



## **Review of the Supreme Court’s 2019-2020 Immigration Cases**

### ***I. Introduction***

Over its 2019-20 term, the U.S. Supreme Court considered a wide range of immigration issues and handed out decisions with mixed results. The most anticipated case of the term, *Department of Homeland Security v. Regents of the University of California*, which concerned the Trump administration’s attempted rescission of Deferred Action for Childhood Arrivals (DACA), ended with a favorable outcome for immigrants. However, in *Kansas v. Garcia*, the Court issued a ruling with negative implications for immigrant communities, affording states new authority to use state laws to prosecute immigrants for supplying false hiring paperwork – an area that historically has been the federal government’s responsibility.

The Court also clarified the parameters of judicial review in several contexts, reaffirming the jurisdiction of federal courts to review how immigration courts apply the law to fact-specific situations in *Guerrero-Lasprilla v. Barr* and to review applications by immigrants for protection under the United Nations Convention Against Torture in *Nasrallah v. Barr*. However, the Court limited review over administrative determinations in the credible fear process in *Department of Homeland Security v. Thuraissigiam* – giving the government almost unfettered discretion over asylum claims made by immigrants in expedited removal proceedings. The Court also clarified the intersection of criminal and immigration law in *Shular v. United States* and *Barton v. Barr*, issuing rulings making legally present immigrants more likely to be deemed deportable.

Below, these and other immigration cases considered by the Court during the 2019-20 term are reviewed at length.

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### **III. Case Summaries**

#### A. High-Profile Victories for Immigrants and Advocates

*In two closely watched cases, the Supreme Court preserved important substantive protections for immigrants. Basing its decisions largely on procedural grounds, the Court allowed DACA to survive and declined to criminalize certain types of immigration advocacy as “inducing” unlawful immigration.*

1. [\*Department of Homeland Security v. Regents of the University of California\*](#), 140 S. Ct. 1891 (2020).

**Takeaway:** The Supreme Court allowed Deferred Action for Childhood Arrivals (DACA) to survive, holding that the Trump administration’s 2017 attempted rescission of the program was invalid. While the decision was a win for Dreamers, allowing them to enjoy continued protections for the immediate future, the Court made clear that the administration could attempt to end DACA again, provided it offered a sufficient rationale.

**Discussion:** This widely anticipated case examined whether the Trump administration’s attempted rescission of DACA in 2017 was valid. Determining that the rescission violated the Administrative Procedure Act by arbitrarily and capriciously failing to provide a reasoned explanation, the Court allowed the policy to survive.

DACA, instituted in 2012, defers the removal of certain unauthorized immigrants who were brought to the United States as children. It also provides work authorization to DACA recipients, which in turn makes these recipients eligible for some Social Security and Medicaid benefits. In 2017, DHS announced it was rescinding DACA under the rationale that it was unlawful. DHS argued that DACA conferred benefits like work authorization, which meant it faced the same legal deficiencies as a similar program that was halted by the courts in 2016.

The Supreme Court, in a 5-4 decision authored by Chief Justice Roberts, held that the 2017 rescission was arbitrary and capricious. The majority noted that DACA contained two core components: deferral of removal and conferral of benefits. While DHS may have believed that DACA’s conferral of benefits was illegal, it did not adequately explain why this would mean that deferral of removal was illegal or why deferral of removal could not be continued separately from the conferral of benefits. Additionally, it faulted DHS for ignoring the many reliance interests of Dreamers, their families, their employers, and the broader community by what was certain to be a disruptive policy change.

The decision allows DACA to survive, while making clear that the Trump administration retains the authority to end it in the future if it uses proper procedures and is able to provide a well-reasoned explanation for its actions.

In dissent, Justice Thomas, joined by Justices Alito and Gorsuch, argued that DACA was illegal in its entirety, and therefore the agency did not need to “jump through administrative hoops” to rescind it. Dissenting separately, Justice Kavanaugh largely agreed with the majority opinion’s analysis, but argued that the Court should have considered certain subsequent explanations for the rescission offered by DHS, which attempted to correct the rescission’s administrative deficiencies.

2. [United States v. Sineneng-Smith](#), 140 S. Ct. 1575 (2020).

Takeaway: This First Amendment case had potential to settle an important immigration question: whether immigration advocates and others who provide assistance to migrants and potentially undocumented immigrants can be charged with a crime for “encouraging unlawful immigration.” Rather than settling this issue, the Supreme Court dodged it by deciding that the appellate court had committed an error by even considering the question.

Discussion: Sineneng-Smith, an immigration consultant in San Jose, CA, routinely charged substantial fees and filed petitions and applications for aspiring immigrants under an expired immigration program. She knew her clients were statutorily barred from receiving work authorization under this inactive program but continued to solicit business and file applications citing it. Sineneng-Smith was convicted of multiple federal felonies including a charge with significant immigration implications – “inducing or encouraging” unlawful immigration under 8 U. S. C. §1324(a)(1)(A)(iv). The U.S. Court of Appeals for the Ninth Circuit, when reviewing these convictions, decided to invite third parties to file briefs on issues framed by the judicial panel, including a question never raised by Sineneng-Smith or the federal government: whether the immigration statute used to convict her was overbroad under the First Amendment. The Ninth Circuit then ruled that the statute was overbroad.

If the court upheld the conviction for “encourag[ing]” or “induc[ing]” unlawful immigration, the decision would have had far-reaching effects, potentially criminalizing common and legitimate activities and programs aimed at protecting undocumented immigrants. Rather than addressing that issue, the Supreme Court punted. The Court held that the Ninth Circuit panel did not have standing to consider the overbreadth issue because it was not part of the original dispute and was not an adversarial adjudication – the Ninth Circuit improperly raised the issue on its own after oral arguments. The Court held unanimously that the Ninth Circuit’s “drastic departure from the principle of party presentation [of the issues] constituted an abuse of discretion.” The Court remanded the case and declined to weigh in on the merits.

B. [Noteworthy Decisions Posing Threats to Immigrants](#)

*While this Supreme Court term included important substantive victories for immigrants, two 5-4 decisions authored by Justice Alito pose significant threats to non-citizens. In [Hernandez v. Mesa](#), the majority placed severe limitations on the constitutional rights of foreigners, providing a Mexican family with no ability to seek damages from the U.S. government after their son was killed by a Border Patrol officer in a cross-border shooting. In [Kansas v. Garcia](#), the majority upheld a state’s ability to crack down on unauthorized immigrants who have used false documents, a departure from the federal government’s traditional role as the level*

*of government carrying out immigration enforcement. Both decisions are likely to curtail the rights of immigrants and foreigners.*

3. [\*Hernandez v. Mesa\*](#), 140 S. Ct. 735 (2020).

Takeaway: In a case closely followed by advocates to determine whether federal personnel could be held accountable for misconduct, the Supreme Court held that there was no remedy available to non-U.S. persons located outside the United States. Ruling in a case involving a foreign person on Mexican soil who was shot and killed by Border Patrol personnel standing on U.S. soil, the Court determined that the U.S. Constitution has limited applicability to foreigners located across the border. In cases of cross-border excessive force by federal officers, international victims and their relatives located outside the United States cannot bring suit seeking monetary damages from U.S. officials.

Discussion: This case concerned the shooting of a fifteen-year-old Mexican teenager, Hernandez, by a U.S. Border Patrol agent along the U.S.-Mexico border. The Border Patrol agent was standing on U.S. land while Hernandez was located on Mexican soil after unlawfully crossing into the U.S. and crossing back. Hernandez's family brought a Fourth Amendment claim for monetary damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* established that damages can be an appropriate remedy for certain constitutional violations, although subsequent decisions have declined to expand it beyond a handful of narrow circumstances.

Here, in a 5-4 opinion written by Justice Alito, the Court refused to apply *Bivens* to permit damages in a case involving cross-border shootings. The Court argued that establishing remedies in this novel context, which involves national security and foreign relations factors, is best suited for the political branches. Further, the Court emphasized that Congress previously declined to extend remedies to international claims when it enacted statutes creating tort remedies for injuries caused by state and federal actors. Accordingly, Hernandez's family and other international claimants will be unable to bring *Bivens* claims when injured or killed by federal agents or officers.

Justice Ginsburg's dissent argued that Hernandez's family should be able to bring a *Bivens* claim against the Border Patrol officer. The dissent noted that *Bivens* claims are intended to redress misconduct by federal actors and argued that Hernandez's physical location at the time of the shooting was immaterial. The dissent disagreed that permitting damages under *Bivens* would implicate national security and foreign relations concerns and noted that the majority opinion could harm U.S.-Mexico relations. Justice Ginsburg concluded by noting that cross-border incidents are common and that the majority's opinion leaves victimized non-U.S. persons no redress for injuries caused by U.S. officials.

4. [\*Kansas v. Garcia\*](#), 140 S. Ct. 791 (2020).

Takeaway: In this case, the Supreme Court allowed states to prosecute individuals for identity theft when they have used fraudulent Social Security Numbers (SSNs) or other false documentation on tax-withholding forms. Because many unauthorized immigrants use false documentation for initial hiring paperwork, *Garcia* threatens to upend federal leadership over immigration policy. In permitting Kansas to prosecute immigration-

related offenses under state law, the majority paves the way for other states to follow Kansas's lead and prosecute unauthorized workers on state criminal charges.

Discussion: This case examined whether a Kansas law criminalizing the use of false Social Security Numbers (SSNs) on state and federal tax withholding forms was preempted by the Immigration Reform and Control Act (IRCA) of 1986. IRCA created the employment authorization process, which requires that employers have new employees fill out an I-9 form and provide proof that they are authorized to work in the United States. Under IRCA, information from the I-9 form can only be used for specific, enumerated federal law enforcement purposes. In this case, Kansas brought state identity-theft and fraud charges against noncitizens for providing false information on tax withholding forms that require the same information as I-9 forms.

The defendants argued that IRCA barred enforcement under the Kansas law because the required information and documentation required in the state tax withholding forms was the same information required for I-9 forms. Accordingly, they argued, this information could only be used for federal law enforcement purposes. The defendants further argued that federal immigration law sets forth a comprehensive scheme which requires that enforcement against employment of unauthorized workers be carried out only by federal authorities.

In a 5-4 opinion authored by Justice Alito, the Court rejected these arguments, holding that IRCA does not prevent the state from using this type of information for identity theft prosecutions when obtained via alternative means. The majority held that IRCA does not bar states from requiring employees to provide SSNs for tax withholding forms or from prosecuting employees who provide false SSNs. The majority also contended that the Kansas statute complements federal immigration enforcement purposes and that there is no tension between the federal immigration system and these types of state criminal prosecutions.

Justice Breyer authored a dissent arguing that the Kansas statute was invalid because it encroaches on IRCA's comprehensive scheme combatting the employment of unauthorized workers. By seeking to prosecute workers for misrepresenting their federal work authorization on tax forms, Kansas's criminal statute impermissibly entered the "narrow field of policing fraud committed to demonstrate federal work authorization." The dissent expressed concern that the majority's decision opens "a colossal loophole," allowing states to police the federal work authorization status of immigrants under the pretense of policing the veracity of these immigrant's tax withholding forms.

### C. Cases Involving Reviewability of Immigration-Related Decisions

*In this series of cases, the Supreme Court clarified the availability of judicial review in the immigration context, limiting federal courts' ability to review administrative decisions under expedited removal, while reaffirming courts' jurisdiction over questions of law in removal cases. The Court also reaffirmed its jurisdiction to review applications for withholding or deferral of removal under the United Nations Convention Against Torture.*

5. *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020).



Takeaway: Federal courts generally cannot review credible fear determinations for asylum seekers in an expedited removal context. This decision limits the due process protections available to asylum seekers, giving front-line immigration officers the final say in deciding whether an asylum-seeker has a credible fear of persecution and is eligible to apply for asylum.

Discussion: This case examined the constitutional rights of detained immigrants to seek judicial review of their cases. Thuraissigiam, a Sri Lankan citizen, was detained after progressing 25 yards into the United States while crossing the southern border. He was placed in expedited removal proceedings, received a credible fear interview, and was unable to establish a credible fear of persecution. Subsequently, he filed a *habeas corpus* petition asserting new reasons establishing his fear of persecution and requesting an opportunity to apply for asylum. *Habeas corpus*, the judicial tool through which wrongfully imprisoned persons can obtain release, is protected under Article I, Sec. IX of the U.S. Constitution, commonly known as the “Suspension Clause.” The district court dismissed his petition for lack of jurisdiction, citing 8 U.S.C. § 1252(e)(2), which limits the scope of *habeas corpus* review for detained immigrants. However, the Ninth Circuit reversed, finding that § 1252(e)(2) violates the Suspension Clause by preventing detained migrants from seeking release under *habeas corpus*.

The Supreme Court, in a 7-2 decision authored by Justice Alito, determined that the statute does not violate the Suspension Clause because it does not interfere with the historical institution of *habeas corpus*. Because § 1252(e)(2) prevents courts from reviewing *habeas* challenges of credible fear determinations, rather than challenges to a person’s actual detention, the Court reasoned that this limitation does not run afoul of the Suspension Clause. Further, the majority stated that § 1252(e)(2) limitations on judicial review do not violate constitutional due process protections because people seeking entry at the border only enjoy statutory rights, not constitutional rights. The Court held that Thuraissigiam’s brief presence in U.S. territory did not constitute an “entry” implicating broader constitutional rights.

Justice Sotomayor’s dissent contended that the majority’s decision effectively grants DHS unreviewable authority to make asylum determinations for anyone undergoing expedited removal proceedings.

6. [\*Guerrero-Lasprilla v. Barr\*](#), 140 S. Ct. 1062 (2020).

Takeaway: In this case, the Supreme Court decided that federal law does not foreclose judicial review for immigrants who claim that the government incorrectly applied the law to the facts of their case. This decision will protect immigrants’ right to due process by allowing judicial oversight of a wider range of removal cases.

Discussion: The main issue in this case then is whether 8 U.S.C. § 1252(a)(2)(D), which gives federal circuit courts the authority to review “constitutional claims or questions of law” in removal cases, grants jurisdiction to consider situations in which there is an application of a legal standard to undisputed facts.

Guerrero-Lasprilla is an immigrant who belatedly filed a motion to reopen his removal case with the Board of Immigration Appeals (BIA) and requested that BIA permit the late motion. The BIA refused to accept his motion, saying that he did not exercise due

diligence by attempting to file it as soon as possible. Guerrero-Lasprilla petitioned the U.S. Court of Appeals for the Fifth Circuit to review whether the BIA had properly applied the law in this area to the undisputed facts in his case. The Fifth Circuit denied his petition, stating that it lacked jurisdiction to consider *factual* due diligence questions.

The Court, in a 7-2 opinion authored by Justice Breyer, held that the Immigration and Nationality Act (INA) allows federal circuit courts the jurisdiction to consider whether the law was properly applied to undisputed or settled facts. The majority notes that nothing in the statute's language precludes review of these questions. Further, judicial review of such questions is supported by a) a strong presumption of judicial review of agency actions, b) statutory language elsewhere in the INA indicating that review of "questions of law" includes review of the application of law, and c) legislative history for this particular section demonstrating congressional intent to provide for judicial review of law to undisputed facts.

Justice Thomas's dissent, joined by Justice Alito, argued that because the INA expressly prohibits judicial review of "questions of fact" concerning removal cases, this decision will muddy the distinction between questions of law and fact and ultimately this exception will "swallow the rule."

7. [\*Nasrallah v. Barr\*](#), 140 S. Ct. 1683 (2020).

**Takeaway:** The Supreme Court established that federal courts have jurisdiction to review whether the government was justified in denying an immigrant's application for protection under the United Nations Convention Against Torture (CAT). The decision reinforces due process protections for deportable persons who fear persecution if they are sent back to their home countries.

**Discussion:** This case examined whether federal courts have jurisdiction to review applications for protection under the CAT when the applicant has committed an offense precluded from judicial review under 8 U.S.C. § 1252(a)(2)(C). That section limits judicial review of an order of removal of a criminal alien – only permitting review of constitutional questions and questions of law. In this case, Nasrallah was convicted of a crime involving moral turpitude, bringing him under § 1252(a)(2)(C).

In a 7-2 decision authored by Justice Kavanaugh, the Supreme Court held that Nasrallah could obtain judicial review of his CAT application. The Court made a distinction between an order of removal – a judgment to deport an alien – and a CAT application for withholding or deferral of removal. The Court reasoned that if a CAT applicant is granted relief from removal, this does not affect the validity of an underlying order of removal and the CAT relief remains distinct from the order of removal. Accordingly, notwithstanding § 1252(a)(2)(C), federal courts have jurisdiction to review whether there is substantial evidence supporting the denial of a CAT application.

Justice Thomas authored a dissent, in which he argued that the Court's conclusion contradicted a federal statutory provision limiting judicial review and warned that the majority's decision will lead to increased judicial review of many other forms of relief, contrary to congressional intent.

#### D. Cases Involving the Intersection of Criminal Law and Immigration

*Touching on the intersection of criminal and immigration law, these two cases adopt an expansive interpretation of the “stop-time rule” (in the cancellation of removal context) and of “serious drug offense.” Both decisions have the effect of making legally present immigrants more likely to be deportable.*

##### 8. [\*Shular v. United States\*](#), 140 S. Ct. 779 (2020).

**Takeaway:** This case dealing with the complex question of what constitutes a “serious drug offense” under federal criminal law could make it easier for the government to remove lawfully present immigrants who have been convicted of state-level drug crimes. The decision enables specific state-level drug convictions to qualify as federal-level narcotics violations, which can be a basis for deportation.

**Discussion:** This case sets forth how courts should interpret the Armed Career Criminals Act’s (ACCA) definition of “serious drug offense,” which has implications at the intersection of criminal law and immigration law. The ACCA creates a minimum sentence of 15 years of imprisonment for any defendant with three prior serious drug offenses who is convicted of being a felon in possession of a firearm. The ACCA defines a “serious drug offense” as one “involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.”

The main issue in this case was how courts should decide whether a state-specific drug conviction qualifies as a serious drug offense. In a unanimous opinion authored by Justice Ginsberg, the Court held that the ACCA’s definition of a serious drug offense requires that a matching state drug conviction must involve the general conduct specified in the ACCA, rather than a more restrictive test requiring the state conviction to specifically match certain generic offenses. Because designation of a drug-related conviction as a “serious drug offense” can make a person deportable or inadmissible, this has significant implications under immigration law.

##### 9. [\*Barton v. Barr\*](#), 140 S. Ct 1442 (2020).

**Takeaway:** Cancellation of removal is a type of relief that many lawful permanent residents (LPRs) rely on if the government tries to deport them. This decision may make LPRs ineligible for cancellation of removal if they previously committed a crime within their first seven years residing in the U.S., even if the government waits years to initiate removal proceedings against them or if that offense is not related to the rationale for the deportation. This ruling will make it easier for the government to deport LPRs with criminal records.

**Discussion:** The Court considered whether an offense disqualifying an LPR from being statutorily eligible for cancellation of removal must also be one of the offenses for which the LPR is being removed. The defendant, Barton, was admitted to the United States as an LPR when he was a child. He was convicted of aggravated assault in 1996, as a teenager, within seven years of admission to the U.S. Separately, he was convicted of several drug crimes in the early 2000s. DHS initiated removal proceedings against Barton in 2016, citing the drug convictions. In response, Barton sought cancellation of removal.



To be eligible for cancellation of removal, an LPR must have continuously resided in the United States for seven years after being admitted in any status. However, a separate provision of the applicable statute, referred to as the “stop-time rule,” states that the seven year “clock” stops when someone commits a criminal offense which could be a ground of inadmissibility. Under federal law, Barton’s assault conviction qualified as grounds for inadmissibility, while his drug convictions did not. The drug convictions only qualified as potential grounds for deportation.

The government argued that Barton was ineligible for cancellation of removal because his 1996 aggravated assault conviction activated the “stop-time rule,” preventing him from accruing the required seven years of continuous presence. Barton argued that his assault conviction was irrelevant because he was being deported on separate grounds, and that only offenses for which the LPR is being removed can stop the accrual of continuous presence.

The Court, in a 5-4 opinion authored by Justice Kavanaugh, held that a criminal ground of inadmissibility stopping the accrual of continuous presence necessary for cancellation need not be one of the grounds of removal. Because Barton committed a disqualifying offense in his first seven years of residence, his accrual of continuous presence stopped, and he became ineligible for cancellation of removal. The majority also stated that the INA treats inadmissibility as a “status” which can result from commission of certain offenses, regardless of whether a person was deemed admissible and lawfully admitted prior to the receipt of this status.

Justice Sotomayor authored the dissent, in which she argued that the Court’s decision stems from an improper conflation of inadmissibility with deportability, and that the Court’s understanding of inadmissibility as a “status” is incorrect.