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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 or will file an *amicus* brief.

First Amendment

In *Trinity Lutheran Church of Columbia v. Pauley* the Supreme Court will decide whether Missouri can refuse to allow a religious preschool to receive a state grant to resurface its playground based on Missouri's "super-Establishment Clause." The Missouri Department of Natural Resources (DNR) offers grants to "qualifying organizations" to purchase recycled tires to resurface playgrounds. The DNR refused to give a grant to Trinity Church's preschool because Missouri's constitution prohibits providing state aid directly or indirectly to churches. Trinity Church argues that excluding it from an "otherwise neutral and secular aid program" violates the federal constitution's Free Exercise and Equal Protection Clauses, which Missouri's "super-Establishment Clause" may not trump. In *Locke v. Davey* (2004) the Supreme Court upheld Washington State's "super-Establishment Clause," which prohibits post-secondary students from using public scholarships to receive a degree in theology. The lower court concluded *Locke* applies in this case where: "Trinity Church seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion.'"

The issue in *Packingham v. North Carolina** is whether a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, violates the First Amendment. The North Carolina Supreme Court held that North Carolina's law is constitutional "in all respects." The court first concluded that North Carolina's law regulates "conduct" and not

"speech," "specifically the ability of registered sex offenders to access certain carefully-defined Web sites." The court then concluded that the statute is a "content-neutral" regulation because it "imposed a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites." Finally, the North Carolina Supreme Court concluded the statute was narrowly tailored to prohibit registered sex offenders from accessing websites where they could gather information about minors. Registered sex offenders could still use websites "exclusively devoted to speech" including instant messaging services and chat rooms, websites requiring no more than an a user name and email address to access content, and websites where users must be at least 18 to maintain a profile.

The question the Supreme Court will decide in *Expressions Hair Design v. Schneiderman** is whether state "no-surcharge" laws that prohibit vendors from charging more to credit-card customers but allows them to charge less to cash customers violate the First Amendment. Expressions Hair Design would like to charge three percent more to credit card customers for its goods and services but is prohibited from doing so by New York's "no-surcharge" law, Section 518. Expressions argues that Section 518 regulates speech in violation of the First Amendment. Merchants are allowed to characterize a price difference as a "cash discount" but not as a "credit-card surcharge." The Second Circuit disagreed concluding that the terms "cash discount" and "credit-card surcharge" are not mere labels. Section 518 regulates conduct and not speech—it prohibits a vendor from charging credit-card customers more than the sticker price.

The issue in *Lee v. Tam* is whether Section 2(a) of the Lanham Act, which bars the Patent and Trademark Office (PTO) from registering scandalous, immoral, or disparaging marks, violates the First Amendment. The PTO refused to register the band name The Slants finding it likely disparaging to persons of Asian descent. The Federal Circuit ruled Section 2(a) is unconsitutional. Among other arguments, the court rejected the PTO's argument that trademark registration and the "accoutrements of registration" amount to government speech. The court distinguished the Supreme Court's recent decision in *Walker v. Texas Division, Sons of Confederate Veterans* (2015), where the Court concluded that specialty license plates were government speech, even though a state law allowed individuals, organizations, and nonprofit groups to request certain designs. "There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government." Relatedly, the Federal Circuit rejected the PTO's argument that trademark registration is a form of government subsidy that the government may refuse to extend where it disapproves of a mark's message. "[T]rademark registration is not a program through which the government is seeking to get its message out through recipients of funding (direct or indirect)."

Education

G.G. is biologically female but identifies as a male. The Gloucester County School Board prevented him from using the boy's bathroom. He sued the district arguing that it discriminated

against him in violation of Title IX. Title IX prohibits school districts that receive federal funds from discriminating "on the basis of sex." A Title IX regulation states if school districts maintain separate bathrooms (locker rooms, showers, etc.) "on the basis of sex" they must provide comparable facilities for the other sex. In a 2015 letter the Department of Education (DOE) interpreted the Title IX regulation to mean that if schools provide for separate boys' and girls' bathrooms, transgender students must be allowed to use the bathroom consistent with their gender identity. The Supreme Court has agreed to decide two questions in *Gloucester County School Board v. G.G.*. First, should it defer to DOE's letter interpreting the regulation? Second, putting the letter aside, should the Title IX regulation be interpreted as DOE suggests? The Fourth Circuit ruled in favor of G.G. The court gave *Auer* deference to DOE's letter.

Per the federal Individuals with Disabilities Education Act (IDEA), a student with a disability receives an individualized education program (IEP), which is intended to provide that student with a "free and appropriate public education" (FAPE). According to the Supreme Court in *Board of Education v. Rowley* (1982) to provide a FAPE, an IEP must be "reasonably calculated to enable the child to receive educational benefits." The question the Supreme Court will decide in *Endrew F. v. Douglas County School District*, is what level of educational benefit must school districts confer on children with disabilities to provide them with a FAPE. Some federal circuit courts have held that school districts are required to provide special education students "meaningful" educational benefits. Others, like the Tenth Circuit in this case, have held that school districts only have to provide "some" educational benefits. Circuit courts cite language in *Rowley* which supports both the "meaningful" and the "some" standard.

Police/Qualified Immunity

It is undisputed that police officers used reasonable force when they shot Angel Mendez. As officers entered, unannounced, the shack where Mendez was living they saw a silhouette of Mendez pointing what looked like a rifle at them. Yet, the Ninth Circuit awarded him and his wife damages because the officers didn't have a warrant to search the shack thereby "provoking" Mendez. In *Los Angeles County v. Mendez** the Supreme Court must decide whether to accept or reject the Ninth Circuit's "provocation" rule. Per this rule, "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Mendezes also argue that putting the provocation theory aside, the officers are liable in this case because their unconstitutional entry "proximately caused" them to shoot Mendez. Many Americans own guns. So, it is reasonably foreseeable that if officers barge into a shack unannounced the person in the shack may be holding a gun.

Elijah Manuel was arrested and charged with possession of a controlled substance even though a field test indicated his pills weren't illegal drugs. About six weeks after his arrest he was released when a state crime laboratory test cleared him. If Manuel would have brought a timely false arrest claim it is almost certain he would have won. But such a claim would not have been timely

because Manuel didn't sue within two years of being arrested or charged. So he brought a malicious prosecution claim under the Fourth Amendment. An element of a malicious prosecution claim in that the plaintiff prevails in the underlying prosecution. Manuel "prevailed" when the charges against him were dismissed; and he brought his lawsuit within two years of the dismissal. The question the Supreme Court will decide in *Manuel v. City of Joliet** is whether malicious prosecution claims can be brought under the Fourth Amendment in the first place. The Supreme Court left this question open in *Albright v. Oliver* (1994). The Seventh Circuit concluded that if malicious prosecution violates the federal constitution, cases must be brought as due process claims not Fourth Amendment claims. The lower court found no violation of federal due process in this case because Illinois allows state malicious prosecution claims to be brought.

United States Border Patrol Agent Jesus Mesa, Jr., shot and killed Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, who was standing on the Mexico side of the U.S./Mexico border. At the time of the shooting Agent Mesa didn't know that Hernandez was a Mexican citizen. One question in *Mesa v. Hernandez* is whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident. The Fifth Circuit granted Agent Mesa qualified immunity based on the fact that Hernandez was a Mexican citizen even though Agent Mesa didn't know that at the time of the shooting. A second question this case is whether Hernandez has a Fourth Amendment right to be free from excessive force even though he was a Mexican citizen shot on Mexican soil. The Fifth Circuit relied on a 1990 Supreme Court case *United States v. Verdugo-Urquidez* to reach the conclusion Hernandez has no such right. Hernandez argues the Supreme Court should rely on the more recent *Boumediene v. Bush* (2008). In this case the Supreme Court "held that 'de jure sovereignty' is not and has never been 'the only relevant consideration in determining the geographic reach of the Constitution' because 'questions of extraterritoriality turn on objective factors and practical concerns, not formalism.'"

In *Ziglar v. Turkmen*, *Ashcroft v. Turkmen*, and *Hasty v. Turkmen*, a number of "out-of-status" aliens were arrested and detained on immigration charges shortly after 9/11. They claim they were treated in a "discriminatory and punitive" manner while confined and detained long after it was clear they were never involved in terrorist activities. They have sued former Attorney General John Ashcroft, former Director of the Federal Bureau of Investigation Robert Mueller, former Commissioner of the Immigration and Naturalization Service, James Ziglar, and two wardens and an assistant warden at the federal detention center where they were held. The detainees brought three claims: (1) substantive due process (confinement conditions failed to meet due process); (2) equal protection (detainees were confined to these conditions because of their race, religion, etc.); and (3) conspiracy under 42 U.S.C. § 1985(3) (government officials conspired together to violate equal protection rights of the detainees). The Second Circuit denied qualified immunity to all of the government officials on all three of these claims. The Supreme Court has agreed to review the Second Circuit decisions. All of the government officials make

the same argument regarding § 1985(3). Previously, the Second Circuit had not ruled whether § 1985(3) applied to federal officials. So they argue, how could they have violated "clearly established" law? Regarding the first and second claim, Zigler criticizes the Second Circuit for not considering the 9/11 context in the decision to detain the Respondents. Similarly, Ashcroft and Mueller criticize the Second Circuit for viewing Respondents as "ordinary civil detainees" or "pretrial detainee[s]" instead of as persons "legally arrested and detained in conjunction with the September 11 investigation." Finally, the wardens and associate warden claim that no clearly established law gave them authority to "unilaterally overrule the FBI's terrorism designations and place respondents in less restrictive condition."

In *White v. Pauly* police officers went to Daniel Pauly's house to get his side of the story that he was drunk driving. Daniel and his brother Samuel claim the officers stated they were coming in the house but failed to identify themselves as police officers. Officer Ray White arrived after the officers (inadequately) announced themselves. He hide behind a stone wall after hearing one of the brothers say "we have guns." Daniel fired shots and Samuel pointed a gun at another officer. Officer White shot and killed Samuel. The Pauly brothers claim that Officer White used excessive force in violation of the Fourth Amendment and should be denied qualified immunity. The Supreme Court concluded that Officer White violated no clearly established law in this case. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."

Preemption

The Federal Employees Health Benefits Act (FEHBA) governs federal employee health insurance benefits and authorizes the Office of Personnel Management (OPM) to enter into contracts with private health insurance companies to administer benefit plans. FEHBA preempts state law relating to the "nature, provision, or extent of coverage or benefits." Coventry Heath Care argued that FEHBA preempts Missouri's anti-subrogation law. The Missouri Supreme Court disagreed reasoning that Missouri's anti-subrogation law does not clearly "relate to the nature, provision, or extent of coverage or benefits." In 2015 the U.S. Supreme Court vacated and remanded the Missouri Supreme Court's decision after OMP promulgated a rule saying that an insurance carrier's rights and responsibilities pertaining to subrogation "relate to the nature, provision, or extent of coverage or benefits." The Missouri Supreme Court again ruled that FEBHA doesn't preempt Missouri's anti-subrogation law. The Missouri Supreme Court refused give to *Chevron* deference to OPM's rule reasoning "no binding precedent requiring courts to afford dispositive deference to an agency rule defining the scope of an express preemption clause." In *Coventry Health Care of Missouri v. Nevils** the U.S. Supreme Court again agreed to decide whether FEBHA preempts Missouri's anti-subrogation law. Implicit in that question is whether *Chevron* deference applies to an agency's regulation construing the scope of a statute's

express-preemption provision. In a one-paragraph concurring opinion a majority of the Missouri Supreme Court also concluded the section of FEHBA in question is unconstitutional per the Supremacy Clause because it attempts "to give preemptive effect to the provisions of a contract between the federal government and a private party," here a health insurance company. The U.S. Supreme Court will also review this question.

The question in *Kindred Nursing Centers v. Clark* is whether the Federal Arbitration Act preempts Kentucky's rule that an "attorney-in-fact" may bind a principal to an arbitration agreement only if the power-of-attorney document expressly refers to arbitration agreements. A number of parents executed power-of-attorney documents designating one of their children "attorney-in-fact." While some of these documents gave the children broad rights to act on their parent's behalf ("to do and perform for me in my name all that I might if present"), none explicitly gave their children the authority to agree to arbitration (rather than a jury trial) to resolve disputes regarding their parent's legal rights. All the children signed an arbitration agreement when their parents were admitted to nursing homes. After the parents died in the nursing homes, the children wanted to sue the nursing homes—and avoid arbitration—for various claims. Per the Federal Arbitration Act all valid arbitration agreements must be enforced. The Kentucky Supreme Court concluded that the arbitration agreements in this case were invalidly formed. The children did not have the authority to agree to arbitration where the power-of-attorney documents did not express state they had that authority.

Civil Procedure

The Supreme Court has agreed to decide whether federal courts of appeals versus federal district courts have the authority to rule whether the "waters of the United States" (WOTUS) regulations are lawful in *National Association of Manufacturers v. Department of Defense*. Per the Clean Water Act a number of decisions by the Environmental Protection Agency Administrator must be heard directly in federal courts of appeals, including agency actions "in issuing or denying any permit." A definitional regulation like the WOTUS regulation does not involve the issuing or denying of a permit. Nevertheless, the Sixth Circuit Court of Appeals concluded that it has jurisdiction to decide whether the WOTUS regulations are lawful. Judge McKeague, writing for the court, relied on a 2009 Sixth Circuit decision *National Cotton Council v. EPA* holding that this provision encompasses "not only . . . actions issuing or denying particular permits, but also . . . regulations governing the issuance of permits." The definition of WOTUS impacts permitting requirements. A concurring judge stated he believed *National Cotton* was wrongly decided but that the court was bound to follow it.

Steven Sherman sued the Town of Chester alleging an unconstitutional taking as the town refused to approve a subdivision on plots of land Sherman intended to sell to Laroe Estates. Laroe Estates advanced Sherman money for the land in exchange for a mortgage on the property. Sherman defaulted on a loan to a senior mortgage holder who foreclosed on the property. Laroe Estates, claiming to be the owner of the property, sought to "intervene" in the takings lawsuit.

The district court concluded that Laroe Estates lacked Article III "standing" under the U.S. Constitution to assert a takings claim against the Town. The question the Supreme Court will decide in *Town of Chester v. Laroe Estates** is whether Laroe Estates may intervene in this case even though it lacks standing. The Second Circuit held, based on prior circuit court precedent, Laroe Estates does not have to have standing to intervene in this lawsuit where there is a genuine case or controversy between the existing parties.

Redistricting

In *Bethune-Hill v. Virginia State Board of Elections* what those challenging the plan seem most upset about is that the lower court concluded race does not "predominate" in redistricting unless the use of race resulted in an "actual conflict" with traditional redistricting criteria. Voters from 12 Virginia House of Delegates districts claim their districts were unconstitutionally racially gerrymandered following the 2010 census. Both parties agrees that one of the goals of the redistricting plan was to ensure that these 12 districts had at least a 55% black voting age population (BVAP). To prove an unconstitutional racial gerrymander, challengers must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." To show that race predominated, challengers must show that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations" in drawing districts. Traditional race-neutral districting principles include compactness, contiguity, adherence to boundaries provided by political subdivisions, etc. According to the lower court, predominance demands a showing of "'actual conflict between traditional redistricting criteria and race that leads to the subordination of the former." The lower court only found actual conflict in one "very irregular" district that required "drastic maneuvering" to have a 55% BVAP.

When North Carolina redistricted in 2010 it added two majority black voting age population (BVAP) districts. The two state legislators chairing the joint redistricting committee claimed that per *Bartlett v. Strickland* (2009) "districts created to comply with section 2 of the Voting Rights Act, must be created with [BVAP] . . . at the level of at least 50% plus one." Section 2 of VRA prohibits minority vote dilution in redistricting. While previously neither district was majority BVAP, African-American preferred candidates "easily and repeatedly" won reelection in the last two decades. Plaintiffs in *McCrory v. Harris* claim that creating these two majority BVAP districts was an unconstitutional racial gerrymander, which violated the Fourteenth Amendment Equal Protection Clause. An unconstitutional racial gerrymander occurs when race is the predominant consideration in redistricting and the use of race serves no narrowly tailored, compelling state interest. Two of the three judges on the panel had little trouble concluding that race was a predominant factor in drawing both of the districts. The North Carolina legislature argued it had a compelling interest in relying predominately on race in redistricting to avoid vote dilution under section 2 of the VRA. But the court found no "strong basis in evidence" of a risk

of vote dilution requiring a majority BVAP. Previously, the white majority hadn't voted as a bloc to defeat African-Americans' candidates of choice.

Capital Punishment

In *Moore v. Texas* the Supreme Court will review a Texas Court of Criminal Appeals decision to apply a previous definition of "intellectually disabled" adopted in a 1992 death penalty case rather than the current definition. In *Atkins v. Virginia* (1992) the Supreme Court held that executing the intellectually disabled violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Court tasked states with implementing *Atkins*. In 1980, Bobby Moore was convicted of capital murder and sentenced to death for fatally shooting a seventy-year-old grocery clerk during a robbery. The Texas Court of Criminal Appeals, relying on a 2004 case that adopted the definition of intellectual disability stated in the ninth edition of the American Association on Mental Retardation manual published in 1992, concluded that Moore wasn't intellectually disabled. According to the court it was up to the Texas Legislature to implement *Atkins*. Until it did so, the court would continue to apply this 1992 definition.

In *Ake v. Oklahoma* (1985) the Supreme Court held that if a criminal defendant's mental health will be a significant factor at trial the state must ensure that the defendant has access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." The question the Supreme Court will decide in *McWilliams v. Dunn* is whether such an expert must be *independent* of the prosecution. A state "Lunacy Commission" concluded James McWilliams "was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms." McWilliams was sentenced to death for robbing, raping, and shooting a convenience store employee. At the penalty phase McWilliams' mother testified he had head injuries as a child, which his defense counsel did not know about. Before sentencing, the trial court appointed a state neuropsychologist to evaluate McWilliams. The neuropsychologist had no confidential relationship with McWilliams; he delivered his report to both the defense and the prosecution. McWilliams argues that *Ake* entitles him to an evaluation by a mental health professional who he has a confidential relationship with. The Eleventh Circuit disagreed without any explanation other than noting the federal circuit courts of appeals are split on this question.

In a three-page *per curiam* (unauthored) opinion in *Bosse v. Oklahoma*, the Supreme Court reversed the Oklahoma Court of Criminal Appeals' decision to allow victims' relatives to recommend to the jury that they sentence a defendant to death. In *Booth v. Maryland* (1987) the Supreme Court held that during sentencing capital juries could only hear victim impact evidence that relates directly to the circumstances of the crime. Four years later in *Payne v. Tennessee* the Court changed course holding that capital juries could hear evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family. In *Payne* the Court stated that it didn't reconsider its holding in *Booth* that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the

appropriate sentence violates the Eighth Amendment. Regardless, the Oklahoma Court of Criminal Appeals held that *Payne* "*implicitly* overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence." The Supreme Court reminded the Oklahoma Court of Criminal Appeals that the Supreme Court alone overrules its precedent.

Miscellaneous

The issue in *Wells Fargo v. City of Miami** and *Bank of America v. City of Miami** is whether Miami has statutory standing to sue banks under the Fair Housing Act (FHA) for economic harm caused to the City by discriminatory lending practices. The FHA allows "aggrieved person[s]" to sue. The banks argue that in *Thompson v. North American Stainless* (2011), the Supreme Court defined "aggrieved person," under another federal statute, to require that a plaintiff fall within the zone of interests protected by the statute and have injuries proximately caused by the statutory violation. Unsurprisingly, the banks argue that the City doesn't fall within the zone of interests protected by the FHA and that the banks' conduct didn't cause economic injury to the City. The Eleventh Circuit concluded Miami had statutory standing relying on a much older case, *Trafficante v. Metropolitan Life Insurance Company* (1972), where the Supreme Court stated that statutory standing under the Fair Housing Act is "as broad[] as is permitted by Article III of the Constitution." The parties do not dispute that the City of Miami has Article III standing in this case. So if the Court agrees that only Article III standing is required to also have statutory standing Miami has statutory standing to sue the banks.

In *Murr v. Wisconsin** the Supreme Court will decide whether merger provisions in state law and local ordinances, where nonconforming, adjacent lots under common ownership are combined for zoning purposes, may result in the unconstitutional taking of property. The Murrs owned contiguous lots E and F which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. A St. Croix County merger ordinance prohibits the individual development or sale of adjacent lots under common ownership that are less than one acre total. But the ordinance treats commonly owned adjacent lots of less than an acre as a single, buildable lot. The Murrs sought and were denied a variance to separately use or sell lots E and F. They claim the ordinance resulted in an unconstitutional uncompensated taking. The Wisconsin Court of Appeals ruled there was no taking in this case. It looked at the value of lots E and F in combination and determined that the Murrs' property retained significant value despite being merged. A year-round residence could be located on lot E or F or could straddle both lots. And state court precedent indicated that the lots should be considered in combination for purposes of takings analysis.

The Supreme Court will decide in *Nelson v. Colorado* whether it violates due process to require criminal defendants whose convictions have been reversed to prove their innocence by clear and convincing evidence to receive refunds of monetary penalties they have paid. Shannon Nelson was convicted of five charges relating to sexually assaulting her children. She was ordered to pay a variety of costs and fees. The appeals court overturned her conviction and a new jury acquitted

her. The Colorado Supreme Court ruled that due process does not require that a court award Nelson the costs and fees she paid. The Colorado Exoneration Act authorizes a court to issue refunds to exonerated defendants. Nelson didn't pursue a claim under the Exoneration Act. According to the Colorado Supreme Court: "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." To receive compensation under the Act, the exonerated person must prove, by clear and convincing evidence, that he or she was "actually innocent."

Most states, including Colorado, and the federal government have a "no-impeachment" rule which prevents jurors from testifying after a verdict about what happened during deliberations. After a jury convicted Miguel Angel Pena-Rodriguez of three misdemeanors related to making sexual advances toward two teenage girls, two jurors alleged that another juror made numerous racially biased statements during jury deliberations. In *Pena-Rodriguez v. Colorado*, Pena-Rodriguez argues that if Colorado's "no-impeachment" rule bars admission of the juror's racially biased statements it violates his Sixth Amendment right to be tried by an "impartial" jury. The Colorado Supreme Court disagreed. In two previous cases the Supreme Court ruled that the federal "no-impeachment" rule wasn't unconstitutional where it barred admission of evidence that the jury was "one big party" where numerous jurors used drugs and alcohol (*Tanner v. United States*, 1987) and that a juror in a car-crash case said in deliberations that her daughter caused a car accident and had she been sued it would have ruined her life (*Warger v. Shauers*, 2014). These two cases stand for a "simple but crucial principle: Protecting the secrecy of the jury deliberations is of paramount importance in our justice system."

When the Equal Employment Opportunity Commission (EEOC) investigates allegations of employment discrimination if the employer refuses to provide the information the EEOC requests the EEOC will issue a subpoena demanding the employer produce the information. If the employer refuses to comply with the subpoena the EEOC may ask a court to enforce it. The question in *McLane v. EEOC* is whether a court of appeals should review a district court's decision to quash or enforce an EEOC subpoena de novo ("from the new"), instead of deferring to the lower court's ruling. Of the nine federal circuits to consider this question, only the Ninth Circuit reviews EEOC subpoena requests de novo. In its opinion, even the Ninth Circuit admits it is "unclear" why it does so.

The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States. Per the Act a FCA complaint is kept secret "under seal" until the United States can review it and decide whether it wants to participate in the case. In *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby* the Supreme Court held unanimously that if the seal requirement is violated the complaint doesn't have to be dismissed. State Farm insurance adjusters alleged that after Hurricane Katrina, State Farm instructed them to falsely determine houses and property were damaged by flooding, instead of by wind. State Farm had to pay for wind claims and the federal government had to pay for flooding claims. While the claim was under seal the adjusters' attorney disclosed the FCA complaint to national

journalists. While the news outlets issued stories about the fraud allegations they didn't reveal the existence of the FCA complaint. The Court concluded the FCA doesn't require the "harsh" result of dismissal for a seal violation. When the FCA states that a complaint "shall" be kept under seal it specifies no remedy for a seal violation. But in other sections the statute explicitly requires dismissal for other actions of those bringing FCA claims.