Supreme Court Midterm Review for States 2018

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By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

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 docket is now set. The SLLC Supreme Court Preview for States discussed a number of "big" cases the Supreme Court agreed to decide this term as of last summer on topics including partisan gerrymandering, the travel ban, religious liberty, and sports gambling. Since then the Supreme Court has agreed to decide an additional partisan gerrymandering case, a challenge to the newest version of the travel ban, and a very significant public sector collective bargaining case. But *South Dakota v. Wayfair* tops all of these cases. If South Dakota wins states finally will be able to require out-of-state retailers to collect sales tax.

In *Quill Corp. v. North Dakota* (1992) the Supreme Court held that states cannot require retailers with no in-state physical presence to collect sales tax. The Supreme Court will decide whether to overturn *Quill* in *South Dakota v. Wayfair*.*

In March 2015 in *Direct Marketing Association v. Brohl* Justice Kennedy wrote a concurring opinion stating that the "legal system should find an appropriate case for this Court to reexamine *Quill*."

In response South Dakota passed a law requiring remote vendors to collect sales tax. South Dakota's highest state court ruled that the South Dakota law is unconstitutional because it clearly violates *Quill* and it is up to the Supreme Court to overrule it.

In *Benisek v. Lamone* in 2011 the Maryland legislature needed to move about 10,000 voters out of the Sixth Congressional District to comply with "one-person one-vote." Following redistricting only 34 percent of voters were registered Republican versus 47 percent before redistricting.

A number of Sixth District Republicans sued alleging the state legislature "targeted them for vote dilution because of their past support for Republican candidates for public office, violating the First Amendment retaliation doctrine."

In 2016 two judges on a three-judge panel articulated a standard for when partisan gerrymandering violates the First Amendment. Challengers to the plan must show (1) the legislature redrew the district lines with the specific intent to burden voters of a particular party; (2) the targeted voters suffered a "tangible, concrete burden" on their representation rights; and (3) the legislature's intent was the "but-for" causation of the concrete effect.

In a 2017 ruling applying the above standard two judges on the three-judge panel weren't convinced that the challengers were able to demonstrate that but-for the partisan gerrymander Republicans would have won and continued winning in the Sixth District.

Before deciding whether the three-judge panel in this case correctly applied the test it laid out for partisan gerrymandering that violates the First Amendment, the Supreme Court must decide whether partisan gerrymandering claims can even be brought under the First Amendment and if so what is the proper standard to evaluate them.

In *Abood v. Detroit Board of Education* (1977) the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment.

The rationale for an agency fee is that the union may not discriminate between members and nonmembers in performing these functions. So no free-riders are allowed.

In *Janus v. American Federation of State, County and Municipal Employees* the Court will decide whether to overrule *Abood*.

In *Harris v. Quinn* (2014) the Supreme Court refused to extend *Abood* to Medicaid home health care providers because they aren't "full-fledged" public employees. Justice Alito's majority opinion, joined by Chief Justice Roberts and Justices Scalia (now deceased), Kennedy, and Thomas, was very critical of *Abood* discussing at length its "questionable analysis." Justice Kagan's dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, included a lengthy and vigorous defense of *Abood*.

In *Trump v. Hawaii** the Ninth Circuit temporarily struck down President Trump's third travel ban.

The Supreme Court has agreed to decide four issues. First, whether the case is justiciable, meaning whether the legal issues are "fit for review." Second, whether the third travel ban exceeds the President's authority under the Immigration and Nationality Act (INA). Third,

whether the nationwide injunction was overbroad. Fourth, whether the travel ban violates the Establishment Clause.

The third travel ban indefinitely bans immigration from six countries: Chad, Iran, Libya, North Korea, Syria, and Yemen.

The Ninth Circuit concluded it likely violates the INA because it prohibits entry indefinitely, fails to make findings that "foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States," and amounts to national origin discrimination.

The Ninth Circuit issued a nationwide injunction applying to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." The court's reasoning why it issued a nationwide injunction, rather than just an injunction applicable to the parties, was brief: "Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights."

Conclusion

Typically most Supreme Court terms have 2-3 "big" cases all of which impact the states. Some terms have none. It is pretty rare for a term to have seven! Between the SLLC Supreme Court Preview for States and this Midterm Review, readers will be ready for late June when most of the "big" Supreme Court cases are decided.