



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 [*Knick v. Township of Scott*](#)* the Supreme Court has agreed to decide whether to overrule [*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*](#) (1985), holding that before a takings claim may be brought in federal court landowners must comply with state law procedures and remedies enacted to provide just compensation. The Township of Scott adopted an ordinance requiring cemeteries, whether public or private, to be free and open and accessible to the public during the day. Code enforcement could enter any property to determine the “existence and location” of a cemetery. The Constitution’s Takings Clause states that “private property [shall not] be taken for public use, without just compensation.” Rose Mary Knick sued the county in federal (rather than state) court claiming the ordinance was invalid per the Takings Clause after code enforcement went onto her property without a warrant looking for a cemetery. The Third Circuit agreed with the Township that Knick failed to comply with the *Williamson County* because she filed her case in federal court instead of pursuing her takings claim under Pennsylvania’s Eminent Domain Code.

The Fifth Amendment’s Double Jeopardy Clause prohibits a person from being prosecuted more than once for the same conduct. The “separate sovereigns” exception allows states and the federal government to convict and sentence a person for the same conduct. In [*Gamble v. United States*](#),* Terance Gamble asks the Supreme Court to overrule this exception. Gamble was prosecuted for and convicted of possession of a firearm by a convicted felon under both Alabama and United States law. His challenge to the “separate sovereigns” exception is unsurprising given that Justice Thomas joined Justice Ginsburg’s concurring opinion in *Puerto Rico v. Sanchez-Valle* (2016), which suggested the Court do a “fresh examination” of the “separate sovereigns” exception. According to Gamble, the separate-sovereigns exception “has its origins” in an 1847

Supreme Court case, and it “fully crystallized” in a pair of 1959 cases. Gamble argues it should be overruled because it “flunks every test of constitutional interpretation.” The United States argues that “if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States’ historical police powers.”

In [*Franchise Tax Board of California v. Hyatt*](#) the Supreme Court will decide whether to overrule [*Nevada v. Hall*](#) (1979), which permits a state to be sued in the courts of another state without its consent. Gilbert Hyatt was audited by the Franchise Tax Board of California (FTB) in 1993. He sued FTB in Nevada state court for a number of intentional tort and bad faith conduct claims. FTB argued that the Nevada courts were required to give FTB the full immunity to which it would be entitled under California law. In 2003, the U.S. Supreme Court held in *Hyatt I* that Nevada courts did not have to give FTB full immunity. The Nevada courts eventually awarded Hyatt over \$400 million in damages, which led to a second U.S. Supreme Court case. In *Hyatt II* the Court limited the amount of damages that Nevada courts could award to the amount that they could award against their own agencies. Following *Hyatt II* the Nevada Supreme Court capped damages for FTB at \$50,000. [FTB](#) argues that *Hall* was decided incorrectly. “*Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other’s courts.”

The issue in [*Nieves v. Bartlett*](#)* is whether probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. Russell Bartlett was attending Arctic Man, an Alaskan snowmobile race, when he declined to talk to police officer Luis Nieves who was patrolling the large outdoor party. Officer Nieves later observed Bartlett yelling at a separate officer, Bryce Weight, and Weight pushing Bartlett away. Believing Bartlett posed a danger to Officer Weight, Officer Nieves arrested Bartlett. Bartlett alleges that Nieves said “bet you wish you had talked to me now” in the process of the arrest. Bartlett sued Officer Nieves claiming Nieves arrested him in retaliation for his refusal to initially speak to Nieves in violation of the First Amendment. The district concluded there was probable cause to arrest Bartlett. In the Ninth Circuit a plaintiff will win a First Amendment retaliatory arrest claim if he or she can “demonstrate that the officers’ conduct would chill a person of ordinary firmness from future First Amendment activity” and the evidence “ultimately [proves] that the officers’ desire to chill his [or her] speech was a but-for cause” of the arrest. All federal circuit courts to decide this issue except the Ninth Circuit have held that to bring a First Amendment retaliatory arrest case plaintiffs must be able to prove the absence of probable cause to arrest them, which Bartlett could do not in this case.

This issue in [*Guido v. Mount Lemmon Fire District*](#)* is whether the federal Age Discrimination in Employment Act (ADEA) applies to state and local government employers with less than 20 employees. John Guido was 46 and Dennis Rankin was 54 when they were terminated by the Mount Lemmon Fire District due to budget cuts. They claim they were terminated because of their age in violation of the ADEA. They were the oldest of the district’s 11 employees. The fire district argues that the ADEA does not apply to it because it employs fewer than 20 people. The term “employer” is defined in the ADEA as a “person engaged in an industry affecting commerce who has 20 or more employees.” The definition goes on to say “[t]he term also means

(1) any agent of such a person, and (2) a State or political subdivision of a State.” Guido argued, and the Ninth Circuit agreed, that “employer” means “[A—person] and also means (1) [B—agent of person] and (2) [C—State-affiliated entities].” The clause describing state-affiliated entities contains no size requirement according to the Ninth Circuit. Notably the Sixth, Seventh, Eighth, and Tenth Circuits have come to the opposite conclusion—that the 20-employee minimum applies to state and local governments.

The issue in *Timbs v. Indiana** is whether the Eighth Amendment Excessive Fines Clause applies to the states. Indiana sought to forfeit Tyson Timbs’ Land Rover which he used to buy and transport heroin. The trial court accepted Timbs’ challenge that the fine would be excessive per the Eighth Amendment which states that “excessive bail shall not be required, nor *excessive fines imposed*.” The court observed that the value of the vehicle well exceeded the maximum statutory fine (\$10,000) for the felony Timbs plead guilty to. The Indiana Supreme Court decided not to apply the Excessive Fines Clause to Indiana because the U.S. Supreme Court has not yet decided whether it applies to the states.

In *Weyerhaeuser Company v. U.S. Fish and Wildlife Service** the Supreme Court will decide whether the “critical habitat” designation under the Endangered Species Act (ESA) may include land currently uninhabitable for the species in question. The Court will also decide whether a court may review the Service’s economic impact analysis. Per the ESA, the U.S. Fish and Wildlife Service (Service) designated land in Louisiana owned by the Weyerhaeuser Company a “critical habitat” for the dusky gopher frog. To designate unoccupied areas a “critical habitat,” the Service must determine that they are “essential for the conservation of the species.” The company claims that the land in question is currently “uninhabitable” by the frog “barring a radical change in the land’s use by its private owners.” The Fifth Circuit ruled in favor of the Service concluding the definition of “critical habitat” includes no habitability requirement and no requirement the frog can live on the land in the foreseeable future. The ESA mandates that the Service consider the economic impact of designating a “critical habitat.” Here the Service concluded the economic impacts on the land “are not disproportionate.” The Weyerhaeuser Company claims the potential loss of development value in the land is up to \$33.9 million over twenty years. It also claims because the land isn’t currently habitable by the dusky gopher frog it provides no benefit. The Fifth Circuit agreed with the Service that once it has fulfilled its statutory obligation to consider economic impacts, a decision to not exclude an area is discretionary and not reviewable in court.

In *Dawson v. Steager* the Supreme Court will decide whether states may give some retired state and local government employees a bigger tax break on retirement benefits than retired federal employees. West Virginia allows retired federal employees and most state and local government employees to exempt up to \$2,000 of retirement benefits from their taxable income. Certain state and local police officers, sheriffs, and firefighters can exempt all of their benefits. This group comprises about two percent of all state government retirees. James Dawson, a former U.S. Marshal, sued West Virginia alleging that preferential treatment for state and local law enforcement officials violates 4 U.S.C. § 111. This federal statute allows states to tax federal retirement benefits only “if the taxation does not discriminate . . . because of the source of the

pay or compensation.” In [Davis v. Michigan Department of Treasury](#) (1989), the Supreme Court held that Michigan’s tax scheme where all state retirement benefits were exempt from state taxation while all federal retirement benefits were taxed violated 4 U.S.C. § 111. The West Virginia Supreme Court held that West Virginia’s law doesn’t discriminate against federal retirees. The court distinguished this case from *Davis* on the grounds that the West Virginia tax exemption was not a blanket exemption for all state employees, but was “intended to give a benefit to a very narrow class of former state and local employees.” The court also reasoned that federal retirees receive a tax benefit identical to the majority of state retirees and a better benefit than non-state retirees, so there was no intent to discriminate against federal employees.

Indian law

Patrick Murphy killed George Jacobs. Oklahoma prosecuted Murphy. Per the Major Crimes Act states lacks jurisdiction to prosecute Native Americans who commit murder in “Indian country.” Murphy is Native American. In [Royal v. Murphy](#) Murphy and Oklahoma disagree over whether the murder took place on a Creek Nation reservation. By the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma. In 1901, the Creek Nation agreed to the allotment of tribal lands. Per the Major Crimes Act “Indian country” includes “all lands within the limits of any Indian reservation.” Congress may disestablish or diminish Indian reservations. Allotment on its own does not disestablish or diminish a reservation. In [Solem v. Barlett](#) (1984) the Supreme Court established a three-part test to determine when Congress has diminished a reservation. First, courts “must examine the text of the statute purportedly disestablishing or diminishing the reservation.” Murphy argues that Congress never diminished the 1866 territorial boundaries of the Creek Nation where the murder took place. The Fifth Circuit agreed. It reviewed eight statutes allotting Creek land and creating the State of Oklahoma. The court concluded that the statutory text “fails to reveal disestablishment.” “Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders.”

The issue in [Washington State Department of Licensing v. Cougar Den Inc.](#) is whether the “right to travel” provision of the Yakama Nation Treaty preempts Washington’s tax and permit requirements for importing fuel. Article III of the Yakama Nation Treaty of 1858 states that “the right of way, with free access from the same to the nearest public highway, is secured to [the Yakama]; as also the right, in common with citizens of the United States, to travel upon all public highways.” Washington State law imposes a tax on fuels used for the propulsion of motor vehicles on the highways of the state. The Washington State Department of Licensing sued Cougar Den for importing fuel without an importer’s license and without paying taxes. Cougar Den is owned by a member of the Yakama Nation and is located on the Yakama Indian Reservation in Washington State. Cougar Den argues it is able to transport fuel from Oregon to the reservation without complying with Washington State laws per the “right to travel” provision of the Yakama Nation Treaty. The Washington Supreme Court held that the Yakama’s right to travel for trade purposes is protected by the Yakama Nation Treaty, and thus Cougar Den is not subject to the fuel tax and permit requirements. The state court relied on the historical context surrounding the “right to travel” provision that has been developed at length in Ninth Circuit

cases to conclude that it applied to the “right to transport goods to market without restriction.” The court also held that the fuel importation laws were not purely regulatory, since the purpose of the licensing requirement is to collect taxes. A dissenting judge concluded that the treaty does not preclude taxation in this case because the state laws burden trade, “the *wholesale possession* of fuel within Washington,” not fuel transport.

Clayvin Herrera, a member of the Crow tribe, shot an elk in Big Horn National Forest in Wyoming. He was charged with hunting without a license during a closed season. Herrera claims that an 1868 treaty giving the Crow the right to hunt on the “unoccupied lands of the United States” allowed him to hunt on this land. In [Herrera v. Wyoming](#) the Supreme Court will decide whether Wyoming's admission to the Union or the establishment of the Big Horn National Forest abrogated the Crow’s treaty right to hunt in Big Horn National Forest. To decide this case the lower court applied a 1995 Tenth Circuit decision [Crow Tribe of Indians v. Repsis](#), which raised the same question. In *Repsis*, the Tenth Circuit held that the “Tribe’s right to hunt . . . was repealed by the act admitting Wyoming into the Union” and that “the creation of the Big Horn National Forest resulted in the ‘occupation’ of the land.” The Tenth Circuit in *Repsis* relied on an 1896 Supreme Court case [Ward v. Race Horse](#), involving off-reservation hunting rights and decided against a tribe. Four years after *Repsis*, the Supreme Court decided another off-reservation hunting rights case, [Minnesota v. Mille Lacs Band of Chippewa Indians](#) in favor of a tribe. According to [Herrera](#), *Mille Lacs* indicates *Repsis* was decided incorrectly. Herrera also argues that the establishment of the Big Horn National Forest did not abrogate the Crow’s treaty rights. [Wyoming](#) argues that Herrera’s interpretation of *Mille Lacs* is too broad.

Preemption

In [Wyeth v. Levine](#) (2009), the Supreme Court held that state failure-to-warn claims are preempted when there is “clear evidence” the Food and Drug Administration (FDA) would not have approved the warning a plaintiff claims was necessary. In [Merck Sharp & Dohme Corp. v. Albrecht](#), Merck claims there was such “undisputed” evidence in this case but the Third Circuit improperly allowed the case go to a jury for “conjecture as to why the FDA rejected the proposed warning.” Plaintiffs sued Merck alleging that the osteoporosis drug Fosamax caused them to suffer serious thigh bone fractures. They brought state law failure-to-warn claims on the grounds that Merck had not provided adequate warnings on its label. Merck had long made the FDA aware that Fosamax might increase the risk of atypical femoral fractures. In 2008 Merck proposed changes to the drug label regarding fractures. The FDA rejected them because “the conflicting nature of the literature does not provide a clear path forward.” The FDA also objected to the use of the imprecise term “stress fracture” in the proposed language. In 2010 an FDA task force published a report saying there was “evidence of a relationship between” Fosamax and femoral shaft fractures. The FDA then changed the label but didn’t use the word “stress fractures.” Merck argues that it is “undisputed” that until 2010 the FDA would not agree to a warning about fractures. But the Third Circuit allowed a jury to decide whether the FDA would have approved the label plaintiffs wanted. According to the lower court a jury could conclude that the FDA’s rejection of Merck’s proposed changes to the warning label “were based on Merck’s misleading use of the term ‘stress fractures’ rather than any fundamental disagreement

with the underlying science.” In response, Merck argues lay juries should not be in the business of “inferring” whether the FDA objected only to Merck’s “wording.” “If a drug manufacturer candidly brings a risk to the FDA’s attention and proposes an on-point warning, the FDA’s rejection should suffice as a matter of law to preempt claims alleging failure to warn of that risk.”

Virginia has the largest known uranium deposit in the United States. Since its discovery in the 1980s the Virginia legislature has banned uranium mining. In [Virginia Uranium v. Warren](#)* the Supreme Court will decide whether the Atomic Energy Act (AEA) preempts the ban. The AEA allows states to “regulate activities for purposes other than protection against radiation hazards.” Virginia and Virginia Uranium agree uranium mining isn’t an “activity” per the AEA so states may regulate it for safety reasons. Uranium-ore milling and tailings storage are “activities” under the AEA so states can’t regulate them for safety reasons. Milling is the process of refining ore and tailings storage refers to the remaining (radioactive) material which must be stored. Virginia argued and the Fourth Circuit agreed that its ban on uranium mining isn’t preempted because it doesn’t mention uranium milling or tailings storage. Virginia Uranium points out “no one would want to undertake the pointless expense of constructing a mill and tailings-management complex in Virginia and transporting out-of-state uranium [ore] into the Commonwealth.” But the Fourth Circuit refused to “look past the statute’s plain meaning to decipher whether the legislature was motivated to pass the ban by a desire to regulate uranium milling or tailings storage” when Virginia may ban uranium mining. Virginia Uranium argued the AEA preempts the mining ban because its purpose and effect is to regulate milling and tailings storage for safety reasons. A dissenting judge agreed with Virginia Uranium that the purpose of Virginia’s ban causes it to be preempted.

Capital Punishment

In [Madison v. Alabama](#) the Supreme Court will decide whether a state may execute someone whose mental disability leaves him or her with no memory of committing the capital offense. Vernon Madison was sentenced to death for shooting an off-duty police officer in 1985. He now suffers from vascular dementia and “corresponding long-term severe memory loss, disorientation and impaired cognitive functioning.” As a result, among many other things, Madison can’t “independently recall the facts of the offense; the sequence of events from the offense, to his arrest, to his trial or previous legal proceedings in his case; or the name of the victim.” In a two-paragraph opinion, an Alabama state trial court rejected Madison’s motion to suspend his execution due to incompetency. According to the court, Madison failed to provide a “substantial threshold showing of insanity.” The Eighth Amendment protects against “cruel and unusual” punishment. In 1986 in [Ford v. Wainwright](#) the Supreme Court held that someone who is “incompetent” can’t be executed. In 2007 in [Panetti v. Quarterman](#), the Court stated, “today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.” According to Madison, the Supreme Court has thus far declined to limit the underlying disorders which could render a person incompetent to be executed. “[T]he court below disregarded the medical and scientific evidence that Mr. Madison suffers from dementia and corresponding

memory deficits because, at the State's continued insistence, the court determined that vascular dementia constitutes a different medical condition than what this Court has recognized as triggering the Eighth Amendment protections of *Ford* and *Panetti*." According to Alabama, "the Eighth Amendment forbids the execution of a murderer who has lost his sanity, not his memory."

Russell Bucklew was sentenced to death for murder, kidnapping, and rape. He suffers from cavernous hemangioma, which causes clumps of weak, malformed blood vessels and tumors to grow in his face, head, neck, and throat. Missouri intended to execute him by lethal injection. But he claims that killing him by gas, still on the books in Missouri but not used since 1965, would substantially reduce his risk of pain and suffering given his cavernous hemangioma. The Eighth Circuit rejected his request in *Bucklew v. Precythe*. Supreme Court precedent requires capital defendants challenging their method of execution as a violation of the Eighth Amendment's prohibition of cruel and unusual punishment to "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Bucklew's expert, Dr. Zivot, testified it could take him between 52 and 240 seconds to become unconscious during lethal injection. Dr. Zivot also testified there was a "very, very high likelihood" that Bucklew will suffer "choking complications, including visible hemorrhaging," if he is executed via lethal injection because of his cavernous hemangioma. The state's expert Dr. Antognini testified Bucklew should be unconscious in 20-30 seconds during lethal injection. Bucklew's expert, Dr. Zivot, didn't testify whether execution by gas would render him insensate quicker than death by lethal injection. But the state's expert, Dr. Antognini, testified gas would work as quickly as lethal injection. Bucklew argued the lower court "should have compared Dr. Zivot's opinion that lethal injection would take up to four minutes to cause Bucklew's brain death with Dr. Antognini's testimony that lethal gas would render him unconscious in the same amount of time as lethal injection, 20 to 30 seconds." The majority of the Eighth Circuit refused to do so concluding that Dr. Zivot needed to have provided testimony on the speed of lethal injection versus gas for Bucklew to make his case gas would substantially reduce his risk of pain and suffering.