Washington State Dep't of Licensing v. Cougar Den Inc. (16-1498)

Court below: *Washington Supreme Court*
Oral argument: Oct. 30, 2018

Question as Framed for the Court by the Parties

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

Facts

The Confederated Tribes and Bands of the Yakama Nation is an Indian tribe recognized by the federal government. The Yakama Nation and the United States entered into a treaty in 1855. In the treaty, the Yakama Nation surrendered tribal territory to the United States in exchange for the security of certain rights to the Yakama Nation including "the right, in common with citizens of the United States, to travel upon all public highways."

Cougar Den Inc. is a corporate entity organized under the laws of the Yakama Nation. Cougar Den's owner and president, Kip Ramsey, is an enrolled member of the Yakama Nation. In 1993, Cougar Den became the Yakama Nation's appointed sole agent to provide for the sale and delivery of petroleum products to the Yakama Nation's members.

In 2013, Cougar Den began buying fuel in Oregon and transporting the fuel to the Yakama Reservation located in Washington where Cougar Den sells the fuel to fuel stations. In transporting fuel via public highway from Oregon to the Yakama Reservation in Washington, Cougar Den must travel across a 27-mile gap between the Washington-Oregon state line and the entrance to the Yakama Reservation.

The state of Washington, through its Department of Licensing, levies taxes on motor vehicle fuels. These taxes include a tax on wholesale fuel suppliers, under which the state taxes fuel that is brought into the state via trucks or railcars when that fuel is hauled across the state line.

However, Cougar Den did not pay taxes on the fuel brought into Washington from Oregon over the public highway. In response, the Department of Licensing assessed Cougar Den $3.6 million in taxes, penalties, and interest for Cougar Den's transporting activities for eight months during the 2013 calendar year. Despite this, Cougar Den continued its activities without paying taxes, claiming exemption under the 1855 treaty, and the Department of Licensing continued to assess taxes and penalties. Ultimately, the Department of Licensing assessed tens of millions of dollars in unpaid taxes, penalties, and interest.

Cougar Den appealed this tax assessment to a state administrative law judge (ALJ), who held in favor of Cougar Den. The ALJ determined that the taxes were improper because they impermissibly restricted the right to travel granted to the Yakama Nation under the 1855 treaty. Subsequently, the Department of Licensing appealed to the director of the Department of Licensing, who reversed the ALJ's order.

Cougar Den then appealed to the state Superior Court for judicial review of the Department of Licensing determination. The state Superior Court reversed the director's determination and held in favor of Cougar Den. The state appealed the Superior Court decision to the Washington Supreme Court. By a 7-2 vote, the Washington Supreme Court affirmed the Superior Court's decision that the tax assessment violated the 1855 treaty. The Department of Licensing then petitioned the U.S. Supreme Court, which granted certiorari.

Legal Analysis

Indian Treaty Interpretation and Pre-Emption

The Washington State Department of Licensing argues that its fuel tax applies to Cougar Den because the Yakama treaty does not expressly pre-empt the state tax. The state cites the U.S. Supreme Court's bright-line test from *Mescalero Apache Tribe v. Jones*, which determines whether a state may tax an Indian tribe or its members. Generally, a state may not tax a tribe or its members within reservation land. However, outside of reservation land, a state may impose a non-discriminatory tax, according to the state. The state notes that the off-reservation tax is subject to a caveat: The federal government may pre-empt a state's ability to impose its tax. However, the state argues that the pre-emption must be "clearly expressed" and "unambiguously proved." Otherwise, the state maintains, courts "will not imply tax exemptions."

Here, the state contends that the right-to-travel provision in the treaty does not constitute an express federal pre-emption of its fuel tax. In support of its argument, the state cites *Mescalero*, a case in which the Court refused to exempt from tax income derived from tax-exempt land because the federal statute granting the tax exemption did not expressly exempt income derived from the land. Similarly, the state argues, the treaty's right-to-travel provision says nothing about taxes and never mentions fuel or any other goods. Thus, the state maintains that as in *Mescalero*, "in the absence of clear [treaty] language," the Court should not imply a tax exemption in this case.

Cougar Den counters that the right-to-travel provision pre-empts the Washington fuel tax although the provision never explicitly refers to taxes. Cougar Den argues that the state's "clear-statement rule"—that the treaty cannot pre-empt a tax unless it unmistakably refers to taxes—conflicts with Ninth Circuit precedent. Cougar Den notes that in *Yakama Indian Nation v. Flores*, the U.S. District Court for the Eastern District of Washington held that the treaty's right-to-travel provision pre-empted the application of Washington's licensing and permitting fees to Yakama-owned logging trucks even though the provision never explicitly mentions taxes.

Additionally, Cougar Den contends that the state's clear-statement rule contravenes well-established canons of construction for Indian treaties. Cougar Den maintains that courts must interpret Indian treaties "as the Indians themselves would have understood them." Cougar Den notes that, although the right-to-travel provision does not explicitly refer to taxes, the Yakama would have

understood that the treaty pre-empted taxes associated with treaty-protected rights, like the right to travel in this case. Further, Cougar Den explains that, unlike a federal statute, a treaty is an agreement between parties. Thus, Cougar Den maintains, the Court must consider the parties' intent when interpreting the treaty.

What Is the Washington Fuel Tax 'On'?

The state argues that its fuel tax does not restrain highway travel. The state highlights that the treaty guarantees "the right … to travel upon all *public highways*" (emphasis added). The state does not dispute this right; rather, the state claims that Cougar Den's decision to transport fuel by highway does not convert the fuel tax into a tax on highway travel because the fuel tax attaches to fuel possession. The state notes that the tax is imposed on a per-gallon basis and "is assessed regardless of whether Cougar Den uses the highway." For instance, the state claims that the tax also applies to fuel imported by a railcar or barge. Therefore, the state maintains, the method of transportation is irrelevant. Although the only practical way to import fuel may be by highway, the state posits that the treaty says nothing "about pre-empting off-reservation taxes on possession of goods simply because the only practical way to transport them is by highway."

Cougar Den counters that what the tax is "on" is irrelevant to pre-emption. Whether the tax is "on" fuel possession or fuel transportation, Cougar Den argues that the Court must focus on whether the state is taxing a treaty-protected right. Here, Cougar Den contends that fuel possession cannot be separated from the treaty-protected right to transport goods. Cougar Den claims that to transport something, one must necessarily possess the thing being transported. Therefore, even if the tax were on possession, the treaty would pre-empt the tax. Further, Cougar Den maintains that even if the case turns on what the tax is "on," the treaty pre-empts the tax because importation expressly triggers the tax. Cougar Den posits that to "import" goods is to "transport" goods. Thus, Cougar Den contends that the state must prove that Cougar Den transported goods—a treaty-protected right—to assess the fuel tax.

The Role of Historical Understanding

The state argues that the Yakama Nation's historical understanding of the right-to-travel provision does not prevent the state from imposing its fuel tax on Cougar Den. The state acknowledges that probing the parties' historical understanding is a valuable way to discern the parties' intended meaning of terms used in the treaty, "but it cannot justify adding terms that are not there." The state posits that this is especially true for off-reservation tax exemptions. Because the general rule is that a state may tax an Indian tribe or its members for off-reservation activity, the state maintains that off-reservation tax exemptions must be "clearly expressed" and "unambiguously proved." The state notes that courts do not grant off-reservation tax exemptions by implication. Therefore, the state contends, the Yakama's historical understanding cannot provide a basis for an off-reservation tax exemption because "unwritten understandings" cannot serve as the foundation for off-reservation tax exemptions.

Cougar Den counters that the Ninth Circuit in *Yakama Indian Nation* established that courts must consider the parties' historical understanding when interpreting the right-to-travel provision. Cougar Den noted that in that case, the Ninth Circuit instructed the District Court for the Eastern District of Washington to examine holistically the treaty language, the parties' conduct after the treaty was signed, and the circumstance surrounding signing. Further, Cougar Den contends that the factual findings in that case bind the state because the state never challenged those findings and the Washington Supreme Court in this case determined that the findings were preclusive.

Discussion

Role and Efficacy of Taxation

The state argues that allowing the treaty to pre-empt Washington's fuel tax would result in devastating effects on state and federal taxing powers. The state claims that if the Court holds in favor of Cougar Den, then Washington could lose millions more dollars in tax revenue from Cougar Den's conduct alone.

The Nez Perce Tribe, in support of Cougar Den, argues that just because Washington may not be able to collect fuel tax from the Yakama Nation does not necessarily mean that the tax will go uncollected. For example, the Nez Perce Tribe notes that it collects a fuel tax from its retailers to cover transportation-related expenses, thereby fulfilling the same purpose as the state fuel tax.

Anti-Competitive Impact of Pre-Empting the Fuel Tax

The Washington Oil Marketers Association (WOMA), on behalf of the state, argue that pre-empting Washington's fuel tax would result in tribal businesses gaining a significant competitive advantage over their nontribal business rivals. WOMA asserts that tribal businesses, including Cougar Den, have been able to offer a gallon of gas at a rate 20 cents lower than competitors who are subject to the tax. Indeed, WOMA contends that many individuals shop for the lowest price for their fuel, and tribal businesses' lower tax-free prices will result in non-tribal businesses being driven out of the market.

Cougar Den concedes that the issue of competitiveness is a legitimate one, but responds that a solution has been offered in the past: pass the tax along to the consumer instead of the distributer. Cougar Den notes that this solution has been rejected by the state because it is politically unpopular—consumers do not like to pay taxes, so the state would rather the consumer blame the gas station than blame the state for high prices. Sacred Ground Legal Services, in support of Cougar Den, also notes that Cougar Den transports a large majority of its oil to Yakama gas stations on the Yakama Reservation for the benefit of those driving on the reservation—not for the benefit of those "price shopping" for gas. ⊙

Written by Matt Farnum and Trevor O'Bryan. Edited by Marissa Rivera.

Jam v. Int'l Fin. Corp. (17-1011)

Court below: *U.S. Court of Appeals for the D.C. Circuit*
Oral argument: Oct. 31, 2018

Question as Framed for the Court by the Parties

Whether the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288a(b), which affords international organizations the "same immunity" from suit that foreign governments have, confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-11.

Facts

The International Finance Corporation (IFC) is an international organization purposed with promoting private enterprise in its

184 member countries, mainly by investing in private projects where insufficient capital is available. When investing in these projects, the IFC's internal policies require an assessment of environmental and social risks and the mitigation of potential risks. Recently, the IFC decided to invest in the development of the Tata Mundra Power Plant in India. Pursuant to their internal policies, the IFC put in place environmental and social covenants requiring the power plant to mitigate its negative impact on the area. Fisherman and farmers who work near the plant, including Budha Ismail Jam, allege that the operation of the power plant devastated their way of life by polluting the air and groundwater, altering the local marine ecosystem, and displacing local fishermen and farmers. They argue that the IFC should have enforced the loan agreement and stopped funding the power plant and that, by failing to do so, these social and environmental harms resulted.

Jam first filed a complaint with the IFC's internal accountability mechanism for environmental and social concerns, the Compliance Adviser Ombudsman (CAO). After an investigation, the CAO concluded that the IFC had violated its internal policies when it failed to adequately assess environmental and social dangers the community would be exposed to, which was compounded by its failure to address compliance issues during the project. The CAO, however, lacks an enforcement mechanism to compel the IFC to make reparations.

Jam then sued the IFC in the United States District Court for the District of Columbia, claiming that the IFC was negligent in failing to enforce the loan agreement. In response, the IFC argued that the federal district court did not have jurisdiction to hear the claim under the IOIA, which granted international organizations the same sovereign immunity accorded to foreign nations. Jam argued that the FSIA had restricted foreign sovereign immunity by allowing individuals to sue sovereigns for their commercial activities and that IFC's immunity is similarly limited. The district court rejected Jam's argument and followed *Atkinson v. Inter-American Development Bank*, in which the D.C. Circuit Court of Appeals held that the IOIA granted "virtually absolute immunity."

Jam appealed to the D.C. Circuit Court of Appeals, which dismissed the case, holding that it did not have jurisdiction to hear the case under the 1945 understanding of the IOIA.

The U.S. Supreme Court granted Jam's petition for writ of certiorari on May 21, 2018.

Analysis

The 'Same Immunity' Provision of the IOIA

Jam argues that under the text of § 288a of the IOIA, international organizations receive the "same immunity … as is enjoyed by foreign governments." And according to Jam, the FSIA, which later codified the law of foreign sovereign immunity in 1976, does not provide immunity to foreign governments for their commercial dealings. Jam then argues that courts "must enforce plain and unambiguous statutory language according to its terms." Therefore, according to Jam, the only plausible interpretation of the IOIA is that the statute does not extend immunity for commercial actions to international organizations.

Jam also asserts that the term "same" in the "same immunity" provision of the IOIA buttresses the notion that the IOIA was intended to continually track the law of foreign sovereign immunity. Jam contends that it is a recognized practice to interpret statutes that treat one thing "the same as" another as if Congress intended to maintain that similarity in the future. Additionally, Jam argues that the IOIA is written in the present tense, while the Supreme Court has often looked to the form of verb tense used in a statute to discern the statute's intended temporal reach. According to Jam, the Dictionary Act confirms that with respect to acts of Congress, "words used in the present tense include the future as well as the present." Jam contends that Congress could have, among other things, phrased the statute in the past tense if it did not want to incorporate future changes in sovereign immunity law.

The IFC counters that the IOIA was enacted to bring the United States' foreign sovereign immunity law into line with that of the United Nations and the international community, and so the "same immunity" language was understood by the Supreme Court and the State Department to refer to a common law standard that entailed virtually absolute immunity, including immunity for commercial acts. The IFC asserts that, as the Supreme Court has consistently held, a statute that codifies common law standards is construed to adopt the relevant common law as it existed at the time the statute was enacted. Therefore, argues the IFC, the IOIA should be construed as affording international organizations the same level of virtually absolute immunity.

The IFC further argues that the use of the word "same" does not indicate whether the quality of "sameness" should be evaluated with respect to the time the IOIA was enacted or to the time the IOIA is applied. The IFC contends that the present-tense verbs used in the IOIA also fail to indicate that the statute is meant to incorporate current sovereign immunity law.

Interpreting the Structure and Purpose of the IOIA

Jam argues that comparing the structure of certain parts of the IOIA, namely § 288a, to other parts of the act also supports the interpretation that the IOIA was intended to track current law. Jam asserts that while § 288a references foreign sovereign immunity law in the "same immunity" provision, other provisions of the statute fail to refer to other bodies of law, and instead clearly establish absolute immunity. According to Jam, this discrepancy demonstrates that § 288a was not intended to establish absolute immunity for international organizations. Moreover, Jam asserts that Congress' core purpose for passing the IOIA was to provide "privileges and immunities of a governmental nature" to international organizations. Jam concludes that Congress' underlying objective in doing so was to prevent states from dodging legal accountability by using international organizations as intermediaries.

The IFC responds by asserting that § 288a contains a clause stating that international organizations "may expressly waive their immunity for the purposes of any proceedings or by the terms of any contract," a power that is already established as part of the body of sovereign immunity law. According to the IFC, if § 288a was intended to incorporate the current body of sovereign immunity law it would be superfluous to include this waiver power because it would apply automatically under the commercial activities exception. The IFC further contends that Congress specifically enacted the IOIA to enable the United States to fulfill commitments related to its membership in international organizations and to "facilitate the functioning of international organizations in this country," which Congress recognized are bases that are distinct from

the bases justifying immunity for sovereign governments.

Discussion

Expanding Jurisdiction Over International Organizations

Bipartisan members of Congress, in favor of Jam, argue that preserving immunity for the commercial activities of international organizations will make it too easy for foreign states to avoid legal accountability for their commercial activities if they merely act through international organizations. Furthermore, several professors of international organization and international law claim that allowing international organizations to escape liability will create an unfairly asymmetrical system in which the international organizations are immune while the parties they contract with are not similarly protected. The Center for International Environmental Law (CIEL) contends that if theD.C. Circuit Court of Appeals is affirmed, international organizations will have little incentive to ensure they provide effective internal accountability mechanisms because there will be no available impartial forum where complainants can get relief; whereas withdrawing immunity would open up the courts to grievances.

IFC member countries and the Multilateral Investment Guarantee Agency, in favor of the IFC, argue that granting jurisdiction over international organizations will frustrate the members of the IFC, and other international organizations hosted in the United States who did not agree to be hosted in a country where they were open to suit. The International Bank for Reconstruction and Development (IBRD) agrees and argues that if there is no immunity, international organizations will need to account for significantly greater transaction costs for legal defense and will need to consider potential litigation costs when making investment decisions. International law experts are also concerned that international organizations will not be able to fulfill the purposes for which member states created them because opening international organizations to domestic lawsuits will allow individual members to exert too much influence over the group, compromising the international organization's independence and ability to make impartial decisions.

Opening the Floodgate for Litigation

Professors of international organization and international law, in support of Jam, argue that revoking immunity for commercial activities will not subject U.S. courts to massive amounts of new litigation because existing procedural rules in the United States will prevent lawsuits without a genuine connection to the forum. The United States asserts that the courts will not experience a flood of litigation because the FSIA limits jurisdiction over commercial activities to those that take place in the United States or substantially affect the United States. CIEL argues that it is unaware of any empirical support for the assertion that reversing this case would open up a floodgate of litigation. Furthermore, CIEL argues that even under a more restrictive reading of the IOIA's immunity grant, lawsuits would be quite rare.

IBRD, in support of the IFC, argues that if international organizations do not receive immunity for their commercial activities, there will be a flood of litigation that the restrictive provisions of the IOIA will not contain because they will only inspire plaintiffs' counsel to create new, enterprising arguments as to why the actions fall within the FSIA's jurisdictional allowances. The IBRD also argues that revoking immunity will create more litigation by incentivizing plaintiffs to sue the international organization in the United States when they are unable to sue the foreign company that harmed them. Furthermore, the IBRD argues that other potential jurisdictional limitations are insufficient protections because international organizations will still have to spend money raising these protections and defending themselves against litigation in the United States ⊙.

Written by Garion Liberti and Tayler Woelcke. Edited by Connor O'Neill.

Republic of Sudan v. Harrison (16-1094)

Court below: *U.S. Court of Appeals for the Second Circuit*

Oral argument: Nov. 7, 2018

This case asks the Supreme Court to decide whether plaintiffs can serve a foreign state under the Foreign Sovereign Immunities Act (FSIA) by addressing the service of process package to the state's foreign minister and sending it to the foreign state's embassy located in the United States.

The plaintiff, the Republic of Sudan, maintains that, under the FSIA, plaintiffs must serve a foreign state by sending the service of process package to the foreign minister at the ministry of foreign affairs located in that foreign state's capital. Sudan contends that Article 22 of the Vienna Convention supports this interpretation because it precludes service "via" or "through" a diplomatic mission. However, the respondents—a group of victims of an al-Qaida attack, including named-party Rick Harrison—contend that, although FSIA requires plaintiffs to address and send their service of process mail to a state's foreign minister, it does not direct plaintiffs to send the package to a particular location. Harrison asserts that, because the FSIA's text unambiguously allows service through an embassy, the Vienna Convention does not apply in this case.

This case has large implications for foreign relations, especially as regards to terrorism. A decision for Harrison may better compensate victims of terrorist attacks and restrict state-sponsored terrorism, whereas a decision for Sudan may better protect the United States as a foreign litigant and aid the effective function of embassies.

Full text available at: https://www.law.cornell.edu/supct/cert/16-1094. ⊙

BNSF Railway Co. v. Loos (17-1042)

Court below: *U.S. Court of Appeals for the Eighth Circuit*

Oral argument: Nov. 6, 2018

In this case, the Supreme Court will decide whether time lost awards are taxable as compensation under the Railroad Retirement Tax Act.

BNSF Railway Co. argues that such awards are taxable because they fall within the employer-employee relationship, especially when the Railroad Retirement Tax Act is read in conjunction with the Railroad Retirement Act. Michael Loos counters that the plain text of the Railroad Retirement Tax Act does not include time lost awards in its definition of "compensation" and that regardless, Internal Revenue Code § 104(a)(2) excludes personal injury awards from taxation.

The outcome of this case will determine the contours of the definition of "compensation" in the Railroad Retirement Tax Act as well as the extent to which the Railroad Retirement Tax Act and the Railroad Retirement Act should be interpreted as a unified statutory scheme.

Full text available at: https://www.law.cornell.edu/supct/cert/17-1042.

Sturgeon v. Frost (17-949)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Nov. 5, 2018

This case asks the Supreme Court to resolve whether the National Park Service (NPS) has the authority to regulate activity on navigable waters on nonfederal land located within, but not deemed part of, the national park system in Alaska.

John Sturgeon contends that § 103(c) of the Alaska National Interest Lands Conservation Act, which defines "public lands" as those to which the United States has title, excludes nonfederal lands and waters falling within the boundaries of Alaska's national parks from NPS regulations. Sturgeon further argues that the NPS does not derive any regulatory authority from any reserved water rights the federal government may own. Bert Frost, in his official capacity as Alaska regional director of the NPS, contends that § 103(c) merely restricts the NPS's pre-existing regulatory authority over navigable waters within national parks, as granted by Congress. According to Frost, the NPS may only enforce water-related rules regarding activities hazardous to the use and management of public lands.

The outcome of this case will have implications concerning the balance of power between the state and federal government to regulate nonpublic lands and waters falling within the national park system in Alaska.

Full text available at: https://www.law.cornell.edu/supct/cert/17-949. ⊙

Bucklew v. Precythe (17-8151)

Court below: *U.S. Court of Appeals for the Eighth Circuit*
Oral argument: Nov. 6, 2018

This case asks the Supreme Court to determine whether a death row inmate challenging an execution method must prove a feasible alternative execution method when the challenged method will allegedly inflict an unconstitutional level of pain as applied to the inmate's medical condition.

Russell Bucklew argues that the state should bear the burden of proving an alternative method in such an "as-applied" challenge. He reasons that because there is no risk that the challenged execution method will be outlawed in its entirety and because the state is in the best position to evaluate the effect of existing execution methods on the inmate's medical condition, the Court should place the burden on the state. The Department of Corrections (DOC) argues that the inmate in an "as-applied" challenge case should bear this burden. The DOC notes that the inmate would be able to obtain an exemption from capital punishment and needlessly delay their execution by bringing meritless claims if the Court placed the burden on the state rather than on the inmate.

The Supreme Court's decision in this case will impact the ability of inmates to challenge execution methods, the administrability of common execution methods such as lethal injection, and the effect of the capital punishment process on drug regulators, physicians, and state corrections officers.

Full text available at: https://www.law.cornell.edu/supct/cert/17-8151. ⊙

Richard Culbertson v. Nancy Berryhill (17-773)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral argument: Nov. 7, 2018

This case asks the Supreme Court to decide how to calculate attorney's fees for representation in court and before the Social Security Administration under 42 U.S.C. § 406(b).

Richard Culbertson sought an attorney's fee of 25 percent of the past-due benefits awarded to the Social Security claimants whom he represented in court. Culbertson contends that § 406(b)'s 25 percent cap applies only to his representation before a court. The Court of Appeals applied § 406(b)'s 25 percent cap to the sum of attorney's fees under § 406(a) and § 406(b). Berryhill agrees with Culbertson's position, while the Supreme Court-appointed amicus curiae supports the Court of Appeals.

This case will impact Social Security claimants' protections from overbilling and the financial incentives allowing claimants to access competent legal representation.

Full text available at: https://www.law.cornell.edu/supct/cert/17-773. ⊙

Frank v. Gaos (17-961)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Oct. 31, 2018

This case asks the Supreme Court to decide whether lower courts violated Federal Rule of Civil Procedure 23(e) when they certified a *cy pres* settlement that did not award settlement money to class members in a class action against Google.

Petitioner and class member Theodore H. Frank asserts that the courts should not have certified the *cy pres* class settlement because it was not "fair, reasonable, and adequate" in the meaning of Rule 23(e), given that it did not compensate class members for their injuries. Frank argues that the attorney's fees of class counsel were disproportionate given that class members received no return and contends that *cy pres* awards generate potential conflicts of interest between class counsel and their clients. Finally, Frank contends that in the case at hand, class counsel had conflicts with the beneficiaries of the *cy pres* settlement. Other class members, such as Paloma Gaos, and Google respond that the *cy pres* settlement was "fair, reasonable, and adequate," as distributing settlement money to each class member would be infeasible. Google and Gaos further indicate that the attorney's fees were court-approved and state that Frank does not actually contest the award of attorney's fees. Finally, Google and Gaos assert that class counsel had no conflicts with the beneficiaries of the *cy pres* settlement because the beneficiaries were chosen on their own merits.

The outcome of this case has large implications for class action members, their freedom of speech, their due process rights, and to the awarding of *cy pres* settlements.

Full text available at: https://www.law.cornell.edu/supct/cert/17-961. ⊙

Lamps Plus Inc. v. Varela (17-988)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Oct. 29, 2018

Lamps Plus Inc. and Frank Varela executed an arbitration agreement that contained a clause waiving Varela's right to sue his employer or institute any other action concerning his employment at Lamps Plus.

After a data breach, Varela sued Lamps Plus. Lamps Plus moved to compel arbitration of Varela's claims, but the district court decided to dismiss Varela's claims without prejudice and instead to compel class arbitration of the claims. Lamps Plus appealed, arguing that, because the Federal Arbitration Act requires a contractual basis showing the parties' intent to arbitrate class actions, the court could not read in an agreement to class arbitration. Further, the company argues that even if the agreement is ambiguous as to that intent, Supreme

Court precedent indicates that courts must resolve such ambiguity in favor of arbitration. Varela counters that issues of jurisdiction and standing prevent the Supreme Court from deciding this case and that, even if the Court were to examine the case on the merits, the California contract-law interpretive principles used by the lower court were permissible.

The Supreme Court's decision has implications for the employment sector and will likely influence the decision of employers to expressly exclude class actions from future arbitration agreements to maintain the efficiency and informality of arbitration.

Full text available at: https://www.law.cornell.edu/supct/cert/17-988. ⊙

Virginia Uranium Inc. v. Warren (16-1275)

Court below: *U.S. Court of Appeals for the Fourth Circuit*
Oral argument: Nov. 5, 2018

This case asks the Supreme Court to discern the scope of the Atomic Energy Act of 1954 (AEA) and determine whether federal law pre-empts a state ban on uranium mining.

The AEA regulates nuclear materials and facilities in order to promote the safe development and use of atomic energy. Virginia Uranium contends that the AEA pre-empts a Virginia state ban on uranium mining. The Commonwealth of Virginia counters that the AEA is silent on uranium deposits situated on nonfederal land.

The outcome of this case has broad implications for the United States' nuclear industry, national security, and national economy, as well as the future of the pre-emption doctrine.

Full text available at: https://www.law.cornell.edu/supct/cert/16-1275. ⊙

Henry Schein Inc. v. Archer & White Sales Inc. (17-1272)

Court below: *U.S. Court of Appeals for the Fifth Circuit*
Oral argument: Oct. 29, 2018

The Supreme Court will decide how courts should treat agreements delegating gateway questions of arbitrability to arbitrators—questions of whether an arbitrator has the authority to hear a case.

Henry Schein Inc. argues that, to honor such an agreement, the court must allow the arbitrator to decide gateway questions of arbitrability, even if the case clearly belongs in the court. In support of their argument, Henry Schein contends that under the Federal Arbitration Act (FAA) courts must allow arbitrators to decide the merits of claims delegated to arbitrators by contract, even if the merits are not arguable. Archer and White Sales Inc. counters that if a claim to arbitrability is "wholly groundless," the court does not have to make the arbitrator evaluate the claim. Archer and White assert that the FAA does not ask courts to compel arbitration when plaintiffs file claims where they clearly belong—in court. From a policy perspective, this case asks the Court to balance the FAA's strong policy in favor of arbitration with the need to protect the parties to an arbitration clause from arbitration proceedings they did not agree to.

Full text available at: https://www.law.cornell.edu/supct/cert/17-1272. ⊙

Garza v. Idaho (17-1026)

Court below: *Idaho Supreme Court*
Oral argument: Oct. 30, 2018

The Supreme Court will decide the scope and validity of appeal waivers balanced against a defendant's right to file an appeal.

Gilberto Garza Jr. contends that Roe v. Flores-Ortega supports the proposition that there is a presumption of prejudice when an attorney fails to file an appeal when instructed, even if the defendant previously signed an appeal waiver and underlying plea bargain. The state of Idaho counters that *Flores-Ortega* does not create a blanket rule that an attorney's failure to file prejudices a defendant because the defendant already waived their right and risks additional criminal charges in breaching their plea bargain agreement.

The outcome of this case will affect states that use appeal waivers to prevent frivolous appeals in order to promote judicial efficiency and will determine whether an appeal waiver completely bars a defendant from seeking an appeal.

Full text available at: https://www.law.cornell.edu/supct/cert/17-1026. ⊙

Madison v. Alabama (17-7505)

Court below: *Mobile County Circuit Court*
Oral argument: Oct. 2, 2018

Questions as Framed for the Court by the Parties

This case will consider: (1) whether, consistent with the Eighth Amendment and the Supreme Court's decisions in *Ford v. Wainwright* and *Panetti v. Quarterman*, a state may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense; and (2) whether evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition that prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution.

Facts

In 1985, petitioner Vernon Madison shot and killed Officer Julius Schulte in Mobile, Ala., and was sentenced to death by a jury for capital murder. In 1986, the Alabama Court of Criminal Appeals reversed Madison's conviction on the grounds that the district attorney's office discriminatorily excluded all African-American veniremembers in the original trial.

During his second trial, Madison claimed he could not remember the shooting and pled not guilty by reason of mental disease or defect. However, Madison was convicted again for capital murder and sentenced to death. However, the Alabama Court of Criminal Appeals again reversed Madison's second conviction, citing prosecutorial misconduct where the prosecution introduced expert testimony based on facts not in evidence.

During Madison's third trial in 1994, he was found guilty, despite his claims that the shooting was done in self-defense. The trial judge sentenced Madison to death. In 1998, the Alabama appellate courts affirmed Madison's case and the Alabama Supreme Court denied certiorari in 2006.

In 2009, Madison filed a federal habeas petition, which was denied by the district court. However, in April 2012, the Court of Appeals for the Eleventh Circuit reversed the district court's denial for habeas relief and remanded the case for a *Batson* hearing. The district court held that the original prosecution did not purposefully exclude African-American jurors. As a result, the district court denied Madison's habeas petition, which the Eleventh Circuit affirmed in 2013. The U.S. Supreme Court then denied certiorari review.

In January 2016, Madison suffered a number of strokes. Madison was scheduled for execution in May 2016, but claimed incompetency due to the effects of his strokes. A court-appointed expert concluded that Madison suffered from cognitive decline from his recent strokes but found no evidence of psychosis, paranoia, or delusions. A separate expert called by Madison, however, found that Madison suffered from memory loss and could not recall his previous trials, Officer Schulte's name, and the reason for his execution.

In April 2016, the U.S. Supreme Court denied Madison's habeas petition. In May 2016, Madison again filed a habeas petition and stay for execution in district court. The district court denied the petition, but was reversed by the Eleventh Circuit, which granted habeas relief in 2017. Then, however, the Supreme Court reversed the Eleventh Circuit's finding.

In December 2017, Madison again challenged his execution based on competency grounds. On Jan. 16, 2018, the Mobile County Circuit Court denied Madison's petition to stay the execution. The Supreme Court granted Madison certiorari on Feb. 26, 2018.

Legal Analysis

Defining and Applying the *Ford/Panetti* Standard for Categorizing a Defendant as Legally Incompetent to be Executed

Madison argues that *Ford* and *Panetti* established a legal standard for incompetency that makes many defendants incompetent to be lawfully executed. Madison contends that he meets this standard for incompetency because multiple strokes and vascular dementia have left him unable to understand the reason for his execution. Madison asserts that *Ford* and *Panetti* clearly communicate that a vital component of the Eighth Amendment is the prevention of an incompetent person's execution. Madison further claims that the Eighth Amendment intentionally created a broad standard of categorizing a defendant as "incompetent" by declining to delineate which mental states or disabilities would result in the classification of a defendant as incompetent. In Madison's view, the Court's imprecise discussion surrounding the status of incompetency is intentional and further underscores his argument that the standard for incompetency should be broad enough to include a diverse range of mental states and disabilities.

Madison further posits that advancements in modern medicine occurring after *Ford* and *Panetti* allow for an expanded legal standard that protects a broader range of mental disorders under the Eighth Amendment. Madison asserts that developments in the ease and efficacy of disorder diagnoses are relevant because, under *Panetti*, the opinion of medical professionals must be considered when analyzing whether a defendant's medical status qualifies him or her for protection under the Eighth Amendment. Madison cites to *Moore v. Texas* to note that modern standards of the medical community prevent the government from independently determining a person's mental disorder. Applying these arguments to his own case, Madison notes that modern medical imaging technology allowed a physician to describe Madison's brain damage that led to Madison's memory loss. According to Madison, the advances in medical technology have allowed for a more precise understanding of his diminished mental capacity, including his ability to rationally understand his surroundings and competency for execution.

Alabama, in contrast, asserts that to meet the legal standard for incompetency, a defendant's mental status must prohibit the defendant from rationally understanding the government's reasons for ordering the defendant's execution. Citing *Panetti*, Alabama claims that a defendant is capable of rationally understanding his punishment if his awareness of crime and punishment mirrors the general community's understanding of these concepts. In other words, Alabama contends that a determination under *Panetti* of whether a defendant rationally understands his crime and his punishment should not consider whether a defendant remembers committing his crime. Madison, Alabama reasons, rationally understands his punishment because he understands the connection between crime and punishment and he understands that his punishment is the result of his crime. Alabama claims that Madison's insistence that his punishment is unjust and his denial of his responsibility for murdering Officer Schulte further underscores Madison's awareness of crime and punishment as they apply to his situation.

Furthermore, Alabama counters that Madison's interpretation of *Ford* and *Panetti* expands the incompetency standard, encouraging manipulation and gamesmanship. Alabama cautions that such an expansion would incentivize defendants to falsely claim a mental disability to avoid execution. Alabama also responds that, despite modern technology, psychiatrists often disagree when classifying mental illness and that Madison's argument does not reveal the difficulty of diagnosing mental disorders. Additionally, Alabama notes that as the number of federal and state appeals of capital punishments has grown, the average age of a defendant on death row has increased. Thus, Alabama argues, the continued increase in average age would escalate the likelihood that some defendants will falsely assert an age-related mental disability to be classified as incompetent under Madison's standard.

Under Current Standard of Decency, Should Madison's Execution Be Considered a Cruel and Unusual Punishment?

Madison characterizes his mental state as an inability to understand the circumstances of his execution and asserts that modern standards of decency prohibit his execution under the Eighth Amendment. Madison cites *Roper v. Simmons* and *Atkins v. Virginia* to claim that standards of decency prohibit the execution of defendants whose cognitive function is impaired due to age or intellectual disability. Madison then claims that society's standards of decency necessarily prohibit the execution of defendants who lack the capacity to understand why they are being executed. Madison contends that advances in medical testing have allowed his doctors to better assess how his mental disorder impacts his brain function, which in turn has important implications on preventing the enactment of a cruel and unusual punishment in his case.

Alabama, focusing on objective indicators of standards of decency, characterizes Madison's mental state as a memory disorder that does not exempt him from execution under the Eighth Amendment. Alabama asserts that the Eighth Amendment does not prevent the execution of defendants who do not remember committing the crime for which they are being punished. Alabama claims that the Court has provided a clear analysis for determining when a defendant's execution is prohibited by the Eighth Amendment. Alabama also notes that standards of decency largely originate from and are best measured by state and federal legislation. Alabama notes that no state has passed a law prohibiting the execution of a defendant suffering from memory loss due to dementia. Therefore, Alabama contends,

there is no evidence that executing a defendant with Madison's condition would violate standards of decency.

Discussion

Vascular Dementia and Intellectual Disability

The American Psychological Association and American Psychiatric Association, in support of Madison, assert that vascular dementia and intellectual disability should be treated the same because the only difference between the two is *when* they affect patients. The associations broadly define vascular dementia as a progressive disease that causes a person to have declining intellectual ability and argue that, since courts should consider a person's diminished understanding as a factor to determine incompetency, executing a person with vascular dementia would be inhumane as they cannot comprehend their punishment. Furthermore, the associations assure courts that the danger of misdiagnosis or false cases is remote because mental health professionals have the training coupled with technological advancements to diagnose genuine cases. Therefore, the associations contend, courts should not worry whether more prisoners would claim incompetency because mental health professionals can screen against false cases of dementia.

Texas and 13 states in support of Alabama counter that courts have already determined intellectual disability based on three characteristics: low intelligence, limited adapted ability, and emergence of these two characteristics before the age of 18. Given this, the states contend that vascular dementia and loss of memory does not render someone automatically incompetent merely because that person would have had the capacity to understand whether to plead guilty in an earlier proceeding and found competent when convicted. Furthermore, the states argue, a person like Madison who developed vascular dementia should not be treated like a person with an intellectual disability because that person's vascular dementia manifested *after* the offense was committed.

Purpose of the Death Penalty

The associations contend that the execution of an insane person would not only be unreasonable based on human dignity, but it would also fail to deter other criminal behavior. Given these arguments, the associations contend that executing a person with vascular dementia would not serve society's interest in retribution or deterrence, regardless of the individual's crime.

The National Association of Police Organizations (NAPO) in support of Alabama argues that states have traditionally imposed increased penalties for crimes against police officers and cites recent federal legislation to demonstrate a national consensus to protect law enforcement. NAPO claims that the death penalty in particular represents society's outrage against murder, especially against police officers. ⊙

Written by Lauren Devendorf and Luís L. Lozada. Edited by Abigail Yeo.

Nielsen v. Preap (16-1363)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Oct. 10, 2018

Question as Framed for the Court by the Parties

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take the alien into immigration custody immediately.

Facts

This case involves three detainee-respondents who immigrated to the United States as children. Respondent Mony Preap has lived in the United States as a lawful permanent resident since 1981. Preap was convicted and served prison sentences for the possession of marijuana and for battery. Years after Preap was released, he was taken into custody and detained without a bond hearing. The other two respondents, Eduardo Vega Padilla and Juan Lozano Magdaleno, were similarly convicted, released, and then—years later—detained without bond hearings.

The detainees filed a class action petition asking for habeas relief in the Northern District of California. There, the court considered how they should interpret 8 U.S.C. § 1226(c), the statute under which the government detained Preap and the other detainees. The statute states that the attorney general should take any undocumented individuals who meet specific criteria—such as being convicted of certain crimes—"when the alien is released." These individuals are then subjected to mandatory detention, meaning that they are detained on release without bond.

Preap contended that, for criminal aliens to be subjected to mandatory detention without bond, they would need to be detained at the very moment they were released from criminal custody. The government countered that the statute applied to *all* criminal aliens who committed offenses enumerated in the statute, regardless of when they were detained following their release.

The district court ultimately sided with Preap and ordered that the detainees be either released on their own recognizance or given bond hearings. The government then appealed to the Court of Appeals for the Ninth Circuit, which affirmed the district court's decision.

Analysis

Interpreting § 1226(c)'s Text and Structure

The government argues that mandatory detention under 8 U.S.C. § 1226(c) should still apply to an undocumented alien criminal even if the Department of Homeland Security (DHS) does not detain the criminal immediately following their release from custody. According to the government, §§ 1226(c)(1)(A)-(D) merely describe the categories of persons—for example, convicted criminals—subject to mandatory detention. It does not indicate when such criminals need be convicted prior to detainment. Therefore, the government contends, the timing of the arrest need not be part of the court's analysis. Rather, the undocumented person's criminal act should be the only relevant factor when considering whether an undocumented criminal should be subject to mandatory detention. Furthermore, the government claims that Congress could have easily stated that a released undocumented person had to be immediately detained when drafting § 1226(c).

Preap counters that if the secretary does not detain a criminal alien immediately after the alien is released, that alien should not be subject to § 1226(c)'s mandatory detention. Preap criticizes the government's attempt to distinguish the categories enumerated in §§ 1226(c)(1)(A)-(D) from the statute's language specifying detention "when the alien is released." Preap contends that separating the two sections would effectively nullify the meaning of "when the alien is released," violating the basic rule of statutory interpretation that no word should be treated as superfluous. Preap also argues that the phrase "when the alien is released" should

be interpreted as "at the time of the release" because the word "when" has denoted immediacy in case law. Congress could have used "if" or "after" if it had intended to grant the secretary the authority to detain criminal aliens at any time after their release from criminal custody.

Congress' Intent in Enacting § 1226(c)

To determine the parameters of § 1226(c), the government maintains that Congress enacted the statute in response to increasing rates of flight and recidivism by criminal aliens. According to the government, Congress intended to eliminate the growing threat posed by all removable criminal aliens during their removal proceedings. The government reasons that releasing criminal aliens on bond just due to their gaps in custody would let dangerous criminal aliens loose in society. It would also encourage them to run away from DHS upon their release from criminal custody, thereby undermining Congress' original intent. The government also states that § 1226(c)'s legislative history further shows congressional intent to include all aliens with the requisite criminal history. The government points to 8 U.S.C. § 1252(a)(2) in the Anti-Drug Abuse Act of 1988, the predecessor statute to § 1226(c), which mandated detention of criminal aliens convicted of an aggravated felony and prohibited the attorney general from releasing those aliens from custody. Because Congress later added an exception to the statute for lawfully admitted aliens, the government argues that the all-inclusive scope of this exception shows that the predecessor statute applied to all criminal aliens with the requisite criminal history, not just to criminal aliens who were immediately arrested. Otherwise, the government explains, the exception would have been broader than the statute.

Preap counters that Congress enacted § 1226(c) in the first place to ensure "the immediate transition from criminal to immigration custody" of criminal aliens. According to Preap, § 1226(c)'s legislative history shows such congressional intent. For example, the first mandatory detention statute in the Anti-Drug Abuse Act of 1988 required the immigration authorities to arrest criminal aliens "upon completion of the alien's sentence," and Preap argues that the phrase "upon completion" denotes immediacy. Also, Preap claims that Congress would not have enacted the Transition Period Custody Rules, which allows the attorney general to delay § 1226(c)'s effective date up to two years, if Congress had intended § 1226(c) to allow mandatory detention "at any time after" the release of a criminal alien. Preap also argues that under the government's reading, § 1226(c) would authorize the secretary to categorically detain criminal aliens, thereby raising serious constitutional questions. Preap points out that taking a criminal alien into custody after the alien has lived peacefully for years would violate due process, especially considering that the alien would not likely pose the same level of flight risk and recidivism as before the gap in custody due to communal ties that alien has built over time.

Discussion

Danger to the Public and Risk of Flight

The Immigration Reform Law Institute (IRLI), in support of the government, believes Preap's statutory interpretation has dangerous implications. IRLI argues that aliens who have committed crimes reoffend at a frequency that puts the public's safety in jeopardy and that these aliens will likely flee before their immigration proceedings. The government contends that, due to these concerns, immigration judges and officials should not be responsible for predicting which aliens pose the greatest risks of flight or reoffending and that mandatory detention is thus necessary. According to the Criminal Justice Legal Foundation (CJLF), also in support of the government, these risks do not decrease over time while these aliens are released among the general public. CJLF claims that formerly convicted aliens either evade arrest for crimes they commit soon after their release or eventually commit crimes later on.

In contrast, the Advancement Project argues in support of Preap that there is little benefit to detaining criminal aliens who have been released and have settled in communities. The Advancement Project claims that § 1226 was meant to aid law enforcement in targeting aliens seeking to avoid identification and detection. However, according to the Advancement Project, the aliens now targeted by the government frequently self-report their residence to immigration officials and are usually found by the government specifically due to this self-reporting. Former general counsels for the Immigration and Naturalization Service (INS) and DHS, writing in support of Preap, assert that many undocumented people with criminal records go on to live "law-abiding lives" after their release from criminal custody. They point out that many undocumented convicts never reoffend and some instances of past crimes can be attributed to mistakes they made as youths that do not reflect on their current dispositions.

Practicality of Compliance and Resource Constraints

The government claims that it is impractical for immigration officials to be present for the release of every alien from criminal custody to transfer them to immigration detention. According to the government, one reason for the gap between criminal custody and mandatory detention is resource constraints—the inability of the government to secure adequate funding or services for a particular need. IRLI argues that the government's resources are also significantly depleted by chasing aliens who flee after criminal release and that mandatory detention reduces this waste.

IRLI further asserts that a lack of cooperation from state and local governments can also cause this gap in custody. IRLI claims that state and local governments will often not comply with requests from Immigration and Customs Enforcement (ICE) to be notified of the aliens' release from criminal custody and help effectuate a timely transfer to immigration detention. Finally, IRLI also notes that some jurisdictions, such as California, prohibit their local law enforcement from transferring custody of aliens to ICE, further complicating the feasibility of perfect federal compliance with § 1226.

The National Immigrant Justice Center (NIJC) disagrees, maintaining in support of Preap that the government has sufficient resources at its disposal to be in full compliance with § 1226. According to NIJC, ICE's Criminal Alien Program and Institutional Hearing Program are used to efficiently screen, monitor, and process potentially removable aliens within the criminal justice system. NIJC thus contends that these initiatives reduce the instances where a gap in custody could occur. Moreover, the former general counsels add that bond hearings and custody determinations would not be overly costly or burdensome for the government. The former general counsels also warn that the immigration detention system could reach its full capacity if the Court accepts the government's interpretation of § 1226. In this situation, they claim, the government would be forced to prioritize the release of aliens who are not subject to mandatory detention over those aliens who are. This,

according to the former general counsels, could lead to cases where the aliens the government is forced to mandatorily detain pose a lower threat to public safety and risk of flight than those the government must release to make space for more aliens who must be placed in mandatory detention.

NIJC also contends that active noncompliance by state and local governments is overstated and that refusals to cooperate with federal immigration officials by these jurisdictions have remained consistently low. Additionally, the NIJC notes that even jurisdictions with a reputation for noncompliance cooperate with ICE with respect to certain classes of criminal aliens, such as those who have committed serious or violent crimes. ⊙

Written by Ushin Hong and Russell Mendelson. Edited by Hillary Rich.

Mount Lemmon Fire District v. Guido (No. 17-587)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: Oct. 1, 2018

This case asks the Supreme Court to resolve whether the Age Discrimination in Employment Act (ADEA) applies to political subdivisions of a state regardless of the subdivision's number of employees, or whether the ADEA applies only to those political subdivisions of a state that have at least 20 employees for a statutorily required length of time.

Mount Lemmon Fire District contends that the ADEA defines "employer" to cover only political subdivisions having 20 or more employees. John Guido and Dennis Rankin assert that the ADEA's definition of "employer" creates separate categories of employers, one of which is state political subdivisions with no minimum-employee requirement. The outcome of this case will have implications on the liability of small state political subdivisions under the ADEA for age-based hiring decisions.

Full text available at: https://www.law.cornell.edu/supct/cert/17-587. ⊙

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service (17-71)

Court below: *U.S. Court of Appeals for the Fifth Circuit*
Oral argument: Oct. 1, 2018

The Supreme Court will determine whether the U.S. Fish and Wildlife Service overstepped its authority under the Endangered Species Act of 1973 by designating land that is currently uninhabited and inhospitable for the endangered dusky gopher frog as "critical habitat" for such frog populations. The Supreme Court will also consider whether the agency's decision in this matter is subject to judicial review. The Fifth Circuit held and the Fish and Wildlife Service now argues that the agency's designation was in accordance with the discretion afforded to the agency by Congress, and that the Endangered Species Act does not authorize judicial review. The Court's decision in this case will have implications for property rights, federalism, and agency discretion.

Full text available at: https://www.law.cornell.edu/supct/cert/17-71. ⊙

United States v. Gundy (17-6086)

Court below: *U.S. Court of Appeals for the Second Circuit*
Oral argument: Oct. 2, 2018

In this case, the Supreme Court will decide whether Congress, in passing the Sex Offender Registration Notification Act (SORNA), violated the nondelegation doctrine in allowing the attorney general to define and implement how the act applies to sex offenders who committed offenses prior to SORNA's implementation.

The federal government argues that Congress' grant of power to the executive is constitutional if Congress provides a guiding principle explaining SORNA's general policy and guidelines for its implementation. The federal government contends that Congress did provide these requirements when it explained that SORNA requires sex offenders to register "to the maximum extent feasible." Gundy, however, argues that Congress gave the executive no direction on how to apply SORNA to sex offenders who committed acts prior to the implementation of SORNA. It contends that Congress granted the executive unconstrained power to define when and how SORNA applies to these "pre-SORNA" sex offenders.

A decision for the federal government could promote public safety and ensure a more comprehensive national sex offender registration system. A decision for Gundy could ensure Congress does not over-delegate its authority nor threaten individual liberties.

Full text available at: https://www.law.cornell.edu/supct/cert/17-6086. ⊙

Knick v. Township of Scott (No. 17-647)

Court below: *U.S. Court of Appeals for the Third Circuit*
Oral argument: Oct. 3, 2018

This case asks the Supreme Court to revisit its decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, which established a requirement that property owners must first exhaust statecourt remedies before their federal takings claims are ripe for litigation in federal court. Scott Township, Pa.'s zoning ordinance requires that property owners whose property contains a cemetery must leave that property open to the public during daylight hours and allow state agents access to determine the existence and location of any property or to ensure compliance with the ordinance. Rose Mary Knick, a resident of the township, sued the township after receiving violation notices, arguing that the ordinance is a taking without just compensation. Knick further argues that *Williamson County*'s ripeness requirement is an unworkable standard that prevents plaintiffs from reasonably accessing such courts. Scott Township counters that Knick does not have a valid federal statutory claim because none of Knick's federal rights were violated. That is, the township argues, a state court remedy for just compensation existed, which Knick did not avail herself of. Further, it contends that *Williamson County* does not prevent litigants from accessing federal court because courts have flexibility in deciding if it is fair to hear a plaintiff's claim.

Homeowners, takings litigation, and access to federal forums are some of the considerations implicated in this case. This is because overruling *Williamson County* may allow future plaintiffs to bring their claims in the court of their choosing without insurmountable procedural obstacles barring their path.

Full text available at: https://www.law.cornell.edu/supct/cert/17-647. ⊙

New Prime Inc. v. Oliveira (No. 17-340)

Court below: *U.S. Court of Appeals for the First Circuit*
Oral argument: Oct. 3, 2018

This case gives the Supreme Court an opportunity to determine whether a dispute over the applicability of the Federal Arbitration Act's (FAA) § 1 exemption is an arbitrable issue pursuant to a valid delegation clause. Additionally, the Court has the opportunity to decide whether the

§ 1 exemption for contracts of employment includes, as a matter of law, independent contractor agreements.

FAA § 1 carves out an exception from the act's applicability for contracts of employment of seamen, railroad employees, and other classes of workers engaged in interstate commerce. New Prime argues that the delegation clause covers threshold disputes such as the applicability of the FAA and that the phrase "contract of employment" does not include independent contractor agreements. Oliveira counters that courts must first determine the applicability of the FAA before requiring arbitration and also that the ordinary meaning of "contracts of employment" at the time the FAA was enacted included independent contractor agreements.

The Supreme Court's decision has implications for the trucking industry and will likely influence whether this industry will continue to resort to arbitration to resolve disputes.

Full text available at: https://www.law.cornell.edu/supct/cert/17-340. ⊙

United States v. Stitt (17-765 and 17-766)

Court below: *U.S. Court of Appeals for the Sixth Circuit; U.S. Court of Appeals for the Eighth Circuit*
Oral argument: Oct. 9, 2018

This case asks whether the definition of burglary under the Armed Career Criminal Act (ACCA) of 1984 includes nonpermanent or mobile structures used for overnight lodging.

The ACCA's definition of burglary was interpreted by the Supreme Court in *Taylor v. United States*, which defined burglary as any crime involving unlawful entry or unlawfully remaining in a structure or building with the intent to commit a crime. Respondents Victor Stitt and Jason Sims were previously convicted of burglary under their respective state statutes, which both defined burglary *to include* acts against mobile homes, trailers, tents, and other nonpermanent structures used for overnight accommodations. The State contends Congress intended nonpermanent and mobile structures to be included within the ACCA's definition of burglary, despite not being explicitly included in *Taylor*. On the other hand, Stitt and Sims contend that the Supreme Court in *Taylor* had the option of including language referencing nonpermanent and mobile structures and, by excluding it, established a line of case precedent that understands burglary to exclude such structures.

The Court's decision in this case has implications on the rights of criminal defendants, as well as on existing protections for homeowners.

Full text available at: https://www.law.cornell.edu/supct/cert/17-765. ⊙

Stokeling v. United States (No. 17-5554)

Court below: *U.S. Court of Appeals for the Eleventh Circuit*
Oral argument: Oct. 9, 2018

The Supreme Court will determine whether a conviction under the Florida robbery statute, which contains as an element "overcoming victim resistance," constitutes a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), thereby triggering enhanced sentencing under the ACCA.

Petitioner Denard Stokeling argues that under the ACCA, a "violent felony" involves the use of "violent force." Stokeling maintains that Florida robbery is not a "violent felony" because only a slight amount of force suffices to meet its "overcoming victim resistance" element, which does not constitute "violent force." The federal government, however, contends that a "violent felony" under the ACCA is a felony "capable of causing pain or physical injury." The government asserts that Florida robbery is a "violent felony" because any act that violates the Florida robbery statute is by definition "capable of causing pain or physical injury."

From a policy perspective, this case is important because it will determine which criminals will be subjected to enhanced sentencing under the ACCA.

Full text available at: https://www.law.cornell.edu/supct/cert/17-5554. ⊙

Air and Liquid System Corp. v. Devries (No. 17-1104)

Court below: *U.S. Court of Appeals for the Third Circuit*
Oral argument: Oct. 10, 2018

In this case, the Supreme Court will decide whether a manufacturer may be held liable under maritime law for injuries caused by third-party products that were added to the manufacturer's product.

Air and Liquid Systems Corp. argues that a manufacturer has no duty to warn against the asbestos-related dangers of third-party products. Roberta G. Devries and Shirley McAfee, whose husbands died of asbestos-related illnesses, counter that imposing a duty to warn is reasonable because bare-metal manufacturers should reasonably foresee that their products will be used with asbestos-containing products. Because the injured parties were U.S. Navy sailors, this case also asks the Supreme Court to consider principles of maritime law.

The outcome will determine the contours of recovery in the admiralty context.

Full text available at: https://www.law.cornell.edu/supct/cert/17-1104. ⊙