Supreme Court Preview 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 has or will file an *amicus* brief.

"Big" Cases

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.

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.

Redistricting

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 total *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 *Harris v. Arizona Independent Redistricting Commission* the Arizona redistricting commission claims that it underpopulated some minority districts to strengthen minorities' ability to elect a candidate of their choice, so that the Department of Justice would be more likely to pre-clear its plan. The plaintiffs claim the commission underpopulated minority ability-to-elect districts to favor Democrats. The plaintiffs argue that partisan gerrymandering can't justify deviating from one-person, one vote and that violating one-person, one vote to obtain preclearance under the Voting Rights Act (VRA) wasn't a legitimate justification before or after *Shelby County v. Holder* (2013), holding the VRA's coverage formula unconstitutional. Two of the three judges found that the commission was *primarily* motivated by a desire to obtain pre-clearance. So it did not matter that the commission was also motivated by a desire to favor Democrats. A majority of the court concluded that trying to comply with the VRA could justify minor population deviations when protecting incumbent legislators can. A majority of the judges concluded *Shelby County* has no impact because it had not yet been decided when the map was drawn up in this case.

The Three-Judge Act requires three-judge panels to decide constitutional challenges to congressional and legislative redistricting. But the single judge to whom the request for a three-judge panel is made may determine that three judges are not required to decide the case. The question on *Shapiro v. Mack* is whether a single judge may decide that a three-judge panel is not required because the complaint fails to state a claim under the Federal Rules of Civil Procedure, not because the complaint is frivolous. Shapiro argued that to decide if a three-judge panel was required, based on Supreme Court precedent, the district court judge should have determined whether his compliant was frivolous, not whether it failed to state a claim. The district court concluded the distinction Shapiro was making was splitting hairs. Fourth Circuit precedent indicates that where a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial [frivolous]" and a single judge may dismiss them.

Crime and Punishment

In 2012 in *Miller v. Alabama* the Supreme 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.

Timothy Lee Hurst was convicted of murdering the assistant manager at the Popeye's restaurant where he worked. Seven out of 12 jurors recommend that Hurst be put to death based on unspecified aggravating factors. It seems most likely that the Court will decided whether Florida's death penalty scheme violates the U.S. Constitution to the extent it does not require jurors to find specific facts as to aggravating factors that justify a death sentence. In *Ring v. Arizona* (2002) the Court held the Sixth Amendment right to a jury trial includes for capital defendants a jury determination of any facts which increase the maximum punishment. While Florida allows jurors to find aggravating factors it does not require them to articulate which ones they find. It is also possible that the Court will determine whether jury verdicts that are not unanimous as to the finding of an aggravating circumstance can be imposed per the Eighth Amendment. Every other state and the federal system require juror unanimity as to the finding of an aggravating circumstance. Finally, Hurst alleges that the jury—rather than a judge—should have decided whether he is intellectually disabled. Since the Court held in *Atkins v. Virginia* (2002) that executing people who are intellectual disabled violates the Eighth Amendment states have taken varying approaches to the question of who determines intellectual disability.

In the consolidated cases of *Kansas v. Gleason*, *Kansas v. Reginald Carr*, and *Kansas v. Jonathan Carr* the Court will decide whether the Kansas Supreme Court properly concluded that juries must be affirmatively instructed that capital defendants do not have to prove factors mitigating against the death penalty beyond a reasonable doubt. Kansas law places "no evidentiary burden regarding the existence of mitigating circumstances on the defendant beyond the burden of production" so juries are "left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt." The Kansas Supreme Court held that the Carr brothers' death penalty sentencing should have been severed because the brothers' mitigating testimony was antagonistic toward each other. Non-severing wasn't harmless because "[t]he evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences."

Employment

The issue the Court will decide in *Green v. Donahoe* is whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation. On December 16, 2009, Postmaster Marvin Green signed a settlement agreement that he would resign and use accrued leave to receive pay until March 31, 2010. Then he would either retire or accept a position for

significantly less pay about 300 miles away. On February 9, 2010, he submitted his retirement papers. On March 22, 2010, he contacted an equal employment opportunity counselor about being constructively discharged in violation of Title VII of the Civil Rights Act. Federal employees must contact an EEO counselor about a discrimination charge within 45 days. The Tenth Circuit held that Green had 45 days from the last alleged act of discrimination (here December 16) not from when he resigned to contact the EEO office. The regulation which states federal employees "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" focus on discriminatory acts.

Meat-processing employees brought a collective (class) action under the Fair Labor Standards Act claiming that Tyson failed to pay them overtime for donning and doffing personal protective equipment and walking to and from their workstations. In *Tyson Foods v. Bouaphakeo* the Court will decide whether a representative sample may be used to calculate liability and damages for an entire class of workers and whether a class may include hundreds of members who weren't affected. The employees did time studies calculating the average donning, doffing, and walking time for employees working in the kill and fabrication departments. Tyson claims this method of calculating liability and damages "presume[s] that all class members are identical to a fictional 'average' employee" and amounts to "Trial by Formula," which the Supreme Court disavowed in *Wal-Mart Stores v. Dukes* (2011). The employees argued, and the Eighth Circuit agreed, that *Anderson v. Mt. Clemens Pottery* (1946), where the testimony of eight employees established the liability for 300 similarly situated workers, applies in this case. As to Tyson's claim that the class should have been decertified because it contained members who did not work overtime, the Eighth Circuit noted that Tyson "invited error" by requesting a jury instruction that the jury not compensate anyone not entitled to recovery.

Civil Procedure

In *Franchise Tax Board of California v. Hyatt** the Court may overrule *Nevada v. Hall* (1979), holding that a state may be sued in another states' courts without consent. If it doesn't, the Court will decide states must extend the same immunities that apply to them to foreign state and local governments sued in their state courts. The Franchise Tax Board (FTB) of California concluded that Gilbert Hyatt didn't relocate to Nevada when his tax returns indicated he did and assessed him $10.5 million in taxes and interest. Hyatt sued FTB in Nevada for fraud among other claims and in 2003. In *Franchise Tax Board of California v. Hyatt* the Supreme Court held that the constitution's Full Faith and Credit Clause does not require Nevada to offer FTB the full immunity that California law provides. A Nevada jury ultimately awarded Hyatt nearly $400 million in damages. The Nevada Supreme Court refused to apply Nevada's statutory cap on damages to Hyatt's fraud claim reasoning that Nevada has a policy interest in ensuring adequate redress for Nevada citizens that overrides providing FTB the statutory cap because California operates outside the control of Nevada.

In *Dollar General Corporation v. Mississippi Band of Choctaw Indians* John Doe, a thirteen-year-old tribe member, alleges that his supervisor sexually molested him while he was working as part of a job training program at a Dollar General located on a reservation. Doe sued Dollar General in tribal court alleging a variety of torts including negligent hiring, training, and supervision. In *Montana v. United States* (1981) the Court held that generally nonmembers may not be sued in tribal court except that "tribe[s] may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing." The question in this case is whether "other means" includes suing nonmembers for civil tort claims in tribal court. The lower court in this case determined that the tribal court had jurisdiction looking only at whether there was a commercial relationship between Dollar General and the tribe and a nexus between Dollar General's

participation in the job training program and Doe's tort claim. The Fifth Circuit concluded that even an unpaid internship creates a commercial relationship. As for a nexus the Court reasoned: "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business."

The issue in *Merrill Lynch v. Manning* is whether state law claims alleging that the "naked" short selling at issue in this case violated state law must be heard in federal court. The plaintiff-shareholders want to sue Merrill Lynch in state court for engaging in "naked" short selling which they claim violated New Jersey general securities fraud law, which is not as detailed as SEC regulation of "naked" short selling. Section 27 of the Securities Exchange Act gives federal district courts "exclusive jurisdiction" of all lawsuits to enforce the Exchange Act. Merrill Lynch argues that even though the plaintiffs in this case are alleging violations of New Jersey law their claim should be heard in federal court. The Third Circuit disagreed applying *Pan American Petroleum Corp. v. Superior Court of Delaware In & For New Castle County* (1961), where the Supreme Court considered an exclusive jurisdiction provision of the Natural Gas Act, "substantially identical" to Section 27 of the Securities Exchange Act. In *Pan American* the Court held that "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction." State court jurisdiction exists in this case because federal law doesn't have to be applied to decide it as plaintiffs are suing exclusively under New Jersey law.

To bring a lawsuit in federal court a plaintiff must be injured to have "standing" per Article III of the U.S. Constitution. But what if Congress allows plaintiffs who have suffered no concrete harm to sue based upon a mere violation of a statute? The Court will decide whether such plaintiffs have Article III standing in *Spokeo v. Robins*. Thomas Robins sued a website operator, Spokoe, for willfully violating the Fair Credit Reporting Act (FCRA) by publishing inaccurate personal information about him. The Ninth Circuit concluded that Robins had Article III standing to sue Spokoe in federal court though his only harms were anxiety and possible lost employment prospects. Robins had standing because the FCRA does not require a showing of actual harm when a plaintiff sues for willful violations. If Robbins wins, state and local governments may be sued under in federal court under the Fair Housing Act, the Americans with Disabilities Act, and the Driver's Privacy Protection Act even if the plaintiffs are unharmed.

Miscellaneous

The Court has agreed to decide whether 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.

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.

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 Supreme Court held 6-3 that defendants may not use frozen assets which are the fruits of criminal activities to pay for an attorney.