Supreme Court Watch

By Barrie Tabin Berger

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The 2013-2014 Supreme Court term was an active one for the State and Local Legal Center and its member organizations, which include GFOA, as well as the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the International City/County Management Association, and the International Municipal Lawyers Association. In all, the Legal Center filed or is preparing to file nine amicus or "friend of the court" briefs with the United States Supreme Court.

ABOUT THE STATE AND LOCAL LEGAL CENTER

The State and Local Legal Center, which just celebrated its 30th anniversary, has played a key role in ensuring that states and local governments are effectively represented before the Supreme Court by coordinating, drafting, and submitting amicus briefs that help to further define and clarify the arguments made by the parties to the case, and shed more light on the broader concerns of states and localities, particularly in such areas as federalism and government authority.

In 2014, the GFOA has participated either as an amicus or an advisor on several briefs submitted to the U.S. Supreme Court through the efforts of the State and Local Legal Center. The briefs address issues including the constitutionality of state and local tax schemes, an interpretation of the costly Fair Labor Standards Act, and the proper use of administrative procedure. All are significant for state and local governments, and to GFOA members, because of their implications for preserving federalism and limiting the scope of costly regulatory activities that are often imposed on states and localities. GFOA members can expect the court to issue decisions in these cases in the coming months, during the 2014-2015 term.

INTERPRETATIONS OF TAXING AUTHORITY

In early August 2014, the State and Local Legal Center filed a brief in the case of *Comptroller v. Wynne*. Here, the Supreme Court is asked to determine whether the U.S. constitution requires states to give a credit for taxes paid on income earned out of state.

The Wynnes of Howard County, Maryland, received S-corporation income that was generated and taxed in numerous states. While Maryland law allowed the Wynnes to receive a tax credit against their Maryland state taxes for income taxes paid to other states, it did not allow them to claim a credit against their Maryland county taxes.

The Wynnes challenged Maryland law, and the highest state court held that Maryland's failure to grant a credit against Maryland's county tax violated the U.S. Constitution's dormant Commerce Clause, which denies states the power to unjustifiably discriminate against or burden interstate commerce. The Maryland Court of Appeals noted that if every state imposed a county tax without a credit, interstate commerce would be disadvantaged. Taxpayers who earn income out of state would be "systematically taxed at higher rates relative to taxpayers who earn income entirely within their home state."

The State and Local Legal Center's amicus brief challenges the Maryland Court of Appeals decision on several grounds. First, the brief argues that the power of state and local governments to tax the income of their residents, wherever earned, has been upheld repeatedly by the Supreme Court. Second, the brief maintains that the scope of the "dormant Commerce Clause" regarding individual non-resident income taxes has not been clearly defined by the Court and should not now be construed to mandate credits. Third, the brief argues that taxation is a legislative matter that should not be usurped by the judiciary.

The brief also discusses the difficult tax policy choices that face state and local leaders. As an example, if Maryland were required to provide a dollar-for-dollar tax credit, a neighbor with substantial out-of-state income would contribute significantly less to pay for local services than a neighbor earning the same income in-state, even though both take equal advantage of local services. To counterbalance this dollar-for-dollar tax credit, a county would need to raise some other tax, which would fall disproportionately on some other neighbor and often be more regressive. The brief maintains that Maryland's choice to avoid these results "does not cross any constitutional line."

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The case of *Alabama Department of Revenue v. CSX Transportation* similarly considers a tax-related issue. In particular, the Court is asked to examine whether Alabama's requirement that railroads pay a 4 percent sales tax on diesel fuel, while trucks pay a 19 cent-per-gallon excise tax, and water carriers pay no tax, violates the Railroad Revitalization and Regulatory Reform Act (the 4-R Act), which prohibits states from taxing railroads in a discriminatory manner. The Eleventh Circuit Court of Appeals held that Alabama's sales tax did, in fact, violate the 4-R Act. On appeal, the Supreme Court will be asked to decide the appropriate tax comparison for railroads — competitors only (such as trucks and water carriers) or other commercial and industrial taxpayers broadly — to make a determination of discrimination. The court will also decide whether it should consider amounts paid by the different carriers, for example, the fact that trucks pay roughly the same in excise taxes as railroads pay in sales taxes, when determining whether Alabama's sales tax discriminates against railroads.

This case has significant implications across the country. At least 10 other states, as well as some local governments within those states, charge railroads a sales tax on diesel fuel. If the Supreme Court rules against Alabama, these tax schemes could be found to violate the 4-R Act. Moreover, many other interest groups (e.g., the telecommunications industry) advocate for tax preemptions like the one in the 4-R Act. To preserve state and local taxing authority, it is essential that the Supreme Court interpret "discriminatory taxation" very narrowly. In its brief, the State and Local Legal Center will set forth both legal and policy arguments for a narrow reading of the 4-R Act.

REGULATORY ANALYSIS

In the case of *Integrity Staffing Solutions v. Busk*, the Supreme Court will decide whether to uphold a Ninth Circuit Court of Appeal's ruling that hourly employees must be paid for time spent in security screenings under the Fair Labor Standards Act (FLSA). The State and Local Legal Center's amicus brief, filed in June, argues that the Ninth Circuit erred in reaching this decision by applying a more expansive reading of the FLSA than is appropriate and requests that the Supreme Court reverse on this appeal. Local government employees who work in courthouses, correctional institutions, and warehouses routinely go through security screenings at the beginning

and/or end of each workday. The brief warns that if the Ninth Circuit's decision is not reversed, the court's more expansive reading could permit employees to argue that commuting to and from work is compensable time. Finally, the brief points out that employer state and local governments can ill-afford the higher payroll costs that will likely ensue should the Ninth Circuit's decision stand.

The Fair Labor Standards Act (FLSA) is again at play in the case of *Perez v. Mortgage Bankers Association*, although somewhat less directly. Here, the court is asked to decide whether a federal agency must engage in notice and comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that interprets an agency regulation. Since 1997, the D.C. Circuit Court has required notice and comment, reasoning that an agency is effectively changing the underlying regulation when it significantly alters an interpretive rule. In this case, without notice and comment, the Department of Labor (DOL) issued an Administrator's Interpretation saying mortgage loan officers are eligible for overtime compensation under the FLSA, withdrawing an earlier opinion letter to the contrary. The Mortgage Bankers Association sued the DOL, claiming that if the agency wanted to make this change, it had to conduct notice and comment rulemaking. The brief filed by the State and Local Legal Center will argue that changes to regulations such as the FLSA are often very costly to states and local governments, and it is vital that they have an opportunity to be informed of and to comment on significant alterations to interpretive rules that change the way a regulation will be implemented.

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T-Mobile South v. City of Roswell is also a case of regulatory interpretation. Here, the court will decide whether a letter denying a cell tower construction application that does not explain the reasons for the denial meets the "in writing" requirement of the Telecommunications Act of 1996. In this case, T-Mobile applied to construct a 108-foot cell tower in a residential area in the shape of a man-made tree that would be about 25-feet taller than the surrounding pine trees. After a hearing in which city council members discussed their intentions to vote against the application, the City of Roswell, Georgia, sent T-Mobile a brief letter stating the application was denied and that T-Mobile could obtain hearing minutes from the city clerk. T-Mobile sued the City of Roswell, arguing that the "in writing" requirement means a written explanation of why the city council's majority rejected the application. The district court agreed. However, on appeal, the Eleventh Circuit reversed the district's court's decision, ruling that the "in writing" requirement was satisfied with a simple written denial without reasons, so long as the reasons for the locality's decision could be gleaned from the written minutes or transcript of the council meeting where the decision was made.

The Eleventh Circuit Court of Appeals decision created a split in the Circuit Courts (with the First, Sixth, Seventh and Ninth Circuits arguing that "in writing" demands a separate written decision from the locality that sets forth the reasons for its decision). Such a split prompted a review by the Supreme Court. The State and Local Legal Center brief, filed in August 2014, argues that T-Mobile's interpretation of the "in writing" requirement would put local governments of all sizes under far more stringent procedural requirements than Congress has imposed on federal courts and federal agencies that are subject to other statutory writing requirements. Moreover, such an interpretation would "impose significant additional costs on local governments" as they seek to carry out the core local function of land use regulation with their jurisdictions.

CONCLUSIONS

Decisions reached by the third branch of government, the judiciary, often have long-lasting, far-reaching effects on state and local governments that are at least equivalent to those made by any legislative or regulatory body. Therefore, the GFOA's Federal Liaison Center will continue to work in cooperation with the State and Local Legal Center to monitor and, in some cases, participate as an amicus in these important legal actions.

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