Supreme Court Term Mid-Term Review: Local Government at the High Court

By: Lisa Soronen and Victor Kessler, State and Local Legal Center, Washington DC

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

The Court has accepted all the cases it will decide during its 2013-2014 term. Two of the big local government cases are no longer on the Court's docket. *Mt. Holly v. Mt. Holly Gardens Citizens in Action,* involving whether disparate impact claims can be brought under the Fair Housing Act, settled, and *Madigan v. Levin,* involving whether age discrimination claims can be brought against government employers under the Constitution instead of the Age Discrimination in Employment Act, was dismissed as improvidently granted. And none of the most prominent cases of the term directly involve local government. Yet, the docket remains surprisingly interesting to local government.

In *Riley v. California* and *U.S. v. Wurie* the Court will decide whether the Fourth Amendment permits police to search a cell phone, without a warrant, found on a person lawfully arrested. The lower courts reached opposite conclusions in these cases. In *Riley* the California Court of Appeals concluded the warrantless search was lawful. State court precedent held that a warrantless cell phone search was permissible as incident to an arrest if it was "personal property . . . immediately associated with [his] person." In this case it was. In *Wurie,* the First Circuit applied the two justifications for a search incident to an arrest articulated in *Chimel v. California*, officer safety and preservation of evidence, and concluded that the warrantless cell phone search violated the Fourth Amendment. The court reasoned that officer safety is irrelevant to cell phones, and it is very unlikely that cell phone data would be destroyed while officers obtain a warrant. As the court in *Wurie* points out, smart phones are computers containing a wealth of information. It would significantly assist local police officers if they could search these devices when they arrest someone without first obtaining a warrant.

Mendocino County's 911 call center received a tip that a vehicle had driven the caller off the road. The caller gave a detailed description of the car, its location, and the direction it was headed. Two state police officers quickly located the vehicle, pulled the driver over, and searched the car after smelling marijuana. The question the Court will decide in *Navarette v. California* is whether the Fourth Amendment requires a police officer who receives an anonymous tip regarding drunken or reckless driving to corroborate the dangerous driving before stopping the vehicle. In this case, the police officers did not actually observe any erratic driving before pulling the vehicle over. The California Court of Appeals held that officers need not wait to pull someone over when an anonymous tip is of erratic driving and the officer is able to corroborate innocent details, as in this case. Local police have a significant interest in this case as waiting to pull over someone until the officer actually witnesses reckless driving may put other drivers, and the officer, in harm's way.

In 2006 in *Garcretti v. Ceballos* the Court held that public employee speech made pursuant to an employee's official job duties isn't protected by the First Amendment because a public employee is not acting as a private citizen when making such speech. In *Lane v. Franks*, Edward Lane asks the Court to make an exception for subpoenaed testimony. Lane claims he was laid off because he testified pursuant to a subpoena before a grand jury and at a federal criminal trial that a state legislator employed by his program didn't do any work. The Eleventh Circuit found that Lane was acting pursuant to his official job duties when he testified and therefore his speech wasn't protected by the First Amendment. Other circuits have disagreed reasoning that public employees have obligations as citizens independent of their public employment to testify truthfully. *Garcetti*, decided 5-4, was a big win for public employers. This is the Court's first opportunity to narrow or affirm *Garcetti*.

In *Sebelius v. Hobby Lobby Stores* and *Conestoga Wood Specialties Corp. v. Sebelius* the Court will decide whether the Religious Freedom Restoration Act (RFRA) applies to for-profit, closely held secular corporations. Three corporations claim that the Affordable Care Act's requirement that employers with 50 or more employees provide coverage of all FDA-approved contraceptive methods violates RFRA. RFRA provides that the federal government "shall not substantially burden a **person's** exercise of religion." If RFRA applies to corporations, the Religious Land Use and Institutionalized Persons Act (RULIPA) likely will also apply to corporations, greatly expanding the scope of RULIPA. RLUIPA bars state and local governments from enforcing land use regulations that impose a substantial burden on "the religious exercise of a **person**" unless the government can point to a compelling interest. RFRA and RULIPA are related statutes. But, RFRA only applies to the federal government, and RULIPA only applies in the land use and institutionalized persons' context. Both statutes use the term "person" to define who is covered. The SLLC filed an *amicus* brief in this case arguing that for-profit corporations aren't covered by RULIPA.

Police officers shot and killed Donald Rickard and his passenger after Rickard led police on a high-speed chase. Their families sought money damages claiming the officers violated the Fourth Amendment by using excessive force. The officers argued they should be granted qualified immunity because their use of force wasn't prohibited by clearly established law. In *Plumhoff v. Rickard* the Court will decide whether the lower court properly denied qualified immunity by distinguishing this case, which arose in 2004, with a *later* Supreme Court decision from 2007. The Court also will decide whether qualified immunity should be denied based on the facts of this case. Rickard wove through traffic on an interstate connecting two states, collided with police vehicles twice, and used his vehicle to escape after being surrounded by police officers, nearly hitting at least one officer. Local governments will benefit from clarity the Supreme Court will provide on the boundaries of both qualified immunity and the "hot pursuit" doctrine. The SLLC has filed an *amicus* brief in this case.

In *Wood v. Moss* pro- and anti-President Bush demonstrators had equal access to the President as his motorcade arrived in Jacksonville, Oregon. But when the President made an unexpected stop for dinner, Secret Service agents moved the anti-Bush protesters, who were closer to the restaurant than the pro-Bush demonstrators, about one block further from the President than the pro-Bush demonstrators. The anti-Bush protesters sued two Secret Service agents claiming they violated their First Amendment rights by discriminating against them because of their viewpoint. The Ninth Circuit denied the agents qualified immunity. The Supreme Court will decide whether the lower court evaluated the qualified immunity question in this case too generally. The Ninth Circuit focused on its conclusion that the agents engaged in viewpoint discrimination instead of whether it was clearly established that the anti-Bush protesters could not be moved further away from the President than the pro-Bush demonstrators. The Court will also decide whether the anti-Bush protesters have adequately claimed viewpoint discrimination when there was an obvious security-based rationale for moving them: they were closer to the President. The SLLC has filed an *amicus* brief in this case.

Town of Greece v. Galloway might redefine the Court's approach to legislative prayer practices. Under the 1983 case *Marsh v. Chambers*, the Court held that a state legislature could hire a chaplain to deliver a prayer at the beginning of its sessions as long as the practice was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." The Town of Greece's official policy allows any person of any or no denomination to deliver an invocation at the beginning of town board meetings, and the Town does not approve or even examine the prayer in advance. In practice, all but four invocations (two Jewish, one Baha'I, and one Wiccan) have been led by Christians. The Court will review a "totality of the circumstances" test employed by the Second Circuit to declare the Town's practice an unconstitutional violation of the Establishment Clause and revisit its holding in *Marsh* for the first time in three decades. The case could impact many local bodies which begin their sessions with a prayer.

In *McCullen v. Coakley*, the Court will examine the constitutionality of a Massachusetts law that creates a 35-foot "buffer zone" around reproductive healthcare facilities into which demonstrators are not allowed to enter. A 2000 case, *Hill v. Colorado*, upheld a similar law against a First Amendment challenge because it (1) addressed a legitimate state concern for the safety and privacy of individuals using the facilities, (2) was "content-neutral" in that it applied to all demonstrators equally regardless of viewpoint, and (3) regulated the "time, place, and manner" of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. A broad ruling by the Justices could have sweeping consequences beyond this particular context, as local governments are continually challenged to strike a balance between free speech rights and the duty to protect their citizens from harassment at clinics, funerals, political events, and other locations. The SLLC has filed an *amicus* brief in this case.

So far the Court has decided three cases of interest to local governments. In *Marvin M. Brandt Revocable Trust v. United States* the Court held 8-1 that a private party, rather than the federal government, owns an abandoned railroad right-of-way granted by the General Railroad Right-of-Way Act of 1875. The Court ruled against the United States "in large part because it won when it argued the opposite before this Court more than 70 years ago in the case of *Great Northern Railway Co. v. United States*." The United States and the SLLC argued that the Court should not read *Great Northern* as broadly and that a series of federal statutes apply to abandoned 1875 rights-of-way and grant the United States title to abandoned rights-of-way (unless a state or local government establishes a "public highway," including a recreational trail, within one year of abandonment). The Justices discussed at oral argument the argument in the SLLC brief that state and local governments have relied on these statutes. Yet the Court concluded they don't apply to 1875 rights-of-way because "these statutes do not tell us whether the United States has an interest in any particular right of way; they simply tell us how any interest the United States might have should be disposed of."

In *Fernandez v. California* the Court held that if a defendant objects to the search of his or her home that objection may be overridden by a co-tenant after the defendant is no longer present. Walter Fernandez told police they could not search his home. But after he was arrested and removed from the premises because he was suspected of domestic violence, the woman he was living with consented to a search. In *Georgia v. Randolph* the Court held that if a defendant is physically present and objects to a warrantless search, a co-tenant cannot override that objection. The Court refused to extend *Georgia v. Randolph* where the objecting defendant is no longer present. While the defendant pointed out the police were responsible for his absence, the Court noted that his removal was objectively reasonable. The Court also rejected Fernandez's argument that his objection should remain effective until he changed his mind. *Georgia v. Randolph* was based on the "widely shared social expectation" that if you call on someone and one of the tenants says you were not welcome you would not enter. The "calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the

door." Local police have been waiting since 2006 to find out if the Court would extend *Georgia v. Randolph*.

In *Sandifer v. U.S. Steel Corporation* the Court held that donning and doffing protective gear qualifies as "changing clothes" under Section 29 U.S.C. 203(o) of the Fair Labor Standards Act (FLSA). This section allows parties to decide as part of a collective bargaining agreement that time spent changing clothes at the beginning and end of the work day is noncompensable, which is what U.S. Steel agreed to in a collective bargaining agreement. Clifton Sandifer argued donning and doffing protective gear does not constitute "changing clothes." The Court disagreed reasoning that clothing can include items worn for protection, and changing clothes can includes altering street clothes with protective gear. The Court concluded that that majority of items at issue in this case—hard hats, work gloves, flame-retardant jackets, etc.—were clothes. While safety glasses, earplugs, and respirators weren't, time spent donning and doffing them was minimal. Some local government employees may wear protective gear. This case affirms that local governments and unions may agree in collective bargaining agreements to not compensate employees for taking on and off protective gear.

Most of the issues the Court has taken up this term affecting local government involve routine issues—Fourth Amendment searches, qualified immunity, and First Amendment speech. What makes these case interesting are their sometimes controversial facts and the wide range of contexts in which the issues arise. How will the Court decide these cases? We will know by the end of June.