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Supreme Court Preview for Local Governments - October 2015

The Supreme Court's last term was big for local governments because the Court decided a number of important cases against them, most notably *Reed v. Town of Gilbert, Arizona* (2015), holding that strict scrutiny applies to content-based sign ordinances. The October 2015 term is one to watch, and not just because the Court has accepted numerous cases on controversial topics affecting local governments. Adding to the intrigue, many of the Court's decisions this term are likely to be discussed by the 2016 presidential candidates as the election heats up. Here is a preview of the most significant cases for local governments that the Court has agreed to decide so far.

Public Sector Collective Bargaining

In *Friedrichs v. California Teachers Association* the Court will decide whether to overrule a nearly 40-year old precedent requiring public sector employees who don't join the union to pay their "fair share" of collective bargaining costs. More than 20 states have enacted statutes authorizing "fair share."

In *Abood v. Detroit Board of Education* (1977) the Supreme Court held that the First Amendment does not prevent public employees who do not join the union from being required to pay their "fair share" of union dues for collective bargaining, contract administration, and grievance adjustment. The rationale is that the union may not discriminate between members and nonmembers in performing these functions. So, no free-riders are allowed.

In two recent cases, the Court's more conservative Justices, including Justice Kennedy, have criticized *Abood*.

If the Court doesn't overrule *Abood*, it may instead rule that public employees may be allowed to opt-in rather than required to opt-out of paying "nonchargeable" union expenditures, in which case presumably fewer will opt-in.

"Fair share" and opt-out are foundational principles for public sector collective bargaining in the United States. Overturning either of them would mean a major change in the law that would substantially weaken public sector unions.

Redistricting

The U.S. Constitution Equal Protection Clause "one-person one-vote" principle requires that voting districts have roughly the same population so that votes in each district count equally. But what population is relevant — total population or total voting population — and who gets to decide? The Court will answer these questions in *Evenwel v. Abbott*.

Over the last 25 years the Supreme Court has repeatedly refused to decide (in cases all involving local governments) whether total voter population must be equalized in state and local legislative districts.

Plaintiffs claim that total voter population must be the metric. They argue their votes are worth less than other voters because they live in districts that substantially deviate from the “ideal” in terms of number of voters or potential voters.

The lower court disagreed because the Supreme Court has never held that any particular population metric is unconstitutional. Most state legislatures use total population, not total voting population data.

Asset Forfeiture

The question in *Luis v. United States** is whether not allowing a criminal defendant to use assets not traceable to a criminal offense to hire counsel of choice violates the Sixth Amendment right to counsel.

Local law enforcement often receive asset forfeitures related to drug crime.

This case comes on the heels of *Kaley v. United States* (2014) where the Supreme Court held 6-3 that defendants may not use frozen assets which are the fruits of criminal activities to pay for an attorney.

Luis argues that it is “inconceivable” that she may not use “her own legitimately-earned assets to retain counsel.” The federal government responded that per her reasoning criminal defendants “could effectively deprive [their] victims of any opportunity for compensation simply by dissipating [their] ill-gotten gains.”

The Eleventh Circuit ruled against Luis, who was indicted on charges related to \$45 million in Medicare fraud.

Local Governments Sued Out-of-State

In *Franchise Tax Board of California v. Hyatt** the Court will decide whether states must extend the same immunities that apply to them to foreign local governments (and states) sued in their state courts. *Hyatt* is important to local governments who are often sued out-of-state.

The Franchise Tax Board (FTB) of California concluded that Gilbert Hyatt didn’t relocate to Nevada when his tax returns indicated he did and assessed him \$10.5 million in taxes and interest. Hyatt sued FTB in Nevada for fraud among other claims.

In *Franchise Tax Board of California v. Hyatt* (2003) the Supreme Court held that the Constitution’s Full Faith and Credit Clause does not require Nevada to offer FTB the full immunity that California law provides.

A Nevada jury ultimately awarded Hyatt nearly \$400 million in damages.

The Nevada Supreme Court refused to apply Nevada’s statutory cap on damages to Hyatt’s fraud claim, reasoning that Nevada has a policy interest in ensuring adequate redress for Nevada citizens that overrides providing FTB the statutory cap because California operates outside the control of Nevada.

Hyatt has also asked the Supreme Court to overrule *Nevada v. Hall* (1979), holding that a state may be sued in another states’ courts without consent. If the Court overrules this case, the question of whether the immunities a state enjoys must be offered to a foreign local government (or state) will be moot.

Affirmative Action

For the second time the Court has agreed to decide whether the University of Texas at Austin's race-conscious admissions policy is unconstitutional in *Fisher v. University of Texas at Austin*.

Even though this case arises in the higher education context, the Supreme Court decides relatively few affirmative action cases so all are of interest to local governments that use race as a factor in decision-making.

Per Texas's Top Ten Percent Plan, the top ten percent of Texas high school graduates are automatically admitted to UT Austin, which fills about 80 percent of the class. Most other applicants are evaluated through a holistic review where race is one of a number of factors.

Abigail Fisher claims that using race in admissions is unnecessary because, in the year she applied, UT Austin admitted 21.5 percent minority students per the Top Ten Percent Plan.

The Supreme Court has held that the use of race in college admissions is constitutional if race is used to further the compelling government interest of diversity and is narrowly tailored.

In *Fisher I* the Court held that the Fifth Circuit, which upheld UT Austin's admissions policy, should not have deferred to UT Austin's argument that its use of race is narrowly tailored.

When the Fifth Circuit relooked at the plan again it concluded that it is narrowly tailored.

Only time will tell whether the Court agrees.

Conclusion

The Court's docket is only about half full right now. Interestingly, the Court hasn't accepted a Fourth Amendment or qualified immunity case yet — but no term would be complete without a few such cases. Of interest to the Court may be a case involving whether cell phone location data may be obtained without a warrant.

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