Supreme Court Midterm for Local Governments 2019

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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.

First Amendment

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 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.

Section 1983/civil rights

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."

In *City of Escondido v. Emmons* the Supreme Court granted one police officer qualified immunity and instructed the Ninth Circuit to decide again whether another officer should have

been granted qualified immunity. In April 2013 police arrested Maggie Emmons' husband at their apartment for domestic violence. A few weeks later, after Maggie's husband had been released, police received a 911 call from Maggie's roommate's mother, Trina. While Trina was on the phone with her daughter she overheard Maggie and her daughter yelling at each other and Maggie's daughter screaming for help. When the officers knocked on the door no one answered but they were able to try to convince Maggie to open the door by talking to her through a side window. An unidentified male told Maggie to back away from the window. Officer Craig was the only officer standing outside the door when a man walked out of the apartment. Officer Craig told the man not to close the door but he did and he tried to brush past Officer Craig. Officer Craig stopped him, took him to the ground, and handcuffed him. The man was Maggie's father, Marty Emmons. He sued Officer Craig and Sergeant Toth, another officer at the scene, for excessive force. The Ninth Circuit denied the officers qualified immunity in this case saying the "right to be free of excessive force was clearly established." Regarding Sergeant Toth the Supreme Court held he should have been granted qualified immunity because he didn't use any force against Emmons. Regarding Officer Craig the Court said the Ninth Circuit defined the right to be free from excessive force at too high a level of generality. Instead, the Ninth Circuit "should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances." The lower court did cite to a Ninth Circuit case holding that persons have a right to be free from non-trivial force for engaging in passive resistance. But the Ninth Circuit "made no effort to explain how that case law prohibited Officer Craig's actions in this case." The Supreme Court vacated and remanded the Ninth Circuit's denial of qualified immunity to Officer Craig.

Employment

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."

In *Mt. Lemmon Fire District v. Guido** the Supreme Court ruled 8-0 that 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 laid off by the Mount Lemmon Fire District. 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 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." The Supreme Court, in an opinion written by Justice Ginsburg, held that the phrase "also means" adds a new category to the definition of employer (that contains no size requirement) rather than clarifies that states and their political subdivisions are a type of person contained in the first sentence. The Court reasoned that "also means" is "additive" rather than "clarifying." The Court noted the phrase is common in the U.S. Code "typically carrying an additive meaning." Finally, the statute pairs states and their political subdivisions with agents, "a discrete category that, beyond doubt, carries no numerical limitation."

Administrative law

In *Kisor v. Wilkie** the Supreme Court will decide whether to overturn *Auer* deference to federal agencies. In *Auer v. Robbins* (1997) the Supreme Court reaffirmed its holding in *Bowles* v. *Seminole Rock & Sand Co.* (1945) that courts must defer to a federal agency's interpretation of its own regulations. James Kisor is a Vietnam veteran who participated in Operation Harvest Moon. In 1983 a Veterans Administration (VA) psychiatrist, while noting Kisor's participation in this operation, determined he didn't have PTSD. As a result, Kisor was denied disability benefits. In 2007 Kisor was diagnosed with PTSD and the VA gave him full disability benefits prospectively. Kisor also asked the VA to "reconsider" his case and provide him with an effective date of benefits of 1983. Per regulation, VA's receipt of "*relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim" allow an application to be reconsidered. Kisor claimed that his Combat History document and other paperwork from 1983 that documented his participation in Operation Harvest Moon were such records. Kisor didn't argue that these records show that he was diagnosed with PTSD in 1983. Instead he claimed that these records were "relevant" "because they speak to the presence of an inservice stressor, one of the requirements of compensation for an alleged service-connected injury." The VA claimed they were not "relevant" because "they addressed the matter of an in-service stressor, which was not 'in issue,' rather than the issue of whether he suffered from PTSD, which was 'in issue.'" Kisor argued for a broad definition of "relevant" and the VA argued for a narrow definition. Deferring to the VA, the Federal Circuit adopted the VA's narrow definition of "relevant" noting it isn't "plainly erroneous or inconsistent" with the VA's regulatory framework. The court denied Kisor retroactive benefits.

The Hobbs Act vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain orders made by the Federal Communications Commission (FCC) and orders of the Secretary of Agriculture,

Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission, and others. In *PDR Network, LLC v. Carlton & Harris Chiropractic Inc** PDR Network claims the Fourth Circuit improperly interpreted the Hobbs Act to require a federal district court (and the Fourth Circuit as well) to accept an FCC order which no one questioned was valid but which PDR Network claims should not be deferred to. PDR Network sent Carlton & Harris, a chiropractic office, a fax about receiving a free Physicians' Desk Reference eBook. Carlton & Harris sued PDR Network claiming it violated the Junk Fax Prevention Act, which prohibits the use of a fax machine to send "unsolicited advertisement[s]." PDR Network argued that the fax could not be considered an unsolicited advertisement because it did not offer anything for sale. Carlton & Harris countered that the FCC has adopted a rule stating that "facsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the Act." In this case the district court concluded that the statute isn't ambiguous and doesn't apply to a fax offering something for free. So the district court didn't defer per *Chevron* to the FCC interpretation. The Fourth Circuit disagreed holding that the Hobbs Act required the district court not just to defer to the FCC order but to accept it. A dissenting judge argued that the Hobbs Act is implicated only if there is a challenge to the "validity" of an agency's order. There was no such challenge in this case.

Redistricting

In 1986 a majority of the Supreme Court agreed that partisan gerrymandering may be unconstitutional in certain circumstances. But in that case and since then the Court has failed to agree on a standard for when partisan gerrymandering crosses the line. Last term in *Gill v. Whitford* the Supreme Court again failed to articulate a standard for unconstitutional partisan gerrymandering. Instead, it held that the challengers failed to demonstrate they had standing to bring their case. In *Rucho v. Common Cause* the Court will get another chance to weigh in on standing and what the standard should be. It also may decide whether the North Carolina legislature engaged in unconstitutional partisan gerrymandering. Following the 2016 election, Republicans held 76.9% of the seats in North Carolina's thirteen-seat congressional delegation but North Carolina voters cast only 53.22% of their votes for Republican candidates. One of the redistricting criteria was for Republicans to maintain a partisan advantage. In January 2018 a three-judge panel struck down North Carolina's 2016 redistricting plan concluding it was an unconstitutional partisan gerrymander in violation of the U.S. Constitution's Equal Protection Clause, First Amendment, and two sections of Article I. Last summer the Supreme Court asked the three-judge panel to reconsider the January 2018 decision in light of *Gill v. Whitford*. In a 300 plus page opinion issued in August 2018 the panel found that the challengers in this case have standing to bring all their claims. According to the three-judge panel this case was different than *Gill* because, for example, in *Gill* one of the challengers admitted that he didn't live in a "packed" or "cracked" district. But in *Rucho* the panel found that challengers "who reside and vote in *each* of the thirteen challenged congressional districts testified to, introduced evidence to support, and, in all but one case, ultimately proved the type of dilutionary injury the Supreme Court recognized in *Gill*."

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." It moved about 360,000 Marylanders *out* of the district and about 350,000 Marylanders *in* the district. As a result only 34 percent of voters were registered Republicans versus 47 percent before redistricting. Maryland Governor O'Malley "testifed explicitly that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to [reduce the number of Republican districts]." In *Benisek v. Lamone* a number of Sixth District Republicans sued alleging the state legislature engaged in unconstitutional partisan gerrymandering in violation of the First Amendment. In November 2018 a three-judge panel issued a permanent injunction requiring the state legislature to make changes to the Sixth District. The three-judge panel issued three opinions. Judge Niemeyer, joined by Judge Russell, concluded that the drawing of lines for the Sixth District violated the challengers' First Amendment representational *and* associational rights. Judge Bredar, joined by Judge Russell, rejected the representational rights theory while "embracing much of the associational rights theory." Judge Russell wrote that challengers won under either Judge Niemeyer's or Judge Bredar's theory.

Miscellaneous

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, 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 *Williamson County* because she filed her case in federal court instead of pursuing her takings claim under Pennsylvania's Eminent Domain Code.

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.

The question the Supreme Court will decide in *Mitchell v. Wisconsin* is whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement. A preliminary breath test, not sufficient evidence for trial, indicated Gerald Mitchell had a blood alcohol level of .24. A police officer took Mitchell to the police station for an evidentiary breath test but Mitchell had passed out. When his blood was drawn at the hospital Mitchell was still passed out. Mitchell argues the warrantless blood draw violated his Fourth Amendment right to be free from "unreasonable searches and seizures." A majority of the Wisconsin Supreme Court held that the blood draw in this case didn't violate the Fourth Amendment. Three judges relied on a Wisconsin statute that presumes an unconscious person who police have probable cause to believe is intoxicated hasn't withdrawn consent. Two concurring judges concluded the blood draw in this case was constitutional because it was reasonable. But these judges objected to the notion a state statute could render the blood draw in this case constitutional because "the state can[not] waive the people's constitutional protection against the state." The dissenting judges would have required a warrant in this case. They were even more skeptical of the legislature's ability to presume an unconscious person may consent to a blood draw.

The Supreme Court held that "critical habitat" under the Endangered Species Act (ESA) must also be habitat. In *Weyerhaeuser Co. v. United State Fish and Wildlife Service** the Court also held a federal court may review an agency decision not to exclude an area from critical habitat because of the economic impact. The United State Fish and Wildlife Service (Service) listed the dusky gopher frog as an endangered species. It designated as its "critical habitat" a site called Unit 1 in Louisiana owned or leased by Weyerhaeuser Company, a timber company. The frog hasn't been seen at this location since 1965. As of today Unit 1 has all of the features the frog needs to survive except "open-canopy forests," which the Services claims can be restored with "reasonable effort." Weyerhaeuser argued Unit 1 could not be a "critical habitat" for the frog because it could not survive without an open-canopy forest. The Fifth Circuit disagreed holding that the definition of critical habitat contains no "habitability requirement." The Supreme Court held unanimously that "critical habitat" must be habitat. The ESA states that when the Secretary lists a species as endangered he or she must also "designate *any habitat of such species* which is then considered to be critical habitat." The Service argued that habitat includes areas like Unit 1 one which "require some degree of modification to support a sustainable population of a given

species." The Supreme Court sent this case back to the lower court to "interpret the term 'habitat.'" The ESA requires the Secretary to consider the economic impact of specifying an area as a critical habitat and authorizes the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." Weyerhaeuser Company claims the Service failed to fully account for the economic impact of designating Unit 1. The lower court refused to review the Service's decision-making process. The Supreme Court concluded it is reviewable. It "involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute."

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 lack 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."