Supreme Court Preview for Local Governments 2022-23

July 2022

By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

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.

In *Moore v. Harper* the North Carolina Supreme Court concluded that the state legislature engaged in partisan gerrymandering, which violated the North Carolina Constitution, when it redrew the states' Congressional, state house, and state senate maps. It ordered the legislature to redraw the maps. The U.S. Supreme Court has agreed to decide whether the U.S. Constitution's Elections Clause prevents the North Carolina Supreme Court from ordering the North Carolina legislature to redraw the congressional districts. Following the 2020 census the North Carolina legislature redistricted. At trial a redistricting expert testified that the North Carolina legislature adopted Congressional, state house, and state senate maps which were more favorable to Republicans than at least 99.9% of comparison maps. The North Carolina Supreme Court agreed with the trial court that the state legislature engaged in partisan gerrymandering which violated numerous provisions of the North Carolina constitution. One of those provisions, at issue in this case, is North Carolina's "Free elections" clause. It states: "All elections shall be free." The U.S. Constitution's Elections Clause states that the "Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." North Carolina legislators argue that the U.S. Constitution's Elections Clause "forbids state courts from reviewing a congressional districting plan [that] violates the state's own constitution." The North Carolina Supreme Court rejected this argument stating it is "inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015. It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences."

In *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina* the U.S. Supreme Court will decide whether to overturn *Grutter v. Bollinger* (2003). In that case the Supreme Court held that institutions of higher education may rely on a narrowly tailored use of race in admissions decisions to further the compelling interest of achieving a diverse student body without violating the Constitution's Equal Protection Clause or Title VI (which prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance). If the Court doesn't overturn *Grutter*, Students for Fair Admissions (SFFA) asks it to rule that Harvard's and the University of North Carolina's use of race in the admissions process isn't narrowly tailored. Harvard's admissions process involves multiple steps. A first-reader rates applicants based on six factors including academics, extracurriculars, and a personal rating. Race may be a factor in any of the next steps. Applicants are then given an overall rating, interviewed, considered by a subcommittee, and then a full committee. Harvard also provides "tips" for race and other qualities and for athletes, legacy applicants, dean's interest applicants, and children of faculty or staff. SFFA argues that Harvard's use of race discriminates against Asian Americans. The First Circuit disagreed. First, SFFA claims in its petition asking the Court to hear this case, that Harvard gives Asian Americans a statistically significant lower personal rating than white students despite a lack of evidence "Asian-American applicants actually have less desirable personal qualities." Second, SFFA claims that Harvard engages in unconstitutional racial balancing because the number of students admitted in underrepresented racial categories doesn't vary much from year to year and admissions officers consult "ethic stats" throughout the process to avoid "a dramatic drop-off in some group [from] last year." Third, SFFA argues that Harvard is "obsessed with race" and uses it as more than a plus factor in admissions. Finally, SFFA argues that Harvard has ignored workable race neutral alternatives. SFFA suggests Harvard "eliminates its preferences for the white and wealthy and increases its preference for the socioeconomically disadvantaged. This simulation would achieve greater racial diversity without using race. And it would achieve something that Harvard currently lacks: socioeconomic diversity." The University of North Carolina's admissions process involves readers making a provisional decision about an applicant which a committee then reviews. The reviewer considers academic, extracurricular, personal, and other factors. Race may be a plus factor. If the Supreme Court doesn't overrule *Grutter* SFFA asks the Court to decide whether the University of North Carolina may "reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity." The district court considered at length a number of race-neutral alternatives and concluded the "University has shown that there are not any available, workable, or sufficient [race-neutral alternatives] that would allow it to achieve its diversity goals." In its petition asking the Court to hear this case SFFA suggested a long list of additional race-neutral alternatives which it claims won't require a "dramatic sacrifice" of racial diversity or academic excellence.

In *Sackett v. EPA** the U.S. Supreme Court will decide the proper test for determining when "wetlands" are "waters of the United States." The Clean Water Act (CWA) prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into "navigable waters," defined as "waters of the United States." CWA regulations define "waters of the United

States" to include "wetlands" that are "adjacent" to traditional navigable waters and their tributaries. In *Rapanos v. United States* (2006), Justice Scalia, writing for four Justices, stated that "waters of the United States" extends to "relatively permanent, standing or flowing bodies of water" and to wetlands with a "continuous surface connection" to such permanent waters. For Justice Kennedy, writing alone, if wetlands have a "significant nexus" to navigable waters they are "waters of the United States." According to the Ninth Circuit, while the Scalia plurality did not totally reject the concept of a "significant nexus," it opined that only wetlands with a "physical connection" to traditional navigable waters are "waters of the United States." In this case the Sacketts purchased a "soggy residential lot" 300 feet from Idaho's Priest Lake. To the north of their lot, with a road in between, is a wetland that drains to a tributary that feed into a creek that flows southwest of the Sacketts' property and empties into Priest Lake. After obtaining permits from the county the Sacketts began backfilling the property with sand and gravel to create a stable grade. The Environmental Protection Agency issued the Sacketts a "formal administrative compliance order" explaining they were violating the CWA. Before the Ninth Circuit the Sacketts argued that the Scalia opinion controls whether their property contains wetlands. The Ninth Circuit disagreed. Per the Supreme Court in *Marks v. United States* (1977) if there aren't five votes to support one rationale of a Supreme Court case the holding of the case is "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." According to the Ninth Circuit the Kennedy concurrence supplied the controlling rule in *Rapanos* because if forced to the four dissenting Justices would have joined Kennedy's opinion rather than Scalia's.

In *303 Creative v. Elenis** the U.S. Supreme will decide whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment. Lorie Smith owns 303 Creative LLC where she designs websites. She wants to start creating wedding websites, but she doesn't want to create websites that celebrate same-sex marriages. And she wants to explain on her website that doing so would compromise her Christian beliefs. Colorado's Anti-Discrimination Act's (CADA) "accommodations clause" prohibits public accommodations from refusing to provide services based on sexual orientation. CADA's "communications clause" prohibits communicating that someone's patronage is unwelcome because of sexual orientation. Many states and local governments had adopted laws and ordinances prohibiting sexual orientation discrimination, similar to CADA. Over a lengthy dissent, the Tenth Circuit ruled that CADA doesn't violate 303 Creative's First Amendment free speech rights. According to the Tenth Circuit CADA's "accommodations clause" compels speech and is a content-based restriction on speech. The Tenth Circuit applied strict scrutiny to the "accommodations clause" and concluded it passed. According to the Tenth Circuit: "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." Likewise, per the Tenth Circuit, the "accommodations clause" is narrowly tailored to Colorado's interest in ensuring "equal access to publicly available goods and services."

In *Health and Hospital Corp. of Marion County, Indiana v. Talevski** the U.S. Supreme may decide two questions. First, it may review its holding that Spending Clause legislation may allow private parties to bring lawsuits for money damages under 42 U.S.C. § 1983 when the legislation

contains no express private right of action. Assuming the Court doesn't overturn this holding it will decide whether such claims may be brought under the Federal Nursing Home Reform Act (FNHRA) transfer and medication rules. In 1990 in *Wilder v. Virginia Hospital Association* the Supreme Court held that private parties could sue under Section 1983 to enforce rights contained in some federal Spending Clause legislation, even where Congress didn't expressly provide for a private right of action in the statute. Since *Wilder* the Supreme Court hasn't recognized any new Spending Clause-based private rights. But lower courts have, like the Seventh Circuit in this case. Valparaiso Care argues in its petition asking the Court to hear this case that if a Spending Clause statute lacks an express provision allowing for a private right of action the Supreme Court should hold that no private right of action exists. FNHRA lacks an express private right of action. Ivanka Talevski sued Valparaiso Care claiming it violated FNHRA's medication rules by giving her husband, who had dementia, unnecessary psychotropic medications for purposes of chemical restraint. She likewise claimed it violated FNHRA's transfer rules by transferring him to another facility without consent. The Seventh Circuit held that both statutory provisions create a private right of action allowing individuals to sue for money damages. The Seventh Circuit considers three factors when determining whether a federal statute create a private right of action under Section 1983: whether Congress intended the provision to benefit the plaintiff, whether the right "assertedly protected" is not too "vague and amorphous" that enforcing it would "strain judicial competence," and whether the statute "unambiguously impose[s] a binding obligation on the states." The Seventh Circuit opined that all three of these factors indicate the FNHRA's transfer and medication rules create a private right of action. First, the court concluded Congress intended nursing-home patients to benefit from these sections because it has used "rights" language. For example, the statute states: "[a] skilled nursing facility *must protect and promote the rights of each resident, including each of the following rights.*" Second, per the Seventh Circuit, the rights protected under FNHRA's transfer and medication provisions aren't "vague and amorphous." Nursing home facilities must not do exactly what was alleged in this case: "subject residents to chemical restraints for purposes of discipline or convenience and involuntarily transfer or discharge any resident absent one of several allowable justifications and notice." Finally, the court opined that the statutory provisions at issue in this case use mandatory rather than precatory terms. "Facilities *must* protect and promote the right against chemical restraints, *must* allow residents to remain in the facility, *must* not transfer, and *must* not discharge the resident; these are unambiguous obligations."

Haaland v. Brackeen consolidates four cases challenging multiple provisions of the Indian Child Welfare Act (ICWA) as unconstitutional. Challengers include Texas, Indiana, and Louisiana and individuals who would like to adopt Indian children. Per the ICWA if an Indian child is to be placed in foster care or parental rights are to be terminated, "active effort" must be made to provide remedial services and rehabilitative programs and an expert witness must testify that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The ICWA lists preferred adoptive placements in this order: with family members, members of a child's tribe, and "other Indians families" and preferred foster care placements in this order: with family members, foster homes of the child's tribe, or "Indian foster home[s]." The ICWA also contains record-keeping requirements. The entire Fifth Circuit heard this case. The Supreme Court has been asked to decide five issues. The

anticommandeering doctrine "prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting." Texas and the individual plaintiffs argue that all the ICWA provisions described above violate the anticommandeering doctrine because they require state agencies to take action. In a long and complicated opinion, the Fifth Circuit agreed. By an equally divided vote the Fifth Circuit concluded that the ICWA's placement preferences for "other Indian families" for adoption and "Indian foster home[s]" for foster care violates the Fifth Amendment's Equal Protection Clause. According to Judge Duncan, "the preference privileges Indian families of *any* tribe, regardless of their connection to the child's tribe, over all non-Indian families. ICWA's classification therefore does not rationally further linking children to their tribes." The United States (and the Cherokee Nation) disagree: "[L]egislation does not fail the rational-basis standard applicable here 'merely because the classifications it makes are imperfect.'" The United States and the Cherokee Nation likewise argue that the Fifth Circuit didn't have "standing" to decide the equal protection issue. The United States points out that "other Indian families" and "Indian foster home[s]" are third-ranked preferences meaning it is not certain they would come into play if the challengers tried to adopt an Indian child. The individual plaintiffs challenge more broadly on equal protection grounds ICWA's requirements that states administer a separate child-placement regime for "Indian children" which favor Indians for child placement. A majority of the Fifth Circuit held that the ICWA complies with Congress's Article I authority to "regulate Commerce . . . with Indian tribes." The individual plaintiffs and Texas disagree. The individual plaintiffs argue the ICWA doesn't regulate commerce because "children are not commodities or objects of commerce." They also argue the ICWA doesn't regulate commerce "with the Indian Tribes." "Rather, the placement preferences govern the relationship between prospective parents (including non-tribal members) and 'Indian children' (including non-tribal members)." The question in a non-delegation challenge is whether a statute has impermissibly "delegated legislative power." Section 1915(c) of the ICWA allows Indian tribes to establish through tribal resolution a different order of preferred placement than the order described above. A majority of the Fifth Circuit concluded this authority doesn't violate the non-delegation doctrine because "Congress may incorporate the laws of another sovereign into federal law." But, according to Texas, the "ICWA does not incorporate the laws of Indian tribes; it gives them the power to change the law enacted by Congress."

In *National Pork Producers Council v. Ross** the U.S. Supreme Court will decide whether California can prevent the sale of pork in the state unless it meets the state's standards. California's Proposition 12 prevents the sale of "whole pork meat" in the state unless the meat was produced in compliance with "specified sow confinement restrictions." The National Pork Producers Council (Council) claims that Proposition 12 violates the U.S. Constitution's dormant Commerce Clause. The Constitution grants Congress the power to "regulate Commerce . . . among the several States." As the Ninth Circuit notes, the Commerce Clause doesn't explicitly "impose any restrictions on state law in the absence of congressional action." Nevertheless, the Supreme Court has interpreted it to "implicitly preempt[] state laws that regulate commerce in a manner that is disruptive to economic activities in the nation as a whole." In this case the Council argued that Proposition 12 violates the dormant Commerce Clause because it has "extraterritorial effects" and imposes an undue burden on interstate commerce. The Ninth Circuit rejected both of

these arguments. Regarding "extraterritorial effects" the Council argued that Proposition 12 impermissibly regulates the price of pork in other states. It cited to three Supreme Court cases which the Ninth Circuit acknowledged "used broad language." But the Ninth Circuit has interpreted those cases narrowly holding that the extraterritoriality principle is "not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices." The Ninth Circuit notes "Proposition 12 is neither a price-control nor price-affirmation statute." The Council next argued that Proposition 12 imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local benefits" in violation of the dormant Commerce Clause. According to the Ninth Circuit "the crux" of the Council's argument is complying with Proposition 12 makes pork production more expensive nationwide. "The cost of compliance would result in a 9.2 percent increase in production cost, which would be passed on to consumers, and producers that do not comply with Proposition 12 would lose business with packers that are supplying the California market." But, the Ninth Circuit reasoned, "alleged cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause."

In *United States, ex rel. Polansky v. Executive Health Resource* the U.S. Supreme Court will decide whether the federal government has authority to dismiss a False Claims Act lawsuit after initially declining to proceed with the action, and if so, what standard applies. The False Claims Act allows "relators," including states and local governments, to bring lawsuits against those who have defrauded the federal government. Early on in False Claims Act litigation the federal government may intervene. Dr. Jesse Polansky and a number of states brought a false claims lawsuit against Executive Health Resources claiming it was involved in Medicare fraud. Before trial the federal government notified the parties it intended to dismiss the entire lawsuit though it "originally opted not to proceed with the action and had not formally intervened." Section 3730(c)(1) of the False Claims Act states "If the Government proceeds with the action . . . [the relator] shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." Section 3730(c)(2) states "The Government **may dismiss the action** notwithstanding the objections of the [relator] if the [relator] has . . . [notice and] an opportunity for a hearing[.]" Section 3730(c)(3) states "If the Government elects not to proceed with the action, the [relator] shall have the right to conduct the action. . . . When [the relator] proceeds with the action, the court, without limiting the status and rights of the [relator], **may nevertheless permit the Government to intervene at a later date upon a showing of good cause**. The federal government argued, citing § 3730(c)(2), that it may "move for dismissal of the relator's action at any point in the litigation regardless of whether it has intervened." Polansky, citing § 3730(c)(3), argued the federal government has authority to dismiss the lawsuit "only if it intervenes at the outset and, having declined to do so, it is powerless to seek dismissal *even if* it subsequently intervenes." The Third Circuit rejected both parties' positions. It held the federal government must intervene before it can move to dismiss, but it can seek leave to intervene at any point in the litigation upon a showing of good cause. Regarding the applicable standard to apply to the United States' motion to dismiss, the Third Circuit held Federal Rules of Civil Procedure Rule 41(a) applies. According to the Third Circuit this means: "The relator must receive notice and an opportunity for a hearing, 31 U.S.C. § 3730(c)(2)(A), and the Government must meet whatever threshold the relevant prong of Rule 41(a) requires. If the defendant has yet to answer or move for summary judgment, the Government is entitled to dismissal, albeit with an opportunity for the relator to be heard, subject only to the bedrock constitutional bar on arbitrary

Government action. And if the litigation is already past that 'point of no return,' then dismissal must be 'only by court order, on terms the court consider proper.'"

In *Wilkins v. United States** the U.S. Supreme Court will decide whether the Quiet Title Act's statute of limitations is a jurisdictional requirements or a claim processing rule. If it is a jurisdictional requirements local governments bringing Quiet Title Act cases are more likely to lose on statute of limitations grounds. The Quiet Title Act allows state and local governments and private parties to sue the United State to "adjudicate a disputed title to real property in which the United States claims an interest." Except for most cases brought by states, the Quiet Title Act's statute of limitations is 12 years. Robbins Gulch Road near Connor, Montana, runs through Larry Wilkins' property. The previous owner had granted the United States an easement for Robbins Gulch Road in 1962. In September 2006 the Forest Service put up a sign on the road saying "public access thru private land." In August 2018, Wilkins sued the United States under the Quiet Title Act "to confirm that the easement does not permit public use of the road and to enforce the government's obligations to patrol and maintain the road against unrestricted public use." The United States argued that Wilkins failed to bring his lawsuit within the statute of limitations. The federal district court held that the Quiet Title Act's statute of limitations is jurisdictional and ruled that Wilkins didn't bring his case within the statute of limitations. In a very brief opinion, the Ninth Circuit reaffirmed that the Quiet Title Act's statute of limitations is a jurisdictional rule based on previous Ninth Circuit precedent.