

State & Local Legal Center



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.

*Indicates a case where the SLLC has filed or will file an *amicus* brief.

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 Fifth Amendment’s Double Jeopardy Clause prohibits a person from being prosecuted more than once for the same conduct. The “separate sovereigns” exception allows states and the federal government to convict and sentence a person for the same conduct. In [*Gamble v. United States*](#),* Terance Gamble asks the Supreme Court to overrule this exception. Gamble was prosecuted for and convicted of possession of a firearm by a convicted felon under both Alabama and United States law. His challenge to the “separate sovereigns” exception is unsurprising given that Justice Thomas joined Justice Ginsburg’s concurring opinion in *Puerto Rico v. Sanchez-Valle* (2016), which suggested the Court do a “fresh examination” of the “separate sovereigns” exception. According to Gamble, the separate-sovereigns exception “has its origins” in an 1847 Supreme Court case, and it “fully crystallized” in a pair of 1959 cases. Gamble argues it should be overruled because it “flunks every test of constitutional interpretation.” The United States argues that “if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States’ historical police powers.”

The issue in [*Timbs v. Indiana*](#)* is whether the Eighth Amendment Excessive Fines Clause applies to the states. Indiana sought to forfeit Tyson Timbs’ Land Rover which he used to buy and transport heroin. The trial court accepted Timbs’ challenge that the fine would be excessive per the Eighth Amendment which states that “excessive bail shall not be required, nor *excessive fines imposed*.” The court observed that the value of the vehicle well exceeded the maximum statutory fine (\$10,000) for the felony Timbs plead guilty to. The Indiana Supreme Court decided not to apply the Excessive Fines Clause to Indiana because the U.S. Supreme Court has not yet decided whether it applies to the states.

In *Weyerhaeuser Company v. U.S. Fish and Wildlife Service** the Supreme Court will decide whether the “critical habitat” designation under the Endangered Species Act (ESA) may include land currently uninhabitable for the species in question. The Court will also decide whether a court may review the Service’s economic impact analysis. Per the ESA, the U.S. Fish and Wildlife Service (Service) designated land in Louisiana owned by the Weyerhaeuser Company a “critical habitat” for the dusky gopher frog. To designate unoccupied areas a “critical habitat,” the Service must determine that they are “essential for the conservation of the species.” The company claims that the land in question is currently “uninhabitable” by the frog “barring a radical change in the land’s use by its private owners.” The Fifth Circuit ruled in favor of the Service concluding the definition of “critical habitat” includes no habitability requirement and no requirement the frog can live on the land in the foreseeable future. The ESA mandates that the Service consider the economic impact of designating a “critical habitat.” Here the Service concluded the economic impacts on the land “are not disproportionate.” The Weyerhaeuser Company claims the potential loss of development value in the land is up to \$33.9 million over twenty years. It also claims because the land isn’t currently habitable by the dusky gopher frog it provides no benefit. The Fifth Circuit agreed with the Service that once it has fulfilled its statutory obligation to consider economic impacts, a decision to not exclude an area is discretionary and not reviewable in court.

In *Dawson v. Steager* the Supreme Court will decide whether states may give some retired state and local government employees a bigger tax break on retirement benefits than retired federal employees. West Virginia allows retired federal employees and most state and local government employees to exempt up to \$2,000 of retirement benefits from their taxable income. Certain state and local police officers, sheriffs, and firefighters can exempt all of their benefits. This group comprises about two percent of all state government retirees. James Dawson, a former U.S. Marshal, sued West Virginia alleging that preferential treatment for state and local law enforcement officials violates 4 U.S.C. § 111. This federal statute allows states to tax federal retirement benefits only “if the taxation does not discriminate . . . because of the source of the pay or compensation.” In *Davis v. Michigan Department of Treasury* (1989), the Supreme Court held that Michigan’s tax scheme where all state retirement benefits were exempt from state taxation while all federal retirement benefits were taxed violated 4 U.S.C. § 111. The West Virginia Supreme Court held that West Virginia’s law doesn’t discriminate against federal retirees. The court distinguished this case from *Davis* on the grounds that the West Virginia tax exemption was not a blanket exemption for all state employees, but was “intended to give a benefit to a very narrow class of former state and local employees.” The court also reasoned that federal retirees receive a tax benefit identical to the majority of state retirees and a better benefit than non-state retirees, so there was no intent to discriminate against federal employees.

Patrick Murphy killed George Jacobs. Oklahoma prosecuted Murphy. Per the Major Crimes Act states lacks jurisdiction to prosecute Native Americans who commit murder in “Indian country.” Murphy is Native American. In *Royal v. Murphy* Murphy and Oklahoma disagree over whether the murder took place on a Creek Nation reservation. By the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma. In 1901, the Creek Nation agreed to the allotment of tribal lands. Per the Major

Crimes Act “Indian country” includes “all lands within the limits of any Indian reservation.” Congress may disestablish or diminish Indian reservations. Allotment on its own does not disestablish or diminish a reservation. In *Solem v. Barlett* (1984) the Supreme Court established a three-part test to determine when Congress has diminished a reservation. First, courts “must examine the text of the statute purportedly disestablishing or diminishing the reservation.” Murphy argues that Congress never diminished the 1866 territorial boundaries of the Creek Nation where the murder took place. The Fifth Circuit agreed. It reviewed eight statutes allotting Creek land and creating the State of Oklahoma. The court concluded that the statutory text “fails to reveal disestablishment.” “Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders.”