Supreme Court State and Local Government Cases 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 filed an *amicus* brief.

In a 5-4 decision written by Justice Kennedy the Supreme Court held in *Obergefell v. Hodges* that same-sex couples have a constitutional right to marry. The Court articulated four principles that demonstrate why the fundamental right to marry applies with equal force to same-sex couples. First, the right to choose who you marry is "inherent in the concept of individual autonomy." Second, because the right to marry is "unlike any other in its importance" it should not be denied to any two-person union. Third, marriage between same-sex couples safeguards children and families just as it does for opposite-sex couples. Finally, marriage is a keystone of American social order from which no one should be excluded. The Court relied on the Constitution's Fourteenth Amendment Due Process Clause and the Equal Protection Clause. In previous marriage cases like *Loving v. Virginia*, invalidating bans on interracial marriage, the Court relied on both Clauses. The Court did not state what standard of review it applied to decide this case.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* the Supreme Court held 5-4 that disparate-impact claims may be brought under the Fair Housing Act (FHA). The Inclusive Communities Project sued the Texas Department of Housing and Community Affairs claiming the Department was giving too many tax credits to low-income housing in predominately black inner-city areas compared to predominately white suburban neighborhoods. In prior cases the Court held that disparate-impacts claims are possible under Title VII (prohibiting race, etc. discrimination in employment) and the Age Discrimination in Employment Act relying on the statutes' "otherwise adversely affect" language. The FHA uses similar language—"otherwise make unavailable"—in prohibiting race, etc. discrimination in housing. And Congress seems to have acknowledged that disparate-impact claims are possible under the FHA. Congress amended the FHA in 1988 to include "three exemptions from liability that assume the existence of disparate-impact claims."

In *Alabama Legislative Black Caucus v. Alabama* the Supreme Court held 5-4 that when determining whether unconstitutional racial gerrymandering occurred—if race was a "predominant motivating factor" in creating districts—one-person-one-vote should be a background factor. And Section 5 of the Voting Rights Act (VRA) does not require a covered jurisdiction to maintain a particular

percent of minority voters in minority-majority districts. The Alabama Legislative Black Caucus sued Alabama claiming by adding more minority voters to majority-minority districts than were needed for minorities to elect a candidate of their choice Alabama engaged in unconstitutional racial gerrymandering. The Court concluded that one-person-one-vote should be taken as a given and not be weighed with other nonracial factors (compactness, contiguity, incumbency protection, etc.) because the predominance analysis is about "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'" Section 5 does not require covered jurisdictions to maintain a particular percent of minority voters in majority-minority districts. Instead, it requires that a minority's ability to elect a preferred candidate be maintained. State legislatures must have a "strong basis in evidence" to support their race-based choices when redistricting.

In 5-4 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* the Court held that the Constitution's Elections Clause permits voters to vest congressional redistricting authority entirely in an independent commission. Justice Ginsburg's majority relies on the history and purpose of the Elections Clause and the "animating principle of our Constitution that the people themselves are the originating source of all the powers of government." Founding era dictionaries typically defined legislatures as the "power that makes laws." In Arizona, that includes the voters who may pass laws through initiatives. The purpose of the Elections Clause was to "empower Congress to override state elections rules" not restrict how states enact legislation. "We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."

In 2006 the Department of Labor (DOL) stated in an opinion letter that mortgage loan officers were eligible for overtime but then changed its mind in 2010 in an "Administrator's Interpretation." In *Perez v. Mortgage Bankers Association** the Supreme Court held unanimously that federal agencies do not have to engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA) before changing an interpretive rule. It overturned a nearly 20 year-old precedent from the D.C. Circuit, *Paralyzed Veterans of America v. D.C. Arena*. The APA requires that "legislative rules" be issued through a notice-and-comment process. But the APA states that notice-and-comment does not apply to "interpretive rules." According to the Court, "[t]his exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*." The Court rejected Mortgage Bankers Association's (MBA) argument that when an agency alters an interpretive rule it is effectively amending the underlying legislative rule. The Court reasoned that interpreting a legislative rule does not amount to "amending" it.

In *Walker v. Sons of Confederate Veterans* the Supreme Court held 5-4 that Texas may deny a proposed specialty license plate design featuring the Confederate flag because specialty license plate designs are government speech. The Court relied heavily on *Summum*, where the Court held that monuments in a public park are government speech and that a city may accept some privately donated monuments and reject others. First, just as governments have a long history of using monuments to speak to the public, states have a long history of using license plates to communicate messages. Second, just as observers of monuments associate the monument's message with the land owner, observers identify license plate designs with the state because the name of the state appears on the plate, the state requires license plates, etc. Third, per state law, Texas maintains control over messages conveyed on specialty plates and has rejected at least a dozen designs, just as the city in *Summum* maintained control monument selection.

In *Glossip v. Gross* the Supreme Court held 5-4 that death row inmates are unlikely to succeed on their claim that using midazolam as a lethal injection drug amounts to cruel and unusual punishment in violation of the Eighth Amendment. In *Baze v. Rees* (2008) the Court approved a three-drug protocol that begins with a sedative, sodium thiopental, which is no longer available; Oklahoma now uses midazolam. In *Baze* the Court stated that prisoners challenging a lethal injection protocol must identify a known and available alternative method of execution. The prisoners in this case did not do so and claimed they did not have to. The Court concluded that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam causes a substantial risk of severe pain. The inmates' experts acknowledged that no scientific proof establishes that a 500-milligram dose of midazolam would not render a person sufficiently unconscious to "resist the noxious stimuli which would occur with the application of the second and third drugs." While midazolam may have a "ceiling effect," where an increased dose produces no more effect, only "speculative evidence" suggests that it renders prisoners insensate to pain.

In 6-3 decision in *King v. Burwell* the Supreme Court ruled that health insurance tax credits are available on the 34 Federal Exchanges. The Affordable Care Act allows state and the federal government to establish health care exchanges. Tax credits are available when insurance is purchased through "an Exchange established by the State." The technical legal question in this case was whether a Federal Exchange is "an Exchange established by the State" that may offer tax credits. The Supreme Court said yes. The Court first concluded that above language is ambiguous. But by looking at it in the context of the entire statute the meaning of the language became clearer. Specifically, if tax credits weren't available on Federal Exchanges "it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."

In *Michigan v. EPA* the Supreme Court held 5-4 that the Environmental Protection Agency (EPA) acted unreasonably in failing to consider cost when deciding whether regulating mercury emissions from power plants is "appropriate and necessary." Per *Chevron v. Natural Resource Defense Council* (1984) courts accept an agency's reasonable interpretation of an ambiguous statute. The Court concluded the EPA's interpretation of "appropriate and necessary" to exclude costs wasn't reasonable stating: "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'"

In *Armstrong v. Exceptional Child Center* the Court held 5-4 that Medicaid providers cannot rely on the Supremacy Clause or equity to sue states to enforce a Medicaid reimbursement statute. 42 U.S.C. §1396a(a)(30)(A) requires state Medicaid plans to assure that Medicaid providers are reimbursed at rates "consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services." Medicaid providers sued Idaho claiming that its reimbursement rates for rehabilitation services were lower than §(30)(A) permits. The Court first rejected the argument that the Supremacy Clause creates a private right of action. "It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." The Court also rejected the providers' argument that equity should permit their case to proceed. First, the statute provided a remedy for a state's breach—Health and Human Services may withhold funds—suggesting Congress intended no other remedies. Second, it would be difficult for a court to fashion a remedy in this case—a reimbursement rate—given the broad and unspecific language of §(30)(A).