Supreme Court Review Summary for State and Local Government 2016

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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 an *amicus* brief.

"Big" Cases

In *Friedrichs v. California Teachers Association*, the Court issued a 4-4 opinion affirming the lower court's decision to not overrule *Abood v. Detroit Board of Education* (1977). In *Abood*, the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements--where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. Since union may not discriminate between members and nonmembers in performing these functions, agency fees are allowed to ensure nonmembers aren't "free-riders." In two recent cases, *Knox v. SEIU* (2012), and *Harris v. Quinn* (2014), in 5-4 opinions written by Justice Alito and joined by the other conservative Justices (including Justice Scalia and Justice Kennedy), the Court was very critical of *Abood*. The Court heard oral argument in *Friedrichs* in January before Justice Scalia died, and the five more conservative Justices seemed poised to overrule *Abood*. Justice Scalia, who ultimately didn't participate in this case, likely would have voted to overrule *Abood*.

In *Reynold v. Sims* (1964), the Court established the principle of "one-person, one-vote" requiring state legislative districts to be apportioned equally. The question in *Evenwel v. Abbott* is what population is relevant—total population or voter-eligible population. The maximum total-population deviation between Texas Senate districts was about 8 percent; the maximum voter-eligible population deviation between districts exceeded 40 percent. The unanimous opinion concluding Texas may redistrict using total population is "based on constitutional history, this Court's decisions, and longstanding practice." Section 2 of the Fourteenth Amendment explicitly requires that the U.S House of Representatives be apportioned based on

total population. "It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." There has been no previous cases alleging a state or local government failed to comply with "one-person, one-vote" where the Court determined if a deviation was permissible based on eligible- or registered-voter data. States and local governments redistricting based on total population is a settled practice.

In *Fisher v. University of Texas at Austin*, the Court ruled 4-3 that the University of Texas at Austin's race-conscious admissions program is constitutional. Per Texas's Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, filling up to 75 percent of the class. Other students are admitted based on a combination of their grades, test scores, and "personal achievement index." Race is considered as one factor in one of the two components of an applicant's "personal achievement index." UT Austin denied Abigail Fisher, a white Texan who did not graduate in the top ten percent of her class, admission. She sued claiming the university's use of race in admissions violates the Fourteenth Amendment's Equal Protection Clause. The Court rejected Fisher's four arguments that UT Austin's admissions policy isn't narrowly tailored. Fisher first claimed the university should have specified more precisely what level of minority enrollment would constitute a "critical mass." The Court responded that critical mass isn't a number and that the university articulated "concrete and precise goals" about the "educational values it [sought] to realize" through its race-conscious admissions process. Second, the Court rejected the argument that the university already achieved a critical mass of minority students using the Top Ten Percent Plan. Between 1996 and 2002, when race wasn't a factor in admissions, minority enrollment stagnated. The Court disagreed with Fisher's argument that the use of race had only a minimal impact on minority enrollment. Between 2003 and 2007, when race was considered, Hispanic and African-American enrollment increased 54 percent and 94 percent respectively. Finally, the Court rejected Fisher's argument that UT Austin could have used numerous race-neutral means of achieving more diversity. The Court noted that the university tried many of her suggestions but they didn't increase minority enrollment.

In *McDonnell v. United States*, the Supreme Court unanimously reversed former Virginia Governor Robert McDonnell's bribery conviction. The Court held that setting up meetings, calling other public officials, and hosting events do not alone qualify as "official acts." While in office McDonnell accepted more than $175,000 in loans, gifts, and other benefits from Jonnie Williams. Williams wanted a Virginia state university to test a dietary supplement, Anatabloc, his company, Star Scientific, had developed. Federal bribery statutes make it a crime for public officials to "receive or accept anything of value" in exchange for being "influenced in the performance of any *official act*." The federal government claimed McDonnell committed at least five official acts, including arranging for Williams to meet with Virginia government officials; recommending that senior government officials meet with Star executives; hosting and attending events at the Governor's mansion designed to encourage Virginia university researchers to study Anatabloc; and allowing Williams to invite individuals of importance to Star's business to exclusive events at the Governor's mansion. An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be

pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." The Court found a number of "questions or matters" in this case, including whether researchers at a Virginia university would study Anatabloc. But merely setting up a meeting, hosting an event, or calling another official does not qualify as a "decision or action" on any of these questions or matters.

The Supreme Court split 4-4 in *United States v. Texas* on whether the President's deferred action immigration program violates federal law. As a result, the Fifth Circuit's nationwide temporary stay of the program remains in effect. The Deferred Action for Parents of Americans (DAPA) program allows certain undocumented immigrants who have lived in the United States for five years, and either came here as children or already have children who are U.S. citizens or permanent residents, to lawfully stay and work temporarily in the United States. Before the Fifth Circuit several states challenged DAPA as violating the Administrative Procedures Act (APA) notice-and-comment requirement and claimed it is arbitrary and capricious in violation of the APA. The Fifth Circuit concluded the states were likely to succeed on both claims. It reasoned DAPA is a substantive rule, requiring the public to have the opportunity to offer comments, not a policy statement. The Fifth Circuit concluded DAPA is likely arbitrary and capricious because it is "foreclosed by Congress's careful plan" in the Immigration and Nationality Act for "how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization." The United States had also argued that the states lacked "standing" to challenge DAPA. The Fifth Circuit disagreed, reasoning that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing.

Fourth Amendment

A police officer stopped Edward Streiff after he left a suspected drug house. The officer discovered Streiff had an outstanding warrant, searched him (legally), and discovered he was carrying illegal drugs. The Court held 5-3 in *Utah v. Strieff* that even though the initial stop was illegal, the drug evidence could be admissible against Streiff in a trial. The attenuation doctrine is an exception to the exclusionary rule. Per that doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct [here the illegal stop] and the evidence is remote or has been interrupted by some intervening circumstance [here finding the warrant]." The Court first concluded that the discovery of a valid, pre-existing, untainted arrest warrant triggered the attenuation doctrine. The Court, applying a three-factor test articulated in *Brown v. Illinois* (1975), then concluded that the discovery of the warrant "was [a] sufficient intervening event to break the causal chain" between the unlawful stop and the discovery of drugs. Proximity in time between the initially unlawful stop and the search favored suppressing the evidence. But the other factors in this case, "intervening circumstances" and the lack of purposeful and flagrant police misconduct, weighed strongly in favor of the State. The warrant was an intervening factor in this case because it was valid, it predated the stop, and it was entirely unconnected to the stop.

In *Birchfield v. North Dakota*,* the Court held 5-3 that states may criminalize an arrestee's refusal to take a warrantless *breath* test. If states criminalize the refusal to take a *blood* test, police must obtain a warrant. Per the search-incident-to-arrest exception, police officers are allowed to search an arrestee's person, without first obtaining a warrant, to protect officer safety or evidence. To determine if this exception applies, the Court weighed the degree to which the search "intrudes upon an individual's privacy" with the need to promote "legitimate government interests." The Court concluded the privacy intrusion of breath tests was minimal but the privacy intrusion of blood tests was not. "[W]hile humans exhale air from their lungs many times per minute, humans do not continually shed blood." For this reason the Court concluded if states criminalize the refusal to take a *blood* test, police must obtain a warrant.

Employment

In *Heffernan v. City of Paterson, New Jersey*,* the Court held 6-2 that a public employer violates the First Amendment when it acts on a *mistaken* belief that an employee engaged in First Amendment protected political activity. Police officer Jeffery Heffernan worked in the office of the police chief. The mayor was running for reelection against a friend of Heffernan's, Lawrence Spagnola. Heffernan was demoted after another member of the police force saw Heffernan picking up a Spagnola yard sign and talking to the Spagnola campaign manager and staff. Heffernan was picking up the sign for his bedridden mother. The Court agreed that Heffernan has a First Amendment claim even though he engaged in no political activity protected by the First Amendment, because the City's motive was to retaliate against Heffernan for political activity. In *Waters v. Churchill* (1994), the employer mistakenly believed the employee engaged in personal gossip rather than protected speech on a matter of public concern. The Court upheld the employee's dismissal focusing on the employer's motive.

In *CRST Van Expedited v. EEOC*, the Court ruled that employers who prevail in Title VII employment discrimination cases may recover attorney's fees if they are able to "rebuff" employee's claims for any reason—including reasons not related to the merits of the claims. The lower court dismissed the sexual harassment claims of 67 women because the Equal Employment Opportunity Commission (EEOC), who represented the women, failed to meet its statutory obligation to investigate the allegations and conciliate with their employer, CRST Van Expedited. The lower court concluded that for CRST to be a prevailing party eligible to recover attorney's fees, the court would have had to have ruled "on the merits" of the employees' claims, which it did not. The Court disagreed, concluding that employers may prevail "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." "Common sense" indicates that an employer may prevail regardless of whether the case is disposed of "on the merits." An employer's objective is to rebuff an employee's claim, "irrespective of the precise reason for the court's decision."

In *Green v. Brennan*, the Court held 7-1 that the clock begins to run on when an employee must start the process of bringing a constructive discharge case, after the employee resigns. Nonfederal employees have up to 300 days "of the matter alleged to be discriminatory" to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The lower court held that the timeline to contact the EEOC is triggered by the employer's last

discriminatory act. The Court noted in its analysis that the "matter alleged to be discriminatory" language in the Title VI regulations is "not particularly helpful" in determining when the timeline is triggered. But the standard rule for when statutes of limitations begin to run is when a plaintiff has a "complete and present cause of action." Plaintiffs can't bring constructive discharge claims until they resign. The Court also noted that nothing in the regulations indicate the standard rule should be displaced, and starting the clock on complaining to the EEOC before a plaintiff can sue makes little sense.

In *James v. City of Boise*, the Court reversed the Idaho Supreme Court's refusal to follow Supreme Court precedent. Per 42 U.S.C. §1988, courts have discretion to grant attorney's fees to prevailing parties in civil right lawsuits filed under 42 U.S.C. §1983. In *Hughes v. Rowe* (1980), the Court interpreted §1988 to permit prevailing defendants to only recover in suits if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." The Idaho Supreme Court concluded it was not bound by *Hughes* and awarded attorney's fees to a prevailing defendant without first determining whether the plaintiff's lawsuit was frivolous. The Court reversed the Idaho Supreme Court's decision, reminding it that it is bound by the Supreme Court's interpretation of federal law.

Civil Procedure

In *Franchise Tax Board of California v. Hyatt*,* the Court held 6-2 that the Constitution's Full Faith and Credit Clause requires state courts to apply a damages cap, which applies to the state, to foreign states and local governments sued in its court. Gilbert Hyatt sued the California Franchise Tax Board in Nevada state court alleging a variety of claims related to what he described as abusive audit and investigation practices. A Nevada jury ultimately awarded Hyatt nearly $500 million in damages and fees. The Nevada Supreme Court refused to apply Nevada's $50,000 statutory cap, which applies to Nevada state and local governments, to damages related to Hyatt's fraud claim. CFTB claimed this refusal violates the Full Faith and Credit Clause. Per the Constitution, "Full Faith and Credit" must be "given in each State to the public Acts . . . of every other State." The Court concluded that the Full Faith and Credit Clause requires Nevada state courts to apply the damages cap that it would apply to Nevada to CFTB. The Full Faith and Credit Clause prohibits a state from adopting a "policy of hostility to the public Acts" of another state. Nevada's rule allowing damages awards of over $50,000 against foreign states and local governments is "not only 'opposed' to California law [which provides total immunity], it is also inconsistent with the general principles of Nevada immunity law [which grants the state immunity over $50,000]."

The Court sent *Spokeo v. Robins* back to the lower court to determine whether Thomas Robins suffered a "concrete" harm and therefore had "standing" to sue. The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of information used for employment purposes. Robins sued a "people search engine," Spokoe, for willfully violating the FCRA by publishing inaccurate personal information about him. Spokoe described Robins as holding a graduate degree and being relatively affluent though neither are true. The Court concluded 6-2 that the Ninth Circuit

failed to determine whether Robins suffered a concrete harm, which is a requirement of "standing." While injuries may be intangible and even the mere risk of real harm can satisfy the concreteness requirement, just because a statute grants a person a right and purports to allow them to sue does not mean a person has been injured-in-fact; they must still have suffered a concrete harm. A bare procedural violation, divorced from any concrete harm (such as an incorrect zip code), will fail to provide the basis for "standing."

In *Tyson Foods v. Bouaphakeo*, the Court held 6-2 that pork processing employees could bring a collective (class) action lawsuit using "representative evidence" put together by an industrial relations expert averaging donning and doffing time by position based on 744 videotaped observations. If each class member could have relied on a representative sample to establish liability in an individual lawsuit, that sample may be relied on to prove class wide liability. This is the reason the Court opined that the use of a representative sample is acceptable here: "In this suit [the employees] sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the] study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing." The Court also stated that while the question of whether uninjured class members may receive damages is one of "great importance," it is not fairly presented in this case, because the damages award has not yet been disbursed.

The Court's 4-4 ruling in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, leaves in place the Fifth Circuit's ruling that in some instances nonmembers of Indian tribes (including state and local governments) can be sued in tribal court (as opposed to state or federal court) for tort (civil wrongdoing) claims. John Doe, a thirteen-year-old tribe member, alleges that his supervisor sexually molested him while he was working as part of a job training program at a Dollar General located on a reservation. Doe sued Dollar General in tribal court alleging a variety of torts, including negligent hiring, training, and supervision. In *Montana v. United States* (1981), the Court held that generally nonmembers may not be sued in tribal court except that "tribe[s] may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing." The question in this case was whether "other means" include suing nonmembers for civil tort claims in tribal court. The Fifth Circuit determined that the tribal court had jurisdiction in this case, looking only at whether there was a commercial relationship between Dollar General and the tribe, and whether there was a nexus between Dollar General's participation in the job training program and Doe's tort claim. The Fifth Circuit concluded that even an unpaid internship creates a commercial relationship. As for a nexus the Fifth Circuit reasoned, "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business."

Redistricting

In *Harris v. Arizona Independent Redistricting Commission*, the Court held that Arizona's redistricting plan, which had a total population deviation among districts of 8.8 percent, wasn't

unconstitutional. Section 5 of the Voting Rights Act (VRA) requires that redistricting plans in "covered" jurisdictions don't worsen the position of minority voters. All the commissioners agreed that to obtain preclearance from the Department of Justice under the VRA, Arizona's plan had to contain at least ten districts where minority voters are able to elect their candidate of choice. A majority of the commissioners agreed to keep a higher population of minority voters in District 8, which leans Republican, so that the Commission might be able to claim District 8 was an eleventh "ability-to-elect" district. A group of Arizona voters claimed that the deviations from "absolute equality" reflect the fact that the Commission was trying to help the Democratic Party by making changes to District 8. The Court assumed, but did not decide, that partisanship is an illegitimate redistricting factor. Regardless, the Court concluded that the deviations predominately reflected the Commissions efforts to comply with the VRA, not to help a political party.

The Court held unanimously in *Wittman v. Personhuballah* that three members of Congress from Virginia lacked "standing" to intervene in a lawsuit alleging that Virginia's redistricting plan resulted in an unconstitutional racial gerrymander. When the Virginia legislature redrew congressional voting districts following the 2010 census it increased the number of minority voters in District 3, its only majority-minority district. A federal district court twice concluded that Virginia's plan amounted to an unconstitutional gerrymander. Neither time did Virginia appeal, but members of Congress intervened claiming that rejecting Virginia's redistricting plan harmed their reelection prospects. The Court concluded that none of the three intervenors in this case have standing. One legislator ultimately told the Court he would not be affected by its decision; the other two legislators failed to identify evidence indicating rejecting Virginia's plan would harm them.

In *Shapiro v. McManus,* the Court held unanimously that a three-judge court must be convened to decide a constitutional challenge to a redistricting plan even if the judge to which the request was made doesn't think the challenger will win. Stephen Shapiro, dissatisfied with Maryland's "crazy-quilt gerrymandering," sued Maryland, arguing its congressional redistricting plan violated his First Amendment right of political association. Per federal law, three judges "shall be convened" to hear challenges to the constitutionality of a congressional or statewide redistricting plan "unless [the judge whom the request for three judges is made] determines that three judges are not required." The Court reasoned that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." The "unless [the judge whom the request for three judges is made] determines that three judges are not required" language means that the judge receiving the request for a three-judge court merely needs to preliminarily examine the complaint to make sure it alleges a claim regarding whether a district is constitutionally apportioned (even if the claim doesn't seem particularly winnable).

Miscellaneous

In *United States Army Corp of Engineers v. Hawkes,** the Court ruled unanimously that an approved jurisdictional determination that property contains "waters of the United States" may be immediately reviewed in court. Per the Clean Water Act, "waters of the United States" (WOTUS) are federally regulated. Property owners may seek an approved jurisdictional

determination (JD) from the US Army Corp of Engineers definitively stating whether such waters are present or absent on a particular parcel of land. Per the Administrative Procedures Act, judicial review may be sought only from final agency actions. Per *Bennett v. Spear* (1997), agency action is final when it marks the consummation of the agency's decision-making process and when legal consequences flow from the action. The Court concluded that an approved JD is a final agency action subject to court review because it meets both conditions laid out in *Bennett*. The Corp didn't argue that an approved JD is tentative; its regulations describe approved JDs as "final agency action" valid for five years. Approved JDs give rise to "direct and appreciable legal consequences," the Court reasoned, because the Corp and the EPA (through a long standing agreement) are bound by them for five years. So per an approved JD, the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act may, practically speaking, grant or deny a property owner a five-year safe harbor from such proceedings.

In *Mullenix v. Luna*, Israel Leija Jr. led officers on an 18-minute chase at speeds between 85 and 110 miles an hour after officers tried to arrest him. Leija called police twice saying he had a gun and would shoot police officers if they did not abandon their pursuit. While officers set up spike strips under an overpass, Officer Mullenix asked his supervisor via dispatch if his supervisor thought shooting at Leija's car to disable it was "worth doing." His supervisor told Officer Mullenix to wait to see if the spike strips worked. Officer Mullenix then learned an officer was in harm's way from Leija beneath the overpass. Officer Mullenix shot at Leija's vehicle six times killing him but not disabling his vehicle. Leija's estate sued Officer Mullenix claiming that he violated the Fourth Amendment by using excessive force. The Court concluded Officer Mullenix should be granted qualified immunity, stating: "Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did."

In a 6-2 decision in *Luis v. United States*,* the Court ruled that the Sixth Amendment right to counsel includes allowing a criminal defendant to use *untainted* assets to hire an attorney, rather than freezing them for potential forfeiture to the government after conviction. Sila Luis was charged with fraudulently obtaining nearly $45 million in Medicare funds. She claimed she has a Sixth Amendment right to use the untainted portion of the $2 million in assets remaining in her possession to hire an attorney of her choice. The Court agreed in a plurality opinion. It distinguished two previous cases where it held that a post-conviction defendant (*Caplin & Drysdale v. United States* (1989)) and a pre-trial defendant (*United States v. Monsanto* (1989)) could not use *tainted* assets to pay an attorney. "The distinction between [tainted and untainted assets] is…an important one, not a technicality. It is the difference between what is yours and what is mine." The Court then applied a balancing test weighing the defendant's "fundamental" right to assistance of counsel with the government's interest in punishment through criminal forfeiture and victims' interest in restitution. The balance favored the interest of the accused because the interests in criminal forfeiture and restitution aren't constitutionally protected.

In a *per curiam* (unauthored) opinion, which concurring Justices Alito and Thomas called "grudging," the Court ordered the Supreme Judicial Court of Massachusetts to decide again whether Massachusetts's stun gun ban is constitutional. Currently, eight states and a handful of

cities and counties ban stun guns. The highest state court in Massachusetts held that the Second Amendment doesn't protect stun guns, because they weren't in common use at the time the Second Amendment was enacted--they are "unusual" as "a thoroughly modern invention," and they aren't readily adaptable for use in the military. In *District of Columbia v. Heller* (2008), the Court ruled that the Second Amendment provides an individual the right to possess a firearm to use for lawful purposes, including for self-defense, in the home. In *Heller*, the Court concluded that the Second Amendment extends to arms "that were not in existence at the time of the founding." In its two page decision in *Caetano v. Massachusetts*, the Court notes that the Supreme Judicial Court of Massachusetts ignores this "clear statement" in *Heller*. A gun can't be considered "unusual" just because it is a modern invention. And *Heller* "rejected the proposition 'that only those weapons useful in warfare are protected.'"

The Court adopted a new theory of liability under the False Claims Act in *Universal Health Services v. U.S. ex. rel. Escobar*. The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States. While the Supreme Court has yet to rule whether states and local governments can bring FCA claims, local governments, but not state governments, can be sued for making false claims against the federal government. Per the "implied false certification" theory, when a defendant submits a claim for reimbursement, it impliedly certifies compliance with all conditions of payment. In a unanimous opinion the Court adopted the "implied false certification" theory with two caveats. "[F]irst, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." The Court went on to rule that failure to disclose violations of statutory, regulatory, or contractual requirements violate the FCA only if they are material to the federal government's decision to pay. This is the case regardless of whether the requirements are expressly designated as a condition of payment or whether the federal government is entitled to refuse payment if it was aware of the violation.

In *Solem v. Bartlett* (1984), the Court articulated a three-part test to determine if a reservation has been diminished. Courts must look at "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act." In *Nebraska v. Parker*, the Court concluded the Omaha Indian Reservation hadn't been diminished where only the third factor indicated diminishment. An 1882 Act of Congress allowed part of the Omaha Indian Reservation to be sold to non-Indian settlers. A settler bought the land the Village of Pender is located on per the 1882 Act. In 2006 the tribe sought to subject retailers in Pender to its newly amended Beverage Control Ordinance. In this unanimous opinion the Court had little trouble concluding that the first two factors didn't indicate diminishment. The Court acknowledged that the third factor indicated diminishment. Only two percent of Omaha tribal members live on the disputed land, and the tribe doesn't enforce any of its regulations or offer any services on the disputed land. "But this Court has never relied solely on this third consideration to find diminishment."