International Municipal Lawyers Association

2017 Mid-Year Seminar

Washington D.C.

Friday, April 21, 2017

Supreme Court Update

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

Supreme Court Midterm Review for Local Governments 2017

April 2017

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 or will file an *amicus* brief.

Police/Qualified Immunity

It is undisputed that police officers used reasonable force when they shot Angel Mendez. As officers entered, unannounced, the shack where Mendez was living they saw a silhouette of Mendez pointing what looked like a rifle at them. Yet, the Ninth Circuit awarded him and his wife damages because the officers didn't have a warrant to search the shack thereby "provoking" Mendez. In *Los Angeles County v. Mendez** the Supreme Court must decide whether to accept or reject the Ninth Circuit's "provocation" rule. Per this rule, "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Mendezes also argue that putting the provocation theory aside, the officers are liable in this case because their unconstitutional entry "proximately caused" them to shoot Mendez. Many Americans own guns. So, it is reasonably foreseeable that if officers barge into a shack unannounced the person in the shack may be holding a gun.

In *Manuel v. City of Joliet** the Supreme Court held 6-2 that even after "legal process" (appearing before a judge) has occurred a person may bring a Fourth Amendment claim challenging pretrial detention. Elijah Manuel was arrested and charged with possession of a controlled substance even though a field test and a lab test indicated his pills weren't illegal drugs. A county court judge further detained Manuel based on a complaint inaccurately reporting the results of the field and lab tests. Forty-eight days later Manuel was released when another

laboratory test cleared him. Manuel brought an unlawful detention case under the Fourth Amendment. The Seventh Circuit held that such a case had to be brought under the Due Process Clause which Manuel failed to do. Justice Kagan explains why pretrial detention after legal process can be challenged under the Fourth Amendment: "The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause."

United States Border Patrol Agent Jesus Mesa, Jr., shot and killed Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, who was standing on the Mexico side of the U.S./Mexico border. At the time of the shooting Agent Mesa didn't know that Hernandez was a Mexican citizen. One question in *Mesa v. Hernandez* is whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident. The Fifth Circuit granted Agent Mesa qualified immunity based on the fact that Hernandez was a Mexican citizen even though Agent Mesa didn't know that at the time of the shooting. A second question this case is whether Hernandez has a Fourth Amendment right to be free from excessive force even though he was a Mexican citizen shot on Mexican soil. The Fifth Circuit relied on a 1990 Supreme Court case *United States v. Verdugo-Urquidez* to reach the conclusion Hernandez has no such right. Hernandez argues the Supreme Court should rely on the more recent *Boumediene v. Bush* (2008). In this case the Supreme Court "held that 'de jure sovereignty' is not and has never been 'the only relevant consideration in determining the geographic reach of the Constitution' because 'questions of extraterritoriality turn on objective factors and practical concerns, not formalism.'"

In *Ziglar v. Turkmen*, *Ashcroft v. Turkmen*, and *Hasty v. Turkmen*, a number of "out-of-status" aliens were arrested and detained on immigration charges shortly after 9/11. They claim they were treated in a "discriminatory and punitive" manner while confined and detained long after it was clear they were never involved in terrorist activities. They have sued former Attorney General John Ashcroft, former Director of the Federal Bureau of Investigation Robert Mueller, former Commissioner of the Immigration and Naturalization Service, James Ziglar, and two wardens and an assistant warden at the federal detention center where they were held. The detainees brought three claims: (1) substantive due process (confinement conditions failed to meet due process); (2) equal protection (detainees were confined to these conditions because of their race, religion, etc.); and (3) conspiracy under 42 U.S.C. § 1985(3) (government officials conspired together to violate equal protection rights of the detainees). The Second Circuit denied

qualified immunity to all of the government officials on all three of these claims. The Supreme Court has agreed to review the Second Circuit decisions. All of the government officials make the same argument regarding § 1985(3). Previously, the Second Circuit had not ruled whether § 1985(3) applied to federal officials. So they argue, how could they have violated "clearly established" law? Regarding the first and second claim, Zigler criticizes the Second Circuit for not considering the 9/11 context in the decision to detain the Respondents. Similarly, Ashcroft and Mueller criticize the Second Circuit for viewing Respondents as "ordinary civil detainees" or "pretrial detainee[s]" instead of as persons "legally arrested and detained in conjunction with the September 11 investigation." Finally, the wardens and associate warden claim that no clearly established law gave them authority to "unilaterally overrule the FBI's terrorism designations and place respondents in less restrictive condition."

In *White v. Pauly* police officers went to Daniel Pauly's house to get his side of the story that he was drunk driving. Daniel and his brother Samuel claim the officers stated they were coming in the house but failed to identify themselves as police officers. Officer Ray White arrived after the officers (inadequately) announced themselves. He hide behind a stone wall after hearing one of the brothers say "we have guns." Daniel fired shots and Samuel pointed a gun at another officer. Officer White shot and killed Samuel. The Pauly brothers claim that Officer White used excessive force in violation of the Fourth Amendment and should be denied qualified immunity. The Supreme Court concluded that Officer White violated no clearly established law in this case. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."

First Amendment

The issue in *Packingham v. North Carolina** is whether a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, violates the First Amendment. The North Carolina Supreme Court held that North Carolina's law is constitutional "in all respects." The court first concluded that North Carolina's law regulates "conduct" and not "speech," "specifically the ability of registered sex offenders to access certain carefully-defined Web sites." The court then concluded that the statute is a "content-neutral" regulation because it "imposed a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites." Finally, the North Carolina Supreme Court concluded the statute was narrowly tailored to prohibit registered sex offenders from accessing websites where they could gather information about minors. Registered sex offenders could still use websites "exclusively devoted to speech" including instant messaging services and chat rooms, websites requiring no more than an a user name and email address to access content, and websites where users must be at least 18 to maintain a profile.

The question the Supreme Court will decide in *Expressions Hair Design v. Schneiderman** is whether state "no-surcharge" laws that prohibit vendors from charging more to credit-card customers but allows them to charge less to cash customers violate the First Amendment. Expressions Hair Design would like to charge three percent more to credit card customers for its goods and services but is prohibited from doing so by New York's "no-surcharge" law, Section 518. Expressions argues that Section 518 regulates speech in violation of the First Amendment. Merchants are allowed to characterize a price difference as a "cash discount" but not as a "credit-card surcharge." The Second Circuit disagreed concluding that the terms "cash discount" and "credit-card surcharge" are not mere labels. Section 518 regulates conduct and not speech—it prohibits a vendor from charging credit-card customers more than the sticker price.

The issue in *Lee v. Tam* is whether Section 2(a) of the Lanham Act, which bars the Patent and Trademark Office (PTO) from registering scandalous, immoral, or disparaging marks, violates the First Amendment. The PTO refused to register the band name The Slants finding it likely disparaging to persons of Asian descent. The Federal Circuit ruled Section 2(a) is unconstitutional. Among other arguments, the court rejected the PTO's argument that trademark registration and the "accoutrements of registration" amount to government speech. The court distinguished the Supreme Court's recent decision in *Walker v. Texas Division, Sons of Confederate Veterans* (2015), where the Court concluded that specialty license plates were government speech, even though a state law allowed individuals, organizations, and nonprofit groups to request certain designs. "There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government." Relatedly, the Federal Circuit rejected the PTO's argument that trademark registration is a form of government subsidy that the government may refuse to extend where it disapproves of a mark's message. "[T]rademark registration is not a program through which the government is seeking to get its message out through recipients of funding (direct or indirect)."

In *Trinity Lutheran Church of Columbia v. Pauley* the Supreme Court will decide whether Missouri can refuse to allow a religious preschool to receive a state grant to resurface its playground based on Missouri's "super-Establishment Clause." The Missouri Department of Natural Resources (DNR) offers grants to "qualifying organizations" to purchase recycled tires to resurface playgrounds. The DNR refused to give a grant to Trinity Church's preschool because Missouri's constitution prohibits providing state aid directly or indirectly to churches. Trinity Church argues that excluding it from an "otherwise neutral and secular aid program" violates the federal constitution's Free Exercise and Equal Protection Clauses, which Missouri's "super-Establishment Clause" may not trump. In *Locke v. Davey* (2004) the Supreme Court upheld Washington State's "super-Establishment Clause," which prohibits post-secondary students from using public scholarships to receive a degree in theology. The lower court concluded *Locke* applies in this case where: "Trinity Church seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion.'"

Miscellaneous

The issue in *Wells Fargo v. City of Miami** and *Bank of America v. City of Miami** is whether Miami has statutory standing to sue banks under the Fair Housing Act (FHA) for economic harm caused to the City by discriminatory lending practices. The FHA allows "aggrieved person[s]" to sue. The banks argue that in *Thompson v. North American Stainless* (2011), the Supreme Court defined "aggrieved person," under another federal statute, to require that a plaintiff fall within the zone of interests protected by the statute and have injuries proximately caused by the statutory violation. Unsurprisingly, the banks argue that the City doesn't fall within the zone of interests protected by the FHA and that the banks' conduct didn't cause economic injury to the City. The Eleventh Circuit concluded Miami had statutory standing relying on a much older case, *Trafficante v. Metropolitan Life Insurance Company* (1972), where the Supreme Court stated that statutory standing under the Fair Housing Act is "as broad[] as is permitted by Article III of the Constitution." The parties do not dispute that the City of Miami has Article III standing in this case. So if the Court agrees that only Article III standing is required to also have statutory standing Miami has statutory standing to sue the banks.

In *Murr v. Wisconsin** the Supreme Court will decide whether merger provisions in state law and local ordinances, where nonconforming, adjacent lots under common ownership are combined for zoning purposes, may result in the unconstitutional taking of property. The Murrs owned contiguous lots E and F which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. A St. Croix County merger ordinance prohibits the individual development or sale of adjacent lots under common ownership that are less than one acre total. But the ordinance treats commonly owned adjacent lots of less than an acre as a single, buildable lot. The Murrs sought and were denied a variance to separately use or sell lots E and F. They claim the ordinance resulted in an unconstitutional uncompensated taking. The Wisconsin Court of Appeals ruled there was no taking in this case. It looked at the value of lots E and F in combination and determined that the Murrs' property retained significant value despite being merged. A year-round residence could be located on lot E or F or could straddle both lots. And state court precedent indicated that the lots should be considered in combination for purposes of takings analysis.

Steven Sherman sued the Town of Chester alleging an unconstitutional taking as the town refused to approve a subdivision on plots of land Sherman intended to sell to Laroe Estates. Laroe Estates advanced Sherman money for the land in exchange for a mortgage on the property. Sherman defaulted on a loan to a senior mortgage holder who foreclosed on the property. Laroe Estates, claiming to be the owner of the property, sought to "intervene" in the takings lawsuit. The district court concluded that Laroe Estates lacked Article III "standing" under the U.S. Constitution to assert a takings claim against the Town. The question the Supreme Court will decide in *Town of Chester v. Laroe Estates** is whether Laroe Estates may intervene in this case even though it lacks standing. The Second Circuit held, based on prior circuit court precedent,

Laroe Estates does not have to have standing to intervene in this lawsuit where there is a genuine case or controversy between the existing parties.

When the Equal Employment Opportunity Commission (EEOC) investigates allegations of employment discrimination if the employer refuses to provide the information the EEOC requests the EEOC will issue a subpoena demanding the employer produce the information. If the employer refuses to comply with the subpoena the EEOC may ask a court to enforce it. The question in *McLane v. EEOC* is whether a court of appeals should review a district court's decision to quash or enforce an EEOC subpoena de novo ("from the new"), instead of deferring to the lower court's ruling. Of the nine federal circuits to consider this question, only the Ninth Circuit reviews EEOC subpoena requests de novo. In its opinion, even the Ninth Circuit admits it is "unclear" why it does so.

The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States. Per the Act a FCA complaint is kept secret "under seal" until the United States can review it and decide whether it wants to participate in the case. In *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby* the Supreme Court held unanimously that if the seal requirement is violated the complaint doesn't have to be dismissed. State Farm insurance adjusters alleged that after Hurricane Katrina, State Farm instructed them to falsely determine houses and property were damaged by flooding, instead of by wind. State Farm had to pay for wind claims and the federal government had to pay for flooding claims. While the claim was under seal the adjusters' attorney disclosed the FCA complaint to national journalists. While the news outlets issued stories about the fraud allegations they didn't reveal the existence of the FCA complaint. The Court concluded the FCA doesn't require the "harsh" result of dismissal for a seal violation. When the FCA states that a complaint "shall" be kept under seal it specifies no remedy for a seal violation. But in other sections the statute explicitly requires dismissal for other actions of those bringing FCA claims.