations period under the FDCPA, 15 U. S. C. §1692k(d), states that an FDCPA action "may be brought . . . within one year from the date on which the violation occurs." Based on the complaint, the violation was the filing of the debt collection lawsuit in 2009.

Hmm. Rotkiske could not argue that the words said something other than what they said. That would not get him anywhere. And, indeed, Justice Thomas said that the text of the statute "unambiguously sets the date of the violation as the event that starts the one-year limitations period." He elaborates:

> *At the time of the FDCPA's enactment, the term "violation" referred to the "[a]ct or instance of violating, or state of being violated." Webster's New International Dictionary 2846 (2d ed. 1949) (Webster's Second). The term "occur" meant "to happen," and, as Webster's Second explains, "occur" described "that which is thought of as definitely taking place as an event."* Id.*, at 1684. Read together, these dictionary definitions confirm what is clear from the face of §1692k(d)'s text: The FDCPA limitations period begins to run on the date the alleged FDCPA violation actually happened. We must presume that Congress "says in a statute what it means and means in a statute what it says there."*

(Citation omitted.)

Rotkiske argued that despite this text, he did not know about the violation until 2014. He urged the Court to hold that the date of discovery should control. Justice Thomas was not persuaded.

> *Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.*

> *Congress has enacted statutes that expressly include the language Rotkiske asks us to read in, setting limitations periods to run from the date on which the violation occurs or the date of discovery of such violation. See,* e.g.*, 12 U. S. C. §3416; 15 U. S. C. §1679i. In fact, at the time Congress enacted the FDCPA, many statutes included provisions that, in certain circumstances, would begin the running of a limitations period upon the discovery of a violation, injury, or some other event. See,* e.g.*, 15 U. S. C. §77m (1976 ed.); 19 U. S. C. §1621 (1976 ed.); 26 U. S. C. §7217(c) (1976 ed.); 29 U. S. C. §1113 (1976 ed.).*

He then implored the Court to consider equitable tolling, as if a fraud had occurred. But Rotkiske failed to preserve this issue before the court of appeals and failed to raise this issue in his petition for certiorari. "Accordingly, Rotkiske cannot rely on this doctrine to excuse his otherwise untimely filing."

Another lesson learned the hard way.

Foreign Sovereign Immunities Act

Opati v. Republic of Sudan*: Congress authorized the award of punitive damages under the terrorist exception in the Foreign Sovereign Immunities Act*

The Foreign Sovereign Immunities Act is a law that nearly all lawyers know nothing about. And I am going to change that just a little bit. In this 8-0 decision written by Justice Gorsuch (Justice Kavanaugh did not participate in the decision), the issue was whether the FSIA allowed for a punitive damages award.

> *The FSIA "holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts. See 28 U. S. C. §§1603(a), 1604. But the law also includes a number of exceptions. See,* e.g.*, §§1605, 1607. Of particular relevance today is the terrorism exception Congress added to the law in 1996. That exception permits certain plaintiffs to bring suits against countries who have committed or supported specified acts of terrorism and who are designated by the State Department as state sponsors of terror.*

The FSIA was adopted in 1976. Two years later al Qaeda attacked U. S. Embassies in Kenya and Tanzania. In response, some of the victims and their family members sued the Government of Sudan alleging that Sudan had provided shelter and other support to al Qeada.

While the suit was pending, Congress amended the FSIA in the National Defense Authorization Act for Fiscal Year 2008 (NDAA), moving the state-sponsored terrorism exception to 28 U. S. C. §1605A. This change was significant because in its original form the FSIA barred punitive damages. But moving the terrorism exception "had the effect of freeing claims brought under the terrorism exception from the FSIA's usual bar on punitive damages. See §1606 (denying punitive damages in suits proceeding under a sovereign immunity exception found in §1605 but not §1605A)."

In addition, in §1083(a), "Congress created an express federal cause of action for acts of terror. This new cause of action, codified at 28 U. S. C. §1605A(c), is open to plaintiffs who are U. S. nationals, members of the Armed Forces, U. S. government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages."

In §1083(c)(2), a provision titled "Prior Actions," Congress addressed existing lawsuits that had been "adversely affected on the groun[d] that" prior law "fail[ed] to create a cause of action against the state." Actions like these, Congress instructed, were to be given effect "as if" they had been originally filed under §1605A(c)'s new federal cause of action.

Finally, in §1083(c)(3), a provision titled "Related Actions," Congress provided a time-limited opportunity for plaintiffs to file new actions "arising out of the same act or incident" as an earlier action and claim the benefits of 28 U. S. C. §1605A.

Unsurprisingly, the plaintiffs in the action against Sudan amended their complaint and other victims and their family members also sued. Sudan declined to participate. The district court tried the matter and made findings of fact adverse to Sudan. Based on Special Master reports, the court ultimately awarded $10.2 billion in damages, including $4.3 billion in punitive damages.

Sudan then decided to appear and appeal. It lost on most points but prevailed in the court of appeals on the argument that Congress did not clearly authorize punitive damages for conduct that occurred prior to the enactment of the NDAA. It was not as fortunate in the Supreme Court.[33]

Justice Gorsuch concluded that Congress clearly allowed for certain plaintiffs to recover punitive damages if the terrorist exception was satisfied.

> *Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using §1065A(c)'s new federal cause of action. After all, in §1083(a), Congress created a federal cause of action that expressly allows suits for damages that "may include economic damages, solatium, pain and suffering, and* punitive damages*." (Emphasis added.) This new cause of action was housed in a new provision of the U. S. Code, 28 U. S. C. §1605A, to which the FSIA's usual prohibition on punitive damages does not apply. See §1606. Then, in §§1083(c)(2) and (c)(3) of the very same statute, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in §1605A. Both provisions specifically authorized new claims for preenactment conduct. Put another way, Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation.*

The court of appeals had refused to allow punitive damages to foreign-national family members proceeding under state law for "the same reason" that it refused punitive damages to the plaintiffs

[33] Foreign national family members also had joined the litigation. They brought claims under state law. They too were barred from seeking punitive damages by the court of appeals. But that issue was not before the Supreme Court.

proceeding under the terrorist exception to the FSIA. Because the Court allowed punitive damages on the federal claim, on remand, it allowed the court of appeals to reconsider its decision on punitive damages with respect to the foreign-national plaintiffs.

Fourth Amendment

Kansas v. Glover*: Where a computer check of a license plate number reveals that the registered owner of the vehicle had a revoked license, stopping the vehicle was based on reasonable suspicion consistent with the requirements of the Fourth Amendment because, under the totality of the circumstances, there was no information to rebut the inference that the owner was the driver*

Justice Thomas delivered this 8-1 opinion (Justice Sotomayor dissented) addressing the reasonableness of a traffic stop of a driver of a vehicle where the owner of the vehicle is shown on a computer search of the vehicle license plate as having a revoked license.

As with all Fourth Amendment cases, you have to know the facts to evaluate the outcome. They were stipulated by the parties. I provide a truncated version of them here. On a routine patrol, an officer (Mehrer), ran a search of a tag on a pickup truck. The search revealed that the registered owner of the vehicle (Glover) had a revoked driver's license. "Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr." Mehrer "did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the license of the registered owner of the truck was revoked," Mehrer initiated a traffic stop. As it turned out, the driver of the truck was, indeed, Glover.

Was there a reasonable basis for the search?

To help you respond, let me share Justice Thomas's discussion of the relevant case law.

> *Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity."* United States v. Cortez, *449 U. S. 411, 417–418 (1981); see also* Terry v. Ohio, *392 U. S. 1, 21–22 (1968). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."* Prado Navarette v. California, *572 U. S. 393, 397 (2014) (quotation altered);* United States v. Sokolow, *490 U. S. 1, 7 (1989).*
>
> *Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause."* Alabama v. White, *496 U. S. 325, 330 (1990). The standard "depends on the factual and practical considerations of everyday life on which* reasonable and prudent men, *not legal technicians, act."* Navarette, supra, *at 402 (quoting* Ornelas v. United States, *517 U. S. 690, 695 (1996) (emphasis added; internal quotation marks omitted)). Courts "cannot reasonably demand scientific*

> *certainty . . . where none exists."* Illinois v. Wardlow, *528 U. S. 119, 125 (2000). Rather, they must permit officers to make "commonsense judgments and inferences about human behavior."* Ibid.*; see also* Navarette, supra, *at 403 (noting that an officer "'need not rule out the possibility of innocent conduct'").*

As you might have guessed, Justice Thomas decided that it was reasonable to infer that the registered owner of a vehicle is also its driver.

> *The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy, see* United States v. Arvizu, *534 U. S. 266, 274 (2002), for, as we have explained, "[t]o be reasonable is not to be perfect,"* Heien v. North Carolina, *574 U. S. 54, 60 (2014).*

But if Mehrer knew that the license was revoked, should he have inferred that the owner was driving? Yep. Justice Thomas explained.

> *Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.*

Justice Thomas did "emphasize the narrow scope of our holding." He explained that the officer's action must be justified at its inception. A court has to consider the totality of the circumstances. "As a result, the presence of additional facts might dispel reasonable suspicion." (Citations omitted.) Justice Thomas even gave an example: "[I]f an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.'" (Citation omitted.) But here, Mehrer "possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified."

Habeas Corpus

Banister v. Davis*: A Rule 59(e) motion to alter or amend a habeas judgment is a part of the first habeas proceeding and does not represent a second successive habeas application under 28 U. S. C. §2244(b) requiring leave from a court of appeals*

In this 7-2 decision (Justice Alito dissented and was joined by Justice Thomas), Justice Kagan addressed a procedural question in a habeas proceeding. Non-criminal defense lawyers may not have an interest in the case, but give it a try.

Here's the issue. Under 28 U. S. C. §2244(b), a state prisoner seeking federal habeas corpus relief always gets one chance to bring a habeas challenge. To file a second or successive habeas application

to a district court, the prisoner must obtain leave from the court of appeals based on a "prima facie showing" that his petition satisfies the statute's gatekeeping requirements. 28 U. S. C. §2244(b)(3)(C).

> *Under those provisions, which bind the district court even when leave is given, a prisoner may not reassert any claims "presented in a prior application." §2244(b)(1). And he may bring a new claim only if it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish his innocence. See §2244(b)(2). Still more: Those restrictions, like all statutes and rules pertaining to habeas, trump any "inconsistent" Federal Rule of Civil Procedure otherwise applicable to habeas proceedings. 28 U. S. C. §2254 Rule 12.*

Habeas proceedings are governed by the Federal Rules of Civil Procedure. Rule 59(e) allows a party to file a "motion to alter or amend a judgment" within 28 days from the entry of the judgment. In reviewing a Rule 59(e) motion, "courts will not address new arguments or evidence that the moving party could have raised before the decision issued." The filing of a timely Rule 59(e) motion "suspends the finality of the original judgment." (Citation omitted.) "[I]f an appeal follows, the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment."

By now you know where this is leading. Banister filed a habeas application, but the district court entered judgment denying the application. Banister then timely filed a Rule 59(e) motion to alter the judgment. The district court rejected the motion. Banister then timely filed an appeal. The Fifth Circuit, however, dismissed the appeal as untimely. It ruled that because Banister's motion attacked the district court's resolution on the merits, it had to be construed as a successive habeas petition. And unlike a Rule 59(e) motion, a successive habeas petition does not extend the time to file an appeal. Thus, Banister's appeal was untimely under the court of appeals' ruling. And that ruling also meant that in a future case, Banister or others similarly situated would have to obtain the permission of the court of appeals to file another habeas application.

To resolve a circuit split about whether a Rule 59(e) motion to alter or amend a habeas judgment "counts as a second or successive habeas petition," the Court granted certiorari. And as you have probably guessed from the recitation of the law above, Justice Kagan held that it does not. I invite you to read Justice Kagan's analysis if you are interested. It is enough here to quote her holding.

> *Rule 59(e) motions are not second or successive petitions, but instead a part of a prisoner's first habeas proceeding. In timing and substance, a Rule 59(e) motion hews closely to the initial application; and the habeas court's disposition of the former fuses with its decision on the latter. Such a motion does not enable a prisoner to abuse the habeas process by stringing out his claims over the years. It instead gives the court a brief chance to fix mistakes before its (single) judgment on a (single) habeas application becomes final and thereby triggers the time for appeal. No surprise, then, that habeas courts historically entertained Rule 59(e) motions, rather than dismiss them as successive. Or that Congress said not a word about changing that familiar practice even when enacting other habeas restrictions.*

Immigration

With the Trump administration's aggressive stance on immigration enforcement, the Court again resolved a number of immigration cases beyond the DACA decision discussed earlier.

Department of Homeland Security v. Thuraissigiam*: Limitations in the Illegal Immigration Reform and Immigrant Responsibility Act on habeas review do not violate the Suspension Clause or the Due Process Clause of the Fifth Amendment as applied to respondent*

This was a 7-2 decision written by Justice Alito, but two of those seven votes belonged to Justice Breyer who wrote an opinion concurring in the judgment, and Justice Ginsburg who joined in Justice Breyer's opinion. Justice Sotomayor filed a dissenting opinion, joined in by Justice Kagan.

Let me try to be as succinct as I can be to explain this decision. I am going to omit the statutory citations to avoid the clutter. You can read the opinion if you want them.[34]

An alien who arrives at a port of entry in the United States must apply for admission to the United States. If an alien is inadmissible, the alien can be removed from the United States. Removal typically involves an evidentiary hearing before an immigration judge. At that hearing, the alien can attempt to show why removal is inappropriate. One such showing involves an application for asylum because he or she would be persecuted if returned to his or her home country. "If that claim is rejected and the alien is ordered removed, the alien can appeal the removal order to the Board of Immigration Appeals and, if that appeal is unsuccessful, the alien is generally entitled to review in a federal court of appeals." Because it can take a while to hear a claim for asylum, Congress decided to expedite proceedings where, as relevant here:

> *[T]he applicant (1) is inadmissible because he or she lacks a valid entry document; (2) has not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility"; and (3) is among those whom the Secretary of Homeland Security has designated for expedited removal. Once "an immigration officer determines" that a designated applicant "is inadmissible," "the officer [must] order the alien removed from the United States without further hearing or review."*

(Citations omitted.)

One way to avoid expedited removal is to claim asylum. If the applicant "indicates either an intention to apply for asylum" or "a fear of persecution," the immigration officer "shall refer the alien for an interview by an asylum officer." This "screening interview" is designed to determine whether the applicant has a "credible fear of persecution." "The applicant need not show that he or she is in fact eligible for asylum—a 'credible fear' equates to only a 'significant possibility' that the alien would be eligible."

If the officer finds the fear of persecution to be credible, the applicant receives "full consideration" of the claim in a standard removal hearing. If the officers makes the contrary finding, that determination

[34] https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

is reviewed by a supervisor. And if the supervisor agrees, the applicant can appeal to an immigration judge who can take further evidence and make a de novo determination.

An applicant is detained pending a final determination of a credible fear of persecution.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA placed restrictions on the ability of asylum seekers to obtain review under the federal habeas statute. The Ninth Circuit held that these restrictions are unconstitutional. According to the Ninth Circuit, they unconstitutionally suspend the writ of habeas corpus and violate asylum seekers' right to due process.

To provide a factual context for the Court's holding that the Ninth Circuit erred in making this determination, this is what happened. Respondent crossed the southern border of the United States and was detailed by a Border Patrol agent. He was detained for expedited removal. He then claimed a fear of persecution if returned to Sri Lanka, his home country. The asylum officer rejected the claim of a credible fear. The supervising officer agreed. And so did the Immigration Judge. Respondent then filed his habeas application. In that application, he based his fear of persecution for the first time on his Tamil ethnicity and his political views. Among others, he claimed he was deprived by immigration officials of a meaningful opportunity to establish his claims. The district court rejected the petition. As mentioned already, the Ninth Circuit reversed, based on the Suspension Clause and due process.

Justice Alito disagreed with both rationales.

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, §9, cl. 2. Respondent agreed that the Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted and there was no reason to extend its reach. (Citation omitted.) Whether that concession was required or not, I cannot say, but it was fatal.

> *This principle dooms respondent's Suspension Clause argument, because neither respondent nor his* amici *have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release.*

Here, respondent never sought release from custody. Instead, he sought vacatur of the removal order and an order that would provide him with a new opportunity to apply for asylum. That relief "falls outside the scope of the common-law habeas writ."

Justice Alito spent the bulk of the opinion responding to respondent's arguments why the writ should apply here, rejecting all of them. Respondent's due process argument—that "IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credibility-fear proceeding"—fared no better.

> *In 1892, the Court wrote that as to "foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted*

> *into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."*
>
> . . .
>
> *That rule rests on fundamental propositions: "[T]he power to admit or exclude aliens is a sovereign prerogative," the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit, and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted.*

(Citations omitted.) Thus, Justice Alito directed that the habeas petition be dismissed.

Justice Breyer concurred only in the judgment because he felt that as applied here, the Suspension Clause was not violated. But he saw no need to say anything more because no more was asked of the Court in the Government's petition for review.

Nasrallah v. Barr: *Because an order denying relief under the Convention Against Torture (CAT) is distinct from a final order of removal, 8 U. S. C. §1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order.*

This was one of the rare decisions this term written by Justice Kavanaugh with a super-majority (here 7-2 with Justice Thomas issuing a dissenting opinion joined by Justice Alito).

The issue is narrow. Nasrallah came from Lebanon and became a lawful permanent resident of the United States in 2007. Six years later he pled guilty to two counts of receiving stolen property. The Government initiated deportation proceedings based on his conviction. Nasrallah then applied for what is called CAT relief because he believed he would tortured by Hezbollah if he was returned to Lebanon. CAT stands for the international Convention Against Torture. "If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although he still may be removed to other countries)." The Immigration Judge granted the application for CAT relief but ordered Nasrallah removed to a country other than Lebanon. The Board of Immigration Appeals disagreed with the Immigration Judge on Nasrallah's entitlement to CAT relief and ordered him removed to Lebanon.

Nasrallah filed a petition for review in the Court of Appeals (Eleventh Circuit). Among his arguments was this: The Board of Immigration Appeals "erred in finding that he would not likely be tortured in Lebanon. Nasrallah raised factual challenges to the Board's CAT order." Applying Circuit precedent, the Eleventh Circuit declined to review the factual challenges.

> *The court explained that Nasrallah had been convicted of a crime specified in 8 U. S. C. §1252(a)(2)(C). Noncitizens convicted of §1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a "final order of removal." §§1252(a)(2)(C)–(D). Under Eleventh Circuit precedent, that statute also precludes judicial review of factual challenges to the CAT order.*

Before the Supreme Court, the Government argued that "judicial review of a CAT order is analogous to judicial review of a final order of removal. The Government contends, in other words, that the court of appeals may review the noncitizen's constitutional and legal challenges to a CAT order, but not the noncitizen's factual challenges to the CAT order."

Nasrallah response? The court of appeals "may review the noncitizen's constitutional, legal, and factual challenges to the CAT order, although Nasrallah acknowledges that judicial review of factual challenges to CAT orders must be highly deferential."

The narrow question before the Court was "whether, in a case involving a noncitizen who committed a crime specified in §1252(a)(2)(C), the court of appeals should review the noncitizen's factual challenges to the CAT order (i) not at all or (ii) deferentially." The courts of appeals were divided on this question.

Based on the text of the statute, Justice Kavanaugh concluded that the court of appeals should review factual challenges to the CAT order deferentially, and therefore, reversed.

> *The relevant statutory text precludes judicial review of factual challenges to final orders of removal—and only to final orders of removal. In the deportation context, a final "order of removal" is a final order "concluding that the alien is deportable or ordering deportation." §1101(a)(47)(A).*
>
> *A CAT order is not itself a final order of removal because it is not an order "concluding that the alien is deportable or ordering deportation." As the Government acknowledges, a CAT order does not disturb the final order of removal. Brief for Respondent 26. An order granting CAT relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country. But the noncitizen still "may be removed at any time to another country where he or she is not likely to be tortured." 8 CFR §§1208.17(b)(2), 1208.16(f).*

As for the precise standard of review, it is the "substantial-evidence standard: The agency's 'findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" (Citations omitted.)

Guerrero-Lasprilla v. Barr: *The phrase "questions of law" in the Limited Review Provision of the Immigration and Nationality Act includes the application of a legal standard to undisputed facts and is not limited to pure questions of law*

In yet another 7-2 decision where Justice Thomas dissented and Justice Alito joined him (except for Part II-A-1), Justice Breyer answered yet another judicial review question under the Immigration and Nationality Act.

There were two petitioners: Guerrero-Lasprilla and Ruben Ovalles. Each committed a drug crime, making them removable. Both were ordered removed and both left the country. Years later (in 2016 and 2017 respectively), long after the 90-day time limit for filing a motion to reopen, petitioners asked the Board of Immigration Appeals to reopen their case. They rested their claim on equitable tolling, a

recognized doctrine in the field. The Board rejected the claims because of a lack of due diligence. Petitioners then asked the Fifth Circuit to review the Board's decision. The Fifth Circuit rejected the requests for review, concluding that whether an alien acted diligently to reopen removal proceedings based on equitable tolling "is a factual question." The facts, however, were not in dispute. Petitioners thus argued that they were entitled to review.

Under the Immigration and Nationality Act, there is what is referred to as the "Limited Review Provision." It provides that in an immigration case involving aliens who are removable for having committed certain crimes, a court of appeals may consider only "constitutional claims or *questions of law.*" 8 U. S. C. §1252(a)(2)(D). (Emphasis added.)

Does the statutory phrase "questions of law" include the application of a legal standard to undisputed or established facts? It does. Justice Breyer concluded that the phrase "questions of law" included this type of review, and the court of appeals was wrong to hold otherwise.

> *Consider the statute's language. Nothing in that language precludes the conclusion that Congress used the term "questions of law" to refer to the application of a legal standard to settled facts. Indeed, we have at times referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry.*

He then looked to other provisions of the statute, "statutory history," and "relevant precedent" which confirmed his conclusion that the words "questions of law" include the misapplication of a legal standard to undisputed facts.

Insanity Defense

Kahler v Kansas: *The Due Process Clause of the Fourteenth Amendment does not require a State to adopt the "moral-incapacity" strain of the insanity defense*

In a rarely seen vote alignment, Justice Kagan wrote this 6-3 opinion with Justice Breyer dissenting (he was joined by Justices Ginsburg and Sotomayor).

The insanity defense has not been an issue for the Court's consideration in recent memory. As she is wont to do, Justice Kagan began her opinion with a history lesson. She described the different strains of the insanity defense.

■ In *Clark v. Arizona*, 548 U. S. 735, 749 (2006), this Court catalogued state insanity defenses, counting four "strains variously combined to yield a diversity of American standards" for when to absolve mentally ill defendants of criminal culpability.

- The first strain asks about a defendant's "cognitive capacity"—whether a mental illness left him "unable to understand what he [was] doing" when he committed a crime. *Id.*, at 747, 749.
- The second examines his "moral capacity"—whether his illness rendered him "unable to understand that his action [was] wrong." *Ibid.*

■ Those two inquiries, *Clark* explained, appeared as alternative pathways to acquittal in the landmark English ruling *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H. L. 1843), as well as in many

follow-on American decisions and statutes: If the defendant lacks either cognitive or moral capacity, he is not criminally responsible for his behavior.

■ Yet a third "building block[]" of state insanity tests, gaining popularity from the mid-19th century on, focuses on "volitional incapacity"—whether a defendant's mental illness made him subject to "irresistible[] impulse[s]" or otherwise unable to "control[] his actions." *Clark*, 548 U. S., at 749, 750, n. 11; see, *e.g.*, *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866–867 (1887).

■ And bringing up the rear, in *Clark*'s narration, the "product-of-mental-illness test" broadly considers whether the defendant's criminal act stemmed from a mental disease. 548 U. S., at 749–750.

■ As *Clark* explained, even that taxonomy fails to capture the field's complexity. See *id.*, at 750, n. 11. Most notable here, *M'Naghten*'s "moral capacity" prong later produced a spinoff, adopted in many States, that does not refer to morality at all. Instead of examining whether a mentally ill defendant could grasp that his act was immoral, some jurisdictions took to asking whether the defendant could understand that his act was illegal. Compare, *e.g.*, *People v. Schmidt*, 216 N. Y. 324, 333–334, 110 N. E. 945, 947 (1915) (Cardozo, J.) (asking about moral right and wrong), with, *e.g.*, *State v. Hamann*, 285 N. W. 2d 180, 183 (Iowa 1979) (substituting ideas of legal right and wrong). That change in legal standard matters when a mentally ill defendant knew that his act violated the law yet believed it morally justified. See, *e.g.*, *Schmidt*, 216 N. Y., at 339, 110 N. E., at 949; *People v. Serravo*, 823 P. 2d 128, 135 (Colo. 1992).

In Kansas, it is a defense to a prosecution if a defendant "as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged." Kan. Stat. Ann. §21–5209 (2018 Cum. Supp.). Justice Kagan explains how the law works.

> *Suppose, for example, that the defendant shot someone dead and goes on trial for murder. He may then offer psychiatric testimony that he did not understand the function of a gun or the consequences of its use—more generally stated, "the nature and quality" of his actions.* M'Naghten, *10 Cl. & Fin., at 210, 8 Eng. Rep., at 722. And a jury crediting that testimony must acquit him. As everyone here agrees,* ***Kansas law thus uses* M'Naghten*'s "cognitive capacity" prong—the inquiry into whether a mentally ill defendant could comprehend what he was doing when he committed a crime****.*

(Emphasis added.)

Kansas law also provides, however, that mental disease or defect "is not otherwise a defense." §21–5209. "In other words, Kansas does not recognize any additional way that mental illness can produce an acquittal."

> *Most important for this case,* ***a defendant's moral incapacity cannot exonerate him, as it would if Kansas had adopted both original prongs of* M'Naghten***. *Assume, for example, that a defendant killed someone because of an "insane delusion that God ha[d] ordained the sacrifice."* Schmidt, *216 N. Y., at 339, 110 N. E., at 949. The defendant knew what he was doing (killing another person), but he could not tell moral right from wrong; indeed, he thought the murder morally justified. In many States, that fact would preclude a criminal conviction, although it would almost always lead to commitment in a mental health facility. In Kansas, by contrast,*

> *evidence of a mentally ill defendant's moral incapacity—or indeed, of anything except his cognitive inability to form the needed* mens rea*—can play no role in determining guilt.*

(Emphasis added.)

However, once a verdict is in, in Kansas, a defendant can raise mental illness as a reason to lessen his punishment. Kan. Stat. Ann. §§21–6815(c)(1)(C), 21–6625(a).

> *He may present evidence (of the kind* M'Naghten *deemed relevant) that his disease made him unable to understand his act's moral wrongness—as in the example just given of religious delusion. See §21–6625(a). Or he may try to show (in line with* M'Naghten's *spinoff) that the illness prevented him from "appreciat[ing] the [conduct's] criminality." §21–6625(a)(6). Or again, he may offer testimony (here invoking volitional incapacity) that he simply could not "conform [his] conduct" to legal restraints.* Ibid. *Kansas sentencing law thus provides for an individualized determination of how mental illness, in any or all of its aspects, affects culpability. And the same kind of evidence can persuade a court to place a defendant who needs psychiatric care in a mental health facility rather than a prison. See §22–3430. In that way, a defendant in Kansas lacking, say, moral capacity may wind up in the same kind of institution as a like defendant in a State that would bar his conviction.*

That is a lot to absorb, I know, but the facts will help you. Kahler, distraught after a divorce, drove to the home of his ex-wife's grandmother on Thanksgiving weekend, and killed his ex-wife, her grandmother and his two teenage daughters. His 9-year-old son was able to run away. Kahler surrendered to the police the next day and later tried for the murders.

Before trial, Kahler argued that Kansas's treatment of the insanity defense violated the Due Process Clause of the Fourteenth Amendment.

> *Kansas, he asserted, had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong."*

That motion was denied. Kahler tried to show through psychiatric and other testimony that "severe depression had prevented him from forming the intent to kill." The jury was not persuaded. He was convicted of capital murder and after offering additional evidence of his mental illness, the jury, still unpersuaded, imposed the death penalty. Kahler was unsuccessful in his appeal to the Kansas Supreme Court. The Supreme Court granted the writ of certiorari to decide "whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not 'distinguish right from wrong' when committing his crime—or, otherwise put, whether that Clause requires States to adopt the moral-incapacity test from *M'Naghten*."

The answer? "[I]t does not."

Kahler was unable to surmount a very high bar.

> *Under well-settled precedent, a state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."*

In addressing the application of this standard, the Court looks to "eminent common-law authorities."

> *The question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another. An affirmative answer, though not unheard of, is rare.*

Illustratively, in *Powell v. Texas*, 392 U. S. 514 (1968), the Court upheld Texas's decision not to recognize chronic alcoholism as a defense to public drunkenness, emphasizing the role of the States in setting "standards of criminal responsibility." *Id*. at 533.

> *In refusing to impose "a constitutional doctrine" defining those standards, the Court invoked the many "interlocking and overlapping concepts" that the law uses to assess when a person should be held criminally accountable for "his anti-social deeds."* Id.*, at 535–536. "The doctrines of* actus reus, mens rea*, insanity, mistake, justification, and duress"—the Court counted them off—reflect both the "evolving aims of the criminal law" and the "changing religious, moral, philosophical, and medical views of the nature of man."* Id.*, at 536. Or said a bit differently, crafting those doctrines involves balancing and rebalancing over time complex and oft-competing ideas about "social policy" and "moral culpability"—about the criminal law's "practical effectiveness" and its "ethical foundations."* Id.*, at 538, 545, 548 (Black, J., concurring). That "constantly shifting adjustment" could not proceed in the face of rigid "[c]onstitution[al] formulas."* Id.*, at 536–537 (plurality opinion). Within broad limits, Powell thus concluded, "doctrine[s] of criminal responsibility" must remain "the province of the States."* Id.*, at 534, 536.*

Justice Kagan then explained how the Court has hewed closely to these principles in addressing the contours of the insanity defense. She gave two examples. In *Leland v. Oregon*, 343 U. S. 790, 798 (1952), the defendant challenged as a violation of due process the State's use of the moral-incapacity test of insanity. 343 U. S., at 800–801.

> *According to the defendant, Oregon instead had to adopt the volitional-incapacity (or irresistible-impulse) test to comply with the Constitution. See* ibid.*;* supra*, at 2. We rejected that argument. "[P]sychiatry," we first noted, "has made tremendous strides since [the moral-incapacity] test was laid down in* M'Naghten*'s Case," implying that the test seemed a tad outdated. 343 U. S., at 800– 801. *But still, we reasoned, "the progress of science has not reached a point where its learning" would demand "eliminat[ing] the right and wrong test from [the] criminal law."* Id.*, at 801. And anyway, we continued, the "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy" about when mental illness should absolve someone of "criminal responsibility."* Ibid. *The matter was thus best left to each State to decide on its own. The dissent agreed (while parting from the majority*

> *on another ground): "[I]t would be indefensible to impose upon the States[] one test rather than another for determining criminal culpability" for the mentally ill, "and thereby to displace a State's own choice."* Id.*, at 803 (opinion of Frankfurter, J.).*

Then in *Clark*, the Court rejected a challenge to Arizona's decision to discard the cognitive-incapacity prong of *M'Naghten* and leave in place only the moral-incapacity test—just the opposite of what Kansas had done.

Kahler could not overcome this jurisprudential track record. He was left to argue that the moral-incapacity test is so fundamental that it is the "baseline due process." Justice Kagan acknowledged that for hundreds of years, jurists and judges "have recognized insanity (however defined) as relieving responsibility for a crime."

> *But neither do we think Kansas departs from that broad principle. First, Kansas has an insanity defense negating criminal liability—even though not the type Kahler demands.*
>
> *. . . Second, and significantly, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing.*

And then after another history lesson on the treatment of the insanity defense over centuries and its various formulations in the States, Justice Kagan explained.

> *[C]onstitutionalizing the moral-incapacity standard, as Kahler requests, would require striking down not only the five state laws like Kansas's (as the dissent at times suggests, see* post*, at 16), but 16 others as well (as the dissent eventually concedes is at least possible, see* post*, at 21). And with what justification? The emergence of* M'Naghten's *legal variant, far from raising a due process problem, merely confirms what* Clark *already recognized. Even after its articulation in* M'Naghten *(much less before), the moral-incapacity test has never commanded the day.* Clark*, 548 U. S., at 749.*

After her legal time travel through common law, Justice Kagan summarized her conclusion.

> *We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later.*

Justice Breyer's dissent made the argument that Kahler made: that the moral-incapacity test is so fundamental as to represent a denial of due process if it is not available. But his normal voting colleague, Justice Kagan, rejected the claim.

Patent and Trademark Office v. Booking.com B. V.: *A mark that appends ".com" to an otherwise generic word does not preclude the mark from becoming descriptive and thus entitled to registration*

In this 8-1 decision written by Justice Ginsburg (Justice Breyer dissented), the Court clarified the scope of a "generic" mark—something that represents the name of a class of products or services.

The Patent and Trademark Office (PTO) rejected the application of Booking.com to register the mark "Booking.com." It reasoned that the word "booking" is generic—it represents hotel reservation services. Hence, adding ".com" to the word "booking" does not convert it to a registrable mark, it reasoned.

Under the Lanham Act, among the conditions for registration of a mark are these:

> *[T]he mark must be one "by which the goods of the applicant may be distinguished from the goods of others." [15 U. S. C] §1052; see §1091(a) (supplemental register contains "marks capable of distinguishing . . . goods or services"). Distinctiveness is often expressed on an increasing scale: Word marks "may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful."* Two Pesos, Inc. v. Taco Cabana, Inc., *505 U. S. 763, 768 (1992).*

Justice Ginsburg then explains the differences among marks and how those differences related to registration. In particular, pay attention to the difference between a descriptive mark—one that may have a "secondary meaning"; i.e., the public has associated the mark with the owner of the mark, say, through intensive advertising—and a generic mark.

> *The more distinctive the mark, the more readily it qualifies for the principal register. The most distinctive marks—those that are "'arbitrary' ('Camel' cigarettes), 'fanciful' ('Kodak' film), or 'suggestive' ('Tide' laundry detergent)"—may be placed on the principal register because they are "inherently distinctive."* Wal-Mart Stores, Inc. v. Samara Brothers, Inc., *529 U. S. 205, 210–211 (2000). "Descriptive" terms, in contrast, are not eligible for the principal register based on their inherent qualities alone.* E.g., Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., *718 F. 2d 327, 331 (CA9 1983) ("Park 'N Fly" airport parking is descriptive), rev'd on other grounds, 469 U. S. 189 (1985). The Lanham Act, "liberaliz[ing] the common law," "extended protection to descriptive marks."* Qualitex Co. v. Jacobson Products Co., *514 U. S. 159, 171 (1995). But to be placed on the principal register, descriptive terms must achieve significance "in the minds of the public" as identifying the applicant's goods or services—a quality called "acquired distinctiveness" or "secondary meaning."* Wal-Mart Stores, *529 U. S., at 211.(internal quotation marks omitted); see §1052(e), (f). Without secondary meaning, descriptive terms may be eligible only for the supplemental register. §1091(a).*
>
> *At the lowest end of the distinctiveness scale is "the generic name for the goods or services." §§1127, 1064(3), 1065(4). The name of the good itself (e.g., "wine") is*

> *incapable of "distinguish[ing] [one producer's goods] from the goods of others" and is therefore ineligible for registration. §1052; see §1091(a). Indeed, generic terms are ordinarily ineligible for protection as trademarks at all. See Restatement (Third) of Unfair Competition §15, p. 142 (1993);* Otokoyama Co. v. Wine of Japan Import, Inc.*, 175 F. 3d 266, 270 (CA2 1999) ("[E]veryone may use [generic terms] to refer to the goods they designate.").*

Against this legal backdrop, the facts are relatively straightforward. After failing to convince the PTO to register its mark, Booking.com sought review in the district court. Under the Lanham Act, Booking.com is allowed to present evidence not presented to the PTO. (Citation omitted.) That evidence swung the pendulum away from "generic" to "descriptive."

> *Relying in significant part on Booking.com's new evidence of consumer perception, the District Court concluded that "Booking.com"—unlike "booking"—is not generic. The "consuming public," the court found, "primarily understands that BOOKING.COM does not refer to a genus, rather it is descriptive of services involving 'booking' available at that domain name."* Booking.com B.V. v. Matal, *278 F. Supp. 3d 891, 918 (2017). Having determined that "Booking.com" is descriptive, the District Court additionally found that the term has acquired secondary meaning as to hotel-reservation services. For those services, the District Court therefore concluded, Booking.com's marks meet the distinctiveness requirement for registration.*

The Fourth Circuit affirmed, and Justice Ginsburg agreed with the decision.

The district court's findings of fact doomed the PTO.

> *[W]hether "Booking.com" is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services. Thus, if "Booking.com" were generic, we might expect consumers to understand Travelocity—another such service—to be a "Booking.com." We might similarly expect that a consumer, searching for a trusted source of online hotel-reservation services, could ask a frequent traveler to name her favorite "Booking.com" provider.*
>
> *Consumers do not in fact perceive the term "Booking.com" that way, the courts below determined. The PTO no longer disputes that determination. See Pet. for Cert. I; Brief for Petitioners 17–18 (contending only that a consumer-perception inquiry was unnecessary, not that the lower courts' consumer-perception determination was wrong). That should resolve this case: Because "Booking.com" is not a generic name to consumers, it is not generic.*

What is the effect of this holding? The PTO cannot reject registration of a mark solely on the basis of adding ".com" to a generic word, and, as a corollary, cannot automatically cancel registrations of scores of currently registered marks that include ".com."

Romag Fasteners, Inc. v. Fossil Group, Inc.: *A plaintiff who proved a Lanham Act violation for false and misleading advertising is entitled to defendant's profits for the violation without having to show willfulness because, under the plain terms of the Lanham Act, a showing of willfulness as a precondition of recovering an infringer's profits is required only when the claim is one for trademark dilution*

Justice Gorsuch delivered this opinion for a unanimous court (although Justice Sotomayor concurred in the judgment and Justice Alito filed a concurring opinion in which Justices Breyer and Kagan joined).

This case is about "willful infringement"—sort of.

Romag sells magnetic snap fasteners for use in leather goods. Fossil designs and distributes leather goods, among others. By agreement, Fossil used Romag fasteners. But Romag learned that factories later hired by Fossil in China were using counterfeit Romag fasteners, and Fossil did next to nothing about it. So Romag sued Fossil for trademark infringement and falsely representing its fasteners came from Romag. A jury agreed with Romag, finding, additionally, that Fossil had acted in "callous disregard" of Romag's rights. But the jury rejected an accusation that Fossil had acted "willfully."

Romag sought damages in the form of profits Fossil had earned "thanks to its trademark violation," to use Justice Gorsuch's words. The district court rejected the request, holding that under Second Circuit precedent, a plaintiff seeking a profits award had to prove that the defendant's violation was willful. Other circuits had a different view of the law, however. So Justice Gorsuch resolved the circuit split.

You get to be the judge again.

The relevant section of the Lanham Act governing remedies for trademark violations, §35, 60 Stat. 439–440, as amended, 15 U. S. C. §1117(a), provides (I have separated the clauses to help you understand the issue):

> *When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office,*
>
> *a violation under section 1125(a) or (d) of this title,*
>
> *or a willful violation under section 1125(c) of this title,*
>
> *shall have been established . . . ,*
>
> *the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."*

How do you rule? All I need to tell you is that Romag did not proceed under Section 1125(c). The answer is then clear. Romag did not need to show willfulness.

> *The statute does make a showing of willfulness a precondition to a profits award when the plaintiff proceeds under §1125(c). That section, added to the Lanham Act*

> *some years after its initial adoption, creates a cause of action for trademark dilution—conduct that lessens the association consumers have with a trademark. But Romag alleged and proved a violation of §1125(a), a provision establishing a cause of action for the false or misleading use of trademarks. And in cases like that, the statutory language has never required a showing of willfulness to win a defendant's profits. Yes, the law tells us that a profits award is subject to limitations found in §§1111 and 1114. But no one suggests those cross-referenced sections contain the rule Fossil seeks. Nor does this Court usually read into statutes words that aren't there. It's a temptation we are doubly careful to avoid when Congress has (as here) included the term in question elsewhere in the very same statutory provision.*

So, *caveat* trademark infringers.

Intellectual Property: Inter Partes Review

Thryv, Inc. v. Click-To-Call Technologies, LP: *The Patent and Trademark Appeal Board's application of the one-year time limit to institute inter partes review where a prior infringement action had been dismissed without prejudice is closely tied to a decision to institute inter partes review and thus is not appealable under 35 U. S. C. §315(d)*

This 7-2 decision by Justice Ginsburg (Justices Thomas and Alito joined Justice Ginsburg's opinion except for Part III-C, and Justice Gorsuch dissented and was joined as to Parts I-IV by Justice Sotomayor) deals with "inter partes" review at the Patent and Trademark Office (PTO)—the process by which the PTO can reconsider the validity of earlier granted patent claims.

Rather than get into the intricacies of inter partes review, let me lay out the problem and then the conclusion.

1. A decision to institute inter partes review is not appealable: "The determination by the [PTO] Director whether to institute an inter partes review under this section shall be final and nonappealable." 35 U. S. C. §314(d).
2. If a request for inter partes review is made more than one year after suit against a requesting party for patent infringement was brought, "[a]n inter partes review may *not* be instituted." 35 U. S. C. §315(b). (Emphasis added.)
3. Respondent, Click-to-Call, owns a patent relating to a technology for anonymous telephone calls.
4. In 2013, petitioner, Thryv, sought inter partes review of several of the patent's claims.
5. Respondent argued that Thryv sought review too late because of a patent infringement suit brought against it in 2011 that had been voluntarily dismissed. Respondent argued that this suit started the one-year clock under Section 315(b).
6. The Patent Trial and Appeal Board accepted inter partes review, determining that a complaint dismissed without prejudice does not trigger §315(b)'s one-year limit. "Finding no other barrier to institution, the Board decided to institute review. After proceedings on the merits, the Board issued a final written decision reiterating its rejection of Click-to-Call's §315(b) argument and canceling 13 of the patent's claims as obvious or lacking novelty."
7. Click-to-Call appealed.

8. The court of appeals eventually (after an *en banc* opinion of the Federal Circuit came out in a similar situation, finding the Board's decision was appealable), held that the petition for inter partes review was untimely because the 2011 infringement suit started the one-year clock under Section 315(b).
9. As has been the case often with Federal Circuit decisions, Justice Ginsburg disagreed, vacated the judgment of the Federal Circuit, and ordered the appeal dismissed for lack of jurisdiction.

The Court was not writing on a blank slate. In *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. ___, ___ (2016), the Court determined that a decision to institute inter partes review was not appealable (where there was a claim that the grounds for challenging patent claims in an inter partes review must be stated with particularity). And the Court added this description of the scope of its holding:

> *"[O]ur interpretation applies where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review."*

(Citation omitted.)

By this standard, the outcome was easy.

> *We need not venture beyond* Cuozzo*'s holding that §314(d) bars review at least of matters "closely tied to the application and interpretation of statutes related to" the institution decision, 579 U. S., at ___ (slip op., at 11), for a §315(b) challenge easily meets that measurement.*
>
> *Section 315(b)'s time limitation is integral to, indeed a condition on, institution. After all, §315(b) sets forth a circumstance in which "[a]n inter partes review may not be instituted."*
>
> *. . . Because §315(b) expressly governs institution and nothing more, a contention that a petition fails under §315(b) is a contention that the agency should have refused "to institute an inter partes review." §314(d). A challenge to a petition's timeliness under §315(b) thus raises "an ordinary dispute about the application of" an institution-related statute.* Cuozzo*, 579 U. S., at ___ (slip op., at 7). In this case as in* Cuozzo*, therefore, §314(d) overcomes the presumption favoring judicial review.*[35]

[35] In case you are wondering, Part III-C address the "purpose and design" of the underlying statute.

***Peter v. NantKwest, Inc.**: Where 35 U. S. C. §145.provides that an applicant challenging a decision of the Patent Trial and Appeals Board in district court must pay "all expenses of the proceeding," the word "expenses" does not include the salaries of attorneys and paralegal employees of the Patent and Trademark Office*

Justice Sotomayor wrote this unanimous opinion.

This is a case of statutory interpretation. When the Patent and Trademark Appeals Board renders an adverse decision, the applicant can bring a *de novo* action in the federal district court. There is just one catch. Under 35 U. S. C. §145, the applicant must pay all of "the expenses" of the proceedings.

Do the expenses include the salaries of PTO attorneys and paralegals? If you are familiar with the "American Rule" on attorneys' fees, you know the answer: No. Justice Sotomayor first explained the rule:

> *This Court's "'basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the '"American Rule"': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."*

(Citations omitted.)

Justice Sotomayor then described what the Government had to show to establish a departure from the American Rule.

> *To determine whether Congress intended to depart from the American Rule presumption, the Court first "look[s] to the language of the section" at issue. While "[t]he absence of [a] specific reference to attorney's fees is not dispositive," Congress must provide a sufficiently "specific and explicit" indication of its intent to overcome the American Rule's presumption against fee shifting.*

(Citations omitted.)

As you can guess, "[t]he reference to 'expenses' in §145 does not invoke attorney's fees" with the kind of "clarity we have required to deviate from the American Rule." She referred to dictionary definitions of "expense," the meaning of the phrase "expenses of the proceeding" (which is akin to costs of litigation that do not include attorneys' fees), and why adding the word "all" does not expand the meaning of "expenses" to include attorneys' fees. And then as if to drive the point home, she reviewed the history of the Patent Act where Congress included provisions that allowed for attorneys' fees in other contexts. "Because Congress failed to make its intention similarly clear in §145, the Court will not read the statute to 'contravene fundamental precepts of the common law.'"

Second Amendment Right to Bear Arms

New York State Rifle & Pistol Assn., Inc. v. City of New York: *Because New York City amended its firearm licensing statute to allow residents to transport firearms to a second home or a shooting range outside of the city—the relief requested by petitioners—the case is moot*

This *per curiam* opinion featured a dissent by Justice Alito who was joined by Justice Gorsuch and in part by Justice Thomas, who complained that the Court has been avoiding Second Amendment petitions that, in their view, violate the Court's opinion in *District of Columbia v. Heller,* 554 U. S. 570 (2008), where the Court held that the Second Amendment protects the right of ordinary Americans to keep and bear arms. Even Justice Kavanaugh, in a concurring opinion, tipped his hand on *Heller*. While he agreed the case was moot, he also sided with the spirit of Justice Alito's dissent. "The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."

But the Chief Justice was clearly interested in avoiding that fight at this time. Petitioners originally sued to invalidate an ordinance that limited their ability to transport firearms to a second home or a shooting range outside of New York City. The ordinance in issue was amended to provide that relief. So the case presented to the Court was moot.

Petitioners claimed that their rights were still being infringed because they might be found in violation of the ordinance if they stopped along the way to a second home or a shooting range. They also wanted to make a claim for damages. The majority said those issues could be raised on remand.

Stay tuned. Whenever Justice Kavanaugh decides—perhaps over the objection of the Chief Justice—that a Second Amendment case should be considered, the votes are there to grant a petition for certiorari.

Section 1983 (Dissent from Denial of the Petition for a Writ of Certiorari)

Baxter v. Bracey: *Justice Thomas's dissent in a qualified immunity case*

Because of the issue presented, I note Justice Thomas's dissent from the Court's decision to deny a writ of certiorari: Whether the Court should revisit the Court's jurisprudence on the scope of qualified immunity under 42 U. S. C. §1983. This topic has been in the news lately following the death of George Floyd at the hands of a police officer.

Here the Sixth Circuit applied the Court's precedents in affirming a judgment for police officers in a case of alleged excessive force because their conduct did not violate a "clearly established right" under the Constitution. But Justice Thomas argued that "the text of §1983 'ma[kes] no mention of defenses or immunities.' Instead, it applies categorically to the deprivation of constitutional rights under color of state law." He points out that for the first century of the law's existence, "the Court did not recognize an immunity under §1983 for good-faith official conduct. Although the Court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiffs must prove malice to recover." He then traced the development of the qualified immunity defense—first by analogy to common law protections afforded police officers in tort cases and then, abandoning that

approach, to development of the defense based on practical considerations regarding the scope of discretion afforded to officers at the time of the action. As to the requirement that a plaintiff demonstrate that an officer violated a "clearly established right" at the time of the action complained of, he wrote:

> *There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this "clearly established law" test. Indeed, the Court adopted the test not because of "'general principles of tort immunities and defenses,'" but because of a "balancing of competing values" about litigation costs and efficiency.*

(Citations omitted.)

He said that he expressed no "definitive view" on the outcome of the question, but I would not be surprised if the Court takes up the matter when the "right" case comes along.

Securities Laws:

***Liu v. S.E.C.**: A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is "equitable relief" permissible under 15 U. S. C. §78u(d)(5)*

Justice Sotomayor delivered the opinion of the Court in this 8-1 decision (Justice Thomas dissented).

The facts will give you needed context. Liu and his wife (Wang) violated the federal securities laws by spending nearly $20 million of investor money on "ostensible marketing expenses and salaries, an amount far more than" was set forth in a private offering memorandum sent to prospective investors, "pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center." Liu and Wang also diverted "a sizable portion of" the funds raised "to personal accounts and to a company under Wang's control." "Only a fraction of the funds were put toward a lease, property improvements, and a proton-therapy machine for cancer treatment."

The Securities and Exchange Commission (SEC) brought a civil action against Liu and Wang and won. Among other relief granted, the district court "ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project." (Citation omitted.)

Liu and Wang argued that the disgorgement award should account for their business expenses, but the district court disagreed. The Ninth Circuit affirmed.

What does the SEC statutory authority say about the scope of a disgorgement award? Justice Sotomayor outlines the applicable laws.

- In administrative proceedings, the SEC can seek limited civil penalties and "disgorgement."
    - 15. U. S. C. §77h–1(e): "In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement."
    - 15 U. S. C. §77h–1(g): "Authority to impose money penalties."

- In civil actions, the SEC can seek civil penalties and "equitable relief."
    - 15 U. S. C. §78u(d)(5): "In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors";
    - 15 U. S. C. §78u(d)(3): "Money penalties in civil actions."

Congress, however, did not define "equitable relief." So, "courts have had to consider which remedies the SEC may impose as part of its §78u(d)(5) powers." And, as you probably guessed by now, disgorgement of a wrongdoer's profits that deprives a defendant of the gains of . . . wrongful conduct" was identified by courts as within the umbrella of "equitable relief." (Citation omitted.)

In *Kokesh v. SEC*, 581 U. S. ___ (2017), the Court held that a disgorgement order in an SEC enforcement action imposes a "penalty" for the purposes of 28 U. S. C. §2462, the applicable statute of limitations. However, the Court did not reach the question of whether, and to what extent, the SEC may seek "disgorgement" in the first instance through its power to award "equitable relief " under 15 U. S. C. §78u(d)(5), "a power that historically excludes punitive sanctions."

Justice Sotomayor answered this question by reference to equity jurisprudence from which she discerned two principles:

> *First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.*

And that's where she came out at the end. Disgorgement is a permissible remedy under 15 U. S. C. §78u(d)(5), but there are limitations on the amount that can be ordered disgorged.

- For one, the profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, "into a trustee, as to those profits, for the owner of the patent which he infringes."
- Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory.
- Finally, courts limited awards to the net profits from wrongdoing, that is, "the gain made upon any business or investment, when both the receipts and payments are taken into the account."

(Citations omitted.)

There are circumstances where a defendant "will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." (Citation omitted.) But that circumstance aside, "courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses."

Justice Sotomayor recognized that prior disgorgement orders had not always conformed to the equitable principles set forth above.

> *Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud. The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices.*

Those same issues were raised by Liu and Wang, but Justice Sotomayor chose not to address them because the parties' briefs focused on the broader question of whether any form of disgorgement was permissible.

But she did offer this guidance. First, "Section 78u(d)(5) restricts equitable relief to that which 'may be appropriate or necessary for the benefit of investors.' . . . The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit."

Second, the practice of seeking to impose joint-and-several liability to obtain benefits that accrue to an affiliate of a wrongdoer "could transform any equitable profits-focused remedy into a penalty. And it runs against the rule to not impose joint liability in favor of holding defendants 'liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation.'" (Citations omitted.)

> *The common law did, however, permit liability for partners engaged in concerted wrongdoing. The historic profits remedy thus allows some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.*

So, here, the Court left it to the Ninth Circuit to determine "whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required."

Finally, "[c]ourts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" (Citations omitted.) "Accordingly, courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5)." This issue, too, was left for the lower courts to evaluate on remand.

Sentencing

Holguin-Hernandez v. United States*: Defendant preserved for appeal his objection to a sentence by arguing for a shorter sentence before the district court because no more was needed to inform the court of the action the party wishes the court to take under Fed. Rule Crim. Proc. 51(b)*

Justice Breyer delivered the opinion for a unanimous court (Justice Alito issued a concurring opinion joined by Justice Gorsuch). The case involves preservation of an objection—in this case to the sentence imposed by the district court.

As Justice Breyer explains, a criminal defendant "who wishes a court of appeals to consider a claim that a ruling of a trial court was in error must first make his objection known to the trial-court judge."

How is that done? The Federal Rules of Criminal Procedure answer that question. They provide two ways of doing so: "[a] party may preserve a claim of error by informing the court . . . of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b).

Errors "not brought to the court's attention" in one of these two ways are subject to review only insofar as they are "plain." Rule 52(b).

Defendant here was sentenced to 12 months in prison, but argued to the district court that his sentence should have been less than 12 months. Here is what happened next.

> *Petitioner appealed, arguing that the 12-month sentence was unreasonably long in that it was "'greater than necessar[y]' to accomplish the goals of sentencing." The Court of Appeals held that petitioner had forfeited this argument by failing to "object in the district court to the reasonableness of the sentence imposed." The court would, of course, consider whether the error petitioner asserted was "plain." But it found no plain error, and so it affirmed.*

(Citations omitted.) Justice Breyer saw it differently:

> *By "informing the court" of the "action" he "wishes the court to take," Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision. See Rule 52(b). And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges, having in mind their "overarching duty" under §3553(a), would ordinarily understand that a defendant in that circumstance was making the argument (to put it in statutory terms) that the shorter sentence would be "'sufficient'" and a longer sentence "'greater than necessary'" to achieve the purposes of sentencing. Nothing more is needed to preserve the claim that a longer sentence is unreasonable.*

(Citation omitted.)

Thus, "defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved 'sufficient,' while a sentence of 12 months or longer would be 'greater than necessary' to 'comply with' the statutory purposes of punishment. 18 U. S. C. §3553(a)."

State Sovereign Immunity

Allen v. Cooper*: The Copyright Remedy Clarification Act's waiver of state sovereign immunity for copyright infringement is unconstitutional*

The vote in this matter was 9-0 but there were three concurrences in the judgment (one by Justice Thomas and one by Justice Breyer who was joined by Justice Ginsburg). Justice Kagan otherwise delivered the opinion of the Court.

How did a case about the salvage efforts of a pirate ship that sunk in 1718 become the stuff of a Supreme Court opinion? Well, in 1996, a salvage company discovered the wreck. But under federal and state law, the wreck belonged to North Carolina. So the State contracted with the salvager for recovery activities and the salvager retained Allen to document the operation. Allen took videos and photos and registered copyrights in his work. The State published some of the videos and photos. Allen protested the infringement. They worked things out the first time around, but Allen finally sued for copyright infringement. And the State responded by invoking sovereign immunity.

Justice Kagan is always very good about explaining doctrines. And here is her explanation of the doctrine of sovereign immunity.

> *In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a non-consenting State. That bar is nowhere explicitly set out in the Constitution. The text of the Eleventh Amendment (the single most relevant provision) applies only if the plaintiff is not a citizen of the defendant State. But this Court has long understood that Amendment to "stand not so much for what it says" as for the broader "presupposition of our constitutional structure which it confirms."* Blatchford v. Native Village of Noatak*, 501 U. S. 775, 779 (1991). That premise, the Court has explained, has several parts. First, "each State is a sovereign entity in our federal system."* Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 54 (1996). Next, "[i]t is inherent in the nature of sovereignty not to be amenable to [a] suit" absent consent.* Id.*, at 54, n. 13 (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). And last, that fundamental aspect of sovereignty constrains federal "judicial authority."* Blatchford*, 501 U. S., at 779.*
>
> *But not entirely. This Court has permitted a federal court to entertain a suit against a nonconsenting State on two conditions. First, Congress must have enacted "unequivocal statutory language" abrogating the States' immunity from the suit.* Seminole Tribe*, 517 U. S., at 56 (internal quotation marks omitted); see* Dellmuth v. Muth*, 491 U. S. 223, 228 (1989) (requiring Congress to "mak[e] its intention unmistakably clear"). And second, some constitutional provision must allow Congress to have thus encroached on the States' sovereignty. Not even the most*

> *crystalline abrogation can take effect unless it is "a valid exercise of constitutional authority."* Kimel v. Florida Bd. of Regents, *528 U. S. 62, 78 (2000).*

Did the Copyright Act provide an unequivocal waiver of sovereign immunity? The Copyright Remedy Clarification Act of 1990 (CRCA or Act) provides that a State "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement. 17 U. S. C. §511(a). And the Act specifies that in such a suit a State will be liable, and subject to remedies, "in the same manner and to the same extent as" a private party. §501(a); see §511(b).

Hmm. Sounds pretty unequivocal. But if you have read carefully you know that there is a second step. Congress has to have the authority to waive the State's immunity. And this is where Allen ran into an insuperable obstacle: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999), where the Court held that virtually identical waiver language in the patent statute lacked a valid constitutional basis.

Allen advanced an argument under the Intellectual Property Clause in the Constitution, but the Court had already rejected this theory.

> *The Intellectual Property Clause . . . covers copyrights and patents alike. So it was the first place the* Florida Prepaid *Court looked when deciding whether the Patent Remedy Act validly stripped the States of immunity from infringement suits. In doing so, we acknowledged the reason for Congress to put "States on the same footing as private parties" in patent litigation. 527 U. S., at 647. It was, just as Allen says here, to ensure "uniform, surefire protection" of intellectual property. Reply Brief 10. That was a "proper Article I concern," we allowed. 527 U. S., at 648. But still, we said, Congress could not use its Article I power over patents to remove the States' immunity. We based that conclusion on* Seminole Tribe v. Florida, *decided three years earlier. There, the Court had held that "Article I cannot be used to circumvent" the limit sovereign immunity "place[s] upon federal jurisdiction." 517 U. S., at 73. That proscription ended the matter. Because Congress could not "abrogate state sovereign immunity [under] Article I,"* Florida Prepaid *explained, the Intellectual Property Clause could not support the Patent Remedy Act. 527 U. S., at 636. And to extend the point to this case: if not the Patent Remedy Act, not its copyright equivalent either, and for the same reason. Here too, the power to "secur[e]" an intellectual property owner's "exclusive Right" under Article I stops when it runs into sovereign immunity. §8, cl. 8.*

Allen had no better success arguing that Section 5 of the Fourteenth Amendment gave Congress the necessary authority. Section 1 of the Amendment imposes prohibitions on the States, "including (as relevant here) that none may 'deprive any person of life, liberty, or property, without due process of law.'" Section 5 gives Congress the "power to enforce, by appropriate legislation," these limitations on the States' authority. "That power, the Court has long held, may enable Congress to abrogate the States' immunity and thus subject them to suit in federal court." (Citation omitted.)

However, to satisfy Section 5's appropriateness standard, an abrogation statute must be tailored to "remedy or prevent" conduct infringing the Fourteenth Amendment's substantive prohibitions. (Citations omitted.) Congress cannot use its "power to enforce" the Fourteenth Amendment to alter what that Amendment bars. (Citation omitted.) "That means a congressional abrogation is valid under Section 5 only if it sufficiently connects to conduct courts have held Section 1 to proscribe."

Justice Kagan then explains how the Court has decided whether a law satisfies this test.

> *To decide whether a law passes muster, this Court has framed a type of means-end test. For Congress's action to fall within its Section 5 authority, we have said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations. Hard problems often require forceful responses and, as noted above, Section 5 allows Congress to "enact[] reasonably prophylactic legislation" to deter constitutional harm. But "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." Always, what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to "enforce."*

(Citations omitted.)

Copyrights are a form of property, Justice Kagan recognized, and the Fourteenth Amendment proscribes the deprivation of a person's property by a State without due process. But a negligent act does not deprive a person of property under Court precedent; so "an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause." (Citation omitted.) And if the State offers a remedy for the deprivation, due process is satisfied. (Citation omitted.)

> *That means within the broader world of state copyright infringement is a smaller one where the Due Process Clause comes into play.*
>
> *Because the same is true of patent infringement,* Florida Prepaid *again serves as the critical precedent. That decision defined the scope of unconstitutional infringement in line with the caselaw cited above—as intentional conduct for which there is no adequate state remedy. See 527 U. S., at 642–643, 645. It then searched for evidence of that sort of infringement in the legislative record of the Patent Remedy Act. And it determined that the statute's abrogation of immunity—again, the equivalent of the CRCA's—was out of all proportion to what it found. That analysis is the starting point of our inquiry here. And indeed, it must be the ending point too unless the evidence of unconstitutional infringement is materially different for copyrights than*

> *patents. Consider once more, then,* Florida Prepaid*, now not on Article I but on Section 5.*

And when she considered the analysis in *Florida Prepaid*, the result was the same. Just as the Patent Remedy Act, did not "enforce" Section 1 of the Fourteenth Amendment—and so was not "appropriate" under Section 5—so too, the CRCA did not enforce Section 1.

> *Under* Florida Prepaid*, the CRCA thus must fail our "congruence and proportionality" test. As just shown, the evidence of Fourteenth Amendment injury supporting the CRCA and the Patent Remedy Act is equivalent—for both, that is, exceedingly slight. And the scope of the two statutes is identical—extending to every infringement case against a State. It follows that the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew. In this case, as in* Florida Prepaid*, the law's "indiscriminate scope" is "out of proportion" to any due process problem. In this case, as in that one, the statute aims to "provide a uniform remedy" for statutory infringement, rather than to redress or prevent unconstitutional conduct. And so in this case, as in that one, the law is invalid under Section 5.*

Justice Kagan did offer Congress the opportunity to change the law and to bring "digital Blackbeards" (referring to internet postings of the pirate ship videos and photos) to justice.

> *[G]oing forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.*

The Hague Convention on the Civil Aspects of International Child Abduction

Monasky v. Taglieri*: An infant's "habitual residence" under the Hague Convention on the Civil Aspects of International Childhood Abduction requires a factual inquiry and review of the facts found is subject to the "clear error" rule*

This case is about the move of a mother and child to the United States after a divorce in Italy, and the father's successful court fight to return the child to Italy. Justice Ginsburg wrote the opinion. The vote count was 9-0, but Justices Thomas and Alito wrote opinions concurring in part and concurring in the judgment, respectively.

I realize that the Hague Convention on the Civil Aspects of International Child Abduction (Convention) and its implementing legislation in the United States, The International Child Abduction Remedies Act (ICARA), are not part of just about all lawyers' practices, but I discuss it in part because the case caught my attention and in part because of Justice Ginsburg's citation to court decisions from other countries in support of her decision on the merits.

Here is background on the Convention.

The Convention was adopted to address the international child abductions during domestic disputes. "It is the Convention's core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.' Convention Preamble, Treaty Doc., at 7." (Case citation omitted.)

As a result, the Convention "ordinarily requires the prompt return of a child wrongfully removed or retained away from the county in which she habitually resides."

> *The removal or retention is wrongful if done in violation of the custody laws of the child's habitual residence. Art. 3,* ibid. *The Convention recognizes certain exceptions to the return obligation. Prime among them, a child's return is not in order if the return would place her at a "grave risk" of harm or otherwise in "an intolerable situation." Art. 13(b),* id.*, at 10.*
>
> *The Convention's return requirement is a "provisional" remedy that fixes the forum for custody proceedings. Silberman, Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence, 38 U. C. D. L. Rev. 1049, 1054 (2005). Upon the child's return, the custody adjudication will proceed in that forum. See* ibid. *To avoid delaying the custody proceeding, the Convention instructs contracting states to "use the most expeditious procedures available" to return the child to her habitual residence. Art. 2, Treaty Doc., at 7. See also Art. 11,* id.*, at 9 (prescribing six weeks as normal time for return-order decisions).*

Here are the facts. Monasky and Taglieri were married in the United States in 2011. In 2013, they relocated to Italy with no plans to return to the United States. They lived in Milan together until the marriage deteriorated. Taglieri became physically abusive, and "forced himself upon [her] multiple times," she testified. They lived separately—Monasky in Milan and Taglieri in Lugo, a town about three hours away. Monasky, as you have figured out by now, became pregnant. It was a difficult pregnancy adding strain to a marriage already strained. Monasky looked into returning to the United States and even searched for a divorce lawyer. But, at the same time, she and Taglieri "made preparations to care for their expected child in Italy." Justice Ginsburg continues the story:

> *They inquired about childcare options there, made purchases needed for their baby to live in Italy, and found a larger apartment in a Milan suburb.*
>
> *Their daughter, A. M. T., was born in February 2015. Shortly thereafter, Monasky told Taglieri that she wanted to divorce him, a matter they had previously broached, and that she anticipated returning to the United States. Later, however, she agreed to join Taglieri, together with A. M. T., in Lugo. The parties dispute whether they reconciled while together in that town.*
>
> *On March 31, 2015, after yet another heated argument, Monasky fled with her daughter to the Italian police and sought shelter in a safe house. In a written statement to the police, Monasky alleged that Taglieri had abused her and that she feared for her life. Two weeks later, in April 2015, Monasky and two-month-old A. M. T. left Italy for Ohio, where they moved in with Monasky's parents.*

That's the record. Where was A.M.T.'s "habitual residence"? After a four-day bench trial, the district court ruled it was Italy. Monasky's efforts to stay this ruling failed and A.M.T. was returned to Italy in her father's care.

In the meantime, Monasky's appeal continued but she was unsuccessful. The Sixth Circuit affirmed the district court's decision.

Before the Court, Monasky argued that, categorically, there had to be an agreement between the parents on where to raise their child to establish an infant's habitual residence. Justice Ginsburg disagreed.

Focusing first on the test of the Convention, which suggested a fact-sensitive inquiry to determine the "habitual residence," she wrote:

> *The Hague Convention does not define the term "habitual residence." A child "resides" where she lives. See Black's Law Dictionary 1176 (5th ed. 1979). Her residence in a particular country can be deemed "habitual," however, only when her residence there is more than transitory. "Habitual" implies "[c]ustomary, usual, of the nature of a habit."* Id.*, at 640. The Hague Convention's text alone does not definitively tell us what makes a child's residence sufficiently enduring to be deemed "habitual." It surely does not say that habitual residence depends on an actual agreement between a child's parents. But the term "habitual" does suggest a fact-sensitive inquiry, not a categorical one.*

Next she looked to the negotiation and drafting history of the Convention, which supported the need for a factual inquiry.

> *The Convention's explanatory report states that the Hague Conference regarded habitual residence as "a question of pure fact, differing in that respect from domicile." The Conference deliberately chose "habitual residence" for its factual character, making it the foundation for the Convention's return remedy in lieu of formal legal concepts like domicile and nationality. That choice is instructive. The signatory nations sought to afford courts charged with determining a child's habitual residence "maximum flexibility" to respond to the particular circumstances of each case. The aim: to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home.*

(Citations omitted.)

Finally, Justice Ginsburg looked at the "views of our treaty partners." Citing to decisions from the United Kingdom Supreme Court, the Court of Justice of the European Union, the Supreme Court of Canada, and the High Court of Australia, she concluded, that "[t]he 'clear trend' among our treaty partners is to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case." (Citations omitted.)

Having determined that an actual agreement was not the standard to determine the habitual residence of an infant, Justice Ginsburg had to answer the second question presented: What was the standard of review? The Convention did not provide that answer. Neither did ICARA, the U.S. implementing

statute. Justice Ginsburg determined that the clear error standard applied to the district court's fact finding.

> *The habitual-residence determination thus presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court.*

And because the district court's findings favored A.M.T.'s return to Italy, Monasky lost.

And in case you are wondering, A.M.T. is now five years old, custody of A.M.T. had been resolved only on an interim basis, and Monasky's parental rights were still being litigated in an Italian court.

CONCLUSION

The Roberts Era has, indeed begun. Now distanced from Justice Kennedy, the Chief Justice is firmly in control of this Court. And he is doing his best to protect the institutional integrity of the Court in what is otherwise a highly partisan environment.

The Chief Justice chose to write seven opinions, one or two more than every other Justice, except Justice Gorsuch. And consider the topics. DACA. Religious freedom. Separation of powers. Executive power. His concurring opinion in *June Medical Services L.L.C. v. Russo* managed to walk the line between *stare decisis* and eliminating, despite *stare decisis*, part of the analytic framework of *Whole Women's Health v. Hellerstedt*.

His opinions in *Trump v. Vance* and *Trump v. Mazars USA, LLP* secured seven votes, including those of the two Trump appointees on the Court.

He saved the federal Superfund law from a chaotic outcome allowed by the Montana Supreme Court and ensured that the public could have access to "government edicts" in the form of annotated laws of the State of Georgia without fear of copyright infringement claims.

He had only two dissents. That means that he selected the author of 51 of the 53 authored opinions. He chose Justice Kavanaugh for four of the 12 five-vote majority opinions, and not Justices Thomas or Gorsuch, whose approaches to issue resolution in some matters might not lend themselves to maintaining a majority.

Yet he asked Justice Gorsuch to write *Bostock v Clayton County* and joined that opinion despite his opposition to Justice Kennedy's historic ruling in *Obergefell v Hodges* (2015), to give the opinion a bit of heft.

We also learned in the 2019-2020 Term a bit more about Justice Kavanaugh. He wrote or joined in the second fewest dissents. He has the confidence of the Chief Justice in writing 5-4 opinions. He has separated himself from Justices Thomas, Alito, and Gorsuch, preferring to write his own opinions when he concurs or dissents. And he offered his views of *stare decisis* in a lengthy concurring opinion in *Ramos v. Louisiana*, where the Court overruled *Apodaca v. Oregon*, 40 U S. 404 (1972).

For his part, Justice Gorsuch does seem to be consistent in his textualist views. If nothing else, he has ensured the importance of dictionaries from all time periods to aid the Court in its statutory interpretive challenges.

The Court created a lawyer and expert's relief program by its decision in *County of Maui v. Hawaii Wildlife Fund*, as they try to figure out how close to a navigable water a point source discharging to groundwater must be before a permit is required.

The Court cleared up a number of circuit conflicts in the 2019-20 Term, maintained its battles with the Texas Court of Criminal Appeals in death penalty cases at the same time as it affirmed the constitutionality of the use of lethal injection as a means to execute a death-row inmate—this time for the federal government—resulting in three executions in one week by the Department of Justice, after a 17-year hiatus from death-penalty executions.

After the 2019-20 Term, Electors in a state know that they can be punished if they don't vote for the Presidential candidate receiving the most votes in that state. Section 1981 plaintiffs have to show "but-for" causation to state a claim but federal employees claiming age discrimination do not—unless they are seeking monetary relief. An Indian reservation does not cease to exist unless Congress says it does. Religious schools are protected by the First Amendment in employment decisions where the function of the employee is integral to the school's religious formation mission. Jury verdicts must be unanimous in cases involving serious crimes. Drivers with revoked licenses need to beware they can be stopped if they are the registered owner of the vehicle being driven. A ".com" mark might be descriptive and thus entitled to trademark registration. Congress did not waive a state's immunity from suit for copyright infringement.

And amidst all of this, a pandemic that caused the Court to end later than usual, with fewer opinions than usual, and virtual oral arguments that featured rotating questions with time limits in which all of the Justices participated.

Memorable may be an understatement to describe the 2019-20 Term. Historic. Remarkable. Surprising. All of these.

/jmb

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. Mr. Barkett was a member of the Advisory Committee for Civil Rules of the Federal Judicial Conference from 2012-18, and served on the Discovery Subcommittee that developed the December 1, 2015 amendments to the rules, the Rule 23 Subcommittee that developed the 2018 amendments to Rule 23, and the Rule 30(b)(6) and MDL subcommittees. He served as a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility from 2016-2019 and 2014-15. He is also a member of the American Law Institute. He is a fellow of the College of Commercial Arbitrators, the American College of Civil Trial Mediators, and the American College of Environmental Lawyers. In 2019, Mr. Barkett was awarded a Lifetime Achievement Award by the Miami Daily Business Review at its annual legal Professional Excellence awards dinner.

Mr. Barkett is a commercial (contract, corporate, and banking disputes, employment, trademark, and antitrust) and environmental lawyer (CERCLA, RCRA, and toxic tort) having handled scores of complex and simple litigation matters in Federal and state courts or before an arbitration tribunal.

Mr. Barkett is also a problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of commercial, environmental, and reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals." He has served or is serving as a neutral in scores of matters involving in the aggregate more than $4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations.

Mr. Barkett chairs the Miami International Arbitration Society (MIAS) "Task Force on Issues Related to Expedited Arbitration in connection with the UNCITRAL Rules" being considered by UNCITAL Working Group II. He wrote the Report of the Task Force that was submitted to UNCITRAL for consideration by Working Group II and drafted a proposed Appendix on Expedited Procedures under the UNCITRAL Rules for consideration by Working II at its 70th Session in Vienna, Austria in September 2019.

In November 2003, Mr. Barkett was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the multi-billion dollar restoration of the Florida Everglades. He has also served as a Special Master for judges on the Southern District of Florida or the Miami-Dade

County Circuit Court to address a wide variety of discovery and e-discovery issues in complex litigation.

Mr. Barkett also consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also is consulted by other lawyers on questions of legal ethics.

Mr. Barkett is a recipient of the Burton Award for Legal Achievement which honors lawyers for distinguished legal writing. Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers* (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past nine years, in addition to a number of other articles on a variety of topics:

- *A Mediator's Dilemma: Evaluating Without Compromising Self-Determination or Impartiality* (CPR Annual Conference, St. Petersburg, FL, February 2020)
- *CERCLA Allocation: Discretion Rules Yet Again* (ABA Section of Litigation Environmental Committee Newsletter, Winter 2020)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA Section of Litigation CLE Program, Aspen, Colo. January 2020, updating an earlier paper)
- *Superfund: 20+20 = 40* (Blog Posting, American College of Environmental Lawyers, January 2020)
- *Superfund Year in Review,* (ABA Section of Environment, Energy, and Resources) (co-author, January 2020)
- *The Roberts Court 2018-19: Avoiding the Limelight After the Kavanaugh-Kennedy Trade* (ABA Webinar, August 5, 2019)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA Cross Border Discovery National Institute, Berlin, July 2019) (updating a paper first presented at the ABA National Institute on E-Discovery, May 15, 2015, New York)
- *The Ethics of Lawyers in Need of Assistance* (ABA Section of Litigation Annual Meeting, New York, May 2, 2019)
- *Attorney-Client Privilege*, 45 Litigation Journal 34 (Winter 2019)
- *Superfund Year in Review,* (ABA Section of Environment, Energy, and Resources) (co-author, January 2019)
- Trinity Industries v. Greenlease*: Allocation Roulette Under CERCLA?* 76 Chem. Waste. Lit. Reporter 11 (November 2018)
- *The 2018 Amendments to the Federal Class Action Rule* (ABA Section of Litigation Annual Conference, San Diego, May 3, 2018; ABA National Institute on Class Actions, Chicago, October 2018)
- *The Roberts Court 2017-18: A Return to the Norm Before Wading Into a New Era* (ABA Webinar, August 2018)
- *Arbitration and the Unauthorized Practice of Law,* 36 *Alternatives* 83 (June 2018)
- *Practice Focus: The Duty of Candor, Inadvertent Production of Documents, and Your Arbitration Work*, 36 Alternatives 51 (April 2018)
- *Superfund Year in Review,* (ABA Section of Environment, Energy, and Resources) (co-author, January 2018)

- *The Roberts Court 2016-17: A Quiet Term, or the Calm Before the Storm?* (ABA Webinar, August 16, 2017)
- *Refresher Ethics: Cross Border Issues* (ABA National Institute on Cross Border Discovery, Munich, Germany, July 26, 2017)
- *The Future of the Attorney Client Privilege and Work Product Protection*, (ABA National Institute on Cross Border Discovery, Munich, Germany, July 26, 2017 updated from ABA Litigation Section Annual Conference, San Francisco, May 5, 2017)
- *Arbitration Ethics: A Sampler* (Shook, Hardy & Bacon Update on the Law, Kansas City, Missouri, June 22, 2017 updated from a paper presented at the CPR Annual Meeting, Miami, March 3, 2017)
- *Work Product Protect for Draft Expert Reports and Attorney-Expert Communications* (Environmental & Energy Litigation Committee, Section of Litigation, May 30, 2017)
- *Lawyer Ethics: E-Communications, Social Media, and the Internet*, (ABA Eleventh Annual National Institute on E-Discovery, Chicago, May 11, 2017 updated from DePaul University Law School, Clifford Law Offices Ethics Webinar livestreamed to over 4,000 registrants, Feb. 16, 2017)
- *Arbitration Ethics: The Duty of Candor, the Unauthorized Practice of Law, and Inadvertent Production of Privileged or Protected Documents* (CPR Annual Meeting, Miami, March 3, 2017)
- *Superfund Year in Review,* (ABA Section of Environment, Energy, and Resources) (co-author, January 2017)
- *The 2015 Civil Rules Amendments: One Year Later* (ABA Center for Professional Responsibility Webinar, December 15, 2016)
- *Do Arbitrators Have Sanctions Authority in Domestic Arbitrations?* Daily Business Review, November 17, 2016.
- *Refresher Civil Procedure: Cost-Shifting Under the Federal Rules* (Georgetown Advanced E-Discovery Institute, Washington D.C., November 10, 2016)
- *Class Action Reform*, 31 N.R.E. 54 (Fall 2016)
- *The Roberts Court 2015-16: An Untimely Death and Its Impacts* (ABA Annual Meeting, San Francisco, August 5, 2016)
- *Antonin Scalia: A Retrospective* (Shook, Hardy & Bacon Update on the Law, Kansas City, June 23, 2016)
- *The First 100 Days (or so) of the 2015 Civil Rules Amendments* (Bloomberg BNA Digital Discovery and e-Evidence, 16 DDEE 178 (April 14, 2016) adapted from a longer piece by the same title at http://src.bna.com/d6z.
- *The First 100 Days (or so) of the 2015 Civil Rules Amendments*, (Bloomberg BNA Digital Discovery & Evidence Report, April 14, 2016)
- *Cheap Talk? Witness Payments and Conferring with Testifying Witnesses* (ABA Webinar, October 2015)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar, September 30, 2015)
- *The Roberts Court 2014-15: Individual Rights, Voting Rights, Fair Housing, and the Importance of (Con)Text* (ABA Annual Meeting, Chicago, July 31, 2015)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA National Institute on E-Discovery, May 15, 2015, New York)
- *Arbitration: Hot Questions, Cool Answers* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)

- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses* (ABA Webinar, October 2014, updating a presentation first made at the ABA Annual Meeting, Chicago, 2009)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar September 2014 updating an October 31, 2013 webinar for the Professional Education Broadcast Network))
- *The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, and More (or Less) Unanimity* (ABA Annual Meeting, Boston, August 7, 2014)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals* (Miami-Dade County Bench and Bar Conference, February 8, 2013 updated for Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Perspectives on the New York Convention Under the Laws of the United States* (co-authored with F. Cruz-Alvarez; M. Paulsson, and S. Pagliery) (International Council For Commercial Arbitration 22nd Biennial Congress, April 8, 2014, Miami, Florida)
- *New Rule 45*, 28 N.R.E. 50 (Spring 2014)
- *Refresher Ethics: Steering Clear of Witness Minefields* (with Green, Bruce; Sandler, Paul Mark) (Professional Education Broadcast Network Webinar, May 16, 2014)
- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent* (ABA Annual Meeting, San Francisco, August 10, 2013)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012; updated, ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 26, 2013)
- *Lawyer-Client Fallout: Using Privileged Information To Establish A Claim Against a Client/Employer* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review* (Duke Law School, Washington D.C., April 19, 2013)
- *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 Fordham L. Rev. 1589 (March 2013)
- *Neighborly RCRA Claims*, 27 N.R.E. 48 (Spring 2013)
- *The Roberts Court 2011-12: The Affordable Care Act and More* (ABA Annual Meeting, Chicago, August 3, 2012)
- *Un-taxing E-Discovery Costs: Section 1920(4) After* Race Tire Amer. Inc. *and* Taniguchi (June 29, 2012) (http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf)
- *ABA to Tackle Technology Issues in Model Rules at August Meeting*, (http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560335059&thepage=3&slreturn=1) Law Technology News, June 25, 2012)
- *E-Communications: Problems Posed by Privilege, Privacy, and Production* (ABA National Institute on E-Discovery, New York, NY, May 18, 2012)
- *The 7th Circuit Pilot Project: What We Might Learn And Why It Matters to Every Litigant in America* (ABA Section of Litigation News Online, December 11, 2011) http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf

- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011) (Mr. Barkett received the Burton Award for Legal Achievement for this paper)
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)
- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York. 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0*, (ACEDS Conference, Hollywood, FL March 2011)
- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Walking%20the%20Plank.pdf)
- Zubulake *Revisited: Pension Committee and the Duty to Preserve (Feb. 26, 2010)* (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *From Canons to Cannon* in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses* (ABA Annual Meeting, Chicago, 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules* in Electronic Disclosure in International Arbitration (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13* (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)

- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August 2007)
- *Help Has Arrived…Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way…Sort of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Meeting, Los Angeles (2006)
- *The Battle for Bytes: New Rule 26*, e-Discovery, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?*, 9 Widener Law Symposium 485 (2003)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and the editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002).

Mr. Barkett is a former member of the Council of the ABA Section of Litigation. At the University of Miami Law School, Mr. Barkett teaches "E-Discovery," and in the past has taught a course entitled, "Environmental Litigation."

Mr. Barkett has been recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including *Who's Who Legal* (International Bar Association) (since 2005); *Best Lawyers in America* (National Law Journal) (since 2005); *Legal Elite* (since 2004), (Florida Trend), *Florida Super Lawyers* (since 2008), and Chambers USA *America's Leading Lawyers* (since 2004). Mr. Barkett can be reached at jbarkett@shb.com.

APPENDIX (VOTE COUNT SINCE 2007 TERM)

Vote Count	19-20 No.	19-20 %	18-19 No.	18-19 %	17-18 No.	17-18 %	16-17 No.	16-17 %	15-16 No.	15-16 %	14-15 No.	14-15 %	13-14 No.	13-14%	12-13 No.	12-13%	11-12 No.	11-12%	10-11 No.	10-11%	09-10 No.	09-10 %	08-09 No.	08-09 %	07-08 No.	07-08 %
4-2	0	0	0	0	0	0	1	1.4	-	-	-	-	-	-	-	-	--		-	-	-	-	-	-	-	-
4-3	0	0	0	0	0	0	0	0	2	2.5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4-4	0	0	0	0	1	1.3	0	0	4	4.9	0	0	0	0	0	0	0	0	2[36]	2.4	0	0	0	0	2	2.8
5-2	0	0	0	0	0	0	0	0	1	1.2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1.4
5-3	**1[37]**	**1.6**	**2**	**2.7**	**2**	**2.6**	**7[38]**	**10.0**	**7**	**8.6**	**0**	**0**	**0**	**0**	**2**	**2.5**	**2**	**2.7**	**3[39]**	**3.6**	**3**	**3.3**	**0**	**0**	**2**	**2.8**
5-4	**13[40]**	**20.6**	**18**	**24.7**	**18**	**23.7**	**3**	**4.3**	**0**	**0**	**19**	**25**	**11[41]**	**14.9**	**21[42]**	**26.6**	**14[43]**	**19.2**	**14**	**16.7**	**16[44]**	**17.4**	**22**	**27.2**	**10[45]**	**13.9**
6-2	1	1.6	1	1.4	0	0	8	11.4	15	18.5	2	2.6	2	2.7	1	1.3	1	1.4	7	8.3	0	0	0	0	1	1.4

[36] Both decisions were *per curiam*. Justice Kagan did not participate in either case.

[37] Justice Kagan did not participate in *Agency for Int'l Development v. Alliance for Open Society*.

[38] One of these decisions was *per curiam* (*Hernandez v. Mesa*, in which Justice Ginsburg dissented, joined by Justice Breyer, and Justice Thomas dissented).

[39] One of these decisions was *per curiam.*

[40] Two of these decisions were *per curiam* (*Republican National Committee v. Democratic National Committee*, in which Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan and *Barr v. Lee* (Justice Breyer dissenting joined by Justice Ginsburg, and Justice Sotomayor dissenting joined by Justices Ginsburg and Sotomayor).

[41] This count includes *Utility Air Regulatory Group v. EPA* that was a 7-2 decision on one issue in the case but the vote was 5-4 on a second issue in the case.

[42] This count includes *US Airways, Inc. v. McCutchen* which was a 9-0 decision in rejecting equitable defenses to an ERISA claim, but 5-4 on applying the common-fund doctrine.

[43] This includes one *per curiam* decision.

[44] This includes two *per curiam* decisions and one writ improvidently granted. *Perdue v. Winn* was a 9-0 vote on whether a fee award could be enhanced, but a 5-4 vote on the decision to remand the award for review in light of the standards set by the Court.

[45] One 5-4 decision, *Davis v. Federal Election Commission*, had a 9-0 vote on a standing issue but is treated here as a 5-4 vote on the merits.

Vote Count	19-20 No.	19-20 %	18-19 No.	18-19 %	17-18 No.	17-18 %	16-17 No.	16-17 %	15-16 No.	15-16 %	14-15 No.	14-15 %	13-14 No.	13-14%	12-13 No.	12-13%	11-12 No.	11-12%	10-11 No.	10-11%	09-10 No.	09-10 %	08-09 No.	08-09 %	07-08 No.	07-08 %
6-3	8	12.7	11	15.1	7[46]	9.2	1[47]	1.4	3	3.7	11	14.5	8[48]	10.8	6	7.6	14[49]	19.2	4	4.8	10	10.9	10	12.3	8[50]	0
7-0	0	0	0	0	0	0	2	2.9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.0
7-1	0	0	2	2.7	0	0	6	8.6	6	7.4	0	0	1	1.4	2	2.5	0	0	3	3.6	3	3.3	0	0	1	1.4
7-2	11	17.5	6	8.2	10[51]	13.1	3	4.3	0	0	6	7.9	4	5.4	6	7.6	4	5.5	5	5.9	14[52]	15.2	14[53]	17.3	18	25.0
8-0[54]	2	3.2	3	4.1	4	5.2	28	40.0	28[55]	35.8	0	0	2	2.7	1	1.3	4	5.5	18	21.4	4	4.3	0	0	0	0.0
8-1	6	9.5	4	5.5	6[56]	7.9	2	2.9	4	4.9	5	6.6	1	1.4	2	2.5	8	10.9	5	5.9	4	4.3	6[57]	7.4	5	6.9
9-0[58]	21	33.3	26	39.7	28	36.8	9[59]	**12.9**	**10**	**12.3**	**33[60]**	**43.4**	**45**	**60.8**	**38**	**48.1**	**26**	**35.6**	**23**	**27.4**	**38**	**41.3**	**29**	**35.8**	**24**	**33.3**

[46] This includes one *per curiam* decision (*Tharpe v. Sellers*, where Justice Thomas dissented, joined by justices Alito and Gorsuch).

[47] *Pavan v. Smith* was *per curiam* but Justice Gorsuch dissented, joined by Justices Alito and Thomas.

[48] This includes one *per curiam* decision.

[49] This includes two *per curiam* decisions.

[50] *Crawford v. Marion County Election Board* was a 6-3 vote, but there was not a majority opinion.

[51] This includes one *per curiam* decision.

[52] This includes four *per curiam* decisions. *Florida v. Powell* (holding that advising a suspect that the suspect has the right to talk to a lawyer before answering any of the law enforcement officers' questions and that the suspect can invoke this right at any time during the interview satisfies *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)) was an 8-1 decision on jurisdiction but a 7-2 decision on compliance with *Miranda* (Justice Stevens dissented and was joined by Justice Breyer on Part II of the dissent).

[53] This includes one *per curiam* decision.

[54] The *per curiam* count for 8-0 decisions is one for 2017-18, five for 2015-16, one for 2010-11 and two in 2006-07. In 2017-18, one 8-0 "decision" was a decree in a water rights dispute (*Montana v. Wyoming*).

[55] This includes one decree resolving a dispute between two states.

[56] This includes two *per curiam* decisions.

[57] This includes one *per curiam* decision.

[58] The *per curiam count* for 9-0 decisions is four for 2018-19, ten in (2017-18); 5 (2015-16); eight (2014-15); seven (2013-14 including two dismissals because the writ of certiorari was improvidently granted); six (2012-13) (including one dismissal because the writ was improvidently granted); 14 (2011-12); five (2010-11) (including one dismissal where the writ was improvidently granted); 12 (2009-10); four (2008-09); two (2007-08); and six (2006-07).

Vote Count	19-20 No.	19-20 %	18-19 No.	18-19 %	17-18 No.	17-18 %	16-17 No.	16-17 %	15-16 No.	15-16 %	14-15 No.	14-15 %	13-14 No.	13-14%	12-13 No.	12-13%	11-12 No.	11-12%	10-11 No.	10-11%	09-10 No.	09-10 %	08-09 No.	08-09 %	07-08 No.	07-08 %
Total	**63**	**100**	**73**	**100**	**76**	**100**	**70**	**100**	**81**	**100**	**76**	**100**	**74**	**100**	**79**	**100**	**73**	**100**	**84**	**100**	**92**	**100**	**81**	**100**	**72**	**100**

[59] In the *per curiam* decision in *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii*, the vote was 9-0 but Justice Thomas dissented in part, joined by Justices Alito and Gorsuch.

[60] This includes two decrees resolving disputes between states.