Supreme Court Review for States

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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.

If the only case the Supreme Court decided was *South Dakota v. Wayfair*, last term would have been one of the most important for states and local governments in this century. But of course the Court consumed its steady diet of about 70 cases. In a couple of these cases, the Court didn't decide nearly as much as it could have. For example, in *Gill v. Whitford* and *Benisek v. Lamone* the Supreme Court failed to articulate a standard for when partisan gerrymandering is unconstitutional, without closing any doors, as it has since the 1986. Likewise, in the infamous "cake case" the Supreme Court failed to decide whether a cake maker had a First Amendment right to not make a wedding cake for a same-sex couple. But a number of other cases were as big as could be for states and local governments. This article covers the three biggest cases for states.

In *South Dakota v. Wayfair** the Supreme Court ruled that states and local governments can require vendors with no physical presence in the state to collect sales tax. In a 5-4 decision, the Court concluded "economic and virtual contacts" are enough to create a "substantial nexus" with the state, allowing the state to require collection.

In an opinion written by Justice Kennedy, the Court offered three reasons for why it was abandoning the physical presence rule from *Quill v. North Dakota* (1992). "First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be 'applied to an activity with a substantial nexus with the taxing State.' Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow."

To require a vendor to collect sales tax, the vendor must still have a "substantial nexus" with the state. The Court found a "substantial nexus" in this case based on the "economic and virtual contacts" Wayfair has with South Dakota, reasoning that a business could not do $100,000 worth

of business or 200 separate transactions in the state "unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."

In *Abood v. Detroit Board of Education* (1977), the Supreme Court upheld "agency shop" arrangements where public employees who do not join a union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. In *Janus v. AFSCME*, the Supreme Court overruled *Abood* in a 5-4 opinion. The Court also held that employees must "affirmatively consent" to join a union.

In an opinion written by Justice Alito, the Court repudiated the two main justifications for "fair share" in *Abood*: "labor peace" and avoiding free riders. In *Janus*, the Court pointed out that labor peace exists in federal employment (where agency fee is disallowed), as well as states without agency fee. The second defense for agency fee in *Abood* was to avoid free riders who "enjoy[] the benefits of union representation without shouldering the costs." But the Court pointed out Janus' analogy that "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."

Finally, the Court looked at the five factors it typically weighs when deciding whether to overturn precedent: the quality of the Court's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. Only one factor, the Court concluded, weighed in favor of keeping *Abood*. But that factor—reliance—"does not carry decisive weight."

In a 6-3 decision in *Murphy v. National Collegiate Athletic Association*,* the Supreme Court declared the federal Professional and Amateur Sports Protection Act (PASPA) unconstitutional. PASPA, adopted in 1992, prohibited states from authorizing sports gambling.

The New Jersey governor asked the Third Circuit and the Supreme Court to declare PASPA unconstitutional per the anticommandeering doctrine. An opinion written by Justice Alito admitted that the anticommandeering doctrine "sounds arcane," but explained it is simply the notion that Congress lacks the power to "issue orders directly to the States."

The Court concluded PASPA violates the anticommandeering rule by telling states they could not authorize sports gambling (either outright or by repealing bans on the books). "[PASPA] unequivocally dictates what a state legislature may and may not do. . . . [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."

It would be remiss not to mention *Trump v. Hawaii*.* Although this case doesn't involve state power, it is significant because a state was a party claiming to be injured by the travel ban.

In a 5-4 decision, the Supreme Court upheld President Trump's travel ban. The third travel ban indefinitely prevents immigration from six countries: Chad, Iran, Libya, North Korea, Syria, and Yemen. Hawaii and others sued President Trump claiming the ban was illegal and unconstitutional.

The Supreme Court, in an opinion written by Chief Justice Roberts, held that the travel ban fell "well within" the President's authority under the Immigration and Nationality Act (INA). The INA allows the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

The Court next addressed the challenge to the travel ban as violating the Establishment Clause of the First Amendment due to "anti-Muslim animus." The Court acknowledged the anti-Muslim statements of the President and his advisers, but stated the issue before the Court "is not whether to denounce the statements." Because this case involved a "national security directive regulating the entry of aliens abroad" the Court only applied "rational basis review" where it would uphold the travel ban "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." According to the Court, "it cannot be said that it is impossible to 'discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus.'"

Conclusion

With the exception of the sports gambling case, Justice Kennedy provided the crucial fifth vote in all of these cases. While he leaned conservative this term, his retirement will shift the Court to the right if he is replaced by a more reliable conservative. In some cases a more conservative Court will benefit the states, while in other cases it will not. Regardless, his retirement marks another significant shift that will have lasting effects on state government.