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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.

Police/Qualified Immunity

In a unanimous opinion in *County of Los Angeles v. Mendez** the Supreme Court rejected the "provocation rule," where police officers using *reasonable* force may be liable for violating the Fourth Amendment because they committed a separate Fourth Amendment violation that contributed to their need to use force. Police officer entered the shack Mendez was living in without a warrant and unannounced. Mendez thought the officers were the property owner and picked up the BB gun he used to shoot rats so he could stand up. When the officers saw the gun, they shot him resulting in his leg being amputated below the knee. The Ninth Circuit concluded that the use of force in this case was reasonable. But it concluded the officers were liable per the provocation rule--the officers brought about the shooting by entering the shack without a warrant. (The Ninth Circuit granted the officers qualified immunity for failing to knock-and-announce themselves.) The Ninth Circuit also concluded that provocation rule aside, the officers were liable for causing the shooting because it was "reasonably foreseeable" that the officers would encounter an armed homeowner when they "barged into the shack unannounced." The Court rejected the provocation rule noting that its "fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Court also rejected the Ninth Circuit's causation analysis because it focused on what might foreseeably happen as a result of the officers' failure to knock-and-announce instead of their failure to have a warrant.

In *Manuel v. City of Joliet** the Supreme Court held 6-2 that even after "legal process" (appearing before a judge) has occurred a person may bring a Fourth Amendment claim challenging pretrial detention. Elijah Manuel was arrested and charged with possession of a controlled substance even though a field test and a lab test indicated his pills weren't illegal drugs. A county court judge further detained Manuel based on a complaint inaccurately reporting the results of the field and lab tests. Forty-eight days later Manuel was released when another laboratory test cleared him. Manuel brought an unlawful detention case under the Fourth Amendment. The Seventh Circuit held that such a case had to be brought under the Due Process Clause, which Manuel failed to do. Justice Kagan explains why pretrial detention after legal process can be challenged under the Fourth Amendment: "The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause."

In *Hernandez v. Mesa* the Supreme Court ruled that the lower court erred in granting qualified immunity to a police officer based on facts unknown at the time of the shooting, but favorable to the officer. 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. Hernandez's family argued, among other things, that Agent Mesa violated their son's Fifth Amendment due process rights. The Fifth Circuit granted Agent Mesa qualified immunity relying on the fact that Hernandez was "an alien who had no significant voluntary connection to . . . the United States." But Agent Mesa didn't know Hernandez's nationality and the extent of his ties to the United States at the time of the shooting. In a *per curiam* (unauthored) opinion the Court noted that "[f]acts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant" to the qualified immunity analysis.

In *Ziglar v. Abbasi*, the Supreme Court in a 4-2 decision granted a number of high level federal executive agency officials qualified immunity related to a claim they conspired to violate the equal protection rights of a number of undocumented immigrants held on suspicion of a connection to terrorism after September 11, 2001. Six men of Arab or South Asian descent, five who are Muslims, brought a variety of legal claims against former Attorney General John Ashcroft, former FBI Director Robert Mueller, former Immigration and Naturalization Service Commissioner James Ziglar, and two federal prison wardens. According to the Court "[t]he

gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in . . . harsh conditions." Among other things the detainees claimed that the federal officials violated 42 U.S.C. 1985(3) by engaging in a conspiracy to violate the detainees' equal protection rights. According to the majority of the Justices deciding this case two factors weighed in favor of qualified immunity. First, the alleged conspiracy was between officials in the same branch and department of the government. In antitrust law, per the intracorporate-conspiracy doctrine, no conspiracy can exist between agents from the same legal entity. While the lower courts are split on whether this doctrine applies in the Section 1985 context, the split indicates the law on this question isn't clearly established. Second, the Court noted that the government officials in this case discussed matters of "general and far-reaching policy." "[O]pen discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue."

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."

First Amendment

In *Trinity Lutheran Church of Columbia, Inc. v. Comer* the Supreme Court held 7-2 that Missouri violated Trinity Lutheran Church's free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires. Trinity's preschool ranked fifth among 44 applicants to receive a grant from Missouri's Scrap Tire Program. Missouri's Department of Natural Resources (DNR) informed the preschool it didn't receive a grant because Missouri's constitution prohibits public funds from being used "directly or indirectly, in aid of any church, sect, or denomination of religion." Trinity sued the DNR claiming it violated the Church's First Amendment free exercise of religion rights. The Supreme Court sided with the church. As the policy expressly discriminated against otherwise eligible recipients on the basis of religion, the Court reached the "unremarkable" conclusion that it must be able to withstand "the most exacting scrutiny." It did not because the DNR "offers

nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns."

Section 2(a) of the Lanham Act bars the Patent and Trademark Office (PTO) from registering trademarks that disparage persons or institutions. Simon Tam named his band The Slants to "reclaim" and "take ownership" of Asian stereotypes. The PTO refused to register the band name, concluding a "substantial composite of people" would find it offensive. In *Matal v. Tam*, Tam sued the PTO arguing that Section 2(a) violates the First Amendment Free Speech Clause. In rejecting the argument that trademarks are government speech, the Court noted that none of the factors present in *Walker v. Texas* (2005) are present in this case. Specifically, license plates have long been used to convey state messages; are closely identified with the state as they are manufactured, owned, and generally designed by the state; and Texas directly controlled the messages conveyed on specialty plates. The Supreme Court has upheld the constitutionality of government programs that subsidize speech expressing a particular viewpoint like federal grants to artists or libraries. The Court rejected the argument that the federal registration of trademarks is anything like these programs. Notably, the PTO charges people to register trademarks; it does not pay people seeking trademark registration. Applying the First Amendment the Court concluded that the "disparagement clause" is unconstitutional because it is not "'narrowly drawn' to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*."

In *Packingham v. North Carolina** the Supreme Court ruled unanimously that a North Carolina law making it a felony for a registered sex offender to access social networking sites where minors can create profiles violates the First Amendment Free Speech Clause. Lester Packingham was charged with violating the North Carolina statute because he praised God on Facebook when a parking ticket was dismissed. The Supreme Court reasoned that this law violates the free speech rights of sex offenders because it is too broad. "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." The Supreme Court assumed the statute was content-neutral but held that it is too broad to withstand even less rigorous intermediate scrutiny. The Court assumed sex offenders would not be able to use very common social networking sites like Facebook, LinkedIn, and Twitter. And the Court noted that it has never approved a statute "as broad in its reach" as this one.

In *Expressions Hair Design v. Schneiderman** the Supreme Court held unanimously that a New York statute prohibiting vendors from advertising a single price and a statement that credit card customers must pay more regulates speech under the First Amendment. A New York statute states that "[n]o seller in any sales transaction may impose a surcharge on a [credit card] holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Twelve

states have adopted credit-card surcharge bans. The Supreme Court agreed that this statute prohibits Expressions Hair Design from posting a single price—for example "Haircuts $10 (3% or 30 cent surcharge added if you pay by credit card)." The sticker price is the regular price so sellers may not charge credit card customers an amount above the sticker price that is not also charged to cash customers. According the Court, this statute regulates speech and isn't a typical price/conduct regulation, which would receive less protection under the First Amendment. "What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit" because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price."

Miscellaneous

In *Bank of America v. Miami** the Supreme Court held 5-3 that local governments have "standing" to bring Fair Housing Act (FHA) lawsuits against banks alleging discriminatory lending practices. But to win these claims local governments must show that their injuries were more than merely foreseeable. Miami claims that Bank of America and Wells Fargo intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than similarly situated white customers in violation of the FHA. Miami further claims these discriminatory practices caused foreclosures and vacancies which harmed the city by decreasing property values, reducing property tax revenue, and increasing costs to the city. The Court concluded, based on precedent, that Miami's claims of financial injury are sufficient to meet the FHA's standing requirement. Specifically, in *Gladstone, Realtors v. Village of Bellwood* (1979) the Court allowed the Village of Bellwood to sue real estate brokerage firms who were steering prospective black home buyers away from predominately white neighborhoods under the FHA for similar economic injuries. Regarding causation, the lower court concluded that the banks' alleged discriminatory lending practices proximately caused the city's economic injuries because they were the foreseeable result of the banks' misconduct. The Supreme Court concluded foreseeability isn't enough to prove causation. Instead, proving proximate-cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged."

In *Murr v. Wisconsin** the Supreme Court concluded 5-3 that no taking occurred where state law and local ordinance "merged" nonconforming, adjacent lots under common ownership, meaning the property owners could not sell one of the lots by itself. The Murrs owned contiguous lots E and F, which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. State law and a St. Croix County merger ordinance prohibit the individual development or sale of adjacent lots under common ownership that are less than one acre total. The Murrs claimed the ordinance resulted in an unconstitutional uncompensated taking. According to the Court, the question in this case was whether the lots should be viewed as a single parcel when concluding

whether a taking took place. The Court applied a three-factor test which lead it to conclude that the lots should be viewed as one parcel. First, state law and local ordinance treat the property as one for a "specific and legitimate purpose." Second, the physical characteristics of the property in this case indicate the parcels should be combined for purposes of takings analysis. Third, the "special relationship of the lots is further shown by their combined valuation." Lot E appraised at $40,000; lot F at $373,000; but the combined lots appraise at $689,300. Looking at the parcels as a whole the Court concluded no compensable taking occurred in this case. The Murrs could still build a bigger house on the combined lots, and they cannot claim they "reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

In *Town of Chester v. Laroe Estates** the Supreme Court held that an intervenor must possess Article III standing to intervene in a lawsuit as a matter of right if he or she wishes to pursue relief not requested by the plaintiff. Steven Sherman sued the Town of Chester alleging an unconstitutional taking as the town "obstructed his plans" to build a subdivision. Laroe Estates paid $2.5 million to Sherman for the property while Sherman went through the regulatory process. Laroe Estates sought to intervene in the lawsuit. The Supreme Court assumed that Laroe Estates lacked Article III standing. Both parties and the Court agreed that it "follows ineluctably from our Article III case law" that if interveners seek different relief from plaintiffs they are required to have standing. Here, it is unclear whether Laroe Estates wants the damages Sherman requested (damages for Sherman) or damages in Laroe Estates' name.

In *Nelson v. Colorado* the Supreme Court struck down a Colorado law requiring defendants whose criminal convictions have been invalidated to prove their innocence by clear and convincing evidence in order to receive a refund of fees, court costs, and restitution. According to the Court in a 7-1 opinion, this scheme violates the Fourteenth Amendment's guarantee of due process. Shannon Nelson was convicted on a number of charges from the alleged sexual and physical abuse of her children. Her conviction was reversed due to a trial court error; a new jury acquitted her of all charges. Louis Alanzo Madden was convicted of two sex crimes. The Colorado Supreme Court reversed his conviction; the state did not appeal or retry the case. The only way Nelson or Madden could recover fees, court costs, and restitution was filing a civil claim under Colorado's Exoneration Act, which requires them to show by clear and convincing evidence their actual innocence. The Court concluded that Colorado's scheme doesn't comport with due process, applying a three-part balancing test from *Mathews v. Eldridge* (1976). Nelson and Madden have an "obvious interest" in regaining the money they paid to Colorado. There is a risk they will be erroneously deprived of their funds because they must prove their innocence by clear and convincing evidence. "But to get their money back, defendants should not be saddled with any proof burden. Instead . . . they are entitled to be presumed innocent." Finally, "Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right."

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.

In *McLane v. EEOC* the Supreme Court held 7-1 that a federal court of appeals should review a federal district court's decision to enforce or quash an Equal Employment Opportunity Commission (EEOC) subpoena for abuse of discretion, not *de novo* ("from the new"). In concluding that a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena for abuse of discretion, Justice Sotomayor, writing for the Court, looked at two factors which she concluded point toward abuse-of-discretion review. First, the long standing practice of every court of appeals except the Ninth Circuit was to use the abuse-of-discretion standard. Second, district courts are well suited, and better suited that appellate courts, to make "fact-intensive, close calls" necessary to decide whether to enforce a subpoena.