SUPREME COURT CASES AFFECTING LOCAL GOVERNMENT FROM THE 2012 TERM

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CASES DECIDED

Filarsky v. Delia

Facts: Firefighter Nicholas Delia missed three weeks of work, per doctor's orders, after becoming ill while responding to a toxic spill. The City of Rialto was suspicious of Delia's extended absence and hired private investigators to conduct surveillance on Delia. The private investigators observed Delia buying building supplies including insulation, and the City surmised Delia was missing work to do construction at home. The City then hired outside attorney Steve Filarsky to conduct an administrative investigation interview. After Delia refused to agree to produce the insulation, Filarsky ordered Delia to do so, which he did. Delia brought a Section 1983 claim against Filarsky and three fire chiefs claiming that being ordered to produce the materials violated his Fourth and Fourteenth Amendment rights. The Ninth Circuit granted qualified immunity to the fire chiefs concluding that while the order violated the Fourth Amendment, Delia's Fourth Amendment rights weren't clearly established. But the Ninth Circuit denied qualified immunity to Filarsky because he wasn't a City employee, relying on Ninth Circuit precedent.

Issue: Whether an individual hired by the government to do its work is prohibited from seeking qualified immunity solely because he or she does not work for the government full-time or permanently?

Holding: The Court held unanimously that an individual temporarily hired by the government to do its work is eligible for qualified immunity. Justice Roberts, writing for the Court, reasoned that under common law, part-time public servants were common and qualified immunity was granted to them. The Court also discussed a number of policy reasons for why qualified immunity should be granted to private individuals performing occasional services for the government. Some of these reasons include the fact that the "most talented candidates" may decline public assignments if they don't receive qualified immunity, the "distractions that accompany even routine lawsuits," and the difficulty of determining whom is working for the government full-time and permanently.

Significance of the issue: This case is a big win for local government and outside attorneys who represent local government as they will now be eligible to receive qualified immunity just like their in-house counsel counterparts. The SLLC wrote an *amicus* brief in this case, which IMLA joined, informing the Court that local governments frequently hire outside counsel, and outside attorneys are likely to raise their rates or even refuse to represent government altogether if they can be sued for the legal advice they give to government clients on complicated constitutional matters.

Rehberg v. Paulk

Facts: James Paulk, chief investigator in the district attorney's office, investigated faxes Charles Rehberg sent anonymously to several recipients, including management of a hospital, criticizing the hospital.

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Paulk allegedly gave false testimony to a grand jury three times regarding Rehberg assaulting a doctor and making harassing phone calls. All indictments against Rehberg were dismissed. The Eleventh Circuit granted Paulk absolute immunity for his grand jury testimony.

Issue: Whether a witness in a grand jury proceeding is entitled to the same absolute immunity from suit under Section 1983 as a witness who testifies at trial.

Holding: A unanimous Court held that a grand jury witness is entitled to the same absolute immunity as a trial witness. According to the Court, this rule may not be circumvented by a claim that a grand jury witness conspired to present false testimony. The Court, in an opinion written by Justice Alito, concluded that the reasons the Court extended absolute immunity to any claim based on a trial witness' testimony in *Briscoe v. LaHue*, 460 U.S. 325 (1983) apply with "equal force" to grand jury witnesses. In both contexts, without absolute immunity, a witness may not speak freely for fear of retaliatory litigation. In neither contexts is potential civil liability needed to prevent perjury because it is a serious criminal offense. As in *Briscoe,* the Court chose not distinguish between lay witnesses and law enforcement witnesses when granting absolute immunity because police officers testify frequently and "a police officer witness' potential liability, if conditioned on the exoneration of the accused, could influence decisions on appeal and collateral relief." Finally, the Court rejected the argument that grand jury witnesses are "complaining witnesses" who are not shielded by absolute immunity. According to the Court, "complaining witnesses" procure an arrest and initiate a prosecution, not necessarily testify at trial. But if they do, they too cannot be held liable for perjurious trial testimony.

Significance of the issue: It is advantageous for state and local government officials to be granted absolute immunity in any context because then they cannot be sued for money damages. The fact that government officials, without absolute immunity, may be less inclined to be totally truthful when testifying before a grand jury for fear of a lawsuit illustrates local government would be significantly undermined had the Court ruled the other way. The Court's ruling also protects the integrity of the grand jury process. As the Court pointed out, not granting absolute immunity could lead to discovery of grand jury proceedings—which will undermine their secrecy.

Douglas v. Independent Living Center of Southern California

Facts: The California Legislature passed three statutes reducing state Medicaid payments to various providers and placing a limit on state contributions for certain services. Medicaid providers and beneficiaries sued California arguing that the rate reductions were preempted by § (30)(A) of the federal Medicaid statute that discusses state payments. The Ninth Circuit held that plaintiffs could sue California under the Supremacy Clause and that § (30)(A) of Medicaid preempted the state laws. After the Supreme Court heard oral argument in this case, the Centers for Medicare and Medicaid (CMS) approved several of California's statutory amendments to its Medicaid plan, indicating that it did not believe Medicaid preempted California's statutes.

Issue: Whether once CMS has approved state statutes reducing state Medicaid payments, Medicaid providers and beneficiaries may bring a Supremacy Clause action asserting that Medicaid preempts the state statutes.

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Holding: The Supreme Court 5-4 remanded this case to the Ninth Circuit to determine whether a Supremacy Clause claim may proceed in light of CMS's action. The majority of the Court seemed skeptical that the Supremacy Clause provides a cause of action in this case noting that the plaintiffs may now be required to seek review of CMS's decision under the Administrative Procedure Act instead of against California under the Supremacy Clause. The dissent concluded that the Supremacy Clause provides no private right of action to enforce § (30)(A) of the Medicaid statute as the Supremacy Clause is "not a source of any federal rights."

Significance of the issue: The SLLC filed an *amicus* brief in the case arguing for the position adopted by the dissent in this case. At least one significant concern for state and local government following this case is that lower courts and the Supreme Court will allow Supremacy Clause causes of action to be read into other federal statutes.

United State v. Jones

Facts: Following an investigation for narcotic trafficking, the government installed a GPS tracking devise on the undercarriage of the Jeep Antoine Jones drove. The government tracked the vehicle's movement for 28 days and collected over 2,000 pages of data. Jones was charged with a variety of drug-related offenses and sought to suppress evidence obtained through the GPS. The District of Columbia Court of Appeals reversed Jones' conviction holding that warrantless use of a GPS devise violates the Fourth Amendment.

Issue: Whether attaching a GPS device to a vehicle and then using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment.

Holding: Five Justices agree that attaching a GPS device to a vehicle and then using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment. Justice Scalia, writing for the majority, reasoned that "physically occup[ying] private property for the purpose of obtaining information" would have been a search "within the meaning of the Fourth Amendment when it was adopted." Justice Sotomayor wrote separately but joined the majority opinion. She agreed with Scalia that "[w]hen the government physically invades personal property to gather information a search occurs." But she criticized Scalia's trespass test as providing "little guidance" where surveillance occurs without a physical intrusion. Justice Alito, writing for three other Justices, rejected the trespass test and concluded that "long term GPS monitoring in investigations of most offenses impinges on expectations of privacy" and is therefore a search. Justice Sotomayor agreed with Justice Alito's holding too.

Significance of this issue: State and local police officers want to use GPS to track a variety of suspects because it is cheap, easy to use, and it provides a wealth of detailed information about the suspect's whereabouts. If the use of GPS wasn't a search then no warrant, probable cause, or reasonable suspicion would be required, which would make the use of GPS easy. While the Court held that installing and using GPS is a search, it did not hold whether a warrant is required.

Messerschmidt v. Millender

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Facts: After Shelly Kelly told Detective Messerschmidt that her boyfriend, gang member Jerry Bowen, shot at her repeatedly with a particular gun Messerschmidt sought and received a warrant to search Bowen's foster mother's home for firearms, firearm-related materials, and gang-related items. Bowen's foster mother sued Messerschmidt and others under Section 1983 claiming the warrant was unconstitutionally overbroad. The Ninth Circuit agreed and denied Messerschmidt qualified immunity.

Issue: Whether a warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her was so obviously lacking in probable cause that the officers seeking it should be denied qualified immunity?

Holding: Seven Justices agreed that Messerschmidt should receive qualified immunity for seeking a warrant to search for all firearms and firearms-related items, not just the specific firearm used to shoot at Kelly. According to Chief Justice Roberts, writing for the majority, "Evidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned." Regarding the warrant's authorization to search for evidence of gang membership, five Justice agreed that a reasonable officer could have concluded that Bowen's attack on Kelly, in which he became enraged because she called the police, was not motivated by her ending their relationship but instead by a desire to prevent her from disclosing details of his gang activities to the police. And, the fact that Messerschmidt sought and obtained approval for the warrant from a superior and a deputy district attorney before submitting it to the magistrate "provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause."

Significance of the issue: Thousands of warrants are issued every day to state and local police officers. Some are likely better than others. While the qualified immunity determination in this case is pretty fact specific, state and local police will benefit from the Court concluding in this case that even if the warrant was invalid, "it was not so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise."

CASES TO BE DECIDED

Armour v. Indianapolis

Facts: The City of Indianapolis connected properties to its sewer system and required those who benefited to pay about $9,000, which they could pay in full or in installments over up to 30 years. Indianapolis later adopted a new method of financing sewer projects which was cheaper. Simultaneously, Indianapolis decided to forgive outstanding installment payments *but* did not refund any payments to property owners who paid for the sewer improvements in full.

Issue: Whether the Equal Protection Clause prohibits Indianapolis from refusing to refund payments made by homeowners who have paid their assessments in full, while forgiving the obligations of identically situated homeowners who chose to pay over a multi-year installment plan.

Lower court ruling: The Indiana Supreme Court ruled in favor of Indianapolis. The court's opinion contains a number of justifications for its ruling.

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First, the Indiana Supreme Court concluded that Indianapolis had three rational bases for forgiving the debt of installment payers: providing relief to property owners facing financial hardship (who more likely chose to pay in installments); administrative efficiency of not having to maintain a collection system for up to 30 years; and preserving limited resources by not having to pay out a refund.

Second, the Indiana Supreme Court rejected applying *Allegheny Pittsburgh Coal Co. v. Webster County Commission*, 488 U.S. 336 (1989), where the Court held that a county tax assessor violated a taxpayer's equal protection rights by valuing her property based on its purchase price and only making minor assessment adjustments to other property that had not been sold. The county argued the tax scheme was rationally related to assessing properties at their true current market value. The Court, however, concluded the assessments to property that had not sold recently were too small to accomplish this goal. Three years later the Court upheld a very similar tax scheme where the state offered a number of legitimate government interests in taxing newer homeowners more. Simply stated, the Indiana Supreme Court confined *Allegheny Pittsburgh* to its facts.

What the SLLC brief argues: Jon Laramore and Scott Chinn of Faegre Baker Daniels in Indianapolis, Indiana, wrote the SLLC's brief which makes three arguments. First, it argues that courts should be hesitant to second guess state and local government decisions to forgive the debt of citizens particularly where those whose debt is not forgiven got what they paid for. Second, the SLLC's brief argues that Indianapolis's reasons in this case for forgiving the debt of some and not issuing a refund to others—helping poorer residents, preserving government funds, and administrative efficiency—pass rational basis review. Third, the brief argues infrastructure financing is complicated and must be flexible. Invalidating changing to the infrastructure financing scheme in this case might deter other state and local governments from undertaking infrastructure projects that require a change in financing.

Reichle v. Howards

Facts: Mr. Howards accompanied his son to a piano recital at a mall where Vice President Dick Cheney was making an appearance. Mr. Howards was arrested for assault by a number of Secret Service agents after stating in his cell phone that he was going to ask Cheney how many kids he killed today, actually telling Cheney his "policies in Iraq are disgusting," and touching Cheney's shoulder and denying that he did so to the Secret Service agents. Mr. Howards was charged with harassment under state law but was never prosecuted. Mr. Howards sued the Secret Service agents in their official and individual capacities alleging they violated his Fourth Amendment rights by arresting him without probable cause and his First Amendment rights by arresting him in retaliation for his engaging in constitutionally protected speech.

Issues: Whether a First Amendment retaliatory arrest claim can be brought against a police officer even though the officer had probable cause to make the arrest. Whether the Secret Service agents in this case were properly denied absolute and qualified immunity.

Lower court ruling: The Tenth Circuit determined there was probable cause to arrest Mr. Howards, so his Fourth Amendment claim failed. It is a violation of 18 U. S. C. § 1001 to lie to a federal agency, so when Mr. Howards denied touching Cheney to the Secret Service agents he violated this statute.

Two Secret Service agents did not dispute they arrested Mr. Howards in retaliation for his speech to Cheney and on the phone, which was protected by the First Amendment. But the agents claimed

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Howards' First Amendment retaliation claim should be barred because they had probable cause to arrest him for violating 18 U. S. C. § 1001.

The Tenth Circuit held that probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim. The Tenth Circuit rejected extending to retaliatory arrest claims *Hartman v. Moore*, 547 U.S. 250 (2006), where the Court held that the lack of probable cause is a necessary element to prove a retaliatory *prosecution* claim. The Tenth Circuit concluded that the three factors the Supreme Court relied on to bar retaliatory prosecution claims where probable cause is present do not apply to retaliatory arrest claims.

The Tenth Circuit also denied qualified immunity to the two Secret Service agents on the First Amendment retaliation claim despite the fact the officers had probable cause to arrest Mr. Howards for lying to them. A dissenting judge argued that the Secret Service agents should receive qualified immunity in this case because it was not clearly established when the case arose whether probable cause was a bar for First Amendment retaliation arrest cases. *Hartman* had just been decided, and it was unclear whether *Hartman* would be extended to retaliatory arrest cases. Tenth Circuit precedent from the 1990s, not specifically overturned by *Hartman*, held that retaliatory arrest claims were actionable even if probable cause existed. But *Hartman* called into question the continuing viability of that Tenth Circuit precedent. And federal circuits' post-*Hartman* decisions were split over whether *Hartman* applies to retaliatory arrests.

What the SLLC brief argues: The SLLC brief, which IMLA signed onto, argues that the Supreme Court should bar First Amendment retaliatory arrest claims supported by probable cause because retaliatory arrest claims are easy for a citizen to allege and difficult for a police officer to disprove. If such claims aren't barred, state and local police officers may be disinclined to make lawful arrests when a citizen expresses speech protected by the First Amendment, which happens in virtually every arrest. The brief also argues that the agents in this case should be granted qualified immunity because the Supreme Court held in *Hartman v. Moore*, that retaliatory *prosecutions* claims are barred if probable cause supports the prosecution. Until this case, it was unclear whether the Tenth Circuit would apply *Hartman* to retaliatory arrest claims.

Patient Protection and Affordable Care Act Litigation: Medicaid

Facts: The Patient Protection and Affordable Care Act (PPACA) requires states to expand Medicaid eligibility in five ways. By 2020 the federal government will only pay 90% of the increased cost and will never pick up increased administrative expenses. If states do not agree to expand Medicaid they risk losing *all* of their federal Medicaid funding.

Issue: Whether Congress exceeded its Spending Clause authority by requiring states to expand Medicaid coverage or risk losing all federal Medicaid funding.

Lower court ruling: The Eleventh Circuit held that the Medicaid expansion in this case does not violate the "coercion doctrine" for four reasons. First, Congress has repeatedly expanded Medicaid and required states to comply with the new changes or lose all federal funding—without challenge. Second, the federal government will pay for most of the cost of the Medicaid expansion. Third, states have four

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years to decide if they want to get out of Medicaid. Finally, if states don't comply they won't necessarily lose *all* their Medicaid funding.

Significance of this issue: On a practical level this case is significant because a lot of money is at stake. This case is about states complying with new federal requirements regarding Medicaid—a very expensive program—or possibly losing all federal Medicaid funding.

As to the narrow legal issue, this is only the third time the Supreme Court has considered the "coercion doctrine" (most recently 1987; the Court has never found it to actually bar federal legislation). This case provides an opportunity for the Supreme Court to clarify the "coercion doctrine" in a way that may (or may not) be favorable to state and local government. A favorable ruling regarding the "coercion doctrine" could limit the ability of the federal government to use its Spending Clause authority against states in other instances.

Simply stated, per the "coercion doctrine," the federal government can use its spending authority to "pressure" but not "compel" state participation in a federal program. Thus far, the "coercion doctrine" rarely has been successfully used to challenge federal spending power for a few reasons. First, the "coercion doctrine" apparently has been avoided by lower courts because the Supreme Court has not articulated a test or bright-line rule explaining exactly when Congress's use of spending authority becomes a compulsion. Likewise, the Supreme Court applied but rejected the "coercion doctrine," in *South Dakota v. Dole,* 483 U.S. 203 (1987), where South Dakota challenged the withholding of federal highway funds to states who failed to adopt a minimum drinking age of 21, because only 5% of highway funds would be withheld. Lower courts have rejected other cases because the amount of money at stake has not been enough.

While the Eleventh Circuit ruled against the states on this issue the facts of this case are very favorable to the states (at least compared to the facts of *South Dakota v. Dole*). Medicaid is an extremely costly federal program, and under the ACA *all* federal Medicaid funding is conditioned on complying with the new Medicaid requirements, not just additional Medicaid funding to cover the cost of the new requirements.

Patient Protection and Affordable Care Act Litigation: Individual Mandate

Facts: Under the Patient Protection and Affordable Care Act (PPACA) almost all Americans are required to purchase and maintain health insurance or pay a fine.

Issue: Whether the individual mandate to purchase health insurance violates the Commerce Clause.

Lower court ruling: The Eleventh Circuit ruled the individual mandate is unconstitutional for a number of reasons. The reason most relevant to state and local government is that regulating health insurance and health care traditionally has been a state concern.

Significance of this issue: The broad issue in this case is whether this unprecedented expansion of federal power is constitutional. So the argument goes: if the federal government can now regulate "inactivity" (not having health insurance) and force people to purchase health insurance, what can't it do?

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Arizona v. United States

Facts: Arizona's S.B. 1070 addresses state law enforcement related to illegal immigration. Specifically it (1) requires police to determine if an individual has a legal right to be in the United States if the officer has reasonable suspicion of illegality upon making an arrest or a stop; (2) makes it a crime under state law to fail to obtain and carry immigration papers as required by the Immigration Naturalization Act (INA); (3) makes it a misdemeanor for a undocumented immigrant to apply for a job or work in Arizona and; (4) allows police to arrest a person the officer has probable cause to believe has committed a crime that would make the person subject to deportation.

Issue: Whether federal immigration law impliedly preempts the above four provisions of S.B. 1070 on their face.

Lower court ruling: The Ninth Circuit concluded that all of the above provisions of Arizona's S.B. 1070 are preempted by federal immigration law. Regarding police being required to determine if a person is in the United States legally, the Ninth Circuit concluded that the INA allows state and local police to aid in immigration enforcement *only* under the supervision of the Attorney General. Regarding state criminalization of failing to carry immigration papers, the Ninth Circuit concluded this requirement is preempted because Congress that did not provide for state participation in this section of the INA, though it did in other sections of the law. Regarding Arizona criminalizing employment, the Ninth Circuit noted that the INA only sanctions employers. Regarding police officers being allowed to arrest a person who is likely subject to deportation, the Ninth Circuit concluded this section is preempted because "states do not have the inherent authority to enforce the civil provisions of federal immigration law."

Significance of this issue: According to SCOTUSblog, since 2008 the Supreme Court has taken at least 10 preemption cases. This case has been prominent nationally not because of its implications for preemption jurisprudence but because what to do about illegal immigration is a politically divisive question. The argument that what Arizona has tried to do in S.B. 1070 is to compliment a broken system of federal immigration enforcement—while not accepted by the Ninth Circuit—is not an unreasonable one. More importantly, the holding and reasoning of this case likely will be applicable to other state statutory schemes that arguably cooperate with federal statutory schemes.

Florida v. Jardines

Facts: Based on a "crime stoppers" tip that the Jardines were growing marijuana at their house, two detectives brought a drug detection dog up to the front door of the Jardines' house. The dog alerted to the scent of contraband. The detectives then got a search warrant, searched the home, and confirmed marijuana was being grown there.

Issue: Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

Lower court ruling: The Florida Supreme Court held that the dog sniff in this case "is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment," and must be based on probable cause.

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Significance of this issue: State and local police officers routinely use drug dogs to detect drugs. Being able to use them to sniff outside private residences—without probable cause—is advantageous to law enforcement. The U.S. Supreme Court has yet to hold that a dog sniff is a Fourth Amendment search in any of the contexts it has decided (luggage, drug interdiction checkpoint, vehicle exterior during a traffic stop). However, like the Florida Supreme Court, it may view sniffing outside a private home as more intrusive and therefore protected by the Fourth Amendment.

Florida v. Harris

Facts: After county police officer Wheetley noticed during a traffic stop for expired tags that Harris was shaking, breathing rapidly, could not sit still, and had an open beer can in a cup holder, Wheetley deployed his drug detection dog, Aldo. Aldo alerted to the door handle of the driver's side. Wheetley then searched Harris's car and found a variety of ingredients to cook methamphetamine, including pseudoephedrine pills. While Aldo is trained to detect meth, he is not trained to detect alcohol or pseudoephedrine. Wheetley testified that presumably Aldo altered to residual odor of meth on the door handle; Harris told Wheetley that he is addicted to meth and needs it at least every few days.

Issue: Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.

Lower court ruling: The Florida Supreme Court held that to establish probable cause for a search by a trained and certified drug detection dog the state must: explain the dog's training and certification, present records of the dog's successes and failures in the field, explain the significance of any unverified alerts and the dog's ability to detect or distinguish residual odors, and present evidence of the experience and training of the officer handling the dog. Florida claims that these requirements are contrary to the Supreme Court's holdings in *United States v. Place*, 462 U.S. 696 (1983) *Illinois v. Caballes*, 543 U.S. 403 (2005), that an alert by a trained and certified dog, standing alone, provides an officer with probable cause to search a vehicle. The Florida Supreme Court, in reaching its holding, concluded that a dog's reliability cannot be demonstrated by training and certification alone. No uniform training or certification standard exist for single-purpose drug detection dogs (who only detect drugs and do not apprehend them), some dogs and handlers are better than others, and alerts to residual odor are possible.

In this case the court concluded that Wheetley lacked sufficient probable cause to search Harris's car. Among other things, the court found Aldo's field records inadequate, the state failed to present evidence describing the criteria for Aldo's certification, and Wheetley wasn't able to explain how long Aldo could detect residual odor or why residual odor on the door handle provides probable cause for determining drugs would be in the car.

Significance of this issue: State and local police officers routinely use drug detection dogs to determine if there is probable cause for a vehicle search. Providing evidence that a dog is trained and certified is not difficult. Being asked to explain the training and certification and keeping accurate field records of successes and failures and being able to explain them might be difficult and not that helpful. For example, field records can never prove if a dog failed to alert when drugs were in fact present in the car because the officer will not search the car due to the lack of an alert. And officers, like Officer Wheetley in this case, may not have the technical expertise to explain how long dogs can detect residual odors, among other technical questions about drug detection dogs' training and abilities. Under the Florida

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Supreme Court's test it seems likely that more uses of drug detection dogs will be challenged. Because the state has to provide so much evidence related to a drug detection dog, poking holes in that evidence might at least be worth a try. Equally as significantly in this case is that, as the dissent points out, under the majority opinion, police may only use drug detection dogs that "are shown to be virtually infallible." A determination probable cause is that strict of a standard could lead to courts interpreting probable cause more strictly in other contexts.

Lozman v. City of Riviera Beach

Facts: Fane Lozman docked his "floating shack" at a marina owned by the City of Riviera, Florida. The City ultimately changed dockage requirements requiring marina customers to secure and maintain liability insurance and sign a revised dockage agreement. When Lozman failed to comply with the City's new requirements and to pay an outstanding balance the City brought a maritime lien and trespass action against Lozman's "floating shack" and towed it to Miami. The City won before the district court on both claims.

Issue: Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

Lower court ruling: For federal admiralty jurisdiction to arise in this case Lozman's "floating shack" must be a "vessel" as defined by federal law. The Eleventh Circuit defines "vessel" broadly focusing on whether the boat is capable of transportation over water. Even though Lozman's "floating shack" was intended as a residence the court concluded it was a "vessel" because it was "practically capable of transportation over water by means of a tow, despite having no motive or steering power of its own." The Eleventh Circuit acknowledged that the Fifth and Seventh Circuits focus on the intent of the ship owner rather than whether the boat is capable of transportation or movement in determining whether a boat is a "vessel." According to Lozam's *certiorari* petition, confusion in the circuits has arisen because of the following language in *Stewart v. Dutra Construction Company*, 543 U.S. 481 (2005).

> In the course of this uncontroversial holding, this Court stated for the first time in any case that a floating structure is "capable of" maritime transportation so long as "the watercraft's use 'as a means of transportation on water' *is a practical possibility*" instead of "*merely a theoretical one*." *Stewart*, 543 U.S. at 496 (emphasis added). This Court also stated that a "vessel" is "any watercraft capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497.
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> Shortly after *Stewart* was decided, a leading authority on maritime law predicted that "the *Stewart* Court's initiation of a practical vs. theoretical debate is bound to fuel litigation. And the litigation will be messy, because 'merely theoretical' has an unduly manipulable range of meaning." David W. Robertson, *How The Supreme Court's New Definition Of "Vessel" Is Affecting Seaman Status, Admiralty Jurisdiction, And Other Areas of Maritime Law*, 39 J. MAR. L. &COM. 115, 155 (2008).

Significance of this issue: It is difficult to gauge how significant this issue is for state and local government—even government units owning marinas. All other cases on this issue appear to not involve government parties. It is also not obvious why the City wanted to bring federal claims rather

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than state claims in this case. The City's attorney explained to me that it wanted to bring a federal action in this case because under maritime law it could sue **the boat** rather than Lozman. Before this case, Lozman successfully defended eviction in state court claiming the eviction was in retaliation for Lozman suing the City previously. Lozman's attorney sees this as a preemption case where the City of Rivera has taken an unusual position in this case because maritime law is more favorable than state law in obtaining liens. Lozman's attorney thinks that cities typically take the position that "floating residential structures" are not vessels because cities want to regulate them through state and local law.

Salazar v. Patchak, Match-E-Be-Nash-She Wish Band v. Patchak

Facts: The Gun Lake Band Indian tribe wanted to build a casino on land it owned. Per the Indian Gaming Regulatory Act, the Interior Secretary first had to take title to the land in trust. David Patchak sued the Interior Secretary claiming that the casino, which was being built near his home, would destroy the peace and quiet of where he lived.

Issues: Whether an individual who claims he was injured by a gaming facility on Indian trust land has prudential standing to challenge the Secretary of the Interior's taking title of the land. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity applies when the plaintiff does not claim title to the land?

Lower court ruling: The D.C. Court of Appeals held that Patchak had standing to bring his case noting "[h]is stake in opposing the Band's casino is intense and obvious." Under the Quiet Title Act the government has sovereign immunity with respect to disputes over Indian land. According to the court, Patchak did not bring a Quiet Title Act claim because he did not claim title to government land, so the federal government lacks sovereign immunity.

Significance of this issue: Regarding the first question, according to the court, other cases have held that state and local government, but not individuals, have standing to sue to prevent the Secretary of the Interior from taking land into trust for Indian gaming. It does not appear that this lower court precedent on state and municipal authority is being called into question in this case. But if a state or a municipality wants a casino on Indian land it will be to its disadvantage if an individual has standing to sue to prevent the casino. (But, of course, if a state or local government *doesn't* wants a casino on Indian land it will be to its *advantage* if an individual has standing to sue to prevent the casino.) Regarding the second question, in two out of the other four cases considering whether the federal government can be sued under the Quiet Title Act, where the plaintiff is not claiming title to federal government land, a state or local government was the plaintiff. Therefore, state and local government has an interest in the Supreme Court agreeing with the D.C Circuit that Quiet Title Act claims do not include suits where the plaintiff asserts no title to Indian trust land.

Arkansas Game & Fish Commission v. United States

Facts: From 1993-2000 the Army Corps of Engineers allowed interim deviations from the Clearwater Lake Water Control Manual, adopted in 1953. These deviations resulted in a slower release of dammed water. This led to flooding of the Arkansas Game and Fish Commission's Management area for longer periods of time that resulted in the damaging of trees. A Commission expert estimated that half of the damaged trees would die within five years and the other damaged trees were now worth half of their original value. In 2000-2001 the Corps and the Commission jointly determined that releasing certain

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water levels from the dam could potentially damage or destroy the trees. As a result, the Corp declined to permanently deviate from the Water Control Manual.

Issue: Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

Lower court ruling: The Federal Circuit held that flooding must be permanent for a taking to occur, based on Federal Circuit precedent. Both parties agree the Corp's deviations from the 1953 plan were temporary. A dissenting judge stated that Supreme Court precedent holds that if the *injury* caused by flooding is permanent then a taking has occurred.

Significance of this issue: Numerous policy arguments support the determination that the Federal Circuit reached the wrong conclusion in this case. Most obviously, the federal government in this case could indefinitely make interim changes to the Water Control Manual until every tree in the Management area is dead and avoid a taking. However, as the United States points out in its brief in opposition to the *certiorari* petition, in some instances a state or local government will be doing the flooding. In those cases, state and local governments would prefer that only permanent flooding results in a taking. Also, it seems possible that the Court's ruling in this case will have implications beyond flooding takings cases; all of the numerous *certiorari* briefs discuss Supreme Court cases that do not involve the flooding context. A number of Supreme Court taking cases dealing with a variety of interim intrusions involve state and local government doing the intruding.

CASE ACCEPTED AND SETTLED

Manger v. Gallagher

Facts: The City of St. Paul aggressively enforced its local property maintenance code against landlords serving a largely poor, African-American population. The landlords claimed the City's enforcement practices made it more difficult for them to offer affordable housing, which had a disparate impact on racial minorities in violation of the federal Fair Housing Act (FHA).

Issues: (1) Whether disparate impact claims are cognizable under the Fair Housing Act; and, if so (2) what test should be used to analyze them.

Lower court ruling: The Eighth Circuit assumed with no discussion that disparate impact FHA claims are cognizable. While apparently 11 circuits have concluded the same, this question has remained controversial for decades. The City suggests that *Smith v. Jackson*, 544 U.S. 228 (2005), casts doubt on the viability of disparate impact FHA claims. In *Smith* the Court stated that disparate impact claims under Title VII are rooted in Title VII's "adversely affect" language, which is lacking in the FHA. Also a week after *certiorari* was granted in *Manger*, Housing and Urban Development issued proposed regulations stating that disparate impact violations are possible under the FHA.

Under the test adopted by the Eighth Circuit the court concluded that the City's enforcement had a disparate impact on minorities and violated the FHA. According to the City's reply *certiorari* petition, the federal circuits have adopted at least four different disparate impact tests under the FHA.

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Significance of this issue: Looking at this case broadly, a cause of action has been read into a federal statute and has been used against a city. Moreover, a city's enforcement of its local housing code is being used as proof of a violation of federal law.

To the specific issue in this case, the number of disparate impact FHA claims alone indicates that this is a significant issue for cities.

On a practical level it seems likely that other cities have used, or would like to use, the strategy of aggressively enforcing local housing codes to improve the quality of tenant properties in their cities. The liberals on the Supreme Court may perceive this case as an attempt by St. Paul to force poor minorities out of the city; regardless cities should be able to expect that management companies who provide housing to the poor to run their operations in compliance with local law.

Why did St. Paul settle: St. Paul issued a press release explaining why it settled: "The City of Saint Paul, national civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate 'disparate impact' civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act. This would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition."

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