Supreme Court Midterm Summary for the States 2016

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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.

"Big" Cases

In *Friedrichs v. California Teachers Association* the Court issued a non-precedential 4-4 opinion affirming by an equally divided Court the lower court's decision to not overrule *Abood v. Detroit Board of Education* (1977). In *Abood* the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. The rationale for an agency fee 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, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014), in 5-4 opinions written by Justice Alito and joined by the other conservative Justices (including Justice Scalia and Justice Kennedy), the Court was very critical of *Abood*. The Court heard oral argument in this case in January before Justice Scalia died, and the five more conservative Justices seemed poised to overrule *Abood*. Justice Scalia, who ultimately didn't participate in this case, likely would have voted to overrule *Abood*.

In *Reynold v. Sims* (1964) the Court established the principle of "one-person, one-vote" requiring state legislative districts to be apportioned equally. The question in *Evenwel v. Abbott* is what population is relevant—total population or voter-eligible population. The maximum total-population deviation between Texas Senate districts was about 8 percent; the maximum eligible-voters deviation between districts exceeded 40 percent. The unanimous opinion concluding Texas may redistrict using total population is "based on constitutional history, this Court's decisions, and longstanding practice." Section 2 of the 14th Amendment explicitly requires that

the U.S House of Representatives be apportioned based on total population. "It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." In no previous cases alleging a state or local government failed to comply with "one-person, one-vote" had the Court determined if a deviation was permissible based on eligible- or registered-voter data. And states and local governments redistricting based on total population is a settled practice.

In *United States v. Texas* the Court will decide whether the Deferred Action for Parents of Americans (DAPA) program violates federal law or is unconstitutional. DAPA allows certain undocumented immigrants who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents to lawfully stay and work temporarily in the United States. The United States argues that the states lack "standing" to challenge the DAPA program. The Fifth Circuit concluded that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing. States also challenged the DAPA program as violating the Administrative Procedures Act (APA) notice-and-comment requirement and claim it is arbitrary and capricious in violation of the APA. The lower court concluded the states were likely to succeed on both claims because DAPA is a substantive rule and it is "foreclosed by Congress's careful plan" in the Immigration Nationality Act. The Court has also agreed to decide whether DAPA violates the Constitution's Take Care Clause because it is contrary to federal law; the President is failing to "take care" that federal law is followed.

The issue in *Whole Women's Health v. Hellerstedt* is whether Texas's admitting privileges and ambulatory surgical center requirements create an undue burden on women seeking abortions and are reasonably related to advancing women's health. Texas claims, and the Fifth Circuit agreed, that women's health is advanced if doctors performing abortions have admitting privileges at a nearby hospital and if abortion clinics must comply with standards set for ambulatory surgical centers. Whole Women's Health argues that the Fifth Circuit erred in refusing to consider "whether and to what extent" Texas law actually serves its purported interest in achieving safer abortions. Whole Women's Health also argues that these requirements create an undue burden on those seeking abortions. Fewer than 10 of Texas's over 40 abortion clinics will remain open, those that do will be inaccessible to many and will be unable to keep up with demand for abortions. The Fifth Circuit found no undue burden even though 17 percent of women of reproductive age would face travel distances of 150 miles or more to receive abortions.

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*. 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. Unless an applicant has an "exceptionally high Academic Index," he or she will be evaluated through a holistic review where race is one of a number of factors. The Court has held that the use of race in college admissions is constitutional if it 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 defer to UT Austin's argument that its use of race is narrowly tailored. When the Fifth Circuit relooked at UT Austin's admissions policy it again concluded that it is narrowly tailored. The Top Ten Percent Plan works well at increasing minority student enrollment because Texas schools are so segregated. But a number of well-qualified students are excluded—specifically minority students who performed well at majority-white schools but aren't in the top ten percent of their class. If race wasn't considered during holistic review almost every student admitted would be white because of the test score gap between white and minority students. And as a result of holistic review a much higher percent of white students are admitted, but generally between 25-30 percent of the overall number of black and Hispanic students are admitted through holistic review.

Preemption

In *Hughes v. Talen Energy Marketing** and *CPV Maryland v. Talen Energy Marketing** the Maryland Public Service Commission offered the successful power plant development bidder a twenty-year "contract for differences." The power plant would sell its capacity at Federal Energy Regulatory Commission (FERC)-regulated auction price. If the action price was lower than its bid price, local utilities would make up the difference. If it was higher, the developer would rebate the utilities who would pass the cost recovery onto retail customers. Per the Federal Power Act, FERC has the authority to regulate interstate wholesale rates. FERC claims that Maryland's program amounts to rate-setting and is field and conflict preempted by the U.S. Constitution's Supremacy Clause. The Fourth Circuit concluded that Maryland's program is barred based on "field preemption" because it "effectively supplants the rate generated by the auction with an alternative rate preferred by the state." It is conflict preempted because it disrupts FERC-controlled federal markets by setting the price the bidder receives for a substantial time period.

In an 8-2 decision in *FERC v. Electric Power Supply Association* the Court ruled that the Federal Energy Regulatory Commission (FERC) has the authority to regulate wholesale "demand response" and that demand response bidders may receive the same compensation as electricity producers. "Demand response" is a practice in which operators in wholesale markets pay electricity consumers to not use power at certain times. Per the Federal Power Act, FERC regulates wholesale rates of electricity but states regulate retail rates. Electric Power Supply Association (EPSA) argued that through demand response FERC is "effectively" setting retail prices because when a consumer is deciding whether to buy electricity at retail the consumer will now consider both the cost of making the purchase *and* the cost of forgoing a demand response payment. The Court disagreed stating that "the rate is what it is": "the price paid, not the price paid plus the cost of a foregone economic opportunity." No matter what they bid, successful demand response bidders receive the wholesale rate. EPSA also argued that demand response bidders are receiving a "double-payment" and that they should only receive the wholesale price less the savings they net by not buying electricity on the retail market. FERC reasoned that demand response bidders should receive the same compensation as electricity generators because they are providing the same value. The Court agreed concluding that FERC's judgment wasn't

“arbitrary and capricious” because regulating energy is technical and FERC provided reasons supporting its position and responded to EPSA’s proposed alternative.

The Court held 6-2 in *Gobeille v. Liberty Mutual Insurance Company** that the Employee Retirement Income Security Act (ERISA) preempts Vermont’s all-payers claims database (APCD) law. Seventeen other states collect health care claims data. ERISA preempts all state laws that “relate” to any employee benefits plan. Vermont’s APCD law requires health insurers to report to the state information related to health care costs, prices, quality, and utilization, among other things. The Court concluded ERISA preempts Vermont’s APCD law “to prevent States from imposing novel, inconsistent, and burdensome reporting requirements on plans.” Justice Ginsburg, joined by Justice Sotomayor, dissented. She cited the State and Local Legal Center *amicus* brief which, in her words, pointed out that APCD laws “serve compelling interests, including identification of reforms effective to drive down health care costs, evaluation of relative utility of different treatment options, and detection of instances of discrimination in the provision of care.”

The issue in *Merrill Lynch v. Manning* is whether state law claims alleging that the “naked” short selling at issue in this case violated state law must be heard in federal court. The plaintiff-shareholders want to sue Merrill Lynch in state court for engaging in “naked” short selling which they claim violated New Jersey general securities fraud law, which is not as detailed as SEC regulation of “naked” short selling. Section 27 of the Securities Exchange Act gives federal district courts “exclusive jurisdiction” of all lawsuits to enforce the Securities Exchange Act. Merrill Lynch argues that even though the plaintiffs in this case are alleging violations of New Jersey law their claim should be heard in federal court. The Third Circuit disagreed applying *Pan American Petroleum Corp. v. Superior Court of Delaware In & For New Castle County* (1961), where the Supreme Court considered an exclusive jurisdiction provision of the Natural Gas Act, “substantially identical” to Section 27 of the Securities Exchange Act. In *Pan American* the Court held that “[e]xclusive jurisdiction’ is given the federal courts but it is ‘exclusive’ only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction.” State court jurisdiction exists in this case because federal law doesn’t have to be applied to decide it as the plaintiffs are suing exclusively under New Jersey law.

In *DIRECTV v. Imburgia* the Court held 6-3 that a California state court interpretation of California law, that class action arbitration is unenforceable, is preempted by the Federal Arbitration Act (FAA). Two DIRECTV customers sued DIRECTV claiming its early termination fees violate California law. Their service agreement stated that all claims would be resolved by arbitration and that class arbitration would be prohibited. But, if the “law of your state” made waiver of class arbitration unenforceable, the entire arbitration provision was unenforceable. In 2008, when the DIRECTV customers sued DIRECTV, a 2005 California Supreme Court case, *Discover Bank v. Superior Court*, holding class-arbitration waivers unenforceable, was good law. But in 2011 in *AT&T Mobility v. Concepcion* the U.S. Supreme Court held that the FAA preempted and invalidated that ruling. The U.S. Supreme Court ruled that the FAA preempts the California Court of Appeals’ interpretation of California law. While the Court agreed that parties

could chose to have contracts governed by pre-*Concepcion* California law (or the law of Tibet or pre-revolutionary Russia), the ordinary meaning of "law of your state" is *valid* state law.

Redistricting

In *Harris v. Arizona Independent Redistricting Commission* the Arizona redistricting commission claims that it underpopulated some minority districts to strengthen minorities' ability to elect a candidate of their choice, so that the Department of Justice would be more likely to pre-clear its plan. The plaintiffs claim the commission underpopulated minority ability-to-elect districts to favor Democrats. They argue that partisan gerrymandering can't justify deviating from one-person, one vote and that violating one-person, one vote to obtain preclearance under the Voting Rights Act (VRA) wasn't a legitimate justification before or after *Shelby County v. Holder* (2013), holding the VRA's coverage formula unconstitutional. Two of the three judges found that the commission was *primarily* motivated by a desire to obtain pre-clearance. So it did not matter that the commission was also motivated by a desire to favor Democrats. A majority of the court concluded that trying to comply with the VRA could justify minor population deviations when protecting incumbent legislators can. And majority of the judges concluded *Shelby County* has no impact because it had not yet been decided when the map was drawn up in this case.

When the Virginia legislature redrew congressional voting districts following the 2010 census it increased the number of minority voters in District 3, the state's only majority-minority district, from 53.1 to 56.3 percent. Plaintiffs argue in *Wittman v. Personhuballah* that the plan unconstitutionally packed minority voters into District 3 thus diluting their ability to influence races in other districts. The lower court ruled that the plan was unconstitutional finding that race was the predominant consideration for the district. Per strict scrutiny, the lower court held that complying with the VRA is a compelling state interest. But increasing the minority population wasn't narrowly tailored as District 3 is a "safe" minority-majority district. The Virginia legislators appealed claiming *Easley v. Cromartie* (2001), requires plaintiffs to "show a conflict between race and traditional principles, including politics, that the legislature resolved by redistricting in a way that sacrificed traditional principles to race," which plaintiffs did not and could not show in this case.

In *Shapiro v. McManus* the Court held unanimously that a three-judge court must be convened to decide a constitutional challenge to a redistricting plan even if the judge to which the request was made doesn't think the challenger will win. Stephen Shapiro, dissatisfied with Maryland's "crazy-quilt gerrymandering," sued Maryland arguing its congressional redistricting plan violated his First Amendment right of political association. Per federal law, three judges "shall be convened" to hear challenges to the constitutionality of a congressional or statewide redistricting plan "unless [the judge whom the request for three judges is made] determines that three judges are not required." The Court reasoned that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." The "unless [the judge whom the request for three judges is made] determines that three judges are not required" language means that the judge receiving the request for a three-judge court needs to examine the complaint to make sure

it alleges a claim regarding whether a district is constitutionally apportioned (even if the claim doesn't seem particularly winnable).

Crime and Punishment

The Court held 6-3 in *Montgomery v. Louisiana* that juvenile offenders sentenced to life in prison without parole before *Miller v. Alabama* (2012) was decided may have their sentences reviewed. In *Miller* the Court held that a juvenile may not be sentenced to life in prison without parole "absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." Per *Teague v. Lane* (1989) new substantive rules of constitutional law (as opposed to procedural rules) apply retroactively. Substantive rules prohibit a certain category of punishment for a class of defendants to be applied for certain offenses. While the Court noted that some juveniles could still be sentenced to life in prison without parole the vast majority cannot following *Miller*. So *Miller*'s rule was substantive. The Court suggested that rather than relitigating sentences states may allow relevant juvenile offenders to be eligible for parole.

In a 6-2 decision in *Luis v. United States** the Court ruled that the Sixth Amendment right to counsel includes allowing a criminal defendant to use *untainted* assets to hire an attorney, rather than freezing them for forfeiture to the government after conviction. Sila Luis was charges with fraudulently obtaining nearly $45 million in Medicare funds. She claimed she has a Sixth Amendment right to use the untainted portion of the $2 million in assets remaining in her possession to hire an attorney of her choice. The Court agreed in a plurality opinion. It distinguished two previous cases where it held that a post-conviction defendant (*Caplin & Drysdale v. United States* (1989)) and a pre-trial defendant (*United States v. Monsanto* (1989)) could not use *tainted* assets to pay an attorney. "The distinction between [tainted and untainted assets] is…an important one, not a technicality. It is the difference between what is yours and what is mine." The Court then applied a balancing test weighing the defendant's "fundamental" right to assistance of counsel with the government's interest in punishment through criminal forfeiture and victims' interest in restitution. The balance favored the interest of the accused because the interests in criminal forfeiture and restitution aren't constitutionally protected.

In an 8-1 decision in *Kansas v. Carr*, the Court reversed the Kansas Supreme Court's ruling overturning a jury's death sentence for the Carr brothers and Sidney Gleason in an unrelated murder. The Court held that the Eighth Amendment does not require juries deciding capital cases to be informed that mitigating circumstances need not be proved beyond a reasonable doubt and that the joint sentencing of the Carrs didn't violate the Eighth Amendment's right to an "individualized sentencing determination." Reginald and Jonathan Carr were convicted of killing four people in the "Wichita Massacre"; one intended victim survived because her hair clip deflected a bullet. The Carr brothers argued that the "juxtaposition" of aggravating and mitigating circumstances in the jury instruction may have caused the jury to believe that mitigating factors also had to be proved beyond a reasonable doubt. The Court disagreed. Prior precedent doesn't require juries to be informed that mitigating circumstances need not be proved beyond a reasonable doubt. And even assuming it would be unconstitutional to require the defense to prove mitigating circumstances beyond a reasonable doubt, the jury instructions in

this case make clear that mitigating circumstances must merely be "found to exist." The Court concluded it was "beyond the pale" for the Carr brothers to claim that the other's mitigating evidence "so infected" the jury's consideration of the other's sentence that imposing the death penalty was a denial of due process. The jury was instructed in multiple ways to give separate consideration to each defendant.

In *Hurst v. Florida* the Court ruled 8-1 that Florida's death penalty sentencing scheme is unconstitutional because it allows the judge, instead of requiring the jury, to impose the death sentence. In 2000 in *Apprendi v. New Jersey* the Court held that any factual determination that exposes a defendant to a punishment greater than that authorized by a jury's guilty verdict must be determined by the jury. In *Ring v. Arizona* (2002) the Court held that Arizona's capital sentencing scheme violated *Apprendi* because it allowed the judge to find facts necessary to impose the death sentence. Florida's scheme worked similar to Arizona's. A jury verdict for first-degree murder would result in life in prison without parole unless a judge finds facts supporting a death sentence. But in Florida, unlike Arizona, the jury attends the sentencing evidentiary hearing and renders an "advisory verdict." The jury does not have to specify any factual basis for its recommendation but the judge must give it "great weight." The Court opined that advisory jury verdicts do not make Florida's sentencing scheme constitutional because Florida juries don't make specific factual findings on aggravating or mitigating factors and their recommendations aren't binding.

In *Foster v. Chatman* the Court will decide whether potential black jurors were purposely excluded in violation of *Batson v. Kentucky*. Timothy Tyrone Foster, who is black, was sentenced to death for murdering an elderly white woman by an all-white jury. The prosecutor peremptorily struck all four prospective black jurors. The prosecutor's jury selection notes reveal highlighting all prospective black jurors' names in the same color, circling "Black" on the black jurors' questionnaires, and identifying black jurors as B#1, B#2, and B#3. The prosecution's investigator ranked black jurors against each other and recommended one in case a black juror had to be selected. The Georgia Superior Court concluded that the prosecutor's notes failed to demonstrate purposeful race discrimination and even if they did that the prosecutor cited numerous race-neutral reasons for striking each prospective black juror.

Terrance Williams was sentenced to death for killing Amos Norwood who Williams claimed at trial he did not know. Two decades later Williams' co-conspirator revealed, among other things, that the prosecutor urged him to falsely testify that the motive for the murder was robbery, not that Norwood had sexually abused Williams. The Supreme Court of Pennsylvania refused to reverse Williams' death sentence concluding that Williams was aware at trial "of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males." Justice Castille was the elected prosecutor during Williams' trial and earlier appeal, and he campaigned for judge citing the number of defendants he had sent to death row (45), including Williams. In *Williams v. Pennsylvania* the Court will decide whether Justice Castille's decision not to recuse himself violates the Eighth and Fourteenth Amendments and whether it matters that Justice Castille's vote wasn't decisive.

Fourth Amendment

In *Missouri v. McNeely* (2013) the Court held that police generally have to obtain a warrant to conduct a blood alcohol content (BAC) test. So the argument goes, it is unconstitutional to criminalize the *refusal* to take a BAC test if a warrant was required to conduct the test but not obtained. The three decisions that the Court has agreed to review all upheld the state statutes. In *Bernard v. Minnesota** the Minnesota Supreme Court held that the warrantless search of Bernard's breath was constitutional as a search incident to a lawful arrest. In *Birchfield v. North Dakota** the North Dakota Supreme Court concluded that because Birchfield wasn't tested there was no search so there was no Fourth Amendment violation. In *Beylund v. Levi** Beylund argued that the test imposed an unconstitutional condition. The North Dakota Supreme Court concluded test refusal statutes are reasonable because "a licensed driver has a diminished expectation of privacy with respect to the enforcement of drunk driving laws, and our implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement to submit to a chemical test."

A police officer stopped Edward Streiff as he was leaving a house where police suspected drugs were being sold. Utah concedes that the stop was unlawful. The officer called dispatch to run Streiff's identification. Streiff had an outstanding warrant so the officer searched him incident to a lawful arrest and found drugs. The issue in *Utah v. Strieff* is whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful. The exclusionary rule suppresses evidence obtained in violation of the Constitution. Per the "attenuation" exception, the Court has held that the taint of an initial, unlawful detention may be dissipated by an intervening circumstance. The Utah Supreme Court rejected the argument that the attenuation exception applies to the discovery of a warrant following an illegal stop. In all previous Supreme Court cases applying the attenuation exception the attenuating event was a "subsequent, intervening act of a defendant's free will"—a voluntary confession (following an illegal arrest).

Employment

In *Heffernan v. City of Paterson, New Jersey** Officer Heffernan was assigned to a detail in the police chief's office. He was demoted after he was seen picking up a campaign sign for the current police chief's opponent. The sign wasn't for himself; it was for his bedridden mother. Officer Heffernan sought to bring a lawsuit claiming that he was retaliated against based on the City's *perception* he was exercising his First Amendment free association rights. He pointed to lower court precedent holding that public employees may bring First Amendment retaliation claims if an adverse employment action is taken because they remain politically neutral or silent. The Third Circuit concluded Heffernan could not bring a perceived free-association claim because he wasn't retaliated against for "taking a stand of calculated neutrality." Instead, he was demoted on a "factually incorrect basis."

In *CRST Van Expedited v. EEOC* the Court will decide whether an employer is a prevailing party, eligible to recover reasonable attorney's fees in frivolous cases, where a court dismissed a Title VII case because the Equal Employment Opportunity Commission (EEOC) failed to meet

its pre-lawsuit obligations. The district court awarded CRST over $4.5 million in attorney's fees and costs. EEOC objected claiming that CRST wasn't a prevailing party with respect to claims dismissed because the EEOC failed to investigate, find reasonable cause Title VII was violated, and conciliate, so the district court made no ruling on the merits. According to the Eighth Circuit, to be a ruling on the merits the pre-lawsuit obligations the EEOC failed to meet would have to be elements of the hostile work environment lawsuit as opposed to "nonjurisdicational precondition[s] to filing suit." The Eighth Circuit concluded that EEOC's pre-suit obligations weren't elements of the lawsuit. Finding reasonable cause and attempting conciliation are required before the EEOC files *any* lawsuit, not just sexual harassment lawsuits; the Eighth Circuit had never labeled these requirements as "elements" of a Title VII claim; and pre-suit obligations don't distinguish between employers who have violated Title VII and those who have not.

The issue the Court will decide in *Green v. Donahoe* is whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation. On December 16, 2009, Postmaster Marvin Green signed a settlement agreement that he would resign and use accrued leave to receive pay until March 31, 2010. Then he would either retire or accept a position for significantly less pay about 300 miles away. On February 9, 2010, he submitted his retirement papers. On March 22, 2010, he contacted an equal employment opportunity (EEO) counselor about being constructively discharged in violation of Title VII. Federal employees must contact an EEO counselor about a discrimination charge within 45 days. The Tenth Circuit held that Green had 45 days from the last alleged act of discrimination (here December 16) not from when he resigned, to contact the EEO office. The regulation which states federal employees "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" focus on discriminatory acts.

Civil Procedure

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 court without consent. If it doesn't, the Court will decide whether states must extend the same immunities that apply to them to foreign state and local governments 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.

To bring a lawsuit in federal court a plaintiff must be injured to have "standing" per Article III of the U.S. Constitution. But what if Congress allows plaintiffs who have suffered no concrete harm to sue based upon a mere violation of a statute? The Court will decide whether such plaintiffs have Article III standing in *Spokeo v. Robins*. Thomas Robins sued a website operator, Spokoe, for willfully violating the Fair Credit Reporting Act (FCRA) by publishing inaccurate personal information about him. The Ninth Circuit concluded that Robins had Article III standing to sue Spokoe in federal court though his only harms were anxiety and possible lost employment prospects. Robins had standing because the FCRA does not require a showing of actual harm when a plaintiff sues for willful violations. If Robbins wins, state and local governments may be sued in federal court under the Fair Housing Act, the Americans with Disabilities Act, and the Driver's Privacy Protection Act even if the plaintiffs are unharmed.

In *Tyson Foods v. Bouaphakeo* the Court held 6-2 that pork processing employees could bring a collective (class) action lawsuit using "representative evidence" put together by an industrial relations expert averaging donning and doffing time by position based on 744 videotaped observations. If each class member could have relied on a representative sample to establish liability in an individual lawsuit that sample may be relied on to prove class wide liability. This is the reason the Court opined that the use of a representative sample is acceptable here: "[i]n this suit [the employees] sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the] study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing." The Court also stated that while the question of whether uninjured class members may receive damages is one of "great importance," it is not fairly presented in this case because the damages award has not yet been disbursed.

In *Dollar General Corporation v. Mississippi Band of Choctaw Indians* John Doe, a thirteen-year-old tribe member, alleges that his supervisor sexually molested him while he was working as part of a job training program at a Dollar General located on a reservation. Doe sued Dollar General in tribal court alleging a variety of torts including negligent hiring, training, and supervision. In *Montana v. United States* (1981) the Court held that generally nonmembers may not be sued in tribal court except that "tribe[s] may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing." The question in this case is whether "other means" includes suing nonmembers for civil tort claims in tribal court. The lower court determined that the tribal court had jurisdiction looking only at whether there was a commercial relationship between Dollar General and the tribe and a nexus between Dollar General's participation in the job training program and Doe's tort claim. The Fifth Circuit concluded that even an unpaid internship creates a commercial relationship. As for a nexus the court reasoned: "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business."

Miscellaneous

The issue in *U.S. Army Corp of Engineers v. Hawkes** is whether a court may review an Army Corp of Engineers "jurisdictional determination" (JD) that property contains "waters of the United States" per the Clean Water Act. The Eighth Circuit concluded that Hawkes may challenge the JD in court immediately and not wait until the permit is denied to sue. Per the Administrative Procedures Act, judicial review may be sought from final agency actions. Per *Bennett v. Spear* (1997) agency action is final when it marks the consummation of the agency's decision making process and when legal consequences flow from the action. A JD is the consummation of the Corps decision making process because the Corp describes an approved JD as a "definitive, official determination" that there are or aren't waters of the United States on a site. "Rights or obligations have been determined" and "legal consequences flow" from a JD because Hawkes' two choices following it are cost prohibitive. It can complete the permitting process which will be costly, time consuming, and--in this case the Corp already told them--futile. Or it may proceed without a permit and risk an enforcement action. But doing so after obtaining an unfavorable JD could expose Hawkes to criminal monetary penalties or imprisonment for knowingly violating the Clean Water Act.

In *Mullenix v. Luna* Israel Leija Jr. led officers on an 18-minute chase at speeds between 85 and 110 miles an hour after officers tried to arrest him. Leija called police twice saying he had a gun and would shoot police officers if they did not abandon their pursuit. While officers set up spike strips under an overpass, Officer Mullenix asked his supervisor via dispatch if his supervisor thought shooting at Leija's car to disable it was "worth doing." His supervisor told Officer Mullenix to wait to see if the spike strips worked. Officer Mullenix then learned an officer was in harm's way from Leija beneath the overpass. Officer Mullenix shot at Leija's vehicle six times killing him but not disabling his vehicle. Leija's estate sued Officer Mullenix claiming that he violated the Fourth Amendment by using excessive force. The Court concluded Officer Mullenix should be granted qualified immunity stating: "[g]iven Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did."

In a *per curiam* (unauthored) opinion, which concurring Justices Alito and Thomas called "grudging," the Court ordered the Supreme Judicial Court of Massachusetts to decide again whether Massachusetts's stun gun ban is constitutional. Currently eight states and a handful of cities and counties ban stun guns. The highest state court in Massachusetts held that the Second Amendment doesn't protect stun guns because they weren't in common use at the time the Second Amendment was enacted, they are "unusual" as "a thoroughly modern invention," and they aren't readily adaptable for use in the military. In *District of Columbia v. Heller* (2008), the Court ruled that the Second Amendment provides an individual the right to possess a firearm to use for lawful purposes, including for self-defense, in the home. In *Heller* the Court concluded that the Second Amendment extends to arms "even those that were not in existence at the time of the founding." In its two page decision in *Caetano v. Massachusetts* the Court notes that the Supreme Judicial Court of Massachusetts ignores this "clear statement" in *Heller*. A gun can't be

unprotected as “unusual” just because it is a modern invention for the same reason. And *Heller* “rejected the proposition ‘that only those weapons useful in warfare are protected.’”

While in office former Virginia Governor Bob McDonnell accepted more than $175,000 in money and luxury goods from Jonnie Williams. Williams wanted a Virginia state university to test a dietary supplement his company, Star, had developed. A jury found McDonnell guilty of violating a number of federal bribery statutes. In *McDonnell v. United States* McDonnell essentially claims he did not do enough to help Williams to be guilty of bribery. To violate the federal bribery statutes at issue in this case, a government must agree to take “official action” in exchange for something of value. McDonnell argues that “official action” is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power. And he argues that if these statutes aren’t so limited they are unconstitutional. More specifically, he argues the “provision of mere ‘access’ or conferral of amorphous reputational benefits”—which is all he did—isn’t “official action.” And if it is, “every elected official and campaign contributor [will be] a target for investigation and indictment.” The Fourth Circuit affirmed a jury verdict for bribery against McDonnell. “The evidence at trial made clear that Star executives wanted [McDonnell] to use his prominence and influence to the company’s advantage. To the extent, then, that [McDonnell] made any ‘decision’ or took any ‘action’ on these matters, the federal bribery laws would hold that decision or action to be ‘official.’”

The question in *Universal Health Services v. Escobar* is whether a claim for reimbursement from the federal government containing no affirmative misstatements can be deemed false per the False Claims Act because the claimant failed to disclose that it has violated a requirement of the federal program. Yarushka Rivera’s parents argued that Arbour Counseling Services Medicaid reimbursement claims for Rivera’s care were false because Arbour wasn’t complying with program requirements. Arbour argues that only factually false FCA claims should be possible--for example claims that incorrectly describe the goods or services provided or seek reimbursement for goods or services that were not provided. The First Circuit disagreed adopting the “implied certification” theory. It noted that “each time it submitted a claim, Arbour implicitly communicated that it had conformed to the relevant program requirements, such that it was entitled to payment.” Arbour further argues that if the Court does recognize the implied-certification theory “its application must be limited to situations in which a defendant requests payment in violation of an expressly designated precondition to payment.” The First Circuit again disagreed stating that a material condition of payment “need not be ‘expressly designated’” as such in any statute, regulation, or contract provision.

In *Solem v. Bartlett* (1984) the Court articulated a three-part test to determine if a reservation has been diminished. Courts must look at “statutory language used to open the Indian lands,” “events surrounding the passage of a surplus land Act,” and “events that occurred after the passage of a surplus land Act.” In *Nebraska v. Parker* the Court concluded the Omaha Indian Reservation hadn’t been diminished where only the third factor indicated diminishment. An 1882 Act of Congress allowed part of the Omaha Indian Reservation to be sold to non-Indian settlers. A settler bought the land the Village of Pender is located on per the 1882 Act. In 2006 the tribe sought to subject retailers in Pender to its newly amended Beverage Control Ordinance. In this

unanimous opinion the Court had little trouble concluding that the first two factors didn't indicate diminishment. The Court acknowledged that the third factor indicated diminishment. Only two percent of Omaha tribal members live on the disputed land and the tribe doesn't enforce any of its regulations or offer any services on the disputed land. "But this Court has never relied solely on this third consideration to find diminishment."

Per the Fair Debt Collection Practices Act (FDCPA) debt collectors may not make false, deceptive, or misleading representations. The definition of debt collectors excludes "officers" of the State. In Ohio the attorney general (AG) is responsible for collecting debts owed to the state. Per Ohio law the AG may appoint "special counsel" to collect the debt on its behalf. Special counsel must use the AG's letterhead. In *Sherrif v. Gillie* the Court will decide whether "special counsel" hired by the AG are "officers" per the FDCPA. Assuming they are not, the Court will decide whether using AG letterhead violates the FDCPA. The Sixth Circuit concluded that "special counsel" aren't "officers" of the State. The court looked to the federal Dictionary Act definition of officer which "includes any person authorized by law to perform the duties of the office." Special counsel aren't "authorized by law" to collect debts on behalf of the state because a contract, rather than a state statute, grants them authority. Special counsel aren't authorized to perform "*the* duties" of the AG's office because they can't perform *all* the duties of the AG's office. A reasonable jury could find that special counsel's use of AG letterhead was confusing and a violation of the FDCPA. While the letters contained indications that they were sent by an attorney acting as a debt collector separate from the AG: "[t]hese representations may clarify the confusing impact of the letterhead for the least sophisticated consumer, or they may be overshadowed by the larger presence of the Great Seal of Ohio and the Attorney General's name."

In *Sturgeon v. Frost* the Court unanimously rejected the Ninth Circuit's conclusion that per Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), National Park Service (NPS) regulations that apply nationally apply to nonpublic land in Alaska contained in an ANILCA "conservation unit." The second sentence of ANILCA Section 103(c) states that no "nonpublic" (meaning non-federally owned) land "shall be subject to the regulations applicable solely to public [federal] lands within such [conservation] units." The Ninth Circuit concluded that this language meant that non-federally owned land contained in conservation units could be subject to NPS regulations that apply nationally—like the no hovercrafts in national parks rule. But NPS regulations applicable solely to federal land *in Alaska* would not apply to nonfederal land in conservation units in Alaska. The Court rejected the Ninth Circuit's "surprising conclusion" noting that ANILCA is replete with Alaska-specific exceptions to NPS's general authority over federally managed preservation areas.