Supreme Court Preview for States 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.

As of mid-July, the Supreme Court’s 2020-2021 docket looks a little different than usual. It includes 10 cases the Court was supposed to decide in the 2019-2020 term but didn’t due to COVID-19. This article discusses two of those case. Finally, as of right now, the Court’s docket only contains one potential blockbuster, which isn’t particularly unusual. Even in terms where the Court hears a handful of significant cases, it often grants petitions in those cases in the fall and winter. The big case, discussed immediately below, involves a topic of continuing interest to the Supreme Court—the Affordable Care Act (ACA).

In *California v. Texas* the Supreme Court will decide whether the ACA’s 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.

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 and that Delaware’s balance requirement is unconstitutional. 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.”

In *Rutledge v. Pharmaceutical Care Management Association* the Supreme Court will decide whether states’ attempts to regulate pharmacy benefit managers’ (PBMs) drug-reimbursement rates are preempted by the Employee Retirement Income Security Act (ERISA).

PBMs are an intermediary between health plans and pharmacies. Among other things, they set reimbursement rates to pharmacies dispensing generic drugs. Contracts between PBMs and pharmacies create pharmacy networks. According to the Eighth Circuit, “[b]ased upon these contracts and in order to participate in a preferred network, some pharmacies choose to accept lower reimbursements for dispensed prescriptions.” So, in some instances pharmacies lose money.

Arkansas requires that pharmacies “be reimbursed for generic drugs at a price equal to or higher than the pharmacies’ cost for the drug based on the invoice from the wholesaler.” The Pharmaceutical Care Management Association sued arguing that ERISA preempts this law. The Eighth Circuit agreed.

According to the Eighth Circuit, ERISA preempts “any and all State laws insofar as they . . . relate to any employee benefit plans.” A state law “relates to” an ERISA plan by having “a connection with or a reference to such a plan.” The Eighth Circuit concluded that Arkansas’s law “ma[de] implicit reference to ERISA” because it regulates “PBMs who administer benefits for . . . entities, which, by definition, include health benefit plans and employers, labor unions, or other groups . . . subject to ERISA regulation.”
Conclusion

COVID-19 isn’t going to slow the Supreme Court down next term. It is likely that the Court will not hold in person oral arguments when next term begins on October 5. Instead, the Court will likely continue holding oral arguments using live audio open to the public. This format was very popular when the Court used it to hear 10 cases last May. The Affordable Care Act case will certainly attract many live listeners. The big question for the Supreme Court and Americans is whether the Court will continue to offer live argument available to the public when the pandemic is over.