Sturgeon v. Frost
For many years petitioner John Sturgeon used a small hovercraft to hunt moose in Alaska. One day, he was told by National Park Service (NPS) officials that hovercrafts are not allowed inside the National Park System. Sturgeon’s suit challenging the NPS hovercraft restriction is now before the Court a second time. This time, like the first time, the issue is whether the NPS’s power to regulate boating in the National Park System is restricted in Alaska by Section 103(c) of the Alaska National Interest Lands Conservation Act.

Bucklew v. Precythe
In 1998, Russell Bucklew was convicted of first-degree murder, kidnapping, burglary, forcible rape, and armed criminal conduct, and was sentenced to death. While Bucklew does not challenge his conviction, sentence, or the death penalty in general, he does challenge Missouri’s method of execution (a single-drug lethal injection) as applied to him. More particularly, Bucklew argues that lethal injection would create an unacceptably high risk of extreme pain, given his exceedingly rare medical condition, and that a known and available alternative method of execution (lethal gas) exists.
NOVEMBER 5
Sturgeon v. Frost
Virginia Uranium, Inc. v. Warren

NOVEMBER 6
Bucklew v. Precythe
BNSF Railway Co. v. Loos

NOVEMBER 7
Republic of Sudan v. Harrison
Culbertson v. Berryhill

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Who Decides Arbitrability When the Demand for Arbitration Is Wholly Groundless?

CASE AT A GLANCE

The Federal Arbitration Act requires courts to enforce agreements to arbitrate, including agreements allowing an arbitrator, rather than a court, to decide the gateway question of whether the parties have agreed to arbitrate in the first place. The Supreme Court must decide whether the Act includes an exception allowing courts to decline to send the arbitrability question to an arbitrator when the demand for arbitration is “wholly groundless.”

Henry Schein, Inc. v. Archer and White Sales, Inc.
Docket No. 17-1272

Argument Date: October 29, 2018
From: The Fifth Circuit

by Daniel Thies
Webber & Thies, P.C., Urbana, IL

ISSUE

Does the Federal Arbitration Act permit a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the demand for arbitration is “wholly groundless”?

FACTS

Congress passed the Federal Arbitration Act (the Act) in 1925 to ensure that arbitration agreements “shall be valid, irrevocable, and enforceable” in court. 9 U.S.C. § 2. The Supreme Court has followed this directive to develop a robust jurisprudence favoring the enforcement of arbitration agreements. For example, the Court has held repeatedly that the Act requires enforcement of arbitration agreements in a variety of circumstances and over a variety of obstacles.

This case explores the limits of this principle as applied to a general agreement by parties to let the arbitrator decide if a dispute is subject to arbitration. The question is whether this general agreement should be enforced even when the argument that a particular dispute should go to the arbitrator is “wholly groundless.” In that narrow case, would it not be better to let a court decide for itself that the dispute is not arbitrable, thus avoiding the time and expense of shipping a dispute to the arbitrator just for it to be returned back to court?

The case arises out of an alleged antitrust conspiracy in the market for dental equipment and supplies. Archer and White Sales, Inc. (Archer) is a distributor in the market. Archer sued a number of other distributors and manufacturers in 2012, including Henry Schein, Inc. (collectively Schein), alleging that they illegally conspired to exclude low-cost distributors from the market and seeking damages and an injunction halting the behavior. One of the manufacturers moved to compel arbitration based on a provision in its distribution agreement with Archer providing that:

Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturer]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

The other defendants joined the request, arguing that they were also entitled to arbitration on the ground of equitable estoppel, even though they had not entered a similar agreement with Archer.

Archer’s argument against arbitration was straightforward: because the complaint sought injunctive relief, the case was disqualified from arbitration by the parenthetical exception to the arbitration clause. The magistrate judge disagreed. Because damages, not injunctive relief, were “the predominant relief sought,” the magistrate judge reasoned, there was a “plausible construction” of the agreement requiring arbitration. Moreover,
because the American Arbitration Association rules delegate to the arbitrator the right to decide whether a particular dispute is arbitrable, the invocation of those rules gave the arbitrator, rather than the court, the authority to decide if the dispute was arbitrable in the first place. The magistrate judge accordingly ordered the dispute to arbitration.

Archer filed a “motion for reconsideration,” which the court did not act on for over three years, apparently due to confusion about whether it should be decided by the magistrate judge or treated as objections to be reviewed by the district judge. The district judge eventually construed the filing as an objection to the magistrate judge’s order and reversed, ordering the matter to proceed in court. The district judge relied on the Fifth Circuit’s decision in *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014), holding that an arbitrability question should not go to an arbitrator where the demand for arbitration is “wholly groundless.” Because the arbitration provision unambiguously excluded any matter seeking injunctive relief, the court held that any argument in favor of arbitrating the dispute was implausible. Sending the dispute to arbitration would thus be pointless, and so the district judge ordered that the matter should remain in court.

The Fifth Circuit affirmed on similar grounds, and the Supreme Court granted certiorari.

**CASE ANALYSIS**

The Act does not explicitly mention a “wholly groundless” exception, but Archer identifies several statutory provisions that it contends supply a basis for the exception. First, Section 4 of the Act requires that before ordering arbitration, courts must be “satisfied” that a nonmovant “fail[ed] to comply” with the arbitration agreement. 9 U.S.C. § 4. According to Archer, “If a dispute is not even ‘arguably’ subject to arbitration, there is no possible ‘failure to comply’ by filing in court,” and so Section 4’s requirement is not met.

Schein counters that the requirement that a court be satisfied “merely contemplates that a court will assure itself that a valid arbitration agreement exists”—it does not allow a court to parse “the merits of the issue to be arbitrated: namely, the issue of arbitrability.” Indeed, Archer’s argument proves too much. If a court has to be “satisfied” that the arbitrator has the power to decide the merits of a case before ordering arbitration, the court would have to make the arbitrability decision itself de novo every time—not just when the argument for arbitration is “wholly groundless.” The parties then would never be able to agree to arbitrate the gateway question of arbitrability, contrary to the Court’s holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

Archer also focuses on Section 10(a)(4) of the Act, which requires courts to vacate arbitration awards “where the arbitrators exceeded their powers.” 9 U.S.C. § 10(a)(4). Archer contends that “if courts have the power (under Section 10(a)(4)) to vacate awards after months or years of costly arbitration, then surely courts have the power (under Section 4) to make the same determination where the result is a foregone conclusion.” Any other conclusion would require “an expensive and futile detour” to arbitration to obtain an arbitration award that a court will promptly vacate.

Schein answers that this view gives far too little credit to arbitrators, who are “hardly powerless in the face of a truly frivolous claim of arbitrability” and are thus unlikely to spend time and money resolving a dispute that plainly does not belong in front of the arbitrator. Arbitrators have ample authority to resolve jurisdictional disputes at a preliminary telephonic conference, for example, and can also impose sanctions against a party making a baseless argument for arbitration. The far greater danger to efficient dispute resolution is not a futile detour to arbitration, but instead the danger that courts will spend years wrangling over the peripheral issue of whether a particular argument for arbitration is “wholly groundless,” without ever getting to the merits. The poster child for this problem is this case, which has languished in the court system for six years of debate over whether the “wholly groundless” exception applies.

Archer responds that much of the delay in this case is the result of the confusion over whether the district judge or the magistrate judge should have decided Archer’s motion for reconsideration. Such anomalies aside, Archer points out that since 1991, the “wholly groundless” exception has been invoked in only 4 cases in federal appellate courts (in the Fifth, Sixth, and Federal Circuits) and only 96 cases in federal district courts. As Archer puts it, “This is hardly compelling evidence that the sky is falling.”

Both parties also make an appeal to the history and purpose of the Act. “Arbitration is a matter of contract” controlled by the parties’ intentions, Archer argues, and it should be obvious that no party would write a contract that “grants a right to assert implausible claims or waste everyone’s time with pointless detours.” The “wholly groundless” exception is thus implicit in every agreement to arbitrate. Schein counters that “the parties’ agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious,” and that the Act requires a court to honor those wishes, even where it might lead to an inefficient outcome. In short, the court should not be evaluating the wisdom of the parties’ agreement, but should instead enforce it consistent with the terms of the Act.

Schein bolsters its case by attempting to cast the “wholly groundless” doctrine as part of a longstanding trend of judicial hostility toward arbitration, a hostility that Congress intended to reverse when it adopted the Act in 1925. Archer counters with legislative history suggesting that Congress based the 1925 Act on a New York arbitration law, a law that had been interpreted by New York courts to include a version of the “wholly groundless” exception. Archer infers from this history that however much Congress wished to bolster agreements to arbitrate, it nonetheless intended to allow courts to dispose efficiently of meritless claims to arbitration.

**SIGNIFICANCE**

The extended procedural history of this case gives the Court several outs if it opts not to resolve whether the Act contemplates a “wholly groundless” exception. First, the Court could hold that Schein’s argument for arbitration is not wholly groundless, and so the case should have been sent to an arbitrator regardless of whether the “wholly groundless” exception might apply in some other case. Drawing the line between a “groundless” argument and a “wholly groundless” argument is notoriously difficult, but the
magistrate judge below found Schein’s argument for arbitration at least plausible (and arguably more), which would mean that the “wholly groundless” exception would not apply even assuming the Act contemplates such an exception. The Court thus has a possible basis to reverse the judgment below and to send the case to arbitration without addressing the exception and with little implication for other cases.

The Court could also choose to address the question of whether the mere incorporation of the American Arbitration Association’s rules, which allow the arbitrator to decide its own jurisdiction, are a sufficiently clear agreement to send the gateway issue of arbitrability to the arbitrator. Every court of appeals to address the question has held that it is, but the Court has not addressed the issue. Moreover, although neither party raises the issue, an amicus brief from Professor George Bermann of Columbia Law School urges the Court to take this course. Such an outcome would allow the Court to affirm the denial of the motion to send the case to arbitration while avoiding the question of whether the “wholly groundless” exception applies, but it would also significantly curtail the power of arbitrators to resolve arbitrability questions in the many agreements that speak to the arbitrability question only by reference to arbitration rules.

Assuming the Court does not take either of these off ramps, this case will determine the fate of the “wholly groundless” exception. One might assume that a decision on this issue will be relatively inconsequential, given Archer’s analysis showing that no more than 100 cases have invoked the doctrine since 1991. But it is safe to say that a Supreme Court decision endorsing the doctrine will embolden parties seeking to avoid arbitration to rely on it, and thus will increase the frequency of such arguments. This will give opponents of arbitration a much-needed tool in a toolbox that has been shrinking in recent years (albeit one with limited applicability).

At a deeper level, the case will test the limits of the Court’s commitment to the enforcement of arbitration agreements. As outlined above, previous cases have found that an agreement to arbitrate should trump countervailing state or federal law in a variety of circumstances. This case will determine whether that commitment to arbitration prevails even when a detour to arbitration will be fruitless and wasteful because the case will certainly be returned to court.

The decision thus may provide some indication as to the strength of the Court’s ongoing commitment to enforcing arbitration agreements (particularly with the new personnel on the Court). There is reason to believe, however, that a decision on the applicability of the “wholly groundless” doctrine in this case may not necessarily correlate with the Court’s arbitration jurisprudence more broadly. Many of the Court’s decisions in this area (including, for example, Concepcion, Italian Colors, and most recently Epic Systems) have had a political valence, with the Court’s five conservatives comprising the pro-arbitration majority prevailing over a liberal dissent. But this case may not break down in the same predictable fashion, for two reasons. First, unlike many of the Court’s 5–4 decisions, which featured large corporations seeking to enforce arbitration agreements against an individual consumer or small business, this case features sophisticated business entities on both sides. Second, the lower court decisions addressing the “wholly groundless” exception have not always broken on predictable liberal-conservative lines. (The Fifth Circuit decision adopting the “wholly groundless” exception, for example, was authored by conservative Judge Jerry Smith, over a dissent by liberal Judge James Dennis. Douglas v. Regions Bank, 757 F.3d 460 (5th Cir. 2014).) This suggests that the Court’s views on the “wholly groundless” exception may be sui generis, rather than tracking the ideological divide that runs through much of the Court’s jurisprudence. The case’s value in predicting the outcome of future cases thus may also be limited.

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PREVIEW of United States Supreme Court Cases 46, no. 2 (October 29, 2018): 4–6. © 2018 American Bar Association

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FEDERAL ARBITRATION ACT

Which Default Rule Applies When an Arbitration Agreement Does Not Address Class Arbitration?

CASE AT A GLANCE

The Supreme Court has held that a court cannot order arbitration to proceed using class procedures unless there is a "contractual basis" for concluding that the parties "agreed to" class arbitration. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In this case, the parties’ agreement was silent as to class arbitration, but the lower courts sent the case to arbitration based on the state-law rule that any ambiguity in an agreement must be construed against the drafter. The Supreme Court must decide whether a state-law rule of contract interpretation can provide the necessary "contractual basis" for concluding that the parties agreed to class arbitration.

*Lamps Plus, Inc. v. Varela*
Docket No. 17-988

Argument Date: October 29, 2018
From: The Ninth Circuit

by Daniel Thies
Webber & Thies, P.C., Urbana, IL

ISSUE

Can a state-law rule of contract interpretation for resolving ambiguity supply the contractual basis that the Federal Arbitration Act requires before a court may conclude that the parties have authorized class arbitration?

FACTS

For several decades, the Supreme Court has interpreted the Federal Arbitration Act (the Act) based on the assumption that the Act primarily aims to effectuate the parties’ agreement about how to resolve their disputes. See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U.L. Rev. 1939 (2014). As the Court has repeatedly articulated, “arbitration under the [Act] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). Thus, “[t]he central or ‘primary’ purpose of the [Act] is to ensure that private agreements to arbitrate are enforced according to their terms.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (quotation marks and citation omitted). By applying this “consent principle,” the Court claims to remain neutral as to the substantive question of the best way to resolve the parties’ dispute, and instead merely implements the parties’ prior agreement.

But what is the Court to do when the parties’ agreement is silent on a particular question? This case presents precisely that issue, and thus tests the limits of the consent principle and its ability to resolve disputes under the Act.

Plaintiff Frank Varela entered an arbitration agreement with his employer, Lamps Plus. The agreement did not explicitly address whether it allowed class-action arbitration and instead included only the following provision:

“I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment…"

The Company and I mutually consent to the resolution by arbitration of all claims or controversies…, past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me.

After Varela entered this agreement, Lamps Plus was the victim of a data breach that compromised the personal information of its current and former employees. Varela brought a putative class action against Lamps Plus in California federal court seeking redress for the data breach. Lamps Plus moved to compel arbitration and further argued that, because the agreement did not explicitly authorize class-wide arbitration, the arbitration should proceed on an individual basis. Varela opposed the motion and argued that if arbitration were appropriate, it should include his class-based claims.
The district court ordered the case to arbitration, but denied Lamps Plus’s request to limit the arbitration to Varela’s individual claims. The district court reasoned that “the language stating that ‘all claims’ arising in connection with Varela’s employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter.”

Lamps Plus appealed, and a divided panel of the Ninth Circuit affirmed. The panel majority agreed that the arbitration agreement was ambiguous, but held that “the most reasonable [ ] interpretation…is that it authorizes class arbitration.” The panel majority also relied on the contra proferentem doctrine from California contract law, which required it to construe any ambiguities against the drafter, Lamps Plus. Lamps Plus petitioned the Supreme Court for review.

CASE ANALYSIS

The parties’ central dispute is over what default rule to apply when an arbitration agreement does not clearly address class arbitration. Lamps Plus contends that the default rule should be that class arbitration is forbidden unless explicitly endorsed. Varela, in contrast, argues based on state law that ambiguity should always be construed against the drafter, which will favor class arbitration in the typical case (an individual employee or consumer arguing for class arbitration against a large company that drafted the agreement).

To support its view, Lamps Plus hitches its wagon to the Court’s decision in Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., which held that “a party may not be compelled under the [Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so” and that a court thus cannot conclude that “the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” Lamps Plus reads these pronouncements to impose a default rule that an agreement does not authorize class arbitration unless it includes “clear and unmistakable” language providing otherwise. The language at issue here, which Lamps Plus characterizes as nothing more than “general language commonly used in arbitration agreements,” is insufficient.

Varela distinguishes Stolt-Nielsen on the ground that the parties there stipulated that their agreement was silent on class arbitration. By contrast, the agreement here can plausibly be read to authorize class arbitration, particularly the provision agreeing to arbitration “in lieu of any and all lawsuits or other civil legal proceedings” (emphasis added). That language is at least ambiguous, Varela argues, and so provides the “contractual basis” for class arbitration that Stolt-Nielsen requires, at least when combined with the background assumption of California state contract law that ambiguities should be construed against the drafter (here, Lamps Plus).

Varela contends that this approach is mandated by longstanding precedent providing that arbitration agreements must be construed using state contract law. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995). Indeed, Section 2 of the Act explicitly recognizes that arbitration agreements may be enforced “upon such grounds as exist at law or in equity for the revocation of any contract”—language that plainly encompasses general state law contract principles. 9 U.S.C. § 2. That is why the Court has previously referenced a state-law contra proferentem doctrine when interpreting an arbitration agreement (albeit, as Lamps Plus points out, as dictum that provided additional support for the conclusion the Court otherwise would have reached under the Act). See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

Lamps Plus replies that the Supreme Court has also long recognized that the Act trumps various principles of state contract law. For example, in DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015), the Court interpreted the phrase “law of your state” in a consumer contract. The Court explained that although “California courts are the ultimate authority on [California] law,” it was for this Court to decide whether “that state law is consistent with the [Act].” Lamps Plus argues that the rule that class arbitration is not allowed unless explicitly authorized similarly trumps any contrary rule of state contract law.

Lamps Plus also counters Varela’s textual argument by suggesting that any ambiguity is resolved by the agreement’s limitation of the claims subject to arbitration to “claims or controversies” that “I may have against the Company…or that the Company…may have against me” (emphasis added). According to Lamps Plus, this language clearly excludes class arbitration.

Each side also seeks to justify its proposed default rule by appealing to the well-entrenched consent principle. Lamps Plus contends that its default rule requiring an explicit agreement to class arbitration in the contract itself “follows naturally from the Act’s rule of fundamental importance that arbitration is a matter of consent, not coercion” (quotation marks and alterations omitted). According to Lamps Plus, this overriding requirement that the parties consent to any arbitration procedure preempts any “state-law interpretive canon” that would artificially “manufacture the contractual basis for class arbitration.”

Varela, by contrast, contends that the state contract-law rules he favors are designed precisely “to ascertain the intent of contracting parties as objectively manifested in their agreement.” Applying those state-law rules thus does not contradict the Act, but is instead the only way to carry out the Act’s mandate of ascertaining and enforcing the parties’ arbitration agreements. Varela argues that “[s]uch generally applicable interpretive principles are not preempted by the Act because they comply with its fundamental requirement of equal treatment of arbitration agreements and other contracts.”

Lurking behind all of these arguments is a jurisdictional argument that Varela raised for the first time in its opposition to Lamps Plus’s certiorari petition. The Act permits appeals from denials of motions to order arbitration, Section 16(a)(1)(B), but prohibits appeals from orders directing arbitration to proceed, Section 16(b)(2). Because the district court here ordered the parties to proceed to class arbitration, Varela argues that Lamps Plus cannot appeal. Lamps Plus counters that appellate jurisdiction is conferred by a separate provision—Section 16(a)(3)—which allows a party to appeal from “a final decision with respect to an
arbitration." Because the district court dismissed Varela’s claims in total (albeit without prejudice), Lamps Plus contends that the decision is final and appealable under Section 16(a)(3). Lamps Plus also asserts that at least a portion of the final decision was adverse to it—the portion ordering class arbitration—which is sufficient to confer on it the right to appeal.

SIGNIFICANCE
Assuming the Court does not dismiss the case on jurisdictional grounds (which seems unlikely, given that the Court granted the certiorari petition over Varela’s jurisdictional argument), the Court’s decision in this case will test the limits of the consent principle to resolve disputes under the Act. The parties’ efforts to tease meaning out of their arbitration agreement with respect to the class arbitration issue are admirable, but ultimately futile and even a bit disingenuous. The agreement ultimately is silent on the issue, and so an appeal to enforce simply “what the parties agreed” is insufficient. The dispute instead must be resolved through an appeal to background principles or policy arguments that determine the outcome when the agreement itself is silent.

Lamps Plus hints at the need to reference such background principles. Although it couches its arguments in terms of the consent principle, for example, Lamps Plus explicitly references “the numerous benefits of traditional, bilateral arbitration that this Court has repeatedly recognized” and seeks to enforce “the strong federal policy favoring the type of arbitration envisioned by the [Act],” which is “traditional, bilateral arbitration” rather than class arbitration. Varela, by contrast, doubles down on the consent principle, arguing that “uncritical acceptance of arguments that individual arbitration is better for employees should not figure into any decision in this case” and that “Lamps Plus’s dubious empirical assertions have nothing to do with what this Court has held to be the dispositive question: The meaning of the parties’ contract.”

The Court’s resolution of these various arguments will shed light on the adequacy of the consent principle as an interpretive lens when applying the Act. That is, is it possible to resolve disputes such as this merely by appeals to the parties’ agreement, as Varela contends? Or will the Court find it necessary to apply a more substantive jurisprudence based on the goals that it perceives Congress to have been advancing when it passed the Act, as Lamps Plus suggests? The answer to these questions, in turn, will help future litigants predict how the Court will likely resolve other disputes under the Act.

On a practical level, this case will also determine whether the gradual spread of class arbitration waivers in response to the Court’s jurisprudence will continue. Since the Court’s decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), which held that the Act preempts state law holding class arbitration waivers unconscionable and unenforceable, consumer contracts have increasingly contained explicit class arbitration waivers. Such waivers are likely to become more common in employment contracts as well following the Court’s decision last term in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), which held such waivers enforceable over the argument that the National Labor Relations Act renders them illegal. But there are nonetheless a large number of contracts predating these decisions that, like Varela’s agreement with Lamps Plus, do not explicitly address the issue. This case will determine the rights of parties seeking to bring class claims under such agreements.

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PREVIEW of United States Supreme Court Cases 46, no. 2

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The Right to Travel to Bring Goods to Market: 
Treaty Interpretation in the 21st Century

CASE AT A GLANCE

This case examines whether the Yakama Treaty of 1855 allows Yakama tribal members and Yakama tribal businesses to be exempt from state-imposed taxes on the importation of motor vehicle fuel, where the conduct in question (1) occurs on land ceded by the Yakama Nation in the 1855 Yakama Treaty; (2) is performed by a tribal entity acting as agent for the Yakama Nation tribal government; (3) is performed in order to bring fuel to the Yakama Reservation; and (4) occurs along traditional trading routes used by tribal ancestors.

Washington State Department of Licensing v. Cougar Den, Inc. 
Docket No. 16-1498

Argument Date: October 30, 2018
From: The Supreme Court of Washington

by Amy Kullenberg
Ann Arbor, MI

ISSUE

Does the Yakama Treaty of 1855 provide a right for tribal members and entities to avoid state taxes on off-reservation commercial activities that make use of public highways?

FACTS

Petitioner is the Washington State Department of Licensing. Respondent is Cougar Den, Inc., a corporation formed under the laws of the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation), a federally recognized Indian tribe. Cougar Den’s owner and agent, Kip Ramsey III, is an enrolled member of the Yakama Nation.

The Yakama Nation is presently situated on a reservation inside the boundaries of what is now recognized as the state of Washington. The Yakama Reservation was created by the Yakama Treaty of 1855 (Treaty) and is surrounded by what once was the ancestral territory of the Yakama people, approximately 12 million acres of land which was ceded to the U.S. government in the Treaty. The Yakama Reservation is nearly equidistant from Seattle, Washington (about 200 miles to the northwest), and Portland, Oregon (about 200 miles to the southwest). From the reservation, Portland can be reached via US-97 (running north-south) and I-84 (running east-west). Most of this distance is covered by I-84, with the US-97 portion composing about 27 miles. US-97 provides entry into, and runs through, the Yakama Reservation.

In March 2013, Cougar Den began bringing motor vehicle fuel from Oregon to the Yakama Reservation, where it was sold at tribal gas stations. Cougar Den used the US-97 route for this transport. Cougar Den had obtained an import license from the Yakama Nation and was paying applicable federal and tribal taxes on the fuel sales. Cougar Den had not obtained an import license from the state of Washington, nor had it remitted any taxes on its imported fuel. In December 2013, petitioner issued an assessment against Cougar Den for approximately $3.6 million, pursuant to chapters 82.36 and 82.38 of the Revised Code of Washington (RCW), alleging that Cougar Den had failed to pay a mandatory state excise tax on fuel imported into Washington. Cougar Den challenged this assessment, and the matter went before a Departmental Administrative Law Judge (ALJ), who ruled in favor of Cougar Den, finding that the state tax assessment constituted an impermissible restriction under the Yakama Treaty of 1855.

The department’s director issued an order reversing the ALJ, finding that the Treaty did not preempt the state from assessing taxes, license requirements, and penalties against Cougar Den. The case was then brought to the Yakima County Superior Court, which (sitting in an appellate capacity) reversed the director’s order. Petitioner then appealed to the Washington Supreme Court, which granted direct review.

The Washington Supreme Court opinion was filed on March 16, 2017, holding that, absent express federal law to the contrary, Indian citizens are generally subject to state laws when engaging in activity outside of a reservation; a treaty qualifies as express federal law; and treaties with Indians must be interpreted as Indians would have understood them, with ambiguities to be resolved in the Indians’ favor. The state court found that the Yakama Treaty of 1855 guaranteed that Yakama tribal members would retain the right to travel outside reservation boundaries and to trade their goods, without conditions or restrictions imposed by the state.
Petitioner promptly filed a petition for writ of certiorari, which was granted on June 25, 2018.

**CASE ANALYSIS**

This case concerns the interpretation of a federal treaty to determine whether state tax laws apply to a tribal member’s off-reservation activity.

The state laws in question are contained in Revised Code of Washington chapters 82.36 and 82.38, which together require fuel suppliers and distributors to acquire a state license, and to pay an excise tax, for motor vehicle fuel distributed within or imported into the state of Washington.

The federal treaty provisions at play are found in Article III of the Yakama Treaty of 1855:

*And provided* that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Petitioner contends that because Cougar Den travels to Oregon to acquire its fuel, and then brings this fuel across state lines into Washington, Cougar Den is clearly an importer of fuel and therefore subject to the licensing and tax requirements of RCW 82.36 and 82.38. Respondent acknowledges that it acquires the fuel in Oregon, but denies that it imports the fuel into Washington; asserting instead that it imports this fuel into the Yakama Nation, using a 27-mile route through Yakama ceded land, which was historically a Yakama trade route. Cougar Den invokes Article III of the Yakama Treaty of 1855 to assert that this conveyance of fuel is a protected tribal activity which is immune from state interference.

Petitioner denies that Cougar Den is exempt from Washington State law, because (1) Cougar Den possesses and carries the fuel on off-reservation, state land; (2) Washington’s fuel tax attaches to the first possession of fuel, which occurs within the state of Washington; (3) tribal members are subject to state laws governing activity that occurs off-reservation, absent express federal law to the contrary; and (4) the Treaty merely protects a tribal member’s right to travel in common with others upon public roads, but does not protect the right to engage in unregulated trade or commerce.

The parties are divided on two key points of law: (1) how the Treaty language should be interpreted and (2) which line of cases provides the proper precedent for resolving the current dispute.

Respondents and its amici invoke canons of construction uniquely applied to the interpretation of federal treaties made with Indian tribes, which require that (1) Indian treaties be interpreted as the Indians themselves would have understood them in the historical and social context in which they were made; (2) ambiguities be resolved in favor of the Indian signatories; and (3) treaties be interpreted with regard to the federal government’s ongoing fiduciary obligation to tribal nations.

Respondent and its amici provide extensive briefing on the historical context of the Yakama Treaty of 1855 and assert that, although the treaty does not explicitly mention the word *trade*, Yakama custom at the time incorporated “travel” and “trade” as inherently connected activities. Therefore, Yakama tribal signatories would have understood the “right of free access” and the “right to travel” as including the right to possess and carry goods to and from markets without conditions or restrictions placed *either* on the travel or on the goods themselves. Respondent and amici emphasize that the Yakama, in particular, would have found this to be a critical provision, in light of the fact that they had for centuries established sophisticated trade routes through the 90 percent of tribal territory ceded in the Treaty.

Petitioner and its amici disagree with this interpretation and state that the Treaty must be interpreted according to its ordinary meaning, which provides tribal members a right to utilize public highways in the same manner as nontribal citizens do, but does not guarantee them a right to be free from the state’s authority to regulate and tax off-reservation commercial activities.


Petitioner cites *Mescalero* for the proposition that “[o]utside an Indian reservation, Indian citizens are subject to state tax laws, ‘[a]bsent express federal law to the contrary.’” Petitioner acknowledges that a treaty is federal law; however, it denies that the Yakama Treaty of 1855 provides the express statement of exemption that *Mescalero* requires.

Furthermore, petitioner invokes *Oklahoma Tax Commission* for the premise that an intent to provide exemptions from state taxes must be “clearly expressed” by the federal sovereign and “unambiguously proved” by the party seeking exemption. Petitioner argues that Cougar Den does not meet this burden, because the express language of the Treaty cannot be construed to have contemplated a future tax on goods, simply because these goods were transported by highway.

Petitioner invokes *King Mountain Tobacco* because it also involved a Yakama-owned tribal business. In *King Mountain*, the Ninth Circuit considered whether the Treaty preempted a state escrow fee implemented to fund public health initiatives to address the
deleterious effects of cigarette smoking. The court highlighted the regulatory purpose of the escrow fee and noted that King Mountain was a Yakama-owned tobacco manufacturer engaged in extensive interstate trade as part of its manufacturing process. The court held that the “right to travel” provision did not preempt application of the Washington escrow statute to King Mountain. Petitioner cites King Mountain for the proposition that, while the Treaty protects a tribal member’s right to travel, it does not, and cannot, provide an unfettered right to travel, where that trade occurs off-reservation and on land subject to the state’s legitimate regulatory and taxing authority.

Petitioner argues that its fuel tax laws are nondiscriminatory in purpose and implementation, serve the legitimate state interest of raising revenue to support public infrastructure, do not interfere with respondent’s right to travel, and are an allowable tax on goods that respondent voluntarily possesses off-reservation within the state of Washington. Petitioner and its amici urge the Court to reinforce bright-line rules, which make clear that states have the authority to regulate and tax commercial activity that takes place off-reservation, absent express federal statements providing for preemption.

Respondent distinguishes King Mountain on the basis that the escrow tax there was based on the sale of cigarettes and was not inextricably related to the transportation of the cigarettes. Respondent acknowledges that, under Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005), the Ninth Circuit’s decision in King Mountain was correct and that the “right to travel” Treaty provision was not implicated. By contrast, respondent argues that the fuel tax at issue in Cougar Den is inherently associated with a tribal agent’s travel for the purpose of bringing the fuel to the reservation for use by tribal members. Therefore, this is activity that tribal signatories would have understood to be protected by the Treaty’s “right to travel” provisions.


To begin with, respondent and its amici state that the extensive findings of fact made by the district court in Yakama Indian Nation are conclusive with respect to the historical context of the Yakama Treaty of 1855 and, particularly, with respect to the manner in which the Yakama signatories would have understood the Treaty provisions at the time when they were endorsed. Respondent argues that petitioner is, as a matter of law, estopped from challenging these findings and that these findings must be afforded deference in interpreting the Treaty in the current dispute. Respondent highlights this point, in part, because the litigation in Yakama Indian Nation also involved the Treaty’s right-to-travel provision and also involved tribal member Kip Ramsey, who is the owner and operator of Cougar Den. This argument is strongly corroborated by amicus briefing offered by the Yakama Nation itself, as well as by the National Congress of American Indians, the Nez Perce Tribe, and the Confederated Salish and Kootenai Tribes (CSKT).

Secondly, respondent acknowledges that, while the Court has never yet construed the Treaty’s right-to-travel provision, the Court has interpreted similar language, the right-to-fish provision, which follows immediately after the right-to-travel provision in Article III of the Treaty (see the statute text above).

In Tulee, the Court held that the right-to-fish provision bars the state from charging the Yakama “for exercising the very right their ancestors intended to reserve” and therefore prohibited the state from imposing a fishing-license fee on Yakama fishermen. Respondent argues that by bringing fuel from Oregon onto the Yakama Reservation for use by tribal members, over a 27-mile stretch of road that lies in territory ceded by the Yakama to the state of Washington and adjacent to the current reservation, Cougar Den is engaging in a Treaty-protected activity and is therefore exempt from the state’s tax and licensing requirements.

Respondent further emphasizes that the Yakama Nation identified Cougar Den as its sole agent “for the purpose of obtaining petroleum products for sale and delivery to its members” and that, therefore, under Washington’s own statute, the Yakama Nation is the actual “importer” of fuel and, as such, cannot be taxed or regulated by the state in its capacity as independent sovereign.

Respondent argues that the Treaty contains four bedrock propositions that should be affirmed by the Court: (1) the Treaty protects the right to transport goods for purposes of trade; (2) the Treaty secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected travel; (3) the Treaty applies even to nondiscriminatory fees and taxes; and (4) the Treaty preempts taxes and fees, but does not preempt certain regulatory provisions. Respondent states that these four concepts represent what the Yakama people would have understood they were securing in exchange for what they were ceding at the time the Treaty was negotiated.

Respondent acknowledges that the subject of taxes is not addressed in the language of the Treaty. However, respondent states this is not unusual, as many state taxing authorities did not yet exist when treaties were negotiated. However, respondent explains, the creation of reservations by treaties has itself been held to implicitly bar a state from taxing reservation lands. McClanahan v. Tax Commission of Arizona, 411 U.S. 164 (1973). Therefore, respondent argues, even though taxes are not explicitly mentioned in these treaties, the right to be exempt from certain taxes is a right that a Treaty may nonetheless confer.

Finally, respondent addresses petitioner’s concerns about potential negative consequences by distinguishing between a state’s authority to engage in bona fide regulatory measures—to protect and preserve the public health and welfare, for example—and the state’s authority to assess taxes for the purpose of raising revenue. Respondent states that the former will not be prohibited, but the latter will, when and where it interferes with the exercise of Treaty-protected rights. Amicus Yakama Nation itself states:
[T]he Yakama Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. [T]he Yakama Nation and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure.

Furthermore, respondent argues that the impact of affirming the Washington State Supreme Court decision will not be as far-reaching as petitioner contends. Respondent notes the right-to-travel provision at play here appears in only three treaties and applies to tribes which are primarily located in the northwestern portion of the United States.

SIGNIFICANCE
The outcome of this case has potential significance in several realms: practical, legal, historical, and political. Petitioner and its amici warn that if the Washington State Supreme Court’s decision is affirmed, states will lose their ability to create and implement taxing regimes, with a disastrous resulting loss of revenue for public infrastructure. They also caution that tribal businesses would be unfairly advantaged in the marketplace, causing an unhealthy disruption in commerce throughout the country.

Finally, petitioner and its amici address public health concerns, which are related not to the importation of motor vehicle fuel itself, but rather the potential application of tax-exempt status to tribes trading in cigarettes. On this last point, the petitioner’s amicus group—which includes the American Cancer Society’s Cancer Action Network, the American Heart Association, and the American Lung Association—advances a grim prediction that the benefits of the 1998 Tobacco Master Settlement Agreement would be seriously undermined. Amici warn states may lose settlement proceeds and smoking rates could increase.

Respondent and its amici address the legal and historical implications: whether the Court will uphold or revise canons of construction historically applied to Indian tribes, and whether a tribe’s assessment of its own participation in Treaty negotiations will inform Treaty interpretations going forward. In the larger context, respondent urges fidelity to Treaty expectations even as tribal commercial activities become more modern, complex, and global.

Finally, from a political perspective, this case is interesting merely from the standpoint of timing. Supreme Court Justice Brett Kavanaugh was confirmed and sworn in on October 6, 2018, to assume the seat vacated by retired Justice Anthony Kennedy. Oral argument in this case will be held on October 30, 2018. Justice Kavanaugh will have had a mere 24 calendar days to prepare, and his prior record on Indian law cases is not entirely conclusive. Although Senator Tom Udall, vice chairman of the Senate Committee on Indian Affairs, vigorously opposed Justice Kavanaugh’s nomination, his tenure on the D.C. Circuit Court provides scant information regarding his judicial philosophy regarding Indian law matters. Justice Kavanaugh’s participation is therefore likely to garner a great deal of scrutiny, both for Cougar Den and for other cases brought on in the first portion of the October 2018 term.

CONCLUSION
The Yakama Treaty was signed in 1855: 163 years ago, and 34 years before Washington was admitted to the Union as the 42nd state. Daily life has changed a great deal since then. The advent of the train, the automobile, the plane, the television, the computer, the Internet, and the smartphone have created new platforms for tribal engagement across personal, commercial, and public realms. State governance has expanded. Tribal businesses are exploring new arenas. The intersection of tribal-state-federal sovereignty is growing more complex as tribes recalibrate their tribal activities to comport with the demands of the 21st century. The challenge in this particular case is to identify the authentic expectations of the Treaty’s signatories and to apply those expectations to parties who now inhabit a very different world.

Amy Kullenberg is an attorney practicing in southeastern Michigan, with expertise in family, criminal, environmental, and Indian law. She can be reached at kullenbergaa@gmail.com.

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CASE AT A GLANCE

*Roe v. Flores-Ortega*, 528 U.S. 470 (2000), establishes that an attorney’s failure to appeal when his or her client expressly instructs the attorney to file an appeal is presumptively prejudicial. In other words, it is presumed that the attorney provided ineffective assistance of counsel. This case presents a different spin, because the petitioner in this case signed an appeal waiver. The question is whether the presumption of prejudice still applies when the petitioner signed such a waiver.

**Garza v. Idaho**
Docket No. 17-1026

Argument Date: October 30, 2018
From: Supreme Court of Idaho

by David Hudson Jr.
Belmont Law School, Nashville, TN

ISSUE

Is prejudice presumed when attorneys fail to follow their clients’ express instructions to appeal because the clients’ plea agreements contain an appeal waiver?

FACTS

In 2015, Gilberto Garza Jr. (petitioner) entered an Alford plea to aggravated assault and a guilty plea to possession of a controlled substance with intent to deliver. (Alford pleas are used by defendants who wish to enter guilty pleas as part of a plea bargain without actually admitting guilt.) Both plea agreements contained a waiver provision, stating that petitioner “waives his right to appeal.” Under the plea agreements, he was to receive a five-year sentence on both charges to be served consecutively in exchange for the state (respondent) not to pursue additional charges and tab him as persistent violator.

A trial judge sentenced Garza, and he did not appeal. Four months later, petitioner filed for post-conviction relief, alleging ineffective assistance of counsel and that his pleas were involuntary. He contended his counsel was ineffective in not filing an appeal from his sentence. He asked that his sentences run concurrently rather than consecutively.

A reviewing district court rejected the involuntary plea claim but found that the ineffective assistance of counsel claim was “potentially viable.” Garza’s original trial counsel made the following statement:

> Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f) (1)(c) Agreement. I did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

After reviewing the evidence, the district court concluded that petitioner could not show prejudice and ruled in favor of respondent, Idaho. The district court focused on the fact that petitioner had signed an appeal waiver. Thus, there was no presumption of prejudice.

Petitioner appealed, but the Idaho Court of Appeals affirmed. The intermediate appellate court reasoned that “an attorney has a duty to avoid frivolous litigation, and filing a futile appeal is frivolous.” The appeals court reasoned that petitioner had to “make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver.”

On further appeal, the Supreme Court of Idaho affirmed. Like the intermediate appeals court, the supreme court reasoned that there was no presumption of prejudice from petitioner’s attorney failing to file an appeal, because petitioner had signed an appeal waiver. The supreme court determined that petitioner could prevail only by showing prejudice, something petitioner failed to do in the court’s determination.

Petitioner filed a petition for writ of *certiorari*, which this Court granted.

CASE ANALYSIS

The Sixth Amendment requires that criminal defendants facing serious charges receive “the assistance of counsel.” The Supreme
In his plea agreement, petitioner received a much lower sentence both sides give away or bargain away certain positions or things. To show ineffective assistance of counsel, a defendant ordinarily must show two things: (1) that the attorney’s performance was deficient and (2) that the attorney’s deficient performance caused the client prejudice.

Sometimes, errors committed by an attorney are so fundamental that prejudice is presumed. These are frequently called structural errors. Other errors, while not structural, are so important that prejudice is also presumed.

In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Supreme Court explained that “when counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” In other words, prejudice is presumed if an attorney fails to appeal when the client wants to appeal.

In Garza’s case, his plea agreement contained an appeal waiver. Petitioner asserts that this distinction does not matter and that the “categorical” rule from Flores-Ortega applies—namely that prejudice is presumed when an attorney fails to follow a client’s instructions to file an appeal. Petitioner emphasizes that no appeal waiver, no matter how broadly written, means that a criminal defendant loses all rights to appeal. For example, a criminal defendant always can appeal, claiming that his plea agreement was not voluntary.

Petitioner argues that the attorney’s failure to appeal against the client’s express wishes deprives or “usurps” a criminal defendant’s right to make fundamental decisions about his or her case. “A defendant who signs an appeal waiver as part of a plea agreement retains the autonomy to decide for himself whether to pursue an appeal in which he can raise any claims preserved by the waiver,” petitioner argues.

Respondent counters that the appropriate analysis is not to create any categorical rule or presume prejudice. Instead, the typical two-part Strickland v. Washington test for ineffective assistance of counsel claims should be applied on a case-by-case basis. 466 U.S. 668 (1984).

Respondent argues that an attorney’s “actions cannot forfeit an appeal that the client already affirmatively waived.” According to respondent, petitioner wanted to appeal his sentences, but in his appeal waiver, he waived the right to challenge his sentences. “Even if he had a right to raise other issues, he never claimed that was the appeal he wanted,” respondent notes. “At the very least, a defendant such as [petitioner] is not presumptively prejudiced when his counsel declines to file an appeal on a plainly waived matter,” respondent concludes.

Louisiana and 13 other states, as amici in support of respondent, contend that a plea agreement is a contract. In such an agreement, both sides give away or bargain away certain positions or things. In his plea agreement, petitioner received a much lower sentence than he might have in exchange, in part, for signing an agreement with an appeal waiver. The states contend that he cannot now go back on that agreement.

SIGNIFICANCE

This case affords the Court the chance to resolve a deep split in the circuits over whether the categorical rule in Roe v. Flores-Ortega applies when a defendant signs a plea agreement with an appeal waiver. Eight federal appeals courts, the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, hold that the categorical rule from Flores-Ortega applies even if there is an appeal waiver. The Third and Seventh Circuits reached the opposite conclusion.

The case is also significant because of the dominance of plea bargaining in the criminal process and the number of plea agreements that contain appeal waivers. The Idaho Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers, as amici in support of petitioner, explain that “appeal waivers vary dramatically in form and scope.”

On the other side, Louisiana and 13 other states in support of respondent, assert that the case is significant for the vitality and continued use and effectiveness of appeal waivers. They cite a law journal article for the proposition that two-thirds of the plea agreements at the federal level contain appeal waivers. These waivers help further the important interest of finality to the criminal process. “Such waivers, which guarantee finality in the proceedings for the State, the defendant, the victim, and the system, have great value to all involved,” the states claim.

Of course, the case is also significant because of the importance of a criminal defendant’s right to appeal. As the Ethics Bureau at Yale explains: “[W]ere this Court to permit lawyers to refuse to file an appeal, it would be depriving defendants of their constitutional right to a thorough review of the merits on appeal.”

David L. Hudson Jr. is a visiting associate professor of legal practice at Belmont Law School in Nashville, Tennessee. He is also the author, coauthor, or coeditor of more than 40 books, including a coeditor of The Encyclopedia of the Fourth Amendment (2013). He can be reached at davidhudsonjr@gmail.com.

PREVIEW of United States Supreme Court Cases 46, no. 2

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Louisiana and 13 Other States (Elizabeth B. Murrill, 225.326.6766)

United States (Noel J. Francisco, Solicitor General, 202.514.2217)
Are International Organizations Afforded the Same Immunity as Foreign States Are Afforded Under the Foreign Sovereign Immunities Act?

CASE AT A GLANCE

Indian fishermen sued International Finance Corporation (IFC), alleging harm caused by a plant partially financed by IFC. The lower courts found IFC immune from suit under 22 U.S.C. § 288a(b), which grants international organizations “the same immunity from suit…as is enjoyed by foreign governments.” The Court will decide whether Section 288a(b) affords international organizations absolute immunity, or whether Section 288a(b) incorporates the “restrictive theory” codified in the Foreign Sovereign Immunities Act, including the “commercial activities” exception to immunity.

Jam v. International Finance Corporation
Docket No. 17-1011

Argument Date: October 31, 2018
From: The D.C. Circuit

by Birgit Kurtz
Gibbons P.C., New York, NY

INTRODUCTION

In 1945, Congress enacted the International Organizations Immunities Act (IOIA), 22 U.S.C. §§ 288 et seq. At issue in this case is 22 U.S.C. § 288a(b), which provides as follows:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract. (Emphasis added.)

Three decades later, Congress enacted the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602 et seq. The FSIA codified the “restrictive theory” of immunity first expressed by the U.S. Department of State in 1952 in the so-called “Tate Letter”—after foreign sovereigns had enjoyed more than a century of general immunity based on “grace and comity.”

ISSUE

Does the International Organizations Immunities Act, which affords international organizations the “same immunity” from suit that foreign governments have, 22 U.S.C. § 288a(b), confer the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11?

FACTS

Petitioners are (1) fishermen and farmers who live and work in a coastal region of Gujarat, India; (2) a local trade union dedicated to the protection of fisherworkers’ rights; and (3) the local government of a village in the region. The fishermen and farmers sued on behalf of themselves and others similarly situated.

Respondent is the International Finance Corporation (IFC). IFC was founded in 1956 and is an international organization with 184 member countries, including the United States and India. IFC’s Articles of Agreement provide that its purpose is “to further economic development by encouraging the growth of productive private enterprise in member countries.” To further this purpose, IFC may invest in private projects for which “sufficient capital is not available on reasonable terms.”

IFC loaned $450 million to Coastal Gujarat Power Limited, a subsidiary of Tata Power, an Indian power company, for the development of the Tata Mundra Power Plant. The overall cost of the project was estimated at $4.14 billion.

IFC’s internal policies require careful attention to any environmental or social impacts of the projects it finances. Having recognized that the Gujarat project entailed significant, and potentially irreversible risks, IFC incorporated an “Environmental and Social Action Plan” into the loan agreement.

In 2015, petitioners sued IFC in the D.C. District Court, alleging that the project and IFC’s failure to follow its own policies had caused a number of negative environmental and social impacts, which, in the aggregate, had “fundamentally threatened or destroyed” the local “way of life.” The complaint points to IFC’s “irresponsible and negligent conduct…in appraising, financing, advising, supervising and monitoring its significant loan to enable the development of the [project].” Petitioners claimed
“negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract” and demanded injunctive relief against IFC or, in the alternative, compensatory and punitive damages.

IFC moved to dismiss, arguing, inter alia, that the suit is barred by the IOIA.

In 2016, the D.C. District Court dismissed the complaint, holding that IFC was immune from suit and had not waived that immunity, stating:

When Congress enacted the IOIA in 1945, foreign sovereigns enjoyed—contingent only upon the State Department’s making an immunity request to the court—“virtually absolute immunity.” Atkinson v. Inter-Am. Dev. Bank, 156 E3d 1335, 1340 (D.C. Cir. 1998) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)). The IOIA thus confers that same absolute immunity upon international organizations like IFC.

The remainder of the district court’s decision dealt with the question whether IFC had waived its immunity. The court found IFC had not waived its immunity and dismissed the complaint.

Petitioners appealed, and, in 2017, the D.C. Circuit Court affirmed, holding that IFC was immune and had not waived that immunity. Judge Laurence Silberman wrote the opinion for the court joined by Judge Harry Edwards; Judge Cornelia Pillard wrote a concurring opinion.

The D.C. Circuit relied on two main cases. In Atkinson v. Inter-Am. Dev. Bank, 156 E3d 1335 (D.C. Cir. 1998), the Circuit held that IOs enjoyed virtually absolute immunity. In Nyambal v. International Monetary Fund, 772 F3d 277 (D.C. Cir. 2014), the D.C. Circuit reaffirmed Atkinson, stating that the case “remains vigorous as Circuit law.” Judge Silberman was involved in all three cases: He authored the Atkinson opinion in 1998, he served as a judge on the panel that decided Nyambal in 2014, and he was the author of the 2017 opinion in Jam v. IFC (the case at issue here). Judge Edwards joined Judge Silberman in Jam and also served on the panel that decided Atkinson (at the time, in 1998, he was the chief judge of the D.C. Circuit).

As to the immunity issue, the circuit court in Jam v. IFC rejected petitioners’ “rather bold[ ] request not to follow Atkinson. The court disagreed with petitioners’ argument that “Atkinson was wrong to conclude that when Congress tied the immunity of international organizations to foreign sovereigns, it meant the immunity foreign sovereigns enjoyed in 1945.” The court noted that Atkinson “explicitly rejected…an evolving notion of international organization immunity,” and “Congress rejected a commercial activities exception.” Further, the court disagreed with petitioners’ argument that, in 1945, the immunity of foreign sovereigns was, in fact, not absolute. The court concluded:

In any event, the holding of Atkinson—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations were given complete immunity by the IOIA unless it was waived or the President intervened. And as we noted, that holding was reaffirmed in Nyambal after the Supreme Court dicta on which appellants primarily rely. Therefore, we conclude our precedent stands as an impassable barrier to appellants’ first argument.

The balance of the court’s opinion dealt with the waiver issue.

In her concurrence, Judge Pillard agreed that Atkinson remained binding law in the D.C. Circuit and that it was controlling. She wrote a separate opinion to point out that Atkinson, together with the Mendaro case on waiver, “have left the law of international organizations’ immunity in a perplexing state.” Judge Pillard concluded that “both cases were wrongly decided” and suggested that “our circuit may wish to revisit them.”

On January 19, 2018, petitioners filed a petition for a writ of certiorari, listing two questions for review:

1. Does the International Organizations Immunities Act—which affords international organizations the “same immunity” from suit that foreign governments have, 22 U.S.C. § 288a(b)—confer the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11?

2. If not, what are the rules governing the immunity to which international organizations are entitled?

On May 21, 2018, the Court granted the petition limited to Question 1.

CASE ANALYSIS

The Supreme Court is called upon to interpret the meaning of “same immunity” in Section 288a(b) of the IOIA. Specifically, the issue is whether, under the IOIA, the immunity of international organizations is the same as it was in 1945 (when the IOIA was enacted), that is, virtually absolute; or whether it is tied to the immunity of foreign sovereigns under the FSIA and, therefore, subject to exceptions like the “commercial activities” exception.

Enacted in December 1945, the IOIA grants certain international organizations (IOs) and their employees and close relatives a number of exemptions, immunities, and privileges. Section 288 defines an IO as follows:

a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in [the IOIA].

The privileges, exemptions, and immunities under the IOIA include immunity from suit and judicial process (Section 288a(b)); immunity from search of property and assets (Section 288a(c)); same treatment as foreign diplomats regarding customs
duties, internal revenue taxes, and so on (Section 288a(d)); no customs duties on baggage of alien employees, families, servants (Section 288b); no property taxes imposed by Congress (Section 288c); and same treatment as foreign diplomats re U.S. entry and departure, and so on (Section 288d).

By executive order, the president can revoke the designation of any IO or withhold or withdraw from any such organization (or from its officers or their employees) any of the privileges, exemptions, and immunities or impose conditions or limits thereon. See Section 288.

Currently, more than 80 organizations have been designated as IOs under the IOIA, including the IMF, the ILO, the United Nations, UNESCO, the WHO, WIPO, and the WTO. Over the years, the provisions of the IOIA have also been extended to certain IOs of which the United States is not a member, as for example the African Union (Section 288f-2) and the Commission of European Communities Bank (Section 288h).

The history of foreign sovereign immunity goes back a long way. For more than a century, foreign sovereigns were generally immune from suit in U.S. courts. Judges deferred to the views of the executive branch as to whether cases against foreign sovereigns should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.

In 1952, U.S. courts' jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called “Tate Letter,” announcing the Department's adoption of a new “restrictive theory” of foreign sovereign immunity to guide courts in invoking jurisdiction over foreign sovereigns. The “Tate Letter” directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or “public,” acts. But acts taken in a commercial or “private” capacity would no longer be protected from U.S. court review. Nonetheless, even with this new guidance, courts continued to seek the executive branch's views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistency and susceptibility to “diplomatic pressures rather than to the rule of law.”

In 1976, Congress addressed this problem by enacting the FSIA, essentially codifying the “restrictive theory” of immunity, and empowering the courts to resolve questions of sovereign immunity without resorting to the executive branch. The FSIA provides that “foreign states”—including their “political subdivisions” and “agencies or instrumentalities”—shall be immune from the jurisdiction of U.S. courts unless one of the statute’s exceptions to immunity applies. The exceptions to jurisdictional immunity are set forth in Sections 1605 and 1605A of the FSIA. These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities.

Petitioners argue that, by its plain terms, the IOIA tracks the rules established in the FSIA. They assert that, under the “time-honored reference canon,” a statutory command to apply another body of law requires that the statute “incorporates that body of law as it exists at the time of suit.” As the current law of foreign sovereign immunity is embodied by the FSIA, the IOIA must follow the FSIA. The IOIA's use of the present tense (“as is enjoyed”) strengthens this conclusion because a statute expressed in the present tense must be applied as of the time of suit.

The structure, purpose, and drafting history of the IOIA reinforce this conclusion, petitioners argue. Different subsections of the IOIA give IOs and their officers complete immunity from certain actions, while other subsections expressly distinguish the privileges and exemptions of IOs from those of foreign sovereigns. But the section that deals with immunity from suit does not follow either example. Rather, Congress’s decision to approach this subject in a different way evidences the wish to avoid “either absolute protection or differential treatment.” Because IOs are compilations of sovereigns, the rules governing the amenability of sovereigns to suit should govern the IOs as well. If that were not the case, foreign sovereigns could evade legal accountability for certain actions simply by pursuing them through IOs.

Petitioners point out that “the Congress that enacted the IOIA specifically considered and rejected proposed language that would have given IOs complete immunity from suit” because the House version would have granted IOs “immunity from suit and every form of judicial process,” but the Senate did not agree to that language.

Petitioners argue that, even if the IOIA incorporated the 1945 view of foreign sovereign immunity, the FSIA would still be the relevant body of law. That is so because, in 1945, courts generally deferred to the then-current views of the political branches on whether foreign sovereigns were immune, and the political branches consistently endorsed the “restrictive theory” of sovereign immunity, which was eventually codified in the FSIA.

In their reply, petitioners assert that “there is no escaping the IOIA's plain text.” The IOIA's language clearly incorporates the current law of foreign sovereign immunity. Any other interpretation would not only contradict Congress’s specific language choices, but would also “wreak havoc on long-settled understandings that other incorporations-by-reference throughout the U.S. Code likewise require applying the referenced law as it exists today.”

Petitioners also disagree with IFC's reasoning on executive branch practice and the policy goals of IO immunity. Ever since the enactment of the FSIA, the executive branch has interpreted the IOIA’s “same immunity” language as incorporating the FSIA, and the United States has confirmed that position in its amicus brief. That is a “sensible policy” because IOs engaged in commercial activities should be treated just like other commercial actors, including foreign sovereigns—they “should not be singularly above the law.”

Petitioners are supported by a number of notable amici. The United States, as one amicus, argues that the IOIA grants an IO the same immunity from suit “as is currently enjoyed by foreign states, not as was enjoyed in 1945.”
First, the text, structure, and history of the IOIA support this interpretation. Second, the executive branch’s conduct concerning the IOIA and subsequent congressional actions confirm this interpretation, according to the United States. The procedure for granting privileges and immunities to IOs generally occurs as follows: the executive branch enters into an agreement to form an IO; Congress authorizes U.S. participation in that IO; and, finally, the president issues an Executive Order designating the IO as entitled to IOIA privileges and immunities.

The United States notes, however, that in cases where agreements oblige the United States to grant the IO absolute immunity from suit (and if the agreement is not a self-executing treaty), Congress has provided for such immunity by separate legislation. If, *arguendo*, the IOIA granted IOs absolute immunity from suit, those types of legislation would be unnecessary. In addition, the long-standing interpretation by both political branches that the jurisdictional immunity under the IOIA tracks the immunity granted to foreign sovereigns under the FSIA deserves deference.

The United States warns that adopting the court of appeals’ interpretation of the IOIA would present a number of practical problems, including (1) the question “whether the provision incorporates the substantive rules of foreign sovereign immunity applicable in 1945 or the procedural ones” and (2) the difficulty of deciding cases under the law as it applied “some 70 years in the past.”

The United States rejects IFC’s policy arguments as not sufficiently strong to justify disregarding the plain text of the statute. And because “the legislative history of the IOIA is replete with statements reflecting a commitment” to treat IO immunity the same as that of foreign sovereigns, it reflects Congress’s judgment that IFC is subject to lawsuits in circumstances similar to foreign sovereigns.

A bipartisan group of members of Congress join together as amici to support petitioners, noting that the question in this case is whether, in narrowing foreign sovereign immunity in 1976, Congress also meant to narrow the immunity of IOs that “enjoy the same immunity from suit…as is enjoyed by foreign governments.” The amici argue that the Third Circuit’s answer to this question is the correct one, as distilled in its conclusion that “the FSIA’s exception for suits arising out of a government’s commercial transactions…is equally applicable to international organizations and is incorporated into the IOIA.” *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010).

The D.C. Circuit concluded that IOIA’s “view of foreign sovereign immunity was frozen in amber in 1945.” According to amici, that view is incorrect “as a textual matter” and “as a matter of plain common sense.” The more natural reading of the IOIA points to foreign sovereigns immunity law “as it exists at the time the claim of immunity is made.”

A group of law professors with special expertise in international organization and international law filed an amicus brief in support of petitioners, arguing that in light of the IOIA’s text and context, IOs enjoy the same immunities as those available to foreign states at the time of suit, unless an international agreement requires otherwise.

When the IOIA was enacted, “there was no developed law of IO immunity in the U.S.,” so Congress linked IO immunity to foreign sovereign immunity. That body of law was “rapidly evolving” and was expected to continue to do so, argue the law professors. Many key international agreements being negotiated around 1945 adopted a functional rather than absolute approach to IO immunity, and, during this same time period, the executive and judicial branches were similarly leaving absolute immunity behind to move to the restrictive theory for foreign sovereigns. The law professors conclude it is, therefore, “implausible that Congress meant for IOs to benefit from different immunity than foreign states enjoy or than international agreements require.”

Absolute immunity would shield IOs from liability in U.S. courts if they conduct commercial activity in the United States or if their commercial activities have a direct effect in the United States, while foreign governments do not enjoy such immunity. That “makes little sense,” assert the law professors.

A collection of advocacy groups led by the Center for International Environmental Law argues that the purpose of immunity is to help IOs in effectively reaching their stated mission. Some IOs expressly mention immunity in their charters; for others, the IOIA provides default rules on immunity, and those should be applied to advance the IOs’ work in their fields. Amici claim that applying the “restrictive theory” of immunity to IOs will increase the IOs’ “accountability” to those with whom they interact in the pursuit of their mission; it would also improve an IO’s “reputation and public image by sending a message that the organization does not consider itself to be above the law.”

Respondent, IFC, argues that the IOIA granted IOs “virtually absolute immunity” when it was enacted in 1945. Since then, IOs headquartered or operating in the United States have pursued their goals “in reliance on the settled understanding” by all three branches of the U.S. government that IOs enjoy immunity from suits that challenge the exercise of their “core functions.” Abandoning this arrangement now to implement limited immunity, IFC cautions, “would defeat the purpose for which these organizations were granted immunity in the first place and undermine their ability to pursue their important development objectives.”

The switch from absolute to restricted immunity would “open U.S. courts to a potential flood of lawsuits by foreign plaintiffs seeking redress for alleged injuries suffered abroad at the hands of foreign funding recipients,” even if the only contact with the United States is the IO’s headquarters being physically located there. Petitioners’ interpretation of the IOIA would, thus, lead to “harmful, counterproductive” results, argues IFC.

Because the IOIA refers to the common law, the meaning of its reference to “the same immunity…as is enjoyed by foreign governments” must be determined as of the time of enactment. The “reference canon” is irrelevant because it applies only where one statute incorporates another statute by reference. The construction that IOs benefit from “an unchanging rule of virtually
absolute immunity that does not fluctuate with subsequent changes in foreign-state immunity” is required to achieve the purposes of IO immunity, which are different from those underlying foreign sovereign immunity, IFC notes.

Foreign sovereign immunity is granted by one sovereign to another on the basis of “comity and reciprocity.” Because IOs lack sovereignty, territory, and governmental authority, they require a separate basis for immunity. IFC argues immunity is essential for IOs to pursue the goals set collectively by their member states, “free of undue interference by the courts of any one state.”

The statutory structure and purpose reinforce the view that IO immunity is fixed and absolute. For example, the waiver provision in Section 288a(b), the authorization of the president to “limit” (Section 288) but not expand the baseline immunity of Section 288a(b), and the immunity from discovery in Section 288b “are fundamentally inconsistent with a fluctuating rule of immunity.” Also incompatible is Congress’s express objective that the IOIA would guarantee the observance of “existing—and unchanging—international obligations to accord nearly absolute immunity” to certain IOs.

IFC asserts that restricting IO immunity would defeat the very purpose of IO immunity. IFC and other multilateral development banks (MDBs) regularly act in commerce to promote their non-commercial collective goals of encouraging economic development and international stability. If FSIA principles apply, such activities may be held to fall under the FSIA’s commercial activities exception. That result would be irreconcilable with the purposes of organizational immunity. They would create an opening for “national courts to second-guess the organization’s policy judgments—which reflect the considered collective judgment of the member states—and burden its collectively contributed finances.”

IFC argues that such suits would have “dramatic implications” for it and other MDBs. Some of IFC’s hundreds of development projects are “in the most challenging locations in the world,” making it an appealing target for potential plaintiffs because of IFC’s “self-imposed, rigorous internal standards, deep pockets, and a jurisdictional hook to get their claims before a U.S. court.” IFC predicts that restricted immunity “would invite myriad lawsuits” trying to hold IFC “liable for everything from allegedly adverse project outcomes to a host government’s illegal conduct.”

Respondent’s position is supported by six sets of prominent amici, including a group of former secretaries of state and secretaries of the treasury. The former secretaries note that IFC furthers important U.S. policy goals to “increase production of goods, spur new jobs for more people, raise the standard of living, and build a global economy in which the rising tide lifts all boats.” IOs are different from sovereigns with different functions. Sovereigns are independent, self-interested actors, while IOs are not. The former secretaries argue IOs are comprised of member states and must “serve as the instrumentalities of many nations” all at once. It follows that IOs do not advance the goals of any single member state. Rather, the various independent states that comprise the collective body that is IFC agree that IFC’s purpose is “to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas.”

Immunity is necessary for IFC to perform its mission, conclude amici. Without immunity, IOs would not only be hampered by facing litigation over the performance of their functions, but their independence would be undermined by submission to suits in local courts.

The former secretaries caution that restrictive immunity would open IOs to burdensome litigation, diverting resources from their missions. Reducing IO immunity would subject them to a new risk of U.S. lawsuits merely for pursuing their internationally agreed upon mission. Any time a plaintiff has a claim arising out of a project receiving IFC financing, a plaintiff could argue that the IO should not be immune for such alleged “commercial activity” under the FSIA.

IFC is also supported by a group of former executive branch attorneys acting as amici. This group notes that unlike foreign sovereign immunity, IO immunity exists to advance the United States’ foreign policy interests. While foreign sovereign immunity rests on comity and reciprocity, IO immunity exists to further each member’s “own direct interest” in the effective functioning of the IOs in which it participates. Thus, regarding an IO’s conduct, “the U.S. has a seat at the table at which policy decisions are made—and the U.S. often uses that seat to advance its specific foreign policy aims.”

The former executive branch attorneys argue restricted immunity invites “undue interference in sensitive matters of foreign policy.” Because petitioners seek specific, equitable relief in addition to damages, the judgment they seek is a plea for the courts to regulate IFC, by dictating to it what specific environmental policies and practices it must adopt. Such judicial prescriptions are at odds with the role the United States is supposed to play as one member among several.

Another group of amici, led by the International Bank for Reconstruction and Development, notes that the purpose of IOs is to address global or regional problems via a multilateral approach. Because IOs must be independent from their member states and free from member state interference to function properly, they benefit from the privileges and immunities necessary to achieve their missions; this includes immunity from suit and legal process.

Many IOs with offices or operations in the United States are headquartered in D.C. and have relied on the D.C. Circuit’s IO immunity jurisprudence in structuring and running their operations. The Court is now asked to abandon more than 20 years of precedent. Amici point out that only one court of appeals, the Third Circuit (“with little experience hearing cases involving IOs and their immunities”) has interpreted the IOIA as incorporating the FSIA.

According to amici, the language, context, and history of the IOIA demonstrate that Congress did not permanently link the scope of IO immunity and the scope of foreign sovereign immunity. Further, the IOIA established a default rule of virtually absolute immunity where IOs would have the discretion to opt out and waive
immunity when necessary to achieve their international missions. Finally, abandoning the D.C. Circuit’s longstanding precedent would create real and significant challenges for IOs with a presence in the United States: The predictable result of restrictive immunity will be more lawsuits against IOs. Less predictable is how courts will decide the difficult issues inherent in attempting to “harmonize” the IOIA with the FSIA. In the end, amici conclude, it is IOs that will suffer “the burden of uncertainty and increased financial and operational costs of the ensuing litigation, diverting time and resources away from the pursuit of their agreed-upon mission of economic development.”

The Multilateral Investment Guarantee Agency (MIGA) and certain member countries of IFC, MIGA, and other IOs came together to file an amicus brief, noting that Congress enacted the IOIA soon after three of the world’s most critical IOs were formed: the UN, the IMF, and the World Bank. The founding documents of these IOs required member countries to make sure that their own domestic laws granted immunity from suit to the organizations. Amici argue that is what the IOIA did by reference to the virtually absolute immunity from suit that foreign sovereigns enjoyed at the time that the statute was enacted.

“It is against the backdrop of virtually absolute immunity that sovereigns throughout the world agreed to allow the United States to host these IOs.” Since then, many other IOs have been formed and headquartered in the United States based on the assumption of broad immunity from suit. Even today, that assumption of immunity remains critical to those IOs’ members and missions. Without an IO’s “independence from the undue control or influence of any one member,” amici conclude, IOs cannot draw the kind of broad membership from which they currently benefit, and they cannot raise funds sufficient to achieve their missions.

Based on the IOIA, IOs and their member countries had “every reason to believe that the immunity of IOs would remain intact, subject only to waiver by the organization or action by the executive branch.” The IOIA expressly grants to the president the power to make “sensitive decisions about whether and how to alter or withhold the otherwise virtually absolute immunity that the statute confers.” No further adjustments are needed to take account of the evolving law of foreign sovereign immunity.

A group of international law experts alert the Court that there are fundamental differences between IOs and foreign states: states have sovereign authority, with all the related rights and obligations, while IOs are creatures of treaties established by their member countries for the limited purposes set forth in their constituent instruments. Because the two are so different, the reasons for granting them immunity are also different. Foreign sovereign immunity is grounded in grace and comity and usually granted based on reciprocity. IO immunity, on the other hand, is based on IOs’ requirement to be free to pursue the work for which they were formed—without undue interference by member countries.

Amici argue Congress devised the IOIA to guarantee IOs’ functional immunity. The IOIA expressly gives the president the power to withhold or withdraw IOs’ immunities “in light of the functions performed by any such international organization.” The IOIA and the FSIA are “structurally incompatible, and reading the two together would create an unworkable hybrid inconsistent with Congress’s delegation of plenary power to the President in the IOIA.”

The incorporation of the FSIA’s immunity provisions into the IOIA would lead to “grave interpretive problems.” The “restrictive theory” of sovereign immunity “turns on the distinction between foreign states’ sovereign acts and their private acts.” That distinction becomes “meaningless” when it is applied to the acts of IOs because IOs cannot undertake sovereign acts. Instead, IOs undertake acts in the exercise of their function, and many of those acts have some of the attributes of private acts. Nonetheless, those acts are “not genuinely private acts”—rather, they are acts in pursuit of the mission their member countries have assigned to them.

Finally, a group of IOs, led by the African Union, filed an amicus brief to support IFC and argue that Congress designed the IOIA to provide IOs with the protection needed “to enable them to successfully and efficiently fulfill their missions of public interest with full independence.” A holding of absolute immunity “would dramatically alter the settled expectations of IOs like amici and drastically interfere with their continued ability to carry out their missions, by requiring them to defend themselves against claims in United States courts.”

FSIA concepts are “radically at odds with [IOs’] essential character.” IOs are not sovereigns, they are not aggregations of sovereigns, and they do not exercise sovereign powers. IOs are separate and independent bodies formed by a number of countries to address regional or global problems and to provide a forum for international cooperation among member countries, nonmember countries, and private actors. IOs work “as part of a collaborative, diplomatic effort among states that have created and empowered the organization to pursue a specific mission.” Because IOs are so different from foreign sovereigns, the reason for granting absolute immunity to IOs is fundamentally different from the rationale behind foreign sovereign immunity.

According to amici, the incorporation of FSIA exceptions into the IOIA “would frustrate the ability of IOs to carry out their good work by opening the door to private litigation that would interfere with the discharge of their missions.”

**SIGNIFICANCE**

The Court is asked to determine if IOs enjoy absolute immunity from suit in U.S. courts, or whether their immunity is subject to certain exceptions. The answer will have profound consequences for IOs and their stakeholders. The submission of ten amicus briefs is testament to the great significance of the issue before the Court.

If the Court confirms the D.C. Circuit’s longstanding precedent, approving absolute immunity for international organizations, then international organizations can keep their headquarters and operations in the United States and continue the pursuit of their missions as before. But certain potential plaintiffs harmed by human rights abuses will be unable obtain redress from those
IOs in U.S. courts, unless the IOs waive their immunity or the president revokes the IO designation or withholds immunity from the IOs.

If, on the other hand, the Court holds that the IOIA incorporates the FSIA and its commercial activities exception, then IOs headquartered in the United States may be crushed by a flood of expensive and distracting lawsuits in U.S. courts, diverting scarce resources from the pursuit of their worthy missions. The holding may also result in IOs moving their headquarters to other countries that offer absolute immunity (as well as court systems without pretrial discovery and class actions). This may, in turn, result in the loss of jobs and revenue in the United States and even negatively impact the United States’ standing as a welcoming host to the world’s most prominent international organizations.

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129 Million Class Members $0, Charities $6.5 Million, Attorneys $2 Million: Are *Cy Pres*-Only Settlements Fair, Adequate, and Reasonable?

**CASE AT A GLANCE**
This appeal involves a class action settlement with Google, where the 129 million class members received no compensation, the class action attorneys received $2.125 million in attorney’s fees, and Google and the class counsel agreed to contribute $6.5 million to be distributed to seven charitable and nonprofit organizations as a *cy pres* resolution of the litigation. The Court will decide whether such *cy pres*-only awards in settlement classes comport with the requirement that such settlements be “fair, adequate, and reasonable.”

**Frank v. Gaos**  
Docket No. 17-961

**Argument Date:** October 31, 2018  
**From:** The Ninth Circuit

by Linda S. Mullenix  
University of Texas, Austin, TX

**ISSUE**
Do *cy pres*-only awards in class action settlements, where the class members receive no compensation, charitable and nonprofit entities receive settlement funds, and class counsel are awarded significant attorney’s fees, comport with the Federal Rule of Civil Procedure 23(e) requirement that class settlements must be adjudged as “fair, adequate, and reasonable”?

**FACTS**
In October 2010, Paloma Goas filed a class action lawsuit against Google in the Northern District of California. Goas’s lawsuit alleged that when she used Google to search her own name and personal information and clicked on the resulting links, Google disclosed her search terms and other personal information to third-party websites through the “referral headers” the Google browser collected. Websites use this referral information in editorial and marketing efforts.

Goas’s lawsuit alleged claims include fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, unjust enrichment under California law, and violations of the federal Stored Communications Act, 18 U.S.C. § 2707(c)(the SCA). The nationwide class action embraced all Google users, an estimated 129 million class members. The SCA provides for statutory damages of $1,000 per violation and attorney’s fees for a successful action. The complaint requested class certification, monetary damages, and injunctive and equitable relief. Goas amended her complaint several times, dropping various state-based claims.

After several of Goas’s claims were dismissed over concerns as to whether her complaint sufficiently alleged an Article III injury, her lawsuit was consolidated with another SCA action for settlement purposes. During this litigation, the Northern District of California dismissed three cases alleging similar SCA violations. *Zynga Privacy Litigation*, 750 F.3d 1098 (9th Cir. 2014).

Against this background of litigation uncertainty, in March 2013 Google and the Goas plaintiffs reached a settlement agreement after one day of mediation. This settlement provided that the class claimants would receive no compensation, but that Google would pay $8.5 million into a settlement fund to be disbursed to organizations that “agree to devote funds to promote public awareness and education, and/or support research, development, and initiatives, related to protecting privacy on the Internet.” Google also agreed to make new disclosures on three of its web pages, to inform users of Google’s handling of search-query data. The settlement required Google to make new disclosures in addition to existing disclosures already in place.

Class counsel sent letters to proposed *cy pres* recipients seeking proposals on what they would do if they were designated as beneficiaries. Forty organizations submitted applications that outlined the entity’s intended use of the *cy pres* funds consistent with the problems identified in the litigation, the institution’s experience with privacy issues, and the organizations’ prior financial connection with the defendant Google.

Class counsel and Google designated six recipients to receive the *cy pres* award, without disclosing the proposals or the methodology by which recipients were chosen or rejected. The *cy pres* recipients were the Center for Information, Society,
and Policy at the Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; World Privacy Forum; Carnegie Mellon University; and AARP, Inc. Three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were alma mater's of class counsel who entered into the agreement with Google. In addition, Google already was a donor to several of the designated *cy pres* recipients.

In return for this *cy pres* settlement, Google received a general release of any and all of privacy-related claims from the approximately 129 million U.S. Google users between 2006 and 2014. In addition, Google negotiated a term that provided that it would not be required or requested to make any changes to the practices or functionality of Google Search engine or other services.

The third leg of the settlement provided for class counsels’ fees. The parties agreed that the $2.125 million in attorney's fees would come out of the settlement fund. The attorney-fee award represented 25 percent of the settlement fund and more than double the class counsels’ alleged lodestar.

Theodore Frank and Melissa Holyoak, class members and public interest attorneys with the Center for Class Action Fairness, objected to class certification, approval of the settlement, and the attorney-fee agreement. The objectors raised four challenges to the settlement.

First, the objectors argued that the all-*cy pres* settlement was inappropriate because there were feasible, standard claims processes to compensate the class members. If the court were to find that any distribution to class members was not feasible, then the class action should not have been certified. Second, the objectors contended that the parties’ selection of the *cy pres* recipients, based on preexisting relationships, represented a conflict of interest and divided loyalties, which breached the attorneys’ fiduciary duties to the class members. The objectors claimed that even the appearance of conflicts precluded the *cy pres* awards to these recipients. Third, the objectors maintained that the *cy pres* distribution compelled some class members to subsidize the lobbying and policy efforts of entities with whom the objectors disagreed. And fourth, the objectors challenged the attorney-fee award, based as it was on the assumption that the $8.5 million *cy pres* fund was equivalent to the actual compensation amount to the class.

Relying on Ninth Circuit precedent, the district court overruled all the objectors’ contentions and approved the *cy pres*-only settlement. The court rejected the objectors’ argument that *cy pres*-only settlement classes could never be certified. The court found that trying to divide a $6.5 million net settlement fund to 129 million class members would be “infeasible.” The court further found that the designated *cy pres* recipients would meet the objectives of the SCA and further the interests of class members. The court indicated that it was sufficient that the *cy pres* recipients’ activities were “sufficiently related” to the subject matter of the litigation. The court further concluded that there was no indication that any counsel’s allegiance to a particular alma mater factored into the selection process or were tainted by a conflict of interest. Therefore, a *cy pres* distribution in such circumstances was well established under Ninth Circuit case law. Nonetheless, the court raised a number of concerns about the lack of transparency in the selection of the *cy pres* recipients and the potential conflicts of interest, which the court noted raised “a red flag” and “did not pass the smell test.”

The Ninth Circuit upheld the district court’s approval of the *cy pres*-only settlement, finding the approval consistent with Ninth Circuit precedents supporting *cy pres* awards. Again, the court rejected the argument that *cy pres*-only settlements are categorically improper. Considering the three factors relevant to a determination of the legitimacy of *cy pres* relief, the Ninth Circuit upheld the lower court’s findings. The district court did not abuse its discretion or clearly err in approving the settlement. The court held that a district court could approve a *cy pres*-only settlement provided that the court found the settlement to be “fair, adequate, and free from collusion.” It did not matter whether there might be possible alternatives to compensate class members.

The Ninth Circuit also dismissed the argument that a class action that provided no compensatory relief to class members was therefore not “superior” to other means of adjudication, requiring denial of class certification. The same factors that make individual litigation economically infeasible likewise supported the rationale for *cy pres*-only settlements.

The Ninth Circuit rejected the contention that preexisting relationships among counsel and the *cy pres* recipients raised a problem of conflicts of interest. The fact that Google had previously donated funds to some of the designated beneficiaries was not disqualifying. The court refused to further scrutinize the parties’ selection of the *cy pres* beneficiaries, suggesting that such inquiries would be “an intrusion into the private parties negotiations” and therefore “improper and disruptive to the settlement process.” The Ninth Circuit indicated that the standard was that *cy pres* “be [ ] tethered to the objectives of the underlying statute and the interests of the silent class members.”

Finally, the Ninth Circuit rejected the argument that the attorney’s fees should have been calculated on some lesser amount because it was a *cy pres*-only deal, and not a settlement that provided actual compensation to class members. The court held that a 25 percent fee was a permissible benchmark, whether or not class counsel obtained actual compensation for class members. The court further rejected the objectors’ suggestion of a “random lottery distribution” to some class members as an alternative to *cy pres* relief.

Judge J. Clifford Wallace dissented in part. While he agreed that the *cy pres* settlement was sustainable under Ninth Circuit precedents, he took issue with the district court’s failure to probe the preexisting relationships between counsel and the *cy pres* beneficiaries. He explained that the burden should be on counsel to show that any prior relationship played no role in the negotiations. Judge Wallace thought that a remand to the district court to make further findings was appropriate.
CASE ANALYSIS

Cy pres is derived from trust law, traceable at least to the 19th century. If a charitable testamentary bequest would fail for lack of an ascertainable beneficiary, the cy pres doctrine allowed a probate court to reassign the gift to another purpose. In modern trust law, the cy pres doctrine applies where it becomes unlawful, impracticable, or wasteful to fulfill a testator’s original directive. Restatement (Third) of Trusts § 67 (2003).

Class action settlements entail problems with the allocation of settlement funds not claimed by a substantial number of eligible class members. This problem typically arises in small claims consumer class actions, where there are large numbers of claims but the value of each claim is very small. In such cases, it may be difficult to notify all the claimants, the administration of the funds might consume the payout to class members, or large portions of a fund might go unclaimed. In the past, to address this contingency, corporate defendants negotiated for “reversionary clauses” whereby unclaimed settlement funds reverted to the defendant.

Reversionary clauses came under significant attack and courts began to disfavor reversionary provisions, declining to approve settlements with such provisions. Because it was well known that claim rates in consumer class actions typically were very low, defendants reaped the benefit of agreements that released them from liability, without imposing significant financial burdens on the offending corporation.

With the mounting disapproval of reversionary clauses, settling parties looked for other means to deal with the prospect of unclaimed settlement funds. Attorneys turned to innovative use of the cy pres doctrine. The application of cy pres to class action settlements is a relatively recent development, first appearing in the 1980s. Settling parties used the doctrine to redirect settlement funds if portions of settlement monies might go undistributed to class members.

Settling parties gradually expanded the cy pres doctrine to permit settling parties to designate portions of settlements for charitable entities, nonprofits, or foundations, in addition to, or in place of, monies distributed to class members. In recent years, parties have negotiated cy pres-only settlements where class members receive no compensation at all, but the entire settlement fund is distributed to a variety of charitable institutions designated by class counsel and defense attorneys. These nonmonetary settlements have been justified as providing indirect benefits to the class.

Courts have developed three general standards to evaluate cy pres provisions. First, direct distribution of settlement funds to class members must be infeasible, for example if there are millions of class members who are difficult to locate or notify, or the administrative costs of making such a distribution would exceed the value of the fund. Courts have defined the concept of “feasibility” in various ways. Thus, some courts have indicated that cy pres awards as part of a settlement are permissible even if it might be feasible to accomplish a claims distribution process that would award class members some small monetary compensation.

Second, cy pres recipients must have a mission tied to addressing the problems identified in the underlying litigation. This requirement ensures that class members will receive an indirect benefit from the settlement, even if they do not receive direct monetary compensation.

Third, the court or any party must not have any significant prior affiliation with the cy pres beneficiary that would raise substantial questions about whether the selection of the recipient was made on the merits. ALI’s Principles of the Law of Aggregate Litigation § 3.07 cmt. b. Courts have indicated that they will not police possible collusion between class counsel and settling defendants, to ascertain whether a cy pres resolution was the result of improper coordination among the attorneys. The Ninth Circuit, which permits cy pres settlements, has indicated that the court will not intrude on the negotiations of settling parties, which would be disruptive to the settlement process. Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012). In addition, the Ninth Circuit requires evidence of collusion before rejecting a settlement, shifting the burden to objectors to prove such collusion.

As is true for all class action settlements, settlements that incorporate cy pres relief must be presented to a court for approval under Rule 23(e). In order for a court to approve a proposed settlement, the court must conduct a fairness hearing and determine that the agreement is fair, adequate, and reasonable. Typically, class settlements with cy pres provisions specify the charitable designees for receipt of the cy pres funds. However, the settling parties are under no obligation to explain the reasons for the selection of particular cy pres beneficiaries, or the process by which the settling parties chose the recipients. Nonetheless, courts consistently have approved class action settlements with cy pres provisions, expressing reluctance and distaste for probing into the motivations of the settling parties.

As settling parties expanded the use of cy pres relief with concomitant judicial approval, the deployment of cy pres provisions have come under increased scrutiny and criticism. The designation of certain favored charitable entities to receive cy pres funds has drawn especial attention, where the named beneficiaries consisted of the attorneys’ alma mater law schools or universities, or charities favored by the attorneys, presiding judge, or the judge’s family. In some instances, cy pres provisions designated charitable causes having no relationship to the underlying subject matter of the litigation.

The increased use of cy pres provisions has generated an array of objections and challenges. First, critics note that cy pres awards create potential conflicts of interest between the settling parties and class members to whom class counsel, at least, owed a fiduciary duty of loyalty. Under this theory, class attorneys’ primary obligation is to obtain the best monetary result for class members, and not have those monies siphoned off to the attorneys’ favored charities. This potential for conflict of interest extended to judges responsible for approving the settlement, but nonetheless who would benefit if the judges’ favored charities were included among the cy pres recipients.

Second, critics argue that cy pres provisions illegitimately and unconstitutionally deprive class members of their property without
due process of law. In this view, class members in Rule 23(b)(3) consumer actions are entitled to monetary compensation if the defendant chooses to settle the action. Thus, settling parties who divert settlement funds to other entities that are not parties to the litigation effectively deprive class members of their property. Moreover, settling parties have no right to award the class members’ property to third parties with no relationship to the litigation.

Third, critics contend that cy pres provisions allow class counsel to be awarded outsized attorney’s fees based on inflated valuation of the cy pres fund. Instead, objectors argue that attorney’s fees ought to be based solely on the actual monetary value of the settlement to class members, rather than an illusory figure tied to cy pres relief.

Fourth, critics maintain that the increased use of cy pres remedies creates perverse incentives that encourage unscrupulous class counsel to file dubious consumer strike suits. Pursuant to this theory, the assurance of significant attorney’s fees based on cy pres settlements inspires counsel to file and settle these suits quickly. The prospect of cy pres relief also incentivizes defense attorneys, who are able to obtain complete release from liability at relatively painless cost, with the added benefit of virtue signaling to charitable causes.

Notwithstanding the increased chorus of criticism, courts have continued to approve and uphold class settlements with cy pres provisions. With the increasing use of cy pres provisions in class action settlements and mounting condemnation from some quarters, Chief Justice John Roberts signaled the Court’s interest in reviewing cy pres relief in an appropriate appeal. See Marek v. Lane, 134 S. Ct. 8 (2013)(Roberts, C.J., respecting denial of certiorari). In Marek, Chief Justice Roberts indicated that the Court should clarify the limits and use of cy pres remedies. He suggested that the Court should consider the role of the parties and the judge in shaping a cy pres remedy, how entities should be selected, and how closely the goals of designated organizations should be aligned with class interests. The Frank challenge crystallizes many of the cy pres issues that have been percolating in the class action arena for several years.

Petitioner Frank rehearses the multiple criticisms of cy pres remedies discussed above. He notes how cy pres creates perverse incentives for class and defense counsel to use cy pres relief for their own benefit, rather than to direct compensation to class members. Frank anchors this point to the larger problem of gamesmanship and self-dealing, at the expense of class members, in class settlements. Thus, cy pres incentivizes class counsels’ pursuit of otherwise unprofitable strike suits that would be infeasible to litigate because of questionable merit or unmanageability.

He discusses at length the problem of unseemly conflicts of interest inherent in application of cy pres. He contends that courts and class counsel lack the authority or discretion to divert class members’ property to third parties with no relationship to the litigation. He argues that the diversion of money to charitable entities violates the First Amendment rights of class members who do not wish to support the policies or actions of the charitable designees.

Frank raises five basic arguments against the use of cy pres relief. First, Frank claims that a settlement that awards disproportionate attorney’s fees to class counsel, untethered to the actual monetary compensation to class members, is not fair or reasonable under Rule 23(e). In calculating attorney’s fees based on the percentage of recovery to the class, courts should substantially discount cy pres distributions relative to direct payment to class members. To address this issue, Frank suggests that courts should apply a simple principle at the fairness hearing: “regardless of whether a settlement is ‘adequate,’ it is not fair or reasonable if the settlement pays attorney’s fees that are disproportionate to the actual and direct benefit realized by the class compromising its claims.”

Frank proposes a “proportionality rule” whereby courts would assess the ratio of the fee, to the fee plus what the class members received.

Second, Frank argues that cy pres awards are inappropriate where it is feasible to distribute monetary proceeds to class members, no matter how small those awards might be. Moreover, cy pres is inappropriate where a claims process can be developed to distribute proceeds to identifiable class members, without a requirement that all potential class recipients receive compensation. Frank contends that the Ninth Circuit ruling has the potential to sweep every consumer class action into the cy pres category, because such settlements typically compensate only a fraction of class members. Frank suggests, as an alternative to cy pres relief, that settling parties could conduct a “random lottery distribution” to ensure that some class members would receive compensation.

Third, if a class action settlement cannot provide direct relief to the class, defaulting to a cy pres alternative, then the settlement class cannot be certified under Rule 23(e). Thus, any class settlement that awards a disproportionate fee award to class counsel, with no actual or direct benefit to class members, is not fair or reasonable under Rule 23(e). Frank argues that though a settlement may be adequate, that does not mean it is fair or reasonable. Moreover, such cy pres agreements cannot satisfy the Rule 23(b)(3) requirement that the settlement be the superior means for resolving the dispute.

Fourth, if courts are to permit cy pres relief, then there should be strict restrictions against diverting funds to recipients with significant or prior relationships with the attorneys or the presiding judge. Frank suggests that the possibility of cy pres relief offers an enticing opportunity for attorneys who are interested in promoting their own personal and political preferences. Additionally, cy pres relief can enmesh presiding judicial officers in the appearance of impropriety, by flattering judges with cy pres beneficiaries favored by judges or their relatives (and thereby ensuring approval of the settlement). Moreover, courts should be wary of cy pres awards directing money to charitable causes that the defendant would have given to anyway, given the illusion of relief.

Fifth, Frank contends that cy pres awards fail to address class members’ injuries for which they are waiving their rights to future litigation with the defendant. Neither class counsel nor the courts
have the authority or discretion to redirect class members’ actual compensation (their property) to third parties. This application of cy pres doctrine, therefore, contravenes the Rules Enabling Act, 28 U.S.C. § 2072(b), which specifies that Rule 23 cannot operate to “abridge, enlarge, or modify any substantive right.”

Finally, Frank urges that if the Court declines to adopt a cy pres rule that applies to all class action settlements, it should at least reverse the Ninth Circuit’s judgment, which he claims exacerbates the conflict of interest problem in class actions. “A bright-line rule is required because of ‘the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases.’”

In an unusual occurrence, the class itself and Google (as the defendant in the lawsuit) independently have submitted briefs as respondents, both seeking to preserve the cy pres settlement. The Class Respondents criticize the objectors for engaging in hyperbolic, inflammatory rhetoric that attacks class actions generally. They contend that the objectors’ broadside attack impugns the bar’s integrity and denigrates the district courts’ capabilities to exercise sound discretion in approval of class settlements. They suggest that Frank’s true goal is to punish counsel for cases that work out poorly or to discourage “bad” lawsuits. However, the Class Respondents note that Rule 23 is intended to protect class members, not to punish class counsel.

The Class Respondents point out that cy pres settlements and distributions are exceedingly rare, limited only to those occasions where payment to class members is infeasible. They note that from 1990 to 2008, an average of 5 class actions resulted in cy pres settlements, citing to 86 cy pres settlements over an 18-year period. The Class Respondents recite the three established criteria for courts to approve cy pres settlements and contend that the settlement satisfied all three requirements.

The Class Respondents note that parties can settle ordinary litigation that provides for no monetary compensation, arguing that Rule 23 does not prohibit class action settlements from doing the same. The objectors’ proposal to categorically ban all cy pres settlements is not supported by relevant law or any Federal Rule of Civil Procedure. Instead, the objectors have recommended a series of legislative proposals based on policy arguments, but the Court is constitutionally inhibited from adopting atexual modifications to Rule 23, apart from the established federal rulemaking process. Courts are not free to amend a rule outside the rulemaking process Congress has ordered.

The Class Respondents argue that, while Congress and the Advisory Committee on Civil Rules have repeatedly considered cy pres settlements, both institutions have declined to overturn or amend existing cy pres standards. They note that Congress has addressed abusive class action practices in the Class Action Fairness Act by specifically cabining use of so-called “coupon settlements” but Congress did not provide any special rules for cy pres provisions. The Class Respondents contend that the objectors are attempting to rewrite Rule 23(b)(3), which enables small claims class actions and permits cy pres settlements. They argue that a categorical ban on cy pres settlements would leave such small claimants with no recovery at all. Finally, they criticize Frank’s alternative proposal to institute a “random lottery distribution” to some percentage of claiming class members, which would deny some class members any benefit at all to increase the return to others.

The Class Respondents deny that cy pres settlements fail to satisfy the Rule 23(b)(3) superiority requirement. Thus, a class action that yields no monetary relief, but provides indirect benefit to the class, is superior to the alternative in which a court denies class certification and leaves claimants out of court. Thus, the Class Respondents note that in small claims class actions, the realistic alternative to a class action is not millions of individual suits, but zero individual suits. Therefore, cy pres settlements are superior to nothing.

In response to Frank’s First Amendment argument, the Class Respondents maintain that the objectors failed to assert this theory in the lower courts and therefore waived this argument. In addition, any class member offended by the designation of cy pres recipients had the opportunity to opt out of the settlement. Likewise, Frank’s objection to the calculation of fee awards presents an issue outside the scope of the Supreme Court’s grant of certiorari and, therefore, was also waived. Nonetheless, Frank’s fee award objections defy the text and history of fee awards in class litigation. Finally, the Class Respondents contend that cy pres settlements do not implicate a Rules Enabling Act violation, because settlements are contracts. Therefore, such settlements do not expand substantive remedies.

Google, as a party to the settlement, is aligned in interest with the class to assure that the Court upholds the settlement. Google’s arguments substantially overlap with those advanced by Class Respondents, reiterating that district courts have discretion to approve cy pres remedies provided that three well-recognized conditions are met. Google urges that the objectors’ categorical ban on cy pres settlements will not solve any underlying problems with class litigation, generally, and will actually harm class members. Google contends that banning cy pres settlements would make class action litigation more costly and less efficient, “imposing a cure that worsens the disease.”

Similar to the Class Respondents, Google maintains that the settlement satisfied the conditions for approval of a cy pres remedy and that it benefited class members far more than de minimus payments to a very tiny number of class claimants. In Google’s view, the administrative costs of attempting to compensate 129 million class members would consume small payments to even 1 percent of the class. Like the Class Respondents, Google attacks Frank’s recommendation of a “random lottery distribution” to some class members.

Google rehearses the history of class actions as rooted in equity doctrine, noting that cy pres also is rooted in equity. Relying on the equitable powers of courts, Google notes that the Federal Rules of Civil Procedure do not abrogate the equitable powers of courts to approve cy pres remedies, and no rule expressly addresses cy pres. No prior amendments to Rule 23 have limited the availability of cy pres settlements. The Rules Enabling Act also does not somehow bar judicial approval of cy pres settlements, again observing that settlements are a matter of private contract between the parties.
Echoing the Class Respondents’ point, Google suggests that Frank’s concerns about violation of his First Amendment rights is insubstantial because Rule 23 permits dissenting class members the opportunity to opt out. That option was open to any class member who did not want to be associated with speech by any cy pres recipient.

Regarding Frank’s objections to the attorney fee award, Google notes that concerns about attorney’s fees “speak to a broader issue with the administration of class actions.” Google contends that any limitations on a district court’s discretion to award attorney’s fees in cy pres cases should apply equally to all class actions. Google urges that a rule imposing a presumptive lodestar hourly model, rather than a percentage of the settlement fund, would best align attorney incentives with sound policy for the class.

Unlike the Class Respondents, Google expansively redirects the Court’s attention to other class certification issues, which is not surprising as a repeat defendant in class litigation. Initially, Google notes that there are numerous abuses in class action litigation. Google would like the Court to further address problems such as the viability of no-injury classes and the ascertainability of class membership—issues not on appeal in this case. Google also suggests that it would favor a rule that required courts to conduct an early evaluation of the merits and magnitude of injury as a factor in the superiority evaluation at class certification. Noting the uncertainties of lower-court class action jurisprudence that impose settlement pressure on defendants, Google recommends a rule “barring certification of de minimus claims where the per-class-member damages are less than the cost to pay them, particularly if the determination could be made, and the case dismissed, early in the litigation.”

**SIGNIFICANCE**

Class action attorneys will be closely watching the Court’s attention to the issue of cy pres relief in class action settlements. Cy pres provisions have become increasingly prevalent in settlement agreements, raising heightened judicial concern and academic criticism. Notwithstanding the increasing concern, lower courts continue to approve settlement agreements with cy pres provisions, and class action attorneys continue to expand their use.

The heightened interest in this appeal is illustrated by the large number of amicus briefs filed on behalf of the parties. Generally, defense-minded actors have aligned with Frank, urging the Court to either outright ban cy pres remedies or restrict cy pres in very confining ways. Hence, most amici in support of petitioner urge reversal of the Ninth Circuit’s decision, fearing that the circuit’s sweeping precedent will encourage a flood of frivolous strike suits. Many of these amici also have used the appeal to rehearse a litany of class action abuses that they wish the Court to curb. On the contrary, the usual array of plaintiff-minded organizations have aligned to ask the Court to uphold the Ninth Circuit’s decision and not outright ban or restrict cy pres relief, stressing the constructive benefits to society of various cy pres settlements, including support of legal aid entities otherwise publicly underfunded.

The Frank appeal embodies both the ideal as well as the imperfect vehicle for the Court to address the issue of cy pres relief. In contrast to the failed attempt to accomplish cy pres review in *Marek*, the Frank appeal capably perfects the issues of cy pres relief, which are well briefed to the Court. On the other hand, the Frank appeal could hardly have embraced a more extreme exemplar of possible cy pres overreaching: a no-compensation class, cy pres-only settlement, with 25 percent attorney fee.

The Court might adopt one of several approaches to addressing the use of cy pres relief in settlement agreements. Radically, the Court could declare cy pres provisions unconstitutional and not sustainable under Rule 23: issuing a categorical ban urged by objector Frank. This outcome would be possible if the Court’s conservative wing, joined by a newly appointed Justice Brett Kavanaugh, endorsed this result. But at least some conservative justices will recognize that corporate defendants sometimes desire cy pres provisions, as did Google here, and therefore have little interest in a Court-mandated outright ban. A bright-line prohibition on cy pres awards, however, most certainly would not be joined by the Court’s liberal justices.

Another possibility, raised by the respondents, is for the Court to decide that it had improvidently granted *certiorari* for an array of reasons, including the dubious nature of the plaintiff’s Article III standing.

More likely, however, given the extreme nature of the Google agreement, the Court will choose not to throw the proverbial baby out with the bathwater. Thus, it is possible that the Court may disapprove the cy pres-only settlement in the Google litigation, but nonetheless preserve the possibility of cy pres in more limited circumstances. The Court may set forth parameters and rules governing the permissible scope of cy pres relief that acknowledge the concerns raised by the objector, but nonetheless recognize situations where cy pres relief makes sense, as urged by the respondents and various amici. This compromise position could conceivably earn the endorsement of both liberal and conservative justices.

The complicated role that cy pres relief plays in the class settlement arena is reflected in the interesting array of amicus briefs. Normally, one would expect that the usual cohort of corporate, anti-class action groups to weigh in opposition to cy pres relief. However, corporate defendants sued in consumer class litigation do not always oppose cy pres remediation and frequently coordinate with class counsel to draft cy pres settlements that are to the defendants’ advantage. Google’s hybrid brief, urging that the Court uphold the cy pres settlement while also urging the Court to address various class action abuses, captures the complex position of defendants regarding this appeal.

It remains to be seen whether and how the Court might address Frank’s arguments based on the First Amendment and attorney’s fees. The respondents have challenged whether these issues were properly raised in the lower courts or whether these contentions exceed the scope of the questions certified for appellate review.

Three amici that have filed in support of neither party further illustrate the complex practical implications of cy pres. Thus, the American Bar Association formally has taken no position “on the precise question before this Court,” but instead asks the Court to
preserve *cy pres* awards in certain circumstances, particularly for legal services organizations that serve low-income and indigent clients. The ABA further argues that state rules governing *cy pres* could be imperiled if the Court chooses to impose constitutional or other strict limits on *cy pres* awards.

The reliably corporate (and anti–class action) Chamber of Commerce of the United States also has filed an amicus brief in support of neither party, perhaps recognizing that certain *cy pres* awards can be beneficial to corporate defendants. Similar to the ABA, the Chamber takes no position on the *cy pres* award in the Google settlement.

Instead, the Chamber uses this appeal to urge the Court to rigorously police class certification requirements on the front end of class litigation. The Chamber contends that there is a “wide gap” between the Court’s class action jurisprudence and the ways in which lower federal courts implement that jurisprudence—a position articulated by Google in its respondent’s brief. The Chamber suggests that apart from the most egregious cases, courts have been unwilling to discipline class action abuses.

Finally, the U.S. Department of Justice (DOJ) has filed an amicus brief supporting neither party. At the threshold, the DOJ raises skepticism about the plaintiff’s Article III standing in the underlying litigation. Despite taking no side, the DOJ currently disfavors *cy pres* provisions, and the Attorney General has issued a memorandum that directs DOJ litigating entities not to enter into *cy pres* settlements. The government suggests that *cy pres* settlement provisions require careful scrutiny and should be approved only if the provisions satisfy certain limitations, which substantially track petitioner Frank’s recommendations. Thus, *cy pres* awards should be permitted only if they redress the plaintiffs’ injuries, and *cy pres* distributions should be discounted in determining attorney’s fees.

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   Former Professor Roy A. Katriel (Roy A. Katriel, 858.546.4435)
   The American Bar Association (Hilarie Bass, 312.988.5000)

Chamber of Commerce of the United States of America (Ashley C. Parrish, 202.737.0500)
United States (Noel J. Francisco, Solicitor General, 202.514.2217)
Can the U.S. Department of Interior Regulate Boating on Navigable Waters in the National Park System in Alaska?

**CASE AT A GLANCE**
For many years petitioner John Sturgeon used a small hovercraft to hunt moose in Alaska. One day, he was told by National Park Service (NPS) officials that hovercrafts are not allowed inside the National Park System. Sturgeon’s suit challenging the NPS hovercraft restriction is now before the Court a second time. This time, like the first time, the issue is whether the NPS’s power to regulate boating in the National Park System is restricted in Alaska by Section 103(c) of the Alaska National Interest Lands Conservation Act.

**Sturgeon v. Frost**
Docket No. 17-949

**Argument Date: November 5, 2018**
**From: The Ninth Circuit**

by Richard H. Seamon
University of Idaho College of Law, Moscow, ID

**ISSUE**
Does Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA) bar the National Park Service (NPS) from banning hovercrafts in units of the National Park System in Alaska?

**FACTS**
This case arises from petitioner John Sturgeon’s use of a hovercraft to reach the Alaskan wilds in which he regularly hunts moose. In 2007, while Sturgeon was repairing his hovercraft on a gravel bar next to the Nation River, officials of the NPS approached him. At the time, he and the craft were inside the Yukon-Charley Rivers National Preserve, which is a “conservation system unit” administered by the NPS as part of the National Park System in Alaska. The NPS officials told Sturgeon that an NPS regulation bans the use of hovercraft within the boundaries of a conservation system unit.

Sturgeon brought this federal court lawsuit to challenge the hovercraft regulation. The suit, which was filed in 2011, names, among other defendants, respondent Bert Frost, the Alaska Regional Director of the NPS. Sturgeon rests his challenge to the hovercraft regulation on Section 103(c) of ANILCA. Sturgeon argues that Section 103(c) creates an Alaska-specific exemption from the NPS’s general power to regulate boating and other activities on navigable waters that are located inside units of the National Park System.

In the first round of this litigation, Sturgeon lost in the Ninth Circuit. The Ninth Circuit held that ANILCA Section 103(c) did not bar enforcement of NPS regulations of nationwide applicability, like the hovercraft regulation.

The Ninth Circuit’s view was rejected by the Supreme Court in *Sturgeon I*, with Chief Justice John Roberts writing for a unanimous Court. *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016). The Court observed that, because Alaska is “unique,” ANILCA has many provisions that limit enforcement of the NPS’s nationally applicable regulations in Alaska. The Court said in light of these provisions it was “topsy-turvy” for the Ninth Circuit to interpret ANILCA Section 103(c) to prevent the enforcement of only certain Alaska-specific NPS regulations, but not the NPS’s nationally applicable regulations. The Court remanded the case so the lower courts could address the parties’ other arguments about Section 103(c).

On remand from *Sturgeon I*, the Ninth Circuit again ruled against Sturgeon. The Ninth Circuit first determined that ANILCA Section 103(c) restricts NPS’s power only over “non-public lands” in units of the National Park System in Alaska. The Ninth Circuit then determined that the waters of the Nation River that flow through the Yukon-Charley unit are “public lands,” rather than “non-public lands,” because of the “reserved water right doctrine.” Under that doctrine, the Ninth Circuit concluded, all navigable waters within the boundaries of Alaska’s conservation system units are “public lands” for purposes of ANILCA and are therefore subject to NPS regulations, including the hovercraft regulation, without regard to Section 103(c).

In granting *certiorari* a second time, the Court apparently intends to decide once and for all the extent to which ANILCA Section 103(c) restricts the NPS’s regulatory power in Alaska.
CASE ANALYSIS

This case turns upon the proper interpretation of two federal statutory provisions. One provision gave the NPS the power to issue the hovercraft regulation. The other provision, according to petitioner John Sturgeon, limits the NPS’s power to enforce that regulation inside units of the National Park System that are located in Alaska. The Court must parse the language of these two provisions, as well as other provisions that define certain terms employed in them.

NPS issued the hovercraft regulation under 54 U.S.C. § 100751(b). This federal statutory provision authorizes NPS to “prescribe regulations” for “boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States.” (Emphasis added.) The term System unit refers to any unit of the National Park System. That System includes not only national parks but also national preserves like the Yukon-Charley Rivers National Preserve, where Sturgeon wants to use his hovercraft.

There is no dispute that, as a general matter, the NPS’s hovercraft regulation falls within its power under 54 U.S.C. § 100751(b). The dispute is over how that power is limited in Alaska by ANILCA Section 103(c).

Section 103(c) addresses the scope of the NPS’s authority over land within the boundaries of “conservation system units” in Alaska. The term conservation system units includes units of the National Park System in Alaska, including the Yukon-Charley Rivers National Preserve. Section 103(c) contains three sentences, the first two of which are the focus of the parties’ arguments.

The first sentence of Section 103(c) reflects that the boundaries of “conservation system units” in Alaska were drawn to “follow hydrographic divides or [to] embrace other topographic or natural features,” rather than to map land owned by the federal government. Sturgeon I (quoting ANILCA Section 103(c)). As a result of this approach to drawing boundaries, Alaska’s conservation system units include not only federally owned land but also land owned by Alaska Native Corporations, the state of Alaska, and private landowners. Section 103(c)’s first sentence specifies what property within a unit’s boundaries is to be considered part of that unit. The first sentence says, “Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit.” 16 U.S.C. § 3103(c) (emphasis added). ANILCA defines land to include “lands, waters, and interests therein.” 16 U.S.C. § 3102(1). And it defines public lands generally to mean “lands the title to which is in the United States after December 2, 1980,” which was the date of ANILCA’s enactment. 16 U.S.C. § 3102(2) and (3). As the Court summarized the first sentence in Sturgeon I, “only lands, waters, and interests therein to which the United States has ‘title’ are considered ‘public’ land ‘included as a portion’ of the conservation system units in Alaska.”

The second sentence of Section 103(c), as the Court described it in Sturgeon I, “concerns the Park Service’s authority to regulate ‘non-public’ lands in Alaska, which include state, Native Corporation, and private property.” The second sentence says, “No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.”

Sturgeon’s argument proceeds in two broad steps that track the first two sentences of Section 103(c). Relying on the first sentence, he argues that the navigable waters of the Nation River are not “public lands” for purposes of ANILCA and are therefore not part of the Yukon-Charley unit. He relies on the second sentence to argue that, because the Nation River’s navigable waters are not “public lands,” the NPS lacks power to regulate them as if they were public lands. In his view, the second sentence’s reference to “regulations applicable solely to public lands within such units” refers to regulations that apply solely by virtue of the NPS’s authority to manage units of the National Park System. He further argues that the hovercraft regulation is just such a regulation.

The federal government disagrees with Sturgeon at each step. It argues that the Nation River’s navigable waters are “public lands” and that, even if they are not, Section 103(c) does not restrict the NPS’s authority to regulate boating and other activities on navigable waters in units of the National Park System.

Thus, there are two main questions about the meaning of ANILCA Section 103(c): (1) Are the navigable waters of the Nation River that flow through the Yukon-Charley unit “public land,” as that term is used in Section 103(c)’s first sentence, or are they, instead, “non-public land” (which is a term that has been used by the parties and the Court but is not a statutory term)? (2) If the Nation River is “non-public land,” is the hovercraft regulation a “regulation[] applicable solely to public lands within such units” as that phrase is used in Section 103(c)’s second sentence? For Sturgeon to win, the Court must answer “yes” to both questions. The federal government will win if the Court answers either question “no.”

In arguing that the Nation River is nonpublic land, Sturgeon focuses on ANILCA’s definition of public lands as “lands the title to which is in the United States after December 2, 1980.” 16 U.S.C. § 3102(2) and (3) (emphasis added). Sturgeon asserts that the United States doesn’t hold “title” to the navigable waters of the Nation River. For one thing, Sturgeon observes, even the federal government concedes that under the Court’s precedent, no one can “own” navigable water; no one “can acquire anything more than a mere usufructuary right” in it—that is, a right to use it. Federal Power Comm’n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954). Sturgeon asserts that the right to use a thing is not the same as holding “title” to that thing. Alternatively, Sturgeon argues that, if anyone owns the navigable waters of the Nation River, it is Alaska.

In support of his argument that Alaska owns the Nation River’s navigable waters, Sturgeon cites two Court decisions that might come up at oral argument. In PPL Montana, LLC v. Montana, the Court said that under the Constitution’s Equal Footing doctrine, Alaska and other states take “title to the navigable waters and their beds in trust for the public.” 565 U.S. 576 (2012). In the
second case, United States v. California, the Court said that the federal “Submerged Lands Act transferred title to and ownership of the submerged land and waters” to the states. 436 U.S. 32 (1978) (quoted in Sturgeon I). Sturgeon claims that these two Court decisions show that both the Constitution and an Act of Congress give Alaska title to its navigable waters, including the navigable waters of the Nation River that flow through the Yukon-Charley unit.

The NPS concedes that the federal government doesn’t own the navigable waters of the Nation River outright. It emphasizes, however, that ANILCA defines “land” to include “interests” in water. The NPS argues that the federal government “holds interests in navigable waters in the National Park System in Alaska under the reserved-water-rights doctrine.” That doctrine says that when the federal government reserves land for itself, like it did in creating the Yukon-Charley unit, it also reserves an interest in “appurtenant waters” when “needed to accomplish the purpose” of the federal reservation. A leading case on this doctrine, cited throughout the parties’ briefs, is Cappaert v. United States, 426 U.S. 128 (1976). The NPS characterizes its reserved-water-rights interest as a type of “property” interest to which one can hold “title.”

The Ninth Circuit below agreed with the NPS’s reserved-water-rights argument. Two of the three judges on the Ninth Circuit panel, however, wrote an unusual concurring opinion. The concurring judges explained that Ninth Circuit precedent obligated them to accept the NPS’s reserved-water-rights argument, even though they believed it has “nothing to do with” this case. They would have ruled in favor of the NPS based on a different argument discussed below.

The Ninth Circuit precedent on which the Ninth Circuit majority relied in this case will likely come up at oral argument. That precedent concerned NPS regulations issued to carry out a provision in ANILCA about the use of fish and wildlife for subsistence. The provision says that on certain “public lands” in Alaska, subsistence use takes priority over other uses. 16 U.S.C. § 3114. The Ninth Circuit upheld the federal government’s view that ANILCA’s definition of “public lands” is broad enough to allow the NPS to apply the subsistence-use priority on navigable waters that are inside the boundaries of conservation system units in Alaska and as to which the federal government has a reserved-water-right interest. This precedent consists of two Ninth Circuit cases known as Katie John I and Katie John II. NPS argues that this precedent makes sense because the NPS can only prioritize subsistence uses effectively if it can regulate navigable waters flowing through conservation system units. That is because, the NPS asserts, “customary and traditional subsistence fishing takes place on navigable waters, rather than non-navigable ones.” NPS further argues that, if the term public lands includes navigable waters for purposes of ANILCA’s subsistence-use priority provision, it must mean the same thing for purposes of ANILCA Section 103(c).

For his part, Sturgeon makes two arguments against the NPS’s claim (and the Ninth Circuit’s conclusion) that the federal government holds “title” to a reserved-water-rights interest in the navigable waters of the Nation River that flow through the Yukon-Charley unit, and that these waters are therefore “public lands” for purposes of ANILCA. First, Sturgeon argues that a reserved water right is not a “title” interest as ANILCA uses that term in defining “public lands.” Sturgeon emphasizes that a reserved water right is a right to use water, not to own it. Second, Sturgeon argues that the hovercraft regulation exceeds the scope of any reserved water rights the federal government might hold. He asserts that reserved water rights entail using and withdrawing water for certain purposes, not regulating activities that occur on the water. The concurring judges on the Ninth Circuit agreed that “[a] reserved water right is the right to a sufficient volume of water for use in an appropriate federal purpose.” (Emphasis in original.)

If the Court agrees that the navigable waters of the Nation River inside the Yukon-Charley unit are “public lands,” Sturgeon loses. The waters will then be part of that unit under the first sentence of Section 103(c). And the parties agree that the second sentence of Section 103(c) protects only nonpublic lands in the unit from certain NPS regulations.

If, on the other hand, the Court concludes that the navigable waters of the Nation River inside the Yukon-Charley unit are nonpublic lands, it must decide whether the hovercraft regulation is among those from which Section 103(c)’s second sentence exempts Alaska. The second sentence prevents NPS from enforcing, on nonpublic lands, “regulations applicable solely to public lands within such units.” The parties disagree on whether the hovercraft regulation falls within this phrase.

Sturgeon argues that the regulation does fall within this phrase, because the phrase encompasses all regulations that NPS adopts using its authority to regulate the National Park System. Sturgeon points out that the NPS adopted the hovercraft regulation under 54 U.S.C. § 100751, which grants regulatory authority over “units” of the National Park System, and that the Yukon-Charley unit is statutorily designated as a “unit of the National Park System.”

The federal government responds that regulations issued under Section 100751, like the hovercraft regulation, are not “regulations applicable solely to public lands within [conservation system] units” and their enforcement accordingly is not barred by ANILCA Section 103(c)’s second sentence. The NPS emphasizes that Section 100751 allows the NPS to regulate boating and other activities on all “water located within System units.” The NPS argues that it doesn’t matter whether this water is public land or nonpublic land; regardless of the water’s status, in the NPS’s view, activities on it can be regulated under Section 100751 as long as it is within the boundaries of a unit. For example, the NPS points out that the non-navigable waters flowing through federally owned lands within these units are nonpublic lands. Sturgeon doesn’t appear to dispute this point. Because regulations issued under Section 100751 can and do regulate nonpublic land within units, these regulations are not applicable “solely” to public lands within the units. They therefore fall outside of the class of regulations for which Section 103(c)’s second sentence creates an Alaska-specific exemption.

The NPS claims that its interpretation of Section 100751 is reinforced by an ANILCA provision that requires the NPS to develop a management plan for each unit of the National Park System.
Under that provision, a plan must discuss whether the NPS will use the “issuance or enforcement of regulations” on “privately owned land” in the unit to protect the unit. 16 U.S.C. § 3191(b)(7). This provision, in the NPS’s view, shows that Congress intended to authorize the NPS to regulate both public and nonpublic land in System units. Sturgeon’s interpretation of ANILCA Section 103(c) would defeat Congress’s intent, in the NPS’s view, by preventing the NPS from regulating nonpublic lands.

The NPS makes a broader argument about why ANILCA Section 103(c) doesn’t limit its regulatory power. The NPS argues that the Constitution’s Commerce Clause and the NPS’s organic statute give it broad power to regulate navigable waters for conservation purposes. The NPS argues that Congress could not have intended to restrict that power in Section 103(c), given that provision’s modest nature and its origin. The NPS points out that Section 103(c) is part of a provision that goes by the unassuming title “Maps.” Moreover, Section 103(c) “was added to ANILCA through a concurrent resolution to make technical ‘corrections,’” after the rest of ANILCA was passed in the House and Senate. The resolution’s sponsor in the House said Section 103(c) would not “change any of the major features of” ANILCA or “have the effect of altering provisions related to conservation areas” in Alaska. Moreover, both Houses of Congress labeled Section 103(c) a “minor revision.” The NPS argues that these descriptions of Section 103(c) defeat Sturgeon’s proposed interpretation of it, because his interpretation would have it “rescind or revise longstanding [federal] authority” under the Commerce Clause and the NPS’s organic statute “to regulate navigable waters throughout National Park System Units in the State of Alaska.”

This argument convinced the concurring judges in the Ninth Circuit, who would have embraced a Commerce Clause rationale for federal regulation of Alaska’s navigable waters. But Sturgeon opposes the argument by citing Ninth Circuit precedent stating that “Congress did not intend to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters when it enacted ANILCA.” This precedent does not, of course, bind the Court.

The NPS’s last argument rests on what is called the Chevron doctrine. Chevron v. Natural Resource Defense Council, Inc. 467 U.S. 837 (1984). That doctrine generally requires a federal court to accept a federal agency’s interpretation of a statute that it administers as long as the interpretation is reasonable. The Chevron doctrine seems applicable in this case, for it involves the NPS’s interpretation of ANILCA, a statute that it administers. Several of the justices have criticized the Chevron doctrine in recent cases, however, and the Court as a whole has increasingly found reasons not to apply the doctrine. If the Court does apply the Chevron doctrine here, however, the Court could uphold the NPS’s interpretation of Section 103(c) on the ground that, whether or not the interpretation is correct, it is at least reasonable—that is, close enough for government work.

SIGNIFICANCE

Although the facts of this case might make it seem important only to Alaska and its residents, the Court said in Sturgeon I that the parties’ arguments “touch on vital issues of state sovereignty, on the one hand, and federal authority, on the other.” That is because the states traditionally have had broad control over their navigable waters, whereas the federal government has traditionally had broad power to protect and preserve federally owned land and has come to have broad power to regulate activities on navigable waters under the Commerce Clause.

Considering Alaska alone, the amount of land and water involved is huge, and the issue before the Court has great practical importance. In the amicus brief urging the Court to grant review a second time, Alaska observed that Alaska comprises “an area equivalent to one-fifth of the continental United States’ landmass,” and the federal government owns 60 percent of that land. Sturgeon’s petition for certiorari adds that “Alaska is home to over 40% of the nation’s surface waters.” Moreover, residents of Alaska depend heavily on their waters for transportation and economic and social needs. Alaska fears that federal regulators—“who may never even visit Alaska, let alone develop a nuanced understanding of the unique aspects of rural Alaskan life”—will exercise any expanded power granted by the Court in this case to adopt regulations for units of the National Park System in Alaska that are “ill-fitting” given Alaska’s uniqueness.

In opposing Sturgeon’s bid for the Court to conduct a second round of review, the federal government downplayed this case’s importance. The NPS emphasized that the Ninth Circuit upheld the NPS’s regulatory authority based on the reserved-water-rights doctrine. That doctrine, the NPS observed, reserves rights “only to the extent needed to accomplish the purposes of the reservations.” The NPS argues that the hovercraft regulation accomplishes Congress’s purpose in creating the Yukon-Charley unit to “maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features.” But the NPS contends that the scope of regulatory power that it possesses under the reserved-water-rights doctrine is not so all-encompassing that it seriously threatens state sovereignty.

Sturgeon responds that the NPS’s reserved-water-rights argument would extend beyond navigable waters to any water—navigable or not—that the NPS considers necessary to its administration of conservation units in Alaska. Thus, according to Sturgeon, the NPS’s argument would justify NPS regulation of “any state or private waterway in Alaska within a” conservation system unit. The NPS does not seem to dispute that its reserved-water-rights argument would extend NPS’s regulatory power to non-navigable waters in Alaska’s conservation system units, including waters in the privately owned lands in those units.

Besides its implications for Alaska, this case could have great significance outside Alaska if the Court agrees with the NPS that any waters in which the federal government possesses reserved water rights are “public lands.” The significance of the meaning of the term public land for other states is discussed in the amicus brief submitted by Idaho and eight other states. These amici states make two main points. First, the amici states observe that the term public land is used in federal statutes besides ANILCA that bear on the federal government’s regulatory authority. A broad interpretation of that term as it is used in ANILCA could affect the interpretation of the term in the other statutes that use it. Second, the states have traditionally had broad regulatory power,
concurrently with the federal government, over their navigable waters. The states have this power under the Constitution’s Equal Footing doctrine and the federal Submerged Lands Act. Those laws give states title to the submerged land under navigable waters and regulatory control over the waters themselves. The amici states fear that a broad interpretation of the federal government’s power under the reserved water rights doctrine could cut back on the states’ traditional regulatory powers over navigable waters.

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FEDERAL PREEMPTION

Does the Federal Atomic Energy Act (AEA) Preempt Virginia’s Ban on Uranium Extraction, When the Ban, on Its Face, Falls Within a State’s Regulatory Authority but It Nevertheless Has the Purpose and Effect of Regulating the Activities Within the Exclusive Jurisdiction of the Nuclear Regulatory Commission?

CASE AT A GLANCE
Virginia issued a moratorium on uranium mining in the late 1970s. The state renewed the moratorium so that the Commonwealth continues to ban uranium mining today. Virginia Uranium, Inc., which owns the largest uranium mine in the United States, sued the Commonwealth, arguing that the federal Atomic Energy Act (AEA) preempts Virginia’s ban.

Virginia Uranium, Inc. v. Warren
Docket No. 16-1275
Argument Date: November 5, 2018
From: The Fourth Circuit

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

INTRODUCTION
The Atomic Energy Act (AEA) grants exclusive authority to the Nuclear Regulatory Commission (NRC) to regulate the safety of post-extraction uranium refining and radioactive waste management. But the AEA allows states to regulate uranium extraction in the first place. On its face, Virginia’s ban on uranium mining seems to fall within the states’ authority under the AEA to regulate extraction. If so, the AEA does not preempt. But some evidence suggests that Virginia only enacted its ban out of radiological safety concerns over post-extraction management of the radioactive byproduct of uranium production, and that the ban would have this effect. If so, the AEA may preempt.

ISSUE
Does the Court look beyond the face of Virginia’s ban on uranium mining, to the ban’s purpose and effect, in order to determine whether it is preempted under the AEA?

FACTS
Virginia Uranium owns a deposit of about 119 million pounds of uranium ore beneath the Coles Hill estate in Pittsylvania County, Virginia. The deposit is the largest in the United States and one of the largest in the world. But Virginia Uranium can’t mine it, because Virginia law effectively bans uranium mining within the state.

Virginia originally enacted a temporary moratorium on uranium mining soon after the Coles Hill deposit was discovered, in the late 1970s. (The Commonwealth adopted the moratorium despite a state commission recommendation that the Commonwealth could limit public exposure to radiation and that the benefits of uranium mining “outweighed the costs 26 to 1.”) That provision said that the state shall not accept permit applications for uranium mining “prior to July 1, 1984, and until a program for permitting uranium mining is established by statute.” The Commonwealth subsequently extended the moratorium into an indefinite ban and, later, declined to lift it. As a result, the ban remains in effect to this day.

At least some Virginia legislators who supported the ban seemed to be motivated by radiological safety concerns. (The parties dispute the precise weight of these concerns in enacting and maintaining the ban.) In particular, they were concerned that a radioactive byproduct of conventional uranium mining—the waste rock, called “tailings”—could contaminate residential water supplies.

Virginia Uranium sued the Commonwealth, arguing that Virginia’s ban on uranium mining was preempted by the federal AEA. In order to understand that claim, it helps to know the three steps in conventional uranium mining and how the Act regulates them. First, raw ore that contains uranium is extracted from the ground. Second, the uranium ore is milled into a sand and run through a solution to separate the uranium ore from waste rock, or tailings. The uranium is concentrated and dried into “yellowcake,” which is then sold and shipped off site for enrichment. Finally, the tailings, which remain radioactive, are permanently stored in a secure tailings management facility.

The AEA vests the Nuclear Regulatory Commission (NRC) with authority to regulate the second and third steps (the design, construction, and operation of uranium mills and tailings
management facilities), but not the first (uranium ore extraction). At the same time, the Act authorizes the NRC to “enter into agreements with the Governor of any State” to transfer to that state the NRC’s regulatory jurisdiction over uranium milling and tailings management. Such an agreement gives the state the “authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.” Unless such an agreement is in place, a state may regulate only “for purposes other than protection against radiation hazards.” Except under such an agreement, the AEA “prohibits states from regulating, for [radiological] safety reasons, activities that are in any way regulated by the federal government under the [AEA].” Virginia entered into such an agreement, but it explicitly does not cover milling or tailings management.

Virginia Uranium argued that the Commonwealth’s ban on uranium mining was really a regulation on tailings management, borne out of a radiological safety concern, and that this was squarely prohibited by the AEA. The lower courts rejected this claim, and this appeal followed.

CASE ANALYSIS

Under the Supremacy Clause, federal law preempts state law when federal law occupies an entire regulatory field, when state law stands as an obstacle to federal objectives, or when state law conflicts with federal law. Both parties agree that the AEA has some preemptive effect. In particular, they agree that, without a Section 2021 agreement between a state and the NRC, the AEA preempts state law of the second and third steps of uranium production, if done for radiological safety reasons. At the same time, they agree that the AEA does not preempt state law on the first step, mining.

They disagree, however, on which steps of uranium production the Virginia ban seeks to regulate. On its face, the ban regulates the first step, mining, because it only prohibits mining. If so, the AEA does not preempt. But given its purpose, or partial purpose, to protect against radiological contamination of tailings, it may intend to regulate the second and third steps, milling and tailings management. If so, the AEA seems to preempt.

The difference turns on whether the Court can consider a state’s intent or purpose in ruling on preemption. The Court touched on this issue in *PG&E v. State Energy Commission*, 461 U.S. 190 (1983). In that case, the Court ruled that the AEA did not preempt a California law that imposed a moratorium on the certification of new nuclear power plants until a state commission found a demonstrated means for the permanent disposal of high-level nuclear wastes. In so ruling, the Court accepted California’s assertion that it adopted the law in order to determine the economic feasibility of new plants (which was not a concern of the AEA), not the safety of the plants (which was). In other words, the *PG&E* Court looked at the state’s purpose in order to help determine the AEA’s preemptive effect—exactly what Virginia Uranium is asking the Court to do here. But on the other hand, it merely accepted the state’s asserted purpose and expressly declined to “become enembroiled in attempting to ascertain [the state’s] true motive”—language that supports Virginia’s position.

Virginia Uranium argues that the AEA primarily preempts the Commonwealth’s ban. In particular, Virginia Uranium says that Section 2021(k) of the AEA expressly allows Virginia, without an applicable agreement with the NRC, only “to regulate activities for purposes other than the protection against radiation hazards.” (Emphasis added.) Virginia Uranium says that this section plainly preempts the Commonwealth’s ban on uranium mining, because Virginia’s ban, adopted out of concern about radiation hazards, falls squarely within the preempted field.

Virginia Uranium argues next that the Fourth Circuit erred in not considering the purposes behind Virginia’s ban. Virginia Uranium says that while the ban ostensibly applies only to mining (the first step, which is outside the NRC’s regulatory authority), the Commonwealth concedes that it enacted and maintained the ban out of concern about the radiological safety of milling and tailings management (the second and third steps, which fall within the NRC’s exclusive jurisdiction). Virginia Uranium claims that under *PG&E* and the AEA, the Fourth Circuit should have considered the Commonwealth’s purpose in adopting and maintaining the ban, and not just the plain face, or language, of the ban. If the Fourth Circuit had done this, it would have held that Virginia’s ban really applied to areas (milling and tailings management, out of concerns about radiological safety) that are in the exclusive authority of the NRC.

Virginia Uranium argues that the Fourth Circuit’s approach (again, in not considering the Commonwealth’s purpose in enacting and maintaining the ban) would frustrate the purposes of the AEA. That’s because it would invite state and local governments to “ban uranium mining” as a cover for their true radiological concerns and, thus, to undermine the purposes of, and to dodge preemption under, the AEA. Given the controversies around uranium mining at the state and local level, this could mean that state and local governments could effectively stymie uranium mining despite the AEA’s goals to the contrary, or, in the language of Virginia Uranium, “demolish [ ] Section 2021’s framework [and] enable state and local governments to freely block nuclear development so long as they write their bans, restrictions, and moratoriums with sufficient care to formally maintain the pretext.”

Finally, Virginia Uranium argues that the AEA also preempts Virginia’s ban because the ban stands as an obstacle to the AEA’s purposes. Virginia Uranium says that the ban upsets the careful balance reflected in the AEA between the promotion of nuclear power, on the one hand, and radiological health and safety concerns, on the other. Moreover, it claims that the ban means that Virginia has effectively regulated milling and tailings management without first obtaining an NRC agreement under Section 2021. This frustrates the AEA’s purpose of encouraging agreement between states and the NRC around state regulation of the second and third steps of uranium production.

The government, as amicus in support of Virginia Uranium, makes substantially similar arguments.

Virginia counters that the AEA does not field-preempt its ban. According to the Commonwealth, that’s because “Section 2021(k) does not preempt anything…” Moreover, the Commonwealth...
claims that it simply does not address matters, like state regulation of uranium mining, that were never within the NRC’s authority in the first place. Instead, Virginia says that in 1959 Congress enacted legislation to allow the states to regulate aspects of uranium mining—and that’s exactly what Virginia’s ban does.

Virginia argues that Virginia Uranium misreads PG&E and other caselaw to argue that the Court should look at the Commonwealth’s purpose behind the ban. It also says that the Court in those cases actually unanimously rejected preemption challenges to state laws that were “far closer to the heart of exclusive federal authority under the [AEA] than this one.” Virginia contends that even if the Court can look to its purpose in enacting and maintaining the ban, Virginia Uranium is mistaken as to how this purpose analysis should work and what the Commonwealth has conceded. As to the former, Virginia asserts that Virginia Uranium’s evidence of purpose (like quotes from old newspaper articles) only underscores the Court’s traditional skepticism about using purpose analysis in preemption cases. As to the latter, Virginia says that it has never conceded that legislative purpose is purely a question of fact, or that the Commonwealth’s sole purpose in adopting and maintaining the ban was based on radiological safety concerns with milling and tailings management.

Finally, Virginia argues that Virginia Uranium’s obstacle preemption argument must fail. According to the Commonwealth, that’s because Congress has never sought to reduce or eliminate a state’s inherent power to regulate uranium mining within its borders and that, in fact, the federal trend has been to increase the states’ roles in the development and regulation of nuclear energy. Virginia claims that Congress wrote “[e]ach iteration of the [AEA]” to maintain the principle that federal regulatory authority over uranium production begins only after the first step, uranium mining. And because Virginia’s law bans only mining, it cannot create an obstacle to AEA objectives.

**SIGNIFICANCE**

This case touches on the delicate balance that the AEA seeks to strike between state and federal regulation of the uranium mining and refining process and, ultimately, production of nuclear energy. The AEA seeks to provide states with some measure of regulatory authority over uranium mining, while still promoting the safe refining of uranium and maintenance of radioactive waste.

As this case illustrates, uranium mining is always controversial at the state and local level, often because of radiological safety concerns. If the Court declines to consider the purpose and effect of Virginia’s ban, this could give states cover to regulate milling and tailings management out of safety concerns in tension with the carefully calibrated federalism structure in the AEA. Such a holding could effect a net power shift from the federal government to the states over regulation of the uranium mining and refining process. Ultimately this may reduce the amount of uranium mined and produced for nuclear power. (It’s not entirely clear, however, how many states would actually ban uranium mining out of radiological safety concerns over the tailings. Moreover, states may be able to reach the same result by simply banning extraction, which is within their authority under the AEA, without disclosing any radiological safety concern.)

There’s a different, practical problem, too. If the Court decides to consider the purpose and effect of the ban, then it will have to develop standards for doing that. As a general matter, the Court doesn’t like to look behind the plain language of a law, for the very reason that judging a legislature’s purpose is an extremely hard thing to do. Moreover, considering legislative purpose in AEA preemption could open the door to considering purpose in other preemption contexts. While the Court has some tools for this, and while it could limit any ruling to the AEA alone, it’s not clear that the Court will want to open this can of worms.

The line-up in preemption cases can be especially difficult to predict. That’s because any justice’s federalism commitments may be in tension with other values in the case. Often these cases do not fall squarely along conventional ideological lines on the Court.

One final note. As in any preemption case, Congress can have the last say (if it wants). Because the issue is the preemptive effect of the federal AEA, Congress can “overrule” the Court simply by amending the Act.

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Members of the Southern Virginia Delegation to the Virginia General Assembly, Local Chambers of Commerce, Civic, Trade, and Economic Development Associations, and Municipalities (Caleb Adam Jaffe, 434.924.4776)

National Conference of State Legislators, National League of Cities, and International City/County Management Association (John J. Korzen, 336.758.5832)

Preemption Law Professors (Derek T. Ho, 202.326.7931)

Roanoke River Basin Association, Dan River Basin Association, and Piedmont Environmental Council (Sean Hoe Donahue, 202.277.7085)
**DEATH PENALTY**

**Does the Eighth Amendment Prohibit a State from Administering Lethal Injection to a Condemned Prisoner When the Prisoner Has an Exceedingly Rare Medical Condition That May Cause Him Severe Pain During a Lethal Injection and When the State May Be Able to Use Lethal Gas as a Less Harmful Alternative?**

**CASE AT A GLANCE**

In 1998, Russell Bucklew was convicted of first-degree murder, kidnapping, burglary, forcible rape, and armed criminal conduct, and was sentenced to death. While Bucklew does not challenge his conviction, sentence, or the death penalty in general, he does challenge Missouri’s method of execution (a single-drug lethal injection) as applied to him. More particularly, Bucklew argues that lethal injection would create an unacceptably high risk of extreme pain, given his exceedingly rare medical condition, and that a known and available alternative method of execution (lethal gas) exists.

**Bucklew v. Precythe**  
**Docket No. 17-8151**

**Argument Date: November 6, 2018**  
**From: The Eighth Circuit**

by Steven D. Schwinn  
The John Marshall Law School, Chicago, IL

**INTRODUCTION**

The Supreme Court ruled in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), that a state’s three-drug lethal-injection protocol did not violate the Eighth Amendment. The Court held that the petitioners failed to show “a demonstrated risk of severe pain” and that “the risk is substantial when compared to the known and available alternatives.” But Russell Bucklew’s case is different from *Glossip*: Bucklew challenges Missouri’s protocol only as to his highly unique circumstances (his medical conditions); and he attempts to provide an alternative method of execution known and available under state law. This case tests *Glossip*’s application to a different set of facts and a different kind of legal challenge.

**ISSUES**

1. Should a court assume that medical personnel in the execution team are competent to manage Bucklew’s medical condition and that the procedure will go as intended?

2. Does the Eighth Amendment require an inmate to establish a known and available alternative method of execution when raising an as-applied challenge?

3. Does an inmate have to establish evidence comparing an alternative method by way of a single witness, or should the court look to the record as a whole?

4. Did Bucklew meet his burden to establish a known and available alternative method of execution that would be less painful than the planned method of execution?

**FACTS**

In 1998, Russell Bucklew was convicted of first-degree murder, kidnapping, burglary, forcible rape, and armed criminal conduct. The multiple convictions all arose out of Bucklew’s brutal rampage in which he targeted his ex-girlfriend, her friend, their children, and even police officers. Bucklew was sentenced to death. He does not challenge his conviction or sentence.

Instead, Bucklew challenges the state’s method of execution (lethal injection, with a single drug, pentobarbital) based on his medical condition. Bucklew suffers from cavernous hemangioma, an exceedingly rare, progressive, and incurable condition that causes inoperable blood-filled tumors to grow in his throat and around his face, head, and neck. These tumors are sensitive and subject to rupture and tearing. As a result, relatively minor friction, and even mere touching, can cause them to bleed.

Bucklew has one of these tumors on his uvula. This tumor partially obstructs his airway, making it difficult for him to breathe and causing him to choke and bleed. He has an especially hard time breathing when he lies supine, because the tumor drops to the back of his throat and blocks his airway. In order to avoid choking and hemorrhaging, Bucklew has to sleep with his head elevated.

Still, he “typically begins each morning by cleaning the blood off his face that has leaked from his nose and mouth while he slept.”

Bucklew also has compromised peripheral veins in his hands and his arms. This makes it hard to see his veins and hard to insert an IV. (As you might imagine, Bucklew and the state paint two very
different pictures of Bucklew’s conditions. This summary is as neutral as possible.)

Based on these conditions, Bucklew challenged his planned lethal injection, arguing that it would amount to cruel and unusual punishment in violation of the Eighth Amendment. In particular, Bucklew claimed that several aspects of the state’s protocol for lethal injection would likely cause him to suffer especially. For example, he argued that the medical technicians responsible for his execution would have insufficient information about his medical condition to prevent suffering based on his conditions; that the technicians may not have the training to place an IV line in a peripheral vein and that the state’s alternative procedure (called a “cut-down”) would cause extreme pain; and that the stress of the execution and his supine position on the gurney would cause him to bleed from his uvular tumor and to struggle to breathe. (Again, Bucklew and the state describe the state’s protocol in very different terms and seem to disagree about key aspects of the protocol. This summary is as neutral as possible.)

The district court originally rejected Bucklew’s claims. An Eighth Circuit panel granted a stay of execution, but the full Eighth Circuit reversed. The Supreme Court then entered a stay pending his appeal.

On remand, Bucklew amended his complaint to propose lethal gas (nitrogen) as an alternative. Missouri law authorizes the state to use lethal gas, and Bucklew claimed that the state could administer lethal gas without causing him especial pain and suffering. The district court again dismissed the case. Importantly for this appeal, the district court also denied Bucklew “detailed discovery about the execution team members,” known only as M1 and M2, in order to protect their anonymity.

The Eighth Circuit affirmed and subsequently denied Bucklew’s motion for an emergency stay of execution. The Supreme Court then granted a stay and agreed to hear this appeal.

CASE ANALYSIS

In its most recent foray into the death penalty, the Supreme Court ruled just over three years ago that Oklahoma’s lethal-injection protocol did not violate the Eighth Amendment. Glossip v. Gross, 135 S. Ct. 2726 (2015). The Court held that the petitioners failed to provide evidence that pentobarbital would render him insensate to pain and that the state’s protocol for lethal injection would likely cause him to suffer especially. For another, the state in Glossip didn’t have an available alternative method of execution, so the petitioners couldn’t point to one. In contrast, Missouri permits lethal gas, in addition to lethal injection, as a method of execution. Indeed, that’s exactly what Bucklew seeks (even though Missouri has never used the gas, nitrogen, that Bucklew requests).

Against this backdrop, the parties address four issues. Let’s take them one at a time. (One note. These are the four issues on which Bucklew sought, and the Supreme Court granted, review. But the arguments overlap, depend on each other, loop back, and otherwise interrelate. As a result, don’t look for the parties to argue these issues at oral argument exactly as they’re presented here. Indeed, they didn’t even brief them exactly this way.)

Should the Court Assume That Medical Personnel Can Administer Lethal Injection as Intended?

Bucklew argues that the Eighth Circuit improperly assumed that medical personnel who would administer his execution will do it properly, so that “the execution will go as intended.” Bucklew contends that he presented substantial evidence in the district court that his medical conditions will lead to problems in administering the protocol. But he says that the Eighth Circuit “simply assumed these problems away.” As a result, he claims that the Eighth Circuit wrongly decided these key factual questions in the state’s favor and affirmed the district court’s denial of his discovery requests related to the medical personnel. Bucklew asserts that without this improper assumption, the Eighth Circuit’s ruling cannot stand.

The state, in response, argues that Bucklew failed to show that he is “sure or likely” to experience severe pain from lethal injection. The state says that Bucklew failed to provide evidence that pentobarbital would render him insensate to pain and that his only theory of suffering from lethal injection is based on his speculation that the execution team will “botch multiple attempts to access his veins or commit other errors, causing stress that will rupture his tumors.” Moreover, the state contends that Bucklew’s requested discovery related to the execution team’s training and qualifications was irrelevant. That’s because the state’s “numerous safeguards” protect against all but an “isolated mishap,” which does not violate the Eighth Amendment. Finally, the state contends that Bucklew’s requested discovery would have been a waste of time and “served only to burden and harass the members of the execution team,” because Bucklew’s “various theories greatly overstated the risks of accidents.”

Does Bucklew Have to Identify an Alternative Method of Execution, Even Though He Lodges an As-Applied Challenge to Missouri’s Protocol?

Bucklew argues that the Eighth Circuit wrongly required him to identify a known and available alternative to lethal injection. He says that the court imported that standard from Glossip. But Bucklew points out that Glossip involved a facial challenge. He contends that the reasons for this requirement in the context of a facial challenge do not apply to his as-applied challenge. First, in contrast to the claim in Glossip, Bucklew asserts that his claim does not risk creating an effective moratorium on the death penalty (because he only challenges it as applied to his extremely rare situation). Next, again in contrast to Glossip, he contends that the courts can evaluate the “inherent cruelty” of his
lethal injection without comparing it to the pain involved in an alternative method of execution (also because he only challenges his lethal injection as applied to his extremely rare situation).

The state responds that the plain language in *Glossip* requires a challenger to establish an alternative method of execution in “all Eighth Amendment method-of-execution claims.” The state says that this requirement is part-and parcel of an Eighth Amendment challenge, because it shows the state-defendants’ culpable state of mind—that they intended to inflict “pain for the sake of pain” in conducting an execution. The state claims that without this requirement a challenger could seek a de facto exemption from the death penalty, because an available alternative method may not exist. (The state reminds us that the *Glossip* Court held that because “capital punishment is constitutional,” “there must be a means of carrying it out.”)

**What Evidence Must a Court Examine in Comparing Two Methods of Execution?**

Bucklew argues that even if he has to show an available alternative method of execution (which he says he does not), the Eighth Circuit wrongly held that a single witness had to show both (1) that lethal injection would create an unacceptable risk of extreme pain and (2) that the alternative lethal gas would substantially reduce the risk of pain. He claims that this standard is “wrong in general” and perverse: in method-of-execution claims, an inmate will likely have a hard time finding “an expert willing and able, consistent with ethical constraints, to tell the State how best to kill an inmate.”

The state argues that Bucklew simply failed to provide any evidence of the severity and duration of pain from lethal gas and therefore failed to provide any basis of comparison of the pain from lethal injection and the pain from lethal gas. The state says that because Bucklew gave no details about his proposed alternative, nitrogen, the Eighth Circuit properly denied his claim.

**Did Bucklew Meet His Burden to Show That His Proposed Method of Execution Would Cause Less Severe and Shorter Duration of Pain?**

Bucklew argues that “the record as a whole amply supports the conclusion that lethal gas is [a known and available] alternative.” He says that the state did not even dispute the availability of lethal gas in the lower courts. Given the record, including his expert’s testimony on lethal injection and the state’s expert’s testimony on lethal gas, “a reasonable finder of fact could conclude that the lethal gas alternative would indeed substantially reduce” his risk of suffering.

The state argues that Bucklew failed to show that lethal nitrogen was a known and available alternative that would cause less pain than lethal injection. The state says that “[n]o State has ever executed an inmate using lethal nitrogen, and no protocol to do so exists at this time,” and that Bucklew failed to provide any details about how it would work. The state contends that one expert testified that “you might get more suffering from nitrogen gas than you would have Pentobarbital.” The state asserts that, contrary to Bucklew’s contentions, it vigorously disputed these facts in the lower courts.

Finally, and outside of the formal questions certified for review, the state argues that Bucklew missed the five-year statute of limitations on his claim. The state says that he knew of the basis for his claim in 2008, but failed to file a lawsuit until May 2014. Moreover, the state says that his claim is barred by res judicata, because he could have raised it in an earlier lawsuit that he brought.

**SIGNIFICANCE**

This case is the fully predictable follow-up to *Glossip v. Gross* and raises some of the important questions that *Glossip* left open. *Glossip* told us that a condemned prisoner had to show that a planned method of execution would result in severe pain and that the state had a known and available alternative that would cause less pain. But *Glossip* involved a “facial challenge” to the method of execution in that case. That is, the petitioners argued that the method of execution was never constitutional.

In sharp contrast, Bucklew argues only that Missouri’s planned method of execution would cause severe pain only to him and only because of his exceedingly rare medical conditions. Moreover, he claims that Missouri has an alternative: lethal gas.

So at its most general level, this case asks the critical follow-up to *Glossip*: How does that case apply, if at all, to an as-applied challenge to a method of execution?

Bucklew tailors his arguments quite carefully, and quite narrowly, in order to dodge a problem that the petitioners in *Glossip* faced: the majority on the Court viewed the *Glossip*-petitioners’ claim as a full, frontal attack on the death penalty, or at least one of the most popular ways of administering it. In contrast, Bucklew argues no such thing. Instead, he claims only that Missouri’s planned lethal injection is unconstitutional only as to him and that the state can go ahead and administer a known and available alternative.

The state takes issue with this characterization, though. In so doing, it presents a dramatically different picture of Bucklew’s conditions, its own lethal injection protocol, how the protocol might affect Bucklew, given his conditions, and even Bucklew’s proffered alternative.

And this might just be the biggest problem with this case: the parties present radically different facts, and both claim support in the record. The Supreme Court doesn’t like to rule on legal issues when the facts are so contested. Given the factual disputes, it may not be a huge surprise if the Court were to remand the case for further development.

If the Court does rule, however, *Glossip* gives us a likely sense of how it will come out. In *Glossip*, the Court split five to four, along conventional ideological lines (with Justice Anthony Kennedy aligning with the “conservatives”), against the challengers. Since the Court ruled in *Glossip*, Justice Neil Gorsuch replaced Justice Antonin Scalia, and Justice Brett Kavanaugh replaced Justice Kennedy. Justice Gorsuch is most probably an even swap
for Justice Scalia in this case. And while we can’t yet know for certain, Justice Kavanaugh is likely to the right of Justice Kennedy on the death penalty. (Remember, Justice Kennedy wrote some key decisions limiting the death penalty.) If so, we might expect another five-to-four ruling, along the same lines.

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Does the Railroad Retirement Tax Act Include Payment for Time Lost Due to Injury in Its Definition of Taxable Compensation?

CASE AT A GLANCE

Respondent Michael Loos, injured while working at petitioner's railyard, filed suit against petitioner under the Federal Employers Liability Act (FELA) and was awarded damages. Petitioner sought an offset of the wage-loss portion of the judgment, but both the district court and Eighth Circuit ruled that FELA judgments are not subject to Railroad Retirement Tax Act taxation.

INTRODUCTION

This case deals with the interpretation of the Railroad Retirement Tax Act (RRTA) and whether its language includes as compensation for tax purposes damages paid to injured railroad employees. The district court held that personal injury awards are exempt income under IRS regulation 26 U.S.C. § 104. The Court of Appeals for the Eighth Circuit ultimately affirmed the district court's ruling but on different grounds; it held that, under the IRS regulation, a personal injury award would count toward compensation but the RRTA unambiguously cannot be read to include a like provision in its own definition.

ISSUE

Did the Eighth Circuit err in holding that under the RRTA, payment for lost wages due to personal injury does not count toward taxable compensation?

FACTS

Two federal statutes, the RRTA and the Railroad Retirement Act (RRA) operate together to provide retirement benefits for workers in the railroad industry. They substitute for Social Security, from which railroad workers are exempt, and provide additional benefits comparable to those of a private pension plan. To fund these retirement benefits, the RRTA imposes a tax on railroad workers' compensation. The RRTA defines compensation as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers."  Operating in tandem with the RRTA is the RRA, which governs the payment of benefits to railroad retirees. Like traditional Social Security benefits, the amount of benefits a railroad retiree receives depends on the amount and allocation of the retiree's past compensation. Importantly, the RRA defines compensation differently than the RRTA. It defines it thus:

any form of money remuneration paid to an individual or services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, (emphasis added) but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

The Treasury Department, charged with prescribing rules and regulations interpreting the RRTA, has construed the RRTA's definition of compensation as "not [only] confined to amounts paid for active service," but also encompassing "amounts paid for an identifiable period during which the employee is absent from the active service of the employer," including pay for time lost.

Respondent Michael Loos was in the employ of petitioner as conductor, switchman, and brakeman when he fell through an unmarked drain covered in snow in petitioner's railyard. Petitioner subsequently terminated respondent's employment. Respondent filed suit under the Federal Employers Liability Act (FELA) to recover damages for his work-related injuries. The jury found petitioner liable for negligence, awarding respondent $126,212.78, which included $85,000 for past pain, disability, and emotional distress; $11,212.78 for past medical expenses; and $30,000 for past wage loss. Petitioner timely moved to offset the judgment by $3,765, claiming it was owed that amount for RRTA withholdings on the wage-loss portion of the damages award.

The district court held that such a withholding was improper because payment for time lost was not taxable under the RRTA. The district court, while acknowledging that payment for time lost fell within the RRTA's definition of taxable compensation,
ultimately ruled that those payments were excluded from RRTA taxation because of the Internal Revenue Code; the Code excludes from income tax “the amount of any damages (other than punitive damages) received on account of physical injuries.”

The Eighth Circuit affirmed, albeit on different grounds. It acknowledged that Treasury Regulations interpreting RRTA compensation to include payment for time lost are entitled to Chevron deference. Chevron v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984). However, the court concluded that the Treasury had acted unreasonably in construing the statute. Moreover, the court considered the Federal Insurance Contributions Act (FICA), the statute that funds Social Security benefits payments for non-railroad employees, in its analysis of how to interpret compensation under the RRTA. It found that analogies drawn to cases interpreting FICA to be inapposite because FICA taxes payment for “employment,” whereas RRTA taxes payment for “services.” The court also declined to interpret the RRTA in conjunction with the RRA, which in fact includes payment for time lost in its definition of compensation. The Eighth Circuit noted the RRTA explicitly omitted such a provision from its own definition of compensation.

CASE ANALYSIS

To petitioner, the Eighth Circuit’s decision is inconsistent with 1) the statutory text of the RRTA as illuminated by Supreme Court decisions construing similar statutes, 2) the statutory context of the two parallel statutes, and 3) decades of interpretation of regulatory agencies. The crux of petitioner’s argument under the first prong is that compensation in no uncertain terms includes payment for time lost. The RRTA defines compensation as “any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.” This definition, argues petitioner, can be broken down into two components, namely “money remuneration” paid for “services rendered.” Petitioner claims that payment for time lost is undoubtedly a form of money remuneration.

As to the “services rendered” portion of the definition, petitioner construes this broadly. Petitioner argues that “services rendered” arises from the employer-employee relationship. In contrast to the Eighth Circuit holding that “the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not,” petitioner argues that the language is not so plain. Petitioner looks to the Court’s interpretation of a similar statutory phrase, “services performed,” to bolster its argument. In two cases, the Court construed this phrase broadly to encompass activity that was not only productive but done so in the service of the entire employer-employee relationship. Activities the Court construed as “services performed” included vacation pay, sick pay, and pay for time spent in jury service. Petitioner also points to the fact that in most every other circuit, courts have construed compensation to include payment for time lost. The United States echoes this argument as amicus. “So long as a monetary payment from an employer to its employee arises out of the employment relationship, it is covered by that definition, even if it is not paid for hours of active service.” Petitioner also argues that a parallel statutory context gives credence to its claim that compensation includes payment for time lost due to personal injury. It looks for guidance to the RRA, which provides for a pension system for railroad employees. Under this companion statute to the RRTA, the definition of compensation unequivocally includes payment for time lost due to personal injury. Petitioner argues that the “RRA demonstrates that the phrase ‘services rendered’ is broad enough to encompass pay for time lost due to a personal injury.” This is significant, continues petitioner, because the RRTA and the RRA are cut from the same cloth. Both statutes were enacted simultaneously in 1937, and, generally, statutes that address the same subject matter should be treated as if they were one law. As such, to interpret one necessarily means looking to the other for explicit guidance and authority.

Further, petitioner argues that the statutory history of the RRTA supports its position that compensation should be broadly construed to include payment of time lost due to injury. Petitioner points to the fact that Congress in 1937 explicitly dropped the term “active” from its definition of compensation so that services rendered did not have to be only those that were productive. Moreover, in petitioner’s understanding, the fact that the statutory text later omitted payment for time lost from the definition is not dispositive of congressional intent to remove such payments from such a definition. According to petitioner, it is common practice to add language in amendments specifically excluding such terms from the definition.

Finally, petitioner looks to regulatory interpretation. The IRS has long included payment for time lost in its definition of compensation. Under traditional practice, the agency should be accorded a strong measure of deference. Thus, argues petitioner, “even assuming the language were ambiguous, the longstanding administrative interpretation confirms congressional intent to include pay for time lost.” Moreover, petitioner argues that the IRS interpretation of compensation is reasonable as it “aligns compensation for tax purposes with compensation for benefits purposes.” Agency deference, reasons petitioner, is therefore appropriate. However, it concludes that notwithstanding the reasonableness of the IRS interpretation, it is nonetheless entitled to Chevron deference.

Respondent counters that the RRTA taxes remuneration only for services rendered, not other purposes. Respondent states that Congress “defined taxable compensation under the RRTA as remuneration ‘for services rendered.’ That phrase therefore ‘limits the kinds of remuneration that will qualify for taxation.’” Respondent emphasizes that Congress could have chosen to include at the time of the enactment its definition of compensation payment for time lost; the available contemporaneous definitions of compensation included provisions for damages. The fact that Congress specifically included in the statute compensation solely for services rendered, claims respondent, speaks to its intent to exclude from the statute taxation on remuneration for time lost due to injury.

Respondent argues that petitioner’s allegation that the language of the RRTA is “not so plain” lacks merit. To transfer meaning
from the RRA to the RRTA, argues respondent, is an unwarranted approach. Respondent notes that the Court has expressly declined to read in tandem the Social Security Act (the RRA equivalent for non-railroad employees) and the Federal Insurance Contributions Act (the RRTA counterpart). This, continues respondent, should be instructive here.

Furthermore, on respondent’s logic, the significant linguistic difference between the RRA and RRTA—namely the inclusion of payment for time lost in the RRA’s definition of compensation and the exclusion of such language in the RRTA—should preclude reading these two statutes as one law. In its amicus brief in support of respondent, the American Association for Justice (AAJ) notes that the RRTA and RRA should not be construed as one law because they have different objects and purposes. “The RRTA is administered by the IRS to collect taxes that will fund railroad retirement benefits. By contrast, Congress in the Railroad Retirement Act, established the Railroad Retirement Board to disburse benefits from the retirement account and to determine whether an employee has met the requirements for benefit eligibility.”

Respondent further claims that payment for time lost does not include satisfaction of a FELA judgment. If Congress intended to tax FELA judgments, argues respondent, it would have included in the compensation definition a phrase such as “remuneration for services rendered as an employee and damages paid or payable to an employee through suit or judgment.”

Respondent argues that a FELA judgment is exempt under §104 of the Internal Revenue Code and that this section of the code applies to RRTA employee taxes. If, as respondent further claims, “Congress had wanted §104(a)(2) to exclude personal-injury damages from railroad employer taxes, it would have incorporated that exclusion into the RRTA’s definition of taxable compensation.” (Petitioner counters that nothing in the text of the RRTA gives rise to the implication that Section 104 will provide an exemption.)

Finally, respondent and its fellow amici contend that Chevron deference is inappropriate in this case. In contrast to petitioner’s claim that the IRS interpretation has long included payment for time lost in its definition of compensation, thus warranting agency deference, the AAJ, arguing in support of respondent, states that petitioner’s conclusion is wrong. States AAJ, “[The] regulation, however longstanding, does not clearly state that the IRS interprets the definition of compensation to include personal injury awards for lost income.” Indeed, continues AAJ, neither petitioner nor the United States has identified a specific IRS regulation interpreting RRTA compensation to include payment for time lost due to injury.

SIGNIFICANCE
“Congress historically has singled out railroads for unique treatment, motivated in part by the industry’s outsized role in the national economy,” states the Association of American Railroads, as amicus in support of petitioner. As such, their regulation is of great import, historically and at present, to American society.
Can a Foreign State Be Served with Legal Process via Its Embassy in Washington, D.C.?

CASE AT A GLANCE

To serve a lawsuit on a foreign state, 28 U.S.C. § 1608(a)(3) of the Foreign Sovereign Immunities Act (FSIA) requires that a summons, complaint, and notice of suit be “addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” In a case arising out of the bombing of the USS Cole, the Republic of Sudan was served with process via a package sent to the foreign minister at the address of the Sudanese embassy in Washington, D.C. The question is whether service via a foreign embassy conforms with the FSIA’s statutory requirement and is permissible under the Vienna Convention on Diplomatic Relations, which provides that diplomatic missions are inviolable.

Republic of Sudan v. Harrison
Docket No. 16-1094

Argument Date: November 7, 2018
From: The Second Circuit
by Alexis Haller
Aptos, CA

ISSUES
1. Does the mailing of service documents to a foreign minister via the foreign state’s diplomatic mission in Washington, D.C., satisfy 28 U.S.C. § 1608(a)(3)’s requirement that the documents “be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned”?

2. Does service of process upon a foreign state via its diplomatic mission in Washington, D.C., violate Article 22 of the Vienna Convention on Diplomatic Relations, which provides that “[t]he premises of the mission shall be inviolable”?

FACTS
This case arises from the al Qaeda bombing of the USS Cole in Yemen in 2000. In October 2010, injured sailors and their spouses sued Sudan in federal court in the District of Columbia under the Foreign Service Immunities Act (FSIA), claiming that Sudan had provided material support to al Qaeda and Osama bin Laden. To serve process on Sudan, the plaintiffs filed an affidavit asking the district court clerk to mail the service documents pursuant to 28 U.S.C. § 1608(a)(3) to:

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 20008

The court clerk sent the service package as designated by plaintiffs. There was no attempt to serve Sudan by mail at the foreign ministry’s address in Khartoum. It also appears that Mr. Deng Alor Kuol was not the Minister of Foreign Affairs of Sudan when the package was sent.

Because Sudan did not serve an answer or other responsive pleading within 60 days after service, the clerk of court entered a default against Sudan at plaintiffs’ request. Cf. 28 U.S.C. §§ 1608(d)–(e).

On March 30, 2012, Judge Royce Lamberth of the D.C. District Court entered a default judgment against Sudan in the amount of $314,705,896. A copy of the default judgment was mailed by the district court clerk on April 20, 2012, to Sudan’s foreign minister via the Sudanese Embassy in Washington, D.C.

After the judgment was registered in the United States District Court for the Southern District of New York under 28 U.S.C. § 1963, the federal court in New York issued three orders requiring banks to turn over Sudanese assets to plaintiffs. Following the last turnover order, Sudan filed a notice of appearance and appealed the turnover orders to the United States Court of Appeals for the Second Circuit. Sudan argued on appeal that service via the Sudanese Embassy did not comply with the requirements set forth in Section 1608(a)(3).

On September 23, 2015, the Second Circuit held that the plaintiffs’ service of process had satisfied Section 1608(a)(3) of the FSIA. Harrison v. Republic of Sudan, 802 F.3d 399 (2d Cir. 2015). After the United States government filed an amicus
brief supporting Sudan’s petition for rehearing, the Second Circuit adhered to its original decision and denied rehearing on September 22, 2016, rejecting arguments under both the FSIA and the Vienna Convention on Diplomatic Relations (Vienna Convention or VCDR). *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016).

The United States Supreme Court granted certiorari on June 25, 2018. The United States, Saudi Arabia, and Libya have filed amicus briefs in support of Sudan’s position that service via the foreign embassy was defective.

**CASE ANALYSIS**

The FSIA provides “the sole basis for obtaining jurisdiction over a foreign state in the courts of this country,” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Under the FSIA, a foreign state is presumed immune from suit (28 U.S.C. § 1604), unless an exception to sovereign immunity applies. See 28 U.S.C. §§ 1605–1605A. The FSIA contains an exception to immunity where, *inter alia*, the country sued is designated as a State sponsor of terrorism and provided “material support or resources” for a terrorist act. 28 U.S.C. § 1605A.

To obtain personal jurisdiction over a foreign state, an immunity exception must apply and service of process must be accomplished pursuant to the hierarchical service provisions set forth in 28 U.S.C. § 1608(a). 28 U.S.C. § 1330(b). Because neither Section 1608(a)(1) nor Section 1608(a)(2) applied, plaintiffs were required to conform with the requirements of Section 1608(a)(3).

Section 1608(a)(3) provides that service upon a foreign state shall be made “by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3) (emphasis added).

In a typical FSIA case, a plaintiff will send the service documents to the head of the foreign ministry in the foreign country at issue. Here, plaintiffs directed the clerk send the service documents to the Sudanese foreign minister, but *addressed to the Sudanese embassy in Washington, D.C.* It is well settled that a plaintiff must strictly comply with Section 1608(a). See, e.g., *Magness v. Russian Fed’n*, 247 F.3d 609 (5th Cir. 2001). This case thus centers on whether service via a foreign embassy constitutes strict compliance with Section 1608(a)(3)’s requirements.

In the Supreme Court, Sudan raises three central arguments—which are echoed in the United States’ amicus brief—regarding why the Second Circuit erred in upholding the service of process.

First, Sudan contends that the plain language of the FSIA, which requires that service documents “be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned” (28 U.S.C. § 1608(a)(3)), is most naturally interpreted as requiring the service package to be sent to the foreign minister *in the relevant foreign state*, and not in the diplomatic mission in Washington, D.C.

The plaintiffs respond that while Section 1608(a)(3) requires that the service packet be directed to the foreign minister, it does not expressly mandate a specific location where the package must be sent. According to plaintiffs, the service documents could be sent via the embassy, since it serves “as a component and extension of the foreign ministry, with a direct line of reporting and communication to the foreign minister.”

Second, Sudan points to the FSIA’s legislative history, which shows that the original bill containing Section 1608(a) was amended specifically to preclude service of process upon a diplomatic mission. Sudan relies on a diplomatic note that the United States Department of State sent to the heads of foreign missions in July 1974 regarding an earlier draft of the FSIA, which had permitted service of process by mail “to the ambassador or chief of mission of another state.” In the note, the State Department stated that “countries party to the [Vienna Convention] would have a basis for objection to the propriety of process served in this manner [as proposed under the bill] under Article 22, section 1, of that Convention, as interpreted in light of the negotiating history of that Convention.” 71 Dep’t of State Bull. 429, 458–59 (1974). The original draft of Section 1608(a) was thereafter changed to its current language. As pointed out by the United States and Saudi Arabia, the House Report accompanying the FSIA expressly states that service by mail would not be permitted under Section 1608(a):

> A second means [of current service of process against a foreign state], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, [citation omitted] which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, 26 (1976), *citing 71 Dept. of State Bull. 458–59 (1974) (emphasis added).* Plaintiffs disagree with this interpretation of the legislative history, arguing that “it is clear from context that the report was addressing the discrete issue of service directed to an ambassador: specifically, a mailing that would make the ambassador, not the foreign minister, the ultimate recipient of service.”

Third, Sudan argues that permitting service of process upon a foreign state via a diplomatic mission violates Article 22 of the Vienna Convention, which provides that “[t]he premises of the mission shall be inviolable.” VCDR, art. 22(1); *see also* VCDR, art. 22(2) (stating that “[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity”). Sudan relies on the Vienna Convention’s negotiating history in support of its position, which stated that “no writ shall be served within the premises of the mission” and that “[a]ll judicial notices…must be delivered through the Ministry for Foreign Affairs of the receiving State.” Report of the International Law Commission to the General Assembly, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957),

Plaintiffs retort that nothing in the Vienna Convention expressly precludes service by mail via a diplomatic mission and argue that the Convention’s drafting history in fact supports the view that such service is permissible. See Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April–4 July 1958, 13 U.N. GAOR Supp. No. 9, at 17, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int’l Comm’n 78, 95, U.N. Doc. A/CN.4/68/Add.1 (stating that “[i]n some countries, the persons concerned may apply to the Ministry for Foreign Affairs of the receiving State” and that “[t]here is nothing to prevent service through the post if it can be effected in that way”) (emphasis added). Plaintiffs also rely on a recent judgment of the Supreme Court of the United Kingdom, which rejects the argument that Article 22 of the Vienna Convention prohibits service of process by mail at diplomatic premises. See Reyes v. Al-Malki, [2017] UKSC 61.

SIGNIFICANCE
This case could have a number of important ramifications.

First, a decision upholding the service of process used by plaintiffs could have adverse foreign relations consequences. Foreign nations may resent having their embassies in Washington, D.C., act as effective “service agents” for lawsuits against the foreign state or a political subdivision thereof. In addition, if the return receipt is signed by a low-level employee and the service documents are misplaced or misdirected, a foreign state (or political subdivision) may find itself facing a default judgment without even having received actual notice of suit. That is far less likely when service takes place under Section 1608(a)(4), since the formal use of diplomatic channels is designed to ensure that the materials transmitted are received by the appropriate department or official.

In certain respects, the facts of this case highlight the potential dangers of service via an embassy by mail. The record apparently does not show that the service package was ever delivered to the Sudanese Embassy. See JA75 (showing delivery to “Charlotte Hall, Maryland,” on November 18, 2010). The service was deemed accomplished because a return receipt, containing an illegible signature, was returned to the court clerk on November 23, 2010. See JA74. While plaintiffs claim that Sudan received actual notice of the suit, there could be cases where service via an embassy does not provide any actual notice to the foreign state; if that occurs, the entry of default could adversely affect foreign relations.

Second, if the Supreme Court determines that the plaintiffs’ service was proper, service of process in cases involving foreign states could become easier. When a plaintiff attempts service under Section 1608(a)(3), the required return receipt is sometimes not received. Cf. 28 U.S.C. § 1608(c)(2). Under those circumstances, the plaintiff must then proceed to service via diplomatic channels under Section 1608(a)(4), which takes additional time and is more expensive (including a $2,275 fee to the State Department). If service via an embassy is permitted, plaintiffs are likely to first attempt service under Section 1608(a) (3) via diplomatic missions in Washington, D.C., which could result in a decreased use of service via Section 1608(a)(4) (at least if return receipts from diplomatic missions are received at a greater rate than receipts from foreign ministries).

Third, a decision affirming the Second Circuit could undermine the well-established principle that a plaintiff must strictly comply with the service requirements set forth in Section 1608(a).

Finally, the Supreme Court’s decision could have ramifications against the United States in litigation overseas. Under international law, “what’s good for the goose is good for the gander.” In its amicus brief, the United States notes that it “routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy, even if a mail clerk at the embassy has signed for the package.” If the Supreme Court finds that service by mail is permitted under the FSIA and the Vienna Convention, the United States’ ability to continue to refuse such service in foreign proceedings will be severely undercut.

Alexis Haller is a trial and appellate attorney with over 18 years of litigation experience under the Foreign Sovereign Immunities Act (FSIA). Mr. Haller has achieved dismissals in numerous FSIA actions and provides commentary on FSIA issues on the website www.fsiawlaw.com. He can be reached at ahaller@ahlawoffice.com or 831.685.4730.

PREVIEW of United States Supreme Court Cases 46, no. 2 (October 29, 2018): 48–50. © 2018 American Bar Association

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Should the Total Attorney’s Fees in Contested Social Security Cases Be Limited to 25 Percent of the Back-Pay Award?

CASE AT A GLANCE

This case comes to the Supreme Court at the behest of both the petitioner, an attorney representing social security claimants in several consolidated cases, and the United States. The circuits are split on whether federal law limits the aggregate award for all work on a social security denial case to 25 percent of the back-pay award, as the Eleventh Circuit held, or whether it caps only fees for representation in a court proceeding. The United States agreed that the circuit split over the fee question should be resolved. In the certiorari petition process, the United States changed its stance to align with the petitioner, with a little tweak to say that the court or the social security agency should have the discretion to impose a cap based on reasonableness. In its certiorari brief, the United States suggested that the Court appoint an amicus to argue for affirmance of the Eleventh Circuit opinion, which called for a fee cap of 25 percent of a back-pay award. Amicus was appointed, and the Court has allotted 30 minutes for the amicus argument and divided the remainder between Richard Allen Culbertson and the United States.

Culbertson v. Berryhill
Docket No. 17-773

Argument Date: November 7, 2018
From: The Eleventh Circuit

by Barbara L. Jones
Minneapolis, MN

ISSUE

Do fees subject to 42 U.S.C. § 406(b)’s 25 percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency?

FACTS

Contested social security cases may involve both administrative and judicial proceedings. Fees may be awarded under 42 U.S.C. § 406(a) or (b) for administrative or judicial representation, respectively. The statute states in pertinent part: “[w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.” 42 U.S.C. § 406(b)(1)(A).

Fees also may be awarded under the Equal Access to Justice Act, and they are offset against an award against the agency. That is part of the fact pattern before the Court but is not under review.

The question is whether the phrase “for such representation” includes representation before the agency or only before the court. In this case, the claimant was denied disability benefits and had to take the case to district court. The claimant signed an agreement for a fee of 25 percent of the past-due benefits. The claimant prevailed in court, and the judge said that the total attorney fee for both agency and court representation could be only 25 percent of the past-due benefits. The claimant’s case was consolidated with three other cases for appeal. The Eleventh Circuit Court of Appeals affirmed, saying it was bound by Dawson v. Finch, 425 F2d 1192, cert. den. 400 U.S. 830 (1970).

CASE ANALYSIS

The petitioner argues that the Eleventh Circuit’s approach contains a multitude of problems. First, the approach contravenes the plain meaning of the statute by misunderstanding the antecedent of the phrase “such representation.” Under the plain language of the statute, the antecedent of “such representation” is “before the court.” Applying the cap to work performed at the agency stage contradicts the statute, petitioner argues.

Further, petitioner claims the Eleventh Circuit ignored the fact that the statute treats fee awards for agency and court work separately and, in turn, undermines the congressional purpose of encouraging effective legal representation of the plaintiffs. The statute makes the award systems under Sections 406(a) and 406(b) independent and distinct. There are two ways to collect fees under 406(a), either by a fee agreement with the client, which will be capped, or through a fee petition to the social security agency, which must be reasonable and may be in excess of 25 percent.
Moreover, petitioner argues that the circuit court both misconstrued the practical effect of allowing independent awards of fees under Sections (a) and (b) and misinterpreted the legislative history of the statute as applying to agency representation.

A court must award Section 406(b) fees. Since fees under (a) have already been deemed reasonable, there is no need to regulate them again, says petitioner. And since (a) allows reasonable fees greater than 25 percent of past-due benefits, it makes no sense to include those fees under (b), petitioner continues.

Most claimants cannot succeed before the agency or the court without effective representation, but they may have different representation at different stages. A single “cap” could be used up at the agency level, making it difficult for attorneys to take cases to court, petitioner argues.

Lawyers representing social security claimants are not charging too much, petitioner argues. “[T]hese attorneys accept relatively modest compensation to provide a critical service to our country’s most needy and vulnerable individuals,” he argues.

The United States, in support of reversal and remand, agrees that the “before the court” language of the statute limits the cap to judicial work and resolves the case. It also notes that the social security administration “may properly consider the total amount of agency and court fees requested when determining the proper amount of fees for work before the agency. The district court likewise should serve as an ‘independent check’ against excessive fees (cite omitted) when it determines a reasonable fee for work on judicial review.” This will allow sufficient fees to attract attorneys to represent claimants, the government says.

As previously noted, the Court appointed amicus to argue for affirmance of the Eleventh Circuit. The amicus argues that Congress intended the fees to be limited in the aggregate to 25 percent of past-due benefits. While there may be separate avenues to determine an award, the ultimate statutory source of the fee award is only the 25 percent of the past-due benefits. This interpretation is supported by reading the statute as a whole, by social security rules and regulations, and by the legislative history, the amicus says.

That is the holding in Dawson, the amicus continues: that the statute precludes the aggregate allowance of attorney’s fees greater than 25 percent of the past-due benefits received by the claimant. The correct question is not the effect of the fee cap but what the total fee should be.

“By implementing a structure under § 406 for attorneys to collect fees, Congress did not intend to create a pathway for agency attorneys and court attorneys each to be awarded up to 25% of a disabled claimant’s past-due benefits, fees that together could reach 50%—half—of the total past-due benefits awarded to the claimant,” the amicus argues (emphasis in original). Congress’s goal was to protect disabled claimants from excessive attorney’s fees awards.

This is reflected in case law cited by the amicus, including Dawson, where the Court observed that Congress wanted both effective legal representation with reasonable fees but not dilution of benefits by a third or a half. It makes no sense to create a “race to the agency” to collect fees before the pool of benefits is tapped or to allow attorney’s fees to stack up to absurd levels, the amicus continues.

The amicus goes on to criticize the government for changing its position and the attorney for claimants whom, the amicus argues, is adverse to the best interests of his client. “Opposing a 25% aggregate rule seemingly creates an irreconcilable conflict between an attorney’s personal financial interest and his ethical obligation of zealous advocacy on behalf of the client,” the amicus argues.

SIGNIFICANCE

The economic impediments to access to justice are a critical issue for the legal profession. The argument that social security claimants are among the most vulnerable clients and that they need to be protected from exploitation is well taken, and so is the argument that fees in social security cases are rarely, if ever, exorbitant. The argument certainly can be made that the law should encourage, not discourage, representation of claimants. The argument can be made as well that the social security benefits should not be drained at the client’s expense.

The case is confined to the identified statutory scheme, and none of the parties argue that the case will affect the law beyond the topic of social security.

The government’s suggestion that the Court take this opportunity to add an independent check of reasonableness to the court’s discretion may concern some practitioners, not because they want to charge unreasonable fees but simply because it could complicate the presentation of the issue to a court and add uncertainty to the process. Many practitioners doubtless find it sufficiently complex.

Also appearing as amicus is the National Organization of Social Security Claimants’ Representatives, which does not support either party. However, it does say that the Section 406(b) cap does not include agency work and the Court has no discretion to impose a cumulative cap. It also points out that, as a practical matter, there is a single fund of past-due benefits from which to pay fees. The organization also notes that in the absence of a statutory cap, the prevailing market rate effectively provides one.
For Respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration (Noel J. Francisco, Solicitor General, 202.514.2217)

Court-Appointed Amicus in Support of Judgment Below (Amy Levin Weil, 404.581.0000)

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In This Issue

FEDERAL ARBITRATION ACT
Henry Schein, Inc. v. Archer and White Sales, Inc.
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Lamps Plus, Inc. v. Varela
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FEDERAL ARBITRATION ACT

Indian Law
Washington State Department of Licensing v. Cougar Den, Inc.
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CRIMINAL PROCEDURE
Garza v. Idaho
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IMMUNITY OF INTERNATIONAL ORGANIZATIONS
Jam v. International Finance Corporation
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CIVIL PROCEDURE
Frank v. Gaos
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LAND USE
Sturgeon v. Frost
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FEDERAL PREEMPTION
Virginia Uranium, Inc. v. Warren
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DEATH PENALTY
Bucklew v. Precythe
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TAX LAW
BNSF Railway Co. v. Loos
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FOREIGN SOVEREIGN IMMUNITY
Republic of Sudan v. Harrison
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