

A Review of Pending Cases

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The current docket of the Supreme Court features a number of cases that affect local governments. In addition to the First Amendment case, *Pleasant Grove City, Utah v. Summum*, No. 07-665, discussed in the last column, here's a brief outline of other cases to watch.

In October, the justices heard arguments in *Crawford v. Metro. Government of Nashville*, No. 06-1595, addressing whether an employee's cooperation during an internal investigation of a sexual harassment complaint amounts to behavior coming within the scope of Title VII's anti-retaliation provision, Section 704(a). The local government initiated an investigation of sexual harassment involving H., Crawford's supervisor. Crawford had made no prior complaints, but when asked, advised that H. had behaved inappropriately on several occasions. No disciplinary action resulted against H., but after the investigation, Crawford and other female employees who spoke about H's misconduct to investigators were fired on other grounds. Crawford sued, alleging the municipality violated the anti-retaliation provisions of Title VII. The U.S. Court of Appeals for the Sixth Circuit dismissed her claims because, even assuming her allegations were true, Metro violated neither the "opposition" nor "participation" clauses of the anti-retaliation provisions. Based on the oral arguments, some commentators anticipate that the Court is leaning towards ruling that cooperating with an internal sexual harassment investigation against a superior does constitute "opposition" protected by the first clause of Section 704(a), but are less confident that the justices will rule that an investigation like the one here falls within a Title VII investigation protected by the participation clause.

Ysursa v. Pocatello Educ. Ass'n, No. 07-869, an appeal from the Ninth Circuit, deals with the constitutionality of a provision of the 2003 Idaho Voluntary Contributions Act insofar as it applies to local government employers. Section 44-2004(2) states that "deductions for political activities" (defined as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure") "shall not be deducted from wages, earnings or compensation of an employee." The provision was challenged by various labor organizations. The district court held the ban on payroll deductions was constitutional as applied to the state government, but unconstitutional as applied to local government employers. On appeal, the Ninth Circuit, applying strict scrutiny review, affirmed, finding the provision to be an unconstitutional violation of the First Amendment, being a content-based restriction on political speech "for which the State officials assert[ed] no compelling justification." The court specifically rejected the state's argument that its power to regulate various aspects of local governments necessarily gave it the right to control access to the local governments' payroll deduction programs. The Supreme Court heard oral arguments in the case on November 03.

Pending criminal law cases include the much-anticipated ruling in *Pearson, et al. v. Callahan*, No. 07-751, in which the Court specifically directed the parties to brief and argue, in addition to the other questions presented, the issue of whether the Court's ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. *Saucier v. Katz* addresses qualified immunity entitlement in Section 1983 suits, and requires the court to first decide the merits of the plaintiff's constitutional claim before ruling on the qualified immunity defense. In *Pearson*, an informer advised police that Callahan was a drug dealer. Police decided to set up a drug buy by the informer at Callahan's home, and instructed the informant to signal the officers once the purchase had been completed. When he did so, the officers raided the home and found Callahan with drugs and the informant's marked money. The officers did not have an arrest or search warrant at any time. The entry was not justified by the "exigent circumstances" exception to the warrant requirement; however, the district court held that the officers were entitled to qualified immunity because they had not violated a clearly established right. The latter finding turned on the application of the "consent once removed" doctrine (being when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance). The doctrine has been accepted in only the Sixth and Seventh Circuits, which prevented the district court from finding that Callahan's rights were clearly established. On appeal, the Tenth Circuit reversed. The law was clearly established and the officers, therefore, were not protected by qualified immunity. Both the Supreme Court and the Tenth Circuit itself had held it to be "clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear." The questions now before the Supreme Court—in addition to the issues concerning *Saucier v. Katz*—are whether the "consent once removed"

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exception to the warrant requirement authorizes police to enter a home without a warrant immediately after an undercover informant buys drugs inside, or whether such warrantless entry violates the Fourth Amendment; second, whether the Tenth Circuit properly denied qualified immunity when the only decisions directly on point had all upheld similar warrantless entries.

Other "search and seizure" cases before the Court are *Herring v. United States*, No. 07-513, *Arizona v. Gant*, No. 07-542, and *Arizona v. Johnson*, No. 07-1122. *Herring*, on appeal from the Eleventh Circuit, arose out of a challenge to a search incident to arrest, where the arrest itself was based on erroneous information provided by another law enforcement agency. Herring was arrested in Coffee County while picking up items from a sheriff department's impound lot. The lot's clerk decided to see if there were any warrants outstanding for Herring and was told, by a clerk in neighboring Dale County, that there was an active warrant in Dale County. Herring was arrested, and a search incident to arrest turned up methamphetamine in his pocket and a pistol under the front seat of his truck. At the same time, the clerk had checked on the warrant and was informed that the Dale County warrant had actually been recalled. At issue in this case is whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed, when the arresting officer conducted the arrest and search in sole reliance upon facially credible, but erroneous, information negligently provided by another law enforcement agent.

The question presented in *Gant* is whether a warrantless search of a vehicle incident to arrest requires proof of a threat to the safety of police officers or a need to preserve evidence. In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court had previously ruled that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justify a contemporaneous warrantless search of a vehicle's passenger compartment incident to the arrest. In *Gant*, police, acting on a tip, approached a residence. Gant answered the door. He told the officers that the owners were not home, but would return later that day. The officers left, but ran a records check on Gant that indicated an outstanding warrant for driving on a suspended license. When the officers returned later that evening, Gant drove up, parked his car, and got out. An officer called him over, and Gant was arrested. A search of his car—conducted while Gant was handcuffed and locked in the back of a patrol car—turned up drugs and a gun. There were at least four police officers, but no other persons, on the scene. An officer testified at trial that the scene was "secure" while Gant's car was searched. Gant sought to suppress the evidence on the basis that the reasons for a warrantless contemporaneous search of the vehicle—protection of the arresting officers and preservation of evidence—did not, in the circumstances, justify the search and, therefore, the police were required to obtain a warrant. The Arizona Supreme Court, finding the issue was whether police could conduct a search incident to arrest at all once the scene was secured, granted the motion.

Arizona v. Johnson involved a police stop of a vehicle based on an insurance suspension. The officers had not targeted the car for any reason, but simply ran the license plate while they were patrolling a gang-intensive area. The officers had seen no behavior in the car indicative of criminal activity. Johnson was a passenger in the back and was cooperative. One officer wanted to gather "gang intelligence" and asked him to get out of the car. She conducted a pat-down search of Johnson and found a gun. Johnson applied to suppress the evidence on the basis that the search was unreasonable. The court held that the initial lawful seizure of Johnson, incident to the traffic stop of the driver, had evolved into a separate, entirely consensual encounter stemming from an unrelated investigation by the officer. There was no reason to believe Johnson was involved in criminal activity, or any "officer safety" purpose requiring the search. Accordingly, the officer had no right to pat him down for weapons. The question before the Supreme Court is whether, in the context of a vehicular stop for a minor traffic infraction, an officer can conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. ML

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at issue was sufficient to put the government on notice of the essence of the claim; accordingly, whether or not the claim ultimately succeeded, it should not have been struck.

One commentator points out that recognizing this claim in negligence was probably the "most puzzling part of the judgment," as "surely there was no negligence here; there was an intentional decision [on the part] of the government not to implement a judicial decree" (Lewis Klar's posting on the case, University of Alberta Law Faculty blog, July 11, 2008). The other difficulty with the ruling is that the ostensibly neat division between policy and operational decisions is not so easy to apply in real life. Moreover, the decision not to implement a judicial decision is arguably itself a form of policy decision.

Perhaps more light will be shed on the matter when the merits of the case are addressed—the Supreme Court itself declined to comment "on whether the evidence and the applicable law will in fact establish a claim for negligence...at the time of trial." ML

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