



Supreme Court Preview 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.

The SLLC has filed an *amicus* brief in all three cases below.

With half of the docket set for its October 2018 term the Supreme Court has accepted just a handful of cases affecting local governments. The three most interesting and relevant cases all involve “bread and butter” legal issues for local governments: takings, First Amendment free speech, and employment. But each case has at least one intriguing aspect. In the takings case the Supreme Court may overturn a 30-year-old precedent. The issue in the First Amendment free speech case has appeared on the Court’s docket three times in the last six years. And the employment case involves a very simple legal issue complicated by a very confusingly written statute.

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 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 absence of Justice Kennedy and the addition of Justice Gorsuch and possible addition of Judge Kavanaugh will affect the outcome of all the cases the Supreme Court hears this term. It is possible that all three of the above cases could be decided 5-4 (or 4-4 if Judge Kavanaugh isn't confirmed by the time the Court hears oral argument in these cases).