Supreme Court Midterm for Local Governments 2021-22

February 2022

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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 or likely will file an *amicus* brief.

In *New York State Rifle and Pistol Association v. Corlett** the U.S. Supreme Court will decide whether states may prevent persons from obtaining a concealed-carry license for self-defense if they lack "proper cause." Per New York state law, in order to carry a concealed handgun for self-defense purposes a person must show "proper cause." New York case law requires an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" to satisfy the proper cause standard. The challengers in this case want to carry a concealed handgun but lack proper cause. A federal district court ruled against the challengers based on Second Circuit precedent. In a very brief opinion, noting that same Second Circuit case, the Second Circuit affirmed. In *Kachalsky v. County of Westchester* (2012), the Second Circuit held that "New York's handgun licensing scheme . . . requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public" did not violate the Second Amendment. In *Kachalsky*, the Second Circuit applied intermediate scrutiny and upheld New York's law stating: "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention" and "the proper cause requirement is substantially related to these interests." According to the challengers, *Kachalsky* was wrongly decided for the reasons the D.C. Circuit stated in *Wrenn v. District of Columbia* (2017). In that case the D.C. Circuit didn't apply intermediate scrutiny to the District of Columbia's similar "good reason" limit to obtain a concealed carry license. The D.C. Circuit held "the law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun." According to the Second Circuit, the "argument that *Kachalsky* was wrongly decided fails under this Court's precedents."

First Amendment cases

The City of Austin allows on-premises billboards to be digitized but not off-premises billboards. In *City of Austin, Texas v. Reagan National Advertising of Texas Inc.** two outdoor advertising companies claim that this distinction is "content-based" under the First Amendment. The City of Austin disagrees. In *Reed v. Town of Gilbert* (2015), the Supreme Court held that content-based restrictions on speech are subject to strict scrutiny, meaning they are "presumptively unconstitutional" under the First Amendment. In *Reed* the Court defined "content-based" broadly to include distinctions based on "function or purpose." Per Austin's Sign Code, "off-premises" signs advertise "a business, person, activity, goods, products or services not located on the site where the sign is installed." The City argued that the definition of off-premises is a time, place, or manner restriction based on the location of signs. The Fifth Circuit disagreed, stating: "*Reed* reasoned that a distinction can be facially content based if it defines regulated speech by its function or purpose. Here, the Sign Code defines 'off-premises' signs by their purpose: advertising or directing attention to a business, product, activity, institution, etc., not located at the same location as the sign."

The issue the Supreme Court will decide in *Shurtleff v. City of Boston** is whether flying a flag on a flagpole owed by a government entity is government speech. If it is, the city may refuse to fly a Christian flag. Boston owns and manages three flagpoles in an area in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on another flagpole, and its own flag on a third flagpole. Third parties may request to fly their flag instead of the city's flag in connection with an event taking place within the immediate area of the flagpoles. Camp Constitution seeks "to enhance understanding of the country's Judeo-Christian moral heritage." It asked the City twice to fly its Christian flag while it held an event near the flag. The City refused its request to avoid government establishment of religion. The First Circuit held that flying a third-party flag on a City Hall flag poll is government speech meaning the City didn't have to fly the Christian flag. According to the First Circuit, in two previous cases (*Pleasant Grove City v. Summum* (2009) and *Walker v. Texas Division, Sons of Confederate Veterans* (2015)) the Supreme Court has developed a three-part test for determining when speech is government speech. The Court looks at the history of governmental use, whether the message conveyed would be ascribed to the government, and whether the government "effectively controlled" the messages because it exercised "final approval authority over their selection." Regarding the history of governments using flags, the First Circuit stated "that a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable." The First Circuit also concluded that an observer would likely attribute the message of a third-party flag on the City's third flagpole to the City. The First Circuit had no difficulty concluding the City controlled the flags. "Interested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole."

In *Kennedy v. Bremerton School District*,* the U.S. Supreme Court will decide whether the First Amendment protects a high school football coach who, joined by students, prayed after football games. According to Joseph Kennedy, his religious beliefs required him to pray at the end of each game. Students eventually joined him as he kneeled and prayed for about 30 seconds at the 50-yard line. When the school district found out the superintendent directed Kennedy not to pray with students. After widely publicizing his plan, Kennedy announced he would pray after a particular game even if students joined him. He was ultimately put on administrative leave and didn't apply to coach the next fall. The Ninth Circuit held that Kennedy had no First Amendment free speech right to pray because he was speaking as a "government employee" rather than as a "private citizen." And even if he was speaking as a private citizen the Ninth Circuit held the district could prevent him from praying because of Establishment Clause concerns. The Ninth Circuit concluded Kennedy was speaking as a public employee when he prayed. Kennedy "was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade. Thus, his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." The Ninth Circuit also held that even if Kennedy's speech was private, avoiding violating the Establishment Clause was an "adequate justification for treating Kennedy differently from other members of the general public." Per the Ninth Circuit an objective observer would know "Kennedy actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students." "Viewing this scene, an objective observer could reach *no other conclusion* than [the school district] endorsed Kennedy's religious activity by not stopping the practice."

In *Houston Community College System v. Wilson* the U.S. Supreme Court will decide whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech. David Wilson was an elected trustee of the Houston Community College System (HCC). In response to the board's decision to fund a campus in Qatar, he arranged robocalls and was interviewed by a local radio station expressing his disagreement with the decision. He filed a lawsuit against HCC after it allowed a trustee to vote via videoconference, which he contended violated the bylaws. He sued the board again when it allegedly excluded him from an executive session. The board publicly censured him for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct." Wilson sued HCC and the trustees, asserting that the censure violated his First Amendment right to free speech. HCC argued that "it had a right to censure Wilson as part of its internal governance as a legislative body and that Wilson's First Amendment rights were not implicated." However, the Fifth Circuit noted it has repeatedly held that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim." In this case, Wilson was censured because of his speech.

Police cases

The question in *Vega v. Tekoh** is whether a police officer can be sued for money damages for failing to provide a *Miranda* warning. Terrance Tekoh was tried for unlawful sexual penetration. At trial he introduced evidence that his confession was coerced. A jury found him not guilty. Tekoh then sued the officer who questioned him, Deputy Carlos Vega, under 42 U.S.C. Section 1983 claiming Vega violated his Fifth Amendment right against self-incrimination by not advising him of his *Miranda* rights. The Ninth Circuit held Tekoh could bring a Section 1983 case. According to the Ninth Circuit, following *Miranda* there was much debate over whether *Miranda* warnings were "constitutionally required." In *Dickerson v. United States* (2000), the Supreme Court held that Congress could not overrule *Miranda* via a federal statute that provided confessions were admissible as long as they were voluntarily made, regardless of whether *Miranda* warnings had been provided. *Miranda,* the Supreme Court reasoned, was "a constitutional decision." According to the Ninth Circuit, the Supreme Court has subsequently "muddied" the waters since *Dickerson.* But since *Dickerson* only less than five Justices have said money damages aren't available for *Miranda* violations.

In *Thompson v. Clark** the Supreme Court will decide whether the rule that a plaintiff must await favorable termination before suing for unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence" or that the proceeding "ended in a manner that affirmatively indicates his innocence." Larry Thompson's sister-in-law, Camille, who was living with him, reported to 911 that Thompson was sexually abusing his week-old daughter. Thompson wouldn't let police into his apartment because they didn't have a warrant, blocked their path to entry, and allegedly shoved an officer. It was soon determined that Camille's report was false; she suffered from a mental illness which the officers "sensed" when they were in the apartment. Police arrested Thompson and he was charged with obstructing governmental administration and resisting arrest. The prosecutor dropped charges against him "in the interests of justice." The Second Circuit held that Thompson couldn't bring a malicious prosecution claim because he failed to prove that the prosecution against him terminated favorably. In a 2018 case, *Lanning v. City of Glens Falls*, the Second Circuit held that malicious prosecution claims require "affirmative indications of innocence to establish favorable termination." In this case Thompson's innocence wasn't established because the only reason the prosecutor gave for dismissing charges against him was "the interests of justice."

In *Rivas-Villegas v. Cortesluna* the Court reversed the Ninth Circuit's denial of qualified immunity to Officer Rivas-Villegas. A girl told 911 she, her sister, and her mother had shut themselves into a room because their mother's boyfriend, Ramon Cortesluna, was trying to hurt them and had a chainsaw. Officers ordered Cortesluna to leave the house. They noticed he had a knife sticking out from the front left pocket of his pants. Officers told Cortesluna to put his hands up. When he put his hands down, they shot him twice with a beanbag shotgun. Cortesluna then raised his hands and got down as instructed. Officer Rivas-Villegas placed his left knee on the

left side of Cortesluna's back, near where Cortesluna had the knife in his pocket, and raised both of Cortesluna's arms up behind his back. Another officer removed the knife and handcuffed Cortesluna. Rivas-Villegas had his knee on Cortesluna's back for no more than eight seconds. The Ninth Circuit concluded that circuit precedent, *LaLonde v. County of Riverside*, indicated that leaning with a knee on a suspect who is lying face-down on the ground and isn't resisting is excessive force. The Supreme Court disagreed that *LaLonde* clearly established that Officer Rivas-Villegas couldn't briefly place his knee on the left side of Cortesluna's back. The Supreme Court reasoned *LaLonde* is "materially distinguishable and thus does not govern the facts of this case." "In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police."

In *City of Tahlequah v. Bond*, the Supreme Court held that two officers who shot Dominic Rollice after he raised a hammer "higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers" were entitled to qualified immunity. Dominic Rollice's ex-wife told 911 that Rollice was in her garage, intoxicated, and would not leave. While the officers were talking to Rollice he grabbed a hammer and faced them. He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers yelled to him to drop it. Instead, he came out from behind a piece of furniture so that he had an unobstructed path to one of the officers. He then raised the hammer higher back behind his head and took a stance as if he was about to throw it or charge at the officers. Two officers fired their weapons and killed him. The Tenth Circuit concluded that a few circuit court cases—*Allen v. Muskogee* in particular—clearly established that the officers' use of force was excessive. The Supreme Court disagreed. "[T]he facts of *Allen* are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer."

Miscellaneous

In *West Virginia v. EPA* the U.S. Supreme Court will decide whether the Environmental Protection Agency (EPA) had the authority to issue the Clean Power Plan (CPP) Rule. The Clean Air Act directs EPA to regulate powerplants that cause or contribute significantly to air pollution. In 2015 EPA adopted the CPP which regulates greenhouse gas emissions from existing fossil-fuel-fired powerplants. A key "building block" of CPP was "generation shifting" where

emissions reductions occur because "the source of power generation shifts from higher-emission power plants to less-polluting sources of energy." In 2019 EPA repealed the CPP and replaced it with the Affordable Clean Energy (ACE) Rule. EPA concluded it had to repeal the CPP because "generation shifting" operates off site of power plants and "the plain meaning" of the Clean Air Act "unambiguously" limits emission reduction measures to only those "that can be put into operation *at* a building, structure, facility, or installation." A number of states, local governments, and others challenged the ACE Rule's conclusion that emission reduction measures must be implemented at and applied to power plants. West Virginia and others challenged the ACE Rule on other grounds. The D.C. Circuit held that the EPA didn't act lawfully in adopting the ACE Rule because repealing the CPP "hinged on a fundamental misconstruction" of the Clean Air Act, that generation shifting is not allowed. According to West Virginia, among other problems, the D.C. Circuit "gave short shrift to the clear-statement canons." West Virginia points to Judge Walker's dissent in this case where he opined that the lack of a clear statement from Congress allowing generation-shifting is fatal to the CPP: "Hardly any party in this case makes a serious and sustained argument that [the Clean Air Act] includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting. And because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it."

In *Cummings v. Premier Rehab Keller** the Supreme Court will decide whether people who are discriminated against in violation of Title VI, Title IX, Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, or the Affordable Care Act may sue for emotional distress damages. All these statues expressly incorporate the private right of action available to victims of discrimination under Title VI. Jane Cummings has been deaf since birth and is legally blind. She communicates mostly through American Sign Language (ASL). She contacted Premier, which offers physical therapy services, to treat her chronic back pain. She repeatedly requested that Premier provide an ASL interpreter, but it refused. She sued Premier under the Rehabilitation Act and the ACA for disability discrimination and sought emotional distress damages. The Fifth Circuit held that emotional distress damages aren't available under these statutes. The Rehabilitation Act and the ACA are Spending Clause legislation. According to the Fifth Circuit, the Supreme Court has "repeatedly" likened Spending Clause legislation to contract law—"in return for federal funds, the [recipients] agree to comply with federally imposed conditions." In *Barnes v. Gorman* (2002), the Supreme Court explained compensatory damages are available under Spending Clause legislation because federal-funding recipients are "on notice" that accepting such funds exposes them to liability for monetary damages under general contract law. In *Barnes*, the Supreme Court also held that punitive damages *aren't* available under Spending Clause legislation because they aren't generally available for breach of contract. So, federal funding recipients aren't "on notice" that they could be liable for punitive damages. According to the Fifth Circuit, emotional distress damages, like punitive damages are

"traditionally unavailable in breach-of-contract actions." So, the court held, federal-funding recipients aren't on notice of them and can't be held liable for them.

In *Oklahoma v. Castro-Huerta* the U.S. Supreme Court will decide whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country. Per the Major Crimes Act the federal government has exclusive authority to prosecute certain felonies committed by Indians in Indian country. The General Crimes Act provides the federal government with authority to prosecute general federal criminal law violations where either the defendant or the victim was an Indian and the other party was not. In *McGirt v. Oklahoma* (2019) the Court held that historical Creek territory in Oklahoma constituted Indian country for purposes of the Major Crimes Act, meaning the state has no authority to prosecute such crimes committed by Indians in Indian country. After *McGirt*, in *Bosse v. State* the Oklahoma Court of Criminal Appeals held that the "clear language" of the General Crimes Act preempts state prosecutions for crimes committed by non-Indians against Indians in Indian country. In *Oklahoma v. Castro-Huerta* Victor Castro-Huerta, who is non-Indian, was convicted in state court of child neglect occurring in Indian country (per *McGirt*) against his step-daughter, who is Indian. Relying on *Bosse*, the Oklahoma Court of Criminal Appeals concluded Oklahoma lacked jurisdiction to prosecute this case. The General Crimes Act states that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country." Oklahoma argues that "[n]othing in that text acts to relieve a State of its prosecutorial authority over non-Indians in Indian country. As the Court has explained, the phrase 'sole and exclusive jurisdiction' is used to 'describe the laws of the United States' that extend to Indian country; it does not concern the discrete question of who has prosecutorial authority within Indian country."