

Supreme Court Report

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This *Report* summarizes opinions issued on April 20 and 23, 2020 (Part I); and cases granted review on April 20, 2020 (Part II).



I. Opinions

- *Ramos v. Louisiana*, 18-5924. By a 6-3 vote, the Court held that the Fourteenth Amendment fully incorporates against the states the Sixth Amendment guarantee of a unanimous verdict. Much of the dispute centered on the precedential force of *Apodaca v. Oregon*, 406 U.S. 404 (1972), a 4-1-4 opinion. In that case, four Justices (the dissenters) concluded that the Sixth Amendment right to “trial by an impartial jury” guarantees a right to a unanimous verdict in order to convict. Four Justices (the plurality) disagreed. The decisive vote was cast by Justice Powell, who agreed with the dissenters’ view of the unanimity requirement, but (alone among the Justices) concluded that the unanimity right should not be incorporated to apply to the states. Two states—Louisiana and Oregon—continue to allow non-unanimous verdicts in felony cases. The Court granted certiorari to assess *Apodaca*’s continuing vitality. In an opinion by Justice Gorsuch, the Court overruled *Apodaca* and held that the unanimity requirement applies to state prosecutions.

The Court began by noting the racist origins of Louisiana and Oregon’s non-unanimous verdict laws. It then turned to the predicate question of whether the Sixth Amendment right to “trial by an impartial jury” grants a right to unanimous verdicts. The Court explained that the right must have some content, and that “the common law, state practices in the founding era, [and] opinions and treatises written soon afterward” all required juror unanimity to convict. And the Court had noted that requirement at least 13 times in the past 120 years. The Court found unpersuasive Louisiana’s reliance on the Constitution’s drafting history, which shows that the Sixth Amendment originally expressly required unanimity. The Framers could have deleted that clause, the Court noted, because they considered it surplusage. Nor was the Court persuaded by the *Apodaca* plurality, which applied a “functionalist approach” that weighed the benefits of a unanimity requirement against its costs. The “ancient” right to unanimity, found the Court, shouldn’t be subject to “future cost-benefit analyses.”

The Court then turned to the issue of stare decisis and whether to preserve *Apodaca*. In a part of the opinion that only three Justices joined, Justice Gorsuch disputed that *Apodaca* even established a precedent. Justice Powell provided the idiosyncratic decisive vote. To accept his dual-track incorporation theory as precedential “we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.” (For the Court had already rejected dual-track incorporation, under which “a single right can mean two different things depending on whether it is being invoked against the federal or a state government.”) In the end, said Justice Gorsuch, it is a decision’s reasoning that gives it force in future cases, but Justice Powell’s reasoning has already been rejected. Writing again for the Court, Justice Gorsuch next explained that, even if *Apodaca* established a precedent, it should be overruled. In applying the doctrine of stare decisis, the Court looks to “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.” The Court found that each factor points in favor of overruling *Apodaca*.

Criticizing both Justice Powell’s approach and the plurality’s functionalist reading of the Sixth Amendment, the Court found little quality to *Apodaca*’s reasoning. Nor is *Apodaca* consistent with related decisions and legal developments. To the contrary, it “sits uneasily with 120 years of preceding case law” on the jury-trial right and with the Court’s long-established approach to incorporation. Finally, the Court looked to Louisiana and Oregon’s reliance interests, which are the need to retry defendants convicted of felonies by non-unanimous juries. The Court found the hundreds of retrials comparable to the number of retrials required by other new rules it established. And in a part of the opinion joined by four Justices, Justice Gorsuch added that it’s an open question whether its decision here will apply to cases on collateral review. He noted that the *Teague* test for retroactivity “is a demanding one” that would be difficult to meet; but then noted that the issue isn’t before the Court here and so must be left open. He concluded by noting that “the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases.”

Justice Sotomayor concurred in most of Justice Gorsuch’s opinion, and wrote a separate concurring opinion. She wrote to state that “overruling precedent here is not only warranted, but compelled” and that “the interests at stake point far more clearly to that outcome than those in other recent cases.” Justice Kavanaugh wrote a lengthy concurring opinion to set out and apply his approach to *stare decisis*. He said that the “key question” is “[w]hat constitutes a special justification or strong grounds” that justifies overruling a constitutional precedent. Surveying past cases, he identified three “broad considerations.” First, was the prior decision “grievously or egregiously wrong?” In making that assessment, “the Court may examine the quality of the precedent’s reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors.” Second, “has the prior decision caused significant negative jurisprudential or real-world consequences?” And third, “would overruling the prior decision unduly upset reliance interests?” He concluded that these three considerations set a high but not insurmountable bar that limit (although do not eliminate) judicial discretion. Applying those factors here, Justice Kavanaugh agreed with the Court’s decision to overrule *Apodaca*. Justice Thomas filed an opinion concurring in the judgment. He wrote “separately because [he] would resolve this case based on the Court’s longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of ‘trial . . . by an impartial jury.’ [He] also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.”

Justice Alito filed a dissenting opinion, which Chief Justice Roberts and Justice Kagan joined in large part. Justice Alito faulted the majority for stating that Louisiana and Oregon enacted their non-unanimity laws for racist reasons. Both states readopted their laws in later years for different reasons. Plus, “today’s decision is not limited to anything particular about Louisiana and Oregon.” The dissent then turned to *Apodaca* and *stare decisis*. Justice Alito strongly criticized the portion of Justice Gorsuch’s opinion asserting that *Apodaca* is not even precedent at all, asking, “Really?” If that were correct, he wrote, “[i]t would mean that the entire legal profession was fooled for the past 48 years.” But it was not. The decision did what precedents do, which is furnish “a particular outcome

when all the conditions in a clearly defined set are met.” A decision can have precedential force even if no majority agrees on the underlying rationale, as we know from the rule of *Marks v. United States*, 430 U.S. 188 (1977). Next, accepting that *Apodaca* had precedential value, the dissent concluded that it should not be overturned. The majority pointed to the poor “quality” of the *Apodaca* plurality’s reasoning, but the dissent engaged in a lengthy defense of it (even if not a defense of its result). And Justice Powell’s approach “has old and respectable roots” that was only abandoned gradually. As to coherence with the rest of the law, repudiating *Apodaca* calls into question the Court’s decision allowing juries with fewer than 12 members. Justice Alito then turned to a lengthy description of Louisiana and Oregon’s reliance interests, which tip the scale in favor of stare decisis. They now “face a potential tsunami of litigation on the jury-unanimity issue.” Oregon points to at least a thousand cases still on direct review that may need to be retried. And the majority left open whether its decision must be applied to cases on collateral review. Justice Alito added (in the part of his dissent not joined by Justice Kagan) that these reliance interests “far outstrip[] that asserted in recent cases in which past precedents were overruled.”

- *County of Maui v. Hawaii Wildlife Fund*, 18-260. By a 6-3 vote, the Court held that the Clean Water Act “require[s] a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.” The Clean Water Act prohibits the “discharge of any pollutant” unless authorized by a permit issued in accordance with the Act. The Act defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” At issue here was whether the Act “requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.” The County of Maui operates a wastewater reclamation facility that collects sewage, partially treats it, then pumps the water underground. The effluent travels about a half mile, through groundwater, to the ocean. Several environmental groups sued Maui, claiming it was “discharg[ing]” a “pollutant” to “navigable waters” without the required permit. The district court ruled for the environmental groups, and the Ninth Circuit affirmed. It held that a permit is required when “the pollutants are fairly traceable from the point source to a navigable water.” In an opinion by Justice Breyer, the Court vacated and remanded.

The Court stated that the key “linguistic question here concerns the statutory word ‘from.’ Is pollution that reaches navigable waters only through groundwater pollution that is ‘from’ a point source, as the statute uses the word?” The Court noted that the meaning of “from” depends on context: “‘Finland,’ for example, is often not the right kind of answer to the question, ‘Where have you come from?’ even if long ago you were born there.” The Court observed that the parties took diametrically opposed extreme positions, which the Court went on to reject. It started with the Ninth Circuit’s “fairly traceable” rule, which it found “may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms.” The Court concluded that Congress did not intend the permitting requirement to reach that far. That approach “would require a permit in surprising, even bizarre circumstances.” And, moreover, “Congress intended to leave substantial responsibility and autonomy to the States.” Yet the Ninth Circuit approach would “seriously” interfere with “States’

traditional regulatory authority” over groundwater pollution—“authority the Act preserves and promotes.” The Court added that the EPA’s longstanding approach was narrower than the Ninth Circuit’s.

The Court next rejected the opposite approach, advocated by Maui and the U.S. Solicitor General, under which “the statute’s permitting requirement does not apply if a pollutant, having emerged from a ‘point source,’ must travel through any amount of groundwater before reaching navigable waters.” “That interpretation,” held the Court, “is too narrow, for it would risk serious interference with EPA’s ability to regulate ordinary point source discharges.” In particular, observed the Court, that approach would mean that a pipe owner could avoid the permit requirement simply by moving a long pipe back a few yards from navigable water, “so that the pollution must travel through at least some groundwater before reaching the sea.” The Court did “not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.” The Court rejected Maui and the Solicitor General’s textual arguments, finding that the word “from” (and other words in the provision) don’t require their approach. The Court added that that reading can’t be reconciled “with the statute’s inclusion of ‘wells’ in the definition of ‘point source,’ for wells most ordinarily would discharge pollutants through groundwater.”

The Court then explained that it was adopting a “middle ground between these extremes.” Specifically, it held “that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.” “That is,” said the Court, “an addition falls within the statutory requirement that it be from ‘any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.” The Court offered seven “potentially relevant factors” courts can consider in making that assessment: “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.” The Court noted that courts will provide guidance over time through their decisions; and the EPA can provide guidance through permitting decisions and rule-making. And the Court added that its approach does not change things very much: the “EPA has applied the permitting provision to some (but not all) discharges through groundwater for over 30 years.” Justice Kavanaugh wrote a short concurring opinion to note (among other things) that the Court’s ruling is consistent with Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Thomas filed a dissenting opinion, which Justice Gorsuch joined. They would hold, “based on statutory text and structure, . . . that a permit is required only when a point source discharges pollutants directly into navigable waters.” Justice Thomas focused on the statutory term “addition” (a “discharge” is “any *addition* of any pollutant to navigable waters from any point source”). “Addition” means an augmentation or increase. And, said Justice Thomas, “one would not naturally

say” that a point source augmented the sea with pollutants when the groundwater delivered the pollutants to the sea. He also emphasized statutory structure: the Act “reserves to the States the primary responsibility for regulating [non-point sources], including groundwater.” And Justice Thomas faulted the Court for providing “almost no guidance” on when its test is met.

Justice Alito also filed a dissent. He faulted the Court for “mak[ing] up a rule that provides no clear guidance and invites arbitrary and inconsistent application.” In his view, the Clean Water Act can be read in one of two ways: “The first is that pollutants are added to navigable waters from a point source whenever they originally came from the point source. The second is that pollutants are added to navigable waters only if they were discharged from a point source directly into navigable waters.” He concluded that “the better of the two possible interpretations is the latter.” He disagreed with the Court that that interpretation would create a loophole, finding that a permit *would* be required if a pipe stopped a few years short of the beach. And he agreed with the Court that the other approach is extreme. Indeed, it would potentially make every owner of a septic tank obtain a permit. Finally, he criticized the “nebulous standard” the Court adopted, noting it will be hard for regulated parties to operate under.

- *Atlantic Richfield Co. v. Christian*, 17-1498. The Montana Supreme Court had held that various landowners may pursue common-law claims for “restoration” requiring environmental cleanups at Superfund sites that allegedly conflict with EPA-ordered cleanups at those sites. The Court reversed, holding that the Montana Supreme Court erred in holding that the landowners were not potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act) and thus did not need EPA approval to take remedial action. “For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. Over the past 35 years, the Environmental Protection Agency has worked with the current owner of the smelter, Atlantic Richfield Company, to implement a cleanup plan under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. EPA projects that the cleanup will continue through 2025. A group of 98 landowners sued Atlantic Richfield in Montana state court for common law nuisance, trespass, and strict liability. Among other remedies, the landowners sought restoration damages, which under Montana law must be spent on rehabilitation of the property. The landowners’ proposed restoration plan includes measures beyond those the agency found necessary to protect human health and the environment.” The trial court allowed the case to proceed. The Montana Supreme Court granted a writ of supervisory control and affirmed. It rejected Atlantic Richfield’s contentions that CERCLA deprives state courts of jurisdiction of these claims and that the landowners were potentially responsible parties under CERCLA who may not take remedial action without EPA approval. In an opinion by Chief Justice Roberts, the Court affirmed in part, vacated in part, and remanded.

The Court agreed with the Montana Supreme Court that CERCLA does not deprive the Montana courts of jurisdiction over the lawsuit. Section 113(b) of the Act provides that “the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter.” The Court held that this case does not “arise under” CERCLA. Generally, “[a] suit arises under

the law that creates the cause of action.” And the landowners’ claims arise under Montana law. Section 113(b) therefore does not deprive the state courts of jurisdiction over their claims. Atlantic Richfield argued that §113(h) implicitly broadened the scope of actions precluded from state court jurisdiction under §113(b), but the Court was unpersuaded.

The Court next held that the Montana Supreme Court “erred by holding that the landowners were not potentially responsible parties under the Act and therefore did not need EPA approval to take remedial action” under §122(e)(6). That provision states that “no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.” The Court held that, “[t]o determine who is a potentially responsible party, we look to the list of ‘covered persons’ in §107, the liability section of the Act.” And among the “covered persons” is any “owner” of “a facility,” which is defined to include “any site or area where hazardous substance has been deposited, stored, . . . or otherwise come to be located.” The Court reasoned that because the arsenic and lead “have ‘come to be located’ on the landowners’ property, the landowners are potentially responsible parties.” That is so, held the Court, even though “the Act’s six-year limitations period for recovery of remedial costs has run, and thus they could not be held liable in a hypothetical lawsuit.” In the Court’s view, “[a] property owner can be a potentially responsible party even if he is no longer subject to suit in court.” The Court cited precedent stating that even “innocent landowners,” whose property was contaminated by others, can count as a potentially responsible party. The Court added that this reading is consistent with the Act’s objectives, which is to “ensure the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones.” Further, simply because EPA had a policy of not suing innocent homeowners “does not alter the landowner’s status as potentially responsible parties.” Finally, responding to Justice Gorsuch’s dissent, the Court stated that its reading of the Act does not endorse “paternalistic central planning” but instead fosters the “spirit of cooperative federalism [that] run[s] throughout CERCLA.”

Justice Alito concurred in part and dissented in part. He agreed with the Court’s potentially responsible party ruling, but disagreed with its jurisdictional ruling. He concluded that §113(h) greatly complicated the meaning of §113(b) and would have waited till another case to resolve the jurisdictional issue. Justice Gorsuch concurred in part and dissented in part, joined by Justice Thomas. He agreed with the jurisdictional ruling but dissented from the Court’s potentially responsible party holding. He found that “[e]verything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.” He found nothing in the ordinary public meaning of the potentially responsible party provision (§122(e)(6)) that made innocent landowners potentially responsible parties. In short, “there is simply no way the landowners here are potentially, possibly, or capable of being held liable by the federal government for anything.” Among other reasons, the limitations period for holding them liable has passed. They “are potentially responsible to the government for exactly nothing.” And although the Court pointed to §107’s list of “[c]overed persons,” that provision and §122(e)(6) “use different language, appear in different statutory sections, and address different matters.” Plus, “CERCLA differentiates between covered persons and potentially responsible parties in many places.” Justice Gorsuch concluded by

stating that the majority’s reading is an appeal to “paternalistic central planning [that] cannot tolerate parallel state law efforts to restore state lands.”

- *Thryv, Inc. v. Click-to-Call Technologies, LP*, 18-916. By a 7-2 vote, the Court held that a patent owner may not obtain judicial review of the Patent Trial and Appeal Board’s decision to institute “inter partes review” despite the owner’s contention that such review is untimely. The America Invents Act created “inter partes review,” a procedure for challenging a patent before the Patent Trial and Appeal Board. Section 314(d) provides that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” A different provision, §315(b), provides that inter partes review may not be instituted more than one year after the date on which the review petitioner is served with a complaint alleging infringement of the patent. This case involves a patent owned by Click-to-Call on technology for anonymous phone calls. In 2013, Thryv sought inter partes review, challenging many of the patent’s claims. Click-to-Call argued that Thryv filed too late because it had filed an infringement action in 2001 which ended in a voluntary dismissal without prejudice. The Board disagreed, concluding that because the complaint was dismissed without prejudice it did not trigger §315(b)’s one-year limitations period. Click-to-Call appealed to the Federal Circuit, which ultimately held that (1) the Board’s application of §315(b) is judicially reviewable notwithstanding §314(d); and (2) the Board erred in instituting review here. In an opinion by Justice Ginsburg, the Court vacated and remanded.

The Court pointed to §314(d)’s text, which renders “final and nonappealable” the “determination by the Director whether to institute an inter partes review under this section.” “That language,” held the Court, “indicates that a party generally cannot contend on appeal that the agency should have refused ‘to institute an inter partes review.’” The Court pointed to its decision in *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. ___ (2016), where it found nonappealable a review instituted despite the patent owner’s contention that the challenged patent claims weren’t identified “with particularity,” as required by §312(a)(3). *Cuozzo* stated that its “interpretation applies where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s decision to institute inter partes review.” The Court found that the challenge here, under §315(d), “easily meets that measurement.” It added that the “AIA’s purpose and design strongly reinforce [its] conclusion,” for Congress’s goal was “to weed out patent claims efficiently.” Yet “[a]llowing §315(b) appeals would tug against that objective, wasting the resources spent resolving patentability and leaving bad patents enforceable.” The Court rejected Click-to-Call and the dissent’s view that the §314(d) “bar on judicial review applies only to the agency’s threshold determination under §314(a) of the question whether the petitioner has a reasonable likelihood of prevailing.” They pointed to §314(d)’s language “under this section.” The Court found, however, that it already crossed the bridge in *Cuozzo*, where it held unreviewable the Board’s application of §312(a)(3). And, textually, §314(d) “refers not to a determination under subsection (a), but to the determination “under this section,” which refers broadly to the determination whether to institute review.

Justice Gorsuch issued a lengthy dissenting opinion, which Justice Sotomayor joined in large part. In his view, as noted, “the *only* thing §314(d) insulates from judicial review is ‘[t]he determination’ made ‘by the Director’ ‘under this section’—that is, a determination discussed *within* §314.” And that makes sense, he reasoned: “If the Director institutes a meritless petition, the Board can summarily affirm the patent’s validity. In any event, the Board is obligated to render a final—and judicially reviewable—decision within a year.” Justice Gorsuch read *Cuozzo* far more narrowly than the majority and found that it was narrowed further in *SAS Institute Inc. v. Iancu*, 584 U.S. ____ (2018). Justice Gorsuch closed (in a part of the opinion not joined by Justice Sotomayor) by stating that the “Court’s expansive reading of §314(d) takes us further down the road of handing over judicial powers involving the disposition of individual rights to executive agency officials.”

- *Barton v. Barr*, 18-725. A lawfully admitted permanent resident who is removable from the United States may seek cancellation of removal if he meets certain criteria. One of those criteria is that during his initial seven years of continuous residence he did not commit “an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title.” 8 U.S.C. §1229b(d)(1)(B). By a 5-4 vote, the Court held that the §1182(a)(2) offense committed during the initial seven years of residence does not need to be one of the offenses that triggered the alien’s removal to make the alien ineligible to seek cancellation of removal.

Andre Barton is a Jamaican national and lawful permanent resident of the United States. In 1996, a Georgia court convicted him of a firearms offense. And in 2007 and 2008 he was convicted of separate drug offenses. In 2016, the U.S. Government charged Barton with deportability under §1227(a)(2) based on those crimes. An immigration judge found him removable. The judge further concluded that he was ineligible for cancellation of removal because in 1996—6½ years after his admission to the country—he committed aggravated assault offenses for which he was later convicted in a Georgia court. (None of the three offenses for which Barton was being removed fell within §1182(a)(2), but the aggravated assault did.) The Eleventh Circuit affirmed, holding that a §1182(a)(2) offense that precludes cancellation of removal need not be one of the offenses of removal. In an opinion by Justice Kavanaugh, the Court affirmed.

The Court explained that this cancellation-of-removal provision “functions like a traditional recidivist sentencing statute. . . . It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases.” And “[i]f a crime is serious enough to deny admission to a noncitizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence.” The Court found that the text was clear: the provision “requires that the noncitizen be rendered ‘inadmissible’ as the result of the offense.” And that’s just what Barton’s 1996 aggravated assault did. The Court rejected Barton’s counter-arguments. He made a complicated argument based on the structure of the statute that the Court found unpersuasive.

His second argument was textual: He focused on the phrase “committed an offense referred to in §1182(a)(2) . . . that renders the alien inadmissible to the United States under section 1182(a)(2).” Barton contended that “a lawfully admitted noncitizen usually cannot be removed from the United States on the basis of inadmissibility.” Put another way, “how can a lawfully admitted noncitizen be found inadmissible when he has already been lawfully admitted?” The Court found, however, that “the argument fails because it disregards the statutory text, which employs the term ‘inadmissibility’ as a status that can result from, for example, a noncitizen’s (including a lawfully admitted noncitizen’s) commission of certain offenses listed in §1182(a)(2).” Section 1182(a)(2) says that noncitizens who commit certain crimes are inadmissible—“Full stop.” And Congress had “made that status—inadmissibility because of conviction or other proof of commission of §1182(a)(2) offenses—relevant in several statutory contexts that apply to lawfully admitted noncitizens such as Barton.” Finally, the Court discounted a surplusage argument by noting that “[s]ometimes the better overall reading of the statute contains some redundancy.”

Justice Sotomayor wrote a dissenting opinion, which Justices Ginsburg, Breyer, and Kagan joined. In the dissent’s view, “an offense cannot ‘rende[r]’ someone inadmissible unless the Government can legally charge that noncitizen with a ground of inadmissibility.” “That is,” Justice Sotomayor wrote, “[a] noncitizen who has already been admitted, and is not seeking readmission, cannot be charged with any ground of inadmissibility and thus cannot be deemed inadmissible.” Put another way, “a person is not ‘inadmissible’ unless that person actually seeks admission, and thus is subject to charges of inadmissibility.” Justice Sotomayor agreed that there are limited exceptions to this, but they pertain to adjustment of immigration status, which “is an express proxy for admission.” And pointing to the statutory text, Congress could have simply said that the removal can’t be canceled if the noncitizen “has committed an offense referred to in section 1182(a) of this title.” The Court’s reading, said the dissent, makes the rest of the provision superfluous.

- *Romag Fasteners, Inc. v. Fossil Group Inc.*, 18-1233. Without dissent, the Court held that a plaintiff in a trademark infringement suit is not required to show that the defendant willfully infringed the plaintiff’s trademark in order to recover the infringer’s profits as a remedy for the infringement. Romag sells magnetic snap fasteners used in leather goods. Fossil designs, markets, and distributes fashion accessories. The two signed an agreement years ago allowing Fossil to use Romag’s fasteners in Fossil’s handbags and other products. Romag discovered, however, that factories Fossil hired in China were using counterfeit Romag fasteners. Romag sued Fossil, alleging that Fossil had infringed its trademark and falsely represented that its fasteners came from Romag. A jury ruled for Romag. Although it agreed that Fossil had acted “in callous disregard” of Romag’s rights, it held that Fossil had not acted willfully when it failed to guard against its Chinese factories’ actions. Romag sought various remedies, including that Fossil turn over the profits it had earned due to its trademark violation. The district court refused based on Second Circuit precedent that requires a plaintiff seeking a profits award to prove that the defendant’s violation was willful. In an opinion by Justice Gorsuch, the Court vacated and remanded.

The key provision of the Lanham Act, 15 U.S.C. §1117(a), provides:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established . . . , the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

The Court observed that the section makes a showing of willfulness a precondition for relief under §1125(c), a section creating a cause of action for trademark dilution. But Romag’s suit was under §1125(a), and the statutory language does not make a showing of willfulness a precondition for an award of profits under that provision. The Court added that “[t]he Lanham Act speaks often and expressly about mental states,” with provisions requiring intent, knowledge, and willfulness. “The absence of any such standard in the provision before us, thus, seems all the more telling.”

The Court rejected Fossil’s argument that the provision makes willfulness a precondition by making profit awards “subject to the principles of equity.” In its view, “equity courts historically required a showing of willfulness before authorizing a profits remedy in trademark disputes.” The Court found that reasoning wanting on multiple grounds. First, the phrase “principles of equity” “more naturally suggests fundamental rules that apply more systematically across claims and practice areas.” Second, “it’s far from clear whether trademark law historically required a showing of willfulness before allowing a profits remedy.” In the end, said the Court, “[m]ens rea figured as an important consideration in awarding profits in pre-Lanham Act cases. This reflects the ordinary, transsubstantive principle that a defendant’s mental state is relevant to assigning an appropriate remedy.” The Court closed by stating that “we do not doubt that a trademark defendant’s mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances.”

Justice Alito filed a one-paragraph concurring opinion, which Justices Breyer and Kagan joined. He wrote to say that “[t]he relevant authorities, particularly pre-Lanham Act case law, show that willfulness is a highly important consideration in awarding profits under §1117(a), but not an absolute precondition.” Justice Sotomayor filed a two-page opinion concurring in the judgment. She found that “the weight of authority [] indicates that profits were hardly, if ever, awarded for innocent infringement.” And so “a district court’s award of profits for innocent or good-faith trademark infringement would not be consonant with the ‘principles of equity’ referenced in §1117(a) and reflected in the cases the majority cites.”

II. Cases Granted Review



- *Van Buren v. United States*, 19-783. The question presented is “[w]hether a person who is authorized to access information on a computer for certain purposes violates Section

1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.” The provision of the CFAA at issue provides that “[w]hoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information” from a “protected computer” commits a federal crime. 18 U.S.C. § 1030(a)(2). The phrase “exceeds authorized access” means “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser *is not entitled so to obtain* or alter.” 18 U.S.C. §1030(e)(6) (emphasis added). Here, a police sergeant (petitioner) accepted a loan from a shady operator (Albo), who (as part of sting operation with the FBI) asked the sergeant to run a computer search for the license plate number of a dancer at a local strip club to make sure she wasn’t an undercover officer. Petitioner, who was authorized to access the database for law-enforcement purposes, ran the search and then told Albo he had information to provide. The FBI arrested petitioner the next day. The Government charged petitioner with, among other things, one count of felony computer fraud in violation of §1030. Petitioner moved for judgment of acquittal, arguing that “accessing [information] for an improper or impermissible purpose does not exceed authorized access as meant by” §1030(a)(2). The district court denied the motion, and a jury convicted petitioner. The Eleventh Circuit affirmed the CFAA conviction. 940 F.3d 1192.

The Eleventh Circuit relied on its precedent holding that an individual can “exceed[] authorized access” to a protected computer when she accesses the computer for a prohibited purpose or use. Here, the database was supposed to be used for law-enforcement purposes, not a private “tag search.” Petitioner argues that the circuits are deeply divided on the meaning of the statute. On the merits, he argues that “[t]he most natural reading of the CFAA is that a person ‘obtain[s] information in the computer that [he] is not entitled so to obtain,’ 18 U.S.C. § 1030(e)(6), only if he had no right at all to access the information. Reading the statute more broadly would criminalize ordinary computer use throughout the country[.]” For example, he asserts, what if a law school provides students with access to Westlaw for educational purposes, but a student uses the database for personal purposes (such as looking up housing laws to demand a refund of a security deposit)? Or what if office workers use their company computers to generate March Madness brackets? According to petitioner, both the student and office workers are guilty of felonies under the Government’s interpretation of the statute. In petitioner’s view, the statute doesn’t require that. “[W]hether a person is entitled to obtain information” within the meaning of §1030(e)(6), “turns on whether he has the right to acquire the information at all, not on the purpose for his access.”

The United States argues that the case would be a poor vehicle for resolving the scope of the statutory phrase “exceeds authorized access.” As to petitioner’s parade of horrors, the United States notes that “Petitioner does not, however, identify any case in which a court of appeals has determined that the statute authorizes the prosecution of someone who engages in such “common-place activities” involving the violation of private computer-use policies, as opposed to misappropriating proprietary or confidential information for forbidden uses.” (Citation omitted.) And, adds the Government, DOJ instituted a policy in 2014 that “cautions that ‘federal prosecution may not be warranted’ if a defendant ‘exceeded authorized access solely by violating an access restriction contained in a contractual agreement or terms of service with an Internet service provider.’”

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