Supreme Court Midterm Review for Local Governments 2017

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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.

The Supreme Court's 2016-2017 docket is now set. The Court is still down a Justice but has accepted as many cases as usual (about 75). In theory all the cases discussed below will be decided by June 30, 2017. The Court may decide to rehear tied (4-4) cases next term, when a new Justice will presumably join the bench.

This articles covers cases of interest to local governments which the Court agreed to hear this term accepted *after* September 15, 2016. Here is a summary of cases of interest to local governments which the Court agreed to hear *before* September 15, 2016.

The Supreme Court's decision from this term most likely to receive significant media attention involves a transgender student who wants to use the bathroom consistent with his gender identity. *Gloucester County School Board v. G.G.* will not directly affect local governments.

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, the court reasoned.

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.

Given the rapid pace of police work, it is not unusual for officers to learn a variety of information after they have used force, which supports their qualified immunity claim (i.e. the person they shot had a gun, had threatened another officer or citizen, etc.). Considering this kind of after-the-fact information in the qualified immunity analysis would be favorable to officers.

But the question in this case is whether qualified immunity may be granted *or denied* based on facts discovered later. In some cases officers may learn after-the-fact information that undermines their claim for qualified immunity (i.e. the person they shot stated he had a weapon but did not, had been mistakenly perceived to have threatened another officer or citizen, etc.). Considering this kind of after-the-fact information in the qualified immunity analysis would be unfavorable to officers.

During the fall the Supreme Court accepted three First Amendment free speech cases. This is not good news for local governments as the Supreme Court routinely and sometimes unanimously votes against states and local governments in First Amendment free speech cases.

*Packingham v. North Carolina** is probably the First Amendment case of most interest to local governments as the Supreme Court is likely to discuss whether the statute at issue in the case is content-based or content-neutrual.

The issue in this case 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.

Lester Packingham was charged with violating the North Carolina statute because he accessed Facebook. In the posting that got him in trouble Packingham thanked God for the dismissal of a ticket.

If a statute limits speech based on content it is subject to strict (nearly always fatal) scrutiny. In *Reed v. Town of Gilbert, Arizona* (2015), the Supreme Court held that the definition of content-based is very broad.

The North Carolina Supreme Court 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."

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.

The work of the Supreme Court never ends. The Court has already accepted one case for next term involving a local government. In *District of Columbia v. Wesby* the Supreme Court will decide whether, when the owner of a vacant house informs police he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' claims of an innocent mental state.