Supreme Court Review 2014-2015

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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 filed an *amicus* brief.

In a 5-4 decision written by Justice Kennedy the Supreme Court held in *Obergefell v. Hodges* that same-sex couples have a constitutional right to marry. The Court articulated four principles that demonstrate why the fundamental right to marry applies with equal force to same-sex couples. First, the right to choose who you marry is "inherent in the concept of individual autonomy." Second, because the right to marry is "unlike any other in its importance" it should not be denied to any two-person union. Third, marriage between same-sex couples safeguards children and families just as it does for opposite-sex couples. Finally, marriage is a keystone of American social order from which no one should be excluded. The Court relied on the Constitution's Fourteenth Amendment Due Process Clause and the Equal Protection Clause. In previous marriage cases like *Loving v. Virginia*, invalidating bans on interracial marriage, the Court relied on both Clauses. The Court did not state what standard of review it applied to decide this case.

In 6-3 decision in *King v. Burwell* the Supreme Court ruled that health insurance tax credits are available on the 34 Federal Exchanges. The Affordable Care Act allows state and the federal government to establish health care exchanges. Tax credits are available when insurance is purchased through "an Exchange established by the State." The technical legal question in this case was whether a Federal Exchange is "an Exchange established by the State" that may offer tax credits. The Supreme Court said yes. The Court first concluded that above language is ambiguous. But by looking at it in the context of the entire statute the meaning of the language became clearer. Specifically, if tax credits weren't available on Federal Exchanges "it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* the Supreme Court held 5-4 that disparate-impact claims may be brought under the Fair Housing Act (FHA). The Inclusive Communities Project sued the Texas Department of Housing and Community Affairs claiming the Department was giving too many tax credits to low-income housing in predominately black inner-city areas compared to predominately white suburban neighborhoods. In prior cases the Court held that disparate-impacts claims are possible under Title VII (prohibiting race, etc. discrimination in employment) and the Age Discrimination in Employment Act relying on the statutes' "otherwise adversely affect" language. The FHA uses similar language—"otherwise make unavailable"—in

prohibiting race, etc. discrimination in housing. And Congress seems to have acknowledged that disparate-impact claims are possible under the FHA. Congress amended the FHA in 1988 to include "three exemptions from liability that assume the existence of disparate-impact claims."

In 5-4 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* the Court held that the Constitution's Elections Clause permits voters to vest congressional redistricting authority entirely in an independent commission. Justice Ginsburg's majority relies on the history and purpose of the Elections Clause and the "animating principle of our Constitution that the people themselves are the originating source of all the powers of government." Founding era dictionaries typically defined legislatures as the "power that makes laws." In Arizona, that includes the voters who may pass laws through initiatives. The purpose of the Elections Clause was to "empower Congress to override state elections rules" not restrict how states enact legislation. "We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."

In *Alabama Legislative Black Caucus v. Alabama* the Supreme Court held 5-4 that when determining whether unconstitutional racial gerrymandering occurred—if race was a "predominant motivating factor" in creating districts—one-person-one-vote should be a background factor. And Section 5 of the Voting Rights Act (VRA) does not require a covered jurisdiction to maintain a particular percent of minority voters in minority-majority districts. The Alabama Legislative Black Caucus sued Alabama claiming by adding more minority voters to majority-minority districts than were needed for minorities to elect a candidate of their choice Alabama engaged in unconstitutional racial gerrymandering. The Court concluded that one-person-one-vote should be taken as a given and not be weighed with other nonracial factors (compactness, contiguity, incumbency protection, etc.) because the predominance analysis is about "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'" Section 5 does not require covered jurisdictions to maintain a particular percent of minority voters in majority-minority districts. Instead, it requires that a minority's ability to elect a preferred candidate be maintained. State legislatures must have a "strong basis in evidence" to support their race-based choices when redistricting.

In *North Carolina State Board of Dental Examiners v. FTC** the Supreme Court held 6-3 that if the majority of state board members are active market participants, antitrust immunity applies only if the state actively supervises the board. The North Carolina State Board of Dental Examiners is a state agency principally charged with licensing dentists. Six of its eight members must be actively practicing, licensed dentists. After the Board issued cease-and-desist letters to non-dentist teeth whitening service providers, the Federal Trade Commission charged it with violating federal antitrust law. In *Parker v. Brown* the Court held that states receive state-action immunity from federal antitrust law when acting in their sovereign capacity. According to the Court, non-sovereign entities controlled by active market participants receive state-action immunity only if the challenged restraint is clearly articulated in state policy and the policy is actively supervised by the state. Without active supervision, the Court reasoned, agencies, boards, and commissions made up of a majority of market participants may act in their own interest rather than the public interest. Here the parties assumed the clear articulation requirement was met and agreed the Board wasn't actively supervised by the state. So the Court denied the Board state-action immunity.

In *City of Los Angeles v. Patel** the Supreme Court held 5-4 that a Los Angeles ordinance requiring hotel and motel operators to make their guest registries available to police without at least a subpoena violates the Fourth Amendment. The searches permitted by the ordinance are "administrative"—that is, they are done to ensure compliance with recordkeeping requirements. While

administrative searches do not require warrants, they do require "precompliance review before a neutral decisionmaker." Absent this, "the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests." Facial challenges—to a statute itself rather than a particular application of a statute—aren't "categorically barred or especially disfavored." On numerous occasions the Court has declared statutes facially invalid under the Fourth Amendment.

In *Walker v. Sons of Confederate Veterans* the Supreme Court held 5-4 that Texas may deny a proposed specialty license plate design featuring the Confederate flag because specialty license plate designs are government speech. The Court relied heavily on *Pleasant Grove City v. Summum* (2009), where the Court held that monuments in a public park are government speech and that a city may accept some privately donated monuments and reject others. First, just as governments have a long history of using monuments to speak to the public, states have a long history of using license plates to communicate messages. Second, just as observers of monuments associate the monument's message with the land owner, observers identify license plate designs with the state because the name of the state appears on the plate, the state requires license plates, etc. Third, per state law, Texas maintains control over messages conveyed on specialty plates and has rejected at least a dozen designs, just as the city in *Summum* maintained control monument selection.

In *Williams-Yulee v. Florida Bar* the Supreme Court held 5-4 that a Florida statute prohibiting judicial candidates from personally soliciting campaign contributions does not violate the First Amendment. While a majority of the Court agreed that bans on personal solicitation are constitutional applying strict scrutiny, only a plurality agreed that "exacting scrutiny" *should* apply. Yulee didn't dispute Florida's compelling interest in judicial integrity but argued that it is undercut by the fact that Florida allows campaigns to solicit money and allows candidates to write thank yous to donors, which means candidates know who contributed to their campaign. The Court reasoned that Florida's law wasn't fatally underinclusive because it "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates." The solicitation ban was narrowly tailored because judicial candidates may engage in whatever speech they want other than saying "Please give me money." Thirty of the 39 states that elect (rather than appoint) trial or appellate judges prohibit judicial candidates from personally soliciting campaign funds.

In *Glossip v. Gross* the Supreme Court held 5-4 that death row inmates are unlikely to succeed on their claim that using midazolam as a lethal injection drug amounts to cruel and unusual punishment in violation of the Eighth Amendment. In *Baze v. Rees* (2008) the Court approved a three-drug protocol that begins with a sedative, sodium thiopental, which is no longer available; Oklahoma now uses midazolam. In *Baze* the Court stated that prisoners challenging a lethal injection protocol must identify a known and available alternative method of execution. The prisoners in this case did not do so and claimed they did not have to. The Court concluded that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam causes a substantial risk of severe pain. The inmates' experts acknowledged that no scientific proof establishes that a 500-milligram dose of midazolam would not render a person sufficiently unconscious to "resist the noxious stimuli which would occur with the application of the second and third drugs." While midazolam may have a "ceiling effect," where an increased dose produces no more effect, only "speculative evidence" suggests that it renders prisoners insensate to pain.

In 1992 in *Quill Corp. v. North Dakota*, the Court held that states cannot require retailers with no in-state physical presence to collect use tax. Since 2010, Colorado has required remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. Direct Marketing Association sued Colorado in federal court claiming these requirements are unconstitutional under *Quill*. The Court held unanimously in *Direct Marketing Association v. Brohl** that the Tax Injunction Act (TIA) does not bar a federal court from deciding this case. Per the TIA, that federal courts may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" where a remedy is available in state court. The TIA was modelled on the Anti-Injunction Act, which concerns federal taxes. According to the Court, "the Federal Tax Code has long treated information gathering as a phase of tax administration that occurs before assessment, levy, or collection." And, while DMA's lawsuit sought to "limit, restrict, or hold back" tax collection in Colorado, it did not "restrain" tax collection in the narrow sense— by stopping it.

In *Armstrong v. Exceptional Child Center* the Court held 5-4 that Medicaid providers cannot rely on the Supremacy Clause or equity to sue states to enforce a Medicaid reimbursement statute. 42 U.S.C. §1396a(a)(30)(A) requires state Medicaid plans to assure that Medicaid providers are reimbursed at rates "consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services." Medicaid providers sued Idaho claiming that its reimbursement rates for rehabilitation services were lower than §(30)(A) permits. The Court first rejected the argument that the Supremacy Clause creates a private right of action. "It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." The Court also rejected the providers' argument that equity should permit their case to proceed. First, the statute provided a remedy for a state's breach—Health and Human Services may withhold funds—suggesting Congress intended no other remedies. Second, it would be difficult for a court to fashion a remedy in this case—a reimbursement rate—given the broad and unspecific language of §(30)(A).

In a 6-2 decision in *City and County of San Francisco v. Sheehan** the Court declined to decide whether Title II of the Americans with Disabilities Act (ADA) requires police officers to accommodate suspects who are armed, violent, and mentally ill when bringing them into custody. When police officers entered Teresa Sheehan's room in a group home for persons with mental illness she threatened to kill them with a knife she held, so they retreated. The officers reentered her room and she still had the knife in her hand. One officer pepper sprayed Sheehan but she refused to drop the knife so the officers shot her multiple times. San Francisco agreed with Sheehan that Title II of the ADA applies to arrests but argued that Sheehan wasn't a qualified individual with a disability because she was a "direct threat" to the officers. Because the parties agreed that Title II applies to arrests the Court dismissed this issue as improvidently granted. The Court held the officers were entitled to qualified immunity though they reentered her room rather than attempted to accommodate her disability. Even assuming that "any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry," no precedent clearly establishes there was no objective need for immediate entry here where Sheehan could have gathered more weapons or escaped.

In a 6-3 decision in *Rodriguez v. United States* the Supreme Court held that a dog sniff conducted after a completed traffic stop violates the Fourth Amendment. Officer Struble pulled over Dennys Rodriguez after he veered onto the shoulder of the highway and jerked back on the road. Seven or eight minutes passed between Officer Struble issuing a warning, back up arriving, and Officer Struble's drug-sniffing dog alerting for drugs. The Court concluded that exceeding the time needed to handle the matter

for which the traffic stop was made violated the Fourth Amendment. Justice Ginsburg, writing for the majority, relied on *Illinois v. Caballes* where the Court upheld a suspicionless dog search conducted *during* (not after) a lawful traffic stop. In that case the Court stated that a seizure for a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.