

State & Local Legal Center



Supreme Court Review for States 2019-20

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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.

Even though the Supreme Court heard fewer cases than usual this term due to COVID-19, the Court, as always, decided numerous cases impacting the states. It is difficult to pick just three to include in this article given the range of topics the Court considered including guns, Deferred Action for Childhood Arrivals, and the President's tax returns. The Court's abortion, "faithless electors," and copyright of statutory annotations cases are discussed below.

In a 5-4 decision in [*June Medical Services v. Russo*](#), the Supreme Court struck down Louisiana's admitting privileges law. Five Justices agreed that Louisiana's law created an unconstitutional "substantial obstacle" to women obtaining abortions.

The Louisiana law requiring abortion providers to hold admitting privileges at a nearby hospital was nearly identical to a Texas law the Supreme Court struck down 5-4 in [*Whole Woman's Health v. Hellerstedt*](#) (2016). Admitting privileges allow doctors to admit patients to a hospital and perform surgery.

The plurality opinion, written by Justice Breyer, agreed with the district court that Louisiana's law created "substantial obstacles" for women seeking abortions. Justice Breyer reasoned that it was likely only one doctor in one location would continue to perform abortions in the state where previously six total doctors working in three different locations performed abortions. The one remaining fulltime abortion doctor could likely meet no more than about 30% of the demand for abortions in Louisiana.

In [*Planned Parenthood of Southeastern Pennsylvania v. Casey*](#) (1992), the Supreme Court stated that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right" and are unconstitutional. In *Whole Woman's Health* the Court held that "[the substantial obstacle] standard requires courts independently to review the legislative findings upon which an abortion-

related statute rests and to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access." The Court's plurality agreed with the district court that Louisiana law does not protect women's health.

Chief Justice Roberts wrote a concurring opinion which provided the fifth vote for the holding that Louisiana's law is unconstitutional. According to the Chief Justice, "[b]ecause Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent."

However, Roberts, and four other Justices, rejected the balancing test the Court adopted in *Whole Woman's Health* writing "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."

In [*Chiafalo v. Washington*](#), the Supreme Court upheld Washington state's law fining "faithless" electors that do not vote for the candidate that won the state's popular vote. Likewise, the Court reversed the Tenth Circuit's decision in [*Baca v. Colorado Dept. of State*](#), which held that removing a "faithless" elector was unconstitutional.

Article II of the U.S. Constitution requires states to appoint electors. The Twelfth Amendment of the Constitution says that electors vote for president and vice president. A majority of states have enacted "pledge laws" requiring electors take a formal oath or pledge to cast their ballot for their party's candidates for president and vice president. The Supreme Court ruled that these pledge laws were constitutional in [*Ray v. Blair*](#) (1952).

Justice Kagan's opinion, joined by all the Justices save for Justice Thomas who wrote his own concurrence, extends this ruling to allow states to punish faithless electors. The Washington statute backs up its pledge with a \$1,000 fine to prevent faithless electors.

Kagan noted that in *Ray* the Court stated "'neither the language of Art[icle] II . . . nor that of the Twelfth Amendment' prohibits a State from appointing electors committed to vote for a party's candidate." Based on this determination, Justice Kagan concluded that nothing in Article II forbids a state from taking away an elector's voting discretion, and that it grants the states the power to do so by allowing them to appoint electors "in whatever way it likes."

In [*Georgia v. Public.Resource.Org*](#), the Supreme Court held 5-4 that non-binding, explanatory legal materials created by state legislatures cannot be copyrighted.

The Official Code of Georgia Annotated (OCGA) contains various non-binding supplementary materials including summaries of judicial decisions, attorney general opinions, and a list of law review articles related to current statutory provisions. The OCGA is assembled by the Code Revision Commission, a state entity where a majority of its member are state legislators. Lexis then prepares the annotations and the legislature approves them.

Georgia argued that it may copyright these annotations. The Supreme Court disagreed in an opinion written by Chief Justice Roberts.

The author of an original work receives copyright protection. According to the Court, "[t]he animating principle behind [the government edicts doctrine] is that no one can own the law." Per

this doctrine, judges “may not be considered the ‘authors’ of the works they produce in the course of their official duties as judges,” regardless of whether the material carries the force of law.

The Court extended this same rule to legislators acting in the course of their legislative duties because “[c]ourts have thus long understood the government edicts doctrine to apply to legislative materials.” The Court held Georgia’s annotations are not copyrightable because the author is the Code Revision Commission which “qualifies as a legislator.”

Conclusion

The Supreme Court moved 10 cases it was supposed to hear in its 2019-2020 term to next term. Two of these cases are of interest to the states. Oral argument has been scheduled in October for both cases. The main question before the Supreme Court in [Carney v. Adams](#)* is whether Delaware’s Constitution may require that three state courts be balanced between the two major political parties. In [Rutledge v. Pharmaceutical Care Management Association](#) the Supreme Court will decide whether states’ attempts to regulate pharmacy benefit managers’ drug-reimbursement rates are preempted by the Employee Retirement Income Security Act.