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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.

Big Cases

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 *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 2012 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% 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 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. 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.

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. A dissenting judge described the majority's opinion as resting on a "bizarre notion of causation that requires the exclusion of all possible alternative explanations, however remote and speculative." 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 didn't reach the question of whether the third travel ban likely violates the Establishment Clause because it discriminates against people based on religion. 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."

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 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."

Voting

This issue the Supreme Court will decide in *Husted v. A. Philip Randolph Institute**is whether federal law allows states, in this case Ohio, 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.

What if a district court adopts a redistricting plan and the state legislature codifies that plan. May the same district court later rule the redistricting plan is unlawful and/or unconstitutional? That is what the Supreme Court will decide in *Abbott v. Perez*. A number of persons and advocacy groups challenged the Texas Legislature's 2011 state legislative and congressional redistricting plan claiming it discriminated against black and Hispanic voters in violation of the Constitution's Equal Protection Clause and the Voting Rights Act. A three-judge district court issued a remedial redistricting plan which the U.S. Supreme Court vacated in 2012. The district court then drew another remedial redistricting plan called plan C235. In plan C235 the court reconfigured nine challenged districts from the legislature's 2011 plan but retained two districts, CD27 and CD35, without reconfiguration. In 2013 the state legislature ultimately adopted plan C235. Challengers claim plan C235 still has the "taint of discriminatory intent" of the 2011 legislative plan. The district court agreed despite the fact that it is the author of plan C235. According to the district court the most important consideration in determining whether the discriminatory taint remains is "whether the 2011 plans continue to have discriminatory or illegal effect, and whether the reenactment furthers that existing discrimination." In this case the Texas legislature failed to "engage in a deliberative process" to make sure plan C235 "cured any taint" from the 2011 plan. Governor Abbott also asked the Supreme Court to decide whether the district court's order was appealable. He also challenges the district court's determination that CD35 was an impermissible racial gerrymander and CD27 resulted in intentional dilution of Hispanic votes.

First Amendment

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.

In *Minnesota Voters Alliance v. Mansky** the Supreme Court will decide whether banning political apparel at polling places violates the First Amendment. At least eight states (Delaware, Kansas, Montana, New York, South Carolina, Tennessee, Texas, and Vermont) other than Minnesota have enacted similar bans. Andrew Cilek was temporarily prevented from voting for wearing two items of political apparel: a t-shirt that stated "Don't Tread on Me," with a picture of the Gadsden Flag and a small Tea Party logo; and an Election Integrity Watch (EIW) button that stated "Please I.D. Me" with EIW's website and phone number. The Eighth Circuit held that Minnesota's law is constitutional citing *Burson v. Freeman* (1992). In that case the Supreme Court upheld a Tennessee statute that banned the "solicitation of votes" and "campaign materials" within 100 feet of the polling place. The Minnesota Voters Alliance argues that Minnesota's statute is unconstitutionally overbroad because it stretches the reasoning of *Burson* too far. "*Burson* plainly does not endorse a categorical ban on all types of 'political' speech."

California law requires that licensed pregnancy-related clinics disseminate a notice stating that publically-funded family planning services, including contraception and abortion are available. It also requires unlicensed pregnancy-related clinics to disseminate a notice they are unlicensed. In *NIFLA v. Becerra** the National Institute of Family and Life Advocates claims that both requirements violate the First Amendment Free Speech Clause. The Ninth Circuit disagreed. In *Reed v. Town of Gilbert, Arizona* (2015), the Supreme Court held that strict (usually fatal) scrutiny applies to content-based regulations on speech. The Ninth Circuit concluded that both notice requirements are content-based but *Reed* doesn't require courts to apply strict scrutiny in all cases or in this case in particular. The Supreme Court has not held what level of scrutiny applies to abortion-disclosure cases. The licensed notice is professional speech and the Ninth Circuit applies intermediate scrutiny to such speech. The court concluded the license notice survives intermediate scrutiny because California "has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion" and the notice "does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use

those state-funded services." The Ninth Circuit also held that the unlicensed notice survives any level of scrutiny including strict scrutiny.

Fourth Amendment

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" because while "content" is protected by the Fourth Amendment "routing information" is not.

Per the Fourth Amendment police officers generally need a warrant to search a car. However, per the automobile exception officers may search a car that is "readily mobile" without a warrant if officers have probable cause to believe they will find contraband or a crime has been committed. *Collins v. Virginia* raises the question of whether the automobile exception applies to a car that is parked on private property. The Virginia Supreme Court held it does. Regarding the car not being immediately mobile the court stated "[t]he mere fact that the stolen motorcycle was 'clearly operational and therefore readily movable' governs our decision." Regarding the car being parked on private property the Virginia Supreme Court noted that the United States Supreme Court "has never limited the automobile exception such that it would not apply to vehicles parked on private property."

In *Byrd v. United States* police officers lacked both a warrant and probable cause to search the car Byrd was driving as part of a traffic stop. Byrd challenged the constitutionality of the search but his name wasn't on the rental agreement. To bring a Fourth Amendment claim a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." The question in *Byrd* is whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement. The Third Circuit in *Byrd* noted that in 2011 it held that no expectation of privacy exists for those not on a rental agreement. Byrd's *certiorari* petition points out that lower courts are divided on the question in this case.

In *District of Columbia v. Wesby** a majority of the Supreme Court ruled D.C. police officers had probable cause to arrest individuals for holding a "raucous, late-night party in a house they did not have permission to enter." All nine of the Justices ruled in favor of granting qualified immunity to the police officers. Police were called to a home in D.C. around 1AM based on

complaints of loud music and illegal activity. The house was dirty with no furniture downstairs except a few metal chairs. In the living room the officers found "a makeshift strip club"; they found "more debauchery upstairs." While many partygoers said they were there for a bachelor party no one could identify the bachelor. Two of the women working the party said that "Peaches" was renting the house and had given them permission to be there. Police officers called Peaches who told them she gave the partygoers permission to use the house. But she ultimately 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 were charged with disorderly conduct. They sued D.C. for false arrest under the Fourth Amendment. The D.C. Circuit concluded there was no probable cause to arrest them. Peaches invited them—so the officers had no reason to believe the partygoers "knew or should have known" their "entry was unwanted." The Supreme Court looked at the totality of the circumstances and concluded police officers made an "entirely reasonable inference" that the partygoers "were knowingly taking advantage of a vacant house as a venue for their late-night party." The totality of the circumstances included: the condition of the house (filthy and empty); the partygoers' conduct (makeshift strip club); their reaction to police presence (scattering, hiding in closets); their answers to questions (vague and implausible); and Peaches' invitation (from a confirmed liar).

Tribal

In the mid-1800s Indian tribes in the Pacific Northwest entered into treaties guaranteeing them a right to off-reservation fishing. In *Washington v. United States* the Supreme Court will decide whether the "fishing clause" guarantees "that the number of fish would always be sufficient to provide a 'moderate living' to the tribes." The "fishing clause" of the Stevens Treaties guaranteed "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." In 2001 the United States and a number of tribes sued Washington State claiming that it violated the treaty by building culverts that prevented salmon for reproducing leading to the salmon supply significantly plummeting. Washington State argued it has no "treaty-based duty to avoid blocking salmon-bearing streams." The Ninth Circuit disagreed construing the treaty in favor of the Indian Tribes stating: "The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs." Washington also argues the Court should accept its equitable defense argument that the federal government "for decades told the state to design culverts a particular way." Finally, Washington argues the injunction violates federalism and comity principles by requiring the state to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon.

The issue in *Upper Skagit Indian Tribe v. Lundgren* is whether a court's exercise of in rem jurisdiction overcomes the jurisdictional bar of tribal sovereign immunity. In 2013 the Upper Skagit Indian Tribe bought land adjacent to the Lundgrens. The Lundgrens sued the tribe to

establish ownership of part of the land which the Lundgrens had taken care of for decades but the tribe claimed to own. The tribe argued that because it has sovereign immunity the court had no jurisdiction to hear this case. The Lundgrens argued that because this is an "in rem" or "against or about a thing" (here land) case the tribe's sovereign immunity does not matter because the court has jurisdiction over the land itself. The court agreed with the Lundgrens citing *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation* (1992) where the "Supreme Court held that the Indian General Allotment Act allowed Yakima County to impose ad valorum taxes on reservation land. The Court reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners."

Miscellaneous

In *National Association of Manufacturers v. Department of Defense* the Supreme Court held unanimously that a legal challenge to the definition of "waters of the United States" (WOTUS) must begin in a federal district court not a federal court of appeals. In 2015 the Obama administration issued a new WOTUS definitional rule per the Clean Water Act (CWA). While most challenges to EPA actions must be filed in federal district court first, the CWA lists seven categories of EPA actions where "review lies directly and exclusively" in the federal courts of appeals. One of the categories providing courts of appeals exclusive jurisdiction is an EPA action "in approving or promulgating any effluent limitation or other limitation" under various sections of the CWA. The Court rejected the argument the WOTUS rule is an "effluent limitation or other limitation" because both terms refer to EPA restrictions on the discharge of pollutants. The second category providing courts of appeals exclusive jurisdiction is an EPA action "in issuing or denying any permit" under a particular section of the CWA. According to the court, the WOTUS rule "neither issues nor denies a permit" under the EPA permitting program at issue.

The Fifth Amendment says no person shall be "compelled in any *criminal case* to be a witness against himself." The question the Supreme Court will decide in *Hays, Kansas v. Vogt** is whether the Fifth Amendment is violated when a public employee's compelled, self-incriminating statements are used against him or her at a *probable cause* hearing rather than at a *trial.* Matthew Vogt told his police chief he kept a knife he obtained in the course of his work as a Hays police officer. The Hays police chief then told Vogt to write a detailed statement about what happened. Hays was charged with two felonies related to possessing the knife but they were dismissed at a probable cause hearing. The Tenth Circuit concluded the right against self-incrimination is more than a trial right by looking at the text of the Fifth Amendment, which doesn't use the term "trial" or "criminal prosecution." Also, according to the Tenth Circuit, the "Founders' understanding of the term 'case' suggested the Fifth Amendment encompasses more than the trial itself."

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 Supreme Court held 5-4 in *Artis v. District of Columbia** that "tolled" under 28 U.S.C 1367(d) means suspended or that the clock is stopped. Under the stop-the-clock approach the state statutes 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 statutes 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 Supreme Court adopted the stop-the-clock reading. Among other reasons, it note that Black's Law Dictionary defines "toll" as "to suspend or stop temporarily," legislatures know how to write statutes adopting a grace-period, and D.C. "has not identified any federal statute in which a grace-period meaning has been ascribed to the word 'tolled' or any word similarly rooted."

State-action immunity provides states and, in some instances, local governments immunity from federal antitrust liability. In *Salt River Project Agricultural Improvement and Power District v. SolarCity** the Supreme Court will decide whether a lower court's refusal to rule state-action immunity applies to a particular entity may be appealed immediately or only after the case is fully litigated. SolarCity sued the Power District claiming it violated federal antitrust law. The Power District argued it is immune from federal antitrust liability per the state-action doctrine. The federal district court denied the Power District's motion to dismiss and the Power District immediately appealed. The Ninth Circuit held that the collateral-order doctrine does not apply to orders denying public entities state-action immunity. The Supreme Court has only allowed interlocutory appeals for denial of immunities from *lawsuits* (as opposed to immunities from *liability*), including 11th Amendment immunity, absolute immunity, and qualified immunity. This is because "[u]nlike immunity from suit, immunity from liability can be protected by a postjudgment appeal." The Supreme Court has described state-action immunity as an immunity from liability.

The Prison Litigation Reform Act (PLRA) states that when an inmate recovers money damages in a confinement conditions case "a portion of the judgment (not to exceed 25 percent)" shall be applied to his or her attorney's fees award. The question the Supreme Court will decide in *Murphy v. Smith* is whether "not to exceed 25 percent" means up to 25 percent or exactly 25 percent. A jury awarded inmate Charles Murphy about $300,000 in damages relating to an officer crushing his eye socket and leaving him unconscious in a cell without checking his condition. The trial judge awarded Murphy's attorney about $100,000 in fees and allocated 10 percent of Murphy's damages award to attorney's fees (about $30,000). The Seventh Circuit reversed the trial judge and held that 25 percent of the judgment in favor of Murphy (or about $75,000) must be allocated to attorney's fees. The Seventh Circuit reached this conclusion relying on a 2003 Seventh Circuit case raising the same issue reasoning: "We do not think the

statute contemplated a discretionary decision by the district court. The statute neither uses discretionary language nor provides any guidance for such discretion."

The issue in *Sveen v. Melin* is whether the application of a revocation-upon-divorce statute to a contract signed *before* the statute's enactment violates the Contracts Clause. The Contracts Clause of the U.S. Constitution prohibits state law "from impairing the Obligation of Contracts." In this case the husband bought life insurance and designated his wife as the beneficiary. A few years later Minnesota applied its revocation-upon-divorce statute to life insurance beneficiaries meaning that upon divorce the designation of a spouse as a life insurance beneficiary is revoked. A few years later the couple divorced but the husband never changed his life insurance beneficiary. A few years after that the husband died. The life insurance company asked the court to determine whether the revocation-upon-divorce statute revoked the ex-wife's beneficiary designation. The Eighth Circuit held that it did not. Application of a revocation-upon-divorce statute to a contract signed *before* the statute's enactment violates the Contracts Clause, the Eighth Circuit reasoned, because the unconstitutionality of the statute turns on the policyholder's rights and expectations, which at the time he signed the contract were his wife would be the beneficiary even if they divorced and he failed to remove her as the beneficiary.

American Express charges merchants who accept its credit card higher fees than its competitors. American Express's standard contract non-discriminatory provision (NDP) requires merchants to not say or imply that they prefer any payment method over American Express. In *Ohio v. American Express* Ohio sued American Express claiming that the NDP is an unreasonable restraint of trade in violation of antitrust law. The Second Circuit ruled in favor of American Express concluding that Ohio failed to prove the NDP caused a net harm to both merchants *and cardholders*. Both parties and the court agreed the case should be analyzed under the "rule of reason" where Ohio had to show the NDPs reduce competition *in the relevant market* and American Express then had to show procompetitive effects of NDPs. Credit cards are a two-sided market serving both merchants and cardholders. The Second Circuit concluded that both groups are included in the market analysis. But Ohio had only proven that the NDPs had an anticompetitive effect on the *merchant* market. Ohio argues that the relevant market in this case should only be merchants and not cardholders. The Supreme Court has used the "reasonably interchangeable" test to determine the applicable market for antitrust purposes. Ohio claims credit-card services to cardholders cannot meet this test because they are not "reasonably interchangeable" with credit-card services to merchants.

The question in *United States v. Sanchez-Gomez* is whether the Ninth Circuit erred in extending the *Gerstein v. Pugh* (1975) mootness exception to a non-class action case. Rene Sanchez-Gomez and three others claimed the Southern District of California policy allowing the U.S. Marshals Service to "produce all in-custody defendants in full restraints for most non-jury proceedings" violates the Fourth Amendment. But their criminal cases were over so they were no longer subject to the shackling policy. The Ninth Circuit nevertheless concluded their cases were not moot, describing them as a "functional class action," per *Gerstein v. Pugh*. In that case the

Supreme Court adopted the capable-of-repetition-yet-evading-review mootness exception and applied it to a named plaintiff no longer subject to the challenged practice. The *Gerstein* defendants were held in pretrial detention without a probable cause hearing. “It wasn’t clear that any representative plaintiff would remain in pretrial custody long enough for the judge to certify the class, much less decide the case.” Dissenting judges argue that the *Gerstein* exception only applies to actual certified class actions, which this case is not. The dissenters reasoned such cases will always have “at least one member of the putative class [with] a live interest” “even if the named representative’s case becomes moot after the district court has ruled on a motion for class certification,” which this case does not.