Supreme Court Review Summary for State and Local Government 2016

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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 filed an *amicus* brief.

"Big" Cases

In *Friedrichs v. California Teachers Association*, the Court issued a 4-4 opinion affirming the lower court's decision to not overrule *Abood v. Detroit Board of Education* (1977). In *Abood*, the Supreme 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. Since union may not discriminate between members and nonmembers in performing these functions, agency fees are allowed to ensure nonmembers aren't "free-riders." In two recent cases, *Knox v. SEIU* (2012), and *Harris v. Quinn* (2014), in 5-4 opinions written by Justice Alito and joined by the other conservative Justices (including Justice Scalia and Justice Kennedy), the Court was very critical of *Abood*. The Court heard oral argument in *Friedrichs* in January before Justice Scalia died, and the five more conservative Justices seemed poised to overrule *Abood*. Justice Scalia, who ultimately didn't participate in this case, likely would have voted to overrule *Abood*.

In *Reynold v. Sims* (1964), the Court established the principle of "one-person, one-vote" requiring state legislative districts to be apportioned equally. The question in *Evenwel v. Abbott* is what population is relevant—total population or voter-eligible population. The maximum total-population deviation between Texas Senate districts was about 8 percent; the maximum voter-eligible population deviation between districts exceeded 40 percent. The unanimous opinion concluding Texas may redistrict using total population is "based on constitutional history, this Court's decisions, and longstanding practice." Section 2 of the Fourteenth Amendment explicitly requires that the U.S House of Representatives be apportioned based on

total population. "It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." There has been no previous cases alleging a state or local government failed to comply with "one-person, one-vote" where the Court determined if a deviation was permissible based on eligible- or registered-voter data. States and local governments redistricting based on total population is a settled practice.

The Supreme Court split 4-4 in *United States v. Texas* on whether the President's deferred action immigration program violates federal law. As a result, the Fifth Circuit's nationwide temporary stay of the program remains in effect. The Deferred Action for Parents of Americans (DAPA) program allows certain undocumented immigrants who have lived in the United States for five years, and either came here as children or already have children who are U.S. citizens or permanent residents, to lawfully stay and work temporarily in the United States. Before the Fifth Circuit several states challenged DAPA as violating the Administrative Procedures Act (APA) notice-and-comment requirement and claimed it is arbitrary and capricious in violation of the APA. The Fifth Circuit concluded the states were likely to succeed on both claims. It reasoned DAPA is a substantive rule, requiring the public to have the opportunity to offer comments, not a policy statement. The Fifth Circuit concluded DAPA is likely arbitrary and capricious because it is "foreclosed by Congress's careful plan" in the Immigration and Nationality Act for "how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization." The United States had also argued that the states lacked "standing" to challenge DAPA. The Fifth Circuit disagreed, reasoning that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing.

In *Whole Women's Health v. Hellerstedt*, the Court held 5-3 that Texas's admitting privileges and ambulatory surgical center requirements (ASC) create an unconstitutional undue burden on women seeking abortions. Texas argued these two requirements would "protect the health of women who experience complications from abortions." According to the Court, nothing in the record indicated that the admitting privileges requirement advanced women's health, because very few women who receive abortions need to be hospitalized. The admitting privileges requirement placed a "substantial burden" on a woman's ability to get an abortion because about half of Texas's clinics closed as a result. These closures meant the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." Regarding the ASC requirement, the Court concluded that it does not benefit patients. For those who have abortions via medication, complications almost always arise only after the patient has left the facility. Also, Texas does not require that much riskier procedures like child birth and colonoscopies be performed in an ASC. The Court concluded the ASC requirement places a substantial obstacle in the path of women seeking an abortion because it will further reduce the number of abortion clinics (initially about 40) to seven or eight. "Common sense" suggests the remaining clinics will not be able to keep up with demand.

In *Fisher v. University of Texas at Austin*, the Court ruled 4-3 that the University of Texas at Austin's race-conscious admissions program is constitutional. Per Texas's Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, filling up to 75 percent of the class. Other students are admitted based on a combination of their grades, test scores, and "personal achievement index." Race is considered as one factor in one of the two components of an applicant's "personal achievement index." UT Austin denied Abigail Fisher, a white Texan who did not graduate in the top ten percent of her class, admission. She sued claiming the university's use of race in admissions violates the Fourteenth Amendment's Equal Protection Clause. The Court rejected Fisher's four arguments that UT Austin's admissions policy isn't narrowly tailored. Fisher first claimed the university should have specified more precisely what level of minority enrollment would constitute a "critical mass." The Court responded that critical mass isn't a number and that the university articulated "concrete and precise goals" about the "educational values it [sought] to realize" through its race-conscious admissions process. Second, the Court rejected the argument that the university already achieved a critical mass of minority students using the Top Ten Percent Plan. Between 1996 and 2002, when race wasn't a factor in admissions, minority enrollment stagnated. The Court disagreed with Fisher's argument that the use of race had only a minimal impact on minority enrollment. Between 2003 and 2007, when race was considered, Hispanic and African-American enrollment increased 54 percent and 94 percent respectively. Finally, the Court rejected Fisher's argument that UT Austin could have used numerous race-neutral means of achieving more diversity. The Court noted that the university tried many of her suggestions but they didn't increase minority enrollment.

The Affordable Care Act (ACA) regulations require employers offering health insurance to cover certain contraceptives unless employers object on religious grounds. Religious nonprofits claim that submitting a form to their insurer or the federal government saying they object to providing contraception coverage on religious grounds violates the Religious Freedom Restoration Act. After oral argument the Court asked the religious nonprofits and the federal government to brief whether contraceptive coverage could be provided to the nonprofits' employees, through the nonprofits' insurance companies, without any notice from the nonprofits. Both parties agreed this is possible. In light of this agreement, the Court didn't decide the merits of *Zubik v. Burwell*. While back in front of the lower courts, the parties "should be afforded an opportunity to arrive at an approach going forward that accommodates [the nonprofits'] religious exercise while at the same time ensuring that women covered by [the nonprofits'] health plans 'receive full and equal health coverage, including contraceptive coverage.'"

Preemption

In a unanimous opinion in *Hughes v. Talen Energy Marketing*,* the Court held that Maryland's program which guarantees a power plant generator a contractual rate, rather than the "clearing price" wholesale rate set at a federally-approved capacity auction, is preempted by the Federal Power Act (FPA). Per the FPA, the Federal Energy Regulatory Commission (FERC) has the authority to regulate interstate wholesale rates. Throughout the electricity grid, through Regional Transmission Organizations (RTOs), FERC administers capacity auctions. Owners of capacity

bid to sell their capacity on the auction for the next three years. The RTO accepts all bids, beginning with the lowest, until capacity is satisfied. All accepted capacity sellers receive the highest accepted bid rate, called the "clearing price." Maryland electricity regulators were concerned that the capacity auction wasn't encouraging sufficient development of new in-state generation. So it offered the successful bidder, CPV, a 20-year contract where it would receive a set contract price rather than the "clearing price." The Court concluded that Maryland's program amounts to wholesale rate setting and is preempted by the FPA. "Exercising [its] authority [over wholesale rates], FERC has approved the . . . capacity auction as the sole ratesetting mechanism for sales of capacity . . . and has deemed the clearing price per se just and reasonable. Doubting FERC's judgment, Maryland . . . requires CPV to participate in the . . . capacity auction, but guarantees CPV a rate distinct from the clearing price. By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf."

In a 6-2 decision in *FERC v. Electric Power Supply Association*, the Court ruled that the Federal Energy Regulatory Commission (FERC) has the authority to regulate wholesale "demand response" and that demand response bidders may receive the same compensation as electricity producers. "Demand response" is a practice in which operators in wholesale markets pay electricity consumers to not use power at certain times. Per the Federal Power Act, FERC regulates wholesale rates of electricity but states regulate retail rates. Electric Power Supply Association (EPSA) argued that through demand response FERC is "effectively" setting retail prices because when a consumer is deciding whether to buy electricity at retail, the consumer will now consider both the cost of making the purchase *and* the cost of forgoing a demand response payment. The Court disagreed stating that "the rate is what it is": "the price paid, not the price paid plus the cost of a foregone economic opportunity." No matter what they bid, successful demand response bidders receive the wholesale rate. EPSA also argued that demand response bidders are receiving a "double-payment" and that they should only receive the wholesale price less the savings they net by not buying electricity on the retail market. FERC reasoned that demand response bidders should receive the same compensation as electricity generators because they are providing the same value. The Court agreed, concluding that FERC's judgment wasn't "arbitrary and capricious," because regulating energy is technical and FERC provided reasons supporting its position and responded to EPSA's proposed alternative.

The Court held 6-2 in *Gobeille v. Liberty Mutual Insurance Company*,* that the Employee Retirement Income Security Act (ERISA) preempts Vermont's all-payers claims database (APCD) law. Seventeen other states collect health care claims data. ERISA preempts all state laws that "relate" to any employee benefits plan. Vermont's APCD law requires health insurers to report to the state information related to health care costs, prices, quality, and utilization, among other things. The Court concluded ERISA preempts Vermont's APCD law "to prevent States from imposing novel, inconsistent, and burdensome reporting requirements on plans." Justice Ginsburg, joined by Justice Sotomayor, dissented. She cited the State and Local Legal Center *amicus* brief which, in her words, pointed out that APCD laws "serve compelling interests, including identification of reforms effective to drive down health care costs, evaluation of relative utility of different treatment options, and detection of instances of discrimination in the provision of care."

Per a general federal court jurisdiction statute, Section 1331, federal courts have jurisdiction over all civil lawsuits "arising under" federal law. Section 27 of the Securities Exchange Act provides federal court jurisdiction for all suits "brought to enforce" the Exchange Act. In *Merrill Lynch v. Manning*, the Court held that "arising under" and "brought to enforce" mean the same thing. Shareholders sued Merrill Lynch in New Jersey state court for engaging in "naked" short selling of stock. The shareholders sued only under New Jersey law, but their complaint mentioned a relevant federal regulation and suggested that Merrill Lynch violated it. Merrill Lynch didn't dispute that federal courts had no jurisdiction to decide this case under Section 1331 but claimed that the "brought to enforce" language of Section 27 of the Exchange Act is broader than Section 1331. The Court disagreed, concluding that the language of the two statutes should be interpreted identically based on precedent. More specifically, the Court noted that Section 27's language "stops short of embracing any complaint that happens to mention a duty established by the Exchange Act."

In *DIRECTV v. Imburgia*, the Court held 6-3 that a California state court interpretation of California law, that class action arbitration is unenforceable, is preempted by the Federal Arbitration Act (FAA). Two DIRECTV customers sued DIRECTV claiming its early termination fees violate California law. Their service agreement stated that all claims would be resolved by arbitration and that class arbitration would be prohibited. However, if the "law of your state" made waiver of class arbitration unenforceable, the entire arbitration provision was unenforceable. In 2008, when the DIRECTV customers sued DIRECTV, a 2005 California Supreme Court case, *Discover Bank v. Superior Court*, holding class-arbitration waivers unenforceable, was good law. But in 2011, in *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held that the FAA preempted and invalidated that ruling. The U.S. Supreme Court ruled that the FAA preempts the California Court of Appeals' interpretation of California law. While the Court agreed that parties could chose to have contracts governed by pre-*Concepcion* California law (or the law of Tibet or pre-revolutionary Russia), the ordinary meaning of "law of your state" is *valid* state law.

Redistricting

In *Harris v. Arizona Independent Redistricting Commission*, the Court held that Arizona's redistricting plan, which had a total population deviation among districts of 8.8 percent, wasn't unconstitutional. Section 5 of the Voting Rights Act (VRA) requires that redistricting plans in "covered" jurisdictions don't worsen the position of minority voters. All the commissioners agreed that to obtain preclearance from the Department of Justice under the VRA, Arizona's plan had to contain at least ten districts where minority voters are able to elect their candidate of choice. A majority of the commissioners agreed to keep a higher population of minority voters in District 8, which leans Republican, so that the Commission might be able to claim District 8 was an eleventh "ability-to-elect" district. A group of Arizona voters claimed that the deviations from "absolute equality" reflect the fact that the Commission was trying to help the Democratic Party by making changes to District 8. The Court assumed, but did not decide, that partisanship is an illegitimate redistricting factor. Regardless, the Court concluded that the deviations

predominately reflected the Commissions efforts to comply with the VRA, not to help a political party.

The Court held unanimously in *Wittman v. Personhuballah* that three members of Congress from Virginia lacked "standing" to intervene in a lawsuit alleging that Virginia's redistricting plan resulted in an unconstitutional racial gerrymander. When the Virginia legislature redrew congressional voting districts following the 2010 census it increased the number of minority voters in District 3, its only majority-minority district. A federal district court twice concluded that Virginia's plan amounted to an unconstitutional gerrymander. Neither time did Virginia appeal, but members of Congress intervened claiming that rejecting Virginia's redistricting plan harmed their reelection prospects. The Court concluded that none of the three intervenors in this case have standing. One legislator ultimately told the Court he would not be affected by its decision; the other two legislators failed to identify evidence indicating rejecting Virginia's plan would harm them.

In *Shapiro v. McManus*, the Court held unanimously that a three-judge court must be convened to decide a constitutional challenge to a redistricting plan even if the judge to which the request was made doesn't think the challenger will win. Stephen Shapiro, dissatisfied with Maryland's "crazy-quilt gerrymandering," sued Maryland, arguing its congressional redistricting plan violated his First Amendment right of political association. Per federal law, three judges "shall be convened" to hear challenges to the constitutionality of a congressional or statewide redistricting plan "unless [the judge whom the request for three judges is made] determines that three judges are not required." The Court reasoned that "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." The "unless [the judge whom the request for three judges is made] determines that three judges are not required" language means that the judge receiving the request for a three-judge court merely needs to preliminarily examine the complaint to make sure it alleges a claim regarding whether a district is constitutionally apportioned (even if the claim doesn't seem particularly winnable).

Crime and Punishment

The Court held 6-3 in *Montgomery v. Louisiana* that juvenile offenders sentenced to life in prison without parole before *Miller v. Alabama* (2012) was decided may have their sentences reviewed. In *Miller*, the Court held that a juvenile may not be sentenced to life in prison without parole "absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." Per *Teague v. Lane* (1989), new substantive rules of constitutional law (as opposed to procedural rules) apply retroactively. Substantive rules prohibit a certain category of punishment for a class of defendants to be applied for certain offenses. While the Court noted that some juveniles could still be sentenced to life in prison without parole, the vast majority cannot following *Miller*. So, *Miller*'s rule was substantive. The Court suggested that rather than relitigating sentences, states may allow relevant juvenile offenders to be eligible for parole.

In a 6-2 decision in *Luis v. United States*,* the Court ruled that the Sixth Amendment right to counsel includes allowing a criminal defendant to use *untainted* assets to hire an attorney, rather

than freezing them for potential forfeiture to the government after conviction. Sila Luis was charged with fraudulently obtaining nearly $45 million in Medicare funds. She claimed she has a Sixth Amendment right to use the untainted portion of the $2 million in assets remaining in her possession to hire an attorney of her choice. The Court agreed in a plurality opinion. It distinguished two previous cases where it held that a post-conviction defendant (*Caplin & Drysdale v. United States* (1989)) and a pre-trial defendant (*United States v. Monsanto* (1989)) could not use *tainted* assets to pay an attorney. "The distinction between [tainted and untainted assets] is…an important one, not a technicality. It is the difference between what is yours and what is mine." The Court then applied a balancing test weighing the defendant's "fundamental" right to assistance of counsel with the government's interest in punishment through criminal forfeiture and victims' interest in restitution. The balance favored the interest of the accused because the interests in criminal forfeiture and restitution aren't constitutionally protected.

In an 8-1 decision in *Kansas v. Carr*, the Court reversed the Kansas Supreme Court's ruling, overturning a jury's death sentence for the Carr brothers and Sidney Gleason in an unrelated murder. The Court held that the Eighth Amendment does not require juries deciding capital cases to be informed that mitigating circumstances need not be proved beyond a reasonable doubt, and the joint sentencing of the Carrs didn't violate the Eighth Amendment's right to an "individualized sentencing determination." Reginald and Jonathan Carr were convicted of killing four people in the "Wichita Massacre"; one intended victim survived because her hair clip deflected a bullet. The Carr brothers argued that the "juxtaposition" of aggravating and mitigating circumstances in the jury instruction may have caused the jury to believe that mitigating factors also had to be proved beyond a reasonable doubt. The Court disagreed. Prior precedent doesn't require juries to be informed that mitigating circumstances need not be proved beyond a reasonable doubt. Even assuming it would be unconstitutional to require the defense to prove mitigating circumstances beyond a reasonable doubt, the jury instructions in this case make clear that mitigating circumstances must merely be "found to exist." The Court concluded it was "beyond the pale" for the Carr brothers to claim that the other's mitigating evidence "so infected" the jury's consideration of the other's sentence that imposing the death penalty was a denial of due process. The jury was instructed in multiple ways to give separate consideration to each defendant.

In *Hurst v. Florida*, the Court ruled 8-1 that Florida's death penalty sentencing scheme is unconstitutional because it allows the judge, instead of requiring the jury, to impose the death sentence. In 2000, in *Apprendi v. New Jersey*, the Court held that any factual determination that exposes a defendant to a punishment greater than that authorized by a jury's guilty verdict must be determined by the jury. In *Ring v. Arizona* (2002), the Court held that Arizona's capital sentencing scheme violated *Apprendi* because it allowed the judge to find facts necessary to impose the death sentence. Florida's scheme worked similar to Arizona's. A jury verdict for first-degree murder would result in life in prison without parole unless a judge finds facts supporting a death sentence. But in Florida, unlike Arizona, the jury attends the sentencing evidentiary hearing and renders an "advisory verdict." Although the jury does not have to specify any factual basis for its recommendation, the judge must give the recommendation "great weight." The Court opined that advisory jury verdicts do not make Florida's sentencing scheme

constitutional, because Florida juries don't make specific factual findings on aggravating or mitigating factors and their recommendations aren't binding.

In a 7-1 opinion the Court held in *Foster v. Chatman* that the prosecutor's decision to exercise preemptory strikes against all four prospective black jurors was racially motivated in violation of *Batson v. Kentucky* (1986). Timothy Tyrone Foster, who is black, was sentenced to death for murdering, sexually assaulting, and burglarizing an elderly white woman. The jury was all-white; the prosecutor peremptorily struck all four prospective black jurors. Through a public records request, Foster gained access to the prosecutor's trial file. Among other things, on the jury venire list the names of the black jurors were highlighted in green and a key indicated that green represented black. The prosecution's investigator recommended a particular black juror if one had to be selected. Two different lists of qualified jurors indicated that all black jurors were a "no." The Court concluded that the prosecutor had a discriminatory purpose in striking all four prospective black jurors, pointing out there was compelling evidence that black jurors were struck for particular reasons where white jurors were allowed to serve. "But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution file."

The Court ruled 5-3 in *Williams v. Pennsylvania* that when a judge had significant prior personal involvement as a prosecutor in a critical decision in the defendant's case, the judge must recuse himself or herself. District attorney Castille approved a subordinate prosecutor's request to seek the death penalty against Terrance Williams. Williams was accused of a robbery and murder which he denied, on the stand, participating in. Almost 30 years later Williams's co-conspirator revealed that he had informed the prosecutor on the case that Williams and the victim had a sexual relationship that was the motive for the murder. A lower state court threw out Williams's execution after discovering extensive prosecutor misconduct. Meanwhile, Castille had become Chief Justice of the Pennsylvania Supreme Court, which was tasked with reviewing the lower court's decision. Castille refused to recuse himself. The U.S. Supreme Court concluded Castille's decision not to recuse was unconstitutional. In *In re Murchison* (1955), the Court held that an "unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator." The facts in *Murchison* are different than the facts of this case, but "the constitutional principles explained in *Murchison* are fully applicable where a judge ha[s] a direct, personal role in the defendant's prosecution."

Fourth Amendment

In *Birchfield v. North Dakota*,* the Court held 5-3 that states may criminalize an arrestee's refusal to take a warrantless *breath* test. If states criminalize the refusal to take a *blood* test, police must obtain a warrant. Per the search-incident-to-arrest exception, police officers are allowed to search an arrestee's person, without first obtaining a warrant, to protect officer safety or evidence. To determine if this exception applies, the Court weighed the degree to which the search "intrudes upon an individual's privacy" with the need to promote "legitimate government interests." The Court concluded the privacy intrusion of breath tests was minimal but the privacy intrusion of blood tests was not. "[W]hile humans exhale air from their lungs many times per

minute, humans do not continually shed blood." For this reason the Court concluded if states criminalize the refusal to take a *blood* test, police must obtain a warrant.

A police officer stopped Edward Streiff after he left a suspected drug house. The officer discovered Streiff had an outstanding warrant, searched him (legally), and discovered he was carrying illegal drugs. The Court held 5-3 in *Utah v. Strieff* that even though the initial stop was illegal, the drug evidence could be admissible against Streiff in a trial. The attenuation doctrine is an exception to the exclusionary rule. Per that doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct [here the illegal stop] and the evidence is remote or has been interrupted by some intervening circumstance [here finding the warrant]." The Court first concluded that the discovery of a valid, pre-existing, untainted arrest warrant triggered the attenuation doctrine. The Court, applying a three-factor test articulated in *Brown v. Illinois* (1975), then concluded that the discovery of the warrant "was [a] sufficient intervening event to break the causal chain" between the unlawful stop and the discovery of drugs. Proximity in time between the initially unlawful stop and the search favored suppressing the evidence. But the other factors in this case, "intervening circumstances" and the lack of purposeful and flagrant police misconduct, weighed strongly in favor of the State. The warrant was an intervening factor in this case because it was valid, it predated the stop, and it was entirely unconnected to the stop.

Employment

In *Heffernan v. City of Paterson, New Jersey*,* the Court held 6-2 that a public employer violates the First Amendment when it acts on a *mistaken* belief that an employee engaged in First Amendment protected political activity. Police officer Jeffery Heffernan worked in the office of the police chief. The mayor was running for reelection against a friend of Heffernan's, Lawrence Spagnola. Heffernan was demoted after another member of the police force saw Heffernan picking up a Spagnola yard sign and talking to the Spagnola campaign manager and staff. Heffernan was picking up the sign for his bedridden mother. The Court agreed that Heffernan has a First Amendment claim even though he engaged in no political activity protected by the First Amendment, because the City's motive was to retaliate against Heffernan for political activity. In *Waters v. Churchill* (1994), the employer mistakenly believed the employee engaged in personal gossip rather than protected speech on a matter of public concern. The Court upheld the employee's dismissal focusing on the employer's motive.

In *CRST Van Expedited v. EEOC*, the Court ruled that employers who prevail in Title VII employment discrimination cases may recover attorney's fees if they are able to "rebuff" employee's claims for any reason—including reasons not related to the merits of the claims. The lower court dismissed the sexual harassment claims of 67 women because the Equal Employment Opportunity Commission (EEOC), who represented the women, failed to meet its statutory obligation to investigate the allegations and conciliate with their employer, CRST Van Expedited. The lower court concluded that for CRST to be a prevailing party eligible to recover attorney's fees, the court would have had to have ruled "on the merits" of the employees' claims, which it did not. The Court disagreed, concluding that employers may prevail "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." "Common sense" indicates that an employer may prevail regardless of whether the case is disposed of "on the

merits." An employer's objective is to rebuff an employee's claim, "irrespective of the precise reason for the court's decision."

In *Green v. Brennan*, the Court held 7-1 that the clock begins to run on when an employee must start the process of bringing a constructive discharge case, after the employee resigns. Nonfederal employees have up to 300 days "of the matter alleged to be discriminatory" to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The lower court held that the timeline to contact the EEOC is triggered by the employer's last discriminatory act. The Court noted in its analysis that the "matter alleged to be discriminatory" language in the Title VI regulations is "not particularly helpful" in determining when the timeline is triggered. But the standard rule for when statutes of limitations begin to run is when a plaintiff has a "complete and present cause of action." Plaintiffs can't bring constructive discharge claims until they resign. The Court also noted that nothing in the regulations indicate the standard rule should be displaced, and starting the clock on complaining to the EEOC before a plaintiff can sue makes little sense.

In *James v. City of Boise*, the Court reversed the Idaho Supreme Court's refusal to follow Supreme Court precedent. Per 42 U.S.C. §1988, courts have discretion to grant attorney's fees to prevailing parties in civil right lawsuits filed under 42 U.S.C. §1983. In *Hughes v. Rowe* (1980), the Court interpreted §1988 to permit prevailing defendants to only recover in suits if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." The Idaho Supreme Court concluded it was not bound by *Hughes* and awarded attorney's fees to a prevailing defendant without first determining whether the plaintiff's lawsuit was frivolous. The Court reversed the Idaho Supreme Court's decision, reminding it that it is bound by the Supreme Court's interpretation of federal law.

Civil Procedure

In *Franchise Tax Board of California v. Hyatt*,* the Court held 6-2 that the Constitution's Full Faith and Credit Clause requires state courts to apply a damages cap, which applies to the state, to foreign states and local governments sued in its court. Gilbert Hyatt sued the California Franchise Tax Board in Nevada state court alleging a variety of claims related to what he described as abusive audit and investigation practices. A Nevada jury ultimately awarded Hyatt nearly $500 million in damages and fees. The Nevada Supreme Court refused to apply Nevada's $50,000 statutory cap, which applies to Nevada state and local governments, to damages related to Hyatt's fraud claim. CFTB claimed this refusal violates the Full Faith and Credit Clause. Per the Constitution, "Full Faith and Credit" must be "given in each State to the public Acts . . . of every other State." The Court concluded that the Full Faith and Credit Clause requires Nevada state courts to apply the damages cap that it would apply to Nevada to CFTB. The Full Faith and Credit Clause prohibits a state from adopting a "policy of hostility to the public Acts" of another state. Nevada's rule allowing damages awards of over $50,000 against foreign states and local governments is "not only 'opposed' to California law [which provides total immunity], it is also inconsistent with the general principles of Nevada immunity law [which grants the state immunity over $50,000]."

The Court sent *Spokeo v. Robins* back to the lower court to determine whether Thomas Robins suffered a "concrete" harm and therefore had "standing" to sue. The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of information used for employment purposes. Robins sued a "people search engine," Spokoe, for willfully violating the FCRA by publishing inaccurate personal information about him. Spokoe described Robins as holding a graduate degree and being relatively affluent though neither are true. The Court concluded 6-2 that the Ninth Circuit failed to determine whether Robins suffered a concrete harm, which is a requirement of "standing." While injuries may be intangible and even the mere risk of real harm can satisfy the concreteness requirement, just because a statute grants a person a right and purports to allow them to sue does not mean a person has been injured-in-fact; they must still have suffered a concrete harm. A bare procedural violation, divorced from any concrete harm (such as an incorrect zip code), will fail to provide the basis for "standing."

In *Tyson Foods v. Bouaphakeo*, the Court held 6-2 that pork processing employees could bring a collective (class) action lawsuit using "representative evidence" put together by an industrial relations expert averaging donning and doffing time by position based on 744 videotaped observations. If each class member could have relied on a representative sample to establish liability in an individual lawsuit, that sample may be relied on to prove class wide liability. This is the reason the Court opined that the use of a representative sample is acceptable here: "In this suit [the employees] sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the] study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing." The Court also stated that while the question of whether uninjured class members may receive damages is one of "great importance," it is not fairly presented in this case, because the damages award has not yet been disbursed.

The Court's 4-4 ruling in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, leaves in place the Fifth Circuit's ruling that in some instances nonmembers of Indian tribes (including state and local governments) can be sued in tribal court (as opposed to state or federal court) for tort (civil wrongdoing) claims. 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 was whether "other means" include suing nonmembers for civil tort claims in tribal court. The Fifth Circuit determined that the tribal court had jurisdiction in this case, looking only at whether there was a commercial relationship between Dollar General and the tribe, and whether there was 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 Fifth Circuit 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."

Miscellaneous

In *United States Army Corp of Engineers v. Hawkes*,* the Court ruled unanimously that an approved jurisdictional determination that property contains "waters of the United States" may be immediately reviewed in court. Per the Clean Water Act, "waters of the United States" (WOTUS) are federally regulated. Property owners may seek an approved jurisdictional determination (JD) from the US Army Corp of Engineers definitively stating whether such waters are present or absent on a particular parcel of land. Per the Administrative Procedures Act, judicial review may be sought only from final agency actions. Per *Bennett v. Spear* (1997), agency action is final when it marks the consummation of the agency's decision-making process and when legal consequences flow from the action. The Court concluded that an approved JD is a final agency action subject to court review because it meets both conditions laid out in *Bennett*. The Corp didn't argue that an approved JD is tentative; its regulations describe approved JDs as "final agency action" valid for five years. Approved JDs give rise to "direct and appreciable legal consequences," the Court reasoned, because the Corp and the EPA (through a long standing agreement) are bound by them for five years. So per an approved JD, the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act may, practically speaking, grant or deny a property owner a five-year safe harbor from such proceedings.

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: "Given 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."

In a *per curiam* (unauthored) opinion, which concurring Justices Alito and Thomas called "grudging," the Court ordered the Supreme Judicial Court of Massachusetts to decide again whether Massachusetts's stun gun ban is constitutional. Currently, eight states and a handful of cities and counties ban stun guns. The highest state court in Massachusetts held that the Second Amendment doesn't protect stun guns, because they weren't in common use at the time the Second Amendment was enacted--they are "unusual" as "a thoroughly modern invention," and they aren't readily adaptable for use in the military. In *District of Columbia v. Heller* (2008), the Court ruled that the Second Amendment provides an individual the right to possess a firearm to

use for lawful purposes, including for self-defense, in the home. In *Heller*, the Court concluded that the Second Amendment extends to arms "that were not in existence at the time of the founding." In its two page decision in *Caetano v. Massachusetts*, the Court notes that the Supreme Judicial Court of Massachusetts ignores this "clear statement" in *Heller*. A gun can't be considered "unusual" just because it is a modern invention. And *Heller* "rejected the proposition 'that only those weapons useful in warfare are protected.'"

In *McDonnell v. United States*, the Supreme Court unanimously reversed former Virginia Governor Robert McDonnell's bribery conviction. The Court held that setting up meetings, calling other public officials, and hosting events do not alone qualify as "official acts." While in office McDonnell accepted more than $175,000 in loans, gifts, and other benefits from Jonnie Williams. Williams wanted a Virginia state university to test a dietary supplement, Anatabloc, his company, Star Scientific, had developed. Federal bribery statutes make it a crime for public officials to "receive or accept anything of value" in exchange for being "influenced in the performance of any *official act*." The federal government claimed McDonnell committed at least five official acts, including arranging for Williams to meet with Virginia government officials; recommending that senior government officials meet with Star executives; hosting and attending events at the Governor's mansion designed to encourage Virginia university researchers to study Anatabloc; and allowing Williams to invite individuals of importance to Star's business to exclusive events at the Governor's mansion. An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." The Court found a number of "questions or matters" in this case, including whether researchers at a Virginia university would study Anatabloc. But merely setting up a meeting, hosting an event, or calling another official does not qualify as a "decision or action" on any of these questions or matters.

The Court adopted a new theory of liability under the False Claims Act in *Universal Health Services v. U.S. ex. rel. Escobar*. The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States. While the Supreme Court has yet to rule whether states and local governments can bring FCA claims, local governments, but not state governments, can be sued for making false claims against the federal government. Per the "implied false certification" theory, when a defendant submits a claim for reimbursement, it impliedly certifies compliance with all conditions of payment. In a unanimous opinion the Court adopted the "implied false certification" theory with two caveats. "[F]irst, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." The Court went on to rule that failure to disclose violations of statutory, regulatory, or contractual requirements violate the FCA only if they are material to the federal government's decision to pay. This is the case regardless of whether the requirements are expressly designated as a condition of payment or whether the federal government is entitled to refuse payment if it was aware of the violation.

In *Solem v. Bartlett* (1984), the Court articulated a three-part test to determine if a reservation has been diminished. Courts must look at "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act." In *Nebraska v. Parker*, the Court concluded the Omaha Indian Reservation hadn't been diminished where only the third factor indicated diminishment. An 1882 Act of Congress allowed part of the Omaha Indian Reservation to be sold to non-Indian settlers. A settler bought the land the Village of Pender is located on per the 1882 Act. In 2006 the tribe sought to subject retailers in Pender to its newly amended Beverage Control Ordinance. In this unanimous opinion the Court had little trouble concluding that the first two factors didn't indicate diminishment. The Court acknowledged that the third factor indicated diminishment. Only two percent of Omaha tribal members live on the disputed land, and the tribe doesn't enforce any of its regulations or offer any services on the disputed land. "But this Court has never relied solely on this third consideration to find diminishment."

Special counsel, retained to collect debt on behalf of the Attorney General (AG) owed to the state, don't violate the Fair Debt Collection Practices Act (FDCPA) when they use AG letterhead to communicate with debtors, the Court held in *Sheriff v. Gillie*. The FDCPA prohibits debt collectors from engaging in false, deceptive, or misleading communications. Debtors sued two special counsel claiming that they violated the FDCPA by sending collection notices on the AG letterhead rather than the letterhead of their private law firms. The debtors acknowledge that it would not be false and misleading instead of using AG letterhead for special counsel to say: "We write to you as special counsel to the [A]ttorney [G]eneral who has authorized us to collect a debt you owe to [the State or an instrumentality thereof]." To this the Court responded: "If that representation is accurate, i.e., not 'false . . . or misleading,' it would make scant sense to rank as unlawful use of a letterhead conveying the very same message, particularly in view of the inclusion of special counsel's separate contact information and the conspicuous notation that the letter is sent by a debt collector."

In *Sturgeon v. Frost*, the Court unanimously rejected the Ninth Circuit's conclusion that per Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), National Park Service (NPS) regulations that apply nationally apply to nonpublic land in Alaska contained in an ANILCA "conservation unit." The second sentence of ANILCA Section 103(c) states that no "nonpublic" (meaning non-federally owned) land "shall be subject to the regulations applicable solely to public [federal] lands within such [conservation] units." The Ninth Circuit concluded that this language meant that non-federally owned land contained in conservation units could be subject to NPS regulations that apply nationally—like the no hovercrafts in national parks rule. But NPS regulations applicable solely to federal land *in Alaska* would not apply to nonfederal land in conservation units in Alaska. The Court rejected the Ninth Circuit's "surprising conclusion," noting that ANILCA is replete with Alaska-specific exceptions to NPS's general authority over federally managed preservation areas.