Supreme Court Mid-Term Review: States and the Supreme 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. This year's biggest cases—a challenge to the President's recess appointment power, a campaign finance case, and a challenge to the Affordable Care Act's contraception mandate—aren't as big as the big cases of the recent past and won't have as great of an impact on states. Yet, the docket remains interesting to state government. The term runs the gambit from controversial subjects like affirmative action, legislative prayer, and speech near abortion clinics to more routine issues like qualified immunity, Fourth amendment searches, and public employee speech.

In *Schuette v. Coalition to Defend Affirmative Action*, the Court will consider the constitutionality of a 2006 Michigan state constitutional amendment that prevents the state and its universities from giving "preferential treatment to any individual or group on the basis of race," relevant here in the university admissions context. Unlike last term's *Fisher v. University of Texas at Austin*, which deferred a ruling on the constitutionality of an affirmative action program, *Schuette* asks the Court to determine whether banning affirmative action altogether violates the Fourteenth Amendment's Equal Protection Clause. As in *Fisher*, Justice Kagan has recused herself from the case, leaving eight Justices to consider the issues and making a broad pro-affirmative action ruling unlikely.

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 state 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 state 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 State and Local Legal Center (SLLC) has filed an *amicus* brief in this case.

The question relevant to states in *Bond v. United States* is whether the federal government can adopt a statute implementing a valid treaty that it otherwise does not have the authority to adopt. Upon discovering her friend was pregnant with her husband's child, Carol Anne Bond acquired toxic chemicals and placed them on her friend's mailbox and door and car handles. Ms. Bond was indicted under a federal statute implementing a chemical weapons treaty the United States signed. While Ms. Bond concedes the treaty is valid, she argues that the federal statute adopting it violates the Tenth Amendment because states—not the federal government—typically punish assaults. However, *Missouri v. Holland*, decided nearly 100 years ago, holds that if a treaty is valid Congress may implement it even if Congress would otherwise be unable to legislate in that domain. The Supreme Court may avoid the question of whether *Missouri v. Holland* should be limited or overruled by holding that Ms. Bond's use of the chemicals didn't violate the federal statute. She argues the statute does not reach "conduct that no signatory state could possibly engage in—such as using chemicals in an effort to poison a romantic rival."

Environmental Protection Agency v. EME Homer City Generation focuses on the scope of the Environmental Protection Agency's (EPA) authority to regulate states contributing to air pollution in other states downwind. Under the Clean Air Act, the EPA sets air quality standards and the states create State Implementation Plans (SIPs) to achieve them. The EPA may impose its own Federal Implementation Plan (FIP) only if a state fails to submit or fails to correct a SIP rejected by the federal government. If the Court does not dismiss the case for a lack of federal

jurisdiction, it will decide whether (1) an FIP may be implemented based on a state's failure to submit an adequate SIP *before* the EPA had defined downwind pollution reduction targets, and (2) whether the Clean Air Act permits the EPA to define a state's contribution to pollution downwind in terms of cost-effective pollution controls or solely in terms of the physical amount of pollution.

In 2007 in *Massachusetts v. EPA* the Supreme Court ruled that EPA has the authority to regulate the emissions of greenhouse gases from new motor vehicles under the Clean Air Act (CAA). The question in *Utility Air Regulatory Group v. EPA* is whether EPA may regulate greenhouse gases emitted from stationary sources, like power plants and factories, too. The D.C. Circuit concluded that EPA does have this authority reasoning that in *Massachusetts v. EPA* the Court determined that CAA's overarching definition of "air pollutant," which applies to all provisions of the Act not just those related to new motor vehicles, includes greenhouse gases. EPA significantly increased the amount of greenhouse gases that will initially require permitting because otherwise millions of stationary sources will need permits. States are affected by this case, and have filed on either side, because they issue permits and own stationary sources that emit greenhouse gases, on one hand, and they would benefit from reduced greenhouse gases emissions, on the other hand.

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*.

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. State 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.

Susan B. Anthony List v. Driehaus involves a First Amendment challenge to a state statute prohibiting making false statements against candidates for office. The Susan B. Anthony List (SBA List) wanted to run a billboard criticizing a Congressman for supporting tax-payer funded abortions by voting in favor of the Affordable Care Act. A panel of the Ohio Elections Commission found probable cause that this billboard would violate Ohio's false-statement statute and referred the matter to the full Commission. The full Commission hearing never took place because the Congressman lost the election. SBA List sued the Commission claiming that the Commission proceedings chilled its First Amendment protected speech and association rights. SBA List wants the Supreme Court to adopt a test that makes it easier to challenge the constitutionality of false-statement laws. At least 15 states have similar laws prohibiting making false statements against candidates which will be affected by how the Court rules in this case.

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.

The Court has issued an opinion in two cases affecting the states. 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 *Sprint Communications Company v. Jacobs* the Court held that a federal court should not have abstained from deciding a case where a state court also was reviewing a decision of the Iowa Utilities Board (IUB) because the IUB proceedings did not "resemble . . . state enforcement actions" where abstention is appropriate. Sprint withheld payment of intercarrier access fees for Voice over Internet Protocol calls to an Iowa communications company, Windstream, and filed a complaint with the IUB asking it to prevent Windstream from discontinuing service to Sprint. The IUB ordered Sprint to pay, and Sprint challenged the IUB's decision in federal and state courts simultaneously. The Supreme Court, in a unanimous opinion, held that *Younger* abstention does not apply in this case. The Court reasoned that *Younger* abstention only applies in three "exceptional circumstances," including civil enforcement proceedings. The IUB proceedings in this case did not resemble state enforcement actions because they were not "akin to criminal prosecution" and were not initiated by "the State in its sovereign capacity." Instead, Sprint initiated the action and no state authority investigated Sprint or filed a complaint against Sprint. The SLLC filed an *amicus* brief in this case.

So how will the states fare in these cases? In the environmental cases it will depend, of course, on what side each state filed. Either way, all opinions will be issued by the end of June.