Supreme Court Preview for the Local Governments 2022-23

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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.

The U.S. Supreme Court's 2022-23 term begins as always on the first Monday in October—this year October 3. The local government docket is thinner than usual—so far. The two biggest cases on the docket right now involve whether elections rules may be challenged in state court and whether affirmative action in college admission is unconstitutional. These cases, depending on how they are decided and reasoned, may have some impact on local governments. This article discusses two cases of significant interest to local governments, no matter how they are decided, involving defining wetlands under the Clean Water Act and First Amendment free speech.

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. Numerous local governments in multiple states have adopted similar ordinances.

CADA's "communications clause" prohibits communicating that someone's patronage is unwelcome because of sexual orientation.

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."

Conclusion

It would be unusual if the Court didn't decide a number of First Amendment cases, a Fourth Amendment case or two, and a handful of cases involving police officers. Just because these topics, all of keen interest to local governments, aren't on the docket yet doesn't mean they won't be ultimately. The Supreme Court will continue to accept cases to be decide in its 2022-23 term through January. Numerous cases involving local governments are likely to be added.