

Supreme Court Midterm for Local Governments 2020-21

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

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

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

Undecided Cases

The issue the Supreme Court will decide in *Caniglia v. Strom** is whether the Fourth Amendment "community caretaking" exception to the warrant requirement extends to the home. A police officer determined Edward Caniglia was "imminently dangerous to himself and others" after the previous evening he had thrown a gun on the dining room table and said something to his wife like "shoot me now and get it over with." Officers convinced Caniglia to go to the hospital for a psychiatric evaluation after apparently telling him they wouldn't confiscated his firearms. The officers went into his home and seized the guns regardless. Caniglia sued the officers for money damages claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. The First Circuit held that the Fourth Amendment's "community caretaker" exception to the warrant requirement applies in this case and that neither of the seizures violated the Fourth Amendment. The Supreme Court first applied the community caretaking exception in *Cady v. Dombrowski* (1973). In that case the Supreme Court held police officers could search without a warrant a disabled vehicle they reasonably believed contained a gun in the truck and was vulnerable to vandals. Police activity in furtherance of the community caretaker function is permissible as long as it is "executed in a reasonable manner pursuant to either 'state law or sound police procedure.'" Importantly, the Supreme Court has never extended the community caretaking exception beyond the motor vehicle context. The First Circuit decided to do so in this case in light of the "special role" that police officers play in our society. The First Circuit reasoned: "[A] police officer — over and above his weighty responsibilities for enforcing the criminal law — must act as a master of all

emergencies, who is 'expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.'"

In *Cedar Point Nursery v. Hassid,** the Supreme Court will decide whether a temporary easement is a taking. The U.S. Constitution's Fifth Amendment allows the government to "take" private property as long as it pays "just compensation." In this case a number of agriculture employers argue California statutes "take" their property by allowing union organizers access to agricultural employees on the grower's property. The access period may be during four 30-day periods each year for up to three hours each day. The union organizers must provide notice to the employers. The Ninth Circuit ruled against the employers. According to the Ninth Circuit, "[t]he Growers base their Fifth Amendment argument entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking." The Ninth Circuit found no *permanent* physical invasion in this case. The lower court compared this case to *Nollan v. California Coastal Commission* (1987), where the California Coastal Commission offered to give a homeowner a permit to rebuild a house in exchange for an easement allowing the public to cross the property to access the beach. In *Nollan*, the Supreme Court required the Coastal Commission to provide just compensation for the easement. Here, according to the Ninth Circuit, "[t]he regulation significantly limits organizers' access to the Growers' property. Unlike in *Nollan*, it does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year."

In *Fulton v. City of Philadelphia** the Supreme Court will decide whether local governments may refuse to contract with foster care agencies who will not work with gay couples. The City of Philadelphia long contracted with Catholic Social Services (CSS) to place foster care children. The City stopped doing so when it discovered CSS wouldn't work with same-sex couples. Philadelphia requires all foster care agencies to follow its "fair practices" ordinance, which prohibits sexual orientation discrimination in public accommodations. CSS claims the City violated the First Amendment by refusing to continue contracting with it because of its religious beliefs. The Third Circuit ruled in favor of the City. The Supreme Court has interpreted the First Amendment's Free Exercise Clause to forbid "government acts specifically designed to suppress religiously motivated practices or conduct." But, per the Court in *Employment Division v. Smith* (1990), individuals must comply with "valid and neutral law[s] of general applicability" regardless of their religious beliefs. CSS first argues that Philadelphia's "fair practices" ordinance isn't applied to it neutrally. According to the Third Circuit, the test for neutrality is whether the City treated CSS "worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs," which the City didn't do. CSS has asked, and the Supreme Court has agreed, to reconsider the Court's holding in *Employment Division v. Smith*. CSS also claims Philadelphia is requiring it to "adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents," in violation of the First Amendment's Free Speech Clause. The Third Circuit agreed that the City couldn't condition contracting with CSS on it officially proclaiming support for same-sex marriage but it could condition contracting with CSS on refusing to work with same-sex couples.

The issue in *Lange v. California* is whether a police officer may enter a person's house without a warrant when the officer has probable cause to believe he or she has committed a misdemeanor (rather than a felony). Right before Arthur Gregory Lange turned into his driveway and after following him for a while, Officer Weikert turned on his lights to pull him over for playing music loudly and unnecessarily beeping his horn. Lange didn't pull over. He later claimed to not notice the officer's lights. Officer Weikert followed Lange up his driveway. As Lange's garage door began to close, Officer Weikert stuck his foot in front of it and went into the garage to speak to Lange. Lange was charged with driving under the influence. He sought to suppress the evidence claiming Officer Weikert's warrantless entry into his home violated his Fourth Amendment rights. The California Court of Appeals held the warrantless entry didn't violate Lange's Fourth Amendment rights even though Officer Weikert only had probable cause to believe Lange had committed noise and flight-related misdemeanors. In *Payton v. New York* (1980), the U.S. Supreme Court held "a warrantless entry by the police into a residence to seize a person is presumptively unreasonable and unlawful in the absence of exigent circumstances." Exigent circumstances include "hot pursuit" of a "fleeing suspect." According to the California Court of Appeals "hot pursuit" isn't limited to "true emergency situations" and includes investigation of minor offenses. Lange cited to the U.S. Supreme Court's decision in *Welsh v. Wisconsin* (1984), holding that "a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense" violated the Fourth Amendment. However, the California Court of Appeals distinguished *Welsh* from this case because *Welsh* did "not involve pursuit into a home after the initiation of a detention or arrest in a public place."

In *City of San Antonio, Texas v. Hotels.com, L.P.** the Supreme Court will decide whether a federal district court has discretion to waive appellate costs. The City of San Antonio won in federal district court a class action lawsuit against online travel companies (OTCs) requiring them to collect occupancy taxes on the "retail rate" for a hotel room—the amount they collect for the room rate plus the service fee. On appeal, the Fifth Circuit ruled against San Antonio because a state court ruled OTCs only have to collect tax on the room rate. Federal Rule of Appellate Procedure 39(e) lists the costs that are "taxable in the district court for the benefit of the party entitled" to them. After Hotels.com won its appeal, the district court ordered San Antonio to pay Hotels.com over $2 million in costs per this rule. San Antonio argued that the district court was incorrect to conclude that it lacked the discretion to deny or reduce the award of costs pointing out that most other federal courts of appeals have held (or implied) they may do so. The Fifth Circuit disagreed. In a previous Fifth Circuit case from 1991, *In re Sioux Ltd., Sec. Litig.,* the Fifth Circuit held under Rule 39(e) district courts have no discretion "whether, when, to what extent, or to which party to award costs of the appeal."

In *B.P. v. Mayor and City Council of Baltimore** the Supreme Court will decide whether a federal appellate court may review all the grounds upon which a defendant claims its case should not be sent back to state court when only one of the grounds the defendant alleges is specifically listed in federal statute as a basis for federal appellate court review. The mayor and City of Baltimore sued 26 oil and gas companies in Maryland state court claiming their role in climate change has violated Maryland law. Federal law allows defendants to "remove" a case brought in state court into federal court if the federal court has jurisdiction over the case. BP claims that the

federal court has jurisdiction to hear this case on eight grounds, including the federal officer removal statute. This statute allows federal courts to hear cases involving a private defendant who can show that it "acted under" a federal officer, has a "colorable federal defense," and that the "charged conduct was carried out for [or] in relation to the asserted official authority." A federal district court rejected all eight grounds BP alleged supported removing this case to federal court. The federal district court remanded the case back to Maryland state court. 28 U.S.C. §1447(d) generally disallows federal courts of appeals to review federal district court orders remanding a case back to state court which was removed to federal court. The statute creates an exception for "an order remanding a case to the State court for which it was removed pursuant to" the federal officer removal statute or the civil-rights removal statute (not at issue in this case). BP asked the Fourth Circuit to review all eight of its grounds for removing the case to federal court because one of the grounds it alleged--federal officer removal--is an exception allowing federal appellate court review. The Fourth Circuit refused to review all eight grounds. It cited to a Fourth Circuit case decided in 1976, *Noel v. McCain*, holding that "when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from §1447(d)'s bar on review." BP argued that a 1996 Supreme Court case and the Removal Clarification Act of 2011 "effectively abrogated" the 4th Circuit decision. The Fourth Circuit disagreed but acknowledged other courts have reached different conclusions.

In *California v. Texas* the Supreme Court will decide whether the Affordable Care Act's (ACA) individual mandate is unconstitutional. More importantly, if the Court holds that it is, it will decide whether the individual mandate is severable from the ACA. It is possible the Court will conclude it isn't and that the entire law is unconstitutional. If it is severable the rest of the ACA will remain good law. The ACA individual mandate required uninsured who didn't purchase health insurance to pay a "shared-responsibility" payment. The Tax Cuts and Jobs Act of 2017 reduced the payment to $0 as of January 1, 2019. Texas, and a number of other states argued, and the Fifth Circuit agreed, that the individual mandate is no longer constitutional as a result. According to the Fifth Circuit, in *NFIB v. Sebelius* (2012), five Supreme Court Justices agreed that the "individual mandate could be read in conjunction with the shared responsibility payment" as "a legitimate exercise of Congress' taxing power for four reasons." The Fifth Circuit reasoned that now the shared responsibility payment amount is zero "[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist." While the district court held that none of the ACA was severable from the individual mandate (meaning the entire Act is unconstitutional), the Fifth Circuit concluded the district court failed to take a "careful, granular approach" in its severability analysis. "The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. California and a number of other states defending the ACA argue that the individual and state plaintiffs lack standing to bring this case. California argues the individual plaintiffs haven't been harmed by the tax being reduced to zero because "[a] statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm." California further claims that the states have failed to alleged harm because they have no proof that the shared-responsibility payment

being zero will force individuals into the states' Medicaid and CHIP programs or increase state costs for "printing and processing [certain] forms."

In *Brnovich v. Democratic National Committee* the Supreme Court will decide whether Arizona's refusal to count out-of-precinct votes violates Section 2 of the Voting Rights Act (VRA) and whether Arizona's limits on third-party ballot collection violate Section 2 of the VRA and the Fifteenth Amendment. Arizona wholly discards out-of-precinct votes instead of counting the votes for the races the voter was eligible to participate in (like U.S. President) no matter what ballot they completed. Arizona also criminalizes, with some exceptions, third-party collection of another person's early ballot. Section 2 of the VRA prohibits intentional discrimination based on race or color in voting and election practices that *result* in the denial or abridgment of the right to vote based on race or color. If discrimination is intentional it also violates the U.S. Constitution's Fifteenth Amendment. Over a number of dissenting judges, the en banc Ninth Circuit agreed with the Democratic National Committee that the out-of-precinct statute violates Section 2 of the VRA because it "adversely and disparately" affects Arizona's minority voters. The court also held that the third-party collection statute violates Section 2 of the VRA and the Fifteenth Amendment because it was enacted with discriminatory intent. Specifically, regarding the results-based VRA claims, the Ninth Circuit concluded that both provisions resulted in a "disparate burden on members of the protected class" and that under the "totality of the circumstances" the burden is linked to "social and historical conditions" in Arizona. Regarding wholly discounting out-of-precinct votes, the court found results-based discrimination because minority voters in Arizona cast out-of-precinct votes at twice the rate of white voters. Regarding third-party ballot collection, the court found that prior to enacting the law "a large and disproportionate number of minority voters relied on third parties" to collect and deliver their early ballots. The Ninth Circuit also concluded that intentional discrimination motivated the Arizona legislature to criminalize third-party ballot collection. According to the court, the law would not have been enacted but for "unfounded and often farfetched allegation of ballot collection fraud" and a "racially tinged" video showing a man of apparent Hispanic heritage appearing to deliver early ballots narrated with "innuendo of illegality . . . [and] racially tinged and inaccurate commentary."

In *PennEast Pipeline Co. v. New Jersey** the U.S. Supreme Court will decide whether a private natural gas company may use the federal government's eminent-domain power to condemn state land. The Natural Gas Act (NGA) authorizes private gas companies like PennEast to obtain necessary rights of way through eminent domain to build pipelines. PennEast asked a federal district court to condemn 42 properties which belong to New Jersey to build a pipeline. New Jersey claims that Eleventh Amendment sovereign immunity prevents a private company from haling it into court. The Eleventh Amendment prohibits states from being sued in federal court unless they have consented to suit. An exemption applies to the federal government. New Jersey argues that "the federal government cannot delegate its exemption from state sovereign immunity to private parties like PennEast." The Third Circuit agreed. The Third Circuit offered three reasons why it "doubt[ed]" the federal government can delegate its exemption. First, the court reasoned case law doesn't support the "delegation" theory of sovereign immunity. Second, "fundamental differences" between lawsuits brought by "accountable federal agents"

versus private parties weigh against allowing the federal government to delegate to private parties its ability to sue states. "Finally, endorsing the delegation theory would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity."

In *United States v. Cooley* the Supreme Court will decide whether tribal police have the authority to temporarily detain and search a non-Indian on a public right-of-way within a reservation based on a potential violation of state or federal law. The Ninth Circuit held the tribal officer has no such authority unless a legal violation is "obvious" or "apparent." If it isn't, any evidence obtained in the search must not be used against the defendant. A tribal highway safety officer passed a truck stopped on a United States highway located on an Indian reservation. Thinking the driver needed assistance the officer knocked on the window. He noticed Joshua Cooley had "watery, bloodshot eyes." Cooley told the officer he was in the area to buy a car from a man whose name he wasn't sure of. One of the names he gave the officer was of a local drug dealer. Cooley initially wouldn't give the officer his driver's license. When the officer returned after trying to run Cooley's license, Cooley had a loaded pistol near his right hand. The officer ordered Cooley out of his vehicle, searched it, and found methamphetamine. Though the officer never asked, Cooley is non-native. Cooley argued the officer was acting outside of the scope of his jurisdiction when he seized Cooley in violation of the Indian Civil Rights Act (ICRA) and the evidence obtained should be suppressed. The Ninth Circuit agreed. According to the court, while a tribal officer may stop someone suspected of violating tribal law on a public right-of-way, the officer's initial inquiry must be limited to whether the person is an Indian. If during this limited interaction, "it is apparent that a state or federal law has been violated, the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities." According to the Ninth Circuit, its precedent made "clear that the power to detain non-Indians on public rights-of-way for 'obvious' or 'apparent' violations of state or federal law does not allow officers to search a known non-Indian for the purpose of finding evidence of a crime." When the officer searched Cooley, it wasn't "obvious" he had committed a crime. The Ninth Circuit held the evidence obtained in violation of the IRCA should be suppressed as is it under the Fourth Amendment. The Ninth Circuit reasoned the IRCA's prohibition against unreasonable searches and seizures is nearly identical to the Fourth Amendment.

Decided Cases

In a 5-3 decision in *Torres v. Madrid** the U.S. Supreme Court held that a person may be "seized" by a police officer per the Fourth Amendment even if the person gets away. In this case, police officers intended to execute a warrant in an apartment complex. Though they didn't think she was the target of the warrant, they approached Roxanne Torres in the parking lot. Torres got in a car. According to Torres, she was experiencing methamphetamine withdrawal and didn't notice the officers until one tried to open her car door. Though the officers wore tactical vests with police identification, Torres claims she only saw the officers had guns. She thought she was being car jacked and drove away. She claims the officers weren't in the path of the vehicle, but they fired 13 shots, hitting her twice. Torres drove to a nearby parking lot, asked a bystander to report the attempted carjacking, stole another car, and drove 75 miles to a hospital. Torres sued the police officers claiming their use of force was excessive in violation of the Fourth

Amendment's prohibition against "unreasonable searches and seizures." The officers argued, and the lower court agreed, that Torres couldn't bring an excessive force claim because she was never "seized" per the Fourth Amendment as she got away. The rule the Supreme Court adopted in this case, as articulated by Chief Justice Roberts, is the "application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." Citing to an English case from 1828, the Court "independently" concluded that "the common law rule identified in [*California v. Hodari D.* (1991)] that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that '[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.'"

In an 8-0 decision in *City of Chicago v. Fulton*,* the U.S. Supreme Court held that the City of Chicago didn't violate the Bankruptcy Code's automatic stay provision by holding onto a vehicle impounded after a bankruptcy petition was filed. 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 return her vehicle; it refused. The Seventh Circuit held the City violated the Bankruptcy Code's automatic stay provision. The Supreme Court unanimously reversed. When a bankruptcy petition is filed, an "estate" is created which includes most of the debtor's property. An automatic consequence of the bankruptcy petition is a "stay" which prevents creditors from trying to collect outside of the bankruptcy forum. The automatic stay prohibits "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." The Bankruptcy Code also has a "turnover" provision which requires those in possession of property of the bankruptcy estate to "deliver to the trustee, and account for" that property. The Supreme Court held that "mere retention" of a debtor's property after a bankruptcy petition is filed doesn't violate the automatic stay. According to Justice Alito, "[t]aken together, the most natural reading of . . . 'stay,' 'act,' and 'exercise control'—is that [the automatic stay provision] prohibits *affirmative acts* that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." However, the Court, conceded it did not "maintain that these terms definitively rule out" an alternative interpretation. According to the Court, "[a]ny ambiguity in the text of [the automatic stay provision] is resolved decidedly in the City's favor" by the turnover provision. First, reading "any act . . . to exercise control" in the automatic stay provision "to include merely retaining possession of a debtor's property would make that section a blanket turnover provision," rendering the turnover provision "largely superfluous." Second, the turnover provision includes exceptions that the automatic stay provision doesn't include. "Under respondents' reading, in cases where those exceptions to turnover . . . would apply, [the automatic stay provision] would command turnover all the same."

In *Uzuegbunam v. Preczewski** the Supreme Court held 8-1 that to have a "redressable injury" required to bring a lawsuit a plaintiff need only ask for nominal damages ($1). Chike Uzuegbunam was threatened with disciplinary action for speaking about his religion in the "free speech expression areas" at Georgia Gwinnett College, a public college where he was enrolled. He and another student, Joseph Bradford, who decided not to speak about his religion because of

what happened to Uzuegbunam, sued the college claiming its campus speech policies violated the First Amendment. They asked for nominal damages and an injunction requiring the college to change its speech policies. The college got rid of the challenged policies and argued the case was now moot. To establish standing, among other requirements, a plaintiff must ask for a remedy that is redressable, meaning likely to address his or her past injuries. In an opinion written by Justice Thomas the Court held that Uzuegbunam's claim for nominal damages is intended to redress a past injury. According to the Court the prevailing rule, "well established" at common law, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage." The Court stated a request for nominal damages doesn't "guarantee[] entry to court" as it only addressed whether nominal damages satisfy the redressability element of standing. The Court also didn't decide whether Bradford could pursue a nominal damages claim noting nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury."

In a very brief, unauthored opinion the Supreme Court denied qualified immunity in *Taylor v. Riojas* to a number of correctional officers who confined Trent Taylor to a "pair of shockingly unsanitary cells" for six days. Trent Taylor claimed the first cell he was confined in was covered in feces "all over the floor, the ceiling, the window, the walls," and even inside the water faucet. The second, frigidly cold cell, "was equipped with only a clogged drain in the floor to dispose of bodily wastes." The Fifth Circuit held that Taylor's confinement conditions violated the Eighth Amendment's prohibition on cruel and unusual punishment. The Fifth Circuit granted the officers qualified immunity because "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." The Supreme Court reversed the Fifth Circuit's grant of qualified immunity because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."

In *Carney v. Adams** the Supreme Court held unanimously that James Adams lacked standing to challenge a Delaware constitutional provision that requires that appointments to Delaware's major courts reflect a partisan balance. Delaware's Constitution states that no more than a bare majority of members of any of its five major courts may belong to any one political party. It also requires, with respect to three of those courts, that the remaining members belong to "the other major political party." So, as a practical matter, to be on three of Delaware's courts a person must belong to one of the two major political parties. James Adams, a Delaware lawyer and political independent, sued Governor Carney claiming Delaware's major party requirement is unconstitutional. The Court, in an opinion written by Justice Breyer, concluded Adams lacks standing to bring this lawsuit. To have standing a litigant must "prove that he has suffered a concrete and particularized injury that is farly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." For Adams to prove he was harmed he had to "at least show that he is likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation." According to Justice Breyer, "three considerations, taken together, convince us that the record evidence fails to show that, at the time

he commenced the lawsuit, Adams was 'able and ready' to apply for a judgeship in the reasonably foreseeable future."

In an unauthored opinion in *Trump v. New York*, the U.S. Supreme Court refused to decide whether President Trump could lawfully and constitutionally direct the Secretary of Commerce to provide information to him about the number of undocumented persons so he could exclude them from the census apportionment base. Federal law requires the Secretary of Commerce to "take a decennial census of population" and report to the President "[t]he tabulation of total population by States." The President then transmits to Congress a "statement showing the whole number of persons in each State." President Trump wants to exclude undocumented persons from this census number which is used to apportion U.S. House of Representatives seats to the states. He asked the Secretary of Commerce to provide him the information he needs to do so. States and local governments and others sued the President claiming he has violated federal statutes governing the census and the U.S. Constitution. The Court refused to decide this case now describing it as "riddled with contingencies and speculation that impede judicial review." The Court noted that while the President "has made clear his desire to exclude aliens without lawful status from the apportionment base," he has qualified the directive to gather the necessary information with language including "to the extent practicable" and "to the extent feasible." According to the Court, "the record is silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner." President Biden has issued an executive order reversing President Trump's policy of excluding to count undocumented persons from the census apportionment base.