

Supreme Court Brief



Day 2 Docket Watch: Separation of Powers, Death Penalty

Okay, the general media consensus is that the new term of the U.S. Supreme Court is no blockbuster (yet). But today's arguments prove that the court's docket includes big cases that may be flying under the radar but shouldn't be. A quick preview:

►► **Gundy v. United States:** This case spotlights an issue that has been dormant lately but becomes very relevant as the Trump administration dismantles the administrative state. We're talking about the non-delegation doctrine, a sleep-inducing name for a big-deal separation of powers question: should Congress be allowed to delegate its legislative powers to the executive branch?

The vehicle for a fresh look at this doctrine is an odd one, involving a provision of the Sex Offender Registration and Notification Act that delegates to the attorney general the power to issue certain regulations under the law.

Plaintiff Herman Gundy ran afoul of the regs and his lawyer New York federal defender **Sarah Baumgartel** appealed, hitting the high court with four different

reasons why it should take up his appeal. But the court picked only one to granted review on: non-delegation, a clear sign that the court is ready to tackle the doctrine.

Conservative groups are not ordinarily keen on helping sex offenders, but they have piled on with amicus briefs in favor of Gundy. Liberals are on his side too. Stanford Law School profs **Jeffrey Fisher** and **Pamela Karlan** are on Gundy's **brief**, though Baumgartel will argue on his behalf. Deputy Solicitor General **Jeffrey Wall will argue** that SORNA does not violate the non-delegation doctrine.

Why it matters: "Herman Gundy was punished for violating a law that no legislature enacted. He now stands convicted of a crime based on the attorney general's whim. Few insults to the principles of a free society could be greater." Cato Institute's **Ilya Shapiro** wrote in an **amicus brief**.

►► **Madison v. Alabama**: This is the case that will remind everyone how important the departure of Justice **Anthony Kennedy** in July was. Kennedy was not a death penalty abolitionist, but he did chip away at it by excluding certain categories of defendants from capital punishment.

Vernon Madison's case could fit right in with Kennedy's approach to the death penalty, but without him on the bench, the outcome is iffy. Madison killed a police officer in Alabama in 1985 and was sentenced to death. But after several strokes and other medical problems, Madison has severe dementia and cannot remember his crime.

His appeals have gone up and down the court system, including the Supreme Court which ruled against him in a per curiam decision in 2017. But the circumstances for his case's return visit today are different, invoking the Eighth Amendment rather than AEDPA. It could be a test of the "evolving standards of decency" rationale in *Ford v. Wainwright*, the key precedent in Madison's case dating back to 1986.

Bryan Stevenson, the famed author, TED Talk speaker and executive director of the Equal Justice Initiative, will argue for Madison. It will be Stevenson's fourth Supreme Court argument, and his first since 2011. Representing **Alabama** is the state's deputy attorney general **Thomas Govan Jr.**

Bottom line: "Executing Mr. Madison would implicate society's and the Eighth Amendment's aversion to grotesque and obscene punishments," Stevenson wrote in Madison's **brief**.



Justices Steer Clear of Attorney Fee Fight in Arkansas Same-Sex Marriage Case

It was a clear win in June 2017 when Marisa Pavan’s lawyers persuaded the Supreme Court that Arkansas could no longer refuse to list both same-sex parents of newborn children on birth certificates.

The per curiam ruling in **Pavan v. Smith** was praised as an important follow-up to the landmark 2015 Obergefell v. Hodges decision declaring that same-sex couples are entitled to be married under the same “terms and conditions” as opposite-sex couples.

Under federal fee-shifting rules in civil rights cases, that would have meant that Pavan and other plaintiffs in the case were entitled to an estimated total of \$220,000 in legal fees from the state as a matter of course.

But the Arkansas Supreme Court did not see it that way, refusing to grant the fee award without explanation. Pavan **appealed to the U.S. Supreme Court**, and **Arkansas fired back**, claiming that the Arkansas Supreme Court’s fee denial was proper and based on state grounds. **Douglas Hallward-Driemeier** (above), a partner at **Ropes & Gray** who won the 2017 case Pavan v. Smith, filed the cert petition.

It was a squabble that the U.S. Supreme Court apparently was eager to avoid. The justices denied certiorari on Monday. The result of that denial is that Ropes & Gray will get zero dollars for its work on the case. And that in turn means zero

dollars for the National Center for Lesbian Rights. Ropes & Gray had planned to turn over its fee recovery to that organization.



In Case You Missed It

>> Justices **Clarence Thomas** and **Ruth Bader Ginsburg** now flank Chief Justice John Roberts Jr. **on the eight-justice bench.**

>> Bill Cosby on Monday **lost his bid** in the Supreme Court to stop a California defamation case.

>> **Laurence Tribe makes the case** for Kavanaugh recusals at the high court, if he is confirmed.

>> Harvard Law School's once cozy relationship with Kavanaugh, who was hired to teach at the school back when U.S. Supreme Court Justice **Elena Kagan** was its dean, **has turned toxic.**