



ESSAY

**Factual Revisionism: Precedent
Subversion and the “Kavanaugh Stop”**

Duncan Hosie*

Introduction

the thing I came for:
the wreck and not the story of the wreck
the thing itself and not the myth
the drowned face always staring
toward the sun
the evidence of damage
worn by salt and sway into this threadbare beauty
the ribs of the disaster
curving their assertion
among the tentative haunters.¹

In September, the Supreme Court stayed an injunction issued against the federal government’s “Operation At Large,” which deployed roving patrols of armed, masked officers to ramp up arrests of undocumented immigrants in Los Angeles.² The order in *Noem v. Vasquez Perdomo*, delivered via the shadow docket without a majority opinion, drew swift criticism. Legal scholars argued that the stay sanctioned racial profiling and punitive enforcement tactics, dispensed with standard decisional procedures, distorted the law of remedies, and reflected an institutional retreat from the Court’s responsibility to constrain presidential overreach.³

* Academic Fellow, Stanford Law School.

1. Adrienne Rich, *Diving into the Wreck*, in *DIVING INTO THE WRECK: POEMS 1971-1972*, at 23-24 (1973).
2. *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).
3. See, e.g., Michael C. Dorf, *Working While Brown Is the New Driving While Black*, *DORF ON LAW* (Sept. 10, 2025), <https://perma.cc/QLS4-8J4S> (criticizing *Vasquez Perdomo* on these
footnote continued on next page

The stay warrants attention for an additional and less scrutinized reason: what it reveals about the Roberts Court's evolving relationship to precedent. Across two written opinions that totaled 113 pages, four judges—one district court judge and three Ninth Circuit judges—had applied Fourth Amendment precedent requiring particularized and articulable suspicion, forbidding ethnicity alone as sufficient for a stop, and barring using apparent ethnicity as the only consideration of reasonable suspicion.⁴ None purported to make new law or extend existing law. Justice Sotomayor similarly anchored her dissent, joined by Justices Kagan and Jackson, in Fourth Amendment precedent, arguing that the temporary injunction ensured ICE would not “brus[h] aside this Court’s precedent” on the set of facts sufficient to constitute reasonable suspicion.⁵ In a solo concurrence that formed the only written defense of the stay, Justice Kavanaugh argued the same Fourth Amendment caselaw was so clear that it necessitated the Court’s emergency intervention to dissolve the injunction. “[G]iven this Court’s precedents,” he posited, *not* issuing the stay “would likely [require the Court to] overrule or significantly narrow . . . the [*United States v.*] *Brignoni-Ponce* line of cases with respect to immigration stops based on reasonable suspicion.”⁶

Conventional accounts would locate this divide in the domains of constitutional theory (the philosophical commitments driving interpretation)⁷ or jurisprudential proceduralism (the weighing of the *Nken* factors).⁸ This Essay, however, situates the divergence at the level of epistemology. In *Vasquez Perdomo*, Justices Sotomayor and Kavanaugh articulated diametrically opposite understandings of precedent and its commands only after relying on disparate factual narratives and distinct methods of evaluating them. Justice Sotomayor cited to the district court record twenty-nine times,⁹ detailed numerous

grounds); Duncan Hosie, *The End of Equity*, N.Y. REV. BOOKS (Sept. 19, 2025), <https://perma.cc/54ML-LDTN> (similar).

4. See *Vasquez Perdomo v. Noem*, 790 F. Supp. 3d 850, 898 (C.D. Cal. 2025), *motion for stay pending appeal granted in part and denied in part*, 148 F.4th 656 (9th Cir. 2025), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025); *Vasquez Perdomo v. Noem*, 148 F.4th 656, 690 (9th Cir. 2025), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).
5. *Vasquez Perdomo*, 2025 WL 2585637, at *10-11 (Sotomayor, J., dissenting).
6. *Id.* at *3-4 (Kavanaugh, J., concurring in the grant of the application for stay) (citing 422 U.S. 873 (1975)).
7. See, e.g., Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989) (arguing “constitutional law, now and always, is about values” and locating the jurisprudential “divergence” between conservative and liberal justices in their “very different ideologies”).
8. See, e.g., *Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (delineating four factors for appellate courts to apply in their exercise of discretion in deciding whether to stay injunctive relief pending appeal).
9. *Vasquez Perdomo*, 2025 WL 2585637, at *7-9, *11-16 nn.3-4, *13 nn.9-11 (Sotomayor, J., dissenting).

declarations,¹⁰ and supplemented the record with five contemporaneous news accounts on the raids and the motivations of its architects.¹¹ Justice Kavanaugh, conversely, never cited the district court record or public press reports. To construct a different factual account, he put forth numerous contestable and discrete claims lacking any citation.¹²

Justice Kavanaugh's evidentiary reconstruction exemplifies what this Essay terms "factual revisionism," a previously unrecognized form of precedent subversion that operates as a strategic tool to reshape legal doctrine while managing the Court's dwindling sociological legitimacy. Unlike express reversals, which openly discard a precedent, stealth reversals change legal doctrine covertly to manage public perceptions of the Court as an institution and its pace of doctrinal change.¹³ As I and others have observed, the Roberts Court turns to stealth reversals to present disruptive, results-oriented reasoning as the neutral, inexorable, and restrained application of settled law.¹⁴ Factual revisionism is a distinct and currently untheorized subtype: It allows a justice to change settled law by manipulating the factual predicates that determine how precedent applies.

Vasquez Perdomo belongs to this genre. By substituting a new narrative for the inconvenient adjudicative facts before the Court, Justice Kavanaugh sanctioned an enforcement paradigm that effectively ratifies investigative stops on slimmer showings of reasonable suspicion than prior precedent would

10. See *infra* notes 30, 35 & 39 and accompanying text.

11. *Vasquez Perdomo*, 2025 WL 2585637, at *8 nn.3-4, *16 nn.9-11 (Sotomayor, J., dissenting).

12. See *infra* notes 43-45 and accompanying text.

13. See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 14 (2010) (theorizing stealth overruling, a "close" but distinct "cousin" of "overruling *sub silentio*," and arguing its "hallmark" comes from the majority coalition being "perfectly aware that they are overruling but hid[ing] the fact that they are doing so"); Linda Greenhouse, Opinion, *Mississippi Explains All on Abortion*, N.Y. TIMES (July 29, 2021), <https://perma.cc/D4AQ-TB3F> (noting that legal scholars define "stealth overruling" as "decisions that undermine a precedent to the point of collapse without actually pushing it over the edge").

14. See Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1327 (2025) (positing that stealth reversals are "a realpolitik tool [for the Roberts Court's conservative justices] to manage public perceptions of its jurisprudence and the velocity of judicially imposed change, bolstering a public narrative that they are not adjudicating in a historically unusual or partisan manner"); see also Linda Greenhouse, Remarks at the University of Southern California Center for Law and Social Science: The Supreme Court After *Dobbs*: Does Precedent Still Matter? 13-21 (Oct. 13, 2025) (transcript on file with author) (defining the related "stealth aggrandizement" as a "a tool for conservative judges" to make new law through "rediscover[ing]" and "re-tool[ing]" precedents).

permit. This “Kavanaugh stop,” a term coined by Professors Anil Kalhan¹⁵ and Sherrilyn Ifill¹⁶ and adopted in ordinary usage,¹⁷ describes the prolonged, demeaning, and dangerous interactions with federal immigration law enforcement, now backed by the imprimatur of his concurrence and the Court’s unexplained order. These stops have proliferated since the shadow docket order, spreading from Los Angeles to Chicago, Minneapolis, Charlotte, and other cities subjected to intensified federal immigration enforcement operations.¹⁸ Federal officials now treat Justice Kavanaugh’s concurrence as a “binding,” enforceable rule, despite being an individual statement appended to an emergency order rather than a precedential merits opinion commanding a majority.¹⁹

The danger of factual revisionism extends far beyond one consequential case. By exploiting the veneer of objectivity embedded in jurisprudential forms of factual presentation, the deferential posture of appellate evidentiary evaluation, an assumption that courts will act with procedural fairness and in good faith when assessing parties’ factual submissions, and a presumption—rooted both in the founding-era embrace of adversarialism and contemporary

-
15. See Anil Kalhan (@akalhan.bsky.social), BLUESKY (Sept. 27, 2025, 6:08 AM), <https://perma.cc/62SN-E4KD> (linking to a complaint alleging racial profiling of a Latino citizen and stating “we might refer to [this type of enforcement action] as a ‘Kavanaugh Stop’”).
 16. Sherrilyn Ifill (@sifill.bsky.social), BLUESKY (Sept. 28, 2025, 8:03 AM), <https://perma.cc/7PFS-AA3T> (linking to a post from Rebecca Solnit (@rebeccasolnit.bsky.social) that condemned “gangs of large (mostly) white men just publicly assault[ing] people who seem to be brown because they’re brown in the hopes of doing far more harm to them in the name of the state” and commenting “[i]t should be referred to as a Kavanaugh stop”).
 17. See generally Samantha J. Gross, *Critics of Trump’s Immigration Crackdown Are Using the Term ‘Kavanaugh Stop.’ Here’s What It Means.*, BOS. GLOBE (Oct. 7, 2025, 6:23 AM), <https://perma.cc/HH6A-6FBJ> (noting legal and popular adoption of the term); Justin Wise, *ICE Apprehension of US Citizens Derided as ‘Kavanaugh Stops’*, BLOOMBERG L. (Oct. 21, 2025, 1:45 AM PDT), <https://perma.cc/999A-P4RM> (same).
 18. See, e.g., Emmy Martin, Sofia Barnett & Louis Krauss, *Racial Profiling Concerns Grow as ICE Expands Presence in Twin Cities*, MINN. STAR TRIB. (Dec. 18, 2025), <https://perma.cc/N4WJ-JEH2> (detailing violence and the harassment of Latino immigrants, including citizens, through pervasive “Kavanaugh stops” in Minneapolis and reporting that “immigration officials across the country appear to be treating the [concurring] opinion as if it were binding”); Laura Rodríguez Presa, Rebecca Johnson & Gregory Royal Pratt, *Latino US Citizens Racially Profiled by Federal Immigration Agents in Chicago: ‘I Felt Like a Piece of Trash’*, CHI. TRIB. (updated Nov. 15, 2025, 10:07 AM CST), <https://perma.cc/YKK5-WLDB> (a similar account for Chicago); Victoria Bouloubasis, *Charlotte, North Carolina Reels as 81 People Arrested in Immigration Raids*, GUARDIAN (Nov. 17, 2025, 5:00 AM EST), <https://perma.cc/9NKG-62NY> (a similar account for Charlotte).
 19. Martin *supra* note 18; see also *infra* notes 66–67 and accompanying text.

legal culture²⁰—that parties, rather than justices, present adjudicative facts, factual revisionism can be especially difficult to observe. In doing so, it may be acutely destabilizing to horizontal and vertical stare decisis.

This Essay unfolds in three parts. Part I demonstrates factual revisionism at work in *Vasquez Perdomo*. Subpart A summarizes the evidentiary consensus reflected in explicit factual findings made by the district court and accepted by the Ninth Circuit and Justice Sotomayor’s dissent under clear error deference. Subpart B demonstrates that Justice Kavanaugh’s rhetorical reconstruction of facts central to the case’s legal claims displaced the evidentiary record and abstracted Operation At Large from its factual context.

Part II examines the relationships among factual revisionism, the articulation of new legal rules, and judicial statecraft. Subpart A shows how Justice Kavanaugh relied on factual revisionism to ratify this eponymous category of “stop.” Subpart B situates factual revisionism within existing typologies of stealth reversals, distinguishing it from previously recognized doctrinal variants and identifying it as an eighth form of stealth reversal. Because factual revisionism does not require invocation of the clear-error standard or explicitly challenge trial court factfinding, it can evade detection, capitalizing on the procedural conventions embedded in the sociolegal practices of interpreting Court opinions while simultaneously blurring the institutional competency and jurisprudential power distinctions among different types of courts.

The Conclusion argues that when the Court reshapes the evidentiary record to fit preferred legal outcomes, it not only distorts individual constitutional rights and undermines litigants’ ability to vindicate them but also erodes the epistemic and democratic foundations on which the rule of law depends.

I. Factual Revisionism in *Vasquez Perdomo*

A. The Established Record

The injunction barred ICE from stopping people solely based on four factors, alone or in combination: (1) an individual’s apparent race or ethnicity;

20. See, e.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 48 (1984) (arguing the Constitution’s array of adversarial mechanisms “suggests that our courts and perhaps the framers of the Constitution have viewed adversary process (or at least its essential components) as fundamental to a fair judicial system”); *id.* at 18-25 (tracing the rise of the adversarial system in legal culture); Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 306 (2000) (describing the modern application of “basic principles of the adversary system”).

(2) whether the individual spoke Spanish or English with an accent; (3) presence at a particular location associated with low-wage work, including sites like a “bus stop, car wash, tow yard, day laborer pick up site, agricultural site”; and (4) the type of work one appeared to do.²¹ To grant or uphold this injunction, seven federal judges converged on a common understanding of the underlying events in Los Angeles. This understanding emerged from standard procedure, namely reliance on a trial court hearing that probed evidentiary and legal claims;²² a trial court opinion accompanying an injunction that evaluated evidentiary submissions and made preliminary factual findings;²³ an appellate oral argument in which a panel of judges further probed factual and legal claims;²⁴ and appellate²⁵ and Supreme Court²⁶ deference to the district court’s evidentiary evaluation. In so doing, this procedure instantiated a structural reflection of hierarchical role division and a prudential reflection of the litigation’s early stage and the tentative nature of its factual evaluation.²⁷

The district court order, Ninth Circuit opinion, and Justice Sotomayor’s dissent took similar forms, grounding their rulings in what the district court called “reality”²⁸ and Justice Sotomayor termed “on-the-ground reality.”²⁹ Each engaged closely with twenty-one declarations,³⁰ sworn under penalty of

-
21. *Vasquez Perdomo v. Noem*, 790 F. Supp. 3d 850, 898 (C.D. Cal. 2025), *motion for stay pending appeal granted in part and denied in part*, 148 F.4th 656 (9th Cir. 2025), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).
 22. Transcript of Hearing Re: Ex Parte Application for Temporary Restraining Order, *Vasquez Perdomo*, 790 F. Supp. 3d 850 (No. 25-cv-05605), ECF No. 90.
 23. *Vasquez Perdomo*, 790 F. Supp. 3d 850.
 24. Oral Argument, *Vasquez Perdomo v. Noem*, 148 F.4th 656 (9th Cir. 2025) (No. 25-4312), <https://perma.cc/LM67-8AZN>, *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).
 25. *Vasquez Perdomo*, 148 F.4th at 686.
 26. *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 258563, at *13 (U.S. Sept. 8, 2025) (Sotomayor, J., dissenting).
 27. See Transcript of Hearing Re: Ex Parte Application for Temporary Restraining Order, *Vasquez Perdomo*, 790 F. Supp. 3d 850 (No. 25-cv-05605), ECF No. 90 (trial court hearing); *Vasquez Perdomo*, 790 F. Supp. 3d 850 (trial court opinion); Oral Argument, *Vasquez Perdomo v. Noem*, 148 F.4th 656 (9th Cir. 2025) (No. 25-4312), <https://perma.cc/LM67-8AZN> (appellate oral argument), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.); *Vasquez Perdomo*, 148 F.4th at 686 (an example of the Ninth Circuit deferentially reviewing the district court’s opinion including its factual determinations); *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 258563, at *13 (U.S. Sept. 8, 2025) (Sotomayor, J., dissenting) (an example of Justice Sotomayor’s dissent deferentially reviewing the “[d]istrict [c]ourt’s factual findings”).
 28. *Vasquez Perdomo*, 790 F. Supp. 3d at 894.
 29. *Vasquez Perdomo*, 2025 WL 2585637, at *16 (Sotomayor, J., dissenting).
 30. See, e.g., *Vasquez Perdomo*, 2025 WL 2585637, at *6-8 (Sotomayor, J., dissenting) (detailing the district court’s evaluation of Jason Gavidia’s and Jorge Viramontes’ declarations); *id.* at *16 (discussing a declaration “describing [a] July 21 incident in
footnote continued on next page

perjury, while supplementing this “mountain of evidence”³¹ with contemporaneous news reports illuminating the raids’ social context, political motivation, and human cost.³² Each cited revelation unearthed in the hearing and oral argument.³³ Together, this overlapping account embraced a realist understanding of Operation At Large and its roots. The opinions began by emphasizing the unprecedented nature of “the largest Mass Deportation Operation in History”³⁴ and observing its political origins in a Trump White House effort to set high “minimum” daily arrest targets.³⁵

Substantively, they declined to euphemize the raids, underscoring the systemic arbitrariness of the stops, seizures, and detentions and the coercive nature of these encounters for the plaintiffs. This analytical emphasis on a close reading of sworn testimony and deference to the district court’s factual findings produced textual duplication: Each opinion independently called attention to the “military-style rifle[s]” carried by “roving patrols” in “unmarked” cars and quoted a “masked” immigration officer telling one plaintiff, Gavidia, to “[s]top right there” before forcefully “push[ing] [him] up

which two masked agents walked into a donut shop, grabbed two Latino men, and threw them to the ground or against a wall, all without asking any questions”).

31. *Vasquez Perdomo*, 790 F. Supp. 3d at 864.

32. The plaintiffs brought some, but not all, of these news reports to the judges. *See, e.g., id.* at 887 & n.26 (citing to a *Los Angeles Times* article to describe the governmental motivations and practical consequences of the raids); *id.* at 867 (drawing from violent ICE detentions “widely reported in the news” featured in the complaint); *id.* at 894 (invoking the plaintiffs’ “citations to news articles” on the racial profiling built into the raids); *Vasquez Perdomo*, 148 F.4th at 665 n.2 (quoting and taking note of “an interview with Fox News” in which Stephen Miller articulated “minimum” immigration arrest goals); *Vasquez Perdomo*, 2025 WL 2585637, at *7 nn.3-4, *13 & nn.9-11 (Sotomayor, J., dissenting) (invoking reporting by the *Wall Street Journal*, the *Guardian*, and NBC News, as well as interviews and social media posts of Trump Administration officials).

33. *See, e.g., Vasquez Perdomo*, 790 F. Supp. 3d at 891 (observing that factual claims made by the government at the hearing lacked corroboration through “any details”); *Vasquez Perdomo*, 148 F.4th at 665 n.2, 666 n.4 (same for governmental presentation at appellate oral argument); *Vasquez Perdomo*, 2025 WL 2585637, at *8-9 (Sotomayor, J., dissenting) (invoking the district court’s evidentiary assessment of the government’s submissions, including at the TRO hearing).

34. The district court and Ninth Circuit quoted this phrase, which plaintiffs had relied on in a declaration and in briefing, *see Vasquez Perdomo*, 790 F. Supp. 3d at 863 (citation modified); *Vasquez Perdomo*, 148 F.4th at 666, whereas Justice Sotomayor relied on more general language expressing a similar theme, *see Vasquez Perdomo*, 2025 WL 2585637, at *6-7 (Sotomayor, J., dissenting).

35. *See, e.g., Vasquez Perdomo*, 2025 WL 2585637, at *8 (Sotomayor, J., dissenting) (“Senior immigration officials also told agents to ‘turn the creativity knob up to 11,’ to ‘push the envelope,’ and that ‘if it involves handcuffs on wrists, it’s probably worth pursuing.’”) (citation modified) (quoting José Olivares, *US Immigration Officers Ordered to Arrest More People Even Without Warrants*, *GUARDIAN* (Jun. 4, 2025, 7:00 AM EDT), <https://perma.cc/35PY-MNHB>).

against the metal gated fence, put[ting] his hands behind his back, and twist[ing] his arm.”³⁶ The plaintiffs constructed their case around the social context and community-wide effects of Operation At Large, which judges at all three levels credited. The Ninth Circuit and Justice Sotomayor, for example, analyzed the plaintiffs’ undisputed evidence that nearly 47% of the Central District is “Hispanic or Latino,” and over 37% of Los Angeles County speaks Spanish at home and 55% of Los Angeles County speaks a language other than English at home.³⁷ All three opinions also highlighted the plaintiffs’ evidence of “panic and fear”³⁸ that radiated beyond the named plaintiffs.

Finally, the judges strenuously objected to the government’s evidentiary presentation. This critique operated at two levels. First, the judges sharply criticized the government’s tactical framing, stating it failed to marshal any evidence for specific factual claims. As Justice Sotomayor observed, the government “submitted no evidence” to substantiate core claims,³⁹ a sentiment echoed throughout the lower court opinions.⁴⁰ Second, all three opinions criticized the government’s narrative: The government was constructing a sanitized version of events fundamentally at odds with what was “actually happening.”⁴¹ Strikingly, the government did not materially dispute plaintiffs’ factual claims or the district court’s factual findings, leaving the record effectively uncontested before the Ninth Circuit and Supreme Court.⁴²

36. See *Vasquez Perdomo*, 790 F. Supp. 3d at 869-871, 890; *Vasquez Perdomo*, 148 F.4th at 664; *Vasquez Perdomo*, 2025 WL 2585637, at *7 (Sotomayor, J., dissenting).

37. *Vasquez Perdomo*, 148 F.4th at 683; *Vasquez Perdomo*, 2025 WL 2585637, at *10-11 (Sotomayor, J., dissenting).

38. *Vasquez Perdomo*, 2025 WL 2585637, at *7-8 (Sotomayor, J., dissenting); *Vasquez Perdomo*, 790 F. Supp. 3d at 882; *Vasquez Perdomo*, 148 F.4th at 669-71.

39. See, e.g., *Vasquez Perdomo*, 2025 WL 2585637, at *8 (Sotomayor, J., dissenting) (juxtaposing the plaintiffs’ “21 declarations describing dozens of seizures that occurred throughout the Central District in June and early July” with the government’s “two declarations generally describing its operations”).

40. See, e.g., *Vasquez Perdomo*, 790 F. Supp. 3d at 890-91 (stating that government-submitted declarations intended to establish that the seizures were based on reasonable suspicion “do not support this contention in the slightest” because “[t]his evidence is entirely too general” and “do[es] not even discuss” specific individuals, including the named plaintiffs); *Vasquez Perdomo*, 148 F.4th at 666 (“Neither [government] declaration rebuts Plaintiffs’ evidence regarding any particular stop.”).

41. *Vasquez Perdomo*, 790 F. Supp. 3d at 864; see *Vasquez Perdomo*, 2025 WL 2585637, at *16; *Vasquez Perdomo*, 148 F.4th at 666.

42. See, e.g., *Vasquez Perdomo*, 148 F.4th at 686 (“Defendants have not pointed to any clear errors in the district court’s factual findings . . .”). Similarly, the government’s application for a stay to the Supreme Court did not challenge the plaintiffs’ and the lower courts’ factual understanding. See Application to Stay the Order Issued by the United States District Court for the Central District of California and Request for an Immediate Administrative Stay, *Vasquez Perdomo*, 2025 WL 2323447 (No. 25A169). And its reply brief objected to the plaintiffs’ and lower courts’ factual understanding in one
footnote continued on next page

B. Justice Kavanaugh's Monologic Reconstruction

Justice Kavanaugh offered an irreconcilable account of the underlying events. His concurrence glossed over key facts the lower courts had already established, embraced government claims those courts had rejected, and even introduced entirely new narratives. This mixed-methods approach began by recasting a coordinated campaign of racialized enforcement emanating from a White House diktat as an ordinary exercise of immigration authority rooted in longstanding administrative practice. Describing Operation At Large as a familiar form of “investigative stop[.]” used “for decades” and “across several presidential administrations” to verify immigration status, Justice Kavanaugh normalized the scope and political genesis of Operation At Large.⁴³ In so doing, he reframed a novel mobilization of federal immigration force as bureaucratic continuity.

More consequentially, Justice Kavanaugh minimized the temporal, coercive, and violent dimensions of the raids as documented by the plaintiffs' adjudicative facts and the trial court's factual findings. He repeatedly asserted that the government “sometimes makes brief investigative stops”⁴⁴ and then “promptly let[s] [individuals] go”⁴⁵ if they are citizens, despite uncontested evidence contradicting these statements. For the five named plaintiffs, none of the stops were “brief.” As the district court found, the twenty-minute stops extended well beyond a transient inquiry.⁴⁶ The encounters also bore little resemblance to the minimally intrusive “investigatory” stops permitted under *Terry v. Ohio*.⁴⁷ ICE agents, for example, charged at the named plaintiff and two others while they were drinking coffee at a bus stop and forcibly removed them to another location *before* asking any questions or identifying themselves, inverting the proper investigatory sequence and protocol.⁴⁸ The record⁴⁹ and

paragraph. *See* Reply in Support of Application to Stay the Order Issued by the United States District Court for the Central District of California, *Vasquez Perdomo*, 2025 WL 2368844 (No. 25A169), at *3-4.

43. *Vasquez Perdomo*, 2025 WL 2585637, at *1-2 (Kavanaugh, J., concurring).

44. *Id.* at *1; *see also id.* at *1, *3-5 (providing other examples of this “brief” characterization).

45. *Id.* at *1; *see also id.* at *5 (stating those stopped “may promptly go free after making clear to the immigration officers that they are U.S. citizens or otherwise legally in the United States”).

46. *See Vasquez Perdomo*, 790 F. Supp. 3d at 869-70, 888-92 (emphasizing the “twenty minutes” between Viramontes' and Gavidia's confirmations of citizenship and their respective releases).

47. 392 U.S. 1, 6-7, 20 (1968).

48. *Vasquez Perdomo*, 148 F.4th at 668.

49. *See, e.g.*, Declaration of Jorge Luis Hernandez Viramontes in Support of Plaintiffs' Motion for Temporary Restraining Order, *Vasquez Perdomo*, 790 F. Supp. 3d 850 (No. 25-cv-05605), ECF No. 45-4 (describing his prolonged detention); Declaration of
footnote continued on next page

the district court's findings⁵⁰ similarly made clear citizens faced recurrent stops without "prompt" release.

The distinction between fact and law can be malleable and elusive.⁵¹ Factual revisionism does not refer to a court's legitimate characterization of facts in the course of applying legal standards—that is ordinary appellate work. It refers to something more insidious: a court substituting its own account of what happened for findings grounded in an evidentiary record, without acknowledging the substitution. Turn, again, to Justice Kavanaugh's repeated characterization of the immigration stops as "brief" encounters with "prompt" release. "Brief" and "prompt" might sound like legal conclusions, steps toward applying the Fourth Amendment's reasonableness standard and other constitutional protections, but their legal valences depend entirely on antecedent empirical questions: How long did these stops actually last, and were detained people released swiftly? These questions were explored and answered below, on a developed record, through declarations made under penalty of perjury. Kavanaugh did not engage or recognize that record.

Justice Kavanaugh's rhetorical construction of occasional, "brief" stops and "prompt[]" release is also notable for its lack of citation. These omissions mark a departure from established norms of judicial socialization and craft,⁵² including past opinions Justice Kavanaugh authored.⁵³ Perhaps most strikingly, his failure to cite extended beyond summation of the litigation-specific⁵⁴ adjudicative facts to statistical legislative facts.⁵⁵ He asserted, for example, that "about 10 percent of the people in the Los Angeles region are illegally in the United States" and that the city has an "extremely high number" and "extraordinary numbers" of "illegal immigrants" but cited no authority for

Brian Gavidia in Support of Plaintiffs' Motion for Temporary Restraining Order, *Vasquez Perdomo*, 790 F. Supp. 3d 850 (No. 25-cv-05605), ECF No. 45-9 (same).

50. See, e.g., *Vasquez Perdomo*, 790 F. Supp. 3d at 891 (rejecting the government's characterization of the length of the raids and detentions).

51. See, e.g., Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 518 (1969).

52. See, e.g., Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 78 (2013) ("Justices are not just making bald factual claims about the world; instead, their claims are commonly backed up with supporting evidence from numerous sources . . .").

53. See, e.g., *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1173-74 (2023) (Kavanaugh, J., concurring in part and dissenting in part) (citing numerous amicus briefs to substantiate specific factual claims about the economics of pig farming and pork production).

54. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230 n.16 (1985) ("Adjudicative facts tend to be litigation specific . . .").

55. For the pathbreaking account that distinguished between these types of facts, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 407 (1942).

either category of claim.⁵⁶ The first claim, seemingly drawn from the Trump Administration’s emergency briefing,⁵⁷ is contestable on evidentiary and methodological grounds.⁵⁸ The second is contestable on normative grounds.⁵⁹ Both reveal a deeper jurisprudential flaw. Without substantiation, these empirical assertions do not allow verification, dialogue, and challenge.

When Justice Kavanaugh gestured toward authority, his sources were ambiguous and uneven. As an epistemic warrant for concluding that the “circumstances taken together can constitute at least reasonable suspicion of illegal presence in the United States,” Justice Kavanaugh invoked “common sense” to justify considering “apparent ethnicity” as one factor—without clarifying whose common sense governs, how to constrain its manifest indeterminacies, or whether “common sense” even exists as a coherent epistemic category.⁶⁰ (Philosophers and sociologists of knowledge would tell us it does not.)⁶¹

He further treated assertions in the Solicitor General’s briefs, including the chilling effect of any injunction, as an established fact.⁶² This raises, at minimum, three concerns. First, the district court explicitly rejected the Trump Administration’s factual presentation, including claims that an

56. *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637, at *1, *3 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring).

57. App. to Stay, *supra* note 42, at *4 (stating, also without authority, that “about 10 percent of all residents are illegal aliens” in the Central District of California).

58. The “Los Angeles region” is a non-technical descriptor that could refer to the City of Los Angeles, Los Angeles County, or the broader Los Angeles metropolitan area, which includes Orange County. The Central District of California, however, extends well beyond even the latter category, covering multiple Inland Empire and Central Coast counties. See *Jurisdiction*, U.S. DIST. CT. CENT. DIST. CAL., <https://perma.cc/754N-UGZ4> (archived Mar. 29, 2026). Justice Kavanaugh seemed to define the “Los Angeles area” as the Central District of California. *Vasquez Perdomo*, 2025 WL 2585637, at *2 n.1 (Kavanaugh, J., concurring).

59. See note 78 and accompanying text (discussing normative priors and inherent discretion involved in conceptualizing a “extremely high” figure).

60. *Vasquez Perdomo*, 2025 WL 2585637, at *3 (Kavanaugh, J., concurring); see generally Jennifer Chacón, *Whose Common Sense? Some Reflections on Noem v. Vasquez Perdomo*, VERFASSUNGSBLOG (Sept. 10, 2025), <https://perma.cc/JTS2-JV7K> (raising similar indeterminacy objections to Justice Kavanaugh’s concurrence).

61. See generally PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 159-71 (Richard Nice transl., Cambridge Univ. Press ed. 1977) (1972) (arguing that what appears self-evident or natural is socially conditioned through the concept of the *doxa*).

62. Compare App. to Stay, *supra* note 42, at *36 (“[T]he injunction gravely chills enforcement efforts by improperly threatening federal officers with contempt and extensive judicial second-guessing even if they comply with its terms.”), with *Vasquez Perdomo*, 2025 WL 2585637, at *4 (Kavanaugh, J., concurring) (“The prospect of . . . after-the-fact judicial second-guessing and contempt proceedings will inevitably chill lawful immigration enforcement efforts.”).

injunction against sole reliance on the four enumerated factors would chill lawful enforcement operations.⁶³ Second, the government’s evidence took an intrinsically “general” and conclusory form.⁶⁴ Third, the second Trump Administration’s attorneys’ record of factual misrepresentations raised serious questions about whether it should be entitled to a presumption of regularity, let alone the seemingly greater deference Justice Kavanaugh afforded it.⁶⁵

This silence about sourcing is structural, not incidental. The rhetorical force of Justice Kavanaugh’s account depends on concealing that a reconstruction is even taking place. He never argued that the district court clearly erred in its factfinding, that the lower court judges’ and Supreme Court dissenters’ reliance on the declarations was mistaken, or that his conceptualization of the facts differs from theirs. Instead, he presented his narrative as explicitly what happened and implicitly what all agree happened. This posture enabled a significant analytical sleight of hand: By treating his factual premises as self-evident, Justice Kavanaugh rendered invisible the evidentiary record that contradicts them—and, in doing so, he foreclosed scrutiny of how these distorted predicates shape his Fourth Amendment analysis.

II. Factual Revisionism as Stealth Reversal

A. From Factual Reconstruction to Legal Principle: The “Kavanaugh Stop”

No uniform definition of “Kavanaugh stop” currently exists. In academic and popular usage, the term generally denotes a new category of encounter between Latino individuals and roving federal immigration enforcement patrols that, under pre-*Vasquez Perdomo* Fourth Amendment law, would have been understood to lack the requisite reasonable suspicion. The “Kavanaugh stop,” at its core, represents a fundamental change in on-the-ground

63. See, e.g., *Vasquez Perdomo v. Noem*, 790 F. Supp. 3d 850, 895-96 (C.D. Cal. 2025) (rejecting “Defendants’ mischaracterizations” and reaffirming the limited scope of the injunction), *motion for stay pending appeal granted in part and denied in part*, 148 F.4th 656 (9th Cir. 2025), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).

64. *Id.* at 890-91.

65. See generally *Pres. of Harvard Coll. v. U.S. Dep’t of Homeland Sec.*, 788 F. Supp. 3d 182, 205 (D. Mass. 2025) (“[T]he Court will not apply any presumption of regularity to conduct that is so unusual and therefore irregular on its face.”); *Fed. Educ. Ass’n v. Trump*, 795 F. Supp. 3d 74, 89-92 (D.D.C. 2025) (similar); see also Alan Feuer & Minh Kim, *Judge Signals She Will Protect Abrego Garcia from Hasty Second Deportation*, N.Y. TIMES (July 11, 2025), <https://perma.cc/WY47-K4AG> (quoting Judge Paula Xinis of the District of Maryland as stating the Trump administration’s lawyers “have taken the presumption of regularity and . . . destroyed it in [her] view”).

immigration enforcement tactics.⁶⁶ These stops, in which officers interrogate people on the basis of their apparent ethnicity or accents,⁶⁷ frequently involve violence, property damage or confiscation, and even the utterance of racial epithets.⁶⁸ They often cascade into further constitutional violations: inadequate medical care, confinement in barbaric conditions, denial of contact with counsel or family, and even physical and psychological abuse.⁶⁹

Consider an illustrative example of a “Kavanaugh stop.” On September 8, the Court’s shadow docket order reinstated full implementation of Operation At Large. The same day, the Trump Administration launched Operation Midway Blitz and days later initiated Operation At Large: Chicago, vowing to apply Court-reinstated tactics, such as indiscriminate sweeps, at certain workplaces in Chicago.⁷⁰ In early October, three masked immigration agents

-
66. See, e.g., Jaclyn Diaz, *Events in Minneapolis Show How Immigration Enforcement Has Changed. What’s the Impact?*, NPR (Jan. 17, 2026, 5:00 AM ET), <https://perma.cc/2G29-D42U> (quoting former ICE Commissioner Gil Kerlikowske explaining that ICE’s enforcement tactics in Minneapolis and other cities experiencing intensified enforcement operations are “unique and different [from] anything that’s ever been done” and that they “increasingly rely[] on these so-called ‘Kavanaugh stops’”); Louis Jacobson, *What Legal Rights Do You Have in Encounters with ICE? Legal Experts Weigh in*, PBS (Jan. 24, 2026, 2:16 PM EDT), <https://perma.cc/S346-F3WM> (observing that “[h]istorically, the Supreme Court has ruled that racial or ethnic profiling is unconstitutional” but “a recent [concurring] opinion by Supreme Court Justice Brett Kavanaugh gave ICE increased discretion to use race as a factor for stopping and questioning people” and describing the application of “Kavanaugh stops” in Minnesota and other targets of federal operations); Carson Hartzog, *Columbia Heights Resident, U.S. Citizen Detained for Accent*, MINN. STAR TRIB. (Jan. 21, 2026, 4:05 PM), <https://perma.cc/CF8W-HLM3> (describing a “Kavanaugh stop” based on accent).
67. For video documentation of a Latino citizen being subjected to a “Kavanaugh stop,” see Elena Shao, Arijeta Lajka, Helmuth Rosales & Raj Saha, *Videos Showing Aggressive ICE Tactics in Minnesota Fuel a Backlash*, N.Y. TIMES (Jan. 24, 2026), <https://perma.cc/ZK6J-47LN> (showing ICE agents conducting an accent-based stop on Ramon Menera).
68. See, e.g., Julián Aguilar, *U.S.-Born Houston Teen Says ICE Agents Beat Him and His Father During Early-Morning Stop*, HOUS. CHRON. (updated Oct. 28, 2025, 6:43 PM), <https://perma.cc/23H5-U9BK>.
69. See Nicole Foy, *We Found That More Than 170 U.S. Citizens Have Been Held by Immigration Agents. They’ve Been Kicked, Dragged and Detained for Days*, PROPUBLICA (Oct. 16, 2025, 12:00 PM), <https://perma.cc/9C2G-MQ6W> (documenting the treatment of citizens ensnared in “Kavanaugh stops”).
70. See *ICE Launches Operation Midway Blitz in Honor of Katie Abraham to Target Criminal Illegal Aliens Terrorizing Americans in Sanctuary Illinois*, DEP’T OF HOMELAND SEC. (last updated Sept. 25, 2025), <https://perma.cc/U2P7-JDVS> (Operation Midway Blitz); Chris Tye, *Feds Launch Second Immigration Enforcement Operation in Illinois, Led by Border Official Who Oversaw L.A. Raids*, CBS NEWS CHI. (updated Sept. 16, 2025, 4:45 PM CDT), <https://perma.cc/HH3E-9QMP> (Operation at Large: Chicago); see also Christine Fernando & Sophia Tareen, *Border Patrol Agent Who Led Immigration Crackdown in Los Angeles Arrives in Chicago*, ASSOC. PRESS (updated Sept. 16, 2025, 2:33 PM PDT), <https://perma.cc/492F-YG3U> (reporting that ICE tactics applied in Los Angeles that had “broken norms” would also be applied to Chicago).

surrounded Maria Greeley, a U.S. citizen and Chicago resident, as she walked home from work.⁷¹ Refusing to identify themselves, they grabbed and zip-tied her before detaining her for over an hour, even after she produced her U.S. passport, which she now regularly carries out of fear of immigration agents.⁷² “I am Latina and I am a service worker,” she said afterward.⁷³ “I fit the description of what they’re looking for now.”⁷⁴

Federal agents subjected Ms. Greeley to four principal departures from existing Fourth Amendment law, each legitimated by the concurrence’s reconstruction of facts underpinning its legal conclusions.⁷⁵ First, the concurrence allows the substitution of population-level statistics for a particularized assessment of reasonable suspicion based upon articulable facts. Under *United States v. Brignoni-Ponce* and related cases, reasonable suspicion must rest on specific, individualized indicators of unlawful presence.⁷⁶ Instead, Justice Kavanaugh relied on a construction of the “totality of the circumstances” that permits considering the ostensible “extremely high number” of undocumented residents in an undefined geographic “region.”⁷⁷

This “high number and percentage” approach sidesteps individualized analysis, reducing constitutional protection to demographic probability filtered through judicial characterization of it. As a matter of pre-existing Fourth Amendment law, the fact that Greeley or the *Vasquez Perdomo* plaintiffs live in areas that federal officials or commentators believe have “extremely high” levels of undocumented immigration does not establish the individualized reasonable suspicion to stop *them*. Moreover, the concurrence’s statistical standard is undefined; what counts as “extremely high” or as an “extraordinary number[.]” is left to judicial discretion, allowing personal views on immigration to shape a baseline constitutional determination.⁷⁸

71. Gregory Royal Pratt, *ICE Tickets Chicago Man with Legal Residency \$130 for not Having His Papers on Him: 'It's Not Fair . . . I'm a Resident'*, CHI. TRIB. (Oct. 13, 2025, 12:00 PM PDT), <https://perma.cc/3F9B-NZLF>.

72. *Id.*

73. *Id.*

74. *Id.*

75. In merits cases, factfinding that underpins legal conclusions of majority opinions may have precedential force. See Larsen, *Factual Precedents*, *supra* note 52, at 63.

76. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (barring, on Fourth Amendment grounds, immigration enforcement officers from making detentive stops absent “specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” that the individual “may be illegally in the country”).

77. *Noem v. Vasquez Perdomo*, 2025 WL 2585637 at *1, *3 (Kavanaugh, J., concurring).

78. Here and elsewhere, Justice Kavanaugh’s gratuitous rhetoric suggests he may harbor anti-immigrant policy views. *Cf. id.* (positing “the millions of individuals illegally in the United States” cause “myriad” problems); *Fogo de Chao (Holdings) Inc. v. U.S. Dep’t*
footnote continued on next page

Second, the concurrence permits grossly overinclusive profiling. The Fourth Amendment bars seizing people exclusively based on a set of factors that “describe[s] a very large category of presumably innocent” people.⁷⁹ By eliding the record evidence that nearly half of the Central District of California’s population identifies as Hispanic or Latino and close to forty percent speaks Spanish at home—facts which were integral to the plaintiffs’ factual presentation and legal argument about the probative value of the sweeps, as well as to the lower court opinions—the concurrence sidesteps the scope of its own reasoning and marks a “striking departure” from the settled understanding that the Constitution limits whom officers may question and detain.⁸⁰

Third, the concurrence routinizes domineering and arbitrary state interference into the daily lives of Latinos. The Fourth Amendment’s essential purpose—the right to live free from “arbitrary and oppressive interference by enforcement officials”⁸¹—becomes hollow when armed, masked patrols can subject citizens to impromptu and coercive interrogation and detention based only on the four factors or some combination of them. Justice Kavanaugh’s description of these encounters as occasional (“sometimes”)⁸² and harmless (“brief”)⁸³ erases their capricious, omnipresent, and “terrifying” nature, to borrow a word used both by Greeley⁸⁴ and repeatedly by the plaintiffs in *Vasquez Perdomo*.⁸⁵

of Homeland Sec., 769 F.3d 1127, 1154 (D.C. Cir. 2014) (Kavanaugh, J., dissenting) (contending that “mere economic expediency does not authorize an employer to displace American workers for foreign workers”). Compare *Agri Processor Co. v. NLRB*, 514 F.3d 1, 10-15 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (referring repeatedly to undocumented workers as “illegal immigrant workers” and suggesting that their votes had “diluted or overridden” those of “legal workers”), and *Garza v. Hargan*, 874 F.3d 735, 754-55 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (“unlawful immigrant minors”), with *Agri Processor Co.*, 514 F.3d at 9 (majority opinion) (“undocumented workers”), and *Garza*, 874 F.3d at 737 (Millet, J., concurring) (“undocumented minor”).

79. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam).

80. See Jazmine Ulloa, Allison McCann & Jennifer Medina, “*I’m from Herel’*: U.S. Citizens Are Ending Up in Trump’s Dragnet”, N.Y. TIMES (Sept. 29, 2025), <https://perma.cc/5AWE-LQDH>.

81. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

82. *Vasquez Perdomo*, 2025 WL 2585637, at *1 (Kavanaugh, J., concurring).

83. *Id.* at *1, *3-5.

84. Pratt, *supra* note 71.

85. See Compl. ¶ 16, 125, 174, 189, *Noem v. Vasquez Perdomo*, 790 F. Supp. 3d 850 (C.D. Cal. 2025) (No. 25-cv-5605) (stating plaintiff Gavidia was “terrified by this experience [of ICE detention] and fears being subjected to similar actions again on the basis of his Latino ethnicity”).

It also obscures the recurrent catch-22 many Latino individuals now face: Federal agents expect them to carry documents confirming lawful status because of their ethnicity, yet refuse to credit those documents when they are produced because of their ethnicity. Immigration agents repeatedly dismissed Greeley’s passport as fraudulent, which she now carries out of fear of ICE.⁸⁶ Similarly, immigration agents detained Gavidia even though he repeatedly insisted that he was “an American” and produced a REAL ID.⁸⁷

Fourth, the concurrence’s factual revisionism subtly inverts the relevant burden. Under Fourth Amendment doctrine, the government bears the duty to show that each seizure rests on reasonable suspicion; whether a stop proves “brief” or an individual is “promptly” released cannot cure a stop that lacked reasonable suspicion at its inception.⁸⁸ Yet Justice Kavanaugh’s framework effectively requires individuals like Greeley to carry documentation and preemptively dispel official suspicion about their legal status, a demand imposed on visibly Latino individuals but not others. When members of one ethnic or racial group must effectively carry papers while others need not, constitutional citizenship fractures into a two-tiered caste.

Factual revisionism helped to achieve what precedential application could not. Had Justice Kavanaugh accepted the district court’s preliminary factual findings that ICE agents were conducting suspicionless seizures—endorsed by the appellate panel and Justice Sotomayor under clear-error deference⁸⁹—he would have faced a stark choice. He could either adhere to *Brignoni-Ponce* and related caselaw, particularly in the procedural posture of an emergency application, and decline to issue a stay, or explicitly repudiate that precedent and acknowledge doctrinal rupture. Instead, by quietly reconstructing core facts, he preserved the illusion of doctrinal continuity while effecting a de facto substantive transformation. Justice Kavanaugh cited *Brignoni-Ponce* as if it required his conclusion, benefiting from the allure of precedent application, but only because he had already done the predicate work of transformation: rendering violent, suspicionless seizures into something resembling brief, consensual encounters. The result is a shadow docket concurrence whose logic undermines the Fourth Amendment’s individualized suspicion requirement

86. Pratt, *supra* note 71.

87. Vasquez Perdomo v. Noem, 148 F.4th 656, 664 (9th Cir. 2025) (“The agents repeatedly asked Gavidia whether he is American—and they repeatedly ignored his answer: ‘I am an American.’”), *stay granted*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (mem.).

88. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968).

89. FED. R. CIV. PRO. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous.”); *see also* Zenith Radio Corp. v. Hazeltine Rsch, Inc., 395 U.S. 100, 123 (1969) (stating the function of appellate courts is “not to decide factual issues *de novo*” in applying the clear error standard).

and expands the zone of permissible racialized law enforcement for certain groups of people.

B. Judicial Statecraft and Factual Revisionism

The Court faces a crisis of sociological legitimacy.⁹⁰ Justice Kavanaugh’s concurrence concluded with a revealing message seemingly addressed to that concern. “It is [] important to stress the proper role of the Judiciary,” he wrote in *Vasquez Perdomo*, emphasizing that “[c]onsistency and neutrality are hallmarks of good judging” and asserting that “[the Court] abide[s] by those enduring judicial values in this case by granting the stay.”⁹¹ This theme—repeated by Justice Kavanaugh and other conservative justices in high-profile, controversial cases that change settled law⁹²—reveals the utility of stealth reversals at a moment when record-low numbers of Americans believe the Court is engaging in “good judging.”⁹³ By preserving the formal chassis of precedent even while hollowing out its substance, these techniques aim to reassure the public of the conservative Court’s “proper role,” purportedly grounded in the application of “enduring” legal values and other characterological manifestations of courts acting “like courts.”⁹⁴

There are currently seven theorized techniques of stealth reversal recognized in the literature. Factual revisionism is a distinct eighth form. Each

90. See, e.g., Brendan Rascius, *Supreme Court Approval Rating Sinks to a New Low, Poll Finds. What Caused Shift?*, MIA. HERALD (Aug. 8, 2025), <https://perma.cc/29DZ-DNZR> (summarizing current public polling on the Court’s historically low approval rating); RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 22-23 (2018) (defining sociological legitimacy); see Duncan Hosie, *Resistance Through Restraint: Liberal Cause Lawyering in an Age of Conservative Judicial Hegemony*, 111 CORN. L. REV. (forthcoming 2026) (manuscript at 14 & n.72) (on file with author) (citing sources for the claim that polling “show[s] the Court’s public reputation at historic and enduring lows” and connecting this “subterranean rating” to “Democratic opposition and unprecedented polarization in [institutional] perception”).

91. *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637, at *5 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring).

92. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2310 (2022) (Kavanaugh, J., concurring) (“The Court today properly heeds the constitutional principle of judicial neutrality [in overturning *Roe v. Wade*]. . .”).

93. See, e.g., Duncan Hosie, *Janus and the Movement Dissent*, 65 B.C.L. REV. 371, 377 (2024) (“Public approval of the Court has fallen to record lows, driven principally by citizens who object to the Court’s conservative rulings on abortion, guns, and other topics.”); *Dobbs*, 142 S. Ct. at 2349-50 (Breyer, J., dissenting) (arguing the method used to overturn *Roe v. Wade* would create doubts about the Court’s institutional “legitimacy”).

94. *Biden v. Nebraska*, 143 S. Ct. 2385, 2355, 2388 (2023) (Kagan, J., dissenting) (stressing the Court’s obligation to act “like [a] court[.]”); cf. Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 343-47 (2020) (discussing the Court’s “investment in institutional stasis”).

of the currently recognized techniques—precedent ruination, precedent gating, precedent revisionism, strategic certiorari denials, shadow docket reversal, settled question revisionism, and methodological destabilization—manipulates the relationship between law and visibility: sometimes by reinterpreting doctrine, sometimes by exploiting procedure, sometimes by withholding explanation altogether.⁹⁵ Yet all presume a stable descriptive ground on which their manipulations occur. Whether the Court re-characterizes a rule, erases it through procedural silence, or limits its reach, the factual record beneath remains taken for granted. Rooted in a founding-era rejection of inquisitorial courts⁹⁶ and central to modern legal practice,⁹⁷ appellate deference to the “major role” of trial judges and jurors in factfinding and gatekeeping—based on their relative “expertise,” “experience,” and proximity—has long been a feature of the American legal system.⁹⁸ That deference, in turn, enables analogical reasoning at the appellate level: Similar facts yield similar rules, and departures from precedent emerge from principles rather than evidence.

These distinctions collapse under factual revisionism. The Court arrogates to itself the authority to define empirical reality, reaching beyond domains in which it has comparative functional advantages and defined responsibilities.⁹⁹ This arrogation can unfold through several interlocking moves: (1) substitution, in which a justice’s description supplants trial-level findings without declaring clear error under Federal Rule of Civil Procedure 52(a)(6) or properly applying it; (2) rhetorical naturalization, in which selective quotation and repetition reinforces uncorroborated claims as truth; (3) evasion, in which the opinion never acknowledges the underlying record, its distortion of it, or the appropriate standard of review; and (4) nominal acceptance, in which the Court professes to respect the district court’s findings without actually doing so or, as in *Vasquez Perdomo*, does not acknowledge a conflict with the district

95. See Hosie, *Stealth Reversals*, *supra* note 14, at 1335-36 (outlining seven forms of stealth reversal).

96. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381 (1982) (“The framers, reacting against the King’s autocratic judiciary . . . gave a principal role to the jury in both civil and criminal trials and permitted Congress to limit the Supreme Court’s appellate review of ‘factual’ determinations.”).

97. See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”).

98. See *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); see also *The Ship Potomac*, 67 U.S. (2 Black) 581, 584 (1862) (“It is not enough for the appellant merely to raise a doubt on conflicting testimony, that the judgment of the Court below may possibly be erroneous.”).

99. See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-33 (1991) (describing the “institutional advantages” of appellate courts in providing legal guidance and interpretation).

court. As the discussion above demonstrates, all four of these interlocking moves appear in Justice Kavanaugh’s concurrence.¹⁰⁰

Factual revisionism corrodes judicial precedent along both vertical and horizontal axes,¹⁰¹ aggrandizing power at the expense of lower courts and past Courts, respectively.¹⁰² Vertically, it dissolves the hierarchy that grounds the legitimacy of and deference to trial courts’ factfinding.¹⁰³ Appellate courts, skilled in “law declaration,” subsume “fact identification.”¹⁰⁴ Horizontally, factual revisionism detaches precedent from its factual moorings, eroding the core analogic principle in a common law system that like cases should be treated “alike.”¹⁰⁵ Once facts and their cognates are fluid, the category of “like” itself becomes manipulable and ultimately incoherent. *Vasquez Perdomo* exemplifies this method of stealth reversal with unusual clarity—the factual distortions of Justice Kavanaugh’s concurrence are uncommonly legible, its real-world consequences uncommonly immediate—but it is neither the Roberts Court’s first foray into factual revisionism nor its last.¹⁰⁶

Doctrinal change through factual revisionism evades scrutiny more easily than explicit legal transformation. Because factual appropriation operates at the level of description rather than legal interpretation, and because the public encounters cases through media accounts that often echo the Court’s characterization of events, it can escape the visibility and contestation that accompany more transparent doctrinal shifts. Journalists reported that in *Vasquez Perdomo*, Justice Kavanaugh had applied “precedent,” not that he had

100. *Supra* Part I.B.

101. See Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 124-25 (summarizing the distinction between “vertical” precedent, a “feature of a judicial system in which lower courts . . . treat higher court decisions on matters of legal interpretation and application as if they were law themselves” and “horizontal” precedent, i.e. stare decisis, “the obligation of a court to follow the previous decisions of the same court”).

102. See generally Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 107, 112 (2022) (commenting on the Court’s recent lack of both “deference to the factfinding of lower courts” and “fidelity to past precedent”).

103. See *supra* note 89.

104. Monaghan, *supra* note 54, at 235, 239.

105. See *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (“The legal doctrine of stare decisis requires us . . . to treat like cases alike.”), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

106. See, e.g., Duncan Hosie, *The Unitary Judiciary*, 125 MICH. L. REV. (forthcoming 2027) (manuscript at 40-48) (on file with author) (identifying various forms of the Court contingently disregarding the clear error standard in merits and non-merits adjudications).

reconstructed facts to subvert it.¹⁰⁷ By eliding politically salient and popularly galvanizing facts—here, the brutality of federal officers, who were deployed to implement the White House immigration policies—the concurrence distorts the epistemological and empirical baselines that might otherwise provoke judicial, legislative, journalistic, or public resistance. For a Court facing profound questions about its sociological legitimacy, factual revisionism offered crucial insulation.

This method of stealth reversal is not confined to the shadow docket.¹⁰⁸ But the shadow docket structurally invites factual revisionism, with Court adjudication occurring without regular briefing, oral argument, and a fully developed factual record. Because the unsigned majority order offers no reasoning, it provides no guidance for application—a problem lower courts have noted when attempting to apply *Vasquez Perdomo*.¹⁰⁹ For insight into the controlling rationale, these courts must turn to Justice Kavanaugh’s concurrence, despite its focus on issues unrelated to the Fourth Amendment merits—from Article III standing to likelihood-of-success balancing and subtle musings on the ills of the Biden administration’s immigration policies¹¹⁰—and despite uncertainty about whether the five other conservative justices who voted to grant the stay share his perspectives.¹¹¹

The concurrence’s questionable precedential status does not diminish factual revisionism’s destabilizing effect. It amplifies it. Rather than limit the concurrence’s reach, the doctrinal uncertainty adds a second layer of instability on top of the first. Factual revisionism distorts the record from which law is made; precedential ambiguity then leaves that distorted record unmoored from any stable legal framework that might correct or constrain it. The result is

107. See, e.g., Debra Cassens Weiss, *Kavanaugh Cites Precedent, ‘Common Sense’ in Supporting SCOTUS Order Allowing Immigration Stops*, ABA J. (Sept. 9, 2025, 8:46 AM CDT), <https://perma.cc/E28T-TDFQ> (describing Justice Kavanaugh as “citing precedent”).

108. See Hosie, *Stealth Reversals*, *supra* note 14, at 1373-81 (arguing the merits case of *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), was a stealth reversal of the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and relied on factual distortions); Greenhouse, *Supreme Court After Dobbs*, *supra* note 14, at 2 n.8 (endorsing my account).

109. See, e.g., *Escobar Molina v. U.S. Dep’t of Homeland Sec.*, No. 25-3417, 2025 WL 2365518, at *17 (D.D.C. Dec. 2, 2025) (commenting that “[b]luntly put, why the Court ruled as it did [in *Vasquez Perdomo*] remains unclear” and lacks “reasoning,” as well as objecting to Justice Kavanaugh’s concurrence).

110. See, e.g., *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637, at *1 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring) (stating gratuitously that “many millions illegally entered (or illegally overstayed) just in the last few years”).

111. See, e.g., *Los Angeles Press Club v. Noem*, No. 25-cv-5563, 2025 WL 4058872, at *3 n.4 (C.D. Cal. Oct. 21, 2025) (recognizing the district court’s “duty to follow the decisions of the Supreme Court” but criticizing the *Vasquez Perdomo* Court for “not elucidate[ing] which of several potentially independently sufficient bases justified the stay, and Justice Kavanaugh’s concurrence is not itself binding”).

compounding indeterminacy: Courts below cannot confidently apply the concurrence, even as they know they must grapple with it, yet executive actors treat it as license to proceed without one.

Even taken at face value, the concurrence's precise legal rule remains opaque. Its core directive is declaratory and negative: Do not issue injunctions like that of the district court. But by distorting the facts underpinning that injunction to uphold conduct beyond extant Fourth Amendment law, the concurrence leaves unclear what forms of injunctions are permissible, what forms of government enforcement are not, and how to evaluate factual claims brought by future litigants. If, for example, a twenty-minute detention and relocation qualify as "brief," then what duration would fall outside this category? The concurrence provides no limiting principle, whether by design or omission.

The result is a one-way ratchet against injunctive relief. Unable to predict which injunctions the Supreme Court will uphold yet cognizant of its intervention here and its frequent emergency stays of injunctions against the Trump Administration,¹¹² lower courts face asymmetric risks: Denying relief is safe; granting it invites reversal. Simultaneously, ICE receives an unmistakable green light to proceed with "Kavanaugh stops," and has done so, dramatically expanding deployment of this tactic.¹¹³ The concurrence's factual sanitization even emboldens more aggressive enforcement: ICE leadership predictably responds to a Court that not only upheld contested actions but rewrote them in terms conveying what I have described elsewhere as "enthusiasm for Trump's [most aggressive] immigration tactics."¹¹⁴

Conclusion

Adrienne Rich once wrote of descending to the ocean floor to discover the "thing I came for: the wreck and not the story of the wreck."¹¹⁵ Courts, at their best, do the same. They descend into empirical reality, separating the wreck itself from the myth that might obscure it. The complementary allocation of judicial roles makes this work possible. Trial courts engage in sustained, disinterested examination of adversarially presented testimony and evidence. Appellate courts, in turn, review those findings with the restraint and humility

112. See, e.g., Lesly Ramirez Melchor, *Worse Than Nothing*, N.Y. REV. BOOKS (Nov. 1, 2025), <https://perma.cc/2SUE-QAF5> (participating in an interview in which I provide examples of this phenomenon).

113. See, e.g., Martin et al., *supra* note 18 ("[I]mmigration officials across the country appear to be treating the opinion as if it were binding."); see also *supra* note 66 and accompanying text.

114. Melchor, *supra* note 112 (my quote in the interview).

115. Rich, *supra* note 1.

rooted in deference and in recognition of the structural remove that renders them only “tentative haunters.” This division of labor enables courts to identify constitutional and statutory violations—the “ribs of disaster”—and to situate them within law. In *Vasquez Perdomo*, that task required confronting the terror and indignity inflicted when armed federal agents detain people based on appearance, language, and occupation.

The harms of factual revisionism cascade outward. They fall first on individuals, sometimes violently. But the deeper injury is structural. By unilaterally revising or evading factual findings developed below and grounded in lived reality, the Court undermines the very foundation on which law can be made in the first instance. Law necessitates a shared commitment to facts, or at least a shared commitment to ordered processes for determining them. It demands taking litigants’ factual submissions seriously and showing them the respect that comes through vigorous adversarial examination. And it depends on fidelity to institutional and evidentiary norms that subordinate ideology to procedure, transparency, reasoned explanation, and democratic values.