

October Term: The Civil Cases

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Revisiting Affirmative Action

Abigail Fisher applied for admission to the University of Texas in 2008. Under Texas' Top Ten Percent Plan, the University accepts the top 10% of graduates from every high school in the state, regardless of the school's academic stature. Remaining University slots are filled based on a combination of factors including the applicant's grades, family circumstances, extracurricular activities and race. Fisher, a white applicant, was not within the top 10% of her class and was not otherwise able to garner an offer of admission. She brought suit, challenging the University's affirmative action policies and alleging discrimination on the basis of race in violation of her Equal Protection rights.

Fisher asked that the court declare the Texas admissions scheme to be in conflict with *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Supreme Court had examined the University of Michigan admissions policy and held that universities may consider race as one factor in a narrowly-tailored admissions program. In the alternative, Fisher sought to have *Grutter* overruled entirely.

The University prevailed at district court and Fisher appealed. Applying strict scrutiny, the Fifth Circuit upheld the University's admissions program in a sharply divided opinion. The Circuit Court prefaced its review by questioning the University's need to use race-based criteria given its ever-increasing minority enrollment under the Top Ten Percent program. The "holistic review" of applicants which *Grutter* authorized as a narrowly-tailored solution to support a compelling state interest in diversity was robustly analyzed. Circuit Judge Garza reluctantly concurred with the majority despite his belief that *Grutter* "represents a digression in the course of constitutional law" and "puts the Supreme Court's imprimatur on ... ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations." (citation omitted).

The case was argued before the Supreme Court on October 10, 2012. The question presented was whether the Texas admissions scheme comported with *Grutter* and other affirmative action precedents. Justices Roberts, Alito and Scalia challenged the Texas program aggressively. They focused not only on the specifics of the University's policy but also on the underlying concept of a 'critical mass' of minority students described in *Grutter* as being necessary to the compelling state interest in a diverse academic community. One of the desired outcomes of *Grutter's* 'critical mass' was that particular minorities did not feel 'isolated'; Justice Roberts queried how one could know when the University had established such an environment.

A recurring theme in the deliberations was that affirmative action in the educational context, even as delimited under *Grutter*, was only to be a temporary rehabilitative mechanism.

The Court's decision in *Fisher* could be limited to an analysis of the University's admission scheme. But the possibility exists that *Grutter* itself could be modified, increasing the scrutiny on affirmative action policies at universities across the country. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

Testing the *Chevron* Standard

In 2010 a trade association of wireless providers (CTIA) petitioned the FCC for an interpretation of various provisions of the Telecommunications Act of 1996 (Act). The Act limits the ability of state and local governments to impede the establishment of cell towers in their communities, and requires that localities "shall act ... within a reasonable period of time" on requests to construct or modify cell towers. 42 U.S.C. § 332(c)(7).

The FCC issued a Declaratory Ruling in response to the CTIA questions. Included in the Declaratory Ruling were specific time frames in which states and localities must respond to wireless facility siting applications: 90 days for collocated facilities and 150 days for all others.

The cities of Arlington and San Antonio, Texas challenged the FCC's unilateral promulgation of the time periods. The Fifth Circuit summarily dismissed the San Antonio complaint because it had not been timely filed, but considered the arguments of San Antonio in its deliberations. The cities' first point was that the FCC had acted in a "rule-making" rather than an "adjudicatory" capacity under the Administrative Procedure Act and therefore should have provided for notice and comment. The Fifth Circuit found that, although there may have been a regulatory character to the FCC action, the failure to require notice and comment was harmless error. The affected jurisdictions were on notice of the action and had in fact commented, and the FCC's 90- and 150-day time frames did not pose a hardship for localities.

The Circuit Court then evaluated whether the two-step analysis under *Chevron U.S.A. Inc. v. NRDC Inc.*, 467 U.S. 837 (1984) should apply: had Congress directly addressed the question at issue; and if not, was the agency's response to the question based on a permissible construction of the statute? While *Chevron* clearly applied where an agency was interpreting a statute it was charged with administering, *Chevron's* applicability was more questionable where the agency was determining its own jurisdiction. The FCC and CTIA argued for application of *Chevron*, while the cities argued for *de novo* consideration of the jurisdictional question.

The Fifth Circuit ultimately applied *Chevron*, noting that the Act was ambiguous regarding the FCC's authority to interpret its own jurisdiction. Under the *Chevron* standard of review, the FCC's promulgation of reasonable time frames was legitimate and the cities' arguments failed. They moved for certiorari.

The Supreme Court consolidated the cases brought by Arlington and San Antonio, with arguments to be heard on January 16, 2013. The question presented is whether *Chevron*

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deference is appropriate in reviewing an agency's determination of its own jurisdiction. Given a split among the circuits on the question (the Third and Tenth Circuits apply *Chevron*, while the Seventh Circuit applies *de novo* review), and in light of the ongoing power struggle between cell tower operators and local jurisdictions, the consequences of this case are very significant.

IMLA and several other national organizations were granted intervenor status in the Fifth Circuit but for tactical reasons did not file briefs. Because of this status, IMLA is a party at the Supreme Court and will be taking the lead in filing a brief as a party with the other intervenors. Paul Clement, a leading Supreme Court advocate, is representing IMLA and the other intervenors pro bono. *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) *cert granted* (U.S. Oct. 5, 2012) (No.11-1545).

If It Floats Like A Boat...

Fane Lozman owned a 57-foot long, two story floating residence that he moored at the Riviera Beach, Florida marina on the Atlantic Intracoastal Waterway. In 2006, the City of Riviera Beach decided to sell the marina to a developer and issued Lozman a notice of eviction. Lozman challenged the development plan. The City's subsequent eviction suit against Lozman was unsuccessful and redevelopment never took place. In 2007, the City Council adopted new rules and regulations for marina users including higher insurance thresholds, a requirement that all moored craft be capable of moving elsewhere in the event of treacherous weather and compliance with the Clean Vessels Act. Lozman and other marina users were advised of the new requirements and requested to sign a new agreement. Lozman did not execute the new agreement and remained at the marina for several more years, during which time he missed one or more marina rent payments.

In 2009, the City filed a two-count *in rem* complaint in admiralty against the floating residence (identified as "Defendant") to foreclose maritime liens for "necessaries" (approximately $3,100 in marina dockage fees, including accrued interest) under 46 U.S.C. § 31342, and for trespass. Defendant was ultimately towed away by the City and sold to pay the outstanding balances.

Lozman claimed that the district court, in granting summary judgment to the City, had incorrectly concluded that his boat was a "vessel" subject to federal admiralty jurisdiction. Defendant had French doors on three sides, floated only a few feet above the waterline and lacked any power or means of movement. On appeal, the Eleventh Circuit affirmed, citing the language of 1 U.S.C. § 3 which sweepingly states that a "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Circuit Court went on to summarize a long line of cases extending "vessel" status to all manner of floating craft, regardless of their use, dimensions, seaworthiness or their lack of navigation or propulsion.

In granting certiorari, the Supreme Court agreed to consider the question of whether a floating structure (indefinitely moored, receiving power and other utilities from shore, and not intended to be used in maritime transportation or commerce) is a "vessel" under 1 U.S.C. § 3, thus triggering federal admiralty jurisdiction.

The case was argued on October 1, 2012 to start the Court's October Term. Much of the discussion focused on the concept of "practical capability" to transport people or things over water. Not all the discourse was solemn; at one point, Justice Kagan posited that "vessel" might include an inner tube with pennies pasted to it. *Lozman v. City of Riviera Beach*, 649 F.3d 1259 (11th Cir. 2011), *cert. granted* (U.S. Feb. 21, 2012) (No. 11-626).

Too Much Water Over the Dam

The question presented in this case was whether a taking occurs under the Fifth Amendment when the federal government causes repeated but temporary flooding of land. Between 1993 and 2000, the Army Corps of Engineers caused major deviations in water release rates from the Clearwater dam on Arkansas' Black River. These actions were taken to alleviate flooding on adjacent farmlands, but also resulted in months of standing water downstream each summer for six consecutive years. Plaintiff Arkansas Fish and Game Commission owned 23,000 acres of land abutting the Black River and lost more than 100,000 trees due to the federally-induced flooding.

The Federal Court of Claims concluded that the government had taken a temporary flow easement over the Commission's land and awarded Arkansas $5.7 million in compensation. The Fifth Circuit reversed, concluding that a property owner could only recover under the Takings Clause if the invasion of property was "permanent or inevitably recurring."

On December 4, 2012 the Supreme Court rendered its decision. Justice Ginsburg, writing for a unanimous court (with the exception of Justice Kagan, who took no part in the case) unequivocally reversed the Court of Appeals and recharacterized a line of Supreme Court cases the lower court had relied upon: "No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case." (citation omitted). In contrast to the Fifth Circuit, Justice Ginsburg discerned a clear and persistent willingness by the Court to recognize a wide range of instances where governmentally-created injuries, even if not permanent, constituted compensable takings. Factors that created a cognizable taking included intentional action by the government, foreseeability of the injury, the investment expectations of the injured party, and the amount of damage sustained. Because the Court of Appeals had based its decision solely on the temporary duration of the injury, issues of foreseeability and quantum of damages were unanswered. The Court remanded the case to the Fifth Circuit for further consideration of these issues. *Arkansas Game and Fish Comm'n v. U.S.*, No. 11-597 (U.S. Dec. 4, 2012). ML

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> have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
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> That is not the country the Framers of our Constitution envisioned." *National Federation of Independent Business et al. v. Sebelius*, 567 U.S. ___, slip opinion at 23, (opinion of Chief Justice Roberts) (2012).

State and local governments can easily argue that Section 6409(a) falls within the preceding analysis, because it compels activity (the approval of modifications of wireless facilities) which might not otherwise occur, *viz.* "a

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