Supreme Court Preview for the States 2022-23

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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 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. With the docket about half full the two biggest cases for next term—as usual, but not always, involve the states. This article discusses those two cases—one about the "independent state legislature" theory and the other about affirmative action in higher education admissions. This article covers a third significant case for states involving implied private rights of action under Spending Clause legislation.

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 may decide whether to overturn *Grutter v. Bollinger* (2003).

In *Grutter*, 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.

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 *Health and Hospital Corp. of Marion County, Indiana v. Talevski** the Court 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.”

Conclusion

Last term was Justice Barrett’s first complete term on the Court. Both of biggest cases of that term, involving guns and abortion, were decided 6-3. This term the biggest cases on the docket to date involve questions that many of the newest Justices—including Justice Jackson—have not ruled on as lower court judges. Only time will whether other big cases for states get added to the docket and how Justices old and new will vote on them.