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This *Report* summarizes opinions issued on March 19, 2019 (Part I); and cases granted review on March 18, 2019 (Part II).

I. Opinions

● *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 16-1498. By a 3-2-4 vote, the Court held that the Yakama Nation's 1855 treaty with the United States preempts Washington from imposing on a tribal business a tax on fuel importers who travel by public highway. Washington taxes "motor vehicle fuel importer[s]" who bring large quantities of fuel into the state by certain forms of ground transportation. Washington attempted to impose this fuel tax upon Cougar Den, a corporation owned by a member of the Yakama Nation that imports fuel to Yakama-owned gas stations within the tribe's reservation. Cougar Den challenged Washington's tax assessment, contending that the tax was preempted by the Yakama Nation's treaty "right, in common with the citizens of the United States, to travel upon all public highways." After an administrative appeal process, a Washington superior court held that the application of Washington's fuel tax was preempted by the 1855 treaty. The Washington Supreme Court affirmed. Through a three-Justice plurality opinion by Justice Breyer (joined by Justices Kagan and Sotomayor) and a two-Justice concurring opinion by Justice Gorsuch (joined by Justice Ginsburg), the Court affirmed.

The plurality concluded that Washington's tax, as applied to Cougar Den, was preempted by the Yakama Nation's 1855 treaty. To begin, the opinion reasoned that it was bound by the Washington Supreme Court's construction of the state's tax statute. This construction—which the plurality endorsed independently—views the statute as a tax on the importation of fuel by ground transportation. The plurality concluded that because the tax, so construed, restricted Cougar Den's ability to move goods by public highway, it violated the Yakama Nation's "right, in common with citizens of the United States, to travel upon all public highways." This conclusion was based on three considerations. First, four previous Supreme Court cases interpreting the 1855 treaty considered similar "in common with" language regarding fishing rights and read this language to confer a right not only against discrimination but also against infringement of the tribe's reserved rights. Second, the historical record indicated that the right to travel included a right to travel with goods for trade. And third, imposing a tax upon traveling with certain goods burdened this right to travel: "the right to travel on the public highways without such burdens is . . . just what the treaty protects." The plurality noted that the Court's prior decisions held that a state may regulate, notwithstanding the treaty, for conservation purposes. And it left open the possibility that states may regulate the tribe's use of public highways to "prevent danger to health or safety." Finally, the plurality said that states may impose sales or use taxes off-reservation when they apply "irrespective of transport or its means."

Justice Gorsuch, joined by Justice Ginsburg, concurred in the judgment. He reasoned that the Court was bound by collateral estoppel from reconsidering factual findings in a prior case against Washington regarding the treaty. Those findings included the determination that the Yakamas understood the "in common with" language in the treaty to mean that their exercise of reserved rights would be without restriction, and not merely to be treated the same as "everyone else." In short, the treaty does "not permit encumbrances on the ability of tribal members to bring their goods to and from market." A "wealth of historical evidence confirms this understanding." Rejecting the state's

contention that it taxes only the possession of goods, not the right to move goods on the highway, he wrote that "it's impossible to transport goods without possessing them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would." And rejecting the state's "parade of horribles," Justice Gorsuch interpreted the treaty as requiring the tribe to "accept regulations designed to allow the two groups [tribal members and whites] safe coexistence," such as safety regulations.

Chief Justice Roberts, joined by Justices Thomas, Alito, and Kavanaugh, dissented. The dissent stated that the treaty does not confer upon the Yakamas a "right to possess whatever goods they wish on the highway, immune from regulation and taxation." In its view, "the mere fact that a state law has an effect on the Yakamas while they are exercising a treaty right does not establish that the law impermissibly burdens the right." Because the tax "targeted" the possession of fuel, rather than travel, it did not impermissibly burden the Yakama Nation's treaty right. The dissent also warned of the broad consequences of the ruling for other transportation regulations, noting that the plurality opinion leaves unclear whether a law against possessing drugs or illegal firearms could be imposed against a Yakima member traveling on a highway. More fundamentally, noted the dissent, the "Court has never recognized a health and safety exception to reserved treaty rights," yet such an exception is needed if the Court's ruling is not to have untoward results. "Today's decision," it said, "digs such a deep hole that the future promises a lot of backing and filling." Justice Kavanaugh filed a separate dissent, joined by Justice Thomas. In Justice Kavanaugh's view, the Yakama Nation is protected only against discriminatory restrictions on travel, not nondiscriminatory regulations like taxes that apply equally to tribal and non-tribal members.

● *Nielsen v. Preap,* 16-1363. In a 5-4 opinion, the Court held that an alien may be detained without a bond hearing even if the detention occurs after the alien is released from custody. Title 8, §1226 sets out the general rules for the detention and release of aliens pending removal proceedings. Subsection (a) permits the Secretary of Homeland Security to arrest an alien pending removal and then either detain the alien or release the alien on bond or parole, "except as provided in subsection (c)." The alien may seek review of the detention and argue that he or she is not a flight risk or a danger. The first paragraph of subsection (c)(1) lists categories of aliens who have committed certain criminal offenses or are inadmissible or deportable because of the alien's involvement in terrorist activities. It then provides that the Secretary "shall take into custody" an alien in one of those categories "when the alien is released." The second paragraph of subsection (c)(1) provides that "an alien described in paragraph one" may be released only in limited instances involving cooperating witnesses (not at issue here).

Respondents are two classes of aliens detained under §1226 who meet the criminal or terrorism predicates in subsection (c) but were not arrested by immigration officials immediately after their release from criminal custody. Indeed, some were not arrested until years later. They allege that they are entitled to a bond hearing under §1226(a) on the ground that they were not taken into custody "when . . . released," and are therefore not "alien[s] described in paragraph (1)" who are ineligible for release pending a removal hearing. The district courts and the Ninth Circuit agreed with respondents' interpretation of §1226 and held that aliens not taken into custody when released are entitled to a bond hearing. Through an opinion by Justice Alito (which was a plurality opinion in parts), the Court reversed and remanded.

Before turning to the merits, Justice Alito, in a plurality section of his opinion, concluded that the Court had jurisdiction over the case. First, the plurality addressed §1226(e), which provides that "[t]he [Secretary's] discretionary judgment regarding the application of [§1226] shall not be subject to review." Relying on its precedent, the Court reaffirmed that "this limitation applies only to 'discretionary' decisions about the 'application' of §1226 to particular cases. It does not block lawsuits over the extent of the Government's detention authority under the 'statutory framework' as a whole." Second, the plurality opined that §1252(b)(9)'s limitation of judicial review to non-final orders did not apply because "respondents . . . 'are not asking for the review of an order of removal.'" The plurality also concluded that the fact that the named plaintiffs had already obtained bond hearings or had their removal canceled before class certification did not make the case moot. It reasoned that "at least one named plaintiff in both cases" faces the threat of "re-arrest and mandatory detention" and that the "harms alleged are transitory enough to elude review."

On the merits, the Court held that aliens meeting the criminal conviction and terrorism elements of §1226(c) but who are not "take[n] into custody" upon release are not eligible for a bond hearing. "Respondents argue[d] that they are not subject to mandatory detention because they are not 'described in' §1226(c)(1), even though they (and all the other members of the classes they represent) fall into at least one of the categories of aliens covered by . . . that provision." In their view, an alien is only "described in" §1226(c)(1) if the alien "was also arrested 'when [he or she was] released' from criminal custody." The Court disagreed, based on the text and structure of §1226. First, the Court reasoned that, as an adverbial clause, "when . . . released" does not modify "alien" and therefore does not comprise part of the definition of aliens "described in paragraph (1)" who face mandatory detention. Even putting aside this grammatical interpretation, the Court continued, the term "describe" means to "communicate . . . salient identifying features." And taking an alien into custody cannot constitute an "identifying feature" that the Secretary relies upon in determining whom to take into custody when released. Next, the Court reasoned that the use of the definite article "the" in the phrase "when the alien is released" suggests that the "alien" at issue has already been defined by the prior paragraphs regarding criminal convictions and terrorism. The Court also rejected the Ninth Circuit's reading of §1226 as containing parallel arrest and release procedures in subsections (a) and (c), instead interpreting subsection (c) as "simply a limit on the authority conferred by subsection (a)." In a separate section of Justice Alito's opinion, joined only by Chief Justice Roberts and Justice Kavanaugh, Justice Alito stated that even if §1226(c)(1) required that a person be detained immediately upon release to be ineligible for a bond hearing, a failure to meet this statutory deadline would not eliminate the Secretary's power to detain someone without bond.

Finally, the Court rejected a set of arguments made by respondents. The Court began by rejecting respondents' claim that the Court's interpretation rendered the "when . . . released" clause surplusage. The Court explained that this clause still functioned to "clarif[y] when the duty to arrest is triggered" and "exhort[s] the Secretary to act quickly." Second, the Court responded to an argument that its interpretation would result in aliens not needing to be arrested at all, but being required to be detained without a hearing if they are arrested. The Court explained that the "when . . . released" clause specifies "the timing of arrest only for . . . aliens who were once in criminal custody. The paragraph simply does not speak to the timeline for arresting the few who had no stint in jail." Lastly, the Court disagreed that its interpretation should be rejected because mandatory detention without

a hearing might raise due process concerns. The Court reasoned that the constitutional avoidance doctrine comes into play only when the statute is ambiguous, which §1226(c) is not.

Justice Kavanaugh concurred, writing separately "to emphasize the narrowness of the issue" before the court and to "emphasize what this case is *not* about." He explained that the sole question is "whether, under §1226, the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to *immediately* detain the noncitizen when the noncitizen is released from criminal custody." He emphasized that the case was not about whether a noncitizen may be removed for criminal offenses, whether or how long a noncitizen may be detained before removal, or whether Congress may mandate that noncitizens be detained before removal, all of which he described as settled questions. Justice Thomas, joined by Justice Gorsuch, concurred in part and concurred in the judgment. Justice Thomas "believe[s] that no court has jurisdiction to decide questions concerning the detention of aliens before final orders of removal have been entered." These jurisdictional concerns are those discussed and rejected in the plurality section of Justice Alito's opinion, summarized above. Nonetheless, because the Court held that it has jurisdiction, Justice Thomas agreed with the majority's "resolution of the merits."

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. The dissent framed the issue as whether the class of persons subject to mandatory detention without bail includes includes those who were taken into custody "years or decades after their release from prison." Relying on the "ordinary meaning of the statute's language, the statute's structure, and relevant canons of interpretation," the dissent agreed with respondents. It remarked that the majority's interpretation "significantly expand[s] the Secretary's authority to deny bail hearings" by permiting the Government to subject aliens to detention without a bail hearing, even though the aliens "may have been released from criminal custody years earlier, and may have established families and put down roots in a community." "These aliens may then be detained for months, sometimes years, without the possibility of release; they may have been convicted of only minor crimes," such as illegally downloading music or possessing stolen bus transfers; "and they sometimes may be innocent spouses or children of a suspect person." "Moreover, for a high percentage of them, it will turn out after months of custody that they will not be removed from the country because they are eligible" for a form of relief.

The dissent contended that this is an illogical result that follows from a misreading of the statutory text and structure. Initially, the dissent explained that the term "describes" is broad and as a result encompasses all of §1226(c)(1), including the phrase "when the alien is released," even if the phrase does not modify the noun "alien." The dissent also argued that the overall statutory structure supports its interpretation: If Congress had intended to limit the cross-reference to paragraph (1) to exclude the "when . . . released" clause, it would have included a more specific citation to subparagraphs (A)–(D). Plus, the dissent asserted, §§1226(a) and (c) are parallel provisions in which each subsection's release rules apply only to individuals who are detained pursuant to that subsection's detention rules. Thus, only aliens who have been detained following subsection (c)'s "when . . . released" requirement fall within the mandatory detention provision in that subsection. Next, the dissent noted that Congress enacted a "transition" statute that allowed the Government to delay implementation of subsection (c) due to insufficient detention space and personnel, which would not have been needed if the Secretary could delay the arrest of aliens and still deny bail hearings. The

dissent also argued that the majority's interpretation "creates serious constitutional problems" in that it would allow for indefinite detention without a hearing, including of people who were never imprisoned for their crimes. Lastly, the dissent expressed its disagreement with the Ninth Circuit's definition of "when the alien is released," asserting that this clause does not require immediate detention. Instead, the dissent would hold that detention within six months is presumptively reasonable.

● *Air & Liquid Systems Corp. v. Devries,* 17-1104. In a 6-3 decision, the Court held that in the maritime tort context, a product manufacturer has a duty to warn when (1) its product requires incorporation of a part, (2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (3) the manufacturer has no reason to know that the product's users will realize that danger. Five manufacturers produced equipment for the U.S. Navy that could not function as intended without asbestos parts or insulation, which the manufacturers did not themselves incorporate into the equipment. Instead, the manufacturers delivered the equipment in "bare metal" condition; the Navy had to obtain and incorporate the necessary asbestos components before using the equipment. Two veterans were exposed to asbestos while serving on Navy ships using the manufacturers' equipment (which the Navy had fitted with the necessary asbestos components), developed cancer, and died. Their families sued the manufacturers, claiming that the manufacturers were negligent in failing to warn of the dangers of asbestos. Invoking federal maritime jurisdiction, the manufacturers removed the cases to federal court, where they moved for summary judgment, arguing that they could not be liable for harms caused by later-added third-party parts (the so-called "bare-metal defense"). The district court granted summary judgment, but the Third Circuit vacated and remanded, holding that a manufacturer could be held liable for injuries caused by later-added third-party parts if the manufacturer could foresee that its product would be used with such parts. In an opinion by Justice Kavanaugh, the Court affirmed.

The Court began by noting that in maritime cases it "act[s] as a common-law court." And so it started with the basic tort-law principle that a manufacturer owes a duty to warn when it knows or has reason to know that its product is or is likely to be dangerous for the use for which it is supplied. The Court then considered three approaches federal and state courts have taken regarding a manufacturer's duty to warn that its product, though not dangerous as delivered, cannot function as intended without the later incorporation of a dangerous part. Under the first approach, which the Third Circuit adopted, a manufacturer is liable for failing to warn if it is foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require incorporation of the other product or part. The Court rejected this approach as "sweep[ing] too broadly." Because a product could foreseeably be used with a variety of products in a variety of ways, "[r]equiring a product manufacturer to imagine and warn about all of those possible uses . . . would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users."

The Court also rejected the second approach—the bare-metal defense, under which a manufacturer would have no duty to warn of dangers arising from the necessary use of its product with a dangerous part—as going "too far in the other direction." The Court found "no persuasive reason" to distinguish for the purposes of the manufacturer's duty to warn between a product that the manufacturer knows or has reason to know is likely to be dangerous when used as intended and a product that requires the integration of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous when used as intended. The Court reasoned that a product

manufacturer "will often be in a better position than the parts manufacturer to warn of the danger from the integrated product," because the product manufacturer knows the nature of the final integrated product. The Court concluded that the best approach was a middle path, requiring a product manufacturer to warn when (1) its product requires the incorporation of a part, (2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended use, and (3) the manufacturer has no reason to believe that the product's users will realize that danger. The Court reasoned that this standard imposes a relatively light burden on product manufacturers, which are already obligated to warn of the dangers of their own products, and reflects maritime law's special and "longstanding solicitude for sailors."

Justice Gorsuch filed a dissenting opinion, which Justices Thomas and Alito joined. The dissent stated that the Court's standard lacks "meaningful roots in the common law" and will likely dilute the incentive of a parts manufacturer to warn of the dangers of its products by sharing that duty with other manufacturers of products with which its parts may be integrated. Further, "encouraging manufacturers to offer warnings about other people's products risks long, duplicative, fine print, and conflicting warnings that will leave consumers less sure about which to take seriously and more likely to disregard them all." In the end, the dissent preferred the bare-metal defense as the simpler standard to apply. That standard avoids expensive uncertainty under the Court's standard regarding when the use of two or more products in conjunction qualifies as "incorporation" of the products; when incorporation of a dangerous third-party component is "required," rather than merely optimal or preferred; and whether, "[i]f a defendant reasonably expects that the manufacturer of a third-party product will comply with its own duty to warn, is that sufficient 'reason to believe' that users will 'realize' the danger to absolve the defendant of responsibility."

II. Cases Granted Review

● *Kansas v. Garcia,* 17-834. At issue is whether the Immigration Reform and Control Act (IRCA) preempts state identity theft prosecutions that are based on information contained in certain employment forms required under federal immigration laws. IRCA makes it unlawful to knowingly employ an unauthorized alien. To enforce that ban, IRCA requires employees to submit a form—the federal I-9 form—attesting to their authorized status. 8 U.S.C. §1324a(b). They are also required to submit documents establishing their work authorization. Employers are required to verify those documents. Critically here, IRCA provides that the I-9 forms "and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and [certain federal crimes]." §1324a(b)(5). The question is whether this federal law expressly or impliedly preempts a state from using information on the I-9 form—including common information such as name, date of birth, and social security number—in a state-law identity theft prosecution.

Respondent Ramiro Garcia used another person's social security number when he obtained a job at Bonefish Grill in Overland Park, Kansas. A state financial-crimes detective discovered this by reviewing documents—including the I-9 form—he had submitted to the Bonefish Grill. The state charged Garcia with identity theft. Garcia argued that the prosecution had to be dismissed because §1324a(b)(5) bars use of the I-9 form and information contained in it for that purpose. Kansas agreed to not use the I-9 form, but used the federal and state tax forms with the same false social security

number. A jury found Garcia guilty of identity theft. Garcia appealed, arguing that IRCA preempts the use of any information contained on a federal I-9 form for any purpose not specified under IRCA, including information that appears on other documents. The Kansas Court of Appeals rejected that argument. The Kansas Supreme Court reversed. 401 P.3d 588. The court held that IRCA expressly preempts the identity theft prosecution: "Prosecution of Garcia—an alien who committed identity theft for the purpose of establishing work eligibility—is not among the purposes allowed in IRCA. Although the State did not rely on the I–9, it does not follow that the State's use of the Social Security card information was allowed by Congress." According to the court, §1324a(b)(5) "prohibit[s] state law enforcement use not only of the I-9 itself but also" of "*any information contained* in the I-9."

In its petition, Kansas argues that IRCA's prohibition on using information from an I-9 form does not mean that information from other documents cannot be independently used merely because the information also appears on an I-9. Kansas notes that the state court's reading of IRCA would bar the state "from prosecuting even citizens and lawful aliens if such persons include any information necessary to the state prosecution—such as false name, false date of birth, false telephone number, false social security number—on a Form I-9 or in appended documents when they apply for employment. The irony of such a result is that the State would not even arguably be interfering with federal immigration law prerogatives when prosecuting citizens or authorized aliens." The United States, in its amicus brief filed at the invitation of the Court, suggested that the Court also address whether IRCA impliedly preempts the state's prosecution. Garcia made that argument to the Kansas courts and its brief in opposition, and other courts have adopted the argument. The Court agreed and added that question when it granted certiorari. In Garcia's view, Congress has occupied the field of the "use of false documents . . . when an unauthorized alien seeks employment"; and state prosecutions for use of false documents conflict with the federal government's discretionary power to bring such prosecutions against unauthorized aliens. The United States counters that "Kansas's identity-theft laws do not regulate the unauthorized employment of aliens" and therefore neither intrude on a federally governed field or "usurp[] federal enforcement discretion."

● *Mathena v. Malvo,* 18-217. At issue is the scope of *Miller v. Alabama*, 567 U.S. 460 (2012), which "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" because a sentencer cannot determine whether life without parole is an appropriate sentence without considering the juvenile offender's youth and its attendant circumstances. *Miller* declined to reach petitioner's argument that the Eighth Amendment categorically prohibits life sentences for juvenile offenders, explaining that it "d[id] not categorically bar a penalty for a class of offenders or type of crime" but instead "mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty." Four years later, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), addressed whether *Miller*'s holding is retroactive. *Montgomery* held that *Miller* is retroactive because "*Miller* announced a substantive rule of constitutional law," namely, that "life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." Thus, said *Montgomery*, *Miller* made "life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." The Court here will resolve whether *Montgomery* should be "interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?"

Respondent Lee Boyd Malvo was one of the two D.C. snipers, who murdered 10 people and wounded many more during a string of random shootings. Malvo was convicted of three murders and an attempted murder that he committed as a juvenile and sentenced to four terms of life imprisonment without parole. After *Montgomery* held that *Miller* applied retroactively, the Fourth Circuit (on habeas review) remanded the case back to the district court. On remand, Virginia argued that *Montgomery* did not change the outcome because Virginia does not impose mandatory life-without-parole sentences like those prohibited by *Miller*. The district court disagreed, holding that *Montgomery* imposed an affirmative duty on courts to determine whether any juvenile may be sentenced to life without parole. The Fourth Circuit affirmed. 893 F.3d 265. It held that *Montgomery* "confirmed that . . . a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'"

Virginia argues that, properly read, *Montgomery* held only that the particular rule announced in *Miller*—that the Eighth Amendment prohibits mandatory life-without-parole sentences for juvenile offenders—is retroactive. It argues that although *Montgomery* included a lengthy discussion of the bases and justifications for *Miller*'s holding, it did not purport to expand *Miller*'s rule from a prohibition against mandatory life-without-parole sentences to a prohibition that includes discretionary life-without-parole sentences. Further, reading *Montgomery* as expanding *Miller*'s rule and holding that newly expanded rule to be retroactive is incompatible with the rules governing retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989). According to the state, "The Fourth Circuit's fundamental error was in viewing a decision that explained *why* the new rule of constitutional law announced in a previous decision was retroactive to cases on collateral review—a rule that was, by its terms, limited to "*mandatory* life without parole" sentences, *Miller*, 567 U.S. at 465 (emphasis added)—as *expanding* the category of punishments prohibited by the Eighth Amendment to include *discretionary* life-without-parole sentences as well."

● *Kahler v. Kansas,* 18-6135. The Court will resolve whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense and allow a defendant to use a mental disease or defect only to show that he lacked a crime's *mens rea*. Under the test known as the *M'Naghten* rule, a defendant is not criminally responsible where he or she does not know the nature and quality of his act, or does not know right from wrong with respect to that act. Kansas has adopted a different statutory definition of insanity, where mental disease or defect "is a defense to a prosecution under any statute" only insofar as it shows "that the defendant . . . lacked the mental state required as an element of the offense charged." Kan. Stat. Ann. §22–3220. Sometimes referred to as the "*mens rea* approach," this definition does not allow a defendant so show lack of ability to know right from wrong or the nature and quality of his actions. Kansas is one of five states that do not follow the *M'Naghten* rule for insanity defenses.

Petitioner James Kahler was convicted of capital murder and sentenced to death for killing four members of his family. At trial, he did not deny shooting the four victims but defended on multiple other grounds including that he was aware he was shooting human beings but his mental state was so disturbed at the time that he was unable to control his actions. He attempted to show that severe depression made him unable to make rational choices related to the murders. Under Kansas' *mens rea* approach, his mental state was relevant only with regard to whether he had the requisite intent

to commit murder. Kahler appealed to the Kansas Supreme Court, arguing that the Kansas *mens rea* approach violates the Due Process Clause because it offends a fundamental principle of justice. The Kansas Supreme Court upheld the conviction. 410 P.3d 105.

In his petition, Kahler argues that punishing a person who did not understand that his or her actions were wrong violates fundamental due process and the Eighth Amendment. He asserts that a defendant's knowledge of right and wrong is fundamental to our legal system: "In short, under both the Eighth and Fourteenth Amendments, and as a matter of both ancient historical practice and modern consensus, the affirmative insanity defense—and especially the requirement that the defendant know right from wrong—is fundamental to our law." He adds that "none of the four traditional penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, or rehabilitation, see *Graham v. Florida*, 560 U.S. 48, 71 (2010)—justify convicting people who cannot distinguish right from wrong." Kansas responds that the Court has already held that the parameters of the insanity defense are substantially open to state choice. See *Clark v. Arizona* 548 U.S. 735 (2006). And it maintains (quoting *Clark*) that "'[e]ven a cursory examination' of historical practice shows that no particular formulation of the insanity rule enjoys widespread use or acceptance."

● *Ramos v. Louisiana*, 18-5924. The Court will consider whether the Sixth Amendment contains a right to a unanimous jury verdict in a criminal prosecution that is incorporated by the Fourteenth Amendment to apply to the states. Evangelisto Ramos was convicted of second-degree murder by a 10-to-2 jury verdict. At the time of his trial, Louisiana permitted criminal verdicts by 10 of 12 jurors, La. Const., art. I, §17(A); La. C. Cr. P., art. 782(A), although Louisiana has since amended its constitution to require unanimous verdicts. 2018 La. Reg. Sess., Act 722. Oregon is the sole remaining state that permits non-unanimous verdicts in criminal trials. The Louisiana Court of Appeal rejected Ramos's constitutional challenge to Louisiana's law allowing non-unanimous verdicts, finding itself bound by *Apodaca v. Oregon*, 406 U.S. 404 (1972). The Louisiana Supreme Court denied review.

In *Apodaca v. Oregon* the Court held in a divided opinion that the right to a unanimous jury is not incorporated. A four-Justice plurality concluded that the Sixth Amendment does not provide a right to a unanimous jury; and four Justices concluded that the Sixth Amendment provides that right and is incorporated against the states through the Fourteenth Amendment. Justice Powell's controlling concurring opinion concluded that the Sixth Amendment creates a right to a unanimous jury but the right is not incorporated by the Fourteenth Amendment. Ramos asks the Court to reconsider its holding in *Apodaca*. He first maintains that "[t]he historical record is clear that unanimity was an essential component of what was conceived of when the Constitution referred to juries." He points out that even *Apodaca*'s four-Justice plurality agreed with that; it concluded that the Sixth Amendment does not require unanimity based only on "the function served by the jury in contemporary society." Ramos insists that the "Court has subsequently broadly rejected the idea that the Sixth Amendment derives its meaning from functional assessments, and has strictly adhered to historical origins of the amendment." Beyond that, he argues that Justice Powell's decisive concurring opinion applied a partial incorporation theory that the Court has since repudiated. Finally, Ramos describes the historical origins of Louisiana's non-unanimous jury rule as an attempt to exclude African-Americans from the political process and to "establish the supremacy of the white race." Given the purpose of the Fourteenth Amendment in combatting racist laws, he explains, the argument for incorporation is particularly compelling in these circumstances.

Louisiana responds that *stare decisis* supports continuing to apply *Apodaca's* limited incorporation of the Sixth Amendment. Louisiana also disputes Ramos's contention that the Founders intended the Sixth Amendment's jury right to include a guarantee of unanimity. It notes that "the text of the Sixth Amendment does not reference a unanimity requirement." And (quoting the *Apodaco* plurality) "the relevant constitutional history casts considerable doubt on the easy assumption that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." Louisiana adds that a unanimous jury is not a fundamental right of trial procedure because it is not needed to ensure liberty or justice and it is not a right in many other countries. Lastly, Louisiana argues that the evidence of racist motives in amending its constitution is not specific to the amendment allowing non-unanimous juries, and that it amended the provision in 1974 (from a 9-3 jury requirement to a 10-2 requirement): a reaffirmance of the non-unanimous jury rule that lacked racial animus.

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