



## Supreme Court Midterm Review for 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.

The Supreme Court's docket is now set. The [SLLC Supreme Court Preview for Local Governments](#) discussed a number of "big" cases the Supreme Court agreed to decide this term as of last summer on topics including the travel ban, religious liberty, and technology and parties and the Fourth Amendment. Since then the Supreme Court has agreed to decide a challenge to the newest version of the travel ban, a very significant public sector collective bargaining case, and a number of First Amendment cases—one of which is discussed in this article. But [South Dakota v. Wayfair](#) tops all of these cases. If South Dakota wins states and local governments 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 [\*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.”

In [\*Lozman v. City of Riviera Beach\*](#)\* the Supreme Court will decide whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim.

At a city council meeting Fane Lozman offered comments about former county commissioners who had served in other communities being arrested. A councilperson had Lozman arrested for refusing to stop talking.

He sued the City claiming they arrested him in violation of his First Amendment free speech rights for opposing the City's redevelopment plan. The City argued Lozman was arrested for violating the City's rule that comments during the public comment period must relate to City business.

A jury ruled against Lozman. The Eleventh Circuit held that the jury's finding of probable cause to arrest Lozman for disturbing a lawful assembly wasn't against the great weight of evidence. The Eleventh Circuit then concluded because the arrest was supported by probable cause Lozman's First Amendment retaliatory arrest claim failed as a matter of law.

#### Conclusion

This Supreme Court term is particularly exciting for local governments. Usually most of the Court's biggest cases don't directly impact local governments. Between the sales tax case and the collective bargaining case that is simply not so this term. As the First Amendment retaliatory arrest case illustrates many the Court's more run-of-the-mine case are interesting as well.