Supreme Court and the States: 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.*

*Indicate a case where the SLLC has or will file an *amicus* brief.

Pending Cases

In reviewing four consolidated cases from the Sixth Circuit, the Court will decide in *Obergefell v. Hodges* two issues regarding same-sex marriage. First, whether the Fourteenth Amendment requires states to allow same-sex marriages. Second, whether the Fourteenth Amendment requires a state to recognize a same-sex marriage lawfully performed out-of-state. After numerous federal circuit courts of appeals decided the first question affirmatively, the Sixth Circuit answered both questions negatively. The Sixth Circuit reasoned that none of the couples' arguments "makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."

The issue in *King v. Burwell* is whether tax credits for low and middle income health insurance purchasers are available under the Affordable Care Act (ACA) if insurance is purchased on a federal exchange rather than a state exchange. Only 16 states and the District of Columbia have established exchanges. The ACA makes tax credits available to those who buy health insurance on exchanges "established by the State." The Internal Revenue Service (IRS) interpreted that language to include insurance purchased on federal exchanges too. The Fourth Circuit upheld IRS's interpretation, concluding that "established by the State" is ambiguous, when read in combination with other sections of the ACA, and could include federal exchanges. The "board policy goals of the Act," also persuaded the court that the IRS's interpretation was permissible.

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).

In a provision added by citizen initiative, the Arizona Constitution entirely removes congressional redistricting authority from the Arizona State Legislature and places it in an unelected commission. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* the Court will decide whether this violates the U.S. Constitution's Elections Clause which requires that the time, place, and manner of congressional elections be prescribed in each state by the "Legislature thereof." The Arizona district court ruled against the Arizona legislature reasoning that the Supreme Court previously held in two cases that a state may allow state bodies other than the legislature to redistrict. A dissenting judge didn't disagree with this, but pointed out that in those cases the state legislature still was able to participate in the redistricting process "in some very significant and meaningful capacity." While the use of redistricting commissions is popular for drawing state legislative district lines, only Arizona and California have mandated them for congressional redistricting.

Michigan v. Environmental Protection Agency challenges a 2012 Environmental Protection Agency (EPA) regulation intended to limit mercury and other emissions from mostly coal-fired power plants. Before regulating emissions from electric utilities, the Clean Air Act (CAA) requires the EPA Administrator to find that regulation is "appropriate and necessary" based on a public health hazards study. The question in this case is whether EPA unreasonably refused to consider costs in making its determination that regulation was "appropriate." The D.C. Circuit agreed with EPA that it was not required to consider costs. "Appropriate" isn't defined in the relevant section of the CAA and dictionary definitions of the term don't mention costs. Throughout the CAA "Congress mentioned costs explicitly where it intended EPA to consider them." States are involved in this case on both sides.

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 *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."

In *Alabama Legislative Black Caucus v. Alabama* the Court will decide whether Alabama's 2010 redistricting plan violates Section 2 of the Voting Rights Act and the Fourteenth Amendment's Equal Protection Clause. While Alabama's plan maintains the number of House and Senate majority-black

districts, it shifts more black voters into majority-black districts which limits their potential influence in other districts. The federal district court found no vote dilution or racial gerrymandering. Race wasn't the predominate motiving factor in creating the districts, instead the legislature "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible."

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 *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 2008 in *Baze v. Rees* the Court approved a three-drug method for lethal injections: sodium thiopental to induce unconsciousness so pain is not felt when the second and third drugs cause paralysis and cardiac arrest. In *Glossip v. Gross*, the Court will decide whether Oklahoma's use of midazolam instead of sodium thiopental violates the Eighth Amendment because it cannot reliably produce a deep, coma-like unconsciousness which will prevent substantial pain caused by the second and third drugs. The

death row inmates in this case claim that midazolam poses a substantial risk that they will experience severe pain because it has a "ceiling effect" (at a certain dose it will have no greater effect) and can cause "paradoxical reactions" such as agitation. The district court rejected these concerns relying on expert testimony that midazolam at the high dose used in executions, regardless of a ceiling effect, "will have the effect of shutting down any individual's awareness of pain" and that a paradoxical effect is rare and occurs most frequently at a low therapeutic dose.

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.

In *Williams-Yulee v. The Florida Bar* the Court will decide whether Florida's Cannon 7C(1), which prohibits candidates for judicial office from personally soliciting campaign funds, violates the First Amendment. The Florida Supreme Court held Cannon 7C(1) does not violate the First Amendment because it is narrowly tailored to serve a compelling state interest. The Florida Supreme Court previously held that Florida "has a compelling interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary" and concluded that Cannon 7C(1) serves these goals. Cannon 7C(1) was narrowly tailored because it seeks to "insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns." Thirty-nine states have some form of popular election for judges. Thirty of those states prohibit judges from personally seeking campaign contributions.

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.

The issue in *Oneok Inc. v. Learjet, Inc.* is whether the Natural Gas Act (NGA) preempts state-law antitrust claims brought by retail natural gas purchasers. Retail purchasers sued natural gas traders claiming they manipulated the price of natural gas by reporting false information to price indices. While the NGA preempts rate practice claims involving *wholesale* natural gas sales, it has no jurisdiction over *retail* natural gas sales. The Ninth Circuit held the retail natural gas purchasers' claims weren't preempted just because wholesale prices were also affected by price manipulation affecting retail sales. "Under the broad reading . . . that [the traders] propose, there is no 'conceptual core' delineating transactions falling within FERC's

jurisdiction and transactions outside of FERC's jurisdiction." This case arose out of the energy crisis of 2000-2003.

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.

Decided Cases

In *North Carolina State Board of Dental Examiners v. FTC** the Supreme Court held 6-3 that if the majority of state board members are active market participants, antitrust immunity applies only if the state actively supervises the board. The North Carolina State Board of Dental Examiners is a state agency principally charged with licensing dentists. Six of its eight members must be actively practicing, licensed dentists. After the Board issued cease-and-desist letters to non-dentist teeth whitening service providers, the Federal Trade Commission charged it with violating federal antitrust law. In *Parker v. Brown* the Court held that states receive state-action immunity from federal antitrust law when acting in their sovereign capacity. According to the Court, non-sovereign entities controlled by active market participants receive state-action immunity only if the challenged restraint is clearly articulated in state policy and the policy is actively supervised by the state. Without active supervision, the Court reasoned, agencies, boards, and commissions made up of a majority of market participants may act in their own interest rather than the public interest. Here the parties assumed the clear articulation requirement was met and agreed the Board wasn't actively supervised by the state. So the Court denied the Board state-action immunity.

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.

The Court held unanimously in *Holt v. Hobbs* that an inmate's rights under the Religious Land Use and Institutionalized Persons Rights Act (RLUIPA) were violated when he was not allowed to grow a half inch beard in accordance with his religious beliefs. RLUIPA states that the government may not substantially burden the free exercise of an institutionalized person unless the burden is the least restrictive means of furthering a compelling government interest. While the Court agreed that preventing the flow of contraband in it facilities and preventing prisoners from disguising their identities are compelling state interests, disallowing half inch beards isn't the least restrictive means of furthering

prison safety and security. The Department's concern that prisoners may hide contraband in their beards was "hard to take seriously." Only small items could be concealed, inmates could more easily conceal items in head hair, and beards can be searched. Photographing an inmate with and without a beard would solve the problem of an inmate changing his appearance to enter restricted areas, escape, or evade apprehension upon escaping. And the fact that the Department allows inmates to grow mustaches, head hair, and quarter inch beards for medical reasons, all of which could be shaved off at a "moment's notice," indicate security concerns raised by quickly changing appearance are not "serious."

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 *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.

In *Kansas v. Nebraska and Colorado* the Supreme Court agreed with a Special Master in a dispute about water rights involving an interstate compact, that Kansas would receive partial disgorgement (a fine) but not an injunction against Nebraska and accounting procedures would be changed so that Nebraska's use of imported water would not be count against its compact allocation. Through an interstate compact ratified in 1943, Colorado, Nebraska, and Kansas share the virgin water supply originating in the Republican River Basin. The Court adopted the Master's recommendation of $1.8 million in disgorgement because Nebraska knowingly failed to comply with the compact by knowingly exposing Kansas to a substantial risk that it would breach the contract and because water is more valuable to farmland in Nebraska than Kansas. The Court agreed with the Master that an injunction against Nebraska was unnecessary because Nebraska has subsequently put compliance measures in place that are "up to the task" of keeping it in compliance. Unbeknownst to the states when they agreed to them, the accounting procedures count imported water toward a state's consumption of basin water when conditions are dry. The Master and the Court rejected Kansas's "a deal is a deal" argument to prevent a breach of the compact.