



Key Cases on the Way to Supreme Court that Kavanaugh and Others Could Use to Overturn Precedent and Harm Our Rights

*Consequences of a Kavanaugh Confirmation Will Come Sooner **and** Later*

If confirmed, President Trump's latest Supreme Court nominee Brett Kavanaugh will push an already conservative Court even further to the right on numerous issues that are profoundly important to everyday Americans. Many of these issues are already in the courts and heading to the Supreme Court, and the addition of Kavanaugh would create a rock solid 5-4 far- right majority to decide these cases—and potentially to use them to overrule key precedents like *Roe v. Wade*.

Although it would be impossible to list all such cases, this document lays out a number of key pending cases that may well make their way to the high court. In a few instances, the Court has already agreed to review the cases in 2018–2019; in other instances, cases are pending or have recently been filed in the lower courts.

In each case, the high stakes raised by the Kavanaugh nomination are clear. Senators considering the Kavanaugh nomination must fully consider all of the important near-term consequences that his confirmation could well produce, as well as the possible ramifications over the decades to come.

Health Care and the Affordable Care Act

Texas v. United States, No. 4:18-cv-00167-O (N.D. Tex. 2018)

Conservative states, with the support of Attorney General Jeff Sessions and President Trump's Department of Justice, are suing to eliminate life-saving protections for millions of people with pre-existing conditions and other key provisions of the Affordable Care Act (ACA). Appellate review, which may well include the Supreme Court, is almost certain.

Stewart v. Azar, 2018 U.S. Dist. LEXIS 108862 (D. DC. 2018)

The Trump administration and Republican state legislatures have sought to drastically reduce the number of people eligible for health care benefits available under the ACA. The administration has taken steps to make benefits more expensive, to make them less comprehensive, and recently, to encourage states to impose work and other requirements on those who get benefits under the ACA's Medicaid expansion. One federal district court has already held that Kentucky's work requirements and benefit cutbacks approved by the Trump administration are unlawful, and the issue is likely to go to higher courts, including the Supreme Court.

Planned Parenthood of Kansas & Mid-Missouri v. Andersen, 882 F.3d 1205 (10th Cir. 2018) petition for cert. filed; ***Planned Parenthood of Gulf Coast, Inc. v. Gee***, 862 F.3d 445 (5th Cir. 2017), petition for cert. filed

Hard-right conservatives in several states have sought to ban Planned Parenthood from providing birth control and other critical non-abortion health care services to women on Medicaid despite clear statutory language prohibiting that. Kansas and Louisiana have already filed petitions to ask the Supreme Court to review lower court decisions and allow them to cut off these critical health care services to thousands of women. These cases could be heard as early as the 2018–2019 term.

Franciscan Alliance v. Azar, Civ. Action No. 7:16-cv-00108 (N.D. Tex.)

A federal judge in Texas ruled against an ACA regulation that extended anti-discrimination protections to transgender people in implementing [under?] the law. That case and others on the issue have been stayed pending the drafting of a new rule by the Department of Health and Human Services, which will likely omit these protections, re-start the litigation, which is likely to go to higher courts.

Women's Reproductive Freedom

Jackson Women's Health Center et al. v. Currier, No. 3:18-cv-171-CWR-FKB (S.D. Miss.); ***West Alabama Women's Health Center v. Miller***, 2017 WL 4843230 (M.D. Ala.)

Federal lawsuits are pending in several courts that challenge severe state restrictions on abortion that directly conflict with *Roe v. Wade* and *Planned Parenthood v. Casey*. These include a Mississippi ban on abortion after 15 weeks of pregnancy, which was temporarily blocked via a restraining order in March, and an Alabama ban on dilation and extraction abortions, which the 11th Circuit heard arguments on in May concerning a lower court decision declaring the ban

unconstitutional. Either or both of these cases could reach the Supreme Court in the next several years, and could be used to restrict or overturn *Roe*.

Comprehensive Health of Planned Parenthood Great Plains v. Williams, 263 F. Supp. 3d 729 (W.D. Mo. 2017)

In Missouri, as in many other states, anti-choice legislators have pursued efforts to abolish access to abortion by passing laws and regulations imposing burdensome and unnecessary restrictions on health clinics that provide abortion services. These efforts and ones like them have forced the closure of clinics in a number of states and have imposed immense burdens on women, particularly low-income women. The Supreme Court in *Whole Woman's Health v. Hellerstedt* narrowly struck down such restrictions in Texas, with Kennedy in the 5-3 majority. A right-wing majority could easily decide to review this or similar cases and overrule or ignore *Whole Women's Health* or *Roe v. Wade* itself.

Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley, No. 4:15-cv-00784-KGB (E.D. Ark.)

In Arkansas, Planned Parenthood has filed litigation challenging a restrictive state law that effectively bans medication abortions. The district court issued a preliminary injunction against the law, but the court of appeals reversed. Earlier this year, the Supreme Court decided not to intervene, effectively waiting for further lower court decisions. This case would also be a vehicle for restricting or eliminating *Roe v. Wade*.

Pennsylvania v. Trump, No. CV 17-4540 (E.D. Pa.), No. 18-1253, 17-3752 (3d Cir.); ***California v. U.S. Department of Health and Human Services***, No. 17-CV-05783 (N.D. Cal.), Nos. 18-15255, 18-15144, 18-15166 (9th Cir.); ***Massachusetts v. U.S. Department of Health and Human Services***, No. 1:17-cv-11930 (D. Mass.); No. 18-1514 (1st Cir.) Attorneys general in Pennsylvania, California, and Massachusetts have filed litigation challenging the Trump administration's interim final rules that vastly expand exemptions to the Affordable Care Act's birth control benefit, allowing virtually any employer or university to deny birth control coverage. District courts in California and Pennsylvania issued nationwide preliminary injunctions blocking the rules in December 2017, and those decisions are presently on appeal. The district court dismissed the Massachusetts claim based on standing, without reaching the merits, and that decision is now on appeal as well. All three cases could come before the Supreme Court in the next year or two.

Irish 4 Reproductive Health v. U.S. Department of Health and Human Services, et al., No. 3:18-cv-00491 (N.D. Ind.)

The Trump administration and the University of Notre Dame agreed to a private settlement to deny insurance coverage for contraceptives to students, employees and their dependents. Civil rights groups have filed suit against this backroom deal and against the Trump administration's interim final rules that vastly expand exemptions to the Affordable Care Act's birth control benefit as discussed above.

Immigration and Child Separation and Imprisonment

Flores v. Sessions, No. 2:85-cv-04544-DMG-AGR (C.D. Cal.); ***Ms. L et al. v. U.S.***

Immigration and Customs Enforcement, Case No. 18cv0428 DMS (S.D. Cal.)

Public outrage forced a temporary end to the Trump administration's policy of forcibly separating immigrant children from their parents at the border—even when the families were following the steps required to lawfully seek asylum. In June, pursuant to a directive from President Trump, Attorney General Sessions filed a motion seeking to change an existing consent order by permitting the administration to keep families together in detention facilities for the duration of their immigration cases, which often last from many months to several years. The court denied Sessions' motion, and that ruling will almost certainly be appealed to higher courts, including the Supreme Court. Another federal judge has issued an order in a recently filed case requiring family reunification that may also produce an appeal to the Supreme Court.

Regents of University of California v. U.S. Department of Homeland Security, No. 3:17-cv-05211 (N.D. Calif.)

Several lawsuits are pending that challenge President Trump's action to suspend the Deferred Action for Childhood Arrivals (DACA) program, which grants work authorization and protection from deportation to young undocumented immigrants who were brought to the U.S. as children. When a federal judge in California issued a preliminary injunction against the suspension of the program, Attorney General Sessions took the unusual step of trying to obtain immediate Supreme Court review of the decision before it had even been reviewed by the court of appeals. The Court denied that effort, but the case was argued in the appellate court in May, and it is widely expected that the administration will push it to the Supreme Court to review if it loses that case or others on the issue.

N.Y. Immigration Coalition v. U.S. Department of Commerce, No. 1:18-cv-05025 (S.D. N.Y. 2018)

Civil and immigrants' rights groups sued the U.S. Department of Commerce and the Census Bureau for intentional discrimination based upon plans to add a new, untested, question to the Census dealing with citizenship. The groups argue that the administration added the question with the specific intent of undercounting immigrants, reducing funding for services to immigrant populations and attempting to reduce the growing political power of immigrants. They note that Secretary of Commerce Wilbur Ross has specifically testified that he expects this question to result in fewer people being counted. This case will certainly be considered by an appellate court and may quite possibly reach the Supreme Court, and could have devastating effects.

City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018)

President Trump and Attorney General Sessions have repeatedly threatened state and local governments with loss of federal funds when those entities have refused to cooperate with overly aggressive federal immigration policies (so-called sanctuary city policies). In at least one case, the administration has been prohibited from holding unrelated federal funds for ransom—but it is unlikely that the administration will cease pursuing this policy unless they are forced to do so by a fair and impartial Supreme Court.

Nielsen, Secretary of Homeland Security v. Preap, Docket No. 16-1363

The Supreme Court has already agreed to decide one important immigration case in the 2018–2019 term. The issue in this case is whether applicable federal law allows noncitizens, who pose neither danger to the community nor flight risk, to be released on bond pending removal hearings after they have been released from criminal custody and DHS has not promptly detained them. DHS has claimed that they can detain such an individual without bail indefinitely until a hearing on whether the person should be removed from this country, but the appellate court ruled that a bail hearing is required.

Voting Rights and Gerrymandering

Whitford v. Nichols, No. 15-cv-421-bbc (W.D. Wisc.); *Benisek v. Lamone*, Civ. No. JKB-13-3233 (D. Md.); *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.)

Without deciding the issue, the Supreme Court recently sent back to the lower courts cases originating in Wisconsin and Maryland about whether extreme partisan gerrymandering can violate the Constitution. The four extreme conservative justices on the Court have already stated that such claims should not be able to be reviewed, and it was likely only the influence of Justice Kennedy that kept the issue alive. Either of those cases, or another case from North Carolina raising similar issues, could well return to the Court soon, and a fifth right-wing vote would close the door to any such challenges.

NAACP v. Merrill, 3:18-cv-01094 (D. Conn. 2018)

Civil rights groups recently filed a lawsuit in Connecticut concerning voting-related problems related to the locations of prisons and the vast disparities in the incarceration rates of minorities. Often, prisons are in rural districts; counting the prisoners as “residents” of those districts disproportionately augments the political clout of those districts at the expense of urban districts where prisoners often live when they are released. This case could well find its way to the Supreme Court, where the conservative majority has already exhibited hostility to the voting rights claims of minorities.

Thompson v. Kemp, No. 1:17-cv-3856-AT (N.D. Ga.); *Thomas v. Bryant*, No. 3:18-cv-441-CWR (S.D. Miss.); *Indiana State Conference of NAACP v. Lawson*, No. 1:17-cv-02897-TWP (S.D. Ind.); *One Wisconsin Institute v. Thomsen*, No. 15-cv-324-jdp (W.D. Wisc.)

Numerous cases are pending in the lower courts challenging state redistricting plans and restrictions on voting rights as racially discriminatory. Examples include lawsuits against redistricting plans in Georgia and Mississippi, the removal of voters from the rolls in Indiana, and a Wisconsin case in which certain voter ID requirements and other restrictions were struck down. A decision is expected from the 7th Circuit court of appeals in that case. One or more of these cases could well reach the Supreme Court soon and provide an opportunity for the conservative majority to further restrict voting rights.

Fish v. Kobach, No. 16-2105-JAR (D. Kan.)

A federal court in Kansas recently struck down as unconstitutional a law pushed by Kansas Secretary of State Kris Kobach requiring that voters submit proof of citizenship before they can vote. The decision could well be appealed to the court of appeals and higher in an effort to restrict voting rights.

Other Civil Rights Issues

Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir 2018); ***Equal Employment Opportunity Commission v. Harris Funeral Home, Inc.***, No. 16-2424 (6th Cir. March 7, 2018)

The 2nd Circuit recently held, despite the contrary views of the Trump-Sessions DOJ, that the nation's premier employment discrimination law, Title VII, prohibits discrimination based on sexual orientation. This decision has the potential to finally extend badly-needed protections to vulnerable LGBTQ employees across the country that, in many states, can be fired simply for being lesbian, gay, bisexual or transgender. Those opposed to the protection of LGBTQ employees have already asked the Supreme Court to hear this case next term. In another case, the 6th Circuit has ruled that Title VII protects against anti-transgender discrimination and declined to accept a claim of exemption from the law based on the Religious Freedom Restoration Act. That case may well also be headed for the Supreme Court.

Mount Lemmon Fire District v. Guido, Docket No. 17-587

The Supreme Court has agreed to review a case in 2018-19 that will decide whether employees are barred from suing when they have been the victim of age discrimination simply because they work for very small government agencies.

Klein v. Oregon Bureau of Labor and Industries, 289 Ore. App. 507, petition for review denied by 2018 Ore. LEXIS 505; ***Arlene's Flowers, Inc. v. Washington***, 2018 U.S. LEXIS 3950

The Supreme Court could well decide to review another case like the *Masterpiece Cakeshop* case that raises the question of whether those who object on religious grounds to complying with state anti-discrimination laws that apply to LGBTQ people can somehow claim an exemption from such laws. A number of such cases are pending, including an Oregon decision requiring a bakery to serve a lesbian couple that cake shop owners have already vowed to take to the Supreme Court, and a Washington decision holding that a florist's refusal to serve a gay couple planning their wedding violated state anti-discrimination and consumer protection laws, which the Supreme Court sent back to the lower courts for further consideration under *Masterpiece*.

Karnoski v. Trump, No. 18-35347 (9th Cir. July 18, 2018); ***Jane Doe v. Trump***, No. 1:17-cv-0197-CKK (D.DC)

Several challenges are pending in federal district and appeals courts to Trump's attempted ban on transgender individuals serving in the military. The 9th Circuit recently entered an order denying a DOJ request for a stay of a preliminary injunction against the ban that is now on appeal. In the

case in DC, a preliminary injunction against the ban was granted and the case is proceeding, with appeals considered likely.

Kelley v. Decatur Baptist Church, No. 5:17-cv-1239 (N.D. Ala.)

A district court in Alabama is considering a case in which a former maintenance and child care worker contends that a church illegally fired her in violation of the Pregnancy Discrimination Act. The case could be used to immunize religious institutions from discrimination lawsuits even from workers with no ecclesiastical responsibilities.

Gardner v. CLC of Pascagoula, LLC, 2018 U.S. App. LEXIS 17939 (5th Cir. 2018)

One outrageous example of sexual harassment occurred in Mississippi at a nursing facility. When Kymberli Gardner was groped, harassed and injured by an elderly patient with an aggressive personality disorder, her concerns were met with laughter and derision by her employer. Initially, the federal district court found that Ms. Gardner's experiences were not "beyond what a person in Gardner's position should expect of patients in a nursing home," notwithstanding the fact that the nursing home eventually transferred the patient to an all-male facility after he attacked another patient. Fortunately, the appeals court gave Ms. Gardner another chance to prove her case, which remains in the courts. The case could well be utilized by opponents of sex harassment liability to limit the law in this area in the Supreme Court.

Gavin Grimm v. Gloucester County School Board, Civil no. 4:15cv54 (E.D. Va.) May 22, 2018); ***Doe v. Boyertown Area School District***, No. 17-3113 (3d Cir. Jun3 18, 2018)

Several cases are pending in lower courts concerning discrimination against transgender students in public schools. In Gavin Grimm's case in Virginia, which was sent back to the district court by the Supreme Court, the district judge recently ruled that the student had a valid legal claim for discrimination under Title X and the Constitution. In the Pennsylvania case, the 3rd Circuit recently rejected a claim that it was illegal for a school district to voluntarily allow students to use facilities that corresponded to their gender identity, and the full 3rd Circuit has been asked to review the case. Either or both of these important civil rights cases could be before the Supreme Court in the near future.

Biestek v. Commissioner of Social Security, Docket No. 17-1184

In 2018-19, the Supreme Court is scheduled to hear a case in which Social Security Disability benefits were denied, even though the applicant was not allowed to review the underlying data used to support the conclusion that other work was available to him. If the Court upholds the opinion of the 6th Circuit against the applicant, the already burdensome process of applying for disability benefits will only become more difficult.

Fair Housing Alliance v. Carson, No. 1:18 – cv-01076 (D. DC)

The Trump administration has sought to delay and dilute rules intended to reduce segregation and promote the full implementation of the Fair Housing Act. Litigation was recently filed attempting to force the federal government to follow key portions of regulations developed in 2015 intended to assist people of color, victims of gender-based violence, people with disabilities and low-income people through holistic, community-based efforts to promote integration. This case could be utilized to severely limit the Fair Housing Act.

American Insurance Association v. U.S. Department of Housing and Urban Development, 2015 U.S. App. LEXIS 16894 (DC Cir. 2015)

Millions of victims of housing discrimination have relied on the long-established principle of “disparate impact” to prove their cases and obtain justice. Despite the fact that this principle is settled law in the fair housing context—and was just recently re-affirmed by the Supreme Court in which Justice Kennedy cast the deciding vote—real estate businesses seeking to increase their profits have continued to file law suits to chip away at the doctrine. Any further weakening of the principle would make it harder for vulnerable Americans to have their rights vindicated when they are the victims of housing discrimination.

Other Workers’ Rights

International Union of Operating Engineers v. Village of Lincolnshire, No. 1:2016cv02395 (N.D. IL.)

In this important Illinois case, a federal district judge ruled that the National Labor Relations Act preempts a local “right to work” law that bans employer-union agreements that require their employees to be union members and require unions to refer new employees. The 7th Circuit heard argument in the case in March.

TEXO ABC/AGC Inc. v. Perez, No.3:16-cv-01998 (N.D. Tex.)

Employers and industry groups challenged an Occupational Safety and Health Administration rule mandating recordkeeping concerning workplace injury and prohibiting retaliation against whistleblowers. Unions have sought to intervene in the case because of concern about its defense by the Trump Administration, and the fact that the case could lead to serious weakening of OSHA protections.

American Federation of Government Employees, AFL-CIO v. Trump, No. 1:18-cv-01261 (D. DC 2018)

In May, the American Federation of Government Employees sued President Trump for signing an executive order denying workers’ First Amendment rights of free association and their right to representation at the job site by restricting time spent on union activities in violation of federal law and previous practice. Such rights could be further harmed if the case is reviewed by a Supreme Court including Judge Brett Kavanaugh.

New Prime Inc. v. Oliveira, Docket No. 17-340

The Court is scheduled to consider a case concerning workers and the Federal Arbitration Act (FAA) in 2018–‘19. The case raises two questions: when the parties to a dispute disagree about whether the FAA applies to a contract, is that issue decided by an arbitrator or a court? And is the FAA, which by its terms does not apply to transportation workers’ contracts of employment, applicable to contracts of employment of truck drivers who are independent contractors?

Presidential Power and Other Litigation against President Trump

Blumenthal v. Trump, No. 17-cv-1154 (D. DC); *District of Columbia v. Trump*, 2018 U.S. Dist. LEXIS 51365 (D. DC 2018); *Zervos v. Trump*, No. 150522 (N.Y.S. 2017)

President Trump and his lawyers have repeatedly argued that he is essentially above the laws that apply to everyone else. The principle that no one, not even the president, is above the law is likely to be tested in the Supreme Court in the near future. Currently there are lawsuits pending against the president, some or all of which could well reach the Court, on subjects ranging from his violation of the Constitution's Foreign and Domestic Emoluments Clauses to defamation cases related to the president's alleged sexual harassment of multiple women, not to mention possible lawsuits relating to the pending investigation by Special Counsel Robert Mueller.

Public Citizen v. Trump, No. 17-253 (RDM) (D. DC)

Several organizations have filed suit against President Trump claiming he did not have the authority to legally issue an executive order that mandates that any agency seeking to issue a new regulation must rescind at least two existing regulations, regardless of the need for the new or existing regulations. The case is pending in federal district court and could be an important matter for the Supreme Court to review concerning presidential power.

Consumer Protection

Obduskey v. McCarthy & Holthus LLP, Docket No. 17-1307

Most Americans have had the experience of dealing with debt collection companies – either because of hard economic times or because of mistakes made by creditors. In this case, the Supreme Court will decide whether consumers who are the subject of a “non-judicial foreclosure” are protected by the Fair Debt Collection Practices Act against abusive behavior by deceptive and unscrupulous debt collectors.

Apple Inc. v. Pepper, 2018 U.S. LEXIS 3800, Docket No. 17-204

As more and more of us rely on electronic devices for work, communication, entertainment and even health care, the more power and influence large tech firms have over us. Next term, in 2018-19, the Supreme Court will consider whether consumers who purchase products from Apple's online “app store” can sue Apple for monopolistic practices that increase the prices they pay directly to Apple.

Lorenzo v. Securities and Exchange Commission, 2018 U.S. LEXIS 3813, Docket No. 17-1077

Just a decade ago, our economy was thrown into chaos caused by questionable and sometimes illegal behavior by large financial institutions, though very few of the individuals responsible for the Great Recession have been punished. Next term, the Court will decide whether someone who knowingly spreads false and misleading statements to investors can escape liability for securities fraud if someone else originally made the false statements. Kavanaugh was on the DC Circuit panel that considered the case.

Merck Sharp & Dohme Corp. v. Albrecht, 2018 U.S. LEXIS 4047, Docket No. 17-290

This case, which is scheduled to be decided by the Court in 2018–‘19 deals with safety and warning labels for Fosamax, a drug that is often prescribed to older women who have or are at risk of developing osteoporosis. The issue at hand in the case is whether a drug manufacturer that fails to warn about a known, serious harmful effect of the drug is excused from liability to patients injured by the drug because the FDA rejected an attempt to include a different warning on the product label.

Frank v. Gaos, 2018 U.S. LEXIS 2658, Docket No. 17-961

The Court will also consider a case in 2018-19 involving an issue important to preserving consumer class actions (the ability of individuals who have been harmed to band together in order to take on much larger businesses or other institutions) as a means of deterring and remedying frauds and other wrongdoing. This case concerns wrongdoing that inflicts small injuries on so many people that it becomes difficult to distribute settlement funds to individual class members. The case before the high court asks whether, in such cases, settlement funds can be put to their next best use by distributing them to nonprofit organizations that are dedicated to combating the kind of wrongdoing that led to the lawsuit.

Consumer Financial Protection Bureau v. All American Check Cashing, Inc., Docket No. 18-60302

Beyond cases already before the Court, the Court may in coming years decide to consider an issue critically important to all consumers: whether the structure of the Consumer Financial Protection Bureau (CFPB), with its director protected against being fired without cause by the president, is unconstitutional. Many companies chafing at the Bureau’s consumer-protection actions have been gearing up to make this argument and will be increasingly encouraged by a more conservative Court. The U.S. Court of Appeals for the DC Circuit rejected this argument in *PHH Corp. v. CFPB*, 881 F.3d 75 (DC Cir. 2018) despite a dissent by Judge Kavanaugh, but the same argument is still being made in other cases in other circuits, including one now pending before the 5th Circuit,

American Beverage Association v. City & County of San Francisco, Docket No. 16-16072; ***CTIA - The Wireless Association v. City of Berkeley***, Docket No. 16-15141

Prompted by recent Supreme Court rulings giving corporations broad First Amendment protections against regulation of their commercial activities, companies are increasingly using the First Amendment to try to challenge laws and rules requiring that they disclose to consumers and other members of the public information about their products, services, and activities. If those cases go before the Supreme Court, there is a possibility of further erosion of protections for consumers in a wide range of areas. Two cases currently pending in the U.S. Court of Appeals for the 9th Circuit illustrate some of the issues the Court might take up in this area: *American Beverage Association v. City & County of San Francisco* involves a challenge by the soft drink industry to San Francisco’s law requiring disclosure of the health risks of consuming large quantities of sugary drinks. *CTIA-The Wireless Association v. City of Berkeley*, is a challenge by the cell phone industry to a requirement that stores selling cell phones post notices regarding the FCC’s recommendations for reducing exposure to cell-phone radiation.

Gun Violence

Prescott et al. v. Slide Fire Solutions, LP, 2:18-cv-00296-GMN-CWH (D. Nev. 2018)

After a gunman massacred 58 people at a country music festival in Las Vegas, Nevada, a lawsuit was filed against the manufacturer of the bump stocks that permitted the shooter to make legal firearms fire like automatic weapons (which are heavily regulated and not legally available for public sale). While the bump stock manufacturer originally claimed that the device was intended to assist “persons whose hands have limited mobility,” he later stated that the device was targeted to “people like me, who love full auto.” This case could be utilized to make it impossible to regulate even bump stocks and semi-automatic weapons.

Environment

Sturgeon v. Frost, Docket No. 17-949

On environmental matters that are upcoming for the Supreme Court next term, this case questions whether the National Park Service has authority to regulate activities on navigable waters within the boundaries of the National Park System in Alaska.

Virginia Uranium, Inc. v. Warren, Docket No. 16-1275

This pending Supreme Court case concerns whether the federal Atomic Energy Act preempts a Virginia ban on mining uranium on non-federal lands.

Weyerhaeuser Company v. United States Fish and Wildlife Service, Docket No. 17-71

The Endangered Species Act requires the Department of the Interior to designate critical habitats for an endangered species which may include areas “occupied by the species” or “areas outside the geographical area occupied by the species” that are “essential for conservation of the species.” This pending Court case questions whether private property rights trump the federal government’s ability to designate critical habitats essential to endangered species on such property.

Upstate Forever v. Kinder Morgan Energy Partners, LP, 887 F.3d 637 (4th Cir. 2018);

Hawaii Wildlife Fund v. City of Maui, 886 F.3d 737 (9th Cir. 2018)

Cases are moving through the lower courts that test whether the Clean Water Act covers discharges to surface waters through groundwater channels, such as leaks of pollutants that make their way into surface waters through the ground, in addition to the direct discharges of pollutants into surface waters like rivers and lakes. The U.S. Courts of Appeals for the 4th and 9th Circuits have held that the statute does cover such discharges, so that they are unlawful absent a permit, and the 6th Circuit will soon face the question. The parties in those cases may well ask the Supreme Court to reverse those lower courts’ rulings, harming environmental protection and the clean water essential to underwater ecosystems.

Other Notable Cases on the Court’s 2018–2019 Agenda

Air & Liquid Systems Corp. v. Devries, Docket No. 17-1104

Roberta Devries and Shirley McAfee are both widows of husbands who served in the United States Navy and developed cancer after being exposed to asbestos. In an appeal from the widows’ case, the Court will decide next term whether, under maritime law, a manufacturer that knows that routine use of its equipment will expose workers to asbestos is excused from claims that it negligently failed to warn individuals of the risk because it didn’t actually manufacture or sell the asbestos.

Madison v. Alabama, Docket No. 17-7505; ***Bucklew v. Precythe***, Docket No. 17-8151

These cases both concern the death penalty. The former concerns whether it is unconstitutionally cruel and unusual punishment to execute a 67 year-old man who has spent over 30 years on death row who is now blind and battling dementia resulting from several serious strokes. The defendant no longer remembers his commission of the crime, and several officials have found him to be incompetent to be executed. The latter case, which originates in Missouri, asks whether the state’s method of execution by lethal injection is cruel and unusual punishment because it would cause significant pain and suffering to an individual with a rare disease.

Gundy v. United States, Docket No. 17-6086

This case could have a broad impact on the ability of federal agencies to carry out Congress’ wishes. The specific issue in *Gundy* is whether Congress properly delegated to the Attorney General the authority under the Sex Offender Notification and Registration Act to promulgate regulations on whether the Act applies retroactively. The Court has not struck down a law under the delegation doctrine since using it to invalidate parts of the New Deal in 1935, and its revival could devastate the ability of agencies to implement Congressional statutes.

Lamps Plus, Inc. v. Varela, Docket No. 17-988; ***Henry Schein Inc. v. Archer & White Sales Inc.***, Docket No. 17-1272

The Court has agreed to decide several additional questions concerning the Federal Arbitration Act (FAA). The former raises the issue of whether the FAA prevents a court from construing ambiguous language in an arbitration agreement in favor of workers and consumers rather than the company that drafted the ambiguous language and foisted it on people who had no opportunity to negotiate over it and no choice but to agree to it. Another asks whether the FAA requires a court to send a case to arbitration even when the court correctly concludes that the argument that the case is subject to arbitration is “wholly groundless.”