



Supreme Court Preview for the States 2015

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September 2015

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.

While it would be hard to top the Supreme Court's last term the October 2015 term is one to watch not just because the Court has accepted numerous cases on controversial topics. Adding to the intrigue, many of the Court's decisions this term are likely to be discussed by the 2016 Presidential candidates as the election heats up, including a number of cases affecting the states. Here is a preview of the most significant cases for the states that the Court has agreed to decide so far.

Redistricting

The U.S. Constitution Equal Protection Clause "one-person one-vote" principle requires that voting districts have roughly the same population so that votes in each district count equally. But what population is relevant—total population or total *voting* population—and who gets to decide? The Court will answer these questions in [Evenwel v. Abbott](#).

Over the last 25 years the Supreme Court has repeatedly refused to decide whether total *voter* population must be equalized in state legislative districts.

Plaintiffs claim that total *voter* population must be the metric. They argue their votes are worth less than other voters because they live in districts that substantially deviate from the "ideal" in terms of number of voters or potential voters.

The lower court disagreed because the Supreme Court has allowed state legislatures to choose their preferred population metric. Most use total population not total *voting* population.

Public Sector Collective Bargaining

In [Friedrichs v. California Teachers Association](#) the Court will decide whether to overrule a nearly 40-year old precedent requiring public sector employees who don't join the union to pay their "fair share" of collective bargaining costs. More than 20 states have enacted statutes authorizing "fair share."

In [Abood v. Detroit Board of Education](#) (1977) the Supreme Court held that the First Amendment does not prevent public employees who do not join the union from being required to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment. The rationale is that the union may not discriminate between members and nonmembers in performing these functions. So no free-riders are allowed.

In two recent cases the Court’s more conservative Justices, including Justice Kennedy, have criticized *Abood*.

If the Court doesn’t overrule *Abood* it may instead rule that public employees may be allowed to opt-in rather than required to opt-out of paying “nonchargeable” union expenditures, in which case presumably fewer will opt-in.

“Fair share” and opt-out are foundational principles for public sector collective bargaining in the United States. Overturning either of them would mean a major change in the law that would substantially weaken public sector unions.

Affirmative Action

For the second time the Court has agreed to decide whether the University of Texas at Austin’s race-conscious admissions policy is unconstitutional in [Fisher v. University of Texas at Austin](#).

Even though this case arises in the higher education context, the Supreme Court decides relatively few affirmative action cases so all are of interest to state governments that use race as a factor in decision-making.

Per Texas’s Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, which fills about 80 percent of the class. Most other applicants are evaluated through a holistic review where race is one of a number of factors.

Abigail Fisher claims that using race in admissions is unnecessary because in the year she applied UT Austin admitted 21.5 percent minority students per the Top Ten Percent Plan.

The Supreme Court has held that the use of race in college admissions is constitutional if race is used to further the compelling government interest of diversity and is narrowly tailored.

In [Fisher I](#) the Court held that the Fifth Circuit, which upheld UT Austin’s admissions policy, should not have deferred to UT Austin’s argument that its use of race is narrowly tailored.

When the Fifth Circuit relooked at the plan again it concluded that it is narrowly tailored.

Only time will tell whether the Court agrees.

Juvenile Life in Prison

In 2012 in [Miller v. Alabama](#) the Supreme Court ruled 5-4 that states may not mandate that juvenile offenders be sentenced to life in prison with the possibility of parole without considering mitigation evidence about the defendant’s youth.

In [Montgomery v. Louisiana](#) the Court will decide whether *Miller* is retroactive.

The Louisiana Supreme Court held that *Miller* does not apply retroactively because it does not meet the [Teague v. Lane](#) (1989) exception to the rule that normally bars a new rule from being applied retroactively: the new rule must completely remove a punishment from the list of punishments that can be imposed. *Miller* only bars sentencing schemes that *mandate* life in prison for juveniles.

This decision may affect over 2,000 prisoners.

States Sued in Other State's Courts

In [Franchise Tax Board of California v. Hyatt](#)* the Court may overrule [Nevada v. Hall](#) (1979), holding that a state may be sued in another state's courts without consent. If it doesn't, the Court will decide whether states must extend the same immunities that apply to them to foreign states sued in their state courts.

The Franchise Tax Board (FTB) of California concluded that Gilbert Hyatt didn't relocate to Nevada when his tax returns indicated he did and assessed him \$10.5 million in taxes and interest. Hyatt sued FTB in Nevada for fraud among other claims.

In [Franchise Tax Board of California v. Hyatt](#) (2003) the Supreme Court held that the Constitution's Full Faith and Credit Clause does not require Nevada to offer FTB the full immunity that California law provides.

A Nevada jury ultimately awarded Hyatt nearly \$400 million in damages.

The Nevada Supreme Court refused to apply Nevada's statutory cap on damages to Hyatt's fraud claim reasoning that Nevada has a policy interest in ensuring adequate redress for Nevada citizens that overrides providing FTB the statutory cap because California operates outside the control of Nevada.

If the Court overrules [Nevada v. Hall](#), the question of whether the immunities a state enjoys must be offered to a foreign state will be moot.

ERISA Preemption

Vermont and at least 16 other states collect health care claims data. In [Gobeille v. Liberty Mutual Insurance Company](#)* the Court will decide whether the Employee Retirement Income Security Act (ERISA) preempts Vermont's all-payers claims database (APCD) law.

ERISA applies to most health insurance plans and requires them to report detailed financial and actuarial information to the Department of Labor. ERISA preempts state laws if they "relate to" an ERISA plan. Vermont's APCD law seeks the following medical claims data: services provided, charges and payments for services, and demographic information about those covered.

The Second Circuit concluded that ERISA preempts Vermont's law because one of the key functions of ERISA is reporting. Vermont's law imposes "burdensome, time-consuming, and risky" reporting obligations which are multiplied by other states' APCD laws.

One judge dissented. He opined that that ERISA and Vermont reporting requirements are too different to warrant preemption and that Vermont's data collection isn't burdensome because it seeks data that health insurance companies already possess.

Energy

In [*FERC v. Electric Power Supply Association*](#) the Court will decide whether the Federal Energy Regulatory Commission (FERC) may regulate “demand response” payments offered to electric utility customers to reduce their electricity use during periods of high demand.

States may save money through participating in demand response programs. But the Electric Power Supply Association argued, and the D.C. Circuit Court of Appeals agreed, that demand response encroaches on states’ regulatory authority.

Per the Federal Power Act, FERC regulates the wholesale sale of electric energy. States regulate the retail sale of electric energy.

Retail electricity prices remain constant over a period of time regardless of demand. So customers have no price incentive to reduce consumption during those time periods. The purpose of “demand response” is to reduce electricity use when it is most expensive and least clean to produce.

FERC argued that demand response affects wholesale prices. The D.C. Circuit agreed but responded that FERC offered no limiting principle. The price of steel, fuel, and labor also affect the wholesale price of electricity but FERC can’t regulate them. “Demand response—simply put—is part of the retail market. It involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption.”

Conclusion

The Court’s docket is only about half full right now. Thus far the Court has also accepted two more narrow redistricting cases and three cases involving the death penalty. It also appears very likely that the Court will accept a case deciding whether requiring abortion doctors to have hospital admitting privileges, leading numerous clinics to close, creates an unconstitutional undue burden on those seeking an abortion. A newly created circuit split means the Court will almost certainly take a case alleging that complying with the ACA’s contraceptive mandate violates nonprofit religious employers Religious Freedom Restoration Act rights.