



SCOTUS 2019 Term Preview

From its inception, the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) has served on the front lines of civil rights litigation efforts. Only the government has litigated more civil rights cases before the Supreme Court. Our goal is to keep our supporters abreast of key developments in civil rights jurisprudence by providing substantive, yet concise, overviews of the noteworthy cases before the Court. Of the many cases the Court will hear this term, we have highlighted five that present issues related to civil rights. These cases are *Ramos v. Louisiana*; *Bostock v. Clayton County, Georgia & Altitude Express, Inc. v. Zarda*; *Mathena v. Malvo*; *Department of Homeland Security v. Regents of the University of California et al.*; and *Comcast Corp. v. National Association of African American-Owned Media*.

In each case snapshot, we provide the question presented, the background of the case, the key legal issues, the case’s importance to civil rights, and a description of LDF’s amicus brief, if applicable. We hope this summary will be easy to digest and will underscore the importance of the U.S. Supreme Court (and other courts) to our lives and the future of our democracy.

Ramos v. Louisiana
Argument Date: October 7, 2019

Question Presented: The first ten Amendments to the Constitution, also known as the Bill of Rights, are directly applicable to actions by the federal government. Most of the Bill of Rights has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which requires due process in action by states, such as criminal trials. The legal theory of applying provisions of the Bill of Rights to the states through the Fourteenth Amendment is referred to as “incorporation.”

The question in this case is whether the Sixth Amendment’s requirement of a unanimous jury verdict to convict a person of a crime applies to the states through the Fourteenth Amendment.

Background:

After the Civil War, Congress passed the Fourteenth Amendment and the Civil Rights Act of 1875 to protect the rights of newly freed African Americans. One of the most important rights protected by these provisions was the right to serve on a jury.¹ Theoretically, this right would help to underscore the citizenship of African Americans and mitigate racial discrimination in jury selection. Because of its long understood significance,² the right to a jury trial was explicitly protected by state constitutions in 36 out of the 37 states in 1868, the year that the Fourteenth Amendment was ratified.³ There is evidence from the period following the ratification of the Fourteenth Amendment that the Sixth Amendment’s unanimity requirement was always intended to be incorporated against the states.⁴ In fact, throughout the 18th century, the right to a unanimous jury was the accepted rule in the United States.⁵

Despite this history, in 1898, White Louisianans convened a constitutional convention and ratified a non-unanimous jury provision. There is overwhelming evidence that Louisiana’s non-unanimous jury provision was enacted with discriminatory intent and was designed to facilitate White jurors being able to convict Black defendants over the dissent of Black jurors.⁶ Non-unanimous juries effectively exclude the Black jurors who sit on them, as their voices—which are much more likely to be dissenting than White jurors—are diluted on majority-White juries.⁷ The effective exclusion of the votes of Black jurors when non-unanimous juries are allowed to convict persons of a crime not only denies a core right of citizenship to jurors whose votes are ignored, but also impairs fair access to justice to both defendants and victims.⁸ In 2018, Louisianans voted to remove the non-unanimous jury provision from their constitution.⁹ The constitutional amendment does not, however, provide retroactive relief for those convicted under the discriminatory non-unanimous jury system created by the state in 1898.¹⁰

In 2016, Evangelisto Ramos was convicted of second-degree murder in Louisiana by ten members of a twelve-person jury.¹¹ In his appeal, which took place prior to the 2018 constitutional amendment, Mr. Ramos contended that the trial court erred in denying his motion to require a unanimous jury verdict.¹² In affirming Mr. Ramos's conviction, the Louisiana appellate court relied on the Supreme Court's decision in [Apodaca v. Oregon](#), in which the Supreme Court refused to incorporate the Sixth Amendment's unanimity requirement in claims against the states and held that non-unanimous state jury verdicts are constitutional.¹³

Key Issues: Mr. Ramos's case relates to two decisions from Supreme Court's October Term 2018: (1) [Flowers v. Mississippi](#), concerning racial discrimination in jury selection; and (2) [Timbs v. Indiana](#), which applied the Eighth Amendment's prohibition on excessive fines to the states through the Fourteenth Amendment. This case presents an opportunity for the Court to revisit its decision in *Apodaca* where it did not grapple with the racist history of Louisiana's non-unanimous jury provision. Last term in *Timbs*, however, the Court held that courts must reckon with the historical context of the Fourteenth Amendment when deciding incorporation questions.¹⁴

Importance as a Matter of Civil Rights: The Sixth Amendment's right to a unanimous jury verdict to convict should apply to the states. LDF filed an [amicus brief](#) in this case, arguing that: (1) the history and purpose of the Fourteenth Amendment compel the incorporation of the Sixth Amendment right to a unanimous jury trial; (2) as reflected in the official record from Louisiana's Constitutional Convention in 1898, Louisiana's non-unanimous jury provision was designed to nullify Black jury service; and (3) the discriminatory design of Louisiana's non-unanimous jury provision persisted as intended by the drafters of the provision. Our brief also amplifies the voices of two Black Louisianans who recently served as jurors, illustrating the point that Louisiana's non-unanimous jury provision continues to give White jurors enhanced power while disempowering Black jurors.

Bostock v. Clayton County, Georgia & Altitude Express, Inc. v. Zarda
Argument Date: October 8, 2019

Question Presented: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (“Title VII”).

Background: These two consolidated cases concern the same issue. Donald Zarda (deceased) was a skydiving instructor who claimed he was fired due in part to his sexual orientation. Mr. Bostock was a child welfare services coordinator who claims he was fired due to his sexual orientation. During the peak of the Civil Rights Movement, Congress passed Title VII to outlaw employment discrimination.¹⁵ The statute explicitly prohibits employers from discriminating against workers on the basis of race, color, religion, sex, or national origin.¹⁶ It applies to private and governmental employers.¹⁷

In 2010, Mr. Zarda, a gay man, worked as a sky-diving instructor, and his job at times entailed participating in tandem skydives with clients.¹⁸ When participating in such skydives, clients were often strapped chest-to-back and pelvis-to-pelvis with their instructor.¹⁹ Mr. Zarda often informed female clients of his sexual orientation to assuage any potential discomfort the client may have had regarding their bodies’ close proximity.²⁰ After informing one female client of his sexual orientation, and then performing a tandem jump with her, the female client accused Mr. Zarda of inappropriately touching her.²¹ In response, Mr. Zarda’s supervisor fired him.²² The supervisor also told the New York Department of Labor that Mr. Zarda was fired “for shar[ing] inappropriate information with [customers] regarding his personal life.”²³ Mr. Zarda filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC), claiming that he was fired because he disclosed his sexual orientation and refused to conform to a “straight male macho stereotype.”²⁴ He then filed litigation in federal court alleging, among other things, that Altitude Express violated Title VII by terminating him because of his sexual orientation.²⁵ Mr. Zarda lost at the district court level, but asked the court to reinstate his case after the EEOC determined in another [matter](#) that sex discrimination includes sexual orientation discrimination.²⁶ The court declined to do so.²⁷ However, the full en banc Second Circuit Court of Appeals found in Mr. Zarda’s favor, holding that sexual orientation discrimination is sex discrimination under Title VII.²⁸

Gerald Bostock is a gay man. He was previously employed as a child welfare services coordinator for the Juvenile Court of Clayton County, Georgia.²⁹ Throughout his ten-year career working for Clayton County, Mr. Bostock received numerous favorable evaluations of his work and several awards.³⁰ He was ultimately given responsibility over the Clayton County Court Appointed Special Advocates (CASA) program, whose volunteers “advocate for the best interests of the child” during juvenile court dependency proceedings.³¹ In 2013, Mr. Bostock joined a gay recreational softball

league and spread awareness among league members of volunteer opportunities through the CASA program.³² Mr. Bostock's sexual orientation and his participation in the gay softball league were openly criticized by an individual of considerable status in the Clayton County court system.³³ At least one of Mr. Bostock's colleagues made demeaning remarks about his sexual orientation and his participation in the league at a meeting attended by Mr. Bostock's supervisor.³⁴ Soon thereafter, Clayton County fired Mr. Bostock, stating that the basis for his firing was engaging in "conduct unbecoming of its employees."³⁵ After filing a charge of discrimination with the EEOC, Mr. Bostock filed a lawsuit against Clayton County under Title VII, claiming that the county discriminated against him based on his sexual orientation.³⁶ The district court dismissed his case, finding that sexual orientation discrimination is not covered by Title VII.³⁷ The Eleventh Circuit Court of Appeals affirmed the dismissal of Mr. Bostock's case.³⁸

Key Issues: Title VII is one of the foundational anti-discrimination statutes. These cases will determine whether it will protect the LGBTQ community from discrimination based on sexual orientation. The employees in these cases argue that sexual orientation is covered by Title VII's prohibition against discrimination based on sex because:

- Sexual orientation is a function of sex (*i.e.*, if you treat a man who is attracted to men differently than a woman who is attracted to men, that is discrimination based on sex);
- Sexual orientation discrimination is based on a sex-based stereotype (*i.e.*, that men should be attracted to women and women to men); and
- Sexual orientation discrimination is associational discrimination based on sex.

Importance as a Matter of Civil Rights: LDF [joined](#) 58 other civil rights organizations in an amicus brief on behalf of the employees. The amicus brief highlights Title VII's critical role in advancing civil rights. The brief also highlights that LGBTQ workers of color face particularly high levels of discrimination, and it can be difficult to disentangle sexual orientation discrimination from race discrimination. Finally, the brief notes that excluding LGBTQ discrimination from Title VII protection would call into question settled law around other forms of discrimination long considered within Title VII's scope.

Brief of United States: The United States [filed](#) a brief supporting the employers and arguing that Title VII does not protect against sexual orientation discrimination.

Mathena v. Malvo
Argument Date: October 16, 2019

Question Presented: Whether the constitutional rule articulated in [*Miller v. Alabama*](#) (holding mandatory sentences of life without possibility of parole unconstitutional for juvenile defendants), which was made retroactive to cases on collateral review in [*Montgomery v. Louisiana*](#), provides relief not only from mandatory life without parole sentences, but also from discretionary life without parole sentences.

Background: In 2002, then-17-year-old Lee Boyd Malvo and John Allen Muhammad—also known as the “DC Snipers”—engaged in a series of random sniper shootings that killed 12 people and injured six others in the Washington, DC metropolitan area.³⁹ Mr. Malvo was sentenced to life without the possibility of parole pursuant to Virginia’s “discretionary” sentencing scheme.⁴⁰ Following the Supreme Court’s decisions in *Miller* and *Montgomery*, he sought to have his sentences vacated.⁴¹ The district court vacated Mr. Malvo’s sentences, finding that the Court’s decision in *Miller* applies to all situations in which juveniles receive a life-without-parole sentence,” irrespective of whether the “penalty scheme is mandatory or discretionary.”⁴² The Fourth Circuit Court of Appeals affirmed.⁴³ It held that although Mr. Malvo’s sentences were legal when imposed, they must now be vacated because the retroactive constitutional rules for sentencing juveniles adopted subsequent to his sentencings were not satisfied.⁴⁴ The court remanded Mr. Malvo’s case to the district court to determine (1) whether Mr. Malvo qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his “crimes reflect permanent incorrigibility,” or (2) whether those crimes instead “reflect the transient immaturity of youth,” which would support a sentence short of life imprisonment without the possibility of parole.⁴⁵

Key Issues: In *Montgomery*, the Supreme Court confirmed that: (1) imposing a life without parole sentence on a juvenile homicide offender pursuant to a mandatory penalty scheme necessarily violates the Eighth Amendment as construed in *Miller*; and (2) sentencing judges also violate *Miller*’s rule any time they impose 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.”⁴⁶ However, Virginia’s Supreme Court has interpreted *Montgomery* differently, contending that the rule from *Miller* only applies in mandatory, not discretionary, sentencing matters.⁴⁷ Virginia also contends that the rules from *Miller* and *Montgomery* should not apply retroactively to Mr. Malvo’s case.⁴⁸

Importance as a Matter of Civil Rights: Poor Black children are most likely to feel the impact of juvenile life without parole (JLWOP) practices. In its 2014 [report](#) on racial disparities in sentencing, the ACLU noted that “although Blacks constitute only about 13 percent of the U.S. population, as of 2009, Blacks constitute 28.3 percent of all lifers, 56.4 percent of those serving

LWOP, and 56.1 percent of those who received LWOP for offenses committed as juveniles.”⁴⁹ A 2012 [report](#) by The Sentencing Project further evidences how JLWOP sentences are racially skewed and systematically unfair. It revealed that 32 percent of those sentenced to JLWOP grew up in public housing, 40 percent had been enrolled in special education classes, and fewer than half were attending school at the time of their offense.⁵⁰

Department of Homeland Security v. Regents of the University of California
Argument Date: November 12, 2019

Questions Presented: (1) Whether the decision of the Department of Homeland Security (“DHS”) to terminate the Deferred Action for Childhood Arrivals (“DACA”) policy is judicially reviewable; and if so (2) whether DHS’s decision to terminate DACA is lawful.

Background: In 2012, during the Obama Administration, DHS implemented DACA to allow undocumented immigrants who had been brought to the United States as children to apply for protection from deportation and permission to work in the United States (among other things). In September 2017, there were nearly 700,000 active DACA beneficiaries, with an average age of just under 24 years old.⁵¹ More than 90 percent of DACA recipients are employed, and 45 percent are in school.⁵² On September 5, 2017, then-Attorney General Jefferson B. Sessions III announced the Trump Administration’s decision to end DACA, stating that it was unlawful.⁵³ As justification, he cited the Supreme Court’s decision in [Texas v. United States](#), which upheld an injunction against Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), a related but distinct policy.⁵⁴

This is a consolidated case from three district courts (the Northern District of California, the District of Columbia, and the Eastern District of New York) where plaintiffs challenged DHS’s decision to terminate DACA. The case presents claims based on the [Administrative Procedure Act](#) (“APA”), 5 U.S.C. § 500 *et seq.*, and on equal protection and due process grounds. In November 2018, the district courts either enjoined or vacated DHS’s decision on a nationwide basis. The Ninth Circuit Court of Appeals affirmed the California district court’s preliminary injunction in November 2018.⁵⁵

Key Issues: The first issue is judicial reviewability under the APA. The Ninth Circuit ruled that DHS’s decision to rescind DACA is reviewable.⁵⁶ While the Supreme Court held in [Heckler v. Chaney](#) that certain types of *discretionary* administrative action are not subject to judicial review under the APA, the Ninth Circuit distinguished this case because DHS claimed its decision was *non-discretionary*, based on its belief that it lacked the power to enforce DACA.⁵⁷ The question whether non-discretionary agency action is judicially reviewable was explicitly left open in *Chaney*.⁵⁸ The Ninth Circuit also rejected DHS’s argument that the [Immigration and Nationality Act](#) (“INA”), 8 U.S.C. § 1101 *et seq.*, precludes judicial review of the decision to rescind DACA because the INA provision that bars judicial review (8 U.S.C. § 1252(g)) only applies to decisions to commence proceedings, adjudicate cases, or execute removal orders, and not to a programmatic shift (like the termination of DACA).⁵⁹

On the merits, there is a question as to whether DHS’s decision to terminate DACA was arbitrary and capricious because it was based on an erroneous conclusion by DHS that DACA is unlawful.

The Supreme Court must also decide whether there is a viable intentional discrimination claim under *Village of Arlington Heights v. Metropolitan Housing Development Corp.* Applying the *Arlington Heights* factors, the Ninth Circuit found that a viable discrimination claim existed based on plaintiffs’ allegations that (1) there was a disproportionate adverse impact of the termination decision, given that 93 percent of persons affected by the decision are Latinxs and persons of Mexican heritage; (2) various statements made by President Trump showed animus toward persons of Latinx descent; and (3) the unusual process behind the sudden decision to terminate DACA “suggests that the normal care and consideration within the agency was bypassed.”⁶⁰ DHS had argued that *Arlington Heights* should not apply, and instead the court should apply a heightened pleading standard applicable to selective-prosecution cases.⁶¹ The Ninth Circuit rejected this argument, finding that plaintiffs’ claim was not related to selective prosecution.⁶²

Importance as a Matter of Civil Rights: LDF filed an amicus brief in this case, agreeing with the Ninth Circuit decision that the *Arlington Heights* framework, and not a heightened selective enforcement prosecution standard, is appropriate in cases challenging changes to immigration programs as racially discriminatory. In addition, LDF’s brief reiterates why the *Arlington Heights* framework is important for smoking out discrimination that may underly facially neutral laws—including in the immigration context—and therefore the Ninth Circuit decision should be upheld.

Comcast Corp. v. National Association of African American-Owned Media
Argument Date: November 13, 2019

Question Presented: During the Reconstruction Era, Congress passed a number of laws to enforce the personhood and citizenship of emancipated African Americans. One of these laws was the [Civil Rights Act of 1866](#). Section 1981 of that Act (“Section 1981”) prohibits racial discrimination in the making and enforcement of contracts and provides for the security of persons and property “as is enjoyed by white citizens.”⁶³

The question in this case is whether a claim of race discrimination under Section 1981 fails in the absence of but-for causation, as opposed to a showing that the discrimination was a motivating factor in the challenged action.

Background: In this case, African American actor and entrepreneur Byron Allen repeatedly attempted to secure a contract for his company Entertainment Studios Networks, Inc. (“ESN”) with Comcast.⁶⁴ Mr. Allen is the sole owner of ESN, which has seven individual lifestyle channels.⁶⁵ The ESN channels are carried by many major distributors, including Verizon FIOS, AT&T U-verse, and DirecTV.⁶⁶ Since 2008, ESN has attempted repeatedly to secure a contract with Comcast, but Comcast has consistently declined.⁶⁷ Despite assuring ESN that its channels were “good enough” and on the “short list” for consideration, Comcast opted to carry more than 80 less popular, White-owned channels.⁶⁸ One Comcast executive candidly told ESN why it refused to contract: “We’re not trying to create any more Bob Johnsons,” referring to the African American founder of Black Entertainment Television.⁶⁹

ESN and the National Association of African American-Owned Media sued Comcast, alleging that its decision not to carry ESN’s channels violates Section 1981.⁷⁰ The district court dismissed the case at the pleading stage, finding that plaintiffs’ allegations did not sufficiently exclude an alternative explanation for Comcast’s decision based on legitimate business reasons.⁷¹ The Ninth Circuit Court of Appeals reversed the district court’s dismissal of the case, rejecting Comcast’s argument that ESN was required to demonstrate that Comcast would not have refused to carry ESN if not for racial discrimination.⁷² The Ninth Circuit held that ESN only needed to allege that race was a “motivating factor” in Comcast’s refusal to contract.⁷³

Key Issues: A finding that Section 1981 requires “but-for” causation would unjustly impose a higher burden on discrimination victims, in conflict with basic principles of civil rights law and general tort law.

Importance as a Matter of Civil Rights: LDF filed an amicus brief in support of ESN and the National Association of African American-Owned Media, maintaining that Section 1981 does not

require a plaintiff to prove “but-for” causation. LDF’s brief makes clear that, even if the Court disagrees, the judgment should still be affirmed on the independent ground that issues of but-for causation can rarely be resolved on the pleadings. There can be multiple but-for causes of a defendant’s conduct and deciding among potential but-for causes requires discovery and a trial.

¹ *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“The guarantees of jury trial . . . reflect a profound judgment about the way in which law should be enforced and justice administered.”); *see also* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. Davis. L. Rev. 1105, 1121 (2014), https://lawreview.law.ucdavis.edu/issues/47/4/Articles/47-4_Ferguson.pdf.

² Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 9 (2010), <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf>.

³ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 77 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114940.

⁴ Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. in Support of Petitioner at 10, *Ramos v. Louisiana*, 139 S. Ct. 1318 (June 18, 2019) (No. 18-5924) https://www.supremecourt.gov/DocketPDF/18/18-5924/103238/20190618104054434_18%205924%20Amicus%20Brief%20of%20NAACP%20Legal%20Defense%20and%20Educational%20Fund.pdf; *see also* Brief of Law Professors and Social Scientists As Amici Curiae in Support of Petitioner, *Ramos v. Louisiana*, 139 S. Ct. 1318 (Jun. 18, 2019) (No. 18-5924), https://www.supremecourt.gov/DocketPDF/18/18-5924/103255/20190618112356367_Ramos%20Amicus%20Brief%20FINAL%20pdf.pdf.

⁵ *See Apodaca v. Oregon*, 406 U.S. 404, 408 n.3 (1972). The Supreme Court has held that the Sixth Amendment requires unanimous jury verdicts in federal criminal cases. *See id.* at 404.

⁶ Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., *Ramos*, *supra* note 4, at 11.

⁷ Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1619 (2018) <https://vanderbiltlawreview.org/lawreview/2018/10/the-jim-crow-jury/>.

⁸ *Id.* at 1602-03.

⁹ German Lopez, *Louisiana votes to eliminate Jim Crow jury law with Amendment 2*, Vox (Nov. 6, 2018), <https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law>.

¹⁰ *Id.*

¹¹ *State of Louisiana v. Ramos*, 231 So. 3d 44, 47 (La. Ct. App. 4 Cir. Nov. 2, 2017).

¹² *Id.* at 49.

¹³ *Id.*

¹⁴ *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

¹⁵ *Civil Rights Act of 1964*, History.com, <https://www.history.com/topics/black-history/civil-rights-act> (last updated Jun. 6, 2019).

¹⁶ U.S. Equal Emp. Opportunity Comm’n, *An Act*, https://www.eeoc.gov/eeoc/history/35th/thelaw/civil_rights_act.html (last visited Oct. 1, 2019).

¹⁷ U.S. Equal Emp. Opportunity Comm’n, *Coverage*, <https://www.eeoc.gov/employees/coverage.cfm> (last visited Oct. 1, 2019).

¹⁸ Brief in Opposition at 2, *Altitude Express, Inc. v. Zarda*, 2019 WL 4283782 (U.S. 2019) (No. 17-1623), https://www.supremecourt.gov/DocketPDF/17/17-1623/59651/20180816105529974_No.%2017-1623%20Brief%20In%20Opposition%208-16-18.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.*

²⁴ Opinion at 11, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775) (en banc), <https://www.scotusblog.com/wp-content/uploads/2018/06/17-1623-opinion-below.pdf>.

²⁵ *Id.* at 12.

²⁶ *Id.* at 12-13.

²⁷ *Id.* at 13.

²⁸ *Id.* at 20-21.

²⁹ Petition for Writ of Certiorari at 5, *Bostock v. Clayton County*, 139 S. Ct. 1599 (May 25, 2018) (No. 17-1618), https://www.supremecourt.gov/DocketPDF/17/17-1618/48357/20180525170054025_36418%20pdf%20Sutherland%20br.pdf.

³⁰ *Id.*

³¹ *Id.* at 5-6.

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 10.

³⁸ *Id.* at 11.

³⁹ Brief in Opposition at 3, *Mathena v. Malvo*, 139 S. Ct. 1317 (Oct. 19, 2018) (No. 18-217), https://www.supremecourt.gov/DocketPDF/18/18-217/67529/20181019151834136_18-217%20Brief%20in%20Opposition.pdf.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 7-8.

⁴² *Malvo v. Mathena*, 254 F. Supp. 3d 820, 827 (E.D. Va. 2017).

⁴³ *Malvo v. Mathena*, 893 F.3d 265, 276 (4th Cir. 2018).

⁴⁴ *Id.* at 267.

⁴⁵ *Id.*

⁴⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

⁴⁷ Petition for Writ of Certiorari at 1, *Mathena v. Malvo*, 139 S. Ct. 1317 (Aug. 16, 2018) (No. 18-217), https://www.supremecourt.gov/DocketPDF/18/18-217/59718/20180816135603749_Malvo%20v%20Mathena%20Petition%20for%20Writ%20of%20Certiorari.pdf.

⁴⁸ *Id.* at 2.

⁴⁹ *Hearing on Reports of Racism in the Justice System of the United States*, 153rd Session of the Inter-American Commission on Human Rights (Oct. 27, 2014) (Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing at 2), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

⁵⁰ Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 2-3 (2012), <https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.

⁵¹ Brief in Opposition for the States of California, Maine, Maryland, and Minnesota at 2, *Dep't of Homeland Sec'y v. Regents of the Univ. of California*, 138 S. Ct. 942 (Dec. 17, 2018) (No. 18-587),

https://www.supremecourt.gov/DocketPDF/18/18-587/76411/20181217121433244_No.%2018-587%20CA%20et%20al.%20BIO%20FINAL.pdf.

⁵² *Id.*

⁵³ U.S. Dep’t of Justice, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

⁵⁴ *Id.*

⁵⁵ *Dep’t of Homeland Sec’y v. Regents of the Univ. of California*, 908 F.3d 476 (9th Cir. 2018).

⁵⁶ *Id.* at 503.

⁵⁷ *Id.* at 495.

⁵⁸ *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

⁵⁹ *Id.* at 503.

⁶⁰ *Id.* at 519-20.

⁶¹ *Id.* at 519.

⁶² *Id.*

⁶³ 42 U.S.C. § 1981.

⁶⁴ Opposition to Petition for a Writ of Certiorari at 4, *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media and Entertainment Studios Networks, Inc.*, 139 S. Ct. 2693 (Apr. 10, 2019) (No. 18-1171),

https://www.supremecourt.gov/DocketPDF/18/18-1171/96050/20190410161850192_Chemerinsky%20Brief%20in%20Opposition%20to%20Petition%20for%20Writ%20of%20Certiorari.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.* at 5.

⁶⁷ *Id.*

⁶⁸ *Id.* at 5-6.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.* at 7.

⁷¹ Petition for a Writ of Certiorari at 9, *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media and Entertainment Studios Networks, Inc.*, 139 S. Ct. 2683 (Mar. 8, 2019) (No. 18-1171),

https://www.supremecourt.gov/DocketPDF/18/18-1171/91371/20190308153623647_Comcast%20-%20NAAAOM%20Petition%20TO%20PRINTER.pdf.

⁷² Opposition to Petition, *Comcast*, *supra* note 64, at 9.

⁷³ *Id.* at 10.