Supreme Court Term Preview: States and the Supreme Court

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After the Justices ruled on same-sex marriage, the Voting Rights Act, and affirmative action at the end of June, attorneys and court-watchers are anxiously awaiting their return in October. The highest court in the land has already agreed to hear cases affecting state government on everything from controversial topics such as legislative prayer and affirmative action to more esoteric subjects like the proper vehicle for age discrimination lawsuits and federal court abstention. Here are a few cases to watch for next term that could have a major impact on state governments.

In Schuette v. Coalition to Defend Affirmative Action, the Court will consider the constitutionality of a 2006 Michigan state constitutional amendment that prevents the state and its universities from giving “preferential treatment to any individual or group on the basis of race,” relevant here in the university admissions context. Unlike last term’s Fisher v. University of Texas at Austin, which deferred a ruling on the constitutionality of an affirmative action program, Schuette asks the Court to determine whether banning affirmative action altogether violates the Fourteenth Amendment’s Equal Protection Clause. As in Fisher, Justice Kagan has recused herself from the case, leaving eight Justices to consider the issues and making a broad pro-affirmative action ruling unlikely.

Town of Greece v. Galloway might redefine the Court’s approach to legislative prayer practices. Under the 1983 case Marsh v. Chambers, the Court held that a state legislature could hire a chaplain to deliver a prayer at the beginning of its sessions as long as the practice was not “exploited to proselytize or advance any one, or to disparage any other, faith or belief.” The Town of Greece’s official policy allows any person of any or no denomination to deliver an invocation at the beginning of town board meetings, and the Town does not approve or even
examine the prayer in advance. In practice, all but four invocations (two Jewish, one Baha’I, and one Wiccan) have been led by Christians. The Court will review a “totality of the circumstances” test employed by the Second Circuit to declare the Town’s practice an unconstitutional violation of the Establishment Clause and revisit its holding in *Marsh* for the first time in three decades. The case could impact many state bodies which begin their sessions with a prayer.

In *McCullen v. Coakley*, the Court will examine the constitutionality of a Massachusetts law that creates a 35-foot “buffer zone” around reproductive healthcare facilities into which demonstrators are not allowed to enter. A 2008 case, *Hill v. Colorado*, upheld a similar law against a First Amendment challenge because it (1) addressed a legitimate state concern for the safety and privacy of individuals using the facilities, (2) was “content-neutral” in that it applied to all demonstrators equally regardless of viewpoint, and (3) regulated the “time, place, and manner” of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. A broad ruling by the Justices could have sweeping consequences beyond this particular context, as state governments are continually challenged to strike a balance between free speech rights and the duty to protect their citizens from harassment at clinics, funerals, political events, and other locations. The State and Local Legal Center (SLLC) will file an *amicus* brief in this case.

*Environmental Protection Agency v. EME Homer City Generation* focuses on the scope of the Environmental Protection Agency’s (EPA) authority to regulate states contributing to air pollution in other states downwind. Under the Clean Air Act, the EPA sets air quality standards and the states create State Implementation Plans (SIPs) to achieve them. The EPA may impose its own Federal Implementation Plan (FIP) only if a state fails to submit or fails to correct a SIP rejected by the federal government. If the Court does not dismiss the case for a lack of federal jurisdiction, it will decide whether (1) an FIP may be implemented based on a state’s failure to submit an adequate SIP before the EPA had defined downwind pollution reduction targets, and (2) whether the Clean Air Act permits the EPA to define a state’s contribution to pollution downwind in terms of cost-effective pollution controls or solely in terms of the physical amount of pollution.

Harvey Levin claims he was fired for being too old. In *Madigan v. Levin*, the Supreme Court will decide whether he and others like him must follow the procedures of the federal Age Discrimination in Employment Act (ADEA) before initiating a lawsuit or whether terminated employees may go to court directly under the Fourteenth Amendment and 42 U.S.C. § 1983. The ADEA contains a comprehensive scheme that requires potential plaintiffs to file a complaint with the Equal Employment Opportunity Commission, which will attempt to resolve the issue informally before the former employee can sue. A § 1983 claim would circumvent this process and end up costing employers, including state governments, substantially more time and money.
Sprint Communications Company v. Jacobs arose out of a telecom dispute in Iowa. Sprint refused to pay another company’s intrastate access charge for a service and asked the Iowa Utility Board (IUB) for confirmation that it was under no obligation to do so. The IUB ordered Sprint to pay, and Sprint challenged the IUB’s decision in federal and state courts simultaneously. Under the Younger abstention doctrine, the Eighth Circuit ruled that the district court should not hear the case, if at all, until the state court review of the IUB decision was complete. The Supreme Court took the case to decide whether it mattered for the purposes of abstention that Sprint initially asked the IUB for approval—a remedial proceeding—or if Younger abstention only applies where the state brings a party before the court or administrative board in a coercive proceeding. Most remedial proceedings happen on the local level and involve zoning variances, the denial of gun permits, and the like. The question is whether a federal court should be able to review this type of decision immediately or whether it should abstain until the state proceedings have ended. The SLLC will file an amicus brief in this case.

Next term is already shaping up to be an exciting one for the states and the Court is likely to grant thirty or so more petitions before February. Although the cases set for argument so far might lack the glamour and media hype of this summer’s rulings on same-sex marriage, voting rights, and affirmative action, many of the issues before the Court deal with federalism principles that form the core of state governance. Whether the Justices will rule in favor of the states remains to be seen.