Supreme Court Review

Presented by the **State and Local Legal Center**
Hosted by the **National Association of Counties**
Featuring **Erin Murphy**, **Quin Sorenson**, and **Brent Kendall**

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About the SLLC

- SLLC files *amicus curiae* briefs before the Supreme Court on behalf of the "Big Seven" national organizations representing the interests of state and local government:
  - National Governors Association
  - National Conference of State Legislatures
  - Council for State Governments
  - National League of Cities
  - National Association of Counties
  - International City/County Management Association
  - U.S. Conference of Mayors
- Associate members: International Municipal Lawyers Association and Government Finance Officers Association

About the SLLC

- Since 1983 the SLLC has filed over 300 briefs
- This term the SLLC filed 7 briefs before the Supreme Court
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example!

Speakers

- **Erin Murphy**
- **Quin Sorenson**
- **Brent Kendall**

United States v. Texas
Factual Background

- In 2014, DHS established DAPA, a program that seeks to authorize roughly 4 million people living in the country illegally to stay, work, and receive benefits.
- Texas and other States sued to block implementation of DAPA, arguing that it violates the immigration statutes, should have gone through the notice-and-comment process, and violates the Take Care Clause.
- The district court held that the states had standing and temporarily enjoined DAPA on notice-and-comment grounds. The Fifth Circuit affirmed, and further held that DAPA likely is statutorily unauthorized.

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United States v. Texas
Factual Background (cont.)

- The government sought cert on three questions: whether the States have standing, whether DAPA is lawful, and whether notice and comment were required.
- The Court granted cert and, at the States' request, added a question asking whether DAPA violates the Take Care Clause.
- Oral arguments focused principally on standing and statutory authority, with the Chief Justice appearing to agree that the States had standing and Justice Kennedy appearing to agree that DAPA was unlawful and/or unconstitutional.

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United States v. Texas
Result & Looking Forward

- On June 23, an equally divided Court affirmed.
- That leaves continuing uncertainty both about State standing in the wake of *Massachusetts v. EPA* and about the executive power issues.
- The case was in a preliminary injunction posture, so the government could proceed to trial and, assuming a permanent injunction ultimately issues, seek cert again once the Court has nine Justices.
- The same issues also could arise through a few different vehicles, but whether the Court takes them likely will depend on whether it has nine Justices.

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Evenwel v. Abbott
Legal Background

- In 1962, the Supreme Court held in *Baker v. Carr* that "malapportionment" districting claims are judiciable.
- In 1964, the Court held that both congressional and state districts must be designed to achieve "equal" populations.
- In 1983, the Court established in *Brown v. Thompson* that deviations under 10% will be considered presumptively permissible, while deviations above 10% will not.
- The Court's decisions had not definitively resolved, however, the question of what measure(s) of population a State may use in seeking to achieve voter equality.

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Evenwel v. Abbott
Factual Background

- Texas, like all other states, currently draws its state legislative districts on the basis of total population, not eligible or registered voters.
- Texas's current state Senate map has a total-population deviation of only 8.04%. But if the baseline is changed to eligible or registered voters, the deviation exceeds 40%.
- Plaintiffs/Appellants are registered Texas voters who claim that the Senate map violates the Equal Protection Clause because the ultimate constitutional goal is "voter equality," which using total population does not achieve.

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Evenwel v. Abbott
Result & Looking Forward

- In a unanimous decision authored by Justice Ginsburg, the Court held that a State *may* draw its legislative districts based on total population rather than voter population. But the Court did not decide whether a State *must* use total population as its measure.
- Justices Thomas and Alito wrote concurrences arguing that the Court should leave it to States to decide whether to us total population or a voter-based measure.
- While the Court's decision paves the way for a State to try to use a voter-based measure, it is unclear whether any State will do so, or whether a majority of the Court would consider it constitutional if a State did.

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Friedrichs v. Calif. Teachers Ass'n
Legal Background

- In *Abood v. Detroit Bd. of Ed.* (1977), the Supreme Court held that requiring public school teachers to pay fees to a union does not violate the First Amendment.
- But *Abood* also held that the First Amendment does prohibit requiring public employees to pay fees that will be used for political or ideological purposes.
- Accordingly, many States currently allow school districts to unionize, so long as they ensure that nonmembers are able to avoid supporting the union's political activities.
- While *Abood* remains good law, two recent 5-4 decisions by the Court have called it into serious question.

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Friedrichs v. Calif. Teachers Ass'n
Factual Background

- Consistent with *Abood*, California allows its school districts to unionize, and to require employees who do not join the union to pay a "fair share service fee."
- While California teachers unions are prohibited from compelling nonmembers to support political activities, nonmembers must affirmatively opt out each year.
- The Court granted cert in *Friedrichs* to decide whether to overrule *Abood* or, in the alternative, to decide whether nonmembers must opt into, rather than opt out of, supporting political activities.

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Friedrichs v. Calif. Teachers Ass'n Result & Looking Forward

- Based on the Court's recent decisions in *Harris* and *Knox*, and the Justices' questions at oral argument, the Court likely was poised to overrule *Abood*.
- After Justice Scalia passed away, however, the Court affirmed by an equally divided Court.
- Petitioners filed a rehearing petition, which the Court held for over two months before ultimately denying at the end of the term without comment.
- With the Court divided 4-4 on the *Abood* issue, whether the Court will take it up again likely hinges on who fills the vacancy left by Justice Scalia.

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Utah v. Strieff
Legal Background

- To enforce the Fourth Amendment, the Court has held that evidence obtained as a result of unconstitutional police conduct must be suppressed when the societal benefits of suppression outweigh the costs.
- In *Brown v. Illinois*, the Court established three factors to guide this analysis: (1) the "temporal proximity" of the unlawful conduct and the discovery of evidence, (2) how "purposeful and flagrant" the unlawful conduct was, and (3) whether there were "intervening circumstances" between the unlawful conduct and the discovery.

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Utah v. Strieff
Factual Background

- Detective Douglas Fackrell was conducting surveillance on a Salt Lake City residence based on an anonymous drug tip. After observing Edward Strieff leave the residence, Fackrell detained him in a nearby parking lot.
- During the stop, Fackrell ran a warrant check and found an outstanding arrest warrant for a traffic violation.
- Fackrell then arrested Strieff, searched him, and found methamphetamine and drug paraphernalia.
- The Utah Supreme Court held that the evidence must be suppressed because there was no reasonable suspicion for the initial stop, and the Supreme Court granted cert.

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Utah v. Strieff
Result & Looking Forward

- In a 5-3 opinion by Justice Thomas, the Court reversed, holding that, absent flagrant police misconduct, the discovery of a valid arrest warrant suffices to attenuate the connection between an unconstitutional stop and a search incident to a lawful arrest.
- Justice Sotomayor authored a dissent joined in part by Justice Ginsburg, and Justice Kagan authored a dissent joined in full by Justice Ginsburg.
- Writing only for herself, Justice Sotomayor lamented that "people of color are disproportionate victims of th[e] type of" stop that led to discovery of the warrant here.

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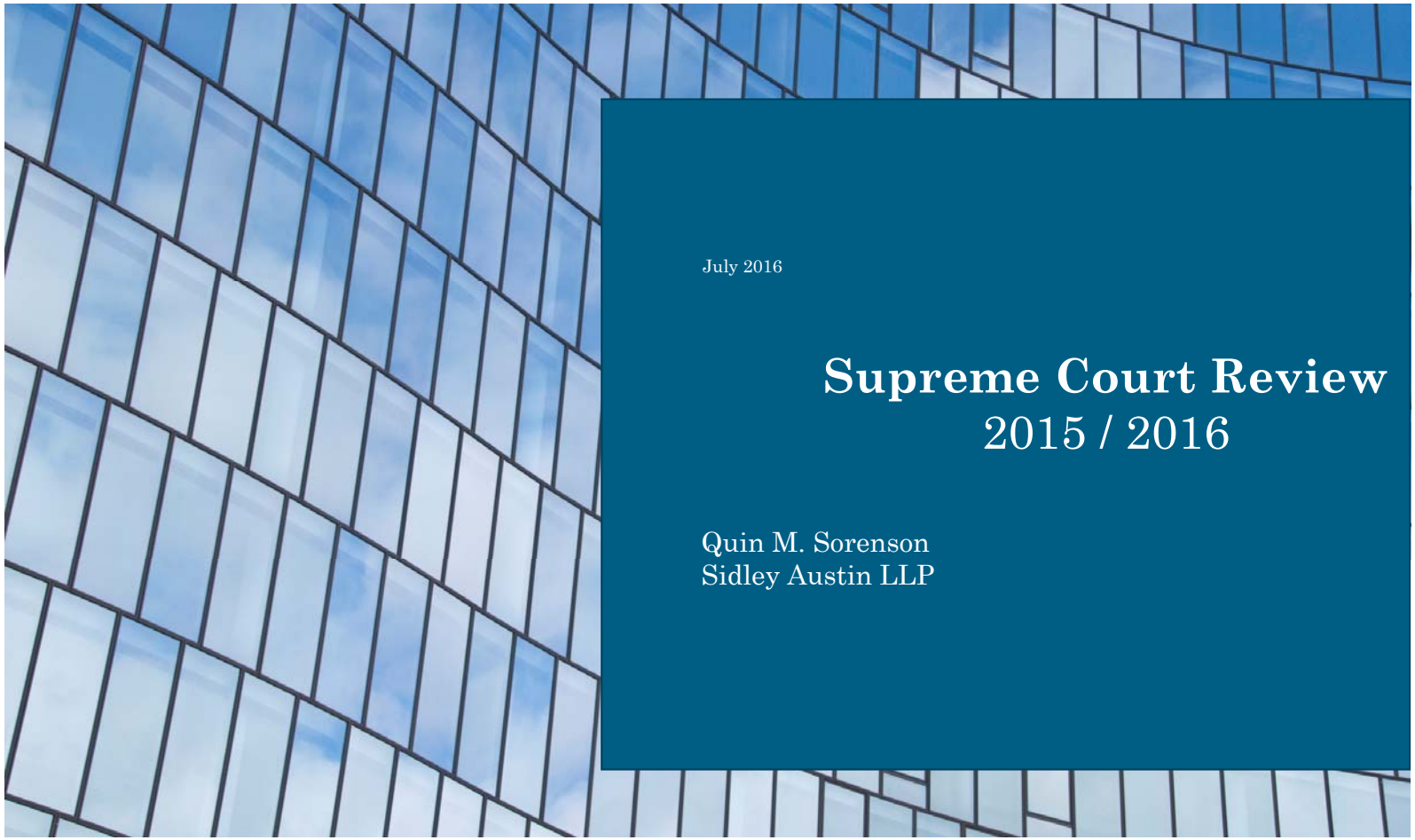

July 2016

Supreme Court Review
2015 / 2016

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SIDLEY
150 YEARS

Franchise Tax Board of California v. Hyatt

136 S. Ct. 1277 (April 19, 2016)

SIDLEY
150 YEARS

- Nevada resident sued California tax agency in Nevada state court, asserting various tort claims under NV law.
- Jury awarded Nevada resident $500 million, plus attorney fees.
- California agency argued that Nevada statutory cap / immunity for public entities should apply.
- Nevada Supreme Court disagreed, though it reduced the award to $1 million.
- Nevada Supreme Court reasoned that the California agency did not have anything stopping it from harassing Nevada residents; political accountability prevents similarly-situated Nevada agency from harassing Nevada residents.

- ***Question 1.*** Overrule *Nevada v. Hall*, 440 U.S. 410 (1979), which held that "one State . . . can open the doors of its courts to a private citizen's lawsuit against another State . . . without the other State's consent"?

  - ***Answer.*** 4-4 split, leaving *Hall* untouched and affirming Nevada Supreme Court on this issue. Justices' votes and reasoning were not explained.

  - Justice Scalia's death left the Court in a split.

- ***Question 2.*** Did Nevada's failure to afford Nevada statutory cap / immunity to California agency violate the Full Faith and Credit clause?

  - ***Answer.*** Yes, by 6-2 decision. *Breyer, joined by Kennedy, Ginsburg, Sotomayor, and Kagan.*

  - Nevada's reasoning disparages "California's own legislative, judicial, and administrative controls," and "cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground is hostile to another State."

- *Alito concurred in the judgment.* No opinion.

- *Roberts, with Thomas, dissented.* "The majority may think that Nevada is being unfair, but it cannot be said that the State failed to articulate a sufficient policy explanation for its decision to apply a damages cap to Nevada state agencies, but not to the agencies of other States."

Heffernan v. City of Paterson, New Jersey

136 S. Ct. 1412 (April 26, 2016)

SIDLEY
150 YEARS

- The city was in a mayoral race: the incumbent mayor had appointed Paterson's Chief of Police and the plaintiff's supervisor. The plaintiff (Heffernan) – a police officer – was friends with the challenger.

- The plaintiff's mother supported the challenger. Bedridden, the plaintiff's mom asked him to pick up a new yard sign for her from the challenger's campaign office.

- While picking up the new sign, the plaintiff spoke to the challenger's campaign manager and staff. Some members of the police force saw the plaintiff and "[w]ord quickly spread throughout the force."

- The next day, the plaintiff's supervisor demoted him – punishing him for his overt involvement in the challenger's campaign.

- But the plaintiff was not involved in the campaign; he simply picked up the sign for his mother.

- The plaintiff sued for violation of his First Amendment rights via 42 U.S.C. § 1983.

- ***Question.*** Does the First Amendment protect an employee from retaliation when the employer has mistakenly perceived the employee to have engaged in First Amendment conduct?

- ***Answer.*** Yes, by 6-2 decision. *Breyer, joined by Roberts, Kennedy, Ginsburg, Sotomayor, and Kagan.*

  - "[T]he government's reason for demoting [the plaintiff] is what counts here," even if the government made a factual mistake about the plaintiff's behavior.

  - Evidence of employer motive is key. The Court conceded that "it may be more complicated and costly for the employee to prove his case" given its holding.

- *Thomas, w/ Alito, dissented.* "A retaliation claim requires proving that [the plaintiff]'s protected activity was a cause-in-fact of the retaliation," and here it was not because he did not engage in protected activity. There was, therefore, no constitutional injury and no constitutional claim.

Whole Woman's Health et al. v. Texas Dept. of State Health Service

136 S. Ct. ____ (June 27, 2016)

SIDLEY
150 YEARS

- ***Question.*** Are the two core requirements of the Texas law an unconstitutional "undue burden
a woman's right to abortion?

- ***Answer.*** Yes, by 5-3 decision. *Breyer, joined by Kennedy, Ginsburg, Sotomayor, and Kagan.*

  - A preliminary issue was whether the plaintiffs' challenge was precluded by res judicata;
had brought a pre-enforcement unsuccessful challenge to other parts of the law. The C
held that the post-enforcement challenge was not precluded because (1) new facts that s
constitutional harm "will give rise to a new constitutional claim," and (2) the Court "has n
suggested that challenges to two different statutory provisions that serve two diffe
functions must be brought in a single suit," even if in the same regulatory scheme.

  - ***Admitting privileges requirement.*** Changed law from provider must have admit
privileges or working arrangement with a physician who has such privileges to provider n
have admitting privileges at a hospital 30 miles from where abortion is performed.

    - "We have found nothing in Texas' record evidence that shows that, compared to p
law . . . , the new law advanced Texas' legitimate interests in protecting wom
health."

    - The Court relied heavily on the district court's factual findings, expert testimony,
peer-reviewed medical studies for much of its analysis that health complications du
abortions of the type necessitating admitting privileges are very rare.

- ***Surgical center requirement.*** Changed law to require any abortion facility to meet "minimum standards . . . for ambulatory surgical centers" under Texas law. That incl specifications regarding size of the nursing staff, building dimensions, having a "full sur suite" comprising a set number of square feet, post-op facilities, and the like.

  - No evidence that any of this materially increases women's health.

  - The overall effect of requirement would be to cram women into seven or eight exis facilities, and would cause closure of Texas facilities that could not comply requirement, exacerbating the cramming.

- *Ginsburg concurred.* Wrote that abortion is so safe relative to other medical procedures restrictions to improve the mother's health are universally suspect.

- *Thomas dissented.* Wrote that third-party standing should be rejected, would overrule *Roe,* would do away with tiers of scrutiny.

- *Alito, joined by Roberts and Thomas, dissented.* Wrote that claims are barred by res judicata, Texas law satisfied "undue burden" standard, and that Court should preserve law and s unconstitutional parts.

Army Corps of Engineers v. Hawkes C

Holding: Landowners can bring court challenges when federal environ
officials determine that property is subject to Clean Water Act regulatio
They aren't required to first go through the lengthy and expensive perm
process before seeking judicial review of federal jurisdiction.

- Justices unanimously rejected position of Army Corps on when the c
  should be an available venue. Hawkes sought to conduct peat mining
  Minnesota. Two sides disagree on wetland's nexus to federal waters.

Army Corps of Engineers v. Hawkes C

- State and local government groups backed Hawkes, citing interests as landowners and local regulators.
- Hawkes case focused on judicial review of Army Corps jurisdictional determinations. The case followed Sackett v. EPA (2012), which dealt wit challenges to compliance orders. That ruling also sided with landowners.

Army Corps of Engineers v. Hawkes C

- Bigger Clean Water Act issues are on the horizon as courts consider challenges to the EPA's "Waters of the United States" rule.
- Effects still felt from muddled Supreme Court ruling in Rapanos (2006)
- Justice Kennedy, the pivotal figure in Rapanos, pens Hawkes concurren that cites "troubling questions" regarding the federal government's Clean Act powers.

McDonnell v. U.S.

Holding: To convict a public officeholder of a federal bribery offense, prosecutors must show a public official took a gift or payment and in exchange engaged in a formal exercise of governmental power, or agre do so.

- Former Gov. McDonnell argued he did nothing more than arrange meetings and attend events for benefactor. Justice Department alle he used power of office in exchange for gifts, loans.

McDonnell v. U.S.

- Public corruption prosecutions likely will become more difficult for the Justice Department.
- A "distasteful" case vs. the realities of politicians advocating for suppor constituents.
- Post-McDonnell, more room to sell access to highest bidder?

McDonnell v. U.S.

- Justices move to make bribery law less vague, say they are still giving "an room" to prosecutors.
- Responsibility shifts to the states.
- Good government advocates cite need for strong state and local ethics ru
- Virginia tightened its gift rules after the McDonnell saga.

Fisher v. University of Texas

Holding: Universities can continue to use racial preferences in admissions, so long a program is designed in a narrow way to ensure the educational benefits of diversity campus. The UT admissions program does not violate the Constitution's guarantee equal protection.

- Courts owe deference to universities as they pursue goals likely student body div that are central to a school's "identity and educational mission."
- Justice Kennedy's (reluctant?) approval of an affirmative action program came as something of a surprise.

Fisher v. University of Texas

- With Kennedy in the majority, the decision could end long push by conservatives to roll back affirmative action.
- But court warns that UT's race-conscious admissions policy today may n necessarily be acceptable in the future. Schools have an "ongoing obliga to reflect on admissions criteria, including the need for considering race.

Fisher v. University of Texas

- On issues of race, divisions on the Supreme Court run deep. Justice Ali
  51-page dissent calls the court's ruling "remarkably wrong."
- A blockbuster ruling in a term where several other big cases fizzled out
  Scalia.
- Other lawsuits remain on the horizon targeting Harvard, University of N
  Carolina.

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