



Supreme Court Midterm for Local Governments

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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 for its current term is set. The most interesting case the Supreme Court has agreed to hear for local governments (and more generally) will be heard next term. In [*New York State Rifle & Pistol Association Inc. v. City of New York, New York*](#)* the Court will decide whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel. This term, in addition to a number of cases covered in the SLLC's Supreme Court Preview for Local Governments article, the Court will decide a religious display on public land case, a significant procedural employment case, and a case involving money damages against a local government employee who allegedly fabricated evidence used in a trial.

In [*Maryland-National Capital Park and Planning Commission v. American Humanist Association*](#)* the Supreme Court will decide whether a local government has violated the First Amendment by displaying and maintaining a 93-year-old, 40-foot tall Latin cross memorializing soldiers who died in World War I.

The Fourth Circuit applied the so-called three-prong *Lemon* test, as modified by the Supreme Court's most recent monument decision *Van Orden v. Perry* (2005), to conclude that the government display and maintenance of this cross violates the Establishment Clause.

The lower court first concluded that the cross has a secular purpose thus passing the first prong of the *Lemon* test. Specifically, the Commission obtained the cross to maintain safety near a busy highway intersection and preserves the memorial to honor World War I soldiers.

But the Fourth Circuit concluded that a reasonable observer would understand this cross to advance religion. The Latin cross is the "preeminent symbol of Christianity." While the cross has secular elements (like the words valor, endurance, courage, and devotion inscribed on its base

and a plaque at the base listing the memorialized soldiers), the “immense size and prominence of the Cross” “evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones.”

The Fourth Circuit also concluded that the cross fails *Lemon*’s third prong because it creates an excessive entanglement between government and religion. First, the Commission has spent \$117,000 to maintain and repair it. In 2008 it set aside an additional \$100,000 for renovations. “Second, displaying the Cross, particularly given its size, history, and context, amounts to excessive entanglement because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets.”

The question the Supreme Court will decide in *Fort Bend County v. Davis** is if an employee fails to exhaust administrative remedies with the EEOC before filing a lawsuit is the lawsuit barred.

Lois Davis claims she was fired for not reporting to work on a Sunday (she attended a church service), in retaliation for reporting that she was sexually harassed and sexually assaulted by a superior. She filed sexual harassment and retaliation charges with the Texas Workforce Commission. After investigating, the Commission told her she could sue and she brought a retaliation and religious discrimination lawsuit.

Fort Bend pointed out she didn’t exhaust her administrative remedies by filing a charge of religious discrimination with the Texas Workforce Commission. Fort Bend argues that administrative exhaustion is a jurisdictional requirement of Title VII, meaning if an employee fails to satisfy it a court cannot hear the case.

Davis argues that exhaustion is a “waivable claim-processing requirement” and that Fort Bend waived it by waiting five years “and an entire round of appeals all the way to the Supreme Court” before raising it.

The Fifth Circuit held that the failure to exhaust administrative remedies is a waivable rule not a jurisdictional rule that would bar the lawsuit from proceeding. The lower court reasoned: “Here, Congress did not suggest—much less clearly state—that Title VII’s administrative exhaustion requirement is jurisdictional, and so we must treat this requirement as nonjurisdictional in character. The statute says nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case.”

The issue the Supreme Court will decide in *McDonough v. Smith* is whether the statute of limitations for a due process fabrication of evidence claim begins to run when the criminal proceedings terminate in the defendant’s favor, or when the defendant becomes aware of the tainted evidence and its improper use.

Edward McDonough, former Democratic Commissioner of Rensselaer County Board of Elections, approved forged absentee ballot applications which he claims he didn’t know had been falsified.

Youel Smith investigated and prosecuted McDonough. McDonough claims Smith “engaged in an elaborate scheme to frame McDonough for the crimes by, among other things, fabricating evidence.”

After two trials, McDonough was ultimately acquitted. Just before three years passed since McDonough was acquitted he sued Smith under Section 1983 for violating his due process rights by fabricating evidence and using it against him.

The Second Circuit held that McDonough’s due process claim was time barred because the three-year statute of limitations started running when the fabricated evidence had been disclosed to him (as late as the end of his first trial), not on the day of his acquittal.

McDonough argued his claim was most analogous to a malicious prosecution claim, which does not accrue until a favorable termination of the prosecution.

But according to the Second Circuit: “Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.”

Conclusion

At the time of publication it is possible the Supreme Court will get involved this term in a dispute over the census. In January, a federal district court held that a question about citizenship may not be included in the 2020 census. The federal government has asked the Supreme Court to rule on this question right away rather than let the Second Circuit weigh in because the census questionnaire must be printed soon. As of early February the Supreme Court had not indicated whether it will hear this case this term. Federal district court Judge Furman explains why the census is so important to local governments: “[The census] is used to allocate hundreds of billions of dollars in federal, state, and local funds. Even small deviations from an accurate count can have major implications for states, localities, and the people who live in them — indeed, for the country as a whole.”