ANNUAL REVIEW
of the
SUPREME COURT'S TERM, CRIMINAL CASES (2017-2018)

Summaries of all Opinions (including Concurrences and Dissents),
in argued and non-argument cases and Orders;
certiorari grants for the upcoming Term;
a chart of "Who Wrote What;"
and a brief Overview of the Term,
regarding all
Criminal Law and related cases before the U.S. Supreme Court
October Term 2017 (Oct. 2017-July 2018)
(with clickable links to the cases)

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CRIMINAL LAW (and related) DECISIONS of the U.S. Supreme Court

October 2017 Term (Oct. 2017- Aug. 2018)

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

Annual Review of the
Criminal Law (and Related) Opinions of the
United States Supreme Court
Issued During the October 2017 Term

2018 Annual Meeting Panelists
(Chicago, Illinois – August 3, 2018)

The Honorable Ann Claire Williams
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Brief Overview of the 2016-17 Term, Criminal Cases

The "story" of this Term, in the criminal law area, has two parts. First is the relative prominence of criminal law in the Supreme Court, at a time when the Court overall is hearing the fewest number of cases since the Civil War. The second story is substantive: while the Court is viewed as moving ever-rightward overall, in this past Term a surprising number of criminal defendants prevailed on the merits of important cases. There are undoubtedly a number of possible explanations for this, including perhaps just random chance. And a defense "win" does not always mean full relief; often it is simply a remand for further proceedings. Still, a majority of the Justices ruling in favor of a criminal defendant seems significant in any case, in light of the popular view of the politics of the Court in its "civil" or constitutional law docket.

So first, the Court continued its historic decline in the number of total cases decided, issuing only 59 signed opinions after full briefing and argument – the lowest number since at least 1864 (in the middle of a domestic wartime setting). However, at least 23 of these decisions were "pure" criminal law cases, and if you count civil cases "related" to criminal law, the number rockets to 34! So almost half of the Court's work can be attributed to criminal-law-and-related cases. This is one of the highest percentages in recent memory.

Justice Gorsuch sat for his first full Term this year; and Justice Kennedy announced his retirement at the end of the Term. It is difficult to know what effect this might have on the criminal law work of the Court overall. But undoubtedly, in some areas (most clearly regarding the death penalty), Justice Kennedy was more "liberal" than four of his colleagues. Thus he provided the necessary "fifth vote" in a number of past cases that limited the application of capital punishment. There are two death penalty cases already granted for the coming Term (*Madison* and *Bucklew*). We shall see whether Justice Kennedy's replacement has any greater sympathy for Justice Breyer's repeated calls for the Court to re-examine the death penalty overall.

Second, on substance, this really was the "Term of the Fourth Amendment," with the *Carpenter* decision -- finding that the "third-party sharing" doctrine does not limit the Fourth Amendment's protections for lengthy collection of cellphone location information -- leading the pack. Notably, the defendant "won" in that case (winning always being a relative term in the Supreme Court – remands often have a way of leaving "winning" defendants convicted). The defendant also won in the Fourth Amendment decisions of *Byrd* (holding that a car renter not listed on the rental agreement is still protected) and *Collins* (holding that police may not trespass on "curtilage" even when they have probable cause to search a moveable vehicle that they can see from the street).

And that was not all. The defendant also prevailed in *McCoy* (ineffective for lawyer to admit guilt over client's objection); and in *Class* (guilty plea does not waive constitutional attack on statute); and in *Ayestas* (stating the standard for the funding of "reasonably necessary" services in habeas defense); and in *Dimaya* (the "violent felony" definition in an immigration statute is unconstitutionally vague). Don't get me wrong: the Court has not suddenly been possessed by the ghosts of Earl Warren and Bill Brennan. This is not a "liberal" criminal law court by any means. But the fact that Justice Alito found it necessary to write more, and more separate opinions, than he has in past criminal-law Terms (see the "Who Wrote What" chart at the end of this booklet), suggests that the Court was more "balanced" in this area than the popular press might describe regarding the overall docket.

Another "story" of this Term might be the increasing discomfort expressed by some regarding the doctrine of qualified immunity as applied to police officers. The dissent in the *Wesby* decision (officers who lack probable cause to arrest still receive immunity), and summary reversals such as *Kisela*, point to these concerns. There is also concern "out there" in academic writing and the popular press. Depending on the views of the Justice that replaces Justice Kennedy, you may see more attention paid to this doctrine in the near future. Even Justice Thomas has expressed some doubts.

Stylistically, I hope that the "clickable" links in the electronic version of this booklet to the cases and some other materials, are useful to you. To get an electronic copy, please email Professor Little or the staff at the Criminal Justice Section. I am always grateful to the ABA and the Criminal Justice Section -- and most prominently to its hard-working and unheralded staff – for the opportunity to organize this panel every year. Kevin Scruggs is now completing his first full year as the CJS Executive director (although he has been performing the job much longer). And Carol Rose has been staffing this panel for, I think, about 20 years. Please thank her when you see her at our registration table outside the panel or at other events.

Our fantastic panelists will have more to say about these cases, as well as others not mentioned here. A video of the session may also be available on the Criminal Justice Section's website. I hope you will ask our panelists hard questions about the cases we discuss as well as cases we omit. Your active engagement is what makes doing this work for the Criminal Justice Section fulfilling and fun!

Finally, you really ought to join the Criminal Justice Section of the ABA (if you already have, thanks!). Check out its website. The number and substantive value of useful programs we sponsor throughout the year is simply amazing. Emailed notices and updates will come to you throughout the year. I urge you to take advantage of the unique and substantive CJS membership benefits!

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

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Explanatory Notes for these Materials

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

The goal of these summaries is to be broadly inclusive for the fully-informed criminal law practitioner. For this reason, civil cases that even mildly relate to criminal law topics or fact-areas are included. For example, we include civil "qualified immunity" cases, securities law cases, and immigration law decisions, because such "civil" issues often arise in a criminal context, or they can be useful for applying the criminal law (if not immediately, then in the future). For example, this became particularly so regarding immigration law after *Padilla v. Kentucky* (2010), in which the Court ruled that a criminal defense attorney can violate the Sixth Amendment's effective assistance of counsel requirement if s/he does not provide reasonable advice regarding immigration consequences of a criminal conviction. Similarly, the similarities between civil securities fraud and criminal fraud are (or should be) well-known to the competent criminal lawyer.

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

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

Following the Summaries of Opinions in argued cases, we describe the criminal law decisions issued in non-argued cases (summary reversals). We also provide brief descriptions of interesting dissents or concurrences regarding Orders issued this Term (most often, dissents from denial of *certiorari*).

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

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

The Detailed Summaries follow on the next page.

DETAILED SUMMARIES of the COURT'S
CRIMINAL LAW (and related) OT 2017 OPINIONS

I. CONSTITUTIONAL DECISIONS

A. APPOINTMENTS CLAUSE (Article II, Sec. 2, Cl. 2)

Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (June 21, 2018), 7-2 (**Kagan**; Thomas concurring with Gorsuch; Breyer concurring in the judgment in part and dissenting in part with Ginsburg and Sotomayor; Sotomayor dissenting with Ginsburg), reversing 868 F.3d 1021 (D.C. Cir. 2017).

Headline: Securities and Exchange Commission administrative law judges are "officers of the United States" subject to the Constitution's appointments clause. So the **appointment of SEC ALJs by SEC staff other than the Commissioners, is invalid.**

Facts: The SEC institutes administrative proceedings against alleged violators, and has designated Administrative Law Judges ("ALJs") to preside over those proceedings. SEC staff "other than the Commission proper" selects these ALJs. Lucia and his investment company ("Buckets of Money") were charged by the SEC with deceptive practices. After a nine-day trial, the ALJ made findings of fact and ordered sanctions against Lucia. The SEC rejected Lucia's challenge that his ALJ proceeding was invalid because ALJs are United States "Officers" who can be appointed only by "Heads of Departments." The SEC stated that ALJs are "mere employees." A panel of the D.C. Circuit agreed and then divided evenly (5-5 after recusals) on the question.

Kagan (for 7): "The Appointments Clause cares not a whit about who name[s]" federal workers, unless they are "Officers of the United States." Art. II, §2, cl.2. Principal "Officers" must be appointed by the President (with Senate "advice and consent;"), and even "inferior officers" must still be appointed by "Heads of Departments" (*id.*). We find that SEC ALJs are "inferior" officers, so they must be appointed by "the Commission" (which constitutes a "Head" of a "Department"), not by staff. We ruled in *Germaine* (1879) that an "officer" must occupy a "continuing position established by law." Then *Buckley v. Valeo* (1976) ruled that an "Officer" must wield "significant power" by law. Finally, *Freytag* (1991) ruled that "special trial judges" of the U.S. Tax Court are "officers" – and that decision "necessarily decides this case," because the *Freytag* STJs were "near-carbon copies" of the SEC's ALJs. **They exercise "nearly all the tools of federal trial judges." Even more powerful, an SEC ALJ's decision can be "final"** because the SEC can decline to review it.

"The only issue left is remedial." We order not only that Lucia must receive a new hearing, but also that **a different ALJ must preside** (assuming that the Commission itself now ratifies the ALJ appointment). This is for reasons of fairness and "to create incentives to raise Appointments Clause challenges" (**Ryder**, 1995). However, we do not hold that this is required "for every Appointments Clause violation" that may happen in the future.

Thomas concurring, joined by Gorsuch: *Freytag* explains what is "sufficient" to be an officer, but not what is "necessary." "The Founders considered" persons who performed "even … only ministerial statutory duties" to be officers; the term encompassed "all federal civil officials who performed an ongoing, statutory duty," even minor ones. An "officer" did not have to be "some special type of official." This "original meaning" is what should control today.

Breyer concurring in the judgment in part and dissenting in part, joined by Ginsburg and Sotomayor: "I would rest our conclusion on statutory" grounds – that is, the Administrative

Procedure Act – and "not constitutional grounds." And I do not think we should order that a different ALJ must preside. There is no statute that permits the SEC to delegate its appointment power to staff, and the APA appears to prohibit it. This will be important when it comes time to address the proper "removal" powers for SEC ALJs (an issue the majority does not address, see its n.1). SEC ALJs are "inferior" officers (another issue the majority does not address, see its n.3), and are protected from removal without "good cause." Today's constitutional ruling puts at risk the independence and "good cause" protection for the SEC that Congress plainly [says Breyer] intended. I worry that the decision portends the "unraveling" of "the Federal Government's administrative adjudication system as it has existed for decades, and perhaps of the merits-based civil-service system in general."

There is also no explanation why the Constitution requires a different ALJ on remand. I would object to any such universal rule (even though its effect is "relatively minor" here).

Sotomayor dissenting, joined by Ginsburg: In order to provide some guidance and "reliability" for administrative proceedings, I would rule that "Officers" are only persons who have the statutory "ability to make final, binding decisions on behalf of the Government." Because the SEC itself, and not its ALJs, has "final decisionmaking authority" over its proceedings, I would hold that their ALJs are not "Officers." I also agree with Justice Breyer's concerns about the remedy.

Ortiz v. United States, 138 S.Ct. 2165 (June 22, 2018), 7-2 (**Kagan**; Thomas concurring; Alito dissenting with Gorsuch), affirming 76 M.J. 189 (C.A.A.F. 2017).

Headline: The **simultaneous service of a military judge** on the Air Force Court of Criminal Appeals and the Court of Military Commission Review ("CMCR") **does not violate the Constitution** or 10 U.S.C. § 973. (Also, the Supreme Court has jurisdiction to review decisions of the Court of Appeals for the Armed Forces ("CAAF") even though it is not an Article III court.)

Facts: Ortiz was dishonorably discharged and sentenced to two years imprisonment, for possession and distribution of child pornography. A panel of the Air Force Court of Criminal Appeals ("CCA") affirmed. Ortiz appealed to the CAAF, arguing that because a member (Mitchell) of the CCA that had affirmed his conviction was also serving on the CMCR, Mitchell's service on the CCA was invalid. Ortiz argued that (1) CMCR judges are "principal" officers of the U.S. and cannot simultaneously serve as "inferior" officers on the CCA under the Appointments Clause; and that (2) 10 U.S.C. §973(b) says that active-duty military officers "may not [also] hold" a "civil office" and that the CMCR is a civil office, so the statute is violated; and that the remedy should be to invalidate Mitchell's CCA appointment. The CAAF rejected enough of these arcane arguments to deny Ortiz relief.

Kagan (for 7): First, we acknowledge that a new argument (made by an amicus law professor from UVa), that we lack review jurisdiction over CAFC decisions, is a "serious [one] deserving of sustained consideration." "Congress has long provided for specialized military courts," and Article III gives us appellate jurisdiction "other cases" that involve federal questions. Federal military appeals are such cases. A "court-martial is in fact older than the Constitution," and the "Framers recognized and sanctioned existing military jurisdiction." They "exercise judicial power." "This Court's appellate jurisdiction … covers more than … Article III courts." We have long exercised such jurisdiction over territorial court, and local D.C. court, judgments. Thus we similarly have constitutional appellate jurisdiction over CAFC judgments. **"Some things go unsaid because they are self-evident."** A specialized military commission that acted only during the Civil War was just

different (distinguishing *Vallandigham*, 1864). We do not decide now whether other Congressional grants for us to review other non-Article III judgments would pass muster.

On the merits, **we do not think that Mitchell's simultaneous service violates the Constitution or §973(b).** The fact that he was appointed to his CMCR position by the President does not affect his statutory position on the CCA. He had a "legislative green light." **And the Appointments Clause simply does not "impose rules about dual service."** Even if it did, there is no "incongruence" or incompatibility between Mitchell's two appointments here.

Finally, although we also granted review in two related military cases (*Dalmazzi* and *Cox*), we now dismiss those two cases as "improvidently granted" because our decision here renders any further discussion about them "unnecessary."

Thomas concurring: "I join the Court's opinion in full," and write separately only to stress that the holding is "consistent with the Framers' understanding of judicial power," which was based on [Thomas's theory of a] "distinction between public and private rights." [Further details omitted.]

Alito dissenting, joined by Gorsuch: **[Ed. Note:** These two Justices buy a new theory about *Marbury v. Madison* that was advanced by the amicus, that was denoted "serious" by the majority but then rejected.] Military courts do not comport with Article III; they are "indisputably part of the Executive Branch. As such, they do not and may not exercise Article III "judicial power." Allowing our judicial review of this non-judicial power "flatly violates the unambiguous text of the Constitution." We think certain historical facts regarding the Court of Claims and habeas corpus support our view. Military judges exercise only "executive, not judicial," power. [Further details of this esoteric, arcane, and "technical" debate are mercifully omitted here.]. "The Framers erected a high wall around our original jurisdiction," and we should respect that here.

B. FIRST AMENDMENT

Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (June 14, 2018), 7-2 (**Roberts**; Sotomayor dissenting with Breyer), reversing 849 F.3d 749 (8th Cir. 2017).

Headline: Minnesota's **ban on wearing political apparel at polling places** (including possible criminal penalties) **violates the First Amendment**'s free speech clause.

Facts: Minnesota law prohibits individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place, and gives judges the authority to decide whether a particular item falls within the ban. Violators are subject to a civil penalty or prosecution for a petty misdemeanor. Petitioners argued that the ban is unconstitutional on its face and as applied. The District Court granted the State's motion to dismiss and the Eight Circuit affirmed.

Roberts (for 7): Because the ban applies only in a specific location, it invokes our "forum based" approach for assessing restrictions on speech. The polling place qualifies as a **nonpublic forum.** On Election Day, its sole purpose is for voting. It is a "special enclave, subject to greater restriction." The standard is therefore whether the ban is "reasonable in light of the purpose served by the forum."

We do not reject the state's determination that some forms of advocacy should be excluded from polling places to ensure the that voting places remain calm. Casting a vote is a weighty civic act and it is a "**time for choosing, not campaigning.**" The state may reasonably decide that the **interior**

of a polling place should reflect that distinction, and in light of the special purpose of polling places, Minnesota may choose to prohibit certain apparel viewed as disruptive.

However, the State must draw a **reasonable line.** The unmoored use of the word "political" in the law, combined with the haphazard interpretations the State has provided in official guidance, cause the statute to fail. "Political" is open to many interpretations, and the state fails to provide any clear way to distinguish between political and non-political apparel. It is self-evident that an indeterminate prohibition carries with it the opportunity for abuse, especially when it has nearly open-ended interpretation. The discretion granted to judges must be guided; otherwise the definition of political will vary based on the judge. If a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one offered by Minnesota.

Sotomayor dissenting, joined by Breyer: I agree with the majority. But I would have instrad asked the Minnesota Supreme Court for a "definitive interpretation of the political apparel ban." This would likely "obviate the hypothetical line-drawing problems that form the basis of the Court's decision today."

Lozman v. City of Riviera Beach, Florida, 138 S.Ct. 1945 (June 18, 2018), 8-1 (**Kennedy**; Thomas dissenting), vacating and remanding 681 Fed. Appx. 746 (11th Cir. 2017).

Headline: **In the unusual context of an alleged municipal policy of retaliation, the existence of probable cause does not bar Lozman's First Amendment retaliatory arrest claim.** The pure question of whether the existence of probable cause bars a retaliatory arrest claim against police will have to await another case. **[Ed. Note:** later in the Term the Court granted cert in just such a case, *Neives v. Bartlett,* No. 17-1174.]

Facts: Lozman had a long-running dispute with the city of Riviera Beach, and sued them (and won, *see Lozman v. Rivera Beach*, 568 U.S. 115 (2013)). He often spoke as a critic of the City during the public-comment period of city council meetings. In June 2006, a City council member allegedly said that the City should use its resources to "intimidate" Lozman and others who had filed lawsuits against the City. Other councilmembers allegedly agreed. Four months later Lozman addressed the Council during the public-comment session, and spoke off-topic and at length about the recent arrest of a former county official even after he was told to stop speaking. The Council instructed a police officer to assist, and when Lozman refused to leave the podium he was arrested and charged with disorderly conduct and resisting arrest.

The charges were later dropped, and Lozman sued the City, alleging that it had violated his First Amendment rights to speak and to petition, by arresting him in retaliation for his criticisms (as well as in violation of the Fourth Amendment). The District Judge instructed the jury that Lozman had to prove, among other things, that the arresting officer lacked probable cause to make the arrest. After some complicated jury instructions and procedural events not relevant here, the Eleventh Circuit ruled for the City on appeal, finding that because the jury had rejected Lozman's Fourth Amendment claim, it had necessarily found that there had been probable cause, and that under the Circuit's controlling precedent, the existence of probable cause necessarily defeats a First Amendment claim for retaliatory arrest.

Kennedy (for 8): The issue before the Court is narrow: "whether the existence of probable cause bars [Lozman's] First Amendment retaliation claim." (The Court assumed for purposes of this opinion that the allegation that the City had a policy of retaliating against Lozman was true.) Two precedents bear on the question: *Mt. Healthy City Bd. Of Ed. v. Doyle* and *Hartman v. Moore*. In *Mt. Healthy*, the Court ruled that retaliation could be the basis for suit if it was a "substantial motive" for

adverse action and was the "but-for cause" of that action. By contrast, in *Hartman*, the Court ruled that probable cause is a complete bar to a First Amendment claim of retaliatory prosecution. We do not settle which of these two precedents should apply here, because Lozman's claim is "far afield from the typical retaliatory arrest claim." First, Lozman is not suing the officer that made the arrest, but rather a municipality that allegedly had an official policy to retaliate against Lozman. "An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." Also, an official policy can be difficult to dislodge. In addition, we think there is little risk of a flood of retaliatory arrest suits against high-level policymakers. Finally, the "right to petition" a governmental body is one of the "most precious of the liberties safeguarded by the Bill of Rights." So Lozman's speech claim here ranks "high in the hierarchy of First Amendment values." For all these reasons, Lozman need not prove the absence of probable cause to maintain his claim of retaliatory arrest, and in this context only, *Mt. Healthy* provides the correct standard.

Thomas dissenting: We should decide the case that we granted review on: "whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under §1983." No one briefed, argued, or even hinted at the context-specific rule that the Court announces today. I would hold that plaintiffs must prove a lack of probable cause as an element of any First Amendment retaliatory-arrest claim. There will be few cases where the majority's odd new special rule will apply. Indeed, not even Lozman's case really seems to fit it.

C. FOURTH AMENDMENT

District of Columbia v. Wesby, 138 S.Ct. 577 (Jan. 22, 2018), 9 (7-2) to 0 (**Thomas**; Sotomayor concur in and in the judgment; Ginsburg concurring in the judgment in part), reversing 765 F.3d 13 (D.C. Cir. 2014).

Headline: The police **officers had probable cause to arrest** several partygoers (who had sued for false arrest); **and the officers were entitled to qualified immunity** in any case. **[Ed. note:** this seems to be a highly fact-specific decision, not a broadly applicable ruling.]

Facts (although some facts were disputed at a late stage in SCOTUS, the Court says its analysis "would not change no matter" what): Wesby and others were arrested after officers responded at 1 in the morning to "a raucous, late-night party in a house they did not have permission to enter." Neighbors told the officers that the house had been unoccupied for some time. Upon entering, the officers smelled marijuana and observed "debauchery" and "a make-shift strip club." 21 persons found in the house hid and gave inconsistent stories. They said that a woman named "Peaches" had given the partygoers permission to be there, but the owner when contacted said that Peaches had no permission to use the house. Peaches was contacted by phone but gave odd stories. Ultimately, the officers arrested all 21 people for "unlawful entry."

The charges were eventually dropped, and 16 of the arrestees sued for false arrest, alleging that the officers had lacked probable cause to believe a crime had occurred. The district court granted summary judgment on liability to the partygoers, finding that the officers had no probable cause to believe that the partygoers knew that did not have permission to enter, since the partygoers said they believed Peaches had permission. Qualified immunity was denied to two officers, and damages of "nearly $1 million" were awarded after trial. The D.C. Circuit affirmed (2-1), ruling that with no reason to question Peaches' invitation to the party, there was no evidence to support a conclusion that the partygoers "knew or should have known" that the invitation was in fact invalid, and the officers should have known that if the partygoers had an invitation to enter from Peaches, they

lacked the intent for the crime of unlawful entry. *En banc* review was denied, calling the disagreement merely a "case-specific assessment of circumstantial evidence," over a four-judge dissent written by now-Supreme-Court-nominee Brett Kavanaugh.

Thomas (for 7): "Considering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house" (quoting *Pringle*, 2003). "Common-sense conclusions about human behavior" support this (quoting *Illinois v. Gates*, 1983). The fact that the partygoers "scattered" and some hid when the officers arrived, supports a *mens rea* inference, as did their "vague and implausible" stories and Peaches' own "nervous, agitated, and evasive" statements. It was error for the courts below to "engage in an 'excessively technical dissection'" of the facts (quoting *Gates*). And officers need not accept a suspect's "innocent explanation" when facts are "suspicious." "Innocent explanations … do not have any automatic probable-cause-vitiating effect." "The circumstances here certainly suggested criminal activity."

Moreover, even though our probable cause determination is "sufficient to resolve this case, … we have discretion to correct" further errors which "would undermine the values qualified immunity seeks to promote." So here. On these facts, even if there were no probable cause, "the constitutionality of the officer's conduct" was not "beyond debate" (quoting *Ashcroft v. al-Kidd* (2011)). Probable cause must be assessed "in the particular circumstances before" the officers; the analysis below was conducted at too "high [a] level of generality." There is no similar "single precedent – much less a controlling case or robust consensus of cases" – that would make this an "obvious case" against the officers or place the unconstitutionality of their conduct "beyond debate." Even if D.C. caselaw could serve as controlling precedent here, there was disputed relevant caselaw in the jurisdiction. The officers were entitled to summary judgment based on qualified immunity.

Sotomayor concurring in part and concurring in the judgment: I agree only due to qualified immunity, and I think the Court should not have reached the "heavily fact-bound nature of the probable cause determination here." (She says the Court does this "apparently only to ensure that … the Court's decision will resolve respondents' [remaining] state-law claims.")

Ginsburg concurring in the judgment in part: The arresting Sergeant here undisputedly acted on an error of law, thinking that the owner's lack of consent made the partygoers' intent irrelevant. I think that should factor into our Fourth Amendment analysis, but I recognize that *Whren* (1996) stands in the way. So I agree that the officers are "sheltered by qualified immunity" – but "I am concerned that the Court's jurisprudence sets the balance too heavily in favor of police unaccountability" [edited slightly for semantic flow].

Byrd v. United States, 138 S.Ct. 1518 (May 14, 2018), 9 (6-3) to 0 (**Kennedy**; Thomas concurring with Gorsuch; Alito concurring), vacating and remanding 679 Fed.Appx. 146 (3d Cir. 2017).

Headline: A **person "in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if" not listed in the rental agreement**, and so may challenge a law enforcement search of the car under the Fourth Amendment.

Facts: In the course of a traffic stop of a rental car that Byrd was driving alone, the police learned that the agreement for the rental car did not list Byrd as an authorized driver. The officers then searched the trunk of the car over Byrd's objection, and allegedly without probable cause, and found 49 heroin bricks and some "body armor." In the subsequent prosecution, the lower courts ruled

that because Bryd was not listed in the car rental agreement, he had no "reasonable expectation of privacy" in the vehicle, and so under *Rakas* (1978) he had no "standing" to object to the search.

[**Ed. Note:** here are other facts in the opinion but apparently not relevant to the court's ruling]: The car had been rented by Bryd's friend Latisha Reed, while Byrd stayed outside in the parking lot. Reed initialed a printed addendum stating that there was no other authorized driver and that permitting an unauthorized person to drive would "violate" the agreement and insurance coverage. Reed then walked out to the parking lot, handed the rental car keys to Bryd, and drove away in a different vehicle. The officer that stopped Byrd's car many miles later, said he was suspicious because Byrd was driving with his hands in the "10 and 2" position on the steering wheel. It was unclear that there was any traffic violation. The officer testified that when stopped, Byrd was "visibly nervous and shaking." Byrd told the officer that his friend had rented the car and he was driving with her permission. Computer searches returned a possible alias, and revealed that Byrd had prior drug and weapon convictions and an outstanding probation violation (but non-extradition) warrant. Byrd declined consent for them to search the car, but the officers said they did not need consent because Byrd "has no expectation of privacy" since he was "not on the renter agreement." Byrd tried to run after the officers found body armor in a bag in the passenger compartment and said they would handcuff him, before they searched the trunk.)

Kennedy (for 9): "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." And **"the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects'"** (*Gant*, 2009). It is true that the Court has said that there is a "diminished expectation of privacy in automobiles" (*Acevedo*, 1991). Still, expectations of privacy analysis "supplements rather than displaces the traditional property-based understanding of the Fourth Amendment (*Jardines*, 2013). Although there is no "single metric or exhaustive list of considerations to resolve" when a "reasonable expectation of privacy" is present, protected property and privacy interests are "often linked."

Here, **although the fact-pattern is new, it is "a well-travelled path in this Court's Fourth Amendment jurisprudence" that "lawful possession" of an item ordinarily gives a person a protectable Fourth Amendment interest.** Thus "a car thief would not have a reasonable expectation of privacy in a stolen car," but a person otherwise in lawful possession generally has a "right to exclude" others. "This **general property-based concept guides resolution** of this case." The government's view is "too restrictive." It is "a misreading of *Rakas*" to argue that a passenger in someone else's car can never have a protectable expectation of privacy. While "legitimate presence" alone is insufficient, here Byrd, "the driver and sole occupant," is similar to the overnight guest who was recognized to have a protected interest in the search of someone else's home in *Jones* (1960). And **there is "no reason" to make a distinction based on owning rather than leasing**.

The government also misreads the car rental agreement here: it says an unauthorized driver is a "violation" of the agreement, not that it "voids" it. Moreover, "there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car." A contractual violation that merely changes "risk allocation" has no bearing on a reasonable expectation of privacy of a lawful driver.

The government now argues that Byrd's particular rental was a fraudulent "strawman" rental, making Byrd no better than a thief. It also argues that the facts on the scene amounted to probable cause to search, for which no consent or warrant is necessary for a vehicle. Both of these arguments may be open on remand. Moreover, because **the concept of *Rakas* "standing" is just a "useful shorthand" for a protectable Fourth Amendment interest**, is "should not be confused with Article

III [jurisdictional] standing. So the probable cause argument can be considered first, on remand, "if … it has been preserved."

Thomas concurring, joined by Gorsuch: "I have serious doubts about the 'reasonable expectation of privacy' test from *Katz*." But the Court "correctly navigates our precedents." Still, "in an appropriate case I would welcome briefing and argument" on further questions.

Alito concurring: "I join the opinion of the Court" on my "understanding" that the Court of Appeals is "free to reexamine the question whether [Byrd] may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground." **[Ed. Note:** since the majority opinion says exactly this, I do not see why Alito felt it necessary to write this separate one-paragraph concurrence. It could be that the majority did not amend its opinion to say this until Justice Alito had circulated, and so he just decided to leave it in place, perhaps as a marker that he had done that?]

Collins v. Virginia, 138 S.Ct. 1663 (May 29, 2018), 8-1 (**Sotomayor**; Thomas concurring; Alito dissenting), reversing 292 Va. 486 (Va. SCt. 2016).

Headline: The Fourth Amendment's **automobile exception does not permit a warrantless entry onto a home's curtilage** to search a vehicle that could be subject to a warrantless search (because there was probable cause) if it were not on the curtilage.

Facts: Officers had probable cause to believe that a particular motorcycle had committed traffic violations and was stolen. Officer Rhodes located what appeared to be the vehicle parked "at the top of the driveway" next to a house. The vehicle was covered by a tarp. Officer Rhodes, without a warrant, walked up the driveway and pulled off the tarp, enabling him to see the license plate and VIN (which confirmed that the vehicle was stolen). Collins explained that he had bought the motorcycle "without title," but he was charged with receiving stolen property. He moved to suppress whatever evidence the officer had obtained by his warrantless search of the motorcycle, arguing that the officer had "trespassed" on the "curtilage" of the house to search and that curtilage is protected from warrantless search just as the house would be. (Virginia concedes that the officer's actions constituted a "search" of the motorcycle.) The trial court ruled, without factual explanation, that "numerous exigencies" allowed the warrantless search. But the Virginia Supreme Court ruled on a different ground: that the automobile exception, which permits a warrantless search of movable vehicles when there is probable cause to search, applies here. That is the question now presented.

Sotomayor (for 8): Our precedents "treat[] automobiles differently from houses" (*Cady*, 1973). "Black letter law" considers **"curtilage – the area 'immediately surrounding and associated with the home' (*Jardines*, 2013) to be part of the home itself for Fourth Amendment purposes"** (*Oliver*, 1984). "When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred," and a judicially-approved warrant to search is generally required absent some recognized exception.

[Based on a somewhat labored description of the driveway here,] the "part of the driveway" where the motorcycle was parked must be considered curtilage. **[Ed. Note:** this appears to leave open the question whether the "bottom" part of the driveway, closest to the street, would be considered curtilage.] Obviously an officer could not go into the house to search without a warrant (or some exception), even if he saw the motorcycle parked in the living room through a window. An "invasion of the curtilage" is the same. The privacy interests in curtilage are the same as in the home itself. Meanwhile, **"the scope of the automobile exception extends no further than the automobile itself." We will not expand the automobile exception** (just as we have declined to expand various

other Fourth Amendment exception (citing cases)). Otherwise we would "undervalue … core Fourth Amendment protections," and also "untether" the exception from its underlying justifications. We also reject the argument that two of our older decisions require a different result here. And we reject a proposed rule that would limit the automobile exception only at the wall or threshold of a house. Among other things, this would favor "those persons with the financial means to afford residences with garages." As for the applicability of any exigency or other exception, we leave that for remand.

Thomas concurring: "The Court correctly resolves the Fourth Amendment question in this case." But I question whether this Court has the authority to actually order States to apply the "exclusionary rule," a "legally dubious" position that "encourages distortions" in Fourth Amendment law. I think "modern precedents" reject "*Mapp's* essential premise that the exclusionary rule is required by the Constitution," and in an appropriate case, we should "revisit that question." [Ed. Note: this is a rather dramatic call to possibly overrule *Mapp v. Ohio* (1961).]

Alito dissenting: "What the police did in this case was entirely reasonable. The Court's decision is not." "An ordinary person of common sense" would not see any difference between removing the tarp from a motorcycle parked on the street versus in a driveway. [Justice Sotomayor's opinion expressly disputes this claim.]. This may have been a "search," but "the question before us … is whether the search was reasonable." The concept of curtilage does not limit other exceptions. And this "intrusion" was "negligible." And the motorcycle was clearly "moveable," which would allow the same rationale of possible "destruction of evidence" that underlies the automobile exception – a type of "exigency" – to apply here.

Carpenter v. United States, 138 S.Ct. 2206 (June 22, 2018), 5-4 (**Roberts**; Kennedy dissenting with Thomas and Alito; Thomas dissenting; Alito dissenting with Thomas; Gorsuch dissenting), reversing 819 F.3d 880 (6th Cir. 2016).

Headline: The government's **acquisition of cellphone location records from wireless carriers (not from the defendant himself) is still a Fourth Amendment "search"** that the defendant can challenge because the he has a "reasonable expectation of privacy" in those records. Ordinarily a judicial warrant supported by probable cause is required. [It is not possible, in a short summary, to capture all the nuances and details in over 100 pages of opinions in this important case.]

Facts: The Court's opinion, and also Justice Kennedy's dissent **[Ed. speculation:** which might have started as a draft majority?], both contain detailed descriptions of CSLI (cell-site location information). Anytime a cellphone is on, it "pings" cell towers to ensure the best reception, and cell companies keep records of every "ping," which shows the rough location of the cellphone. A statute, the Stored Communications Act ("SCA"), permits the government to get such location data from cell companies upon a showing of "reasonable grounds to believe" that the records are "relevant and material" to a criminal investigation. The government used an SCA request for seven days' worth of such data for Carpenter's cellphone, which it later introduced at Carpenter's trial for robberies of Radio Shack and T-Mobile stores (and use of firearms during such robberies), **arguing that the CSLI showed that Carpenter was "right where the robbery was at the exact time of the robbery."** Even Kennedy's dissent says this was "powerful, circumstantial evidence." Carpenter was convicted (with a number of co-conspirators) and sentenced to over 100 years in prison. The district court, affirmed by the Sixth Circuit, denied his motion to suppress the CSLI, saying that he had no "reasonable expectation of privacy" in the data since it was "voluntarily shared" with the cell companies, who kept the records as their own business records.

Roberts (for 5): Although Fourth Amendment analysis traditionally was linked to property concepts, **property is "not the sole measure of Fourth Amendment" protection, and in 1967 the Court extended protection to "reasonable expectations of privacy" as well.** "No single rubric definitively resolves which E-of-Ps are entitled to protection. But two "basic guideposts" are: (1) that the Fourth Amendment was intended to secure "the privacies of life" (*Boyd*, 1886), and (2) that "a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance'" (*Di Re*, 1948). More specifically, one line of cases protects against "sophisticated surveillance" of locations data (*Jones*, 2012). A second line of cases says that a person may have "no legitimate expectation of privacy in information he voluntarily turns over to third parties" (*Miller* 1975, and *Smith* 1979). **"We decline to extend *Smith* and *Miller*" to the "new phenomenon" of "detailed, encyclopedic, and effortlessly compiled" cell-site location records. This data is "unique"** and embodies a "legitimate expectation of privacy" of the cell-user, even if it is "held by a third party." **It provides "an intimate window into a person's life" [Ed. Note:** it is entirely unclear why this is not true of the information in *Smith* and *Miller*, as Justice Stewart himself noted in his *Smith* dissent], and this raises "even greater privacy concerns than the GPS monitoring" that we ruled in *Jones* was protected by the Fourth Amendment. The "seismic shifts in digital technology" allows the effortless discovery and compilation of such private information that, in the past, was "otherwise unknown." This [?? what, exactly?] distinguishes this case from *Miller* and *Smith*. The collection of such data by cell companies requires "no affirmative act" by the user, while carrying a cellphone is "indispensable to participation in modern society (*Riley*, written by Roberts, 2012). **[Ed. Note:** Again, not dissimilar to a bank account in *Miller* or the telephone in *Smith*. This aspect of the decision raises large questions about "voluntariness" as applied in other important doctrines.]

"Our decisions today is a narrow one." **[Ed. Note:** !, really?]. We do not "disturb" *Smith* and *Miller*, and we do "not call into question conventional surveillance techniques … such as security cameras" **[ed. note:** double !!], or cases involving foreign affairs, national security, or exigent situations. Finally, "a warrant supported by probable cause" is "generally" required ("the Government's obligation is a familiar one – get a warrant."). Subpoenas are often used to get business records and we do not question that; "But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." Otherwise, "no type of record would ever be protected by the warrant requirement." **[Ed. note:** this may be perhaps the most innovative or surprising part of the ruling; it seems to revive arguments reminiscent of Boyd in 1886, a decision which has been largely rejected over the past 50 years.]. [The Court concludes with a reference back to Justice Brandeis's famous dissent in *Olmstead* (1928), in which a majority ruled that the Fourth Amendment did not protect against warrantless wiretapping – the case overruled by *Katz* in 1967.]

Kennedy dissenting, joined by Thomas and Alito [using the word "**respectful**" at least four times]: The majority misreads and misapplies precedent; offers no clear distinction between CSLI and bank and phone records in *Miller* and *Smith*, which were more intrusive on privacy; causes "confusion;" and "undermines law enforcement" while "allow[ing] the cellphone to become a protected medium that dangerous persons will use to commit serious crimes." Business records that a person "does not own, possess, control, or use," do not involve a legitimate property or privacy interest – *Miller* and *Smith* were correct. [The dissent also perceives the majority ruling to be limited only to CSLI requests of "more than six days;" but the majority clear says in footnote 3 that they are NOT deciding whether some shorter period would not require Fourth Amendment rules.]. The Court's decision "will have ramifications that extend beyond cell-sire records to other kinds of information held by third parties." But it "gives no indication how to determine whether … information falls on the financial-records side or the cell-site-records side of its newly conceived

constitutional line." And it "calls into question the subpoena practices of federal and state" entities alike. **[Ed. Note:** These seems like fair criticisms of the ruling -- much litigation in the future.]

Thomas dissenting: This case should turn not on whether there was a "search," but on "*whose* property was searched." While I agree with the other dissents, "the more fundamental problem" is that **"the *Katz* [REOP] test has no basis in the text or history of the Fourth Amendment." It is also "unworkable." We should reject** or at least reconsider it.

Alito dissenting, joined by Thomas: Today's decision "guarantees a blizzard of litigation while threatening many … valuable investigation practices." It "destabilizes long-established Fourth Amendment doctrine" and "we will be making repairs – or picking up[the pieces – for a long time." (Justice Alito provides a long history of document subpoenas). The Fourth Amendment applies only to "searches and seizures," not compliance by someone with a subpoena *duces tecum*, which involves no physical intrusion into anyone's space "nor any taking." Nothing suggests that "the Founders intended" to regulate document subpoenas. [Alito expressly criticizes on *Boyd*, which the majority appears to "resurrect."] The majority's opinion is "puzzling" in this regard. Moreover, by "revolutionizing" the third-party doctrine, the Court flouts precedent and will engender a "crazy quilt" of "qualifications and limitations. Meanwhile, private action is a far bigger threat to privacy than legislatively-and judicially regulated business records production. "The desire to make a statement about privacy does not justify the consequences."

Gorsuch dissenting: **[Ed. Note:** Much of Justice Gorsuch's opinion reads more like a concurrence than a dissent. This may be the most thought-provoking of the five opinions in this case, and my short summary cannot do it justice.]. Rather than endorse *Miller* and *Smith*, or conversely "set them aside" and rely wholly on *Katz*," I think we should "look for answers elsewhere." Carpenter expressly disavowed any property-based theory, but I think he thereby "forfeited his most promising line of argument." "Just because you entrust your data -- … your modern day papers and effects – to a third party may not mean you lose any Fourth Amendment interest in its contents." Especially if "you *have* to" so entrust it. "I cannot fault the Sixth Circuit" for following *Miller* and *Smith*. However, "much work is needed to revitalize this area …. I do not begin to claim all the answers today."

D. FIFTH AMENDMENT

Sessions v. Dimaya, 138 S.Ct. 1204 (Apr. 17, 2018): The **statutory definition of "violent felony"** as used in the Immigration and Nationality Act's removal provisions, is **unconstitutionally vague** (summarized under Immigration, below).

United States v. Sanchez-Gomez, 138 S.Ct. 1532 (May 14, 2018), 9-0 (**Roberts**), vacating and remanding 859 F.3d 649 (9th Cir. 2017).

Headline: The defendants' challenge to Marshals' **policy of placing all in-custody defendants in "full restraints" (chains) for non-jury court proceedings became moot** when their underlying criminal cases ended. Our rules and statutes do not permit a criminal equivalent to civil class actions.

Facts: Four criminal defendants challenged a new U.S. Marshals policy in San Diego of placing all in-custody defendants in "full restraints" (handcuffs, chain connecting the handcuffs and then connecting to another chain around the waist, feet chained together). As justification, the

Marshal Service cited safety concerns arising from understaffing, past incidences of violence, and the high volume of in-custody defendants. The defendants pointed to instances where the policy seemed unnecessary: a woman with a fractured wrist, a man with a severe leg injury, a blind man, and a wheel-chair bound woman, were all still placed in full restraints. The district court denied their requests for no chaining, and while their appeals were pending their criminal cases were ended by dismissal or plea. Nevertheless, the Ninth Circuit ruled that their consolidated appeals could continue to challenge the "full restraint" policy, as a "functional class action" subjected to the mootness exception of "capable of repetition but evading review." The Ninth Circuit then ruled that the broad restraint policy violated the Fifth Amendment's Due Process Clause.

Roberts (for 9): If a case becomes moot then there is no "Case or Controversy" to provide a federal court with jurisdiction. The Ninth Circuit erred in relying on civil class action precedents such as *Gerstein v. Pugh* (1975 class action challenging pretrial detention). Unlike this case, *Gerstein* was certified as meeting the requirements of Federal Rule of Civil Procedure 23. *Gerstein* does not support a "freestanding exception to mootness outside the class action context." **"Courts may not recognize a common-law kind of class action or create *de facto* class actions at will"** (*Taylor*, 2008).

Aside from this, **these defendants do not fall within the "capable of repetition, yet evading review" exception.** This exception applies only "when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill." But we have also made clear that it applies only when "the same complaining party will be subjected to the same action again (*Turner* 2011). In civil cases we have applied it here persons were unable to avoid breaking rules or laws "for reasons beyond their control." But **"we have consistently refused" to give credence to a claim that "a party will be prosecuted [again] for violating valid criminal laws.**" This is so even if these particular defendants may have "personal incentives" to commit illegal reentry again (and even though they did, in fact, commit that crime again). Instead, **we assume in the criminal context that they "are able – and indeed required by law – to refrain from criminal conduct."** Finally, the procedural vehicle that the Ninth Circuit called "supervisory mandamus" does not make this case "exempt from normal mootness rules."

City of Hays, Kansas v. Vogt, 138 S.Ct. 1683 (May 29, 2018), 8-0 (**per curiam**), dismissing 844 F.3d 1235 (10th Cir. 2017).

Headline: Due to factual questions and unknowns, **case dismissed after argument as improvidently granted.** SCOTUSBlog discusses the interesting Question Presented: whether Fifth Amendment is violated when compelled statements are used against the speaker at a preliminary hearing but not at trial?

Currier v. Virginia, 138 S.Ct. 2144 (June 22, 2018) (plurality), 5-4 (**Gorsuch**; Kennedy concurring in part; Ginsburg dissenting with Breyer, Sotomayor, and Kagan), affirming 798 S.E.2d 164 (Va. S. Ct. 2016).

Headline: Because Currier consented to a severance of the multiple charges against him, his **second trial, following an acquittal at his first trial, did not violate the double jeopardy clause**.

Facts: Michael Currier was indicted as an accomplice for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. The charges grew out of the discovery of an abandoned safe, found full of firearms, that had been stolen from a local home. Virginia law would allow the prosecution to introduce evidence of his prior burglary and larceny convictions to prove the

felon-in-possession charge, and Virginia law also virtually guaranteed Currier a severance of the felon-in-possession charge, because the prior-conviction evidence could prejudice the jury's consideration of the burglary and larceny charges. Thus Currier agreed to a severance, and he asked that his trial on the burglary and larceny charges be held first. A jury then acquitted Currier on the burglary and larceny charges.

Currier then sought to block the second trial, arguing that because the jury had necessarily decided that Currier was not involved in the burglary or larceny, a second trial based on alleged possession of the firearms that had been stolen would amount to double jeopardy. In the alternative, he asked the court to prohibit the state from relitigating at the second trial any fact that had been resolved in his favor at the first (such as whether he had been involved in the theft or burglary). The court denied these requests and the jury convicted Currier on the felon-in-possession charge. This was affirmed on appeal in the Virginia courts.

Gorsuch (for 5 in Parts I and II): The Double Jeopardy Clause provides that no person may be tried more than once "for the same offence." The Clause recognizes the power of the sovereign, the ordeal of a criminal trial, and the injustice that our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secured convictions. But the Clause was not written or originally understood to pose "an insuperable obstacle to the administration of justice" in cases where "there is no semblance of [these] type[s] of oppressive practices."

In *Ashe v. Swenson*, the Court adopted a theory of "collateral estoppel" or issue preclusion as part of Double jeopardy analysis. In *Ashe* the defendant was charged with robbing six persons at a poker game. He was acquitted in a trial for robbing one of the victims. The State then sought to *Ashe* for robbing a second victim. But the Court ruled that this violated the Double Jeopardy Clause because, the Court reasoned, the first jury had necessarily found that the defendant "was not one of the robbers," so a second jury could not "rationally" convict the defendant of robbing the second victim without calling into question the earlier acquittal. *Ashe* "sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning." Nonetheless, even as it stands the *Ashe* test is a "demanding one."

A "critical difference immediately emerges between our case and *Ashe*": Currier consented. Certainly Currier could have been tried for all three crimes in a single trial without double jeopardy objection. So even if *Ashe* is correct, "it's different when the defendant consents to two trials where one could have been done." What was true in *Jeffers v. United States* can be "no less true here," and nothing in *Jeffers* suggests the outcome should be different if the first trial yielded an acquittal rather than a conviction. The Double Jeopardy Clause protects against "a second prosecution for the same offense" whether after acquittal or conviction. The Clause applies equally to both, and consent to a second trial should have equal effect in both settings. Any other holding would "introduce an unwarranted inconsistency" with a number of our precedents.

Currier argues that he had no choice but to pursue the two trials, but actually he chose to ask for severance. "Difficult strategic choices like this 'are not the same as no choice.'"

Gorsuch (only for 4 in this Part III): Currier further argues that even if his consent was to two trials, his consent did not extend to the relitigation of issues the first jury resolved in his favor. Currier's view is that broad "issue-preclusion" principles should be imported from civil cases, here. But we have said that issue preclusion principles have only "guarded application . . . in criminal cases" (quoting *Bravo-Fernandez v. United States*). We think that the "same offence" text and the history and precedent of the Clause show that civil collateral estoppel cannot be imported into the double jeopardy protection. Similarly, this Court has previously "refused to import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test." We think that the text of the Double Jeopardy Clause "which bars a prosecution for the same

offense" is inconsistent with "an issue preclusion rule." Some States, like Virginia, Finally, grant severance "liberally" for the defendant's benefit. If this Court were to now increase the costs associated with severance, it could decrease severances to defendants' detriment.

Kennedy concurring in part: Part I and II suffice to resolve this case fully; there is no need for the plurality's Part III. There is a strong public interest in giving the prosecution "one complete opportunity to convict those who have violated its laws." But that one opportunity did not occur here, because both parties consented to severance. Currier appears to concede that his consent bars his double jeopardy claim, but he argues that he preserved *Ashe's* protections. Double Jeopardy Clause cannot be "expanded to include situations in which the defendant is responsible for the second prosecution." The Clause does not relieve a defendant from the consequences of his voluntary choice. Thus the extent of the Double Jeopardy Clause protections in *Ashe* need not be reexamined here. "Whatever the proper formulation and implementation of those rights are, they can be lost when a defendant [voluntarily] agrees to a second prosecution."

Ginsburg dissenting, joined by Breyer, Sotomayor, and Kagan: All of Currier's charges arose out of the same episode. I would rule that Currier's acquiescence in severance does not prevent him from raising a plea of issue preclusion based on the jury's acquittals. Although in *Ashe* the second prosecution involved a different victim and thus a different "offense," this Court still ruled that the second prosecution violated the Double Jeopardy Clause. This Court stated a principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." This was, at that time, already "an established rule of federal criminal law," and this Court has since reaffirmed it.

Meanwhile, this Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." So a waiver of "issue preclusion" cannot be implied from his general agreement to separate trials. And I think precedent says nothing "about the issue-preclusive effect of a prior acquittal at a subsequent trial" (citing the same cases as the majority).

E. SIXTH AMENDMENT

McCoy v. Louisiana, 138 S.Ct. 1500 (May 14, 2018), 6-3 (**Ginsburg**; Alito dissenting with Thomas and Gorsuch), reversing 218 So. 3d 535 (La. Sup. Ct).

Headline: Sixth Amendment guarantees a defendant **the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt**.

Facts: McCoy was charged with the capital murder of "the mother, stepfather, and son of [his] estranged wife" in Louisiana. McCoy had been found several days after the killing, in Idaho. Despite what appeared to be overwhelming evidence implicating McCoy in the crime, he claimed he had not done it and had an alibi (supported however weakly by his arrest far from Louisiana). He claimed "that corrupt police killed the victims when a drug deal went wrong." (The Court calls his defense "difficult to fathom.")

McCoy's attorney concluded that a jury would certainly convict McCoy, and that the only way to avoid a death sentence was to concede at the guilt phase that McCoy had committed the killings but that he had lacked the intent for first degree murder. When the lawyer told McCoy of this strategy, just two weeks before trial, McCoy "was furious" and he "vociferously and adamantly objected to any admission of guilt." He directed the lawyer "not to make that concession," and on the day of trial, sought to terminate the lawyer's representation when the lawyer continued to assert his

concession strategy. The lawyer agreed, but the judge refused to allow the lawyer to withdraw even after the lawyer explained the trial strategy disagreement.

The lawyer began his opening statement by telling the jury that there was "no way reasonably possible" that they could reach "any other conclusion than Robert McCoy was the cause of these individuals' deaths." Out of the presence of the jury McCoy protested that the lawyer was "selling me out" by conceding that "I murdered my family." The judge told McCoy that the lawyer was representing him and to not make any other "outbursts." The lawyer then concluded his opening by saying that the evidence was "unambiguous" that "my client committed three murders."

The jury convicted McCoy of first-degree murder. At the penalty phase the lawyer again said that "McCoy committed these crimes" but argued his "serious mental and emotional issues" counselled mercy. The jury returned a sentence of death which was affirmed on appeal. The Louisiana Supreme Court ruled that a lawyer has authority to concede guilt when the lawyer "reasonably believes" that this strategy is "the best chance to avoid a death sentence."

Ginsburg (for 6): We reverse. The Sixth Amendment grants a right to "Assistance" of Counsel, and the common law history as well as *Faretta* (1975) guarantees that "an accused may insist upon representing herself – however counterproductive that course may be." "The choice is not all or nothing: … Trial management is the lawyer's province," and **the right distinguishes between "strategic choices about how best to *achieve* a client's objectives" and "choices about what the client's objectives in fact *are*."** "Autonomy to decide ... the objective of the defense" belongs in the "category" of decisions reserved to the defendant personally. Thus here: a defendant "may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death…." **"When a client expressly asserts that the objective of his defense is to maintain innocence …, his lawyer must abide by that objective."** This distinguishes *Florida v. Nixon* (2004) in which the defendant never asserted his objective but instead was unresponsive. Moreover, "there was no avowed perjury here," so "*Nix v. Whiteside* (1986) is not implicated. The lawyer here "simply disbelieved McCoy's account." **"Counsel may not admit her client's guilt … over the client's intransigent objection to that admission."**

Finally, **this is structural error, not just a claim of ineffective assistance**, so McCoy's claim does not require a showing of "prejudice." An error is "structural" when "its effects are too hard to measure … or where the error will inevitably signal fundamental unfairness. This error affected more interests than just protecting a defendant from an erroneous conviction. This lawyer was "placed in a difficult position," but "the trial court's allowance of [the lawyer's] admission … was incompatible with the Sixth Amendment" and requires reversal.

Alito dissenting, joined by Thomas and Gorsuch: The majority has impermissibly "changed the facts" of this case, because the lawyer here "did not admit that [McCoy] was guilty" of first-degree murder; rather, the lawyer just argued for a lesser homicide conviction. **[Ed. Note:** But here, it seems that Justice Alito, not the Court, is "changing the facts," as that was not the argument below.] This is different from admitting the criminal "acts," and the Court's rule here is confusing at best. Also, this case presents "a freakish confluence of factors … unlikely to recur," so we should not have granted review. "What was [the lawyer] supposed to do?" **[Ed. Note:** Justice Alito never answers this apparently rhetorical question; but in fact there are alternative paths this lawyer could have taken.]. A rule that a lawyer may never concede "an element of the offense charged" would be wrong and unworkable. **[Ed. Note:** of course, this is not the rule that the majority endorses; this is a strawman attack.]. I do not think any "fundamental right" was violated here. I also do not agree that it was "structural" error, which is a question not addressed by the Louisiana Supreme Court.

II. FEDERAL CRIMINAL STATUTES AND SENTENCING GUIDELINES

A. Various Criminal Statutes

"Reasonably necessary" funding for defense services:

Ayestas v. Davis, 138 S.Ct. 1080 (Mar. 21, 2018), 9 (7-2) to 0 (**Alito**; Sotomayor concurring with Gorsuch), vacating and remanding 817 F.3d 888 (5th Cir. 2016).

Headline: The standard for evaluating **whether to grant funding for "reasonably necessary" services, under 18 U.S.C. §3599(f), is "whether a reasonable attorney would regard the services as sufficiently important"** to reasonable representation in the case, whether there is "substantial need" or "a viable constitutional claim" has already been shown.

Facts: After his Texas conviction for capital murder, death sentence, and denial of a first habeas petition were affirmed, Ayestas filed a second federal habeas petition alleging ineffective assistance by trial counsel for failing to adequately investigate mitigation evidence, and by his first habeas counsel for failing to raise this claim before (a claim that *Trevino* (2013) allows). He requested $20,016 to investigate his ineffective assistance claims under 18 U.S.C. § 3599(f), which grants a federal district court discretion to grant expenditures for services in a habeas case that are found to be "reasonably necessary for the representation." Ayestas's district judge denied the request for expenses because Ayestas had not shown "substantial need," and also had not presented "a viable constitutional claim" (two grounds supported by prior Fifth Circuit precedent).

Alito (for 9): Preliminarily, we have jurisdiction to hear this case. The decision to deny habeas funding under a Congressional statute is a "judicial" rather than an unreviewable "administrative" decision. The fact that a funding request may be made *ex parte*, and ordinarily reviewed by only one appellate judge, does not change this; **the government should not "confuse what is familiar with what is constitutionally required,"** and Congress can set up the funding mechanism this way if it wants to. (We do not decide whether a Certificate of Appealability was required for the habeas funding issue to be raised on appeal, because the decision to deny it was "not only debatable, it was erroneous," so a COA should have issued in any case.)

On the merits, the Fifth Circuit's standard is wrong: "substantial need" is different, and "more demanding," than the **textual "reasonably necessary" test** found in the statute. "Necessary" does not mean "required" -- it **means "whether a reasonable attorney would regard the services as sufficiently important" to reasonable representation in the case.** Moreover, the court may not deny funding by finding that a "viable constitutional claim" is not presented, because "it is possible that investigation might enable a [habeas] petitioner" to prove his claim. Congress intended to grant "broad discretion" to district judges here. The merits can be considered and funding denied if, "realistically," the requested investigative services "stand little hope of helping [the petitioner] win." **It is not a "guarantee" of sufficient funding to "turn over every stone." But a "likelihood" of assisting on the "potential merits" of a claim is all that is required.** (Texas's "alternative ground … that was neither presented nor passed on below" – that Ayestas's claim was "procedurally defaulted" because it is based on "facts outside the state court record" – remains open on remand.)

Sotomayor concurring, joined by Gorsuch: "I write separately to explain why … there should be little doubt that Ayestas has satisfied" the funding statute here. As the Court notes, "Ayestas is not expected to *prove* that he will … win relief." And as we have often recognized, claims of ineffective assistance "often turn on evidence outside the trial record." Here, "the evidence [suggesting] the

deficiency of Ayestas's [trial and] post-conviction counsel is … strong." **[Ed. note:** Sotomayor appears to be providing a road-map for full relief on remand, not just winning funding, implicitly in response to Alito's implicit suggestion that relief on the merits can be denied on remand. It is interesting that Justice Gorsuch joins this opinion.]

Guilty Plea waivers of Constitutional Challenges:

Class v. United States, 138 S.Ct. 798 (Feb. 21, 2018), 6-3, (**Breyer**; Alito dissenting with Kennedy and Thomas), reversing 2016 U.S. App. LEXIS 12620 (D.C. Cir. July 5, 2016).

Headline: Absent an explicit waiver, a guilty plea by itself does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. [Ed. Note: the author of this booklet wrote in more detail about *Class* for SCOTUSblog, here.)

Facts: Class was charged with unlawful firearms possession when guns were discovered in his car parked in a lot on the U.S. Capitol grounds in Washington D.C. He argued pro se that the statute prohibiting firearms possession on the U.S. Capitol grounds was unconstitutional under the Second Amendment; and also under the Due Process Clause because (he claimed) the statute did not give fair notice that firearms were prohibited in that parking lot. These arguments were denied, and Class pled guilty a few months later (after he fled, was rearrested, and was further charged with bail jumping). Although various waivers were stated in connection with Class's plea, "the agreement said nothing about the right to raise … a claim that the statute of conviction was unconstitutional." Class then filed an appeal from his conviction, and presented his two "statute is unconstitutional" claims. But the D.C. Circuit ruled that these claims had been waived by Class's guilty plea.

Breyer (for 6): Our decision in *Haynes* (1968), and subsequent decisions like *Blackledge* (1974) and *Menna* (1975), resolve this case. We have explained that **a guilty plea does not waive challenges "which implicate the very power of the State to prosecute."** This "understanding of the nature of guilty pleas … stretches back nearly 150 years." As Justice Ames wrote for the Massachusetts [Breyer's home state] Supreme Court in 1869, "if the facts alleged and admitted [by a defendant's guilty plea] do not constitute a crime, … the defendant is entitled to be discharged." While we have "refined" the Justice Harlan's rule from *Haynes*, Class's claims "do not fall within any of the [excluded] categories." **There is no "inherent" waiver of such constitutional challenges to the statute of conviction in a guilty plea.** Nor does the potential availability of a "conditional guilty plea" mean that Class's failure to attempt such a plea waives his challenges; Federal Rule 11 does not say that a conditional plea is the *exclusive* way to do this. "Class … neither expressly nor implicitly waived his right to appeal his constitutional claims;" reversed and remanded. **[Ed. Note:** The Court does not say whether an express waiver of such constitutional claims would be effective; but it seems to clearly imply that they would be. This is a controversial issue in the lower courts.]

Alito dissenting, joined by Kennedy and Thomas: The Court provides "no clear answer" for what is the precise standard for what claims are waived, and which are not, in a federal guilty plea. Nor does the Court make clear "whether its holding is based on the Constitution or some other ground [like just Federal Rule of Criminal Procedure 11 that governs pleas]. "A muddle [is] left by today's decision." And frankly, I think the "*Blackledge-Menna* doctrine" mentioned in the Rule 11 Advisory Note is neither "clear [n]or coherent." A standard of a "right not to be prosecuted" has "no intelligible meaning" and "makes no sense." I would limit the "*Blackledge-Menna* doctrine" to the precise context of those two cases and not "expand its reach." "Today's decision will bedevil the lower courts." **[Ed. note**: probably true, although not in many cases.]

Prisoner Litigation Reform Act attorneys fee awards:

Murphy v. Smith, 138 S.Ct. 784 (Feb. 21, 2018), 5-4 (**Gorsuch**; Sotomayor dissenting with Ginsburg, Breyer, and Kagan), affirming 844 F.3d 653 (7th Cir. 2016).

Headline: In cases governed by 42 U.S.C. § 1997e(d) in which the prisoner wins, district courts must apply 25 % of the award if that is necessary to satisfy an award of attorney's fees.

Facts: Charles Murphy was awarded a judgment in his federal civil rights suit against two of his prison guards in the amount of $307,733. The court also awarded attorney's fees in the amount of $108,446. The issue then became who should pay what portion of the fee award. 42 U.S.C. §1997e(d)(2) says that "a portion of the prisoner's judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant…." (emphasis supplied). The prison guards argued that the court had to take 25% from Murphy's judgment before taxing them for the balance of the fee award. The court refused and ordered Murphy to pay 10% of his judgment toward the fee award.

Gorsuch (for 5): As always, "we start with the specific statutory language." The word "shall" usually creates a mandate. Following the verb is an infinitival phrase "to satisfy the amount of attorney's fees" -- this specifies the purpose of the apparently non-discretionary duty. Also, when you seek to "satisfy" an obligation, it means you intend to "discharge the obligation in full." These three clues suggest that the court: "(1) must apply judgment funds toward the fee award (2) with the purpose of (3) fully discharging the fee award." To meet that duty, **a district court "must apply as much of the judgment as necessary to satisfy the fee award, without exceeding the 25% cap."**

Murphy argues that speakers sometimes use "satisfy" in contexts involving less than full satisfaction, like when a college student applies three credits earned in a math class to satisfy (in part) the requirements of a chemistry degree. But, this works against the plaintiff because the registrar lacks discretion to award anything but three credits for the class. "Portion" also does not denote unfettered discretion. While it is possible for this to signal a variable amount, here the amount is not "discretionary." In contrast to §1988(b), which does confer discretion on district courts for fee awards, §1997e(d) uses markedly different language. If Congress had wanted to confer similar discretion "we very much doubt it would have bothered to write a new law [and] omit all the words that afford discretion in the old law." We think Murphy's reading is unreasonable because it would allow "exactly the sort of unguided and freewheeling choice" that precedent sought to expunge.

Sotomayor dissenting, joined by Ginsburg, Breyer, and Kagan: We think the text of 1997e(d)(2) and its statutory context make it clear that district courts should exercise discretion in choosing the portion of a prisoner-plaintiff's winning judgment that must be applied toward a fee award against the officers, so long as that portion is not greater than 25 percent. The statute says "applied to satisfy" which means "applied toward the satisfaction of" rather than "applied in complete fulfillment of." In reality, 25% of a prisoner-plaintiff's judgment will almost always be insufficient to satisfy the full attorney's fee award. Given the very small amounts typically awarded in successfully litigated prisoner-civil-rights cases, it is hard to believe that Congress meant "discharge in full" when full discharge will never be possible. The most natural reading is that a "portion" of the prevailing prisoner's judgment be applied toward the attorney's fees. Further, the addition of "not to exceed 25 percent" makes evident that the district court is afforded the discretion to choose the amount of the judgment to be paid toward the fee award. "Not to exceed" sets an upper, not a lower, limit and thus cabins the discretion that "portion" confers.

Obstruction of Tax Proceedings (26 U.S.C. §7212(a))

Marinello v. U.S., 138 S.Ct. 1101 (Mar. 21, 2018), 7-2 (**Breyer**; Thomas dissenting with Alito), reversing 839 F.3d 209 (2d Cir. 2016).

Headline: The crime of **attempting to obstruct** the due administration of the Internal Revenue Code **"does not cover routine administrative procedures** . . . such as the ordinary processing of tax returns" **and requires that the defendant was aware of**, or could reasonably foresee, **a pending tax-related proceeding**.

Facts: In Marinello's tax obstruction trial, the judge did not instruct the jury that it must find that Marinello knew he was under investigation and that he intended corruptly to interfere with that.

Breyer (for 7): Just as we interpreted identical statutory obstruction of justice language in *Aguilar* (1995) (see also *Arthur Anderson* (2005) and *Yates* (2015)), this special tax obstruction statute (26 U.S.C. § 7212(a)) requires a more limited meaning that its plain language might suggest. First, it "refers to specific, targeted acts, … not as a 'catchall' for every violation that interferes" or every "routine" IRS action. This is consistent with the entire statutory structure (so as not to "transform misdemeanor[s] … into felonies") and prevents "unfairness" for subjecting trivial violations ("such as "failing to keep donation receipts from every charity") to felony penalties. Requiring "corruptly" does not cure these potential problems, nor are we willing to rely on good "prosecutorial discretion," which places too much "power in the hands of the prosecutor." In addition, the prosecution must show that the IRS proceeding was "pending . . . or . . . reasonably foreseeable."

Thomas dissenting, joined by Alito: The statute should mean "what it says;" the Court's interpretation is "not what Congress enacted." Marinello, who ran a company that provided courier services," kept almost no records, shredded others, paid employees in cash without records, and did not pay taxes for almost 20 years. Lacking "enough information about Marinello's earnings," due to his lack of records and cash dealings, the IRS prosecuted him for "corruptly endeavoring to obstruct or impede" tax investigations by his unlawful practices. The text of the statute is undoubtedly broad enough to reach his conduct, and the court's invented limitations "have no basis in the text," no "textual or contextual support." And "lenity-sounding concerns" have no application because there is no statutory ambiguity here. Moreover, the statute drafted by the Court is no less vague "than the one Congress drafted." The consequences of a "broadly sweeping obstruction statute" are for Congress. It is "not debatable" that this statute covers Marinello's conduct, regardless of other hypotheticals.

Warrants for production of electronic documents:

United States v. Microsoft Corp., 138 S.Ct. 1186 (April 17, 2018), 9-0 (**Per Curiam**), vacating and remanding 829 F.3d 197 (2d Cir. 2016).

Headline: Judgment and contempt finding vacated and case ordered **dismissed as moot**, because Congress enacted a new law after the SCOTUS argument and a new warrant was obtained.

***Per curiam* three-page ruling:** The government obtained a warrant requiring Microsoft to disclose all emails and other information associated with one of its customers. The district court ordered production even of information that Microsoft stores at its datacenter in Ireland. Microsoft argued that the statute authorizing the warrant, 18 U.S.C. § 2703, did not extend to such "extraterritorial" records, and on appeal the Second Circuit agreed. However, after the Supreme

Court granted review and heard oral argument on the question, Congress passed the CLOUD act, expressly stating that the statutory warrant authority applies to all of a company's records "regardless of whether" the information "is located within or outside of the United States." The government then obtained a warrant for the same records under the new statute. Because "no live dispute remains between the parties over the issue" on which "certiorari was granted," the case is moot and the judgements below are vacated and the case dismissed.

"Facially insufficient" wiretap orders:

Dahda v. United States, 138 S.Ct. 1491 (May 14, 2018), 8-0 (**Breyer**, Gorsuch recused), affirming 852 F.3d 1282 (10th Cir. 2017).

Headline: Wiretap order was not "insufficient on its face" even if the order contained an error, **where it was not lacking any information required by the statute**. So no suppression.

Facts: Federal wiretap orders under 18 U.S.C. §2510 et seq. were used to gather evidence later admitted against defendants in a drug distribution trial. The Orders were issued by a federal judge in Kansas, but purported to authorize interception in "any other jurisdiction" to which a tapped phone [presumably a mobile phone] was transported. Defendants argued that a wiretap order can extend only within the territorial jurisdiction of the issuing judge, and here there had been one instance of an out-of-state interception. Defendants argued that the purported error in the Order rendered the Orders "insufficient on [their] face," which is a ground for suppression of all evidence obtained, under §2518(a)(ii). But the motions to suppress were denied and the Tenth Circuit ruled that any violation of the "territorial requirement" did not require suppression.

Breyer (for 8): "We assume that the relevant sentence authorizing out-of-state interceptions] exceeded the judge's statutory authority." [In fact, the opinion later makes clear that this was a "defect" and that **a federal wiretap order "could not legally authorize a wiretap outside the district court's territorial jurisdiction."**] But under the statute, suppression is not required for "any legal defect." The Orders here contained all the information that the wiretap statutes require. Thus **they were not "insufficient" on their face, even if they did contain an additional, erroneous sentence.** "The Orders would have been sufficient even if they lacked the [offending] language." This subsection of the statute "means what it says," and we can rule on this basis even though the argument was not exactly made below (and it was made in the Government's *certiorari* opposition).

B. Securities Law Cases

Cyan Inc. v. Beaver County Employees Retirement Fund, 138 S.Ct. 1061 (Mar. 20, 2018), 9-0 (**Kagan**), affirming 2016 Cal. LEXIS 1266 (Cal. Supreme Court 2016).

Headline: The Securities Litigation Uniform Standards Act of 1998 did not strip state courts of jurisdiction to adjudicate class actions alleging only 1933 Securities Act violations; nor did it authorize removing such suits from state to federal court.

Facts: The Securities Act of 1933 creates private rights of action to enforce its obligations. The Act authorizes both federal and state courts to exercise jurisdiction over those private suits and it bars the removal of such lawsuits from state to federal court. The Securities Act of 1934 added the regulation of subsequent trading; but its lawsuits can only be litigated in federal court.

In 1955, the Private Securities Litigation Reform Act (PSLRA) amended both Acts, and plaintiffs began filing more state-law class actions. To prevent this, Congress passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA). SLUSA's amendments to the 1933 Act – Sections 77p and 77v(a) – are at issue here.

Respondents are three pension funds that bought shares of Cyan during its IPO. The complaint alleges that Cyan's offering documents contained material misstatements in violation of the 1933 Act. There are no state law claims. Cyan moved to dismiss for lack of subject matter jurisdiction, arguing that SLUSA's §77v(a)'s concurrent-jurisdiction grant stripped state courts of the power to adjudicate 1933 Act claims in "covered class actions." But respondents argue that SLUSA left intact state courts' jurisdiction over lawsuits that allege only 1933 Act claims. The California Supreme Court agreed with respondents and allowed the lawsuit to proceed.

As *amicus curaie*, the United States raised another question: does the SLUSA enable defendants to remove 1933 Act class actions from state to federal court? Because this question is related to the parties' jurisdictional arguments, we consider the scope of §77p(c)'s removal authorization.

Kagan (for a unanimous 9): "By its terms, **§77v(a) … does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act."** Thus SLUSA's text read straightforwardly leaves in place state court jurisdiction over 1933 Act claims. The "except clause" ("except as provided in section 77p of this title") does not limit state-court jurisdiction because it bars only certain securities class actions based on state law. It authorizes removal of those class actions to federal court, for dismissal. But the section says "nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law." That means the background rule of §77v(a) -- which permits state courts to hear 1933 Act claims -- still governs.

The definition in §77p(f)(2) of a "covered class action [a]s a suit seeking damages on behalf of more than 50 persons …. cannot be read to provide an exception to the rule of concurrent jurisdiction." **A definition normally does not provide an exception, but gives meaning to a term**. If Congress wanted to deprive state courts of jurisdiction over 1933 class actions, it could have just said that in §77p. A contrary interpretation fits poorly with the remainder of the statutory scheme.

It would be odd if SLUSA prevented state courts from deciding any 1933 Act class suit seeking damages for more than 50 plaintiffs because it would bar suits even if they did not involve covered securities. But this Court has concluded that **SLUSA expresses no concern for transactions in uncovered securities** because they are primarily of state concern.

Cyan's legislative purpose arguments are likewise unconvincing. Although SLUSA was intended to ensure that federal courts play the principal role in adjudicating securities claims, largely does not mean entirely. We simply not know why Congress declined to require as well that 1933 Act class actions be brought in federal court.

Digital Reality Trust, Inc. v. Somers, 138 S.Ct. 767 (Feb. 21, 2018), 9-0 (**Ginsburg**; Sotomayor concurring with Breyer; Thomas concurring in part and concurring in the judgment with Alito and Gorsuch), reversing 850 F.3d 1045 (9th Cir. 2017).

Headline: The **anti-retaliation provision** of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act **does not extend to an individual who has not reported a violation of the securities laws to the SEC**.

Facts: The Sarbanes-Oxley Act (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) both shield whistleblowers from retaliation but do so in different ways. SOX applies to all "employees" who report misconduct to the SEC, any other federal agency,

Congress, or an internal supervisor. Dodd-Frank defines whistleblower as any individual who "provides information relating to a violation of the securities laws to the Commission …." Dodd-Frank makes a whistleblower eligible for an award and protects that person from retaliation when they make disclosures protected under SOX. SOX contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, while Dodd-Frank permits a whistleblower to sue an employer directly in federal district court. The SEC's Dodd-Frank regulations require a whistleblower to "provide the Commission with information" to receive an award, but do not require SEC reporting.

Paul Somers sued his former employer, Digital Reality, alleging that Digital terminated his employment shortly after he reported to senior management that he suspected securities violations by the company. Digital Reality defended by arguing that Somers is not a whistleblower under Dodd-Frank. The Ninth Circuit ruled for Somers, deferring under Chevron to the SEC regulations that do not require a report to the SEC.

Ginsburg (for 9): Deference to a regulation is inappropriate here, because **"when a statute includes an explicit definition, we must follow that definition,** even if it varies from a term's ordinary meaning." Because the Dodd-Frank statute defines a whistleblower as one who "provides pertinent information to the Commission," a person who falls outside this category is ineligible to seek anti-retaliation protection under the statute. There is another Dodd-Frank provision that imposes no requirement that information be conveyed to a government agency, and "when Congress includes particular language in one section of a statute but omits it in another . . . this Court presumes that Congress intended a difference in meaning." Because the statute's definition is "clear and conclusive," *Chevron* deference is unnecessary. Courts are not at liberty to dispense with the condition Congress imposes.

The purpose and design of Dodd-Frank corroborates our reading, because the core objective of Dodd-Frank's whistleblower program is to motivate people to tell the SEC. By contrast, SOX had the different objective of disturbing the corporate code of silence that discouraged employees from reporting fraudulent behavior within. Our reading does not "gut" retaliatory protections because employees are shielded as soon as they provide relevant information to the Commission.

Sotomayor concurring, joined by Breyer: I write seperately only to note my disagreement with the suggestion in Justice Thomas's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute. Legislative history can aid us in understanding the law. "Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative history materials.

Thomas concurring in part and concurring in the judgment, joined by Alito and Gorsuch: I join the Court's opinion only to the extent it relies on the text of the Dodd-Frank Act. We are a government of laws, not men, and are governed by what Congress enacted rather than by what it intended. I cannot join the portions of the Court's opinion that venture beyond the statutory text.

C. Federal Sentencing and Guidelines

Mandatory restitution of victim investigation services:

Lagos v. United States, 138 S.Ct. 1684 (May 29, 2018), 9-0 (**Breyer**), reversing 864 F.3d 320 (5th Cir. 2017).

Headline: Victim **restitution** under the Mandatory Victims Restitution Act of 1996 **is limited to expenses incurred in government investigations and for attendance at criminal proceedings**.

Facts: Lagos and his company were convicted of defrauding a lender (General Electric) of "tens of millions of dollars." GE conducted a private investigation that cost $5 million "for attorneys, accountants and consultants," and the government used GE's investigation in its criminal prosecution. GE requested restitution for these expenses because they were "necessary … expenses incurred during participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense," as 18 U.S.C. §3663A(b)(4) allows. The district court awarded these expenses to GE and the Fifth Circuit affirmed.

Breyer (for a unanimous 9): Although the statutory words "do not demand our limited interpretation," "we conclude that **those words are limited to government investigations and criminal proceedings," not "private investigations and civil or bankruptcy litigation."** There would be an "awkwardness" to a broader interpretation, and other federal restitution statutes do or do not reach such private expenses with more particularity. Moreover, it would create "significant administrative burdens" in determining exactly what should count. We "begin to doubt whether Congress intended" these effects. We do not address whether the statute might reach a private investigation "that was pursued at a government's invitation or request."

Sentencing Guidelines Cases:

Hughes v. United States, 138 S.Ct. 1765 (June 4, 2018), 6-3 (**Kennedy**; Sotomayor concurring; Roberts dissenting with Thomas and Alito), reversing 849 F.3d 1008 (11th Cir. 2017).

Headline: Because Type-C plea agreements are "based on" the defendant's Federal Sentencing Guidelines range (so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement), Erik Hughes can seek a sentencing reduction under 18 U. S. C. §3582(c)(2).

Facts: Erik Hughes negotiated a Type-C plea agreement to resolve gun and drug charges. The agreement stipulated that Hughes would receive a sentence of 180 months, but it did not refer to a particular Guideline range. The District Court accepted Hughes' guilty plea under the agreement and sentenced him to 180 months. In doing so, the court calculated Hughes's guideline range as 188–235 months and determined the 180-month sentence was compliant with the Guidelines. Less than two months later, the Commission adopted and made retroactive an amendment to the Guidelines, which had the effect of reducing Hughes' sentencing range to 151-188 months. Section 3582(c)(2) provides that when an amendment applies retroactively, district courts may reduce sentences that were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." But the courts below concluded that under *Freeman v. United States* (plurality), Hughes was ineligible for a reduced sentence because his plea agreement was not expressly "based on" a Guidelines range.

Freeman had been a plurality in which a fifth Justice's vote made the difference. In *Marks* (1977), the Court had stated a rule that in such a divided majority, the opinion that expressed the

"narrowest grounds" should be viewed as controlling. This "*Marks* rule" has proven difficult to apply in some cases, and in *Hughes* the Court granted cert on the question how to interpret and apply divided plurality opinions. However, the Court's opinion resolves the merits of Hughes' sentencing reduction, without resolving the *Marks* question.

Kennedy (for 6): [Without mentioning it, the majority here included Justice Sotomayor, who had stated a different view as the necessary fifth Justice in *Freeman*. So no *Marks* analysis of *Freeman* was required. See Sotomayor's concurring opinion below.]. "The Guidelines remain the foundation of federal sentencing decisions." In the typical sentencing case there will be "no question that the defendant's Guidelines range was a basis for his sentence." But even in a Type-C agreement where a precise sentence is agreed upon, the proper Guideline range is both the "starting point and a basis for [the] ultimate sentence." So Hughes is entitled under the statute to be considered for the sentencing reduction. Section 3582(c)(2) directs attention to the reasons the district court imposed the sentence, not the reasons for the parties' plea agreement. In most cases the defendant's sentence will be based on the Guidelines. (*Koons*, which we decide today [summarized below] is an unusual and not dispositive case.) Here, the District Court imposed a sentence that it deemed "compatible" with the Guidelines. The range was thus a "basis" for the sentence.

Sotomayor concurring: I continue to believe that my *Freeman* concurrence sets forth the most convincing interpretation of §3582(c)(2)'s statutory text, but I acknowledge that my concurrence precipitated significant confusion [under *Marks*]. While I still believe that in the (C) agreement context, the sentences are typically based on the agreements themselves, and not the Guidelines, the integrity and legitimacy of our criminal justice system depends on consistency, predictability, and evenhandedness. I therefore join the majority in full because doing so promotes uniformity, and the majority's view "aligns more closely than the dissent does with [my] view … in *Freeman*."

Roberts dissenting, joined by Thomas and Alito: The Federal Rules requires that if a defendant pleads guilty pursuant to a Type-C agreement, the District Court may "sentence him only to that term." If the court finds the specified sentence inappropriate, he can reject the agreement and give the defendant the opportunity to be released from the plea. Although the District Court must still consult the Guidelines when considering whether to accept a Type-C agreement, "when determining the sentence to impose" the court may "base" its decision on only "the plea agreement." It is the negotiated Type-C agreement, not the Guidelines calculation, that forms the basis for the sentence. Here, Hughes pled guilty and entered a binding agreement regarding his sentence because he was otherwise looking at life in prison. The Court should not allow revision of this binding agreement even when the Government has already fulfilled its side of the bargain, and the statute does not require it.

Koons v. United States, 138 S.Ct. 1783 (June 4, 2018), 9-0 (**Alito**), affirming 850 F.3d 973 (8th Cir. 2017).

Headline: When a court has sentenced defendants based on applicability of mandatory minimum term and then lowered it due to "substantial assistance," the sentence is not "based on" the Guidelines and they are not entitled to a reduction under 18 U.S.C. §3582(c)(2).

Facts: Five defendants pled guilty to drug charges that subjected them to mandatory minimum sentences. The District Court did calculate their advisory Guidelines ranges, but the court noted that the Guidelines ranges was not relevant because the top end of the Guidelines range was below the mandatory minimum term. The Court then imposed a sentence below the mandatory minimum due

to the defendants "substantial assistance" in prosecuting other offenders. The Court considered the relevant "substantial assistance factors" mentioned in the Guidelines, but did not consider the Guidelines range.

The Sentencing Commission later announced a retroactive Guidelines amendment that reduced the base offense levels for the defendants' drug offenses. The defendants then sought sentencing reductions arguing that their sentences had been "based on" the Guideline range. The lower courts denied relief.

Alito (for 9): The defendants do not qualify for sentence reductions because their sentences were not "based on" their Guidelines ranges as the statute requires. Rather, their sentences were "based on" their mandatory minimums and on their substantial assistance to the Government. **For a sentence to be "based on" a Guidelines range, the range must have played a "relevant part in the framework the sentencing judge used."** Although it is rare that the Guidelines play no relevant part in a federal judge's sentencing determination, the sentences here fall into this category.

The defendants' argument that their sentences *should have been* based on these ranges is unconvincing, as is the argument that the Commission's policy statements favor eligibility here. The Commission "cannot make a defendant eligible when §3582(c)(2) makes him ineligible." Nor do we think that this ruling creates "unjustifiable sentencing disparities," because the "substantial assistance" factors should lead to the same sentences today.

Rosales-Mireles v. United States, 138 S.Ct. 1897 (June 18, 2018), 7-2 (**Sotomayor**; Thomas dissenting with Alito), reversing 850 F.3d 246 (5th Cir. 2017).

Headline: A miscalculation of a defendant's federal Guidelines sentencing range, not raised in the district court but which still meets the three "*Olano* factors" for "plain error," should ordinarily result in vacation and resentencing under F.R.Crim.Pro. 52(b).

Facts: Rosales-Mireles pleaded guilty to illegal reentry. In calculating the Guidelines range, the Probation Office mistakenly counted a state misdemeanor conviction twice, producing a range of 77-96 months when the correct range should have been 70-87 months. Rosales-Mireles did not object and was sentenced to 78 months. The issue was raised on appeal and the Fifth Circuit found that the error was not intention, "plain," and affected Rosales-Mireles's substantial rights. These are the three "prongs" that the Court has announced for "plain error" under F.R.Crim.Pro. 52(b) (citing *Olano*, 1993). But the Fifth Circuit still denied relief, ruling that Rosales-Mireles had failed to establish that the error would "seriously affect the fairness, integrity, or public reputation of judicial proceedings," often called the unspoken "fourth prong" of *Olano*. The Fifth Circuit said that denying relief here would not "shock the conscience."

Sotomayor (for 7): Although the Guidelines are now "advisory," district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process. The district court has the ultimate responsibility to ensure that a range provided by the Probation Office is correct; a failure to calculate the correct Guidelines range constitutes procedural error. Even if the error is not noticed in the district court, Federal Rule of Criminal Procedure 52(b) provides recourse to correct "plain errors" when its three prongs are met. *Olano*, 1993.

A further "shocks the conscious standard" is unduly restrictive and out of context here. Rule 52(b) includes no "intentionality" standard. Instead, a plain Guidelines error that affects a defendant's substantial rights is precisely the type of error contemplated for correction under Rule 52(b). Indeed, the erroneous deprivation of liberty does undermine the fairness, integrity, and public

reputation of judicial proceedings -- this miscalculation resulted from judicial error. Public legitimacy relies on procedures that provide opportunities for error correction.

The fact that Rosales-Mireles' sentence still falls within the correct Guidelines range does not alter our conclusion. The question is not whether this sentence is "reasonable," it is whether Rule 52(b) permits the defendant an opportunity for correction. Regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. Thus, in the ordinary case, such an error warrants relief under Rule 52(b) and an opportunity for sentencing based on the correct facts, on remand.

Thomas dissenting, joined by Alito: Plain-error review encourages timely objections and reduces wasteful reversals. It must remain stringent to prevent sandbagging and giving defendants an incentive to withhold timely objections and game the system. Rule 52(b) should be applied "case by case" and there should be no "rebuttable presumption" like that fashioned by the Court today. The Guidelines are **advisory** only, they do not constrain district courts.

Here, the decision to grant Rosales-Mireles relief actually undermines the integrity of judicial proceedings. A reversal based on an error that has no actual effect "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Rosales-Mireles's sentence was within the correct range, indeed, in the bottom half. It was reasonable, and leaving a reasonable sentence in p[lace cannot "undermine" the courts' public reputation. "A sentence that is substantively reasonable is hardly the kind of 'particularly egregious error' that warrants plain-error relief."

Chavez-Meza v. United States, 138 S.Ct. 1959 (June 18, 2018), 5-3 (**Breyer**; Kennedy dissenting with Sotomayor and Kagan; Gorsuch recused [it's from his old Circuit]), affirming 854 F.3d 655 (10th Cir. 2017)

Headline: When a judge lowers a defendant's sentence based on a Sentencing Commission amendment, **the sentence is lawful when the record demonstrates that the judge had a "reasoned basis" for his decision, even if the sentence is not at the low end** of the new Guidelines range.

Facts: Chavez pled guilty to methamphetamine distribution. The judge imposed a sentence at the bottom of the 135-168 month range. Later, the Sentencing Commission lowered the range for Chavez's offense to 108 to 135 months. At resentencing, Chavez asked for a sentence at the bottom of the new range, but the judge imposed a sentence of 114 months instead. The judge said nothing to explain this sentence, but he entered it on a form of judgment that certified that he had "considered" Chavez's requests and had "taken into account" relevant statutory and Guidelines factors. Chavez argued on appeal that the judge's explanation was inadequate.

Breyer (for 5) [Ed. Note: note the odd "political" make-up here, with the more "liberal" Justices Kagan and Ginsburg dissenting, with Kennedy, while "liberal" Justices Breyer and Ginsburg make-up the majority.] Assuming that district courts have equivalent duties of explanation when initially sentencing and re-sentencing, what the District Court did here was sufficient. While some explanation is required (citing 18 U.S.C. §3553(c) and *Rita,* 2007), just how much explanation is needed "depends on the circumstances of the particular case." Here at the original sentencing, the judge explained that "the reason the guideline sentence is so high in this case … is because of the drug quantity." At resentencing, the same judge noted that, since the first sentencing, Chavez had "broken a moderately serious rule in prison." We reject the argument that, in a resentencing based on a new Guidelines range, the judge must choose a point in the new range that is "proportional" to the prior sentencing-range point. Nothing in the Guidelines or statutes require this. Moreover here, the new range here was six months shorter than the prior range – if viewed "logarithmically, what may

seem in the middle of the new lower range is not necessarily proportional" to the prior range. **[Ed. note:** Justice Breyer, like most of us, is a lawyer, not a mathematician.] Most importantly, nothing in the Guidelines requires the judge to prove a lengthy explanation if it is clear that she had "a reasoned basis" for reducing the sentence. We do not say that a disproportionate sentence reduction may never require a more detailed explanation. But our task is to decide this case, and the judge's explanation (even if on a pre-printed form) must be awarded deference.

Kennedy dissenting, joined by Sotomayor and Kagan: When the District Court reduced petitioner's sentence, it merely filled out a terse "AO-247" form, checking boxes that said the court had taken into account the Guidelines and other relevant factors. But the court "did not explain why it choose that particular sentence … as … at his original sentencing." I think this form is insufficient to allow for meaningful appellate review. A slight expansion of the AO-247 form could answer my concerns in most cases. **[Ed. note:** It will be interesting to see whether the Commission or the Judicial Conference acts on Justice Kennedy's parting suggestion here.] But the majority's acceptance of this conclusory order is "detrimental to the judicial system and to prisoners alike." This form leaves district courts' re-sentencing decisions a mystery. Ultimately this is less efficient than requiring trial courts to give a short oral explanation or check slightly more detailed boxes, so that meaningful appellate review of the reasonable exercise of discretion can occur.

III. HABEAS CORPUS

Wilson v. Sellers, 138 S.Ct. 1188 (Apr. 17, 2018), 6-3 (**Breyer**; Gorsuch dissenting with Thomas and Alito), reversing 834 F.3d 1227 (11th Cir. 2016).

Headline: A **federal habeas court** reviewing an unexplained State Supreme Court decision **should "look through" that decision to the last reasoned state-court decision that provides a rationale** and presume that the unexplained decision adopted the same reasoning. The state may rebut this presumption if it can show that the unexplained State Supreme Court decision most likely relied on different grounds.

Facts: In 1997 Wilson was convicted of murder in Georgia state court and sentenced to death. After the Georgia Supreme Court affirmed and *cert* was denied, Wilson filed for federal habeas, claiming ineffective assistance. The state habeas trial court denied the petition and gave reasons. The Georgia Supreme court denied, without opinion, Wilson's application for a certificate of probable cause to appeal ("COA"). Wilson then filed for habeas in federal district court. That court denied Wilson's habeas petition, reviewing the state habeas court's reasons deferentially as required by *Harrington* (2011). On appeal, however, the Eleventh Circuit ruled that the district court should not have "looked through" the Georgia Supreme Court's no-opinion denial to review the state trial court's reasons. Instead, CA 11 ruled that the district court should have imagined what arguments "could have supported" the Georgia Supreme Court's denial. The Court of Appeals then "proceeded to identify a number of bases, not offered in the state habeas decision, that CA11 believed reasonably could have supported" denial of Wilson's habeas petition. On rehearing *en banc*, this methodology rejecting the "look-through" approach was affirmed by a 6-5 vote.

Breyer (for 6): In *Ylst v. Nunnemaker* (1991), we adopted a "look-through presumption" on federal habeas, a setting that "parallels" this case. Such a presumption is "realistic" because "state higher courts often (but certainly not always) write 'denied' or 'affirmed' or 'dismissed' when they have examined the lower court's reasoning and found nothing significant with which they disagree." It is also often "more efficient." *Harrington* does not require an opposite conclusion; in *Harrington*

there was no lower state court decision with any rationale; and it too stated only a "presumption," while favorably citing *Ylst*. Since then, both this Court and lower federal courts have applied *Ylst* in the situation here. Of course, a state may rebut the "look-through" presumption in a case where, for example, different grounds were briefed and/or argued to the State higher court, or a different ground was "clear in the record" -- "when there are convincing grounds to believe the silent court had a different basis for its decision," the presumption need not apply. But ordinarily, a look-through presumption "respects" the state courts "and is easier to apply."

Gorsuch dissenting, joined by Thomas and Alito: The federal habeas statute contains no "look-through" presumption. And we do not apply a similar presumption to our own review (indeed, we tell parties that our summary affirmances do not necessarily endorse the reasoning of the courts below). "I discern no good reason to treat the work of our state court colleagues with less respect." "Even so" there is some "good news." **[Ed. Note:** "good news" here apparently means "some reason to still permit federal courts to deny federal habeas relief even when lower state court grounds are unreasonable."] In the end, the Court's "novel presumptions and rebuttals" leave us "very nearly" at the "place where we … belonged all along." Still, *Ylst* was years before Congress tightened the standards for federal habeas review; *Harrington* came after and interpreted those new standards. *Ylst* involved procedural claims only, and should be limited to that. Today's ruling may prod state Supreme Courts to say more than one-word denials, but we "have no power" to "tell state courts how they must write their opinions." And if they do say more, then today's presumption will be proved "futile."

IV. IMMIGRATION LAW

Jennings v. Rodriguez, 138 S.Ct. 830 (Feb. 27, 2018), 5-3 (**Alito**; Thomas concurring in part and concurring in the judgment with Gorsuch; Breyer dissenting with Ginsburg and Sotomayor; Kagan recused), reversing 804 F.3d 1060 (9th Cir. 2015).

Headline: Detained aliens have no right to periodic bond hearings under applicable statutes. And because there is no statutory ambiguity, the canon of "constitutional avoidance" does not apply. Rodriguez's constitutional claims may be considered on remand, but only after class certification is carefully re-examined.

Facts: Three statutory provisions allow detention of aliens who are either "seeking admission" or are already in the country but believed to be removable. None of these statutes appear textually to allow for a hearing to be released on bond, no matter how long the person is detained. In 2015 the Ninth Circuit affirmed a class-action certification challenging prolonged immigration detentions without the possibility of a bond hearing. The district court ruled that prolonged detention without a potential to be released on bond violates the Due Process Clause, and entered an injunction requiring bond hearings under certain conditions. The Ninth Circuit affirmed on statutory grounds, saying that the doctrine of "constitutional avoidance" required interpreting the statutes to allow for bond hearings for any detention lasting longer than 6 months, with the burden on the government to prove necessity for detention by clear and convincing evidence.

Alito (for 5): We have jurisdiction to review the government's appeal here. On the merits, the Ninth Circuit's statutory interpretation was implausible, so it misapplied the constitutional avoidance canon, which applies only when alternative constructions of a statute are "fairly possible." These statutes plainly "authorize detention until the end of applicable proceedings;" there is no "plausible"

limiting interpretation (other than a statutory exception for witness-protection). Adding non-textual limitations "is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." It does not permit "textual alchemy." The dissent "inflict[s] linguistic trauma" to reach a different, "utterly implausible" result.

Moreover, "there is no justifications for any of the procedural requirements that the" Ninth Circuit imposed "without any arguable statutory foundation." *Zadvydas* (2001) does not "grant a license to graft a time limit onto" the statutes.

The court of appeals ruled on statutory grounds, and we decline to reach the constitutional arguments when they did not. Those arguments may be open on remand. But first the court must consider: (1) whether "class-wide injunctive relief" on constitutional grounds is barred by 8 U.S.C. §1252(f)(1), and if only declaratory relief is available, whether that "can sustain the class on its own;" and (2) "whether a class action continues to be the appropriate vehicle" for various suggested reasons.

Thomas concurring in part and concurring with judgment, joined by Gorsuch (except for footnote 6): "In my view, no court has jurisdiction over this case," because 8 U.S.C. §1252(b)(9) prohibits judicial review of "claims related to removal" except after a final order of removal. This does not violate the Constitution's "Suspension Clause" because the respondents "do not seek habeas relief as understood by our precedents."

Breyer dissenting with Ginsburg and Sotomayor [33 pages, 2 pages longer than the majority]: Some of the respondents have been held in detention for many months or even years, without any hearing. Presumably a number pose no danger or flight risk. Because any such interpretation of the applicable statutes "would likely render the statutes unconstitutional, … I would interpret the statute as requiring bail hearings presumptively after six months of confinement." I first examine the Constitution's requirements, because they raise "grave doubts" regarding the constitutionality of the detention statutes. Given that, I then ask whether it is "possible" to read the statutes as implicitly allowing bond hearings. Such a reading does not contravene any express statutory text or congressional intent. Finally, "I can find nothing" that should prevent these respondents from pursuing a class action for a declaratory judgment and then using it to demand bond hearings.

The Declaration of Independence and the Constitution grant *all* persons liberty and freedom from arbitrary deprivation. "Since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. … [W]ith respect, I dissent."

Pereira v. Sessions, 138 S.Ct. 2105 (June 21, 2018), 8-1 (**Sotomayor**; Kennedy concurring; Alito dissenting), reversing 866 F.3d 1 (1st Cir. 2017).

Headline: A paper entitled "notice to appear" that fails to designate the specific time or place of the noncitizen's removal proceeding is not a "notice to appear under section 1129(a)," and so does not trigger the stop-time rule.

Facts: Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), nonpermanent residents who are subject to removal proceedings may be eligible for cancelation of removal if they have been physically present in the United States for a continuous ten years immediately preceding the application. Calculation of this period is deemed to end (the "stop-time rule") when the alien is served with a "notice to appear."

Pereira is a native of Brazil who came to the U.S. in 2000 and remained after his visa expired; he is employed and "a well-respected member of his community." Following a 2006 DUI arrest, Pereira was served with a paper entitled "notice to appear." This notice did not specify a date and time for any removal hearing; it instead . It instead ordered him to appear "on a date to be set at a

time to be set." Over a year later, the Immigration Court sent Pereira a notice with a specific time and date, but it was sent to the wrong address, so Pereira failed to appear. The court ordered him removed *in absentia*.

In 2013, well after Pereira had been in the country for over 10 years, he was arrested for "a minor motor vehicle violation (driving without his headlights on)." He was detained and his removal proceeding was reopened. Pereira applied for cancelation of removal, arguing that he had been in the U.S. for more than 10 years. But the Immigration Court ruled that a notice of removal did not have to have a "date certain" to be effective, and that the "time" for the 10-year period was "stopped" by the 2006 notice. Pereira was therefore statutorily ineligible for cancellation, and he was ordered removed. The Bureau of Immigration Appeals ("BIA") agreed with that interpretation of the law, and the First Circuit affirmed, deferring to the BIA interpretation under *Chevron*.

Sotomayor (for 8): We need not resort to *Chevron* deference for the "narrow question" here, because Congress has supplied a clear and unambiguous answer. The statutory stop-time rule states that a "period of . . . continuous physical presence … end[s] … when the alien is served a notice to appear under section 1229(a)." Section 1229(a), in turn, clarifies and defines a "notice to appear," as a "written notice" that specifies "the time and place at which the removal proceedings will be held." "Based on the plain text of the statute, it is clear that **to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, specifies the time and place of the removal proceeding.**"

Paragraph 2 of §1229(a) further provides that "in the case of any change or postponement in the time and place of removal proceedings," the Government must provide "written notice" with the "new time or place…." This presumes that the Government has already served a notice to appear that specified the time and place; and common sense dictates this outcome: a "notice to appear" must mean, at a minimum, that the Government provides "notice" of when and where to appear. Failing to specify such integral information would unquestionably "deprive the notice to appear of its essential character."

The Government's practical concerns are meritless. The Government argues that administrative realities render it difficult to guarantee a specific time, date, and place. But this information need not be "etched in stone." The government can always change the time or place, so long as it gives adequate notice**.** The dissent's fear that DHS will begin to assign arbitrary times is unsupported, and given today's software capabilities, unlikely.

Kennedy concurring: I agree with the opinion in full -- I write separately to note my general concerns about the way courts apply *Chevron*. "Reflexive deference" sometimes exhibited by courts to any administrative decision is troubling. "When deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still." In an appropriate case, it seems necessary and appropriate to reconsider the premises and implementation of *Chevron*. [Ed. note: The Court seems virtually certain to take up this suggestion very soon, particularly if Judge Kavanaugh is confirmed.

Alito dissenting: The Court's decision implicates the status of the important, frequently invoked, and once celebrated doctrine of *Chevron*. Here it seems that the agency's interpretation is reasonable. Deference is especially appropriate in the immigration context because of the potential foreign-policy implications. Whether or not choosing a particular interpretation is difficult, under *Chevron*, "that choice was not ours to make." We are "obliged to defer to the Government's interpretation."

Sessions v. Dimaya, 138 S.Ct. 1204 (Apr. 17, 2018), 5 (4-1) to 4 (**Kagan**; Gorsuch concurring in part and concurring in the judgment; Roberts dissenting with Kennedy, Thomas, and Alito; Thomas dissenting with Kennedy, Thomas, and Alito), affirming 803 F.3d 1110 (9th Cir. 2015).

Headline: 18 U.S.C. §16(b), which defines **"violent felony" for purposes of the Immigration and Nationality Act's removal provisions, is unconstitutionally vague,** just as we held regarding similar language in another statute in *Johnson* (2015).

Facts: Dimaya, who had resided lawfully in the U.S. since 1992, was convicted twice of first-degree burglary under California law. In a removal proceeding, Immigration judges counted this conviction as a "violent offense" as defined in 18 U.S.C. §16(b), which made it an "aggravated felony" for removal purposes (making removal a "virtual certainty"). But the Ninth Circuit ruled that the definition of "violent felony" in §16(b) was unconstitutionally vague, because it was quite similar to a definition of "violent felony" used in a different statute that the Supreme Court had held unconstitutionally vague in 2015 (*Johnson*).

Kagan (for 5): A "straightforward" application of *Johnson* requires affirmance here. The definition – a felony that "by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" – creates "grave uncertainty" about what state law offenses qualify. **The categorical approach requires a court to imagine "an idealized ordinary case of the crime." "But how c[an a] judge really know?"** It is an "excessively speculative, essentially inscrutable, thing." (And we are not going to abandon this longstanding, textual, categorical test, as Justice Thomas would have us do – it is the same argument the majority rejected in *Johnson*. Moreover, his suggestion of "constitutional avoidance" does not work, because an "as applied" approach would "generate its own constitutional questions" so the constitution would not be avoided.) The statutory differences in language here versus *Johnson* – such as "serious potential risk" versus "substantial risk" – is "slicing the baloney mighty thin," and they make no difference to the features that *Johnson* said produced vagueness. In *Johnson*, Justice Scalia described our repeated unsuccessful attempts for consistency with this language as "insanity." Why would we disregard this "lesson so hard learned" and go back to the "lunatic practice," now?

Gorsuch concurring in part and concurring in judgment: **[Ed. note:** Gorsuch is the necessary fifth majority vote here. As Justice Scalia's successor, he likely feels some loyalty to Scalia's majority opinion in *Johnson*.]. "Vague laws invite arbitrary power," and "a government of laws and not of men can never tolerate that arbitrary power." Although Justice Thomas's dissenting view here is "a serious and thoughtful one that merits careful attention," after some detailed historical analysis "I am persuaded that void for vagueness doctrine … serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution." [Then come 17 pages of Justice Gorsuch's exegesis of "the original understanding."]. I also agree with a "fair notice" standard, but I do not think it depends on the "gravity of the penalty." As for the "categorical approach," I would reserve the question, because no party here has asked that it be abandoned. "Normally courts do not rescue parties from their concessions."

Roberts dissenting, joined by Kennedy, Thomas, and Alito: This statute and context are different than in *Johnson*. Indeed, I am not even sure that the same strict standard for criminal laws should govern civil penalty statutes. *Johnson* was a "careful" holding and should be limited to its language and context. It "does not compel today's result."

Thomas dissenting, joined by Kennedy and Alito **[note:** not Roberts]: "I agree with the Chief" but I "write separately to make two additional points." First, I "harbor doubts about whether the vagueness doctrine" is consistent with "the original meaning of the Due Process Clause." If it is, it should be "limited to cases in which the statute is unconstitutionally vague as applied to the person challenging it." [A lengthy constitutional "original understanding" exegesis follows – his dissent is32 pages long.] Second, even if all this is conceded, the doctrine of "constitutional avoidance" should cause us to interpret the statute to not require a "categorical" approach, but rather to examine "the actual underlying conduct."

Trump v. Hawaii, 138 S.Ct. 2392 (June 26, 2018), 5-4 (**Roberts**; Kennedy concurring; Thomas concurring; Breyer dissenting with Kagan; Sotomayor dissenting with Ginsburg), reversing 878 F.3d 662 (9th Cir. 2017).

Headline: The president **lawfully exercised the broad discretion** granted to him under 8 U. S. C. §1182(f) **to suspend the entry of aliens from various countries** into the United States. Because there was a valid national-security survey that led to the list of countries, **the President's statements about a "Muslim ban" are insufficient** to undermine the Executive action.

Facts: In September 2017, the President issued Proclamation No. 9645, which largely barred entry into the United States for the nationals of eight foreign countries. **[Ed. note:** This was the third attempt at what became popularly known as the "Travel Ban," and this case attracted immense national and international attention.] The specific countries were selected after a "security review" that identified countries with deficient information-sharing practices or other national security concerns. Pursuant to 8 U.S.C. §§1182(f) and (a), the Proclamation said that the restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and to "elicit improved identity-management and information-sharing protocols and practices from foreign governments."

The State of Hawaii and other plaintiffs argued that the Proclamation violated the Immigration and Nationality Act ("INA") and the Constitution's First Amendment Establishment Clause. The District Court enjoined enforcement of the Order and the Ninth Circuit affirmed.

Roberts (for 5): First, "we … assume without deciding that plaintiffs' statutory claims are reviewable." The INA establishes multiple grounds for inadmissibility, and Congress has delegated to the President the authority to suspend or restrict the entry of aliens in certain circumstances. Section 1182(f) "by its plain language" grants the President broad discretion to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States." This statute "exudes deference to the President" and vests the President with "ample power" to impose additional entry restrictions.

The Proclamation falls well within §1182(f)'s "comprehensive delegation." The sole prerequisite is that the President "find []" that the entry of the covered aliens "would be detrimental to the interests of the United States." The Proclamation "undoubtedly" fulfilled that requirement here. It is "questionable" whether the President must provide more specific findings to permit judicial review, and it is inconsistent with the broad statutory text and the deference traditionally accorded the President in the immigration sphere. "The language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority."

Plaintiffs' argument that the Proclamation is inconsistent with other statutes is also questionable. The Proclamation supports Congress's individualized approach for determining admissibility, by promoting the effectiveness of the existing vetting process. Existing programs also already require information sharing. Because plaintiffs "do not point to any contradiction with

another provision of the INA, the President has not exceeded his authority." [The majority was also unconvinced by any legislative history arguments.]

We also reject Hawaii's contention that the Proclamation violates Section 1152(a)(1)(A), which bars "discrimination based on nationality" in issuing visas. Issuing visas is simply different from determining admissibility, even after a visa is issued. So sections 1182(f) and 1152(a)(1)(A) "operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States . . . Once §1882 sets the boundaries . . . §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits."

Common sense and historical practice confirm this. Section 1152(a)(1)(A) has never been treated as a constraint on 1182. Presidents Reagan and Carter both used it to bar entry to the nationals of specific countries. Plaintiffs' broad reading simply does not make sense—it would forbid the President from suspending entry of any foreign nationals even in foreign threats existed.

As for the argument that the Proclamation is an unconstitutional "Muslim Ban," issued with the unconstitutional purpose of excluding Muslims and thus violating the First Amendment's Religion Clauses, first some of the **the individual plaintiffs do have standing,** because they allege the concrete injury of the real-world effect of keeping them separated from relatives.

We recognize that there are some statements made by the President and his advisers allegedly suggesting that the real purpose of the Proclamation was to target Muslims. However, "the President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf" and have sometimes used that power to "espouse the principles of religious freedom and tolerance on which this Nation was founded." Some Presidents have performed "unevenly" in living up to this task -- but here the question is not the correctness of the President's words, but rather the role that those statements should play, if any, in assessing the constitutional claim. **When a policy is facially neutral, as this one is, the standard of review is more relaxed.** "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. **Under this rational basis review, although we can consider extrinsic evidence, we think the Proclamation can "reasonably be understood to result from a justification independent of unconstitutional grounds."** It is "expressly premised" on legitimate purposes: to prevent entry of nationals who cannot be adequately vetted and to induce other nations to improve their practices. The Order covers only 8% of the world's Muslim population and is limited to countries that Congress has previously designated as risks. Countries deemed to no longer pose threats have been removed. Because the government has shown a "sufficient national security justification" for the Proclamation, we reverse the judgments below.

Kennedy concurring: "I join the Court's opinion in full." The Court acknowledges that judicial review of governmental action is appropriate to determine whether it is "inexplicable by anything but animus." Whether that is the case here "is a matter to be addressed in the first instance on remand." Indeed, there are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. "That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects." Officials must "adhere to [First Amendment] guarantees and mandates in all their actions, even in the sphere of foreign affairs."

Thomas concurring: The President has "*inherent* authority to exclude aliens from the country." Merits aside, I write separately to address the all-too common practice by district courts of imposing universal injunctions. "I am skeptical that district courts have the authority to enter universal injunctions." These injunctions did not exist at the time of founding and appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, the Court "must address their legality."

Breyer dissenting, joined by Kagan: There is evidence that supports the conclusion that the Government is not applying the Proclamation as written. The Proclamation says that Cabinet officials "shall coordinate to adopt guidance" for consular offices to grant waivers—but no guidance has issued. More concerning, only two waivers have been approved for 6,555 eligible applicants. Further, although the Proclamation does not apply to asylum seekers or refugees, few refugees have been admitted since the Proclamation took effect.

In practice, the Proclamation appears to have been applied in a discriminatory way: only 258 student visas were issued to applicants from Muslim countries, less than a quarter of the volume of 2016 visa levels. There is also evidence that consular officers are actually not allowed to exercise discretion, and that the waiver process is "merely window dressing."

In light of the "declarations, anecdotal evidence, facts, and numbers" that indicate racial animus in application, I would remand this to the District Court for further proceedings, and leave the injunction in place while the matter is being litigated. However, if forced to decide without further litigation, I would find the evidence of antireligious bias (including the President's online posts) sufficient to set the Proclamation aside.

Sotomayor dissenting, joined by Ginsburg: The Court's decision fails to safeguard the promise of religious liberty. It leaves "undisturbed a policy first advertised openly and unequivocally as a total and complete shutdown of Muslims entering the United States because the policy now masquerades behind a façade of national-security concerns." However, based on the evidence, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus, rather than by the Government's asserted national-security justifications. This suffices to show that plaintiffs are likely to succeed on their Establishment Clause claim, which is all that is required for an injunction.

The majority tells a "highly abridged account" of President Trump's animus toward Islam. [Justice Sotomayor then expressly quotes many statements made by President Trump but omitted from the majority opinion, that suggest religious animus.] The failure to tell the full story shields the fact that the "primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country." This is also clear by President Trump's failure to disavow his earlier statements about Islam. Just this Term, this Court found in *Masterpiece Cakeshop* that official expressions of hostility to religion are inconsistent with the Free Exercise Clause. "It should find the same here."

Instead of recognizing the clear racial animus, the majority limits its review to rational-basis scrutiny. This is "perplexing" given this Court's precedent. But even under that review, the Proclamation must fail because it is "divorced from any factual context from which we could discern a relationship to legitimate state interests, and its sheer breath is so discontinuous with the reasons offered for it that the policy is inexplicable by anything but animus."

Even more troubling are the stark parallels between the reasoning of this majority and that of *Korematsu v. United States*. As in *Korematsu*, the Governance here invokes "an ill-defined national security threat to justify an exclusionary policy of sweeping proportion."

V. CIVIL CASES RELATED TO CRIMINAL TOPICS

Jesner v. Arab Bank, PLC, 138 S.Ct. 1386 (Apr. 24, 2018), 5-4 (**Kennedy**; Thomas concurring; Alito concurring in part and concurring in the judgment; Gorsuch concurring in part and concurring in the judgment; Sotomayor dissenting with Ginsburg, Breyer, and Kagan), affirming 808 F.3d 144 (2d Cir. 2015).

Headline: In a case where the underlying claim is that the defendant bank helped finance terrorists, the Court rules that **foreign corporations may not sued under the 1789 Alien Tort Statute** ("ATS"), 28 U.S.C. 1350.

Facts: Petitioners, who are foreign nationals, alleged that plaintiffs were harmed or killed by terrorist acts committed abroad, and that the defendant Bank and its officials facilitated these tortious acts by aiding the terrorists' funding. They alleged that the Bank's New York branch helped "clear" various transactions, and "laundered" money for a Texas charity that was a front for the terrorists. The district court dismissed the lawsuit and the Second Circuit affirmed.

Kennedy (for 5): The "scholarly and extensive" opinions below "provide significant guidance" for us here. The Framers did not expressly intend that corporations would be ATS defendants; and "judicial deference requires" that any decision to extend it to corporations now should be made by Congress and the President, not us. **[Ed. Note:** Further lengthy details of rationale are omitted here because the substance of the litigation is civil, not criminal. Similarly, the details of the four separate opinions that follow are omitted here:]

Thomas concurring (one paragraph): "I join the Court's opinion in full" and "I also agree with the points raised by my concurring colleagues."

Alito concurring in part and concurring in the judgment: Not only "judicial caution" but also constitutional "separation of powers" compels our ruling today.

Gorsuch concurring in part and concurring in the judgment: "The job of creating new causes of action and navigating foreign policy disputes belongs to the political branches."

Sotomayor dissenting, joined by Ginsburg, Breyer, and Kagan: The Court should not "absolve corporations from responsibility under the ATS for conscience-shocking behavior." "Tort actions against corporations have long been available under federal common law," so applying that here is no innovation. And it is the job of federal courts. Today's result is a special immunity. This "undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose."

Murphy v. National Collegiate Athletic Ass'n, 138 S.Ct. 1461 (May 14, 2018), 6-3 (**Alito**; Thomas concurring; Breyer concurring in part and dissenting in part; Ginsburg dissenting with Sotomayor and Breyer), reversing 832 F.3d 389 (3d Cir. 2016).

Headline: Provisions of the Professional and Amateur Sports Protection Act **(PASPA) that prohibit States from authorizing sports gambling operations violate the Constitution's "anticommandeering" rule.** Other PASPA provisions are not severable from the provisions at issue; the entire statute is unconstitutional. **[Ed. note:** this broadly opens up the field of sports gambling for the States.]

Facts: A federal statute, PASPA directs that a State or its subdivisions may not "sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. It also makes it unlawful for an individual person to "sponsor, operate, advertise, or promote" those same gambling schemes if done pursuant to the law or compact of a governmental entity. But PASPA does not make sports gambling itself a federal crime. Rather, it allows the Attorney General and sports

organizations to bring civil actions to enjoin violations. "Grandfather" provisions allow existing sports gambling to continue in four States; another provision permitted New Jersey to set up sports gambling in Atlantic City within a year of PASPA's enactment, but N.J. missed that window.

Later, New Jersey voters approved a State Constitutional amendment giving the legislature authority to legalize sports gambling schemes, and the legislature enacted such a scheme. The NCAA and other sports leagues sued, alleging that this violated PASPA. New Jersey countered that PASPA is unconstitutional because it prevents States from enacting their own gambling laws. The District Court found no unconstitutional "commandeering" and the Third Circuit agreed. New Jersey then enacted another law, repealing state laws that prohibited various sports gambling. But again the lower courts found this to be unlawful under PASPA, and that PAPSA is not unconstitutional.

Alito (for 6): We reverse. "When a State completely or partially repeals old laws banning sports gambling, it authorizes that activity." The anti-authorization provision in PASPA requires States to maintain their existing laws against sports gambling. But the Constitution, as made clear by the Tenth Amendment, forbids the federal government from "commandeering" the States. This "anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *New York v. United States* (1992). Even a strong federal interest cannot enable Congress to command a state government to enact *state* laws. This rule helps maintain the Constitution's structural protections of liberty, promote political accountability, and prevent Congress from shifting the costs of regulation onto the States.

The PASPA provision that prohibits state authorization of sports gambling "unequivocally dictates what a state legislature may and may not do." It is as if "federal officers were installed in state legislative chambers and were armed with the authority to stop legislatures from voting on any offending proposals." A more direct affront to state sovereignty is hard to imagine. The argument that prohibiting a State from enacting new laws is distinct from ordering them to repeal laws is a "empty." The principle that Congress cannot issue direct orders to state legislatures applies in either event.

Respondents argue that PASPA constitutes a valid preemption provision. But preemption is based on the Supremacy Clause, and that Clause is not an independent grant of federal legislative power, it is just a "rule of decision." Further, federal preemptive laws regulate the conduct of private actors, not the States.

The rest of the law must also fall, because we believe Congress would not have wanted the rest of the statute to stay in action if this ban on State authorization of sports gambling were not part of it. No provision of this law is severable from the provision directly at issue in this case. Whether to legalize sports gambling is "controversial" and requires "important policy choice[s]" that are "not ours to make." Congress may be able to regulate sports gambling directly under various powers, but it cannot commandeer States to order them to do so if Congress elects not to do so directly.

Thomas concurring: I write separately to express my growing discomfort with our modern severability precedents, which are in tension with longstanding limits on the federal judicial power. The doctrine requires a "nebulous inquiry into hypothetical government intent," and for courts to weigh in on statutory provisions that no party has standing to challenge. Although no party in this case has asked us to reconsider these precedents, at some point, it behooves us to do so.

Breyer concurring in part and dissenting in part: I agree with Justice Ginsburg that §3702(2) is severable from §3702(1) and join her opinion in part and all but Part VI-B of the Court's opinion.

Ginsburg dissenting, joined by Sotomayor and Breyer (in part): When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation: "It limits the solution to severing any problematic portions while leaving the remainder intact." Here the Court wields an ax to cut down §3702 instead of using a scalpel to trim the statute. It does so under the mistaken assumption that private sports-gambling schemes would become lawful in the wake of its decision. In fact, §3702(2) prohibits private parties from operating sports-gambling schemes even if state law authorizes them to do so. This error pervasively infects the Court's severability analysis. Congress permissibly exercised its authority to regulate commerce by instructing private parties to refrain from operating sports-gambling schemes. Even if deleting the alleged "commandeering" directions, Congress still would have wanted some regulation. "On no rational ground can it be concluded that Congress would have preferred no statute at all."

VI. SUMMARY REVERSAL OPINIONS (Cases decided summarily, on *cert* pleadings, alone, without full briefing or argument)

Dunn v. Madison, 138 S.Ct. 9 (Nov. 6, 2017) (*per curiam*; Ginsburg concurring with Breyer and Sotomayor; Breyer concurring), reversing 851 F.3d 1173 (11th Cir. 2017).

Madison was sentenced to death in Alabama for a murder committed over 30 years ago. In recent years he has suffered strokes, and sought to block his execution because he is "incompetent." He understands that Alabama seeks to execute him as punishment for a murder, but he cannot recall the events of the murder or his trial and does not believe he killed anyone. The State courts concluded that this did not bar Madison's execution, and CA11 rejected his habeas claim.

In *Panetti* (2007), we ruled that a prisoner who "lacks the mental capacity to understand that he is being executed as a punishment for a crime" by not be executed under the Eighth Amendment. Ford (1986) similarly bars the execution of a person "who has no comprehension of why he has been singled out." But neither case "clearly establishes" that a state cannot execute someone who cannot "remember his commission of the crime," so the state courts did not "unreasonably apply" our precedents (as 28 U.S.C. §2254(d) requires to grant habeas relief).

Ginsburg concurring, joined by Breyer and Sotomayor: The issue here is a "substantial question not yet addressed by this Court." But I concur that §2254(d) is not fulfilled.

Breyer concurring: I agree with Justice Ginsburg, but this case again shows one of the basic problems with the administration of the death penalty itself -- unconscionably long periods of time that prisoners often spend on death row awaiting execution. We should "reconsider … the constitutionality of the death penalty itself."

[Note: On Feb. 26, 2018, the Court granted certiorari in this case and it is scheduled for argument on the first day of the October 2018 Term].

Kernan v. Cuero, 138 S.Ct. 4 (Nov. 6, 2017) (*per curiam*), reversing 827 F.3d 879 (9th Cir. 2016).

Cuero pled guilty in California state court pursuant to an agreement that he could receive a "maximum punishment" of "14 years, 4 months." Prior to sentencing, the state realized it had miscounted Cuero's prior convictions, and sought to amend the Complaint to one that would require a minimum of 25 years. The state court permitted the amendment, and also allowed Cuero to withdraw his plea. But Cuero then pled guilty to the amended complaint and received 25 years. On federal habeas, the district court denied Cuero relief. But CA9 ruled that Cuero was entitled to "specific performance" of his original plea agreement. Seven CA9 judges dissented *en banc*.

First, the appeal is not moot just because the CA9 mandate issued and the State has resentenced Cuero to the 14 year sentence. Our action would simply "undo what the habeas corpus court did," and its failure to obtain a stay does not moot this timely appeal.

On the merits, even if the State violated the Constitution when it moved to amend its complaint, there is no "clearly established federal law" (required to grant relief under 28 U.S.C. §2254(d)(1)), that requires the remedy of specific performance. "Fair-minded jurists could disagree," and no decision of this Court requires it. "Circuit precedent does not constitute clearly established federal law" (*Glebe*, 2014).

Tharpe v. Sellers, 138 S.Ct. 545 (Jan. 8, 2018) (*per curiam*; Thomas dissenting with Alito and Gorsuch).

Tharp produced a "remarkable affidavit" from a juror in his Georgia death penalty trial, that not only demonstrated abhorrent racial bias but also presented a "strong factual basis … that Tharpe's race affected [the juror's] vote for a death verdict." "At the very least, jurists of reason could debate" whether the state court's contrary factual finding was wrong by clear and convincing evidence (as the federal habeas statute requires). Thus CA11 erred when it decided not to grant a "certificate of appealability" (which federal habeas statute require to consider an appeal on the merits). Remanded.

Thomas dissenting, joined by Alito and Gorsuch: [In an unusually long 13-page dissent, Justice Thomas writes:] "If bad facts make bad law, then unusual facts inspire unusual decisions." The majority misreads the lower court opinions, and refuses to entertain clearly available alternative grounds for affirmance; and thereby accomplishes little more than a futile do-over.

The Court does not explain why the strong medicine of summary disposition is warranted **[note** Justice Sotomayor's similar complaint in *Kisela*, below]. This case is merely a mine-rune denial of a COA by a lower court on the eve of an execution, one "that this Court routinely denies *certiorari* to address." The juror later recanted his "odious" affidavit, saying he had been drunk and the defense attorneys had misled him. The decision today is "no profile in moral courage;" the Court is not doing Tharpe any favors because it will ultimately do Tharpe no good. Meanwhile it callously delays justice for the victims. "This Court should not be in the business of ceremonial handwringing."

Kisela v. Hughes, 138 S.Ct. 1148 (Apr. 2, 2018) (*per curiam*; Sotomayor dissenting with Gorsuch), reversing 862 F.3d 775 (9th Cir. 2017).

Police officers responded to a 911 call of a woman hacking a tree with a knife. When they arrived they saw Hughes on the other side of a five-foot chain link fence holding a large knife, near another woman (Chadwick). Officers immediately ordered Hughes to drop the knife, but she did not acknowledge them. Meanwhile, Chadwick said "take it easy" to the officers. Less than a minute after arriving, Officer Kisela dropped to the ground and non-fatally shot Hughes. Hughes sued, claiming unreasonable (excessive) force. The district court dismissed, but the Ninth Circuit ultimately reinstated the suit *en banc* over seven dissenting judges, finding the Fourth Amendment violation "obvious" and the law "clearly established" under CA9 precedent.

We reverse. When an "officer has probable cause to believe that a suspect poses a threat of serious physical harm … to others," an officer may constitutionally use "deadly force." *Tenn. v. Garner* (1985). "The facts and circumstances of each particular case" must be examined, from the perspective of a reasonable officer (not others), who often must "make split-second judgments" in "tense, uncertain, and rapidly-evolving" circumstances. *Graham* (1989). Here, a Fourth Amendment violation is "not at all evident," but in any case, the law was not "clearly established," so the officer is entitled to dismissal based on qualified immunity. "Existing precedent must have placed the …

constitutional question beyond debate." *White* (2017). We have "repeatedly told courts – **and the Ninth Circuit in particular** – not to define clearly established law at a high level of generality."

"Even if" Circuit cases can "clearly establish" law, precedents in CA9 did not. One case was not even decided until after this incident occurred, and reliance on another **"does not even pass the straight face test."**

Sotomayor dissenting, joined by Ginsburg (15 pages, versus the majority's 8 pages): Viewed favorably to Hughes as it must be, the record shows that she was standing "composed and content" with the knife point down at her side and she did not raise it. The other officers felt they should try "verbal commands," but Kisela fired four shots "without warning." This is obviously unreasonable. Qualified immunity should not be an "absolute shield," and "identical cases" are not required. It should be "beyond debate" here that Kisela's response was unreasonable.

Moreover, this is at least a "close call," and does not warrant the "extraordinary remedy" of summary reversal. **"This unwarranted summary reversal is symptomatic of a disturbing trend … in qualified-immunity cases"** (quoting a 2017 Sotomayor dissent). The Court displays an "unflinching willingness" to **reverse cases that have denied officers protection, but "rarely intervenes" where a lower court has wrongly granted officers immunity** (citing a 2015 article published by the late CA9 Judge Stephen Reinhardt). We should not endorse such a "one-sided approach." "It **sends an alarming signal to law enforcement officers and the public": "shoot first and think later, and … palpably unreasonable conduct will go unpunished.** … [T]here is nothing right or just under the law about this."

Azar v. Garza, 138 S.Ct. 1790 (June 4, 2018) (*per curiam*), vacating and remanding 874 F.3d 735 (D.C. Cir. 2017):

The litigation over Jane Doe's temporary restraining order -- allowing her to obtain an abortion despite the policy of the Office of Refugee Resettlement -- falls squarely within established practice of reversing or vacating the judgment below and remanding with a direction to dismiss, when a civil case from a federal court has **become moot while on its way to the Supreme Court.**

Sause v. Bauer, 138 S.Ct. 2561 (June 28, 2018) (*per curiam*), reversing 859 F.3d 1270 (10th Cir. 2017):

Sause sued police and city officials, for an alleged course of "strange and abusive conduct." Among other things, she alleged that when police responded to her apartment on a noise complaint, she knelt and started to pray, but they ordered her to stop. She claimed a violation of her First Amendment right to freely exercise her religion, as well as Fourth Amendment violations. The district court dismissed; the Tenth Circuit affirmed, saying that the officers were entitled to qualified immunity because no "clearly established" law was violated.

"There can be no doubt that the First Amendment protects the right to pray." But there are "clearly circumstances in which an officer may lawfully prevent a person from praying at a particular time and place," such as various arrest or other valid law enforcement situations. In such situations, such as this one, "the First and Fourth Amendment issues may be inextricable." A number of Fourth Amendment questions are present here, beyond the Free Exercise claim. So we reverse and remand.

Sexton v. Beaudreaux, 138 S.Ct. 2555 (June 28, 2018) (*per curiam*; Breyer dissenting), reversing 2017 U.S. App. LEXIS 18047 (9th Cir. Sept. 18, 2017).

On a second habeas petition, the Ninth Circuit found that Beaudreax's trial counsel in his murder case committed ineffective assistance by failing to file a motion to suppress an eyewitness

identification. On a legal issue "that turns on general, fact-driven standards such as suggestiveness and reliability," CA 9 "was not just wrong, [but] it committed fundamental errors that this Court has repeatedly admonished courts to avoid." There was no reasoned state court opinion below, so *Harrington* (2011) requires the federal court to envision what arguments "might have supported the state court's decision," and give "deference" to the state court's possible determinations. Here, trial counsel could "reasonably have determined that a motion to suppress would have failed," and it would not have been "objectively unreasonable" for a state court to so conclude based on the "totality" that our eyewitness ID precedents require. "The Ninth Circuit's essentially de novo analysis … ignored well-established [federal habeas] principles."

Breyer dissenting: No opinion, just the statement "Justice Breyer dissents."

X. OPINIONS RELATING TO ORDERS (such as dissents from denial of *certiorari*)

Truehill v. Florida/Oliver v. Florida (Oct. 16, 2017): **Sotomayor**, joined by Ginsburg and Breyer. The rationale underlying the Florida Supreme Court's rejection of a *Caldwell* challenge is now undermined by *Hurst*. So petitioners ask the Florida Supreme Court to revisit the question of jury instructions to ensure the jurors' sense of responsibility in sentencing people to death. Because petitioners raise potentially meritorious Eighth Amendment challenges to their death sentences, and because the stakes in these cases are so high, I dissent.

Breyer dissents from denial of certiorari for reasons in his *Hurst v. Florida* concurrence.

Reeves v. Alabama (Nov. 13, 2017): **Sotomayor**, joined by Ginsburg and Kagan, dissenting from denial of certiorari. The imposition of a categorical rule, that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective assistance of counsel claim, contravenes our decisions. Reeves identified the omissions of his counsel, alleged they were constitutionally deficient, and gave evidence why the performance was prejudicial. He thus "held up his end of the evidentiary bargain." But the Court of Appeals did not, because it never explained why the choices counsel made were reasonable. *Strickland* demands more. I would reverse and remand so that that Court of Appeals could explain. Instead, this Court has paved the way for Reeves' execution, a result with which I cannot agree.

Floyd v. Alabama (Dec. 4, 2017): **Sotomayor**, joined by Breyer, respecting the denial of certiorari. Although the unique context of Floyd's case counsels against review by this Court, I find the underlying facts troubling; in the ordinary course they would warrant court intervention. This case is strikingly similar to *Foster v. Chatman* because the record fails to support the prosecutors' proffered race and gender-neutral reasons for striking at least two venire members. Not granting certiorari should not be construed as affirmance of the reasoning of the courts below.

Silvester v. Becerra (Feb. 20, 2018): **Thomas** dissenting from denial of certiorari. The Second Amendment "is not a second class right." By refusing to grant certiorari, we undermine that declaration. I believe the Second Amendment cannot be singled out for special or unfavorable treatment and so I dissent.

Hamm v. Dunn (Feb. 22, 2018): **Ginsburg**, joined by Sotomayor, dissenting from denial of certiorari. Hamm is a sixty-one-year-old inmate, with no readily accessible veins for lethal-injection. The lower courts should have examined the risk of "serious illness and needless suffering" rather than accepting the state's stipulations about how Hamm will be put to death.

Breyer respecting the denial of certiorari. As I have said before, rather than develop a constitutional jurisprudence that focuses on the aged, I would reconsider the constitutionality of death penalty itself.

Middleton v. Florida (Feb. 26, 2018): **Breyer** dissenting from the denial of certiorari. For the reasons set out in my concurring opinion in *Hurst*, I would vacate and remand this case for the Florida Supreme Court to address the Eighth Amendment issue. In my view, the Eighth Amendment requires individual jurors to make and take responsibility for a decision to sentence someone to death.

Sotomayor, joined by Ginsburg, dissenting from denial of certiorari. Yet again the Florida Supreme Court failed to address an important Eighth Amendment claim. At least four times now, capital defendants in Florida have come to this Court for help. Each time, this Court has failed to act. The stakes in capital cases are too high to continue ignoring these constitutional problems.

Wessinger v. Vannoy (Mar. 5, 2018): **Sotomayor** dissenting from denial of certiorari. Despite blatant shortcomings in Wessigner's trial, the panel below ruled that counsel's failure to conduct any mitigation research was not a result of deficient performance, but instead a product of the state court's denial of funding for an investigation. But that denial in funding resulted in part from counsel's deficiency. More importantly, it does not excuse counsels' failure to perform any independent mitigation investigation. The denial of certiorari here belies the "bedrock principle in our justice system" that a defendant has a right to effective assistance of counsel and undermines the protections that this Court has recognized are necessary to protect that right. The layers of ineffective counsel here constitute errors within this Court's precedent. The fact that Wessinger now stays on death row is deeply unfair and unjust.

Hidalgo v. Arizona (Mar. 19, 2018): **Breyer**, joined by Ginsburg, Sotomayor, and Kagan, respecting the denial of certiorari. Arizona's capital murder statute broadly defines capital murder and seems to fail our narrowing requirement for death penalty statutes. But I agree with the denial of certiorari. Hildago points to unrebutted statistics suggesting that many first-degree murder defendants are eligible for the death penalty, which suggests a possible constitutional problem. But evidence like this warrants a developed record, which is lacking here. Capital defendants may have the opportunity to fully develop a record of the type we need, so that case would be better suited than this one for certiorari.

Campbell v. Ohio (Mar. 19, 2018): **Sotomayor** respecting the denial of certiorari. I concur in denial of cert because Campbell failed to adequately present his constitutional arguments to the state courts. But I write separately because the statute at issue, which shields from judicial scrutiny life sentences without the possibility of parole, raises serious constitutional concerns.

Guardado v. Jones/Cozzie v. Florida (Apr. 2, 2018): **Sotomayor** dissenting from denial of certiorari. Twice now this Court has declined to vacate and remand cases to the Florida S. Ct. where the court failed to address a substantial Eighth Amendment challenge to capital sentences. The Florida Court has now again failed to address an important and substantial Eighth Amendment challenge to capital defendants' sentences post-*Hurst*. Nothing in its precedent addresses or resolves substantial *Caldwell*-based challenges like this. We should intervene.

Trevino v. Davis (Jun. 4, 2018): **Sotomayor**, joined by Ginsburg, dissenting from denial of certiorari. The Fifth Circuit plainly misapplied our precedent, and so Trevino remains subject to the death penalty despite having received inadequate assistance of counsel. With his execution,

no jury will ever be able to evaluate the substantial mitigating evidence that a competent counsel would have discovered. That is indefensible. Our failure to intervene sanctions the taking of a life by the state.

Kaczmar v. Florida (Jun. 18, 2018): **Sotomayor** dissenting from denial of certiorari. Like other capital defendants in Florida, Kaczmar raises an important Eighth Amendment challenge to his death sentence that went unaddressed by the Florida Supreme Court: that the jury instructions impermissibly diminished the jurors' sense of responsibility regarding the ultimate determination of death, in violation of *Caldwell*. Because Florida S.Ct. does not address these claims, I dissent from the denial of certiorari.

Peede v. Jones (Jun. 25, 2018): **Sotomayor**, joined by Ginsburg, respecting the denial of certiorari. The Eleventh Circuit ruled that Peede could not show "prejudice" in his counsel's ineffective failure to investigate mitigating evidence, because the new evidence could pose a "double-edged sword." But a blanket rule foreclosing a showing of prejudice because new evidence could be double-edged contradicts this Court's precedent and doesn't further the ultimate inquiry in deficient performance cases.

Jordan v. Mississippi (Jun. 28, 2018): **Breyer** dissenting from denial of certiorari. I write to again underline the ways in which cases illustrate the "unconscionably long delays, arbitrary application, and serious unreliability" of the death penalty. I remain of the view that the Court should grant petitions like these to consider whether the death penalty as currently administered violates the Eighth Amendment.

Irick v. Tennessee (Aug. 9, 2018): **Sotomayor**, dissenting from denial of stay: Irick alleges that his execution tonight will amount to "excruciating torture," backed by expert testimony at a ten-day trial on the lethal injection cocktail. Moreover, the "rushed" and "hurried posture" of this case denies us the full trial record. Finally, the basis for denial below was that Irick had not proven an "available alternative." This is a "macabre" error in our precedents, but in any case the records is unavailable to evaluate it. **"If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism."**

VII. Criminal Law *Certiorari* Grants for the Upcoming (Oct. ´18) Term

As of August 9, the Court has granted review in 38 cases for the OT 18 Term. Here are brief descriptions (my own) of the questions presented in the criminal cases that have been granted:

Cases already scheduled for argument:

1. **Gundy v. United States** (No. 17-6086), scheduled for argument on Oct. 2, 2018: Does Congress's delegation of authority to the Attorney General to set sex offender regulations, including retroactive application of the criminal laws to sex offenders, violate the Constitution's "non-delegation" principle?

2. **Madison v. Alabama** (No. 17- 7505), scheduled for argument on Oct. 2, 2018: Does the Eighth Amendment prohibit the execution of a person who does not remember his offense or trial, but does understand that the State seeks to execute him as punishment for a crime?

3. **Stokeling v. U.S.** (No. 17-5554), scheduled for argument on Oct. 9, 2018: Does "robbery" count as an ACCA "violent felony" when a State has interpreted its offense to require only slight force?

4 & 5. **United States v. Stitt** (No. 17-765), scheduled for argument on Oct. 9, 2018: Does "burglary" count as an ACCA "violent felony" when a State has interpreted its offense to apply to non-permanent and mobile structures? (Consolidated with *U.S. v. Sims*, no. 17-766).

6. **Nielsen v. Preap** (No. 16-1363), scheduled for argument on Oct. 10, 2018: Is a criminal alien exempt from mandatory detention if, after the person is released from criminal custody, the Dept. of Homeland Security does not immediately take the person into custody?

Cases granted but not yet scheduled for argument:

7. **Bucklew v. Precythe** (No. 17-8151): How do prior "method of execution" precedent rules apply to a defendant with a rare and sever medical condition that could make lethal injection particularly "gruesome and excruciating"?

8. **Gamble v. United States** (No. 17-646): Should the Court overrule the non-textual "separate sovereign" exception to the Fifth Amendment's Double Jeopardy prohibition?

9. **Garza v. Idaho** (No. 17-1026): Does the "presumption of prejudice," for a lawyer's ineffective assistance when the lawyer fails to file an appeal, apply when the lawyer was instructed by the defendant to file an appeal but the lawyer decided not to file an appeal because the plea agreement contained a waiver of appeal?

10. **Lorenzo v. SEC** (No. 17-1077): May the government's "fraudulent statement" claim for securities fraud, that does not meet the elements of *Janus* (2011), be filed as a "fraudulent scheme claim, without more?

11. **Nieves v. Bartlett** (No. 17-1174): Is a First Amendment claim for retaliatory arrest defeated when there was probable cause for the arrest? (Follow-on to *Lozman* (2018), summarized above).

12. **Timbs v. Indiana** (No. 17-1091): Is the Eighth Amendment's "excessive fines" prohibition incorporated into the Fourteenth Amendment's Due Process Clause so that it applies to State asset forfeiture regimes?

WHO WROTE WHAT in the 2017-18 Term

(All writings in argued cases, not just majorities)

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

ROBERTS	KENNEDY	THOMAS	GINSBURG
Carpenter	**Byrd**	**Wesby**	**McCoy**
Sanchez-Gomez	**Lozman**	*Byrd*	**Murphy**
Mansky	**Jesner**	*Collins*	**Digital**
Trump	*Currier*	*Ortiz*	*Wesby*
Hall	*Trump*	*Lucia*	Currier
Dimaya	Carpenter	*Jennings*	
Hughes	Chavez-Meza	*Jesner*	
		Trump	
		Digital	

BREYER	ALITO	SOTOMAYOR	KAGAN	GORSUCH
Marinello	**Koons**	**Collins**	**Dimaya**	**Currier**
Class	**Ayestas**	**Pereira**	**Cyan**	*Dimaya*
Wilson	**Jennings**	**Rosales-Meza**	**Ortiz**	*Jesner*
Dhada	**Murphy v. NCAA**	*Wesby*	**Lucia**	Carpenter
Lagos	*Byrd*	*Hughes*		*Wilson*
Chavez-Meza	*Jesner*	*Digital*		*Murphy v. NCAA*
Murphy v. NCAA	Carpenter	Ayestas		
Lucia	Collins	Mansky		
Jennings	Class	Lucia	**Per curiams** (no individual author)	
Trump	McCoy	Murphy	**Microsoft**	
	Ortiz	Trump	7 summary reversals (w/o argument)	
	Pereira	Jesner		

Total Criminal Law-and-Related decisions in argued cases: 34 (out of 59 total signed opinions), (plus 7 *per curiam* Summary Reversals). I'd say that 23 were "pure" criminal cases.

Total Writings in argued Criminal Law-and-Related cases: 72 (plus 7 summary reversals). This is 25 more than last Term. The Justices are clearly writing many more separate opinions!

Criminal Law Workhorses: For the first time in memory, it is not **Justice Thomas.** Both Justice **Alito** and Justice **Sotomayor** produced 12 writings, half of them dissents (in opposite directions).

Justices **Kagan** and **Ginsburg** continue to show less interest in criminal cases; while Justice **Breyer** leads with six majority opinions in criminal cases. (All unsurprising given their backgrounds). Justice Kagan also clearly showed her interest in not writing dissents unless necessary.