



Supreme Court 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 filed an *amicus* brief.

The Big Cases

In a 5-4 decision written by Justice Kennedy the 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 6-3 decision in [*King v. Burwell*](#) the Court ruled that health insurance tax credits are available on the 34 Federal Exchanges. The Affordable Care Act allows states 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 ruled yes. The Court first concluded that the above language is ambiguous. But by looking at it in the context of the entire statute the meaning of the language becomes clearer. Specifically, if tax credits aren’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 [*Texas Department of Housing and Community Affairs v. Inclusive Communities Project*](#) the 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 seemed 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."

First Amendment

In [*Reed v. Town of Gilbert*](#)* the Court held unanimously that Gilbert's Sign Code, which treats various categories of signs differently based on the information they convey, violates the First Amendment. Gilbert's Sign Code treats temporary directional signs less favorably (in terms of size, location, duration, etc.) than political signs and ideological signs. Content-based laws are only constitutional if they pass strict scrutiny—that is, if they are narrowly tailored to serve a compelling government interest. The Court concluded that the sign categories in this case are based on content because they draw distinctions based on the message a speaker conveys. Gilbert's Sign Code failed strict scrutiny because its two asserted compelling interests—preserving aesthetic and traffic safety—were "hopelessly underinclusive." Temporary directional signs are "no greater an eyesore" and pose no greater threat to public safety than ideological or political signs.

In [*Walker v. Sons of Confederate Veterans*](#) the 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 [*Pleasant Grove City v. Summum*](#) (2009), 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 over monument selection.

Police/Corrections

In [*City of Los Angeles v. Patel*](#)* the Court held 5-4 that a Los Angeles ordinance requiring hotel and motel operators to make their guest registries available to police without at least a subpoena violates the Fourth Amendment. The searches permitted by the ordinance are "administrative"—that is, they are done to ensure compliance with recordkeeping requirements. While administrative searches do not require warrants, they do require "precompliance review before a neutral decisionmaker." Absent this, "the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests." Facial challenges—to a statute itself rather than a particular application of a statute—aren't "categorically barred or especially disfavored." On numerous occasions the Court has declared statutes facially invalid under the Fourth Amendment.

In [*Kingsley v. Hendrickson*](#)* the Court held 5-4 that to prove an excessive force claim a pretrial detainee must show that the officer's force was *objectively* unreasonable, rejecting the *subjectively* unreasonable standard that is more deferential to law enforcement. Pretrial detainee Michael Kingsley and the officers in this case agree that Kingsley refused to remove a piece of paper covering a light fixture and

was forcibly removed from his jail cell so that officers could remove it. While the officers claim, and Kingsley disagrees, that Kingsley resisted their efforts to remove his handcuffs and in the process the officers slammed his head against the concrete bunk, the parties agree that Kingsley was tasered. The Court held that the objective standard applies to excessive force claims brought by pretrial detainees, relying partially on precedent. In a previous case involving prison conditions affecting pretrial detainees, [Bell v. Wolfish](#) (1979), the Court used an objective standard to evaluate a prison's practice of double bunking. And the Court pointed out that the objective standard applies to those who, like Kingsley, have been accused but not convicted of a crime, but who unlike Kingsley are free on bail.

In a 6-3 decision in [Rodriguez v. United States](#) the Court held that a dog sniff conducted after a completed traffic stop violates the Fourth Amendment. Officer Struble pulled over Dennis Rodriguez after he veered onto the shoulder of the highway and jerked back on the road. Seven or eight minutes passed between Officer Struble issuing a warning, back up arriving, and Officer Struble's drug-sniffing dog alerting for drugs. The Court concluded that exceeding the time needed to handle the matter for which the traffic stop was made violated the Fourth Amendment. Justice Ginsburg, writing for the majority, relied on [Illinois v. Caballes](#) (2005) where the Court upheld a suspicionless dog search conducted *during* (not after) a lawful traffic stop. In that case the Court stated that a seizure for a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.

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."

The Court held unanimously in [Holt v. Hobbs](#) that an inmate's rights under the Religious Land Use and Institutionalized Persons 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 its prisons 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 a 6-2 decision in [City and County of San Francisco v. Sheehan](#)* the Court declined to decide whether Title II of the Americans with Disabilities Act (ADA) requires police officers to accommodate

suspects who are armed, violent, and mentally ill when bringing them into custody. 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, so they retreated. The officers reentered her room and she still had the knife in her hand. One officer pepper sprayed Sheehan but she refused to drop the knife so the officers shot her multiple times. San Francisco agreed with Sheehan that Title II of the ADA applies to arrests but argued that Sheehan wasn't a qualified individual with a disability because she was a "direct threat" to the officers. Because the parties agreed that Title II applies to arrests the Court dismissed this issue as improvidently granted. The Court held the officers were entitled to qualified immunity though they reentered her room rather than attempted to accommodate her disability. Even assuming that "any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry," no precedent clearly establishes there was no objective need for immediate entry herewhere Sheehan could have gathered more weapons or escaped.

In a *per curiam* (unauthored) opinion the Court concluded in [Grady v. North Carolina](#) that satellite-based monitoring (SBM) for a recidivist sex offender is a Fourth Amendment "search." Torrey Dale Grady argued that North Carolina's monitoring program for recidivist sex offenders, which would force him to wear a tracking devise at all times, violated the Fourth Amendment. The Fourth Circuit distinguished Grady's case from [United States v. Jones](#) (2012), where the Supreme Court held that installing and monitoring a GPS devise on a suspect's car is a Fourth Amendment search, based on circuit precedent that SBM monitoring is civil and not criminal. The Court relied on [United States v. Jones](#) and [Florida v. Jardines](#) (2013), where a "drug-sniffing dog nose[d] around a suspect's front porch" to conclude a search occurred here. In all three cases the government physically occupied private property to obtain information. The fact that North Carolina's SBM program was civil did not matter because "the government's purpose in collecting information does not control whether the method of collection constitutes a search." The Court left it to the lower court to decide whether it is an *unreasonable*, and therefore unconstitutional, search.

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 whether police can "knock and talk" at any entrance open to visitors rather than only the front door.

In a *per curiam* (unauthored) opinion in [Taylor v. Barkes](#) the Court granted two prison officials qualified immunity related to an inmate's suicide reasoning that no precedent at the time established that an incarcerated person had a right to proper implementation of adequate suicide prevention protocols. A prison contract nurse screened Christopher Barkes, found only two risk factors for suicide, and did not initiate special suicide prevention measures. He committed suicide the next day. His family sued the Commissioner of Corrections and the warden claiming they violated his right to be free from cruel and unusual punishment by failing to supervise the nurse. The Court granted the officials qualified immunity

noting that no Supreme Court precedent even discusses, much less grants, inmates a right to proper implementation of adequate suicide prevention protocols. While Third Circuit precedent stated that if prison officials know an inmate is vulnerable to suicide they may not act with reckless indifference, it did not state that prisons must implement particular procedures to identify vulnerable inmates.

In *Johnson v. City of Shelby, Mississippi*, in a *per curiam* (unauthored) opinion, the 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.

Tax

In a 5-4 decision in *Comptroller v. Wynne** the Court held that Maryland's failure to offer residents a full credit against income taxes paid to other states violates the dormant Commerce Clause. Maryland taxes residents' income earned in- and out-of-state. If Maryland residents pay income tax to another state for income earned there, Maryland allows them a credit against Maryland's "state" tax but not its "county" tax. Nonresidents who earn income in Maryland pay Maryland "state" tax and a "special nonresident tax" equivalent to Maryland's lowest "county" tax. The problem with Maryland's tax scheme the Court reasoned was that it had the potential to result in double taxation of income earned out-of-state. More specifically, it failed the "internal consistency" test. If all states had a tax scheme like Maryland's "county" and "special nonresident tax" that taxed income residents earned in-state, income residents earned in other jurisdictions, and non-residents' income earned in-state, residents who earn income out-of-state would be taxed by their state of residence and the state where they earned the income.

The Railroad Revitalization and Regulatory Reform Act (4-R Act) prohibits state and local governments from imposing taxes that discriminate against railroads. Railroads and other commercial and industrial taxpayers in Alabama pay a four percent sales tax on diesel fuel, trucks pay a 19-cents per gallon excise tax and no sales tax, and water carriers pay no tax. CSX claimed Alabama violated the 4-R Act by requiring railroads to pay sales tax on diesel fuel and exempting their competitors (even though railroads paid *less* in sales tax than trucks paid in excise tax). In *Alabama Department of Revenue v. CSX Transportation** the Court held 7-2 that railroads can be compared to their competitors (rather than other commercial and industrial taxpayers) when determining whether a tax is discriminatory under the 4-R Act. Competitors are a "similarly situated" class "since discrimination in favor of that class most obviously frustrates the purpose of the 4-R Act," including restoring financial stability to railroads and fostering competition between railroads and other modes of transportation. Because "[t]here is simply no discrimination when there are roughly comparable taxes" different taxes paid by railroads and their competitors must be compared. And the justifications Alabama offered for why water carriers don't pay any tax on diesel fuel must be examined when determining if railroads have been discriminated against.

In 1992 in *Quill Corp. v. North Dakota*, the Court held that states cannot require retailers with no in-state physical presence to collect use tax. Since 2010, Colorado has required remote sellers to inform

Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. Direct Marketing Association sued Colorado in federal court claiming these requirements are unconstitutional under *Quill*. The Court held unanimously in *Direct Marketing Association v. Brohl** that the Tax Injunction Act (TIA) does not bar a federal court from deciding this case. Per the TIA, federal courts may not “enjoin, suspend or restrain the assessment, levy or collection of any tax under State law” where a remedy is available in state court. The TIA was modelled on the Anti-Injunction Act, which concerns federal taxes. According to the Court, “the Federal Tax Code has long treated information gathering as a phase of tax administration that occurs before assessment, levy, or collection.” And, while DMA’s lawsuit sought to “limit, restrict, or hold back” tax collection in Colorado, it did not “restrain” tax collection in the narrow sense—by stopping it.

Employment

In *EEOC v. Abercrombie & Fitch Stores** the Court held 8-1 that to bring a religious accommodation claim an applicant or employee need only show that his or her need for a religious accommodation was a motivating factor in an employment decision. Abercrombie & Fitch refused to hire Samantha Elauf because she wore a headscarf to her interview. Abercrombie suspected she wore it for religious reasons but she did not ask for an accommodation. The EEOC sued Abercrombie alleging it violated Title VII by failing to accommodate Elauf’s religious beliefs. The Court concluded that to bring a religious accommodation claim an applicant/employee need not show that the employer had “actual knowledge” of the need for an accommodation. Instead the employee/applicant only must show that his or her need for an accommodation was a motivating factor in the employer’s decision. Simply put, the Court would not add an “actual knowledge” requirement to Title VII’s “motivating factor” language.

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 the work employees were performing in this case, 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 *Young v. United Parcel Service* the Court held 6-3 that a plaintiff alleging that the denial of an accommodation constitutes disparate treatment under the Pregnancy Discrimination Act’s second clause (employers must treat women “affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”) must first show that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “similar in their ability or inability to work.” The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, nondiscriminatory” reasons for denying her accommodation. But those reasons normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a “legitimate, nondiscriminatory” reason, the plaintiff may show that the employer’s proffered reason is in fact pretextual.

In [*Mach Mining v. EEOC*](#) the Court held unanimously that a court may review whether the Equal Employment Opportunity Commission (EEOC) satisfied its statutory obligation to attempt to conciliate employment discrimination claims before the EEOC files a lawsuit. The EEOC found reasonable cause that Mach Mining discriminated against a class of women who applied for mining jobs. Mach Mining claimed that the EEOC failed to conciliate in good faith before suing it. The EEOC responded that its conciliation efforts are not subject to judicial review. While the Court held that a court may review whether the EEOC satisfied its obligation to conciliate, review is narrow. The “strong presumption” favoring judicial review of administrative action isn’t rebutted in this case because courts routinely enforce other compulsory prerequisite requirements to bringing a Title VII lawsuit. Regarding the scope of the court’s review, a court should determine “that the EEOC afford[ed] the employer a chance to discuss and rectify a specified discriminatory practice.” Unless an employer provides credible evidence to the contrary, “[a] sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement.”

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, holding 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.

Beneficiaries of Edison’s 401(k) plan sued Edison for violating its fiduciary duty by selecting mutual funds with higher fees than “materially identical” funds. Edison argued that the claims were untimely as to three mutual funds added outside of the six-year statute of limitations. The Ninth Circuit agreed, reasoning that no change in circumstances triggered an obligation to review and change the investments within the six-year statute of limitations. The Supreme Court concluded that the Ninth Circuit failed to recognize “that under trust law a fiduciary is required to conduct a regular review of its investments with the nature and timing of the review contingent on the circumstances.” So in this case as long as the breach of the continuing duty to monitor investments occurred within six years of the lawsuit it was timely. A lower court determining the precise nature of the fiduciary duty state and local governments owe employees under a state law similar to ERISA regulating public retirement plans may look to the Supreme Court’s unanimous opinion in [*Tibble v. Edison International*](#).

Other

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. 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 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 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 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 [*Alabama Legislative Black Caucus v. Alabama*](#) the 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 [*Horne v. Department of Agriculture*](#) the Court held 8-1 that the federal government violated the Fifth Amendment Takings Clause by physically setting aside a percentage of a grower’s raisin crop each year without pay. The Court first held that the appropriation of personal property is a *per se* taking just like the appropriation of land stating that the text, history, and precedents interpreting the Takings Clause don’t suggest a different rule. The Court next concluded the government could not avoid paying just compensation because the growers in this case had a contingent interest in the value of the set aside raisins. “The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.” To the question of whether the government’s mandate to turn over raisins as a condition of participating in commerce is a *per se* taking the Court ruled it is in this case. It is not enough that the growers voluntarily chose to sell raisins rather than wine.