

2016 Looms Large for Municipalities

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Editor's Note: This article was submitted before the untimely death of Justice Antonin Scalia on February 13, 2016. it is unclear what cases, if any, the Supreme Court may choose to defer deciding until a full complement of Justices is again seated.

It is unusual for the Supreme Court to accept many cases at once, except at the end and the beginning of the Term. But on the Friday before and the Tuesday after Martin Luther King, Jr. Day (January 15 and 19, 2016) the Court granted *certiorari* for a total of nine cases, including a challenge to the President's executive order allowing undocumented parents of children who are citizens to remain in the United States.

Here is a brief summary of the cases already accepted by the Court which are relevant to state and local government:

United States v. Texas

Various states have challenged the Deferred Action for Parents of Americans (DAPA) program that allows certain undocumented immigrants who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents to lawfully stay and work temporarily in the United States. The United States argues that the states lack "standing" to challenge the DAPA program. The Fifth Circuit concluded that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing.

States also challenged the DAPA program as violating the Administrative Procedures Act (APA) notice-and-comment requirement and claim it is arbitrary and capricious in violation of the APA. The lower court concluded the states were likely to succeed on both claims because the DAPA is a substantive rule and it is "foreclosed by Congress's careful plan" in the Immigration Naturalization Act. The states also argue the DAPA violates the Constitution's Take Care Clause because it is contrary to federal law; the President is failing to "take care" that federal law is followed.

Manuel v. City of Joliet

May federal malicious prosecution claims be brought under the *Fourth* Amendment? In 1994 in *Albright v. Oliver* the Supreme Court held that they may not be brought under the *Fourteenth* Amendment. While numerous federal circuits have held that federal malicious prosecution claims are viable under the Fourth Amendment, the Seventh Circuit disagrees. In this case a lab report cleared Elijah Manuel of possessing ecstasy but charges against him were not dismissed for over a month.

Murr v. Wisconsin

This case involves a possible taking. The Murrs owned contiguous lots which together were just shy of an acre. An ordinance prohibited the individual development or sale of adjacent lots under common ownership that total less than an acre. The Murrs wanted to use or sell the lots separately. They claim the ordinance resulted in an unconstitutional uncompensated taking. To determine whether a taking occurred they argue each plot should be looked at separately.

McDonnell v. United States

A jury found former Virginia Governor Bob McDonnell guilty of violating federal fraud statutes. He was accused of having accepted money and lavish gifts in exchange for helping a company secure university testing for a dietary supplement. McDonnell claims he didn't violate the statutes because he didn't engage in "official acts" to help the company. He merely extended to it "routine political courtesies: arranging meetings, asking questions, and attending events." If "official acts" includes such "routine political courtesies," McDonnell argues the federal statutes are unconstitutional.

Trinity Lutheran Church of Columbia v. Pauley

The issue in this case is whether Missouri's "super-Establishment Clause" trumps the federal Free Exercise of Religion Clause. Missouri refused to give Trinity Church preschool a grant to purchase recycled tires to resurface its playground because Missouri's constitution prohibits aid directly or indirectly to churches. In its 2004 opinion in *Locke v. Davey* the Supreme Court held that Washington State's "super-Establishment Clause" prohibiting post-secondary students from using public scholarships to receive a degree in theology did not violate the federal Free Exercise Clause. This case gives the Court an opportunity to expand or limit *Locke v. Davey* outside of the context of state aid for training clergy.

United States v. Texas will be heard on March 2, 2016 and decided by the end of June. Oral argument will be held next Term in some of the other cases accepted mid-January. ML