Supreme Court Midterm Review for States 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 the states which the Court agreed to hear this term accepted *after* September 15, 2016. Here is a summary of cases of interest to the states 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.

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 lower court gave deference to DOE's letter.

Over 20 states have sued the Department of Education claiming the letter "has no basis in law" and could cause "seismic changes in the operations of the nation's school districts."

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

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 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.

Finally, the Supreme Court has agreed to decide a preemption case of interest to the states. This issue in *Coventry Health Care of Missouri v. Nevils** is whether *Chevron* deference applies to an agency's regulation construing the scope of a statute's express-preemption provision.