



2011 Supreme Court Preview

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The Court has accepted review of the following cases which may be of interest to state and local governments:

Florence v. Board of Chosen Freeholders^{*} – This case hopefully will settle whether a jail can have a blanket policy of strip searching all inmates being housed at the facility. In the past the Ninth Circuit held such blanket search policies violated the Fourth Amendment. That changed in February of last year with the opinion in *Bull v. City and County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc). In *Bull* reversed Ninth Circuit precedent and held that San Francisco’s policy requiring strip searches of all arrestees classified for housing in the general population was facially reasonable under the Fourth Amendment. The Third Circuit in *Florence* rejected the reasoning of Ninth Circuit in *Bull*, creating a circuit split that the Supreme Court has agreed to resolve. Oral argument has been set for October 12th.

Rehberg v. Paulk, et al – The Supreme Court previously held that police officers have absolute immunity from civil rights claims based on their trial testimony. A number of circuits, including the Ninth, have recognized an exception to this rule where the officer acted as a complaining witness. I litigated this issue in *Johnston v. Clackamas County* and Judge Anna Brown granted my summary judgment motion, finding no evidence that my client was a complaining witness. (Judge Brown’s opinion can be found here. [Link](#)) In this case, the Supreme Court should

^{*} Each case name is a hyperlink to a page on the SCOTUS Blog (www.scotusblog.com), where you can access the Supreme Court docket for that case along with the lower court’s opinion briefs filed in that case.

determine if there is a complaining witness exception to absolute witness immunity. Oral argument is November 1st.

Filarsky v. Delia - This case is near and dear to any private attorney who does work for the government. Last year the Ninth Circuit held that a private attorney retained to work with government employees in conducting an internal affairs investigation could not claim qualified immunity because he was not a government employee. The Supreme Court just agreed to hear this case and no date has been set for oral argument.

Petitions in the following cases are still pending with the Supreme Court and may be of interest to state and local governments:

Alto Eldorado Partnership v. County of Santa Fe – In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, the Supreme Court held that a Fifth Amendment takings case could not be brought until the landowner exhausted any state procedures for obtaining just compensation. Attorney's representing landowners dislike this requirement because the rules of claim and issue preclusion effectively bar any subsequent federal court litigation. This case asks the court to reverse *Williamson* or find that it does not apply to cases seeking prospective relief and no damages. The court was to consider this petition at its September 26th conference, but it has not yet issued an order accepting or denying review.

Arizona v. United States – Arizona passed a law that established a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers. The United States sued the State of Arizona in federal district court, alleging the state statute was preempted by the Immigration and Nationality Act. The District Court issued a preliminary injunction against four sections of the state statute, which the Ninth Circuit affirmed. Arizona is asking the Supreme Court to decide the preemption issue.

Armour v. Indianapolis - The City of Indianapolis adopted a new way to finance sewer improvements. To ease the transition, the City discharged all outstanding assessments, but did not refund assessments previously paid. Landowners who were denied a refund sued, claiming a violation of the Equal Protection Clause of

the Fourteenth Amendment. The Indiana Supreme Court found no Equal Protection Clause violation because the Cities decision was rationally related to a legitimate governmental interest. The landowners seek reversal from the Supreme Court.

City of San Leandro v. Int'l Church of the Foursquare Gospel – The church applied to build a new building in an area the city's General Plan designated "IP", meaning the land was set aside for industrial and technological activity. The city zoning code prohibited "assembly uses" such as churches from IP zones. The church tried several strategies to obtain approval to build, but was unsuccessful. It then sued the city in federal court for violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The city obtained summary judgment on that claim, but the Ninth Circuit reversed. The city asks the Supreme Court to review the following issues:

- (1) Whether cost and/or inconvenience alone is sufficient to prove that an adverse land use or zoning decision imposes a "substantial burden";
- (2) Whether case-by-case analysis of a land use application constitutes an "individualized assessment" under the Free Exercise Clause and RLUIPA; and
- (3) Whether neutral, generally applicable planning principles may be a compelling interest of local governments under the Free Exercise Clause and RLUIPA.

Dallas County v. Duvall – This case should be of interest to all jail managers. Duvall was a pre-trial detainee who contracted Methicillin-Resistant Staphylococcus Aureus ("MRSA") during his stay at the Dallas County Jail. He sued the jail under the theory that the presence of MRSA in the jail created an unconstitutional condition of confinement. A jury verdict in his favor was affirmed by the Fifth Circuit Court of Appeals. Dallas County is asking the Supreme Court to review the following issues:

- (1) Does the mere presence of MRSA in the jail establish a constitutional violation;
- (2) Can the lower court's application of *Bell v. Wolfish* be reconciled with later Supreme Court decisions that reject negligence as a basis for liability under §1983; and

(3) Should the “deliberate indifference” standard for claims brought by convicted inmates also apply to claims by pretrial detainees.

Szajer v. City of Los Angeles – In *Heck v. Humphrey*, the Supreme Court held that a §1983 claim that would imply the invalidity of a prior criminal conviction must be dismissed unless the plaintiff can show that the conviction had already been invalidated. In *Szajer* the Ninth Circuit upheld the trial court’s dismissal of plaintiff’s search or seizure claim under the *Heck* doctrine. Plaintiffs are asking the Supreme Court to decide whether *Heck* applies to civil rights actions for illegal search or seizure arguing that in such cases neither the claim, nor the damages sought, necessarily implies the invalidity of the conviction.

Reichle v. Howards – In *Skoog v. Clackamas County*, the Ninth Circuit held that a plaintiff could bring a First Amendment retaliation claim based on a search and seizure for which there was probable cause. Because the court also granted the officer qualified immunity, no opportunity arose to appeal that decision. (Note: I represented Clackamas County in this case, but the First Amendment claim was against a State Police Officer who was represented by the Attorney General’s Office)

In *Reichle*, the Tenth Circuit reached the same conclusion as the Ninth Circuit did in *Skoog*, except it denied the officer qualified immunity. The officer is asking the Supreme Court if the Tenth Circuit erred in following the lead of the Ninth Circuit. According to the petition, the Second, Sixth, Eighth, and Eleventh Circuits have all held that probable cause bars the First Amendment Claim. Plaintiff has until November 10th to file a brief opposing review so the Court likely will not address the petition until next year.

ⁱ Ed McGlone is a litigator who has been representing government, private entities and individuals in state and federal trial and appellate courts throughout Oregon and Washington for more than 25 years. His unique background includes more than ten years as chief litigation counsel for Clackamas County. Ed focuses on matters involving government law, police practices, employment, contracts, personal injury, property damage and professional regulation.

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