Supreme Court and Local Governments: Mid-Term 2014-2015

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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 or will file an *amicus* brief.

Pending Cases

In *Reed v. Town of Gilbert, Arizona** the Court will decide whether Gilbert's sign code violates the First Amendment. The Good News church objected to Gilbert's sign code which treats temporary direction signs less favorably than political signs and ideological signs. A majority of the Ninth Circuit concluded the distinctions between the three sign categories are content-neutral because all signs in each category are treated the same regardless of their content even if the three categories of signs are treated differently. A dissenting judge would have compared the three sign categories with each other stating: "Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed."

In *Sheehan v. City & County of San Francisco** the Court will decide whether the Americans with Disabilities Act (ADA) applies to arresting an armed, violent, mentally ill suspect. When police officers entered Teresa Sheehan's room in a group home for persons with mental illness she threatened to kill them with a knife she held. When officers reentered her room Sheehan stepped toward them with her knife raised and continued to hold it after officers pepper sprayed and ultimately shot her. Sheehan argued that Title II of the ADA applies to arrests and that the officers should have accommodated her mental illness by respecting her comfort zone, engaging in non-threatening communications, and using the passage of time to defuse the situation. The Ninth Circuit held that Title II of the ADA applies to arrests. The ADA applies broadly to police "services, programs, or activities," which means "anything a public entity does," including arresting people. The Ninth Circuit also concluded that reentry into Sheehan's room was unreasonable under the Fourth Amendment and refused to grant the officers qualified immunity: "If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive."

A Los Angeles ordinance requires hotel and motel operators to keep specific information about their guests and allows police to inspect the registries without warrants. The issues in *Los Angeles v.*

*Patel** are (1) whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel and motel registry ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry. The Ninth Circuit did not discuss the possibility that Fourth Amendment facial challenges to ordinances and statutes are impermissible. The majority first concluded that the hotel and motel owners have property and privacy interests in their records and that they are not required to prove, as a factual matter, that their records are subject to a reasonable expectation of privacy. The majority then concluded that the ordinance is facially unconstitutional because it fails to expressly provide for pre-compliance judicial review before the police can inspect the registry.

In *Rodriguez v. United States* the Court will decide whether a police officer violates the Fourth Amendment by extending (for just a few minutes) an already-completed traffic stop for a dog sniff. Dennys Rodriguez veered onto the shoulder of the highway and jerked back on the road. Officer Struble gave him a written warning and then called for backup. When backup arrived, Officer Struble walked his sniffer dog around Rodriguez's car. The Eighth Circuit held the search was reasonable. Officer Struble waited only seven or eight minutes after the traffic stop was completed before deploying his dog because he wanted backup given that there were two people in the stopped car.

For the third time the Court has accepted a case involving the issue of whether disparate-impact claims can be brought under the Fair Housing Act. The Inclusive Communities Project sued the Texas Department of Housing and Community Affairs claiming it was disproportionately approving Low Income Housing Tax Credits in minority-concentrated neighborhoods and disproportionately disapproving them in predominately white neighborhoods so as to maintain segregated housing patterns. It remains to be seen if *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* will settle like its predecessors, *Mt. Holly v. Mt. Holly Citizens in Action* and *Magner v. Gallagher*. The 11 federal circuits that have decided this issue have all held that disparate-impact claims are actionable.

In *Walker v. Texas Division, Sons of Confederate Veterans* the Texas Department of Motor Vehicles Board (Board) rejected the Texas Division of the Sons of Confederate Veterans' (Texas SCV) application for a specialty license plate featuring images of the Confederate Flag. The Fifth Circuit agreed with Texas SCV that its First Amendment rights had been violated. The speech in this case was private applying the "reasonable observer test" test from *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467 (2009), where the Court held that monuments in a public park are government speech. While governments have historically used monuments "to speak to the public" in parks, a reasonable observer would understand that specialty plates are private speech because "states have not traditionally used license plates to convey a particular message to the public." The Board engaged in viewpoint discrimination because it "discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage."

In *Comptroller v. Wynne** the Court will determine whether the U.S. Constitution requires states to offer a credit to its residents for all income taxes paid to another jurisdiction. The Wynnes of Howard County, Maryland, received S-corporation income that was generated and taxed in numerous states. Maryland law allowed them to receive a tax credit against their Maryland state taxes but not their Maryland county taxes. Maryland's highest state court held that offering no credit against their county taxes violated the dormant Commerce Clause, which denies states the power to unjustifiably discriminate against or burden interstate commerce. 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 Railroad Revitalization and Regulation Reform Act (4-R) prohibits states from taxing railroads in a discriminatory manner. In Alabama railroads pay a 4% sales tax on diesel fuel, trucks pay a 19 cents per gallon excise tax, and water carriers pay no tax. In *Alabama Department of Revenue v. CSX Transportation** the Court will first decide who to compare taxation of railroads to: competitors only or other commercial and industrial taxpayers. The Court will also decide whether it should consider the fact that trucks pay roughly the same in excise taxes as railroads pay in sales taxes when determining whether Alabama's sale tax discriminates against railroads. The Eleventh Circuit ruled Alabama violated 4-R. It compared CSX to competitors only and did not include the excise tax trucks pay when comparing their taxation to railroads. At least 10 other states—and some local governments within those states—charge railroads a sales tax on diesel fuel.

Colorado requires online retailers who don't have to collect sales tax to comply with tax notice and reporting requirements. Direct Marketing Association sued Colorado in federal court claiming these requirements are unconstitutional. The issue in *Direct Marketing Association v. Brohl** is whether the Tax Injunction Act (TIA) bars the federal court from hearing this case even though DMA isn't a taxpayer and Colorado "neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration." The Tenth Circuit held federal court jurisdiction is barred. "Nothing in the language of the TIA indicat[es] that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others." Regarding the argument that the notice and reporting obligations aren't taxes, the TIA uses the term "restrain." DMA's lawsuit seeks to retrain state tax collection.

In *Kingsley v. Hendrickson** the Court will define the substantive standard for excessive force claims brought by pretrial detainees. The constitutional standard for the use of excessive force depends on whether a person is an arrestee, a pretrial detainee, or a sentenced inmate. The Fourth Amendment applies to arrestees, the Fourteenth Amendment's Due Process Clause applies to pretrial detainees, and the Eighth Amendment applies to those convicted. Force against an arrestee must be "objectively reasonable," while force against a sentenced inmate must merely not be "cruel and unusual." The Court has never defined the substantive standard for excessive force claims by pretrial detainees. The jury instruction stated that for pretrial detainee Michael Kingsley to win his excessive force case he had to prove that the officers acted "recklessly." Kingsley claims that the jury instruction should have been less deferential to the officers and that he should have only had to prove that they failed to act "objectively reasonable." The Seventh Circuit concluded that the jury instruction was adequate based on circuit precedent.

In *EEOC v. Abercrombie & Fitch Stores** the Court will decide whether employers must ask about an employee/applicant's religion to avoid a failure to accommodate claim under Title VII. Abercrombie & Fitch's "Look Policy" requires sale-floor employees to wear clothing consistent with what Abercrombie sells in it stores and prohibits headwear. Samantha Elauf wore a head scarf to an interview at Abercrombie but didn't ask for a religious accommodation. Her interviewer assumed but did not ask if she were Muslim and wore the headscarf for religious reasons. Ms. Elauf was ultimately not hired because of the headscarf. The Equal Employment Opportunity Commission sued Abercrombie alleging it violated Title VII by failing to accommodate Ms. Elauf's religious beliefs.
The Tenth Circuit held in favor of Abercrombie, finding that an applicant/employee "ordinarily must establish that he or she initially informed the employer that [he or she] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice," which Ms. Elauf did not do.

A group of agencies providing supported living services to Medicaid-eligible individuals sued Idaho's Department of Health and Welfare for failing to implement a cost study that recommended substantial increases in Medicaid reimbursement rates. The issue in *Armstrong v. Exception Child Center* is whether the Supremacy Clause gives Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a state where Congress created no enforceable rights under that statute. This statute requires states to ensure that Medicaid reimbursement rates for healthcare providers "are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers." In 2012 in *Douglas v. Independent Living Center of Southern California* the Court was asked to decide the very same issue but ultimately didn't reach it because the Centers for Medicare and Medicaid indicated that California's Medicaid plan complied with 42 U.S.C. § 1396a(a)(30)(A). Four dissenting Justices would have held that the Supremacy Clause provides no cause of action to sue a state under 42 U.S.C. § 1396a(a)(30)(A).

The issue in *Perez v. Mortgage Bankers Association** is 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 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 issued an Administrator's Interpretation saying mortgage loan officers are eligible for overtime, withdrawing an earlier opinion letter to the contrary. Because state and local governments are often regulated by federal agencies or regulate in the same space as federal agencies, they generally prefer more opportunity to be informed of and comment on significant alterations to interpretive rules.

In *Ohio v. Clark* the Court will decide whether testimony of head start teachers about what a three year old boy told them when they asked him who hurt him was admissible in his father's assault trial. The Sixth Amendment Confrontation Clause requires that those accused of crimes be allowed to confront their accusers. The Confrontation Clause prohibits out-of-court statements of witnesses who do not appear at trial if their statements are "testimonial." Statements made to law enforcement are testimonial when there is no ongoing emergency and the primary purpose of the interrogation is to build a criminal case. The Ohio Supreme Court held that admitting the teachers' testimony, when the boy did not testify due to his young age, violated the Confrontation Clause because the boy's statements were "testimonial." The court reasoned that the teachers were acting as law enforcement agents when they questioned him because they have mandatory child abuse reporting obligations and the boy was not in the midst of an ongoing emergency when he was questioned.

Decided Cases

The Telecommunications Act (TCA) requires that a state or local government's decision denying a cell tower construction permit be "*in writing* and supported by substantial evidence contained in a written record." In *T-Mobile South v. City of Roswell** the Court held 6-3 that local governments have to provide reasons for why they are denying a cell tower application so that courts can determine whether the denial was supported by substantial evidence. The Court rejected, however, T-Mobile's argument that the reasons must be set forth in a formal written decision denying the application instead of council meeting minutes because nothing in the TCA "imposes any requirement that the reasons be given in any particular form." But the Court also held that, because wireless providers have only 30 days after an adverse decision to seek judicial review, the council meeting minutes setting forth the reasons have to be issued "essentially contemporaneous[ly]" with the denial.

In a unanimous opinion in *Integrity Staffing Solutions v. Busk** the Court held that the Fair Labor Standards Act (FLSA) does not require hourly employees to be paid for the time they spend waiting to

undergo and undergoing security screenings. Under the FLSA employers only have to pay "non-exempt" employees for preliminary and postliminary activities that are "integral and indispensable" to a principal activity. An activity is "integral and indispensable" to a principal activity "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." Security screenings are not intrinsic to retrieving and packing products and Integrity Staffing Solutions could have eliminated the screenings altogether without impairing employees' ability to complete their work. State and local government employees who work in courthouses, correctional institutions, and warehouses routinely go through security screening at the beginning and/or end of the workday.

In *Heien v. North Carolina* the Court held that a reasonable mistake of law can provide reasonable suspicion to uphold a traffic stop under the Fourth Amendment. A police officer pulled over a car that had only one working brake light because he believed that North Carolina law required both brake lights to work. The North Carolina Court of Appeals, interpreting a statute over a half a century old, concluded only one working brake light is required. The Court has long held that reasonable mistakes of *fact* do not undermine Fourth Amendment searches and seizures. Justice Roberts reasoned in this 8-1 decision: "Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law."

In *Carroll v. Carman* the Court held, in a *per curiam* (unauthored) opinion, that the Third Circuit improperly denied qualified immunity to a police officer who "knocked and talked" to a homeowner at his back door, rather than his front door, without a warrant. The "knock and talk" exception to the Fourth Amendment's warrant requirement allows police officers to knock on a resident's door and speak to its inhabitants as any other person would. Officer Carroll knocked on the Carmans' back door, which he described as looking like a customary entryway, in search of a man who had stolen a car and two loaded guns. The Court concluded that it wasn't clearly established that the "knock and talk" exception only applies to knocks at the front door. The only circuit precedent the Third Circuit pointed to didn't hold that knocking on the front door is required before officers go onto other parts of the property open to visitors. And other federal and state courts have rejected the Third Circuit's approach. Notably the Court declined to decide the underlying legal issue in this case of whether police can "knock and talk" at any entrance open to visitors rather than only the front door.

In *Johnson v. City of Shelby, Mississippi*, in a *per curiam* (unauthored) opinion, the Supreme Court held that police officers did not have to invoke 42 U.S.C. § 1983 in their constitutional claim against Shelby. 42 U.S.C. § 1983 is a vehicle for private parties to sue state and local governments for constitutional violations. In this case police officers alleged in their complaint that the city's board of aldermen fired them for bringing to light the criminal activities of one alderman in violation of their Fourteenth Amendment due process rights. The Fifth Circuit dismissed the officers' complaint because they didn't invoke § 1983 reasoning that "[c]ertain consequences flow from claims under § 1983, such as the unavailability of *respondeat superior* [employer] liability, which bears on the qualified immunity analysis." The Supreme Court pointed out that the Fifth Circuit was confused in its perception of the officers' suit which was against the city. Unlike a municipal officer, a city cannot invoke qualified immunity. More generally, the Court stated that federal pleading rules don't require a complaint to be dismissed because it imperfectly states the legal theory supporting it.

In *M&G Polymers USA v. Tackett* the Court held unanimously that ordinary principles of contract law apply to determining whether lifetime contribution-free retiree health insurance benefits are vested or terminate when the collective bargaining agreement (CBA) expires. The CBA in this case said that those who retire at a certain age with certain years of service "will receive" fully paid for health insurance. When the CBA expired M&G announced that retirees would have to contribute to the cost of health insurance. The Sixth Circuit agreed with the retirees, applying the *Yard-Man* inference from a 1983 Sixth Circuit decision, that the retiree benefits vest for life. The Court criticized the *Yard-Man* inference on many grounds but most fundamentally that it "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." This case was decided under the federal Labor Management Relations Act, which does not apply to state and local governments. But the same question arises under public sector CBAs, and arbitrators and courts may look to this decision for guidance.