Supreme Court Preview

As the Supreme Court's new term gets under way, states will want to keep an eye on several cases.

BY VICTOR KESSLER

As the U.S. Supreme Court begins another term, several cases could have a significant effect on state governments. From legislative prayer to affirmative action to age discrimination, here are a few of the questions the high court will face this term.

Does banning affirmative action altogether violate the 14th Amendment's Equal Protection Clause?

In *Schuette v. Coalition to Defend Affirmative Action*, the justices will consider the constitutionality of a 2006 Michigan amendment that prevents the state and its universities from giving "preferential treatment to any individual or group on the basis of race" in university admission decisions.

Last term, the affirmative action case of *Fisher v. University of Texas at Austin* was sent back to the circuit court of appeals because the court had failed to require the university to prove that its affirmative action policy is the only way to achieve racial diversity in its student body. As in that case, Justice Elena Kagan has recused herself, making a ruling in broad support of affirmative action unlikely.

Does allowing prayer before government meetings violate the Constitution if it is offered predominantly by only one religion?

The court's ruling in *Town of Greece v. Galloway* could have an impact on any state legislature or other governmental body that begins sessions with prayer. The official policy in the town of Greece in upstate New York allows anyone from any religion without prior approval to deliver an invocation at town board meetings. But in practice, over 10 years, all but four invocations (two Jewish, one Baha'i and one Wiccan) have been led by Christians.

The Second Circuit Court of Appeals ruled the town's practice violated the First Amendment's Establishment Clause, which states, "Congress shall make no law respecting the establishment of religion." (The 14th Amendment extends it to state governments.)

The court hasn't addressed this issue since 1983 when it ruled in *Marsh v. Chambers* that a state legislature could hire a chaplain to deliver a prayer at the beginning of its sessions as long it was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Do "buffer zones" that keep protestors a certain distance from the target of their demonstration violate their First Amendment rights?

In *McCullen v. Coakley*, the court will examine the constitutionality of a Massachusetts law that creates a 35-foot "buffer zone" around reproductive health care facilities that demonstrators are not allowed to enter. A broad ruling by the justices could have sweeping consequences beyond this particular context. State governments often are challenged to strike a balance between protecting one group of citizens' free speech rights with another group's rights to be safe from harassment at clinics, funerals, political events and other locations.

In a 2008 case, *Hill v. Colorado*, the court upheld a similar law against a First Amendment challenge because it addressed a legitimate state concern for the safety and privacy of individuals using the facilities, and it applied to all demonstrators equally, regardless of their viewpoint. The court also noted that the Colorado law regulated the "time, place and manner" of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. The State and Local Legal Center will file an *amicus* brief in support of the Massachusetts law.

How far and wide does EPA's authority extend?

Environmental Protection Agency v. EME Homer City Generation considers the scope of the Environmental Protection Agency's authority to regulate interstate pollution. Under the Clean

Victor Kessler is a legal intern with the State and Local Legal Center in Washington, D.C.

Air Act, the EPA sets air quality standards, and states create their own implementation plans to achieve them. If a state fails to submit a plan or correct a rejected one, only then can the EPA impose its own plan.

If the court does not dismiss this case for lack of federal jurisdiction, it will be answering two questions. Can a state plan developed before the EPA announced its reduction targets be replaced with a federal plan without first giving the state time to amend it? Does the Clean Air Act permit the EPA to not only define how much pollution a state is contributing to its neighbors, but also what equipment the state should use to mitigate the pollution downwind?

May fired state and local employees sue on the grounds of age discrimination without filing a formal complaint with the Equal Employment Opportunity Commission?

In *Madigan v. Levin,* the Supreme Court will decide whether government workers who claim they've been victims of age discrimination may take their former employers directly to court and avoid requirements in the federal Age Discrimination in Employment Act. Harvey Levin claims he was fired at age 60 from his job as an Illinois assistant attorney general because of his age and gender. He sued the state directly under the 14th Amendment and 42 U.S.C. §1983, avoiding the federal act that requires complaints be filed first with the Equal Employment Opportunity Commission. The commission often resolves issues before problems reach the courts. Many are concerned that circumventing this process would result in more complaints going to court, costing employers—including state governments—substantially more time and money.

When is it appropriate for federal courts to abstain from hearing certain cases until after the state courts have ruled?

Sprint Communications Company v. Jacobs arose from a telecom dispute in Iowa. Sprint refused to pay another company's intrastate access charge and asked the Iowa Utility Board to confirm its decision. But the board sided with the other company and ordered Sprint to pay. Sprint then decided to challenge the board's decision in federal and state courts, simultaneously. The Eighth Circuit followed the *Younger* abstention doctrine, which says federal district courts should refrain from hearing cases until state courts issue final rulings.

The Supreme Court took the case to decide whether it matters what specific circumstances exist when using the abstention doctrine. The question is whether a federal court should be able to review certain types of decisions immediately or abstain until state proceedings have ended. The State and Local Legal Center has filed an *amicus* brief in this case in support of using the abstention doctrine.

The Case for Federalism

Although some of these cases lack the glamour and media hype of last term's game changers on gay rights and voting practices, many deal with federalism principles that form the core of state governance. With the court likely to grant 30 or so more petitions before February, there will be plenty of rulings to watch. Whether the justices will rule in favor of the states, however, remains to be seen.