

Supreme Court Midterm for Local Governments 2019-20

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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.

Big cases

In *New York State Rifle & Pistol Association Inc. v. City of New York, New York** the Supreme Court will decide whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel. The Second Circuit held the law is constitutional on all accounts. Applying intermediate scrutiny, the Second Circuit held the rule was "substantially related to the achievement of an important governmental interest." It seeks to "protect public safety and prevent crime." And the court agreed with the former Commander of the License Division that premises license holders "are just as susceptible as anyone else to stressful situations," including driving situations that can lead to road rage, "crowd situations, demonstrations, family disputes," and other situations "where it would be better to not have the presence of a firearm." The Second Circuit concluded the rule doesn't discriminate against interstate commerce in violation of the Commerce Clause. First, it does not facially discriminate against interstate commerce. Licensees may still patronize out-of-state firing ranges—they just can't bring their gun licensed in New York City. Second, no evidence suggests the rule was intended to protect the economic interests of the City's firing range industry. Finally, the challengers failed to offer evidence that the rule has had a discriminatory effect on interstate commerce. While the challengers claim they have not attended out-of-city shooting events with their gun they may have attended them *without* their gun. The Second Circuit rejected the challengers' right to travel argument "for much the same reasons as does their parallel invocation of the dormant Commerce Clause."

In *Department of Homeland Security v. Regents of the University of California* the Supreme Court will decide whether the Department of Homeland Security's (DHS) decision to end the

Deferred Action for Childhood Arrivals (DACA) program is judicially reviewable and lawful. Three lower courts have concluded ending the policy is both reviewable and unlawful. DACA was established through a DHS Memorandum during the Obama presidency. The program allowed undocumented persons who arrived in the United States before age 16 and have lived here since June 15, 2007, to stay, work, and go to school in the United States without facing the risk of deportation for two years with renewals available. DHS rescinded DACA in September 2017 after receiving a letter from the Attorney General stating the program was unconstitutional and created "without proper statutory authority." The United States argues that a court can't review DHS's decision to rescind DACA because the federal Administrative Procedures Act precludes review of agency actions "committed to agency discretion by law." According to the United States, DHS's decision to discontinue DACA "falls comfortably within the types of agency decisions that traditionally have been understood as 'committed to agency discretion'"—particularly because this decision arose in the immigration context. The United States argues DACA may be rescinded because it is unlawful as it is a legislative rule which should have been promulgated through notice-and-comment rulemaking and is "substantively inconsistent" with the Immigration and Nationality Act.

Employment

Title VII prohibits discrimination "because of . . . sex." In *Zarda v. Altitude Express* the Second Circuit held that discrimination on the basis of sexual orientation violates Title VII. The main opinion in *Zarda* concluded the question in this case is whether sexual orientation is "properly understood" as a "subset of actions taken on the basis of sex." The court concluded it was by looking at the statute's text. According to the court: "the most natural reading of the statute's prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions." In *Bostock v. Clayton County Board of Commissioners* the Eleventh Circuit reaffirmed its previous holding that discrimination on the basis of sexual orientation doesn't violate Title VII.

In *EEOC v. R.G. & G.R. Harris Funeral Homes* the Sixth Circuit held discriminating against transgender persons violates Title VII because it amounts to discrimination on the basis of sex stereotyping. The court also held that transgender status is protected under Title VII. The Supreme Court will review both lower court holdings. Title VII prohibits discrimination "because of . . . sex." In *Price Waterhouse v. Hopkins* (1989) the Supreme Court held that employees may bring sex discrimination claims based on sex stereotyping under Title VII. In 2004 the Sixth Circuit extended *Price Waterhouse*'s reasoning to transgender persons as they are also engaging in "non sex-stereotypical behavior." So that previous case controlled the outcome of *Harris Funeral Homes*. The Sixth Circuit also held that transgender status is a protected class under Title VII. Harris Funeral Homes argued that transgender status refers to "a person's self-assigned 'gender identity'" rather than a person's sex, and therefore such a status is not protected under Title VII. The Sixth Circuit disagreed noting "it is analytically impossible to fire an

employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

In *Comcast v. National Association of African-American Owned Media* the Supreme Court held unanimously that a plaintiff who sues under 42 U.S.C. §1981 must plead and prove that race was the but-for cause of his or her injury. Section 1981 prohibits discrimination on the basis of race in contracting *and employment*, among other things. It states "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." African-American entrepreneur, Byron Allen, owner of Entertainment Studios Network (ESN), sought to have Comcast carry its channels. Comcast refused and ESN sued under §1981. ESN didn't dispute that Comcast offered legitimate business reasons for not carryings its channels, but claimed these reasons were pretextual. The Ninth Circuit held that a §1981 plaintiff only has to show that race discrimination played "some role" in the defendant's decision-making process, not that it was the "but for" cause of the defendant's conduct. The Supreme Court rejected the Ninth Circuit's view and held that to win a §1981 case the plaintiff must plead and prove but-for causation. Justice Gorsuch, writing for the Court, noted that it is "textbook tort law" that plaintiffs must prove but-for causation. The Court rejected ESN's argument that §1981 creates an exception to the general rule. According to the Court: "While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation."

First Amendment

The question the Supreme Court will decide in *Barr v. American Association of Political Consultants** is whether allowing robocalls for government-debt only violates the First Amendment. The Telephone Consumer Protection Act (TCPA) prohibits automatic dialing or prerecorded calls to cell phones with three exceptions—emergencies, consent, and debt collection owed to or guaranteed by the United States. The American Association of Political Consultants claims the third exception violates the First Amendment. In *Reed v. Town of Gilbert* (2015), the Supreme Court held that strict-scrutiny applies to content-based restrictions on speech, and the Court defined content-based broadly. Applying *Reed,* the Fourth Circuit concluded that this exception is content-based because "automated calls made to cell phones that deal with other subjects — such as efforts to collect a debt neither owed to nor guaranteed by the United States — do not qualify for the debt-collection exemption and are prohibited by the automated call ban." The court then held that the debt-collection exception fails strict scrutiny because it is "fatally underinclusive for two related reasons. First, by authorizing many of the intrusive calls that the automated call ban was enacted to prohibit, the debt-collection exemption subverts the privacy protections underlying the ban. Second, the impact of the exemption deviates from the purpose of the automated call ban and, as such, it is an outlier among the other statutory exemptions."

Delaware's Constitution requires that three state courts be balanced between the two major political parties. The main question before the Supreme Court in *Carney v. Adams** is whether

this scheme violates the First Amendment. Per Delaware's Constitution no more than half of the members of the Delaware Supreme Court, Superior Court, or Chancery Court may be of the same major political party. Delaware attorney James Adams wants to be a judge in Delaware but he is an Independent. Adams claims that the First Amendment prohibits the governor from making judicial appointments based on political party. In three previous cases the Supreme Court has explained "the limits on a government employer's ability to consider a job candidate's political allegiance." Based on those cases the Third Circuit focused on whether judges are policymakers as First Amendment protections do not apply to them. The Third Circuit concluded judges aren't policymakers. According to the lower court the "purpose of the policymaking exception is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration." But, "[i]ndependence, not political allegiance, is required of Delaware judges." Per the Delaware Constitution only a bare majority of family court and court of common pleas judges may be from the same political party, but the "major political party" rule doesn't apply to them. The Third Circuit concluded that the "bare majority" rule isn't severable from the unconstitutional "major political party" rule. According to the Third Circuit the question of severability turns on legislative intent. "For nearly seventy years, the bare majority component and the major political party component have been intertwined." Finally, the Supreme Court will decide whether Adams has standing to bring this case. He has not applied for any judicial position since becoming an Independent in 2017.

In *Espinoza v. Montana Department of Revenue* the Supreme Court will decide if a state-aid program violates a state constitutional prohibition against mixing church and state because religious institutions may participate, does discontinuing that program violate the federal constitution's Free Exercise or Equal Protection Clauses. Montana statutes allow taxpayers to receive tax credits for contribution to Student Scholarship Organizations (SSO) that give students scholarships to attend private schools, including religious schools. The Montana Department of Revenue adopted Rule 1 disallowing religious schools to participate in the program because it concluded their participation would violate Montana's Constitution. The Montana Supreme Court held that the Tax Credit Program violates the Montana Constitution. According to the court, the provision of the Montana Constitution entitled "Aid prohibited to sectarian schools," is a "broader and stronger" prohibition against aid to sectarian schools than other states." The court concluded: "Although the Tax Credit Program provides a mechanism of attenuating the tax credit from the SSO's tuition payment to a religiously-affiliated [schools], it does not comport with the constitutional prohibition on indirectly aiding sectarian schools." In one sentence the Montana Supreme Court stated that prohibiting state aid to religious schools in this case doesn't violate the federal constitution.

Fourth Amendment

The Supreme Court has held that excessive force violates the Fourth Amendment's prohibition against "unreasonable searches and seizures." The question in *Torres v. Madrid** is whether police have "seized" someone who they have used force against who has gotten away. In this case police officers approached Roxanne Torres thinking she may be the person they intended to arrest. At the time Torres was "tripping" from using meth for several days. She got inside a car and started the engine. One of the officers repeatedly asked her to show her hands but could not

see her clearly because the car had tinted windows. When Torres "heard the flicker of the car door" handle she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the wind shield. The other officer shot at Torres as well to avoid being crushed between two cars and to stop Torres from driving toward the other officer. Torres was shot twice. After she hit another car, she got out of the car she was in and laid on the ground attempting to "surrender" to the "carjackers." She asked a bystander to call the police but left the scene because she had an outstanding warrant. She then stole a car, drove 75 miles, and checked into a hospital. The Tenth Circuit found no excessive force in this case because Torres wasn't successfully "seized." In a previous case the Tenth Circuit held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." This is so, because "a seizure requires restraint of one's freedom of movement." Therefore, an officer's intentional shooting of a suspect isn't a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him."

In an 8-1 opinion the Supreme Court held that a police officer may initiate a traffic stop after learning the registered owner of the vehicle has a revoked license unless the officer has information negating the inference the owner of the vehicle is the driver. In *Kansas v. Glover* Deputy Mehrer ran the license plate of a vehicle he saw being driven lawfully, matched it to the vehicle he observed, and learned it was registered to Charles Glover who had a revoked driver's license. Deputy Mehrer initiated a traffic stop and discovered Charles Glover was in fact driving the vehicle. Glover claims that in this case Deputy Mehrer lacked the necessary reasonable suspicion to stop him. The Supreme Court disagreed with Glover finding reasonable suspicion in this case. According to the Court: "Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop." The Court did note that additional facts might dispel reasonable suspicion. "For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.'"

Environment

In *County of Maui, Hawaii v. Hawaii Wildlife Fund** the Supreme Court will decide whether the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. Maui County injects treated wastewater from wells into the groundwater. Some of the treated wastewater reaches the Pacific Ocean. The Hawaii Wildlife Fund sued the County arguing it was required to obtain an NPDES permit under the CWA for these discharges. A party must obtain an NPDES permit if it discharges a pollutant from a point source to a navigable water. Wells are point sources and the Pacific Ocean is a navigable water. The Ninth Circuit assumed without deciding groundwater isn't a point source or navigable waters. The Ninth Circuit held that the CWA requires Maui to get an NPDES permit in

this case. It concluded that the discharges in this case are point source discharges because "nonpoint source pollution" excludes, for example, roadway runoff that isn't "collected, channeled, and discharged through a point source." Here the pollutants are collected in wells. According to the lower court, they are also "fairly traceable" from the point source to the navigable water and reach the navigable water at "more than de minimis levels."

The Anaconda Smelter, now owned by ARCO, processed copper ore from Butte for nearly one hundred years before shutting down in 1980. That same year Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund law. EPA required ARCO to pursue particular remedies. Landowners located within the bounds of the site sought two additional remedies beyond what EPA required. In *Atlantic Richfield Co. v. Christian*, ARCO argues that two provisions of CERCLA prevent the landowners from obtaining additional remedies in this case. ARCO also argues that CERCLA preempts state common-law claims for restoration beyond EPA-ordered remedies. The Supreme Court of Montana rejected all of ARCO's arguments. ARCO first claimed the landowners were "challenging" EPA's remedial plan. The Superfund statute jurisdictionally bars courts from hearing "challenges." The court found no "challenge" in this case because "the Property Owners are not seeking to interfere with [EPA's] work, nor are they seeking to stop, delay, or change the work EPA is doing." ARCO next claimed the property owners are "Potentially Responsible Parties" (PRP), even though the EPA has never ordered them to pay for the cleanup. The Superfund statute prohibits PRPs from "conducting any remedial action that is inconsistent with EPA's selected remedy without EPA's consent." The Montana Supreme Court noted the property owners have "never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years since the Property Owners' property was designated as being within the Superfund site." Finally, the Montana Supreme Court rejected the argument CERCLA preempts state common-law remediation claims pointing out that CERCLA has two savings clauses which "expressly contemplate the applicability of state law remedies."

Miscellaneous

The question the Supreme Court will decide in *City of Chicago, Illinois v. Fulton** is whether a local government must return a vehicle impounded because of code violations immediately upon a debtor filing for bankruptcy. The City of Chicago impounds vehicles where debtors have three or more unpaid fines. Robbin Fulton's vehicle was impounded for this reason. She filed for bankruptcy and asked the City to turn over her vehicle; it refused. Fulton claims the Bankruptcy Code's "automatic stay" provision requires the City to immediately return her vehicles even though she didn't pay her outstanding tickets. The Seventh Circuit agreed. The "automatic stay" provision of the Bankruptcy Code provides that a bankruptcy petition "operates as a stay, applicable to all entities, of … any act to obtain possession of property of the estate or of property from the estate or to *exercise control* over property of the estate." In a previous case decided in 2009, *Thompson v. General Motors Acceptance Corp*., the Seventh Circuit concluded that "exercise control" includes holding onto an asset and that "exercise control" isn't limited to "selling or otherwise destroying the asset." So, the court reasoned in this case, the City of Chicago "exercised control" over Fulton's car in violation of the automatic stay by not returning it after she filed the bankruptcy petition. The Seventh Circuit next concluded that the

bankruptcy stay becomes effective immediately upon filing the petition, without the debtor bringing a "turnover action." Another section of the Bankruptcy Code requires the creditor to request "adequate protection" of its interest in property subject to a bankruptcy petition. According to the Seventh Circuit in *Thompson*: "[I]f a creditor is allowed to retain possession, then this burden is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession."

A 2013 final rule exempted churches from the Affordable Care Act (ACA) so-called contraceptive mandate. The rule included an accommodations process which allowed women covered by exempted plans to still receive covered contraception. In 2017 a number of federal agencies issued, without notice and a public comment period, two interim final rules that "expanded the existing exemption and Accommodation framework, made the Accommodation process voluntary, and offered similar protections to organizations with moral objections to contraceptives." In *Trump v. Pennsylvania** and *Little Sister of the Poor Saints Peter and Paul Home v. Pennsylvania* two states sued the agencies noting that thousands of women will be without birth-control coverage due to these rules and may turn to state-funded programs to receive contraception. The Trump administration lost on all the issue litigated in this case in the Third Circuit. On the question of whether there is statutory authority to expand the conscience exemption the court concluded that "neither of the statutes upon which the Agencies rely, the ACA and RFRA [Religious Freedom Restoration Act], authorize or require the Final Rules." The Administrative Procedures Act (APA) requires agencies to engage in notice-and-comment rulemaking unless the statute authorizes no notice-and-comment or the agency has good cause. The Trump administration argued that the Health Insurance Portability and Accountability Act (HIPAA) allowed it to avoid notice-and-comment. The Third Circuit disagreed noting that HIPAA "contains no express language supplanting APA procedures, and the sole reference to 'interim final rules' does not confer a license to ignore APA requirements." The Trump administration also argued it had good cause to waive notice and comment based on "(1) the urgent need to alleviate harm to those with religious objections to the current regulations; (2) the need to address 'continued uncertainty, inconsistency, and cost' arising from 'litigation challenging the previous rules'; and (3) the fact that the Agencies had already collected comments on prior Mandate-related regulations." The Third Circuit concluded "[n]one of these assertions meet the standard for good cause." Finally, the Third Circuit agreed with the district court decision to issue a nationwide injunction. "Many individuals work in a state that is different from the one in which they reside. An injunction geographically limited to the States alone will not protect them from financial harm, as some share of their residents who work out-of-state will lose contraceptive coverage originally provided through employers in non-enjoined states who will exempt themselves."

The issue the Supreme Court will decide in *Lomax v. Ortiz-Marquez** is whether dismissal without prejudice for failure to state a claim counts as a strike under the Prison Litigation Reform Act (PLRA). Arthur Lomax filed three lawsuits alleging a variety of constitutional violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility. The federal district court dismissed the first and second lawsuits as barred by *Heck v. Humphrey*, which holds that a litigant cannot bring a lawsuit challenging his or her conviction's legitimacy until that conviction has been dismissed. The third

lawsuit was dismissed for a failure to state a claim. The first two cases were dismissed without prejudice (meaning Lomax is not permanently barred from bringing them again). The PLRA contains a three-strikes rule disallowing an inmate who can't pay filing fees upfront from filing a fourth lawsuit when he or she has filed three previous lawsuits which were dismissed on the grounds that they were "frivolous, malicious, or fail[] to state a claim upon which relief may be granted." Lomax argues he should be able to bring another lawsuit without paying filing fees upfront regardless of the three-strikes rule because two of his previous lawsuits were dismissed without prejudice. The Tenth Circuit ruled against Lomax, relying on "long standing precedent" holding that "the fact that two of the dismissals were without prejudice is immaterial."

In *Kelly v. United States* the Supreme Court will decided whether a public official "defrauds" the government of its property by advancing a "public policy reason" for an official decision that is not the subjective "real reason" for making the decision. Former New Jersey Governor Chris Christie's Deputy Executive Director of the Port Authority of New York and New Jersey, the Port Authority's Director of Interstate Capital Projects, and Christie's Deputy Chief of Staff for Intergovernmental Affairs orchestrated "Bridgegate." Under the guise of conducting a traffic study, they conspired to reduce traffic lanes from the George Washington Bridge (the busiest bridge in the world) to Fort Lee the first week of Fort Lee's school year, because the mayor of Fort Lee refused to endorse Governor Christie for governor. Two of the former employees were convicted of violating a number of federal fraud statutes; one was a cooperating witness. The Third Circuit accepted the United States' argument that these convictions should stand because the former employees deprived the Port Authority of tangible property. Specifically, the court concluded the time and wages of the former employees and the 14 Port Authority employees they "conscripted" in the scheme was sufficient to deprive the Port Authority of money or property. In their *certiorari* petition the former employees argue that the Third Circuit read the fraud statutes too broadly. They claim it can't be that "any official (federal, state, or local) who conceals or misrepresents her subjective motive for making an otherwise-lawful decision—including by purporting to act for public-policy reasons without admitting to her ulterior political goals, commonly known as political 'spin'—has thereby defrauded the government of property (her own labor if nothing else)." If using government resources while misrepresenting a subjective motive is fraud they continue, "nearly limitless array of routine conduct" will be criminal.

The question the Supreme Court will decide in *McGirt v. Oklahoma* may sound familiar: "whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction." The Supreme Court agreed to decide this very same question last term in *Sharp v. Murphy*. But the Court didn't decide that case, presumably because it was deadlocked 4-4; Justice Gorsuch didn't participate. Per the Major Crimes Act states lack jurisdiction to prosecute Native Americans who commit particular crimes in "Indian country." Oklahoma prosecuted Jimcy McGirt, a member of the Seminole/Creek nation, for a number of sex crimes. He claims Oklahoma lacked jurisdiction to prosecute him because he committed his crimes in Indian country. The Oklahoma Court of Criminal Appeals ruled against him noting that this is the same argument being made to, but not yet adopted by, the Supreme Court in the *Sharp v. Murphy*. Per the Major Crimes Act "Indian country" includes "all lands within the limits of any Indian reservation." Congress may

disestablish or diminish Indian reservations. Allotment on its own does not disestablish or diminish a reservation. In *Solem v. Barlett* (1984) the Supreme Court established a three-part test to determine when Congress has diminished a reservation. First, courts "must examine the text of the statute purportedly disestablishing or diminishing the reservation." In *Sharp v. Murphy*, Murphy argued that Congress never diminished the 1866 territorial boundaries of the Creek Nation where he committed his crimes. The Fifth Circuit agreed. It reviewed eight statutes allotting Creek land and creating the State of Oklahoma. The court concluded that the statutory text "fails to reveal disestablishment." "Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders."