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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 or will file an *amicus* brief.

Big cases

In a two-page *per curiam* (unauthored) opinion in *New York State Rifle & Pistol Association v. City of New York*,* the Supreme Court held that a challenge to New York City's rule disallowing residents to transport firearms to a second home or shooting range outside of the city was moot. The Supreme Court concluded the case was moot because "the State of New York amended its firearm licensing statute, and the City amended the rule so that [residents] may now transport firearms to a second home or shooting range outside of the city, which is the precise relief . . . requested" after the Court agreed to hear the case.

In a 5-4 decision in *DHS v. Regents of the University of California*, the Supreme Court held that the decision to wind-down the Deferred Action for Childhood Arrivals (DACA) program violated the Administrative Procedures Act (APA). DACA was established by DHS during the Obama presidency. The program allows certain undocumented persons who arrived in the United States as children to apply for a two-year forbearance of removal, and receive work authorization and various federal benefits. During the Trump presidency the Attorney General advised DHS to rescind DACA based on his conclusion it was unlawful. The Department's Acting Secretary Elaine Duke then issued a memorandum ending the program solely on the basis it was unlawful. Litigation in the D. C. District Court gave DHS an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." DHS Secretary Kirstjen Nielsen wrote a lengthier memo identifying multiple policy reasons for rescinding DACA. The APA directs courts to "set aside" agency actions if they are "arbitrary" or "capricious." Chief Justice Roberts, writing for the majority, held that the decision to end DACA violated the APA because Acting Secretary

Duke "failed to consider . . . important aspect[s] of the problem" before her and failed to address whether there was "legitimate reliance" on the DACA program. The Court rejected considering the Nielsen memo because it contained additional reasons to rescind DACA beyond the only reason contained in the Duke memo, illegality, without going through APA procedural requirements for new agency actions. According to the Court, it is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." Considering only the Duke memo, the Court determined DHS's decision to rescind DACA was arbitrary and capricious. First, despite the Attorney General's determination DACA was illegal, Duke still had "forbearance" discretion to defer removal of DACA recipients, but her memo offered no reason for terminating forbearance. According to the Attorney General, DACA was illegal because the Fifth Circuit held that the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program was illegal, and the Supreme Court tied on the question. DAPA authorized deferred action for parents whose children were U. S. citizens or lawful permanent residents and granted parents the same removal forbearance and work eligibility as DACA recipients. The Supreme Court noted the Fifth Circuit only held that DAPA's eligibility for benefits was illegal—not its forbearance of removal. "[T]he Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy." So, "removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke." Second, the Court concluded that Duke also failed to address whether DACA recipients and others legitimately relied on the program. The APA requires agencies to "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" The federal government agreed that Duke's memo didn't consider the interests of those relying on the DACA program, but argued that was because it didn't have to. The majority of the Court disagreed stating that even if DACA "conferred no substantive rights" and provided benefits only in two-year increments, "neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any."

In *Trump v. Vance,* the Supreme Court held 7-2 that the U.S. Constitution doesn't "categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President." In this case the New York County District Attorney's Office, acting on behalf of a grand jury, subpoenaed President Trump's accounting firm for the President's tax returns from 2011 forward related to an investigation into whether the President violated state law. Since nearly the founding, the Supreme Court has held numerous times that a sitting President may be subpoenaed in *federal* criminal proceedings. The President argued "that the Supremacy Clause gives a sitting President absolute immunity from *state* criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions." The Solicitor General, arguing on behalf of the United States, took the position that a state grand jury subpoena for a sitting President's personal records must, at the very least, "satisfy a heightened standard of need." The Supreme Court rejected both arguments. Regarding absolute immunity, Trump pointed to diversion, stigma, and harassment as the reasons he should be immune from state subpoenas. The majority opinion rejected these arguments as foreclosed by precedent or, in the case of harassment, manageable due to protections already in place to

limit grand jury investigations. The Court cited three reasons why it didn't think a state grand jury subpoena seeking a sitting President's private papers must satisfy a heightened need standard. "First, such a heightened standard would extend protection designed for official documents to the President's private papers." Second, the Solicitor General was unable to establish that "heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions." Third, "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence."

Employment

In a 6-3 decision in *Bostock v. Clayton County,* the Supreme Court held that gay and transgender employees may sue their employers under Title VII for discriminating against them because of their sexual orientation or gender identity. Title VII of the Civil Rights Act of 1964 outlaws employment discrimination on the basis of race, color, religion, sex, and national origin. The Court, in an opinion written by Justice Gorsuch, began its analysis by considering the definition of the word "sex." The Court assumed that the term refers only to biological distinctions between male and female. But, the Court noted, Title VII prohibits taking certain actions "because of" sex, meaning "sex" can be one of multiple factors. Furthermore, Title VII prohibits discrimination against individuals, not groups. According to Justice Gorsuch: "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."

In *Comcast v. National Association of African-American Owned Media,* the Supreme Court held unanimously that a plaintiff who sues under 42 U.S.C. §1981 must plead and prove that race was the but-for cause of his or her injury. Section 1981 prohibits discrimination on the basis of race in contracting *and employment*, among other things. It states "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." African-American entrepreneur, Byron Allen, owner of Entertainment Studios Network (ESN), sought to have Comcast carry its channels. Comcast refused, and ESN sued under §1981. ESN didn't dispute that Comcast offered legitimate business reasons for not carryings its channels, but claimed these reasons were pretextual. The Ninth Circuit held that a §1981 plaintiff only has to show that race discrimination played "some role" in the defendant's decision-making process, not that it was the "but for" cause of the defendant's conduct. The Supreme Court rejected the Ninth Circuit's view and instead held that to win a §1981 case the plaintiff must plead and prove but-for causation. Justice Gorsuch, writing for the Court, noted that it is "textbook tort law" that plaintiffs must prove but-for causation. The Court rejected ESN's argument that §1981 creates an exception to the general rule. According to the Court: "While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation."

First Amendment

In *Espinoza v. Montana Department of Revenue*, the Supreme Court held 5-4 that the U.S. Constitution's Free Exercise Clause allows families to receive tax-credit funded scholarships to attend religious schools regardless of the Montana Constitution's no-aid to sectarian schools provision. The Montana legislature established a program offering tax credits for donations to "student scholarship organization," which give children scholarships to attend private schools, including religious schools. The Montana Department of Revenue adopted a rule disallowing the use of scholarships at religious schools based on the Montana Constitution which prohibits state aid to sectarian schools. The Montana Supreme Court struck down the entire scholarship program holding that it violated the Montana constitution. The U.S. Supreme Court, in an opinion written by Chief Justice Roberts, assumed that the Montana Constitution bars religious schools from participating in the scholarship program. The Court held that the U.S. Constitution's Free Exercise Clause allows religious schools to participate in the program; and that per the U.S. Constitution's Supremacy Clause the Free Exercise Clause trumps the Montana Constitution. In *Trinity Lutheran Church of Columbia v. Comer* (2017), the Court stated that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." In that case, Missouri offered playground resurfacing grants to nonprofits, but disallowed religious organizations from applying. The Supreme Court concluded Missouri's policy failed strict scrutiny because it discriminated against the church "simply because of what it is—a church." Applying the reasoning of *Trinity Lutheran* to this case, the Court opined: "Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school." Applying strict scrutiny to Montana's no-aid provision, the Court rejected the Montana Supreme Court's argument that the state's interest in separating church and state "more fiercely" than the federal Constitution is a compelling interest. The Court also rejected the Montana Department of Revenue's arguments that the no-aid provision passes strict scrutiny because it promotes religious freedom and "advances Montana's interests in public education."

In *Barr v. American Association of Political Consultants*,* the Supreme Court held 6-3 that the Telephone Consumer Protection Act's (TCPA) debt-collection exception was content-based, failed strict scrutiny, and therefore violated the First Amendment. The TCPA, adopted in 1991, prohibits robocalls to cell phones and home phones. A 2015 amendment allows robocalls made to collect debts owed to or guaranteed by the federal government. The Supreme Court, in a plurality opinion written by Justice Kavanaugh, held that the government-debt collection exception is a content-based restriction on speech. According to Justice Kavanaugh, under the TCPA, the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. "That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech." The federal government conceded that the government-debt exception fails strict scrutiny. Seven Justices

voted to sever the government-debt exception from the TCPA. Justice Kavanaugh, writing in favor of severability, noted that since 1934 the Communications Act, which the TPCA amended, contains a severability clause.

Environment

In *County of Maui, Hawaii v. Hawaii Wildlife Fund** the Supreme Court held 6-3 that when there is a "functional equivalent of a direct discharge" from a point source to navigable waters an appropriate permit is required under the Clean Water Act. The Clean Water Act forbids the "addition" of any pollutant "*from* a point source" to "navigable waters" without a National Pollutant Discharge Elimination System (NPDES) permit. In this case the County of Maui wastewater reclamation facility pumps treated wastewater (pollutants) from wells (point sources) which travels through groundwater to the ocean (a navigable water). Maui argued that an NPDES permit is only required when a point source or series of point sources is "the means of delivering pollutants to navigable waters." In this case groundwater lies "between the point source [the wells] and the navigable water [the ocean]." Hawaii Wildlife Fund agreed with the Ninth Circuit "that the permitting requirement applies so long as the pollutant is 'fairly traceable' to a point source even if it traveled long and far (through groundwater) before it reached navigable waters." The Supreme Court, in an opinion written by Justice Breyer, rejected both positions holding instead that a permit is required when there is a functional equivalent of a direct discharge. The Ninth Circuit's interpretation of "from" was too broad, the Court opined, because it would lead to "surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers." The Court likewise rejected as too narrow Maui's argument that if a pollutant travels from a point source through groundwater before reaching navigable water no NPDES permit is required. According to the Court, the functional equivalent of a direct discharge test "best captures, in broad terms, those circumstances in which Congress intended to require a federal permit."

In a 7-2 decision in *Atlantic Richfield v. Christian* the Supreme Court held that landowners located on a Superfund site who wanted additional remedies beyond the Environmental Protection Agency's (EPA) plan to clean up the site could not sue in state court. The Comprehensive Environmental Response, Compensation, and Liability Act, also known as the Superfund statute, seeks "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." Before cleaning up a Superfund site, the EPA conducts a study to evaluate clean up options. Once the study begins "no potentially responsible party may undertake any remedial action" at the site without the EPA approval. For the last 35 years Atlantic Richfield has been working with the EPA to clean up a Superfund site in Montana. In 2008 property owners within the Superfund site sued Atlantic Richfield in Montana state court asserting a variety of state law claims and seeking restoration of their land beyond the EPA's plan. The Montana Supreme Court held that the land owners claims could go forward. The U.S. Supreme Court held that the Montana Supreme Court had jurisdiction to hear this case, but that it could not go forward because the landowners were potentially responsible parties (PRPs) under the Superfund statute who needed, but did not obtain, EPA approval to pursue their own remedial plan. Atlantic Richfield argued that the Superfund statute deprives the Montana Supreme Court from having jurisdiction to hear

this case. The statute provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter." Chief Justice Roberts, writing for the majority, noted that this case "arises under" Montana law and not the Superfund statute, meaning Montana courts retain jurisdiction over the case. Both parties agreed that if the landowners are PRPs they had to obtain EPA approval for their restoration plan, which they did not do. All of the Justices except Gorsuch and Thomas agreed that the landowners in this case were PRPs. PRPs include any "owner" of "a facility." "Facility" is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." According to the Court, because hazardous substances have "come to be located" on the landowners' properties, the landowners are PRPs.

Miscellaneous

The Supreme Court ruled unanimously in *Lomax v. Ortiz** that a dismissal *without* prejudice for failure to state a claim counts as a strike under the Prison Litigation Reform Act (PLRA). The PLRA contains a three-strikes rule disallowing an inmate who can't pay filing fees upfront from filing a fourth lawsuit when he or she has filed three previous lawsuits which were dismissed on the grounds that they were "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." Arthur Lomax's current lawsuit challenges his expulsion from a prison sex-offender treatment program. He previously brought three unsuccessful lawsuits against corrections officers, prosecutors, and judges. Lomax claimed that two of those dismissals shouldn't be counted as strikes as they were *without* prejudice, meaning he could file a later suit on the same claim. Justice Kagan, writing for the Court, disagreed with Lomax stating this case "begins, and pretty much ends, with the text" of the statute; the broad language of the statute covers all dismissals. "To reach the opposite result—counting prejudicial orders alone as strikes—we would have to read the simple word 'dismissed' in [the PLRA] as 'dismissed with prejudice.'"

In an 8-1 opinion, the Supreme Court held that a police officer may initiate a traffic stop after learning the registered owner of the vehicle has a revoked license unless the officer has information negating the inference the owner of the vehicle is the driver. In *Kansas v. Glover,* Deputy Mehrer ran the license plate of a vehicle he saw being driven lawfully, matched it to the vehicle he observed, and learned it was registered to Charles Glover who had a revoked driver's license. Deputy Mehrer then initiated a traffic stop and discovered Charles Glover was in fact driving the vehicle. Glover claims that in this case Deputy Mehrer lacked the necessary reasonable suspicion to stop him. The Supreme Court disagreed with Glover and found there was reasonable suspicion in this case. According to the Court: "Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop." The Court did note that additional facts might dispel reasonable suspicion. "For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the

totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.'"

In a 5-4 decision in *Kansas v. Garcia*, the Supreme Court held that the Immigration Reform and Control Act (IRCA) does not preempt state statutes that provide a basis for identity theft prosecutions when someone uses another person's Social Security Number on their state and federal tax-withholding forms. The IRCA requires employers to verify, using a federal work-authorization form, that an employee is authorized to work in the United States. The IRCA states that "any information *contained in* . . . such form[s] may not be used for purposes other than for enforcement of" the Immigration and Nationality Act or other specified provisions of federal law. A federal regulation separate from the IRCA requires new employees to complete tax-withholding forms. The defendants in this case used social security numbers that weren't their own when completing the I-9 form as well as federal (W-4) and state (K-4) tax withholding forms. They were convicted of violating a Kansas statute disallowing identity theft for using false identities when they completed their W-4s and K-4s. The Kansas Supreme Court held that the IRCA prohibits Kansas from using any information contained within an I–9 as the basis for a state law identity theft prosecution. Here the false social security numbers included on the I-9s were also used on the W-4 and K-4 forms which were the basis of the convictions. Justice Alito, writing for the majority, rejected this theory of what "contained in" means noting that under it no information included in an I-9 (name, address, phone number, etc.) which "could ever be used by any entity or person for any reason." Justice Alito continued: "This interpretation is flatly contrary to standard English usage. A tangible object can be 'contained in' only one place at any point in time, but an item of information is different. It may be 'contained in' many different places, and it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source."

In *Kelly v. United States*, the Supreme Court unanimously overturned the federal fraud convictions of the "Bridgegate" masterminds because they didn't seek to obtain money or property. The Democratic mayor of Fort Lee, New Jersey refused to support then-governor Chris Christie's re-election. As punishment, under the guise of conducting a traffic study, one of Christie's staff members and two high ranking Port Authority employees decided to close two out of three lanes serving only cars coming from Fort Lee on the George Washington Bridge, the busiest motor-vehicle bridge in the world. One of the people involved cooperated with the federal government. The other two were convicted of wire fraud and fraud on a federally funded program. The federal government agreed the convictions in this case could only stand if the two employees engaged in fraud to obtain money or property. The federal government claimed the employees fraudulently obtained property in this case by taking control of the bridge lanes and depriving the Port Authority "of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment." The Court rejected the argument that the "object" of the employees' deceit was to obtain the Port Authority's money or property stating: "[The] realignment was a quintessential exercise of regulatory power. And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property. But [the employees'] plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes."

In a 7-2 decision in *Little Sisters of the Poor v. Pennsylvania*,* the Supreme Court held that religious employers and employers with moral objections may be exempted from the Affordable Care Act's (ACA) contraceptive mandate. Regulations long-exempted churches from the contraceptive mandate. Regulations also allowed religious non-profits to participate in a "self-certification accommodation" process where employees could still receive contraceptive coverage from their health plan. In *Zubik v. Burwell* (2016), the Little Sisters, Catholic women who operate homes for the elderly poor, objected to the accommodation process. The Supreme Court didn't decide that case because it appeared the parties reached a compromise. In *Burwell v. Hobby Lobby* (2014), the Court held that the contraceptive mandate violated a privately held company's rights under the Religious Freedom Restoration Act. In 2017, a number of federal agencies issued regulations exempting all objecting religious employers (not just churches), morally objecting non-profits, and private for-profits from the contraceptive mandate. The ACA states that health insurance plans must provide "additional preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by Health Resources and Services Administration [HRSA]." The states argued that this language allows the HRSA to only list the preventive care and screenings that health plans must provide and "not to exempt entities from covering those identified services." According to Justice Thomas, writing for the majority, "that asserted limitation is found nowhere in the statute." "HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines."

In a 5-4 decision, the Supreme Court held in *McGirt v. Oklahoma* that for purposes of the Major Crimes Act (MCA) three million acres, including most of the City of Tulsa, is a Creek reservation. Per the federal MCA, only the federal government may prosecute Native Americans who commit specific crimes within "Indian country." Oklahoma state court convicted Jimcy McGirt, a member of the Seminole Nation of Oklahoma, for three serious sexual offenses. McGirt claimed his crimes took place on a Creek reservation and therefore that the state of Oklahoma had no jurisdiction to try him. According to Justice Gorsuch, writing for the majority, because "Congress has not said otherwise," the treaty between the Creeks and the federal government creating a reservation in 1932 remains a reservation. "[O]nly Congress can divest a reservation of its land and diminish its boundaries. So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so." But, the Court opined, Congress didn't in this case. Justice Gorsuch recounted the history of the treaty in which the Creeks agreed to relocate to what is now Oklahoma from Alabama and Georgia. Even though the treaty didn't explicitly refer to the Creek land as a "reservation"—"perhaps because that word had not yet acquired such distinctive significance in federal Indian law,"— it was a reservation, according to the majority. Justice Gorsuch acknowledged that over time the federal government "broke[] more than a few of its promises to the Tribe." But what Congress never did, according to the Court, was pass a "statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands."