Supreme Court Midterm 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.

The Supreme Court's docket for its current term is set. The most interesting case the Supreme Court has agreed to hear for states (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 States article, the Court will decide two partisan gerrymandering cases, a religious display on public land case, and a case involving the constitutionality of state statutes allowing police officers to draw blood from unconscious motorists based on probable cause of intoxication and not a warrant.

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 the second partisan gerrymandering case, 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.

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 *Mitchell v. Wisconsin* is whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

Wisconsin and 28 other states allow warrantless blood draws of unconscious drivers where police have probable cause to suspect drunk driving.

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.

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 the states: “[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.”