Supreme Court Preview for States and Local Governments 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.

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 travel ban was supposed to last 90 days. On June 14, the White House issued a Presidential Memorandum stating that its effective date is when outstanding injunctions are "are lifted or stayed."

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."

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."

This issue the Supreme Court will decide in *Husted v. A. Philip Randolph Institute**is whether federal law allows states to remove people from the voter rolls if the state sends them a confirmation notice after they haven't voted for two years, they don't respond to the notice, and then they don't vote in the next four years. The National Voter Registration Act (NVRA) says that roll maintenance procedures "shall not result in" people being removed from the polls for failure to vote. The Help America Vote Act modified the NVRA to say that states may remove voters if they don't respond to a confirmation notice and don't vote in the next two federal election cycles. The Sixth Circuit struck down Ohio's scheme reasoning that it "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." According to the lower court the problem with Ohio's scheme is that the "trigger" for someone being removed from the voter rolls is their failure to vote.

In *United States v. Carpenter* the Supreme Court will decide whether police must obtain warrants per the Fourth Amendment to require wireless carriers to provide cell-site data. Cell-site data showed that Timothy Carpenter and Timothy Sanders placed phone calls near the location of a number of robberies around the time the robberies happened. The federal government obtained the cell-site data from Carpenter's and Sanders' wireless carriers using a court order issued under the Stored Communications Act, which requires the government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." The defendants argued obtaining the information was a "search" under the Fourth Amendment requiring a warrant. The Sixth Circuit held that obtaining the cell-site data does not constitute a search under the Fourth Amendment because while "content" is protected by the Fourth Amendment "routing information" is not.

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. Police officers arrested a group of late-night partygoers for trespass. The party-goers gave police conflicting reasons for why they were at the house (birthday party v. bachelor party). Some said "Peaches" invited them to the house; others said they were invited by another guest. Police officers called Peaches who told them she gave the partygoers permission to use the house. But she admitted that she had no permission to use the house herself; she was in the process of renting it. The landlord confirmed by phone that Peaches hadn't signed a lease. The partygoers sued the police officers for violating their Fourth Amendment right to be free from false arrest. D.C. Circuit granted the partygoers summary judgment reasoning police officers lacked probable cause to make the arrest for trespass because: "All of the information that the police had gathered by the time of the arrest made clear that Plaintiffs had every reason to think that they had entered the house with the express consent of someone they believed to be the lawful occupant."

The Supreme Court has agreed to decide whether federal courts of appeals or 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 of actions issuing or denying particular permits, but also of 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 by it.

Federal Rule of Civil Procedure 28 U.S.C 1367(d) states that statutes of limitations for state law claims pending in federal court shall be "tolled" for a period of 30 days after they are dismissed (unless state law provides a longer tolling period). The question in *Artis v. District of Columbia** is what "tolled" means under 28 U.S.C 1367(d). Under the suspension theory the state statute of limitations freeze on the day the federal suit is filed and unfreeze with the addition of 30 days when the federal lawsuit is dismissed. Under the grace-period theory if the state statute of limitations would have expired while the federal case was pending a litigant has 30 days from federal court dismissal to refile in state court. The District of Columbia Court of Appeals applied the grace-period theory in this case citing, among other reasons, federalism. "Turning to the present statute under consideration, § 1367(d) appears to invade a historic state power by altering state statutes of limitation. As such, we find that the 'grace period' approach hazards significantly less impact on 'local statutes of limitation' than the suspension approach."