Supreme Court Preview for States 2018

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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.

Most of the Supreme Court's interesting grants for its new term beginning the first Monday of October usually come in the fall. It is rare that the Supreme Court's docket for the next term is this interesting for states—much less anyone else—at the end of June. But it is hard to get more interesting than partisan gerrymandering, the travel ban, religious liberty, and sports gambling. Four of the biggest cases for states accepted so far are discussed below in detail.

In *Gill v. Whitford* the Supreme Court has agreed to decide whether and when it is possible to bring a claim that partisan gerrymandering is unconstitutional.

In 2011, Wisconsin legislators redrew state assembly districts to reflect population changes recorded in the 2010 census. In the 2015 election, Republican candidates received less than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts; and, in 2014, 52 percent of the vote yielded 63 seats for Republicans.

The challengers propose a standard for determining the influence of partisan gerrymandering in the district-drawing process. Drawn from a 2015 article written by a University of Chicago law professor and a lawyer for the challengers, the standard is based on "wasted votes"–votes in each district cast for a non-winning party's candidate.

By dividing the difference between the sums of each party's wasted votes by the total number of votes cast, the proposed standard yields an efficiency gap. The challengers argue that efficiency gaps over 7% violate the Constitution. The efficiency gap in Wisconsin was 13.3 percent in 2012 and 9.6 percent in 2014, according to the proposed standard.

A panel of three federal judges ruled in favor of the challengers, finding that the map enacted by the Wisconsin legislature was a result of partisan gerrymandering and prohibited by the First and Fourteenth Amendments.

The so-called travel ban executive order prevents people from six predominately Muslim countries from entering the United States for 90 days, freezes decisions on refugee applications for 120 days, and caps total refugee admissions at 50,000 for fiscal year 2017.

The Fourth Circuit ruled it likely violates the Establishment Clause, noting that it's "text speaks with vague words of national security but in context drips with religious intolerance, animus and discrimination."

The Supreme Court concluded that until it rules on the merits of this case the executive order cannot be enforced against persons, including refugees, who have a "bona fide relationship with a person or entity in the United States."

In *Trump v. International Refugee Assistance Project* the Supreme Court will decide whether the decision to deny a visa is reviewable in this case, whether the travel ban violates the Establishment Clause, and whether the travel ban became moot on June 14.

The issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission** is whether Colorado's public accommodations law, which prohibits discrimination on the basis of sexual orientation, violates a cake artist's First Amendment free speech and free exercise rights.

The owner of Masterpiece Cakeshop, Jack C. Phillips, declined to design and make a wedding cake for a same-sex couple because of his religious beliefs.

The couple filed a complaint against Masterpiece claiming it violated Colorado's public accommodations law. Masterpiece argued that being required to comply with the law violates Phillips' free speech and free exercise rights.

The Colorado Court of Appeals rejected both of Masterpiece's claims.

Masterpiece argued that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, it is being unconstitutionally compelled to express a celebratory message about same-sex marriage that it does not support.

For speech to be protected by the First Amendment it must convey a particularized message. According to the Colorado Court of Appeals: "Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."

Regarding Masterpiece's free exercise of religion claim, the Colorado Court of Appeals applied rational basis analysis to Colorado's law and "easily conclude[d] that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation."

In *Christie v. National Collegiate Athletic Association** the Supreme Court will decide whether the 1992 Professional and Amateur Sports Protection Act (PASPA) prohibition against state-sanctioned sports gambling is unconstitutional commandeering.

New Jersey first amended its constitution to allow some sports gambling and then passed a law repealing restrictions on sports gambling.

In both instances New Jersey Governor Chris Christie was sued for violating PASPA. In both cases Christie responded that PASPA unconstitutionally commandeers states in violation of the Tenth Amendment.

The Supreme Court has only struck down laws on anti-commandeering grounds twice. In *New York v. United States* (1992), the Supreme Court struck down a "take-title" provision requiring states to take title to radioactive waste by a specific date, at the waste generator's request, if they did not adopt a federal program. And in *Printz v. United States* (1997), the Court struck down a federal law requiring state and local police officers to conduct background checks on prospective gun owners.

The Third Circuit distinguished PASPA from the laws at issue in *New York* and *Printz*, noting that PASPA did "not present states with a coercive choice to adopt a federal program" or "require states to take any action."

Conclusion

The billion dollar question for states is whether the Supreme Court will take a case where it is asked to overturn *Quill Corp. v. North Dakota* (1992). In *Quill*, the Supreme Court held that states cannot require retailers with no in-state physical presence to collect sales tax. In *Direct Marketing Association v. Brohl* (2015), Justice Kennedy stated that the "legal system should find an appropriate case for this Court to reexamine *Quill*." South Dakota passed a law requiring remote vendors to collect sales tax, which is currently being litigated in state court. If the South Dakota Supreme Court strikes down this law by the end of August it is possible the Supreme Court could decide this question by June 2018.