Supreme Court Review

Presented by the **State and Local Legal Center**
Hosted by the **National Association of Counties**
Featuring **Mike Scodro**, **Kyle Duncan**, **Ayesha Khan**, and **Joel Liberson**

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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 about 350 briefs
- Last term the SLLC has filed 10 *amicus* briefs before the Supreme Court
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example!

Speakers

- **Mike Scodro,** Mayer Brown
- **Kyle Duncan**, Schaerr Duncan
- **Ayesha Khan**, Potomac Law Group
- **Joel Liberson**, Trial and Appellate Resources

Manuel v. City of Joliet, No. 14-9496

- Plaintiff alleges that police fabricated positive controlled-substance test for seized pills.
- False results formed basis for criminal complaint, on which judge relied to find probable cause.
- Plaintiff was detained pretrial or 48 days before prosecutor dropped charges based on new, negative test results.

Manuel v. City of Joliet, No. 14-9496

- Plaintiff sued under Section 1983 for damages arising from pretrial detention.
- Plaintiff framed claim as Fourth Amendment "malicious prosecution."
- Plaintiff needs favorable termination element for claim to be timely.
- Defendants agreed that Fourth Amendment may apply, but without the favorable termination or other elements of malicious prosecution.

Manuel v. City of Joliet, No. 14-9496

- Majority (Justice Kagan + 5): Plaintiff's pretrial detention claim falls within purview of Fourth Amendment, which continues to apply after start of "legal process."
- Court will not decide elements of this Fourth Amendment tort, leaving that question for remand.
- Dissent (Justice Alito + 1): Would decide full question presented and hold that no Fourth Amendment claim for malicious prosecution.
- Dissent (Justice Thomas): Agrees with Justice Alito but would reserve question of specific accrual date for future case.

County of Los Angeles v. Mendez, No. 16-369

- Sheriff's Deputies searching for fugitive.
- Two Deputies opened door to shack unannounced and without warrant.
- Plaintiff Mendez picked up BB gun.
- Deputies fired and wounded Mendez and his wife, plaintiffs here.

County of Los Angeles v. Mendez, No. 16-369

- Plaintiffs sued under Section 1983, raising three Fourth Amendment claims:
  - warrantless entry
  - failure to knock and announce
  - excessive force
- Ninth Circuit ruled for plaintiffs on warrantless entry but for defendants on knock-and-announce claim.
- Court also held that use of force was reasonable but found for plaintiffs on excessive force claim under Ninth Circuit's "provocation rule."

County of Los Angeles v. Mendez, No. 16-369

- Unanimous Supreme Court (Justice Alito + 7): Rejected "provocation rule"
- "The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist."
- Court also rejected alternative theory that failure to knock and announce proximately caused use of force.
- Court reserved question whether warrantless entry proximately caused use of force.
- Court also reserved question whether prior police conduct falls within "totality of the circumstances" inquiry.

Packingham v. North Carolina, No. 15-1194

- N.C. statute makes it a crime for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."
- Packingham violated statute in 2010 with a Facebook.com post.
- He was convicted and challenged statute on First Amendment grounds.

Packingham v. North Carolina, No. 15-1194

- Supreme Court struck down statute unanimously.
- Majority Opinion (Justice Kennedy + 4): Today cyberspace is "the most important place[] . . . for the exchange of views."
- "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."

Packingham v. North Carolina, No. 15-1194

- N.C.'s broad law fails even intermediate scrutiny.
- ". . . North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."
- The opinion expressly contemplates that more narrowly tailored laws may survive.

Packingham v. North Carolina, No. 15-1194

- Concurring in the judgment (Justice Alito +2): Agreed with majority but would not join opinion "because of its undisciplined dicta."
- "The State's interest in protecting children from recidivist sex offenders plainly applies to internet use."
- But the N.C. law sweeps too broadly, barring "access to a large number of websites"—including Amazon.com, WebMD, and news sites—"that are most unlikely to facilitate the commission of a sex crime against a child."

Trinity Lutheran Church v. Comer

- Holding
  - Missouri violated Trinity Lutheran Church's free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires

Pena-Rodriguez v. Colorado

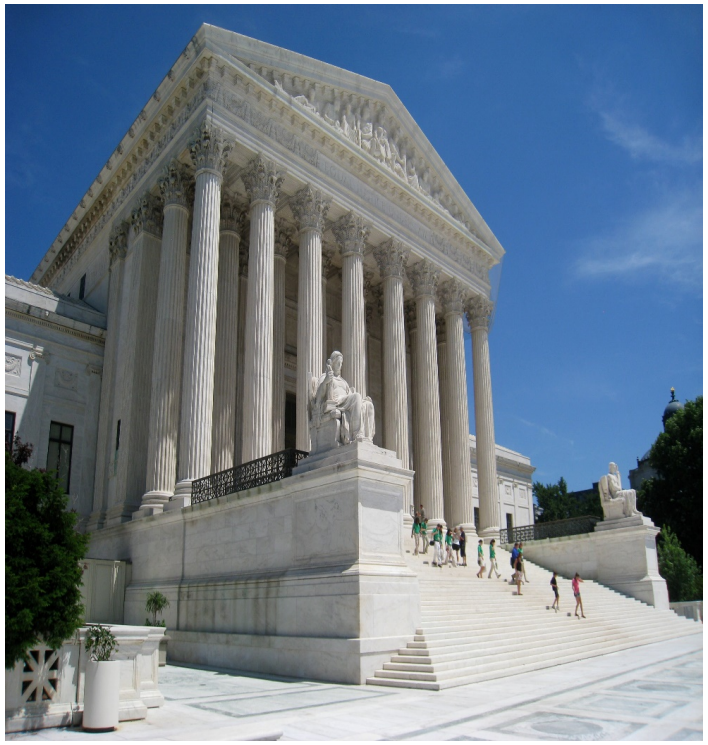
- Holding
  - The "Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt"

Murr v. Wisconsin

- Holding
  - No taking occurred where state law and local ordinance "merged" nonconforming, adjacent lots under common ownership, meaning the property owners could not sell one of the lots by itself

Murr v. Wisconsin

- Justice Kennedy cited the SLLC brief twice in his opinion:
  - "The merger provision here is . . . a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago."
  - Again citing the SLLC's brief, the Court further noted that focusing only on lot lines would "frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today."



SLLC SUPREME COURT REVIEW WEBINAR

Matal v. Slants
&
Expressions Hair Design v. Schneiderman

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July 12, 2017

Potomac LAW GROUP

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MATAL v. SLANTS, 137 S. CT. 1744 (2017)

Lead singer of rock band, Simon Tam, seeks to register "The Slants"

- Wants to "take ownership" of stereotypes about Asians
- Wants to "reclaim" the term
- Band draws inspirations for its lyrics from childhood slurs

U.S. PATENT & TRADEMARK OFFICE REJECTS THE REQUEST

Lanham Act prohibits registration of trademarks that may "disparage … or bring … into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. 1052(a).

Without trademark registration, group can still challenge infringers but loses many benefits, including ability to stop importation into U.S. of articles bearing an infringing mark.

GOVERNMENT'S ARGUMENTS UNANIMOUSLY REJECTED

Not government speech

If this were government speech, "the Federal Government is babbling prodigiously and incoherently"

Not a government subsidy

Principle that government need not subsidize activities it does not wish to promote is inapplicable

Not a permissible regulation of commercial speech

Regulation doesn't withstand even "relaxed scrutiny"

USPTO ACTION VIOLATES BEDROCK PRINCIPLE

"Speech may not be banned on the ground that it expresses ideas that offend"

2

EXPRESSIONS HAIR DESIGN v. SCHNEIDERMAN, 137 S. CT. 1144 (2017)

Five merchants challenge state statute providing that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."

PARTIES' ARGUMENTS

Merchants'

- Requires uniform pricing, which forces people who pay in cash to subsidize 2-3% credit-card surcharge
- Can offer "cash discount" but can't impose "credit card surcharge"

New York's

- Price controls regulate conduct, not speech

COURT'S NARROW HOLDING

Unlike most price-control regulations, this provision doesn't regulate the conduct of how much can be charged; it regulates how the prices are communicated. So it regulates speech.

6-2

- Because Second Circuit held that the provision regulated conduct, not speech, it didn't address whether the speech restriction violated the Free Speech Clause
- Because "[w]e are a court of review, not of first view," we remand for the Court of Appeals to analyze whether the regulation is permissible
- Two Justices wanted case remanded to state court for interpretation of what statute actually prohibits

GORSUCH PARTICIPATED IN NEITHER . . .

. . . but not a lot of mystery about where he would have landed given lack of substantial dissent in either decision.

On to more controversial cases now….
but please feel free to contact me with any questions.

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Bank of America v. City of Miami

- Holdings:
  - Local governments have standing to sue banks under the Fair Housing Act for economic harm caused to them by discriminatory lending practices
  - To prove causation local governments must show "some direct relation between the injury asserted and the injurious conduct alleged"

Questions

Thanks for attending!