

THE CIVIL RIGHTS MISSION



Civil Rights Section Summer 2018 Newsletter

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MESSAGE FROM THE CHAIR

Greetings, Fellow members of the Civil Rights Section! It is a pleasure to be a part of the revival of our Section, which has been moribund for far too long. Now, perhaps more than ever in our lifetimes, it is critical for us as law professors to educate our students and each other on the harsh realities that face us as people of conscience who care about civil rights, and to offer insights and solutions to the problems that seemingly multiply on a daily basis; hence, I offer what I hope is an inspirational and aspirational title to our newly revitalized civil rights section missive -- “The Civil Rights Mission.”

“To view law as mission is to incorporate the noble values of our profession into our work.”

We on the newly-constituted Executive Committee hope that this newsletter will be useful and informative. It is my pleasure to share with you some exciting developments in our Section.

Our planning for the annual meeting is proceeding apace. We are sponsoring or co-sponsoring six programs this year.

Our main program on Thursday afternoon, January 3d, co-sponsored with the Section on Sexual Orientation and Gender Identity Issues and for which we have issued a Call for Papers, is titled “Resistance in the Streets and Through the System: The Phenomena of Protest in the Trump Era.” Our Secretary, Professor Lisa Iglesias, will serve on the panel and share her perspectives on situations in which the struggle for recognition and rights has generated protest, resistance, and arrest, considering more comprehensively the different civil rights regimes, their points of intersection and fragmentation, and the ways these different struggles can support each other in advancing civil rights both in the United States and throughout the world. **If you are interested in joining this panel, please respond to our Section's Call for Papers and/or contact Lisa Iglesias at iglesias@law.miami.edu.**

I shall also serve on the panel to address the great work of State Attorneys General in their litigation resisting the Trump Administration's policies that have targeted the LGBTQ community and the burgeoning efforts of State and local governments to provide sanctuary and respite to the undocumented. Our Treasurer, Barbara Kritchevsky, will serve as the moderator.

We are also co-sponsoring a program with the Section on Minority Groups entitled “Critical Pedagogy in the Era of Diversity,” which immediately follows the previously described panel on Thursday afternoon, the 3d. The panel will address best practices for bringing issues of diversity, inclusion, and marginalized identities into our courses and explores how law faculty are responding to these demographic shifts and reimagining classroom norms. Topics will include how to incorporate more inclusive teaching strategies, enhancing student engagement, addressing identity issues within the curriculum and classroom, preparing students to practice in a diverse society, and the role of experiential learning and academic support. I’ll discuss dimensions of my course on Latinos and the Law. Deborah Archer, our Chair-Elect and the current Chair of the Section on Minorities (which has issued a call for panelists), can fill you in on the other specifics of the panel. We’ll include more information about it in our autumn newsletter.

On Saturday morning, the 5th, we are co-sponsoring a program with the Section on Immigration Law entitled “Immigration Law Values,” which is still being developed, and on Saturday afternoon we are co-sponsoring a program with the Section on Disabilities and the Section on Law, Medicine, and Health Care entitled “Disability Rights as a Social Movement” for which a Call for Papers has been issued.

On Sunday morning, the 6th, we are co-sponsoring another panel with the Section on Sexual Orientation and Gender Identity Issues, which is titled “LGBTQ Rights Halfway Through Trump’s (First?) Term: Advancement, Retrenchment, Potential,” following which is our second co-sponsored event with the Section on Immigration, this one entitled “Civil Rights, Liberty, and Immigration Control,” which I shall moderate and for which a Call for Papers has been issued.

More information on all of our panels at the annual meeting will be forthcoming in the next newsletter. You can also consult the AALS website for specifics on the Calls for Papers for the panels for which they have been issued, to get a better sense of their proposed content.

I would like to thank Lisa Iglesias for taking the lead on our Newsletters and Section members Barbara Kritchevsky and Jason Gillmer for reviewing the Supreme Court summaries. The summaries were initially prepared by student members of the American Constitution Society for Law and Policy -- Amy Berkowitz, Sean Coburn, Benjamin Lash, Charles Roper, Jr., Seung Wook Son, and Dale Williams from Columbia University School of Law, and Brandon Mayes, Jenna Mazzella, Browne Warren, and Jonathan Zator of the University of North Carolina School of Law.

Please continue to send Lisa Iglesias citations to your publications, upcoming relevant conferences or events, and job announcements in the civil rights field for inclusion in our next newsletter. Our business meeting will take place at 1:15 p.m. before our Section panel event. The position of Treasurer will be open for nomination, as will positions on the Executive Committee. Professors who are currently serving on the Executive Committee will be nominated to continue in those positions unless they request otherwise. The slate of candidates for the election will be announced in the autumn newsletter. Please let Deborah Archer know (Deborah.Archer@nyu.edu) if you would like to nominate yourself or someone else to one of these positions. The current officers will succeed to the next highest office automatically. You should also feel free to let me know if there is anything else that you would like to see included or for the Section to undertake. Yours in the Struggle -- Gil Carrasco

Civil Rights Section

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UPCOMING EVENTS

1. 30th Annual Lavender Law Conference and Career Fair

August 7-8, 2018, New York.

To register: <https://lgbtbar.org/annual/>

2. United States Hispanic Leadership Institute Annual Dinner

August 9, 2018, Hyatt Regency Chicago, 5:30-8:30 p.m.

For further information, contact info@ushli.org

3. Property Rights and Human Rights: New Possibilities in an Age of Inequality

August 9-10, 2018, Melbourne, Australia

Registrations now open: <https://shop.monash.edu/property-rights-and-human-rights-new-possibilities-in-an-age-of-inequality.html>

4. Equality, Diversity and Inclusion Conference - 2018

August 16-18, 2018, Montreal, Quebec, Canada.

The conference will be held at the Université de Montréal. It is designed to bring together current research examining the new challenges facing the promotion of all forms of diversity, as well as the analysis of experimentation with policies and practices that seek to address these objectives: <https://www.edi-conference.org/index.php>.

5. Hispanic National Bar Association Annual Convention

September 5-8, 2018, Philadelphia, Pennsylvania

6. Center for Civil & Human Rights at Gonzaga Law - The Pursuit of Justice: Law, Leadership, and the Role of the Civil Rights Activist

Spokane, WA—September 28, 2018

The preliminary conference registration and agenda is now available at <https://www.gonzaga.edu/school-of-law/clinic-centers/center-for-civil-human-rights/cchr-conference-the-pursuit-of-justice>

7. Legal Education for a Changing Society Conference: Society of American Law Teachers Teaching Conference and LatCrit-SALT Junior Faculty Development Conference

October 4-6, 2018, Penn State Law in University Park, PA. Proposals due by August 15, 2018.

The 2018 SALT Teaching Conference will take place on October 5-6, 2018, and the LatCrit-SALT Junior Faculty Development Conference will be held October 4. Click on the links below to register and learn more about the call for proposals. Note that the registration page includes in-person registration and remote participation registration.

<https://w2.pennstatelaw.psu.edu/forms/salt/>
<https://w2.pennstatelaw.psu.edu/forms/salt/SALT-2018-Teaching-Conference-CFP.pdf>

8. Oregon Housing Conference on Supportive Housing

October 15, 2018, Doubletree Hotel, Portland, Oregon
Contact: coordinator@olmhc.org; www.housingconference.org

9. Western Law Professors of Color (WLPOC) / Conference of Asian Pacific American Law Faculty (CAPALF) Joint Conference

October 18-20, 2018, UNLV Boyd School of Law
Contact Ruben Garcia at ruben.garcia@unlv.edu for further information.

10. The U.N. Convention on the Rights of Persons with Disabilities in Practice

October 25-26, 2018, Maastricht University Faculty of Law, The Netherlands
Contact Maastricht University, Sanne de Bok, Tel. +31 43 38 84881

11. 2018 Loyola University Chicago Ninth Annual Constitutional Law Colloquium

November 2-3, 2018, Loyola University Chicago School of Law.
Program Administrators Evelyn Gonzalez, Amy Lenz, & Julie Loftus: ConstitutionLaw@luc.edu

12. 13th Annual Minerva Center for Human Rights of Hebrew University of Jerusalem/International Committee of the Red Cross Conference on Recent Developments in International Humanitarian Law and Detention Law and Practice

November 12-13, 2018, Jerusalem, Israel.

13. Second Annual Equality Law Scholars' Forum

November 16–17, 2018, UC Davis Law School.
Full drafts must be available for circulation to participants by October 19, 2018. Proposals should be submitted to: Tristin Green, USF School of Law, tgreen4@usfca.edu.

14. 11th International Research Association for Interdisciplinary Studies Conference on Social Sciences

November 19-20, 2018, Johns Hopkins University, Rockville, Maryland
Abstract submission deadline: September 15, 2018; full paper deadline: October 20, 2018; registration deadline for authors: November 5, 2018. Contact: i.submission.rais@gmail.com

15. Pound Civil Justice Institute, Pound Fellows Reception

February 3, 2019, Miami Beach, Florida
Nominations for Award for Civil Justice Scholarship (\$ 10,000 honorarium plus accommodations & travel) due by September 17, 2018. More details, nomination form, and criteria at www.poundinstitute.org/cjsa

16. The Berkeley Comparative Equality and Anti-Discrimination Law Study Group 2019 Meeting

June 17-18, 2019 hosted by the Department of Law, Juridicum, at the Stockholm University, Sweden.
Presentation proposals of 500 to 1000 words or applications to participate as a discussant/panel chair, should be submitted no later than October 1, 2018. Please send inquiries and presentation and/or paper proposals or applications to participate as a respondent to Section Executive Committee member David Oppenheimer, doppenheimer@law.berkeley.edu

PUBLICATIONS

- Roy L. Brooks, *The Racial Glass Ceiling: Subordination in American Law and Culture* (Yale University Press, 2017), winner of the Thornes Prize in Legal Scholarship
- Gilbert Paul Carrasco & Iryna Zaverukha, Mercy Versus Fear, or Where the Law on Migration Stands, 40 Seattle Law Review 1283 (2017)
- Katherine A. Macfarlane, *Los Angeles v. Mendez: Proximate Cause Promise for Police Shooting Victims*, 48-62 COLUMBIA LAW REVIEW ONLINE 118 (2018).
- Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, UTAH LAW REVIEW (2018).
- John T. Parry, *Cases and Problems in Civil Rights Litigation: State, Federal, and International Perspectives* (Semaphore Press 2016)
- Cara Cunningham Warren, *Sanctuary Lost? Exposing the Reality of the “Sanctuary-City” Debate and Liberal States-Rights’ Litigation*, 63:2 WAYNE L. REV. 155 (2018). SSRN Top Ten Download List for September, October & November 2017

JOB ANNOUNCEMENTS

- **VISITING ASSISTANT PROFESSOR/ASSOCIATE PROFESSOR/PROFESSOR AND DIRECTOR OF THE CLINIC FOR ASYLUM, REFUGEE AND EMIGRANT SERVICES (CARES) VILLANOVA UNIVERSITY**

https://law.academickeys.com/seeker_job_display.php?dothis=display&job%5bIDX%5d=104545-LA180314w-6e&oid=593788

- **POSTDOCTORAL FELLOWSHIP AT THE UNIVERSITY OF DENVER**

The University of Denver’s Interdisciplinary Research Incubator for the Study of (In)Equality or IRISE (www.du.edu/irise) is seeking 4 Postdoctoral Fellows with a preferred start date of September 1, 2018.

Candidates must apply online through www.du.edu/jobs to be considered. Only applications submitted online will be accepted. Once within the job description online, please scroll to the bottom of the page to apply. If you have questions regarding the application process, please contact recruiting@du.edu. Inquiries about this position can be made to irise@du.edu.

- **FORCED ARBITRATION PROJECT ATTORNEY** Part-Time or Full-Time

Northwest Workers' Justice Project is a non-profit legal advocacy organization in Portland, Oregon, whose mission is to defend and strengthen the workplace and organizing rights of low-wage, temporary and immigrant workers in Oregon, the Pacific Northwest and nationwide.

NWJP seeks a project attorney that can hit the ground running to help launch a legal clinic focused on forced arbitration in employment contracts. The clinic is part of an innovative project aimed at addressing the denial of public justice in cases of where forced arbitration requires employees and consumers to have disputes resolved in an unfair forum. The attorney will evaluate the enforceability of arbitration agreements and represent workers in court or arbitration proceedings. In addition, the attorney will collect stories of workers denied justice because of forced arbitration agreements and present these cases to the public. The project attorney will mentor and supervise law students and other volunteers in pursuit of these goals.

For more information about NWJP visit our website: www.nwjp.org/get-involved.

CALLS FOR PAPERS

1. Disability Rights as a Social Movement, AALS Disability Section encourages academics from a broad range of backgrounds including but not limited to disability law, political theory, critical legal studies, and civil rights law to submit proposals for consideration. This program is co-sponsored by the Civil Rights Section. Please email a one-page abstract to Valarie Blake at valarie.blake@mail.wvu.edu by 5pm EST on Friday, August 24, 2018.
2. Civil Rights Section: seeks additional speakers for its program "Resistance in the Streets and Through the System: The Phenomena of Protest in the Trump Era." Proposals are particularly invited to address these issues as they affect immigrants, the LGBTQ community, race, ethnicity, the environment, disability, gender, and/or economic rights. This program is co-sponsored by the Section on Sexual Orientation and Gender Identity Issues. **Submission guidelines:** Email a one-page abstract to [Tina Sutton](mailto:Tina.Sutton@wvu.edu) by 5pm EST on **Friday, August 24, 2018** with subject line "Submission for Civil Rights Section AALS Program January 2019."
3. The AALS Section on Immigration Law invites papers for presentation at their program, "Civil Rights, Liberty, and Immigration Control," co-sponsored by the Section on Civil Rights. The Sections seek papers that explore the doctrinal, practical and theoretical issues that arise at the crossroads of liberty and migration control. **Submission guidelines:** Send papers at any stage of development (preference will be given to more fully developed work) to AALS2019ImmigrationLaw@kalhan.com by **August 15**.

4. The AALS Section on Immigration Law invites papers for their session, “Immigration Law Values,” which will identify the fundamental values of contemporary immigration law and policy and examine immigration law values of the past and present, and explore whether there are values that might not currently be understood as settled principles in contemporary immigration law that should be. **Submission guidelines:** Send papers at any stage of development (preference will be given to more fully developed work) to AALS2019ImmigrationLaw@kalhan.com by **August 15**.
5. The AALS Section on Immigration Law invites papers and works-in-progress for “New Voices in Immigration Law.” Submissions from individuals who have never presented an immigration law paper at the AALS Annual Meeting and from junior scholars are particularly encouraged. **Submission guidelines:** Send a 5-15 page concept note with a summary of key ideas or an excerpt with an explanatory introduction to AALS2019ImmigrationLaw@kalhan.com by **August 15**.
6. The Section on Sexual Orientation and Gender Identity Issues seeks panelists for their program “LGBTQ Rights, Poverty, and Public Policy,” addressing legal and policy issues concerning poverty in the LGBTQ community in light of a March 2018 report from The LGBTQ Poverty Initiative revealing that LGBTQ people disproportionately struggle with poverty. **Submission guidelines:** Submit a 500-word abstract (and paper draft if available) and a CV to Prof. [David Cruz](#).

REMEMBRANCES

From The New York Times:

Joaquin Ávila, Advocate of Hispanic Voting Rights, Dies at 69. The son of immigrants, he challenged discriminatory laws and practices as president of the Mexican American Legal Defense and Education Fund. <https://www.nytimes.com/2018/03/15/obituaries/joaquin-avila-advocate-of-hispanic-voting-rights-dies-at-69.html>

Gwynne L. Skinner (1964 - 2017): Gwynne was born in Des Moines, Iowa, and died peacefully in Portland after living bravely with ovarian cancer for nearly five years. She attended University of Northern Iowa and was the editor of the newspaper. She earned a law degree from University of Iowa. Gwynne was a paid staffer with the Iowa Democratic Party before law school and continued a passion for politics throughout her life. She worked for the U.S. Department of Justice in D.C., as a prosecutor in Seattle, and for several private law firms. She founded the Public Interest Law Group in Seattle. She later obtained an advanced law degree from Oxford University in International Human Rights Law. She was a law professor at Seattle University and most recently at Willamette University. She litigated many high profile cases, including Guantanamo Bay detainees, and

violations in the Palestinian Occupied Territories. She wrote reports on human trafficking and helped people seek asylum. She was a consultant with ICAR (International Corporate Accountability Roundtable), helping find remedies for those wronged by multinational corporations. She taught and inspired another generation of lawyers who carry on her legacy. Gwynne had much more work to do. She will be greatly missed.

SUPREME COURT NEWS

AYESTAS V. DAVIS, 138 S. CT. 1080 (2018)

Congress provided in 18 U.S.C. § 3599(f) that federal courts in capital cases involving indigent defendants (including suits for post-conviction relief) should fund “investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence.” The Fifth Circuit held that such funding is “reasonably necessary” only when a petitioner can demonstrate a “substantial need” for “services” contemplated by the statute—i.e., “substantiated argument, not speculation, about what the prior counsel did or omitted doing.” Using this standard, the Fifth Circuit upheld the denial of funding that Ayestas, who sought to develop a federal habeas claim based on ineffective assistance of counsel.

Question Presented: Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds “reasonably necessary” resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant’s existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

Holding: The United States Supreme Court, by Justice Alito, vacated and remanded. The denial of funding was a judicial decision subject to appellate review. The Fifth Circuit did not apply the correct standard in affirming the denial of funding. The correct reading of “reasonably necessary” was whether a reasonable attorney would find the services sufficiently important; the test requires an assessment of the likely utility of the services, not that the applicant will win relief. The question of whether funding could be “reasonably necessary” to present a procedurally-defaulted ineffective assistance of counsel claim that depends on facts outside the state court record was open for consideration on remand.

Justice Sotomayor filed a concurring opinion in which Justice Ginsburg joined.

Byrd v. United States, 2018 WL 2186175 (May 14, 2018).

The Fourth Amendment protects individuals from suspicion-less searches of places and effects in which they have a reasonable expectation of privacy. In this case, Byrd’s fiancé rented a car and permitted Byrd to drive it, even though Byrd was not listed as an authorized driver on the rental agreement. Police pulled Byrd over for a minor traffic violation. The police explained to Byrd that he had no reasonable expectation of privacy in the car because he was not listed as an authorized driver on the rental agreement. After searching the car, police found heroin in the trunk. Byrd moved to suppress the evidence from the search as lacking probable cause under the Fourth Amendment. The Third Circuit held that because Byrd was not an authorized driver of the rental car, he had no objectively reasonable expectation of privacy in the car’s trunk.

Question Presented: Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter’s permission to drive the car but is not listed as an authorized driver on the rental agreement.

Holding: The Supreme Court, by Justice Kennedy, vacated and remanded. The fact that Byrd violated the rental agreement did not eliminate any expectation of privacy he had in the rental vehicle. The expectation of privacy comes from lawful presence and control and the attendant right to exclude others. Left for remand were the

questions of probable cause and if a person who uses a third party to secure a rental car for criminal activity is not in lawful possession.

Justice Thomas filed a concurring opinion in which Justice Gorsuch joined and Justice Alito filed a concurring opinion.

Class v. United States, 583 U.S. 798 (2018).

A federal grand jury indicted petitioner Class for possessing firearms in a parking lot on the grounds of the United States Capitol, in violation of a federal statute. Petitioner argued that the court should dismiss the indictment, claiming that the statute violated the Second Amendment and denied due process because he did not have fair notice that the ban applied in the parking lot. Nonetheless, Class later pled guilty to violating the statute and entered a written plea agreement that did not address the right to challenge the statute's constitutionality on direct appeal. Petitioner appealed his conviction to the Court of Appeals for the District of Columbia Circuit, which held that he had waived his constitutional claims by pleading guilty.

Question Presented: Does a guilty plea by itself bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal?

Holding: The United States Supreme Court, by Justice Breyer, held that, while a guilty plea does waive some constitutional claims, a federal criminal defendant's guilty plea does not bar the defendant from challenging the constitutionality of the statute of conviction on direct appeal. A plea doesn't waive a claim that the government cannot constitutionally prosecute the defendant.

Justice Alito filed a dissenting opinion, which Justices Kennedy and Thomas joined.

Dahda v. United States, 2018 WL 2186173 (May 14, 2018)

Federal law normally allows a judge to issue a wiretap order permitting the interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. § 2518(3). A Kansas judge authorized wiretaps as part of drug investigation. Each order contained a sentence purporting to authorize interception outside of Kansas and the Government intercepted communications from a post in Missouri. The Government agreed not to introduce that into evidence. The Dahda brothers challenged admission of the wiretap evidence. Even though the Tenth Circuit agreed the wiretap orders exceeded the district court's territorial jurisdiction, the court upheld the trial court's decision.

Question Presented: Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

Holding: The Supreme Court, by Justice Breyer, affirmed. The orders were not facially insufficient because they contained all information that the statute required and would have been sufficient absent the challenged language authorizing interception outside the court's territorial jurisdiction.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

Police officers responding to a noise complaint discovered Respondent Wesby and other guests drinking and partying at a vacant house. The partygoers and the host of the party claimed they had permission from the owner of the house, but the owner denied this when the officers called him. The officers then arrested the partygoers. Sixteen of the arrested people sued for false arrest, claiming that the arrest violated their Fourth Amendment rights.

Question Presented: Did the officers have probable cause to arrest the partygoers in the case for unlawful entry despite a claim of good faith entry and, if they did not, were the officers entitled to qualified immunity under 42 U. S. C. § 1983 when they mistakenly asserted probable cause?

Holding: The United State Supreme Court, by Justice Thomas, held that the lower courts erred in holding that the officers lacked probable cause to arrest for unlawful entry. Probable cause requires dealing with the totality of circumstances and the lower court failed to follow this principle by viewing each factor in isolation. The totality of circumstances gave the officers reason to doubt the partygoers’ claim that they had permission to be in the house and conclude that there was a substantial chance of criminal activity. The Supreme Court also held that the officers were entitled to qualified immunity under 42 U. S. C. § 1983. The officers were also entitled to immunity even if they lacked probable cause, because they could have reasonably concluded that probable cause was present.

Justice Sotomayor filed an opinion concurring in part and concurring in the judgment. Justice Ginsburg filed an opinion concurring in the judgment in part.

Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018)

The Fair Labor Standards Act (FLSA) exempts from its overtime “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” Respondents are service advisors at a car dealership, and work fifty-five hours per week. The service advisors sued the dealership under the FLSA, contending that they should be paid time-and-a-half under the statute’s overtime rules. In construing the statute, the Ninth Circuit held that the respondents were non-exempt.

Question Presented: Whether service advisors at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the Fair Labor Standards Act’s overtime-pay requirements.

Holding: The Supreme Court, by Justice Thomas, held that car dealership service advisors are exempt from the FLSA’s overtime-pay requirement. Service advisors are “salesmen” because they sell services for vehicles and they are “primarily engaged in . . . servicing automobiles.” The Court rejected the Ninth Circuit’s argument that FLSA exceptions should be construed narrowly because the FLSA contained no textual support for that view. The exemptions should receive a fair reading.

Justice Ginsburg filed a dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.

Epic Systems v. Lewis, 2018 WL 2292444 (May 21, 2018)

Jacob Lewis, a former employee of the healthcare data management company Epic Systems, sued Epic individually and on behalf of similarly-situated employees alleging that they had been denied overtime compensation to which they were entitled. Epic moved to dismiss the complaint, pointing to its arbitration agreement that requires employees to resolve employment disputes through individual arbitration and to waive any right to participate in class proceedings. The district court found the arbitration agreement unenforceable as a violation of the right to concerted activity under the National Labor Relations Act. The Seventh Circuit affirmed and found the agreement unenforceable under the savings clause of the Federal Arbitration Act because there were legal grounds precluding enforcement.

Question Presented: Does the National Labor Relations Act prohibit enforcement of an arbitration agreement requiring employees to resolve employment disputes through individual arbitration?

Holding: The agreement was enforceable. The Supreme Court, by Justice Gorsuch, found that neither the NLRA nor the Savings Clause in the FAA supersede the FAA's dictate that arbitration agreements providing for individual proceedings must be upheld.

Justice Ginsburg filed a dissenting opinion in which Breyer, Sotomayor and Kagan joined.

Jennings v. Rodriguez, 583 U.S. 830 (2018).

Government officials detained respondent Rodriguez, a Mexican citizen and lawful permanent resident of the U.S., pursuant to 8 U.S.C. § 1226 while the federal government sought to remove him. Rodriguez filed a class action alleging that the class members were entitled to bond hearings to determine whether continued detention was justified. The District Court entered a permanent injunction requiring the Government to provide each member of the class individual hearings before an immigration judge. The Ninth Circuit affirmed and held that § 1226(a) required that an alien receive a bond hearing every six months and that detention beyond the initial six-month period is permissible only if the Government proves that further detention is justified by clear and convincing evidence that further detention is warranted.

Question Presented: May the Government conduct “prolonged” detention of aliens absent individualized bond hearing at which the Government proves by clear and convincing evidence that detention remains justified?

Holding: The United States Supreme Court, by Justice Alito, held that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention. A provision in the Immigration and Nationality Act which carves out narrow conditions under which Attorney General may release on bond aliens detained pending their removal based on criminal offenses or terrorist activities could not be plausibly read to implicitly place six-month limit on detention or to require periodic bond hearings.

Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined, except for footnote 6. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg and Sotomayor joined. Justice Kagan took no part in the decision of the case.

McCoy v. Louisiana, 2018 WL 2186174 (May 14, 2018)

The defendant's lawyer in a murder trial, over the defendant's objection, conceded the defendant's guilt in an effort to obtain a lesser sentence. The defendant was found guilty and sentenced to death. Defendant's new

counsel moved for a new trial arguing that the trial court violated defendant's Sixth Amendment rights by allowing the concession over defendant's objection. The Supreme Court of Louisiana held that the defendant could not sustain an ineffectiveness of counsel claim.

Question Presented: Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

Holding: Defendant had a Sixth Amendment right to insist that counsel not admit that defendant committed murder despite counsel's reasonable belief that admitting guilt was defendant's best chance to avoid the death penalty. The Sixth Amendment guarantees defendant the right to choose the objective of his defense and to insist that counsel refrain from admitting guilt. The trial court's error allowing the admission, an error going to defendant's autonomy, was structural; this entitled defendant to a new trial without any need to show prejudice. Justice Alito filed a dissenting opinion in which Justices Thomas and Gorsuch joined.

Murphy v. Smith, 583 U.S. 784 (2018).

Petitioner received a judgment in his federal civil rights suit against two of his prison guards which included an award of attorney's fees. The district court ordered Petitioner to pay 10% of his judgment toward the fee award, leaving the defendants responsible for the remainder. On appeal, the Seventh Circuit reversed, holding that the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), required the district court to exhaust 25% of the prisoner's judgment before demanding payment from the defendants.

Question Presented: When a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney, does the PLRA give the district court discretion to determine how much of the prisoner's judgment is applied to satisfy the amount of attorney's fees awarded?

Holding: The United States Supreme Court, by Justice Gorsuch, held that the PLRA provision which provides 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," 42 U.S.C. § 1997e(d), imposed on district courts a non-discretionary duty to apply as much of the judgment as necessary to satisfy the fee award, up to the 25 percent cap. The use of the word "shall" indicated the mandatory nature of the command to the district court. Justice Sotomayor filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Kagan joined.

SESSIONS V. DIMAYA, 138 S. CT. 1204 (2018)

The Immigration and Nationality Act (INA) establishes that a noncitizen, including a lawful permanent resident, who is convicted of an "aggravated felony" is subject to removal from the United States. Under the INA, the definition of "aggravated felony" incorporates by reference 18 U.S.C. § 16(b), which defines a "crime of violence" under the federal criminal code. The residual clause of that provision defines "crime of violence" as a felony that by its nature "involves a substantial risk that physical force against the person or property of another" may be used in committing the offense. Courts use a categorical approach which looks to the "ordinary case" of an offense to determine if the offense poses the requisite risk.

James Garcia Dimaya, a lawful permanent resident, was convicted of two burglary offenses that did not involve violence. Nevertheless, the immigration court found that the convictions were for "crimes of violence" and ordered Mr. Dimaya removed from the country. After Mr. Dimaya appealed his case, ultimately, the Ninth Circuit held that § 16(b)'s definition of "crime of violence" was void for vagueness under the Fifth Amendment's Due Process Clause.

Question Presented: Whether the definition of a "crime of violence" under 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Holding: A very-splintered Supreme Court, by Justice Kagan, found that the residual clause was unconstitutionally vague. The Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that a similar residual clause in the Armed Career Criminal Act vague, effectively resolved the case. Both

provisions combined an ordinary case requirement and an ill-defined risk threshold leading to grave uncertainty. The fact that removal was a civil matter, not criminal, did not lead to application of a more permissive form of the vagueness doctrine in light of the grave nature of deportation.

Justice Kagan announced the judgment of the Court and delivered an opinion as to some parts that Justices Ginsburg, Breyer, Sotomayor, and Gorsuch joined. Justices Ginsburg, Breyer, and Sotomayor joined other parts of Justice Kagan's opinion and Justice Gorsuch filed an opinion concurring in the judgment. Chief Justice Roberts filed a dissent which Justices Kennedy, Thomas, and Alito joined. Justices Thomas filed a dissent which Justices Kennedy and Alito joined in part.

Tharpe v. Sellers, 138 S. Ct. 545 (2018).

Following a denial of state and federal habeas relief, Petitioner moved to reopen his federal habeas corpus proceedings based on the claim that the jury that convicted him of murder included a juror who was racially biased against him.

Question Presented: In light of a juror's racially discriminatory statements made after the Petitioner's capital murder trial, did the Eleventh Circuit err by denying the Petitioner's certificate of appealability (COA) based on a state court's prejudice determination?

Holding: The United State Supreme Court, by Justice Ginsburg, held that while a state court's factual determination is binding on federal courts the determination can be reversed in the face of clear and convincing evidence to the contrary. 28 U.S.C. §2254(e)(1). Here there was a sworn affidavit clearly showing the compelling evidence that racial bias influenced a juror's vote. The Supreme Court concluded that the evidence was compelling enough for jurists of reason to debate whether Petitioner showed clear and convincing evidence that the state court's factual determination was wrong. The Supreme Court remanded the case to the lower courts to determine whether Petitioner was entitled to a COA.

Justice Thomas filed a dissenting opinion which was joined by Justices Alito and Gorsuch.

WILSON V. SELLERS, 138 S. CT. 1188 (2018)

Ylst v. Nunnemaker, 501 U.S. 797 (1991), created a presumption that, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." This presumption means that a federal habeas court would "look through" an unexplained state-court order and focus its review on the reasoned state-court opinion instead. But in 2011, the Court in *Harrington v. Richter*, 562 U.S.86 (2011), held that even a summary ruling by a state court can count as an adjudication "on the merits" to which federal habeas courts must defer under the Antiterrorism and Effective Death Penalty Act of 1996, at least where there is no lower state-court ruling providing a clearer rationale. Here, a person sentenced to death filed a federal habeas petition alleging ineffective assistance of counsel after state court affirmance of his conviction and sentence and denial of state habeas relief. The district court assumed that counsel was deficient but deferred to the state habeas court's conclusion that any deficiencies did not prejudice Wilson. The Eleventh Circuit affirmed but first concluded that it was wrong to "look through" the State Supreme Court's unexplained decision and assume that it rested on the grounds given in the habeas opinion instead of asking what arguments "could have supported" the summary decision. The Eleventh Circuit agreed.

Question Presented: Whether the court’s decision in *Harrington v. Richter* silently abrogates the presumption set forth in *Ylst v. Nunnemaker*—that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc Eleventh Circuit held, despite the agreement of both parties that the *Ylst* presumption should continue to apply.

Holding: The Supreme Court, by Justice Breyer, reversed and remanded. A federal habeas court reviewing an unexplained state court decision on the merits should “look through” that decision to the last related state court decision that provides a relevant rationale and presume the unexplained decision adopted that reasoning. *Richter* did not control. The State could, though, rebut the presumption by showing that the unexplained decision most likely rested on different grounds than the reasoned decision below.

Justice Gorsuch filed a dissenting opinion which Justices Thomas and Alito joined.

City of Hays, Kansas v. Vogt, 138 S. Ct. 1683 (2018), dismissed as improvidently granted.

Collins v. Virginia, 138 S. Ct. 1663 (2018)

Virginia police suspected that Collins was the driver of a motorcycle involved in two previous traffic incidents. After further investigation, the police learned that the motorcycle was likely stolen. Police parked outside the house where they believed Collins was staying, and without a warrant or permission to enter the property, entered the partially enclosed top portion of the driveway where the motorcycle was located. The police lifted a tarp covering the motorcycle, examined the license plate and VIN number, and used this information to confirm that the motorcycle was stolen. The police then questioned Collins when he returned home and arrested him for receiving stolen property. Collins argued that lifting the tarp was an unreasonable search in violation of Fourth Amendment. The Supreme Court of Virginia held that the search was permitted under the automobile exception of the Fourth Amendment’s warrant requirement even though the motorcycle was on private property and not immediately mobile.

Question Presented: Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked there.

Holding: The United States Supreme Court, by Justice Sotomayor, held that the automobile exception of the Fourth Amendment does not permit an officer to enter the curtilage of a home in order to search a vehicle. In so holding, the Court noted that the part of the driveway where Collins’ motorcycle was parked and subsequently searched was curtilage—the area immediately surrounding and associated with the home—and thus any warrantless search is presumptively unreasonable. The automobile exception, moreover, does not alter this well-established rule because the automobile exception extends no further than the automobile itself.

Justice Thomas filed a concurring opinion. Justice Alito filed a dissenting opinion.

Currier v. Virginia, 138 S. Ct. 2144 (2018)

Currier was charged with burglary, grand larceny, and possession of a firearm as a felon. Concerned that the prosecution would introduce evidence of his prior burglary and larceny convictions to prove the felon-in-possession charge, and thereby prejudice the jury on the other charges, Currier and the government agreed before trial to sever the firearms charge and try the other two charges first. The jury acquitted Currier on the burglary and larceny charges. After, the Commonwealth sought to try Currier on the firearms charge but Currier argued that it would amount to double jeopardy. Alternatively, he argued that the government was precluded from re-litigating at the firearms trial any issue resolved in his favor at the first trial. He was nonetheless tried and convicted. The Virginia courts denied his motion to set aside the jury verdict.

Question Presented: Whether a defendant who consents to the severance of multiple charges into sequential trials may later successfully claim that the second trial violates the Double Jeopardy Clause.

Holding: The United States Supreme Court, by Justice Gorsuch, rejected Currier’s argument and affirmed the conviction. In doing so, the Court distinguished *Ashe v. Swenson*, 397 U.S. 436 (1970), where the Court held

that the Double Jeopardy Clause prohibited the government from trying a defendant for robbing a second victim at a poker game after a jury acquitted him of robbing the first victim. The critical difference between Currier’s case and *Ashe*, according to the Court, was that Currier consented to the second trial. In addition, the Court rejected Currier’s argument that he had no choice but to seek two trials, since evidence of his prior convictions would have tainted the jury. The Court reasoned that the difficult choice that Currier faced was not the same as no choice.

Justice Gorsuch, joined by the Chief Justice, Justice Thomas, and Justice Alito, also addressed Currier’s alternative argument and concluded that civil issue preclusion principles do not apply to the criminal law through the Double Jeopardy Clause.

Justice Ginsburg filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan joined.

Husted v. A. Philip Randolph Institute, 138 S. Ct. 1833 (2018)

The National Voter Registration Act (NVRA), 52 U.S.C. § 20507, prohibits any voter-list maintenance program that “result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person’s failure to vote.” The state of Ohio implemented a program in which the state sent a notice to registered voters who had not participated in elections over a two-year period. If the voter failed to respond, and then failed to vote over the next four years, the voter was removed from the state registration list. The Sixth Circuit held that this practice violated the statute because it used failure to vote as a “trigger” for initiating the removal process.

Question Presented: Whether Ohio’s list-maintenance procedures violate 52 U.S.C. § 20507 given that the procedures rely on the inactivity of the registered voter as a reason to initiate proceedings that result in their removal from the registration rolls.

Holding: The United States Supreme Court, by Justice Alito, reversed, and held that Ohio’s procedures did not violate § 20507. The Court concluded that the “Failure-to-Vote” clause found in the NVRA prohibited the use of nonvoting as *the sole criterion* for removing a registrant. Under Ohio’s procedures, however, the state does not remove a registrant from the official list of voters unless the registrant is first sent and fails to mail back a return card, and then fails to vote for an additional four years.

Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan joined. Justice Sotomayor filed a dissenting opinion.

Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018)

The Governor of Illinois brought a suit challenging the validity of an Illinois law analogous to the law upheld in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *The law in question allowed public employers whose employees are represented by a union to require all employees, regardless of whether they are a part of the union, to pay “agency fees.” These fees were used to cover costs associated with the union’s collective bargaining activities, but not the union’s political and ideological projects. The Governor alleged a First Amendment violation, since the law compelled employees who disapproved of the union to contribute money to it. The district court dismissed the Governor’s case for lack of standing, but two employees subject to the law intervened. The district court subsequently dismissed their case on the ground that the claim was foreclosed by Abood and the Seventh Circuit affirmed.*

Question Presented: Whether *Abood v. Detroit Board of Education* should be overturned so that non-union public employees cannot be required to pay a fee to cover the union’s costs to negotiate a contract that applies to all employees.

Holding: The United States Supreme Court, by Justice Alito, overruled Abood and held that requiring public employees to pay a union’s agency fees violated the First Amendment. The Court concluded that the First Amendment was implicated because the law compelled non-union members to subsidize the private speech of others. Having so found, the Court declined to decide whether strict scrutiny should apply, finding that the law could not survive even under the more permissive “exacting” scrutiny applied in similar cases. Under this standard, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” Applying the standard, the Court rejected the government’s first argument under Abood that the agency-fee arrangement served the state’s interest in “labor peace,” as there were other significantly less restrictive ways to prevent dissension in the work force. The Court also rejected the government’s second argument under Abood that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Avoiding the “risk of free riders,” the Court said, is not a compelling interest. The Court similarly found the state’s alternative justifications for the law unavailing, and held that the principles of stare decisis did not require retention of Abood.

Justice Sotomayor filed a dissenting opinion. Justice Kagan filed a dissenting opinion, in which Ginsburg, Breyer, and Sotomayor joined.

Lozman v. City of Riviera Beach, Florida, 138 S. Ct. 1945 (2018)

Fane Lozman kept his floating home in a slip in a city-owned marina in Riviera Beach. While there, he became an outspoken critic of the city’s plan to use its eminent domain power to seize homes along the waterfront, and he often voiced his position during the public-comment period at city council meetings. He also filed an open-meetings lawsuit against the city. The council subsequently held a closed-door session, in part to discuss Lozman’s lawsuit. At the meeting, Lozman alleged that the councilmembers devised an official plan to intimidate him. Five months later, during a different council meeting, police arrested Lozman when he refused to discontinue comments alleging corruption and charged him with disturbing a lawful assembly. The prosecuting attorney found probable cause for the arrest but dismissed the charges. Lozman then filed a claim under 42 U.S.C. § 1983 against the city alleging that the arrest was retaliation for his disagreement with the city’s redevelopment plans and asserting First and Fourth Amendment claims. A jury found for the city on all counts, following the district court’s instruction that, for Lozman to prevail on his claim for retaliatory arrest, he had to prove that the arresting officer was motivated by impermissible animus against Lozman’s protected speech and that the officer did not have probable cause to make the arrest. In affirming the jury’s verdict, the Eleventh Circuit assumed that the district court erred when it instructed the jury that the officer—rather than the city—was motivated by retaliatory animus. But it held that any error was harmless because the jury necessarily determined the arrest was supported by probable cause when it found for the city on Lozman’s other claims. .

Question Presented: Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim under § 1983.

*Holding: The United States Supreme Court, by Justice Kennedy, vacated and remanded, holding that the existence of probable cause under the circumstances of the case did not bar Lozman’s claim. In reaching its conclusion, the Court emphasized that Lozman’s claim was not like the typical retaliatory arrest claim, in that it was not based on an allegation of an ad hoc, on-the-spot decision by an individual officer. Instead, Lozman argued that the city retaliated against him pursuant to an official policy of intimidation. In such a case, the Court agreed with Lozman that the decision in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), provided the correct standard for assessing his claim and remanded the case to the Eleventh Circuit. At issue on remand will be whether a reasonable juror could find that the city adopted an official policy to retaliate against Lozman, whether a reasonable juror could find that the arrest constituted an official act by the city, and whether, under *Mt. Healthy*, the city has proved that it would have arrested Lozman regardless of any retaliatory animus. Justice Thomas filed a dissenting opinion.*

MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION, 138 S. CT. 1719 (2018)

Colorado’s anti-discrimination law bars places of public accommodation from discriminating based on certain characteristics—including sexual orientation. In 2012, the Denver-area bakery Masterpiece Cakeshop refused to create a cake for a gay couple’s wedding. Asked to explain why, the bakery’s owner said that he did not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. The couple filed a discrimination claim with the Colorado Civil Rights Commission. Following an investigation and hearing, in which some commissioners expressed hostility towards religion and disparaged the baker’s beliefs, the Commission ruled in the couple’s favor. The Colorado courts affirmed.

Question Presented: Whether the Colorado Civil Rights Commission’s determination that a baker violated Colorado’s anti-discrimination law when he refused to create a wedding cake for a same-sex couple violated the state’s duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint.

Holding: The United States Supreme Court, by Justice Kennedy, held that the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the state’s obligation of religious neutrality and violated the Free Exercise Clause of the First Amendment. In so holding, the Court recognized that this case created tension between two competing principles. The first is the ability of the state to protect the rights and dignity of LGBTQ+ persons in places of public accommodation. The second is the right of all persons to exercise fundamental freedoms, including the right to free exercise of religion and the right to free speech, under the First Amendment. The Court did not resolve this tension, however, instead ruling on the much narrower ground that the Commission’s exhibited hostility toward the baker’s sincere religious beliefs compromised its decision. The Court cited statements by commissioners that, among other things, described a person’s faith as “one of the most despicable pieces of rhetoric that people can use,” and compared the baker’s invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. The Court also cited the difference in treatment between this case and the cases of three other bakers who objected to a requested cake on the basis of conscience. In those cases, which involved bakers who refused to create cakes that conveyed disapproval of same-sex marriage, along with religious text, the Commission found that the bakers acted lawfully in refusing service. For these reasons, the Court concluded that the Commission’s treatment of the baker violated the state’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

Justice Kagan filed a concurring opinion, in which Justice Breyer joined. Justice Gorsuch filed a concurring opinion, in which Justice Alito joined. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined.

Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018)

Minnesota statute § 211B.11 bans individuals from wearing political apparel inside polling stations on primary or election day. The individual was allowed to vote regardless of their compliance, but a misdemeanor prosecution was a possible outcome if an individual refused to remove or cover up the offending apparel. Andrew Cilek, director of the Minnesota Voters Alliance, was temporarily prevented from voting for wearing a Tea Party t-shirt and a button advocating voter identification requirements. Plaintiff organization and others sued. The district court dismissed the claims. The Eighth Circuit largely upheld the district court’s ruling. After further litigation, the Supreme Court granted certiorari.

Question Presented: Whether Minnesota statute § 211B.11, banning all political apparel at a polling place, is facially overbroad under the Free Speech Clause of the First Amendment.

Holding: The United States Supreme Court, by Chief Justice Roberts, held that Minnesota’s law violated the First Amendment. In so holding, the Court found that a polling place in Minnesota is a nonpublic forum, which means that the government has much more flexibility to craft rules limiting speech than it otherwise would have in a traditional public forum or a designated public forum. Under the nonpublic forum analysis, the question was whether Minnesota’s ban on political apparel was “reasonable in light of the purpose served by the forum,”—that is, voting. The Court accepted Minnesota’s determination that some forms of advocacy—including certain apparel—could be excluded from the polling place, but it said that the state must draw a reasonable line. Here, the Court said that the “unmoored” use of the term “political” in the law, combined with “haphazard interpretations” by state officials, meant that the law could not pass muster under the First Amendment.

Justice Sotomayor filed a dissenting opinion, in which Justice Breyer joined.

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018)

After Rosales-Mireles pleaded guilty to illegal reentry into the United States, the probation officer in its presentence investigation report mistakenly counted a state conviction of misdemeanor assault twice, resulting in a higher Sentencing Guidelines range. Rosales-Mireles did not object to the mistake at the sentencing hearing, and the district court relied on the miscalculated range in imposing the sentence. On appeal, Rosales-Mireles challenged the incorrect Guidelines range under Federal Rules of Criminal Procedure 52(b), which provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. The Fifth Circuit found that Rosales-Mireles satisfied the plain error standard in Rule 52(b). However, the court declined to remedy the plain error, concluding that Rosales-Mireles failed to show that the error seriously affected the fairness, integrity or public reputation of judicial proceedings because neither the error nor the resulting sentence “would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.”

Question Presented: Whether the court of appeals abused its discretion when it imposed a heightened “shock the conscience” standard under Rule 52(b) before correcting a miscalculation of a Guidelines range that has been determined to be plain and to affect a defendant’s substantial rights.

Holding: The United States Supreme Court, by Justice Sotomayor, held that the Fifth Circuit abused its discretion in imposing an unduly burdensome standard under Rule 52(b). In *United States v. Olano*, 52 U.S. 725 (1993), the Court established three conditions that must be met before a court may consider exercising its discretion to correct an error. “First, the error must have affected the defendant’s substantial rights. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant’s substantial rights.” If those three conditions are met, the court of appeals “should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” By requiring that the defendant prove that the error “shock the conscience of the common man” in order to demonstrate that the error “seriously affects the fairness, integrity or public reputation of judicial proceedings,” the Court held that the Fifth Circuit’s standard was unduly restrictive. The effect of the Fifth Circuit’s heightened standard was especially pronounced in this case. The failure to correct a plain Guidelines error that affects a defendant’s substantial rights, the Court said, is “precisely the type of error that ordinarily warrants relief under Rule 52(b).”

Justice Thomas filed a dissenting opinion, in which Justice Alito joined.

Trump v. Hawaii, 138 S. Ct. 2392 (2018)

Shortly after taking office, President Trump issued an Executive Order (EO-1) suspending the entry of foreign nationals from seven countries identified as posing heightened terrorism risks. After lower courts enjoined EO-1, Trump replaced it with a second, revised Executive Order (EO-2) that temporarily restricted the entry of foreign nationals from six of the countries covered by EO-1 for 90 days. Following additional litigation, Trump issued his third Executive Order (EO-3) which sought to improve vetting procedures by identifying ongoing

deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” To further that purpose, EO-3 placed entry restrictions on the nations of eight countries: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen. Plaintiffs challenged EO-3 on several grounds, including that it contravenes provisions in the Immigration and Nationality Act (INA), and that it violates the Establishment Clause of the First Amendment. The lower court granted a nationwide preliminary injunction, and the Ninth Circuit affirmed. The Ninth Circuit first held that EO-3 exceeded the President’s authority under § 1182(f) of the INA because that provision authorizes only a “temporary” suspension of entry in response to exigencies that “Congress would be ill-equipped to address.” The court also held that EO-3 conflicted with the “INA’s finely reticulated regulatory scheme” by addressing “matters of immigration already passed upon by Congress.” Finally, the court determined that the entry restrictions also contravened the prohibition on nationality-based discrimination in the issuance of immigrant visas under § 1152(a)(1)(A).

Questions Presented: 1. Are the claims challenging the President’s power to issue the proclamation justiciable? 2. Does the President have statutory authority to issue the proclamation? 3. Is the preliminary injunction supported by a likelihood of success on the merits of the plaintiffs’ constitutional claim that the proclamation violates the Establishment Clause?

Holding: The United States Supreme Court, by Chief Justice Roberts, held the following: 1. The Court assumed, without deciding, that the plaintiffs’ statutory claims were reviewable. 2. The President had authority to issue the proclamation under §1182(f) of the INA, which allows the President to exercise broad discretion in suspending the entry of aliens into the country based on findings that their entry would be detrimental to the national interest. The President lawfully exercised discretion under this section, and did not exceed his authority under the INA. 3. The plaintiffs did not demonstrate a likelihood of success on the merits of the Establishment Clause claim. Applying rational basis review, the Court found the Government provided a national security justification sufficient to survive the deferential standard because the facially-neutral proclamation can be reasonably understood to result from “the Government’s stated objective to protect the country and improve the vetting process,” a justification that is “independent of unconstitutional grounds.” Justice Kennedy and Justice Thomas filed concurring opinions. Justice Breyer filed a dissenting opinion, in which Justice Kagan joined. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

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Dunn v. Madison, 138 S. Ct. 9 (2017).

Question Presented: Was the Alabama Supreme Court’s finding that Madison, who suffered strokes that left him unable to remember committing murder, objectively unreasonable?

Holding: Federal habeas relief was not warranted under Antiterrorism and Effective Death Penalty Act. Testimony established that, notwithstanding his memory loss, Madison recognized that he would be put to death as punishment for murder he was found to have committed. The state court’s determination was not so “lacking in justification” as to be error “beyond any possibility for fair-minded disagreement.”

Kernan v. Cuero, 138 S. Ct. 4 (2017).

Question Presented: Was it a violation of clearly established law for a state court not to impose a lower agreed-upon sentence and instead to allow the state to amend its complaint to seek a higher sentence and defendant to withdraw his guilty plea?

Holding: The failure to impose the lower sentence did not violate clearly-established law. Federal law did not clearly establish, as required by the demanding standard of Antiterrorism and Effective Death Penalty Act, that specific performance was warranted. Supreme Court precedent states that the ultimate relief to which Petitioner was entitled for a breach in his plea agreement is left to the discretion of the state court.