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Supreme Court Update

Supreme Court Midterm Summary for Local Governments 2016

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By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

The State and Local Legal Center (SLLC) files Supreme Court amicus curiae *briefs on behalf of the Big Seven national organizations representing state and local governments.*

*Indicates a case where the SLLC has filed an *amicus* brief.

"Big" Cases

In *Friedrichs v. California Teachers Association* the Court issued a non-precedential 4-4 opinion affirming by an equally divided Court the lower court's decision to not overrule *Abood v. Detroit Board of Education* (1977). In *Abood* the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. The rationale for an agency fee is that the union may not discriminate between members and nonmembers in performing these functions. So no free-riders are allowed. In two recent cases, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014), in 5-4 opinions written by Justice Alito and joined by the other conservative Justices (including Justice Scalia and Justice Kennedy), the Court was very critical of *Abood*. The Court heard oral argument in this case in January before Justice Scalia died, and the five more conservative Justices seemed poised to overrule *Abood*. Justice Scalia, who ultimately didn't participate in this case, likely would have voted to overrule *Abood*.

In *Reynold v. Sims* (1964) the Court established the principle of "one-person, one-vote" requiring state legislative districts to be apportioned equally. The question in *Evenwel v. Abbott* is what population is relevant—total population or voter-eligible population. The maximum total-population deviation between Texas Senate districts was about 8 percent; the maximum eligible-voters deviation between districts exceeded 40 percent. The unanimous opinion concluding Texas may redistrict using total population is "based on constitutional history, this Court's decisions, and longstanding practice." Section 2 of the 14th Amendment explicitly requires that

the U.S House of Representatives be apportioned based on total population. “It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.” In no previous cases alleging a state or local government failed to comply with “one-person, one-vote” had the Court determined if a deviation was permissible based on eligible- or registered-voter data. And states and local governments redistricting based on total population is a settled practice.

In *United States v. Texas* the Court will decide whether the Deferred Action for Parents of Americans (DAPA) program violates federal law or is unconstitutional. DAPA 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 DAPA is a substantive rule and it is “foreclosed by Congress’s careful plan” in the Immigration Nationality Act. The Court has also agreed to decide whether 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.

For the second time the Court has agreed to decide whether the University of Texas at Austin’s race-conscious admissions policy is unconstitutional in *Fisher v. University of Texas at Austin*. Per Texas’s Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, which fills about 80 percent of the class. Unless an applicant has an “exceptionally high Academic Index,” he or she will be evaluated through a holistic review where race is one of a number of factors. The Court has held that the use of race in college admissions is constitutional if it is used to further the compelling government interest of diversity and is narrowly tailored. In *Fisher I* the Court held that the Fifth Circuit, which upheld UT Austin’s admissions policy, should not defer to UT Austin’s argument that its use of race is narrowly tailored. When the Fifth Circuit relooked at UT Austin’s admissions policy it again concluded that it is narrowly tailored. The Top Ten Percent Plan works well at increasing minority student enrollment because Texas schools are so segregated. But a number of well-qualified students are excluded—specifically minority students who performed well at majority-white schools but aren’t in the top ten percent of their class. If race wasn’t considered during holistic review almost every student admitted would be white because of the test score gap between white and minority students. And as a result of holistic review a much higher percent of white students are admitted, but generally between 25-30 percent of the overall number of black and Hispanic students are admitted through holistic review.

Fourth Amendment

In *Missouri v. McNeely* (2013) the Court held that police generally have to obtain a warrant to conduct a blood alcohol content (BAC) test. So the argument goes, it is unconstitutional to criminalize the *refusal* to take a BAC test if a warrant was required to conduct the test but not obtained. The three decisions that the Court has agreed to review all upheld the state statutes. In *Bernard v. Minnesota** the Minnesota Supreme Court held that the warrantless search of Bernard's breath was constitutional as a search incident to a lawful arrest. In *Birchfield v. North Dakota** the North Dakota Supreme Court concluded that because Birchfield wasn't tested there was no search so there was no Fourth Amendment violation. In *Beylund v. Levi** Beylund argued that the test imposed an unconstitutional condition. The North Dakota Supreme Court concluded test refusal statutes are reasonable because "a licensed driver has a diminished expectation of privacy with respect to the enforcement of drunk driving laws, and our implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement to submit to a chemical test."

A police officer stopped Edward Streiff as he was leaving a house where police suspected drugs were being sold. Utah concedes that the stop was unlawful. The officer called dispatch to run Streiff's identification. Streiff had an outstanding warrant so the officer searched him incident to a lawful arrest and found drugs. The issue in *Utah v. Strieff* is whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful. The exclusionary rule suppresses evidence obtained in violation of the Constitution. Per the "attenuation" exception, the Court has held that the taint of an initial, unlawful detention may be dissipated by an intervening circumstance. The Utah Supreme Court rejected the argument that the attenuation exception applies to the discovery of a warrant following an illegal stop. In all previous Supreme Court cases applying the attenuation exception the attenuating event was a "subsequent, intervening act of a defendant's free will"—a voluntary confession (following an illegal arrest).

Employment

In *Heffernan v. City of Paterson, New Jersey** Officer Heffernan was assigned to a detail in the police chief's office. He was demoted after he was seen picking up a campaign sign for the current police chief's opponent. The sign wasn't for himself; it was for his bedridden mother. Officer Heffernan sought to bring a lawsuit claiming that he was retaliated against based on the City's *perception* he was exercising his First Amendment free association rights. He pointed to lower court precedent holding that public employees may bring First Amendment retaliation claims if an adverse employment action is taken because they remain politically neutral or silent. The Third Circuit concluded Heffernan could not bring a perceived free-association claim because he wasn't retaliated against for "taking a stand of calculated neutrality." Instead, he was demoted on a "factually incorrect basis."

In *CRST Van Expedited v. EEOC* the Court will decide whether an employer is a prevailing party, eligible to recover reasonable attorney's fees in frivolous cases, where a court dismissed a Title VII case because the Equal Employment Opportunity Commission (EEOC) failed to meet its pre-lawsuit obligations. The district court awarded CRST over $4.5 million in attorney's fees and costs. EEOC objected claiming that CRST wasn't a prevailing party with respect to claims

dismissed because the EEOC failed to investigate, find reasonable cause Title VII was violated, and conciliate, so the district court made no ruling on the merits. According to the Eighth Circuit, to be a ruling on the merits the pre-lawsuit obligations the EEOC failed to meet would have to be elements of the hostile work environment lawsuit as opposed to "nonjurisdicational precondition[s] to filing suit." The Eighth Circuit concluded that EEOC's pre-suit obligations weren't elements of the lawsuit. Finding reasonable cause and attempting conciliation are required before the EEOC files *any* lawsuit, not just sexual harassment lawsuits; the Eighth Circuit had never labeled these requirements as "elements" of a Title VII claim; and pre-suit obligations don't distinguish between employers who have violated Title VII and those who have not.

The issue the Court will decide in *Green v. Donahoe* is whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation. On December 16, 2009, Postmaster Marvin Green signed a settlement agreement that he would resign and use accrued leave to receive pay until March 31, 2010. Then he would either retire or accept a position for significantly less pay about 300 miles away. On February 9, 2010, he submitted his retirement papers. On March 22, 2010, he contacted an equal employment opportunity (EEO) counselor about being constructively discharged in violation of Title VII. Federal employees must contact an EEO counselor about a discrimination charge within 45 days. The Tenth Circuit held that Green had 45 days from the last alleged act of discrimination (here December 16) not from when he resigned, to contact the EEO office. The regulation which states federal employees "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" focus on discriminatory acts.

In *James v. City of Boise* the Court reversed the Idaho Supreme Court's refusal to follow Supreme Court precedent. Per 42 U.S.C. §1988 courts have discretion to grant attorney's fees to prevailing parties in civil right lawsuits filed under 42 U.S.C. §1983. In *Hughes v. Rowe* (1980) the Court interpreted §1988 to permit prevailing defendants to only recover in suits if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." The Idaho Supreme Court concluded it was not bound by *Hughes* and awarded attorney's fees to a prevailing defendant without first determining whether the plaintiff's lawsuit was frivolous. The Court reversed the Idaho Supreme Court's decision reminding it that it is bound by the Supreme Court's interpretation of federal law.

Civil Procedure

In *Franchise Tax Board of California v. Hyatt** the Court may overrule *Nevada v. Hall* (1979), holding that a state may be sued in another state's court without consent. If it doesn't, the Court will decide whether states must extend the same immunities that apply to them to foreign state and local governments sued in their state courts. The Franchise Tax Board (FTB) of California concluded that Gilbert Hyatt didn't relocate to Nevada when his tax returns indicated he did and assessed him $10.5 million in taxes and interest. Hyatt sued FTB in Nevada for fraud among

other claims. In *Franchise Tax Board of California v. Hyatt* (2003) the Supreme Court held that the Constitution's Full Faith and Credit Clause does not require Nevada to offer FTB the full immunity that California law provides. A Nevada jury ultimately awarded Hyatt nearly $400 million in damages. The Nevada Supreme Court refused to apply Nevada's statutory cap on damages to Hyatt's fraud claim reasoning that Nevada has a policy interest in ensuring adequate redress for Nevada citizens that overrides providing FTB the statutory cap because California operates outside the control of Nevada.

To bring a lawsuit in federal court a plaintiff must be injured to have "standing" per Article III of the U.S. Constitution. But what if Congress allows plaintiffs who have suffered no concrete harm to sue based upon a mere violation of a statute? The Court will decide whether such plaintiffs have Article III standing in *Spokeo v. Robins*. Thomas Robins sued a website operator, Spokoe, for willfully violating the Fair Credit Reporting Act (FCRA) by publishing inaccurate personal information about him. The Ninth Circuit concluded that Robins had Article III standing to sue Spokoe in federal court though his only harms were anxiety and possible lost employment prospects. Robins had standing because the FCRA does not require a showing of actual harm when a plaintiff sues for willful violations. If Robbins wins, state and local governments may be sued in federal court under the Fair Housing Act, the Americans with Disabilities Act, and the Driver's Privacy Protection Act even if the plaintiffs are unharmed.

In *Tyson Foods v. Bouaphakeo* the Court held 6-2 that pork processing employees could bring a collective (class) action lawsuit using "representative evidence" put together by an industrial relations expert averaging donning and doffing time by position based on 744 videotaped observations. If each class member could have relied on a representative sample to establish liability in an individual lawsuit that sample may be relied on to prove class wide liability. This is the reason the Court opined that the use of a representative sample is acceptable here: "[i]n this suit [the employees] sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the] study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing." The Court also stated that while the question of whether uninjured class members may receive damages is one of "great importance," it is not fairly presented in this case because the damages award has not yet been disbursed.

In *Dollar General Corporation v. Mississippi Band of Choctaw Indians* John Doe, a thirteen-year-old tribe member, alleges that his supervisor sexually molested him while he was working as part of a job training program at a Dollar General located on a reservation. Doe sued Dollar General in tribal court alleging a variety of torts including negligent hiring, training, and supervision. In *Montana v. United States* (1981) the Court held that generally nonmembers may not be sued in tribal court except that "tribe[s] may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing." The question in this case is whether "other means" includes suing nonmembers for civil tort claims in tribal court. The lower court determined that

the tribal court had jurisdiction looking only at whether there was a commercial relationship between Dollar General and the tribe and a nexus between Dollar General's participation in the job training program and Doe's tort claim. The Fifth Circuit concluded that even an unpaid internship creates a commercial relationship. As for a nexus the court reasoned: "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business."

Miscellaneous

The issue in *U.S. Army Corp of Engineers v. Hawkes** is whether a court may review an Army Corp of Engineers "jurisdictional determination" (JD) that property contains "waters of the United States" per the Clean Water Act. The Eighth Circuit concluded that Hawkes may challenge the JD in court immediately and not wait until the permit is denied to sue. Per the Administrative Procedures Act, judicial review may be sought from final agency actions. Per *Bennett v. Spear* (1997) agency action is final when it marks the consummation of the agency's decision making process and when legal consequences flow from the action. A JD is the consummation of the Corps decision making process because the Corp describes an approved JD as a "definitive, official determination" that there are or aren't waters of the United States on a site. "Rights or obligations have been determined" and "legal consequences flow" from a JD because Hawkes' two choices following it are cost prohibitive. It can complete the permitting process which will be costly, time consuming, and--in this case the Corp already told them--futile. Or it may proceed without a permit and risk an enforcement action. But doing so after obtaining an unfavorable JD could expose Hawkes to criminal monetary penalties or imprisonment for knowingly violating the Clean Water Act.

In *Mullenix v. Luna* Israel Leija Jr. led officers on an 18-minute chase at speeds between 85 and 110 miles an hour after officers tried to arrest him. Leija called police twice saying he had a gun and would shoot police officers if they did not abandon their pursuit. While officers set up spike strips under an overpass, Officer Mullenix asked his supervisor via dispatch if his supervisor thought shooting at Leija's car to disable it was "worth doing." His supervisor told Officer Mullenix to wait to see if the spike strips worked. Officer Mullenix then learned an officer was in harm's way from Leija beneath the overpass. Officer Mullenix shot at Leija's vehicle six times killing him but not disabling his vehicle. Leija's estate sued Officer Mullenix claiming that he violated the Fourth Amendment by using excessive force. The Court concluded Officer Mullenix should be granted qualified immunity stating: "[g]iven Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did."

In a 6-2 decision in *Luis v. United States** the Court ruled that the Sixth Amendment right to counsel includes allowing a criminal defendant to use *untainted* assets to hire an attorney, rather than freezing them for forfeiture to the government after conviction. Sila Luis was charges with fraudulently obtaining nearly $45 million in Medicare funds. She claimed she has a Sixth Amendment right to use the untainted portion of the $2 million in assets remaining in her possession to hire an attorney of her choice. The Court agreed in a plurality opinion. It distinguished two previous cases where it held that a post-conviction defendant (*Caplin &*

Drysdale v. United States (1989)) and a pre-trial defendant (*United States v. Monsanto* (1989)) could not use *tainted* assets to pay an attorney. "The distinction between [tainted and untainted assets] is…an important one, not a technicality. It is the difference between what is yours and what is mine." The Court then applied a balancing test weighing the defendant's "fundamental" right to assistance of counsel with the government's interest in punishment through criminal forfeiture and victims' interest in restitution. The balance favored the interest of the accused because the interests in criminal forfeiture and restitution aren't constitutionally protected.

In a *per curiam* (unauthored) opinion, which concurring Justices Alito and Thomas called "grudging," the Court ordered the Supreme Judicial Court of Massachusetts to decide again whether Massachusetts's stun gun ban is constitutional. Currently eight states and a handful of cities and counties ban stun guns. The highest state court in Massachusetts held that the Second Amendment doesn't protect stun guns because they weren't in common use at the time the Second Amendment was enacted, they are "unusual" as "a thoroughly modern invention," and they aren't readily adaptable for use in the military. In *District of Columbia v. Heller* (2008), the Court ruled that the Second Amendment provides an individual the right to possess a firearm to use for lawful purposes, including for self-defense, in the home. In *Heller* the Court concluded that the Second Amendment extends to arms "even those that were not in existence at the time of the founding." In its two page decision in *Caetano v. Massachusetts* the Court notes that the Supreme Judicial Court of Massachusetts ignores this "clear statement" in *Heller*. A gun can't be unprotected as "unusual" just because it is a modern invention for the same reason. And *Heller* "rejected the proposition 'that only those weapons useful in warfare are protected.'"

While in office former Virginia Governor Bob McDonnell accepted more than $175,000 in money and luxury goods from Jonnie Williams. Williams wanted a Virginia state university to test a dietary supplement his company, Star, had developed. A jury found McDonnell guilty of violating a number of federal bribery statutes. In *McDonnell v. United States* McDonnell essentially claims he did not do enough to help Williams to be guilty of bribery. To violate the federal bribery statutes at issue in this case, a government must agree to take "official action" in exchange for something of value. McDonnell argues that "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power. And he argues that if these statutes aren't so limited they are unconstitutional. More specifically, he argues the "provision of mere 'access' or conferral of amorphous reputational benefits"—which is all he did—isn't "official action." And if it is, "every elected official and campaign contributor [will be] a target for investigation and indictment." The Fourth Circuit affirmed a jury verdict for bribery against McDonnell. "The evidence at trial made clear that Star executives wanted [McDonnell] to use his prominence and influence to the company's advantage. To the extent, then, that [McDonnell] made any 'decision' or took any 'action' on these matters, the federal bribery laws would hold that decision or action to be 'official.'"

The question in *Universal Health Services v. Escobar* is whether a claim for reimbursement from the federal government containing no affirmative misstatements can be deemed false per the False Claims Act because the claimant failed to disclose that it has violated a requirement of the federal program. Yarushka Rivera's parents argued that Arbour Counseling Services Medicaid

reimbursement claims for Rivera's care were false because Arbour wasn't complying with program requirements. Arbour argues that only factually false FCA claims should be possible--for example claims that incorrectly describe the goods or services provided or seek reimbursement for goods or services that were not provided. The First Circuit disagreed adopting the "implied certification" theory. It noted that "each time it submitted a claim, Arbour implicitly communicated that it had conformed to the relevant program requirements, such that it was entitled to payment." Arbour further argues that if the Court does recognize the implied-certification theory "its application must be limited to situations in which a defendant requests payment in violation of an expressly designated precondition to payment." The First Circuit again disagreed stating that a material condition of payment "need not be 'expressly designated'" as such in any statute, regulation, or contract provision.

In *Solem v. Bartlett* (1984) the Court articulated a three-part test to determine if a reservation has been diminished. Courts must look at "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act." In *Nebraska v. Parker* the Court concluded the Omaha Indian Reservation hadn't been diminished where only the third factor indicated diminishment. An 1882 Act of Congress allowed part of the Omaha Indian Reservation to be sold to non-Indian settlers. A settler bought the land the Village of Pender is located on per the 1882 Act. In 2006 the tribe sought to subject retailers in Pender to its newly amended Beverage Control Ordinance. In this unanimous opinion the Court had little trouble concluding that the first two factors didn't indicate diminishment. The Court acknowledged that the third factor indicated diminishment. Only two percent of Omaha tribal members live on the disputed land and the tribe doesn't enforce any of its regulations or offer any services on the disputed land. "But this Court has never relied solely on this third consideration to find diminishment."

In an 8-2 decision in *FERC v. Electric Power Supply Association* the Court ruled that the Federal Energy Regulatory Commission (FERC) has the authority to regulate wholesale "demand response" and that demand response bidders may receive the same compensation as electricity producers. "Demand response" is a practice in which operators in wholesale markets pay electricity consumers to not use power at certain times. Per the Federal Power Act, FERC regulates wholesale rates of electricity but states regulate retail rates. Electric Power Supply Association (EPSA) argued that through demand response FERC is "effectively" setting retail prices because when a consumer is deciding whether to buy electricity at retail the consumer will now consider both the cost of making the purchase *and* the cost of forgoing a demand response payment. The Court disagreed stating that "the rate is what it is": "the price paid, not the price paid plus the cost of a foregone economic opportunity." No matter what they bid, successful demand response bidders receive the wholesale rate. EPSA also argued that demand response bidders are receiving a "double-payment" and that they should only receive the wholesale price less the savings they net by not buying electricity on the retail market. FERC reasoned that demand response bidders should receive the same compensation as electricity generators because they are providing the same value. The Court agreed concluding that FERC's judgment wasn't "arbitrary and capricious" because regulating energy is technical and FERC provided reasons supporting its position and responded to EPSA's proposed alternative.