Supreme Court Preview for Local Governments 2020-21

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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.

In *Fulton v. City of Philadelphia** the Supreme Court will decide whether local governments may refuse to contract with foster care agencies who will not work with gay couples. The City of Philadelphia long contracted with Catholic Social Services (CSS) to place foster care children. The City stopped doing so when it discovered CSS wouldn't work with same-sex couples. Philadelphia requires all foster care agencies to follow its "fair practices" ordinance, which prohibits sexual orientation discrimination in public accommodations. CSS claims the City violated the First Amendment by refusing to continue contracting with it because of its religious beliefs. The Third Circuit ruled in favor of the City. The Supreme Court has interpreted the First Amendment's Free Exercise Clause to forbid "government acts specifically designed to suppress religiously motivated practices or conduct." But, per the Court in *Employment Division v. Smith* (1990), individuals must comply with "valid and neutral law[s] of general applicability" regardless of their religious beliefs. CSS first argues that Philadelphia's "fair practices" ordinance isn't applied to it neutrally. According to the Third Circuit, the test for neutrality is whether the City treated CSS "worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs," which the City didn't do. CSS has asked, and the Supreme Court has agreed, to reconsider the Court's holding in *Employment Division v. Smith*. CSS also claims Philadelphia is requiring it to "adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents," in violation of the First Amendment's Free Speech Clause. The Third Circuit agreed that the City couldn't condition contracting with CSS on it officially proclaiming support for same-sex marriage but it could condition contracting with CSS on refusing to work with same-sex couples.

The Supreme Court has held that excessive force violates the Fourth Amendment's prohibition against "unreasonable searches and seizures." The question in *Torres v. Madrid** is whether police have "seized" someone they have used force against who has gotten away. In this case, police officers approached Roxanne Torres thinking she may have been the person they intended to arrest. At the time Torres was "tripping" from using meth for several days. She got inside a car and started the engine. One of the officers repeatedly asked her to show her hands but could not see her clearly because the car had tinted windows. When Torres "heard the flicker of the car door" handle, she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the wind shield. The other officer shot at Torres as well to avoid being crushed between two cars, and to stop Torres from driving toward the other officer. Torres was shot twice. After she hit another car, she got out of the car she was driving and laid on the ground attempting to "surrender" to the "carjackers." She asked a bystander to call the police, but left the scene because she had an outstanding warrant. She then stole a different car, drove 75 miles, and checked into a hospital. The Tenth Circuit found no excessive force in this case because Torres wasn't successfully "seized" under the Fourth Amendment. In a previous case the Tenth Circuit held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." This is because "a seizure requires restraint of one's freedom of movement." Therefore, an officer's intentional shooting of a suspect isn't a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him."

The question the Supreme Court will decide in *City of Chicago, Illinois v. Fulton** is whether a local government must return a vehicle impounded because of code violations immediately upon a debtor filing for bankruptcy. The City of Chicago impounds vehicles when debtors have three or more unpaid fines. Robbin Fulton's vehicle was impounded for this reason. She filed for bankruptcy and asked the City to turn over her vehicle; it refused. Fulton claims the Bankruptcy Code's "automatic stay" provision requires the City to immediately return her vehicles even though she didn't pay her outstanding tickets. The Seventh Circuit agreed. The "automatic stay" provision of the Bankruptcy Code provides that a bankruptcy petition "operates as a stay, applicable to all entities, of … any act to obtain possession of property of the estate or of property from the estate or to *exercise control* over property of the estate." In a previous case decided in 2009, *Thompson v. General Motors Acceptance Corp*., the Seventh Circuit concluded that "exercise control" includes holding onto an asset and that "exercise control" isn't limited to "selling or otherwise destroying the asset." So, the court reasoned that the City of Chicago "exercised control" over Fulton's car in violation of the automatic stay by not returning it after she filed the bankruptcy petition. The Seventh Circuit next concluded that the bankruptcy stay becomes effective immediately upon filing the petition, without the debtor bringing a "turnover action." Another section of the Bankruptcy Code requires the creditor to request "adequate protection" of its interest in property subject to a bankruptcy petition. According to the Seventh Circuit in *Thompson*: "[I]f a creditor is allowed to retain possession, then this burden is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession."

The question the Supreme Court will decide in *Uzuegbunam v. Preczewski** is whether the government changing a policy after a lawsuit has been filed renders the case moot if the plaintiff has only asked for nominal damages. Georgia Gwinnett College students Chike Uzuegbunam and Joseph Bradford sued the college over its Freedom of Expression policy, which only allowed students to engage in expressive activities in two designated areas after getting a permit. They sought an injunction preventing the college from enforcing its policy and nominal damages. The college then changed the policy. The district court concluded the students' claims for injunctive relief were moot, Uzuegbunam's because he graduated, and Bradford's because the college changed its policy. Uzuegbunam and Bradford don't challenge these conclusions. The Eleventh Circuit also agreed with the district court that the students' claims for nominal damages don't keep this case alive because nominal damages would not "have a practical effect on the parties' rights or obligations." According to the Eleventh Circuit, circuit precedent held that nominal damages have no practical effect absent "a well-pled request for compensatory damages." Uzuegbunam and Bradford didn't ask for compensatory damages.

Delaware's Constitution requires that three state courts be balanced between the two major political parties. The main question before the Supreme Court in *Carney v. Adams** is whether this scheme violates the First Amendment. Per Delaware's Constitution no more than half of the members of the Delaware Supreme Court, Superior Court, or Chancery Court may be of the same major political party. Delaware attorney James Adams wants to be a judge in Delaware, but he is an Independent. Adams claims that the First Amendment prohibits the governor from making judicial appointments based on political party. In three previous cases, the Supreme Court has explained "the limits on a government employer's ability to consider a job candidate's political allegiance." Based on those cases, the Third Circuit focused on whether judges are policymakers as First Amendment protections do not apply to policymakers. The Third Circuit concluded judges aren't policymakers. According to the Third Circuit, the "purpose of the policymaking exception is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration." But, "[i]ndependence, not political allegiance, is required of Delaware judges." Per the Delaware Constitution only a bare majority of family court and court of common pleas judges may be from the same political party, but the "major political party" rule doesn't apply to them. The Third Circuit concluded that the "bare majority" rule isn't severable from the unconstitutional "major political party" rule. According to the Third Circuit, the question of severability turns on legislative intent. "For nearly seventy years, the bare majority component and the major political party component have been intertwined." Finally, the Supreme Court will decide whether Adams has standing to bring this case. He has not applied for any judicial position since becoming an Independent in 2017.

In *California v. Texas* the Supreme Court will decide whether the Affordable Care Act's (ACA) individual mandate is unconstitutional. More importantly, if the Court holds that it is, it will decide whether the individual mandate is severable from the ACA. It is possible the Court will conclude it isn't and that the entire law is unconstitutional. If it is severable the rest of the ACA will remain good law. The ACA individual mandate required uninsured who didn't purchase health insurance to pay a "shared-responsibility" payment. The Tax Cuts and Jobs Act of 2017 reduced the payment to $0 as of January 1, 2019. Texas, and a number of other states argued, and

the Fifth Circuit agreed, that the individual mandate is no longer constitutional as a result. According to the Fifth Circuit, in *NFIB v. Sebelius* (2012), five Supreme Court Justices agreed that the "individual mandate could be read in conjunction with the shared responsibility payment" as "a legitimate exercise of Congress' taxing power for four reasons." The Fifth Circuit reasoned that now the shared responsibility payment amount is zero "[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist." While the district court held that none of the ACA was severable from the individual mandate (meaning the entire Act is unconstitutional), the Fifth Circuit concluded the district court failed to take a "careful, granular approach" in its severability analysis. "The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. California and a number of other states defending the ACA argue that the individual and state plaintiffs lack standing to bring this case. California argues the individual plaintiffs haven't been harmed by the tax being reduced to zero because "[a] statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm." California further claims that the states have failed to alleged harm because they have no proof that the shared-responsibility payment being zero will force individuals into the states' Medicaid and CHIP programs or increase state costs for "printing and processing [certain] forms."