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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.

Police/Qualified Immunity

In a unanimous opinion in *County of Los Angeles v. Mendez** the Supreme Court rejected the "provocation rule," where police officers using *reasonable* force may be liable for violating the Fourth Amendment because they committed a separate Fourth Amendment violation that contributed to their need to use force. Police officer entered the shack Mendez was living in without a warrant and unannounced. Mendez thought the officers were the property owner and picked up the BB gun he used to shoot rats so he could stand up. When the officers saw the gun, they shot him resulting in his leg being amputated below the knee. The Ninth Circuit concluded that the use of force in this case was reasonable. But it concluded the officers were liable per the provocation rule--the officers brought about the shooting by entering the shack without a warrant. (The Ninth Circuit granted the officers qualified immunity for failing to knock-and-announce themselves.) The Ninth Circuit also concluded that provocation rule aside, the officers were liable for causing the shooting because it was "reasonably foreseeable" that the officers would encounter an armed homeowner when they "barged into the shack unannounced." The Court rejected the provocation rule noting that its "fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Court also rejected the Ninth Circuit's causation analysis because it focused on what might foreseeably happen as a result of the officers' failure to knock-and-announce instead of their failure to have a warrant.

In *Manuel v. City of Joliet** the Supreme Court held 6-2 that even after "legal process" (appearing before a judge) has occurred a person may bring a Fourth Amendment claim challenging pretrial detention. Elijah Manuel was arrested and charged with possession of a controlled substance even though a field test and a lab test indicated his pills weren't illegal drugs. A county court judge further detained Manuel based on a complaint inaccurately reporting the results of the field and lab tests. Forty-eight days later Manuel was released when another laboratory test cleared him. Manuel brought an unlawful detention case under the Fourth Amendment. The Seventh Circuit held that such a case had to be brought under the Due Process Clause which Manuel failed to do. Justice Kagan explains why pretrial detention after legal process can be challenged under the Fourth Amendment: "The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause."

United States Border Patrol Agent Jesus Mesa, Jr., shot and killed Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, who was standing on the Mexico side of the U.S./Mexico border. At the time of the shooting Agent Mesa didn't know that Hernandez was a Mexican citizen. One question in *Mesa v. Hernandez* is whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident. The Fifth Circuit granted Agent Mesa qualified immunity based on the fact that Hernandez was a Mexican citizen even though Agent Mesa didn't know that at the time of the shooting. A second question this case is whether Hernandez has a Fourth Amendment right to be free from excessive force even though he was a Mexican citizen shot on Mexican soil. The Fifth Circuit relied on a 1990 Supreme Court case *United States v. Verdugo-Urquidez* to reach the conclusion Hernandez has no such right. Hernandez argues the Supreme Court should rely on the more recent *Boumediene v. Bush* (2008). In this case the Supreme Court "held that 'de jure sovereignty' is not and has never been 'the only relevant consideration in determining the geographic reach of the Constitution' because 'questions of extraterritoriality turn on objective factors and practical concerns, not formalism.'"

In *Ziglar v. Turkmen*, *Ashcroft v. Turkmen*, and *Hasty v. Turkmen*, a number of "out-of-status" aliens were arrested and detained on immigration charges shortly after 9/11. They claim they were treated in a "discriminatory and punitive" manner while confined and detained long after it was clear they were never involved in terrorist activities. They have sued former Attorney General John Ashcroft, former Director of the Federal Bureau of Investigation Robert Mueller,

former Commissioner of the Immigration and Naturalization Service, James Ziglar, and two wardens and an assistant warden at the federal detention center where they were held. The detainees brought three claims: (1) substantive due process (confinement conditions failed to meet due process); (2) equal protection (detainees were confined to these conditions because of their race, religion, etc.); and (3) conspiracy under 42 U.S.C. § 1985(3) (government officials conspired together to violate equal protection rights of the detainees). The Second Circuit denied qualified immunity to all of the government officials on all three of these claims. The Supreme Court has agreed to review the Second Circuit decisions. All of the government officials make the same argument regarding § 1985(3). Previously, the Second Circuit had not ruled whether § 1985(3) applied to federal officials. So they argue, how could they have violated "clearly established" law? Regarding the first and second claim, Zigler criticizes the Second Circuit for not considering the 9/11 context in the decision to detain the Respondents. Similarly, Ashcroft and Mueller criticize the Second Circuit for viewing Respondents as "ordinary civil detainees" or "pretrial detainee[s]" instead of as persons "legally arrested and detained in conjunction with the September 11 investigation." Finally, the wardens and associate warden claim that no clearly established law gave them authority to "unilaterally overrule the FBI's terrorism designations and place respondents in less restrictive condition."

In *White v. Pauly* police officers went to Daniel Pauly's house to get his side of the story that he was drunk driving. Daniel and his brother Samuel claim the officers stated they were coming in the house but failed to identify themselves as police officers. Officer Ray White arrived after the officers (inadequately) announced themselves. He hide behind a stone wall after hearing one of the brothers say "we have guns." Daniel fired shots and Samuel pointed a gun at another officer. Officer White shot and killed Samuel. The Pauly brothers claim that Officer White used excessive force in violation of the Fourth Amendment and should be denied qualified immunity. The Supreme Court concluded that Officer White violated no clearly established law in this case. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."

First Amendment

The issue in *Packingham v. North Carolina** is whether a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, violates the First Amendment. The North Carolina Supreme Court held that North Carolina's law is constitutional "in all respects." The court first concluded that North Carolina's law regulates "conduct" and not "speech," "specifically the ability of registered sex offenders to access certain carefully-defined Web sites." The court then concluded that the statute is a "content-neutral" regulation because it "imposed a ban on accessing certain defined commercial social networking Web sites without

regard to any content or message conveyed on those sites." Finally, the North Carolina Supreme Court concluded the statute was narrowly tailored to prohibit registered sex offenders from accessing websites where they could gather information about minors. Registered sex offenders could still use websites "exclusively devoted to speech" including instant messaging services and chat rooms, websites requiring no more than an a user name and email address to access content, and websites where users must be at least 18 to maintain a profile.

In *Expressions Hair Design v. Schneiderman** the Supreme Court held unanimously that a New York statute prohibiting vendors from advertising a single price and a statement that credit card customers must pay more regulates speech under the First Amendment. A New York statute states that "[n]o seller in any sales transaction may impose a surcharge on a [credit card] holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Twelve states have adopted credit-card surcharge bans. The Supreme Court agreed that this statute prohibits Expressions Hair Design from posting a single price—for example "Haircuts $10 (3% or 30 cent surcharge added if you pay by credit card)." The sticker price is the regular price so sellers may not charge credit card customers an amount above the sticker price that is not also charged to cash customers. According the Court, this statute regulates speech and isn't a typical price/conduct regulation, which would receive less protection under the First Amendment. "What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit" because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price."

The issue in *Lee v. Tam* is whether Section 2(a) of the Lanham Act, which bars the Patent and Trademark Office (PTO) from registering scandalous, immoral, or disparaging marks, violates the First Amendment. The PTO refused to register the band name The Slants finding it likely disparaging to persons of Asian descent. The Federal Circuit ruled Section 2(a) is unconsitutional. Among other arguments, the court rejected the PTO's argument that trademark registration and the "accoutrements of registration" amount to government speech. The court distinguished the Supreme Court's recent decision in *Walker v. Texas Division, Sons of Confederate Veterans* (2015), where the Court concluded that specialty license plates were government speech, even though a state law allowed individuals, organizations, and nonprofit groups to request certain designs. "There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government." Relatedly, the Federal Circuit rejected the PTO's argument that trademark registration is a form of government subsidy that the government may refuse to extend where it disapproves of a mark's message. "[T]rademark registration is not a program through which the government is seeking to get its message out through recipients of funding (direct or indirect)."

In *Trinity Lutheran Church of Columbia v. Pauley* the Supreme Court will decide whether Missouri can refuse to allow a religious preschool to receive a state grant to resurface its playground based on Missouri's "super-Establishment Clause." The Missouri Department of Natural Resources (DNR) offers grants to "qualifying organizations" to purchase recycled tires to resurface playgrounds. The DNR refused to give a grant to Trinity Church's preschool because Missouri's constitution prohibits providing state aid directly or indirectly to churches. Trinity Church argues that excluding it from an "otherwise neutral and secular aid program" violates the federal constitution's Free Exercise and Equal Protection Clauses, which Missouri's "super-Establishment Clause" may not trump. In *Locke v. Davey* (2004) the Supreme Court upheld Washington State's "super-Establishment Clause," which prohibits post-secondary students from using public scholarships to receive a degree in theology. The lower court concluded *Locke* applies in this case where: "Trinity Church seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion.'"

Education

The Supreme Court held unanimously in *Endrew F. v. Douglas County School District* that public school districts must offer students with disabilities an individual education plan (IEP) "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Per the federal Individuals with Disabilities Education Act (IDEA), a student with a disability receives an IEP, developed with parents and educators, which is intended to provide that student with a "free and appropriate public education" (FAPE). *Board of Education v. Rowley* (1982) was the first case where the Supreme Court defined FAPE. In that case the Court failed to articulate an "overarching standard" to evaluate the adequacy of an IEP because Amy Rowley was doing well in school. But the Court did say in *Rowley* that an IEP must be "reasonably calculated to enable a child to receive educational benefits." For a child receiving instruction in the regular classroom an IEP must be "reasonably calculated to enable the child" to advance from grade to grade. In *Endrew F.* the Court stated that if "progressing smoothly through the regular curriculum" isn't "a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."

In *Fry v. Napoleon Community Schools* the Supreme Court held unanimously that if a student's complaint against a school seeks relief for a denial of a free appropriate public education it must first be brought under the Individuals with Disabilities Education Act (IDEA), instead of under other statutes that might also be violated. Napoleon Community Schools prohibited a kindergartener with cerebral palsy from bringing a service dog to school. The district noted the student had a one-on-one human aid who was able to provide the same assistance as the dog. IDEA requires school districts to develop individualized education programs for students with disabilities, which are intended to provide them with a "free and appropriate public education"

(FAPE). The Americans with Disabilities Act (ADA) and Section 5 for the Rehabilitation Act prohibit all public entities from discriminating on the basis of disability. The Frys' brought a lawsuit for money damages for emotional distress under the ADA and Section 5. The school district argued the lawsuit first should have been brought under IDEA, which requires parents to go through an administrative process before going to court and does not allow for money damages for emotional distress. IDEA states that if a lawsuit "seek[s] relief that is also available under the IDEA" it first must be brought under IDEA even if the lawsuit also alleges violations of other statutes. According to the Court the relief that IDEA makes available is for denial of a FAPE. So to have to bring a lawsuit under IDEA the crux of the lawsuit must be that FAPE was denied.

Miscellaneous

In *Murr v. Wisconsin** the Supreme Court will decide whether merger provisions in state law and local ordinances, where nonconforming, adjacent lots under common ownership are combined for zoning purposes, may result in the unconstitutional taking of property. The Murrs owned contiguous lots E and F which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. A St. Croix County merger ordinance prohibits the individual development or sale of adjacent lots under common ownership that are less than one acre total. But the ordinance treats commonly owned adjacent lots of less than an acre as a single, buildable lot. The Murrs sought and were denied a variance to separately use or sell lots E and F. They claim the ordinance resulted in an unconstitutional uncompensated taking. The Wisconsin Court of Appeals ruled there was no taking in this case. It looked at the value of lots E and F in combination and determined that the Murrs' property retained significant value despite being merged. A year-round residence could be located on lot E or F or could straddle both lots. And state court precedent indicated that the lots should be considered in combination for purposes of takings analysis.

Steven Sherman sued the Town of Chester alleging an unconstitutional taking as the town refused to approve a subdivision on plots of land Sherman intended to sell to Laroe Estates. Laroe Estates advanced Sherman money for the land in exchange for a mortgage on the property. Sherman defaulted on a loan to a senior mortgage holder who foreclosed on the property. Laroe Estates, claiming to be the owner of the property, sought to "intervene" in the takings lawsuit. The district court concluded that Laroe Estates lacked Article III "standing" under the U.S. Constitution to assert a takings claim against the Town. The question the Supreme Court will decide in *Town of Chester v. Laroe Estates** is whether Laroe Estates may intervene in this case even though it lacks standing. The Second Circuit held, based on prior circuit court precedent, Laroe Estates does not have to have standing to intervene in this lawsuit where there is a genuine case or controversy between the existing parties.

The False Claims Act (FCA) allows third parties to sue on behalf of the United States for fraud committed against the United States. Per the Act a FCA complaint is kept secret "under seal"

until the United States can review it and decide whether it wants to participate in the case. In *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby* the Supreme Court held unanimously that if the seal requirement is violated the complaint doesn't have to be dismissed. State Farm insurance adjusters alleged that after Hurricane Katrina, State Farm instructed them to falsely determine houses and property were damaged by flooding, instead of by wind. State Farm had to pay for wind claims and the federal government had to pay for flooding claims. While the claim was under seal the adjusters' attorney disclosed the FCA complaint to national journalists. While the news outlets issued stories about the fraud allegations they didn't reveal the existence of the FCA complaint. The Court concluded the FCA doesn't require the "harsh" result of dismissal for a seal violation. When the FCA states that a complaint "shall" be kept under seal it specifies no remedy for a seal violation. But in other sections the statute explicitly requires dismissal for other actions of those bringing FCA claims.

In *McLane v. EEOC* the Supreme Court held 7-1 that a federal court of appeals should review a federal district court's decision to enforce or quash an Equal Employment Opportunity Commission (EEOC) subpoena for abuse of discretion not *de novo* ("from the new"). In concluding that a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena for abuse of discretion, Justice Sotomayor, writing for the Court looked at two factors both of which she concluded point toward abuse-of-discretion review. First, the long standing practice of every court of appeals except the Ninth Circuit was to use the abuse-of-discretion standard. Second, district courts are well suited, and better suited that appellate courts, to make "fact-intensive, close calls" necessary to decide whether to enforce a subpoena.