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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 or will file an *amicus* brief.

"Big" Cases

The U.S. Constitution Equal Protection Clause "one-person one-vote" principle requires that voting districts have roughly the same population so that votes in each district count equally. In *Evenwel v. Abbott* the Court will decide what population is relevant—total population or *voting* population. Texas reapportioned its state senate districts following the 2010 census based on total population alone. Plaintiffs claim that their votes are worth less than other voters because they live in districts that substantially deviate from the "ideal" in terms of number of voters or potential voters, which violates "one-person one-vote." The district court ruled in favor of Texas reasoning that the Supreme Court has never held any particular metric to be unconstitutional. Rather, the Court has stated that a population measure is viable as long as it is not the result of a discriminatory choice by the state legislature.

In *Friedrichs v. California Teachers Association* the Court has agreed to decide whether to overrule *Abood v. Detroit Board of Education* (1977). In *Abood* the Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. The rationale for an agency fee is that the union may not discriminate between members and nonmembers in performing these functions. Public sectors employees who don't join the union may opt-out of paying "nonchargeable" union expenditures—including expenditures for political or ideological purposes. The Court agreed to decide, assuming it doesn't overrule *Abood*, whether requiring non-members to opt-out of nonchargeable expenditures—rather than opt-in—violates the First Amendment. If nonmembers must affirmatively opt-in rather than be required to take action to opt-out, presumably fewer will pay nonchargeable expenditures.

The issue in *Whole Women's Health v. Cole* is whether Texas's admitting privileges and ambulatory surgical center requirements create an undue burden on women seeking abortions and are reasonably related to advancing women's health. Texas claims, and the Fifth Circuit agreed, that women's health is advanced if doctors performing abortions have admitting privileges at a nearby hospital and if abortion

clinics must comply with standards set for ambulatory surgical centers. Whole Women's Health argues that the Fifth Circuit erred in refusing to consider "whether and to what extent" Texas law actually serves its purported interest in achieving safer abortions. Whole Women's Health also argues that these requirements create an undue burden on those seeking abortions. Fewer than 10 of Texas's over 40 abortion clinics will remain open, those that do will be inaccessible to many and will be unable to keep up with demand for abortions. The Fifth Circuit found no undue burden even though 17 percent of women of reproductive age would face travel distances of 150 miles or more to receive abortions.

Per the so-called "birth control mandate," the Affordable Care Act (ACA) has been interpreted to require employers to offer contraception coverage to women at no cost. The federal government has accommodated religious nonprofits that object to providing contraception by allowing them to complete a form objecting to the coverage. Their health insurance plan must then provide free access to contraception without the nonprofits' involvement. The Religious Freedom Restoration Act (RFRA) prohibits the federal government from substantially burdening a person's exercise of religion except to further a compelling interest in the least restrictive way. Religious nonprofits claim that this accommodation process makes them complicit in providing coverage they object to and therefore substantially burdens their exercise of religion in violation of RFRA. They suggest the federal government could rely on a variety of less restrictive options to providing birth control that would not involve them at all. The Court accepted seven cases, including *Zubik v. Burwell* which the Court's decision likely will be titled, involving the question of whether the birth control mandate violates RFRA. All the lower courts deciding this issue, except the Eighth Circuit, ruled in favor of the federal government.

For the second time the Court has agreed to decide whether the University of Texas at Austin's race-conscious admissions policy is unconstitutional in *Fisher v. University of Texas at Austin*. Per Texas's Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, which fills about 80 percent of the class. Unless an applicant has an "exceptionally high Academic Index," he or she will be evaluated through a holistic review where race is one of a number of factors. The Court has held that the use of race in college admissions is constitutional if it is used to further the compelling government interest of diversity and is narrowly tailored. In *Fisher I* the Court held that the Fifth Circuit, which upheld UT Austin's admissions policy, should not defer to UT Austin's argument that its use of race is narrowly tailored. When the Fifth Circuit relooked at UT Austin's admissions policy it again concluded that it is narrowly tailored. The Top Ten Percent Plan works well at increasing minority student enrollment because Texas schools are so segregated. But a number of well-qualified students are excluded—specifically minority students who performed well at majority-white schools but aren't in the top ten percent of their class. If race wasn't considered during holistic review almost every student admitted would be white because of the test score gap between white and minority students. And as a result of holistic review a much higher percent of white students are admitted, but generally between 25-30 percent of the overall number of black and Hispanic students are admitted through holistic review.

Preemption

Vermont and at least 16 other states collect health care claims data. In *Gobeille v. Liberty Mutual Insurance Company** the Court will decide whether the Employee Retirement Income Security Act (ERISA) preempts Vermont's all-payers claims database (APCD) law. ERISA applies to most health insurance plans and requires them to report detailed financial and actuarial information to the Department of Labor. ERISA preempts state laws if they "relate to" the core functions of an ERISA plan. Vermont's APCD law seeks the following medical claims data: services provided, charges and payments for services, and demographic information about those covered. The Second Circuit concluded that ERISA

preempts Vermont's law because one of the key functions of ERISA is reporting. Vermont's law imposes "burdensome, time-consuming, and risky" reporting obligations which are multiplied by other states' APCD laws.

In *Hughes v. PPL EnergyPlus* and *CPV Maryland v. PPL EnergyPlus* the Maryland Public Service Commission offered the successful power plant development bidder a twenty-year "contract for differences." The power plant would sell its capacity at Federal Energy Regulatory Commission (FERC)-regulated auction price. If the action price was lower than its bid price, local utilities would make up the difference. If it was higher, the developer would rebate the utilities who would pass the cost recovery onto retail customers. Per the Federal Power Act (FPA), FERC has the authority to regulate interstate wholesale rates. FERC claims that Maryland's program amounts to rate-setting and is field and conflict preempted by the U.S. Constitution's Supremacy Clause. The Fourth Circuit concluded that Maryland's program is barred based on "field preemption" because it "effectively supplants the rate generated by the auction with an alternative rate preferred by the state." It is conflict preempted because it disrupts FERC-controlled federal markets by setting the price the bidder receives for a substantial time period.

The Court has agreed to decide whether the Federal Energy Regulatory Commission (FERC) may regulate "demand response" payments offered to electric utility customers to reduce their electricity use during periods of high demand in the consolidated cases of *FERC v. Electric Power Supply Association*, and *EnerNOC Inc. v. Electric Power Supply Association*. Per the Federal Power Act, FERC regulates the wholesale sale of electric energy. States regulate the retail sale of electric energy. FERC argued that demand response affects wholesale prices so demand response is a permissible regulation of the wholesale market. The D.C. Circuit agreed but responded that FERC offered no limiting principle. The price of steel, fuel, and labor also affect the wholesale price of electricity but FERC can't regulate them. According to the D.C. Circuit, "Demand response—simply put—is part of the retail market. It involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption." The Court will also decide whether the compensation level for demand response is too high.

Crime and Punishment

In 2012 in *Miller v. Alabama* the Court ruled 5-4 that states may not mandate that juvenile offenders be sentenced to life in prison with the possibility of parole without considering mitigation evidence about the defendant's youth. In *Montgomery v. Louisiana* the Court will decide whether *Miller* is retroactive. Charles Hurt, who was 17 at the time of the crime, was convicted of murder in 1964 and sentence to life in prison. The Louisiana Supreme Court held that *Miller* does not apply retroactively because it does not meet the *Teague v. Lane* (1989) exception to the rule that normally bars a new rule from being applied retroactively: the new rule must completely remove a punishment from the list of punishments that can be imposed. *Miller* only bars sentencing schemes that mandate life in prison for juveniles.

In *Foster v. Chatman* the Court will decide whether potential black jurors were purposely excluded in violation of *Batson v. Kentucky*. Timothy Tyrone Foster, who is black, was sentenced to death for murdering an elderly white woman by an all-white jury. The prosecutor peremptorily struck all four prospective black jurors. The prosecutor's jury selection notes reveal highlighting all prospective black jurors' names in the same color, circling "Black" on the black jurors' questionnaires, and identifying black jurors as B#1, B#2, and B#3. The prosecution's investigator ranked black jurors against each other and recommended one in case a black juror had to be selected. The Georgia Superior Court concluded that the prosecutor's notes fail to demonstrate purposeful race discrimination and even if they did that the prosecutor cited numerous race-neutral reasons for striking each prospective black juror.

Terrance Williams was sentenced to death for killing Amos Norwood who Williams claimed at trial he did not know. Two decades later Williams' co-conspirator revealed, among other things, that the prosecutor urged him to falsely testify that the motive for the murder was robbery, not that Norwood had sexually abused Williams. The Supreme Court of Pennsylvania refused to reverse Williams' death sentence concluding that Williams was aware at trial "of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males." Justice Castille was the elected prosecutor during Williams' trial and earlier appeal, and he campaigned for judge citing the number of defendants he had sent to death row (45), including Williams. In *Williams v. Pennsylvania* the Court will decide whether Justice Castille's decision not to recuse himself violates the Eighth and Fourteenth Amendments and whether it matters that Justice Castille's vote wasn't decisive.

Miscellaneous

In *Heffernan v. City of Paterson, New Jersey** Officer Heffernan was assigned to a detail in the Office of Chief of Police. He was demoted after he was seen picking up a campaign sign for the current police chief's opponent. The sign wasn't for himself; it was for his bedridden mother. Officer Heffernan sought to bring a lawsuit claiming that he was retaliated against based on the City's *perception* he was exercising his First Amendment free association rights. He pointed to lower court precedent holding that public employees may bring First Amendment retaliation claims if an adverse employment action is taken because they remain politically neutral or silent. The Third Circuit concluded Heffernan could not bring a perceived free-association claim because he wasn't retaliated against for "taking a stand of calculated neutrality." Instead, he was demoted on a "factually incorrect basis."

Sila Luis was indicted on charges related to $45 million in Medicare fraud. Unsurprisingly, her personal assets amounted to much less than $45 million. The federal government sought to freeze the use of her assets not traceable to the fraud. She wanted to use them to hire an attorney. The question in *Luis v. United States** is whether not allowing a criminal defendant to use assets not traceable to a criminal offense to hire counsel of choice violates the Sixth Amendment's right to counsel. The Eleventh Circuit affirmed the district court's conclusion that "the most reasonable conclusion is that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." This case comes on the heels of *Kaley v. United States* (2014), where the Court held 6-3 that defendants may not use frozen assets which are the fruits of criminal activities to pay for an attorney.

In *Mullenix v. Luna* Israel Leija Jr. led officers on an 18-minute chase at speeds between 85 and 110 miles an hour after officers tried to arrest him. Leija called police twice saying he had a gun and would shoot police officers if they did not abandon their pursuit. While officers set up spike strips under an overpass, Officer Mullenix asked his supervisor via dispatch if his supervisor thought shooting at Leija's car to disable it was "worth doing." His supervisor told Officer Mullenix to wait to see if the spike strips worked. Officer Mullenix then learned an officer was in harm's way from Leija beneath the overpass. Officer Mullenix shot at Leija's vehicle six times killing him but not disabling his vehicle. Leija's estate sued Officer Mullenix claiming that he violated the Fourth Amendment by using excessive force. The Court concluded Officer Mullenix should be granted qualified immunity stating: "[g]iven Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did."