



Supreme Court Review for Local Governments 2019

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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.

The going theory on the Supreme Court's docket for the 2018-2019 term was that the Court tried to stay out of controversial cases after Justice Kavanaugh's contentious confirmation process. If that was in fact the Court's goal it was mostly able to accomplish it except for the census and partisan gerrymandering cases. As always the Supreme Court decided numerous cases affecting local governments—big and small. This article summarizes the four most significant cases for local governments. At the time of publication it remains unclear whether the 2020 census will contain the citizenship question.

In [*Department of Commerce v. New York*](#) five Justices held that the reasons Commerce Secretary Wilbur Ross gave for adding the citizenship question to the 2020 census were pretextual in violation of the Administrative Procedures Act (APA).

Since 1950 the decennial census has not asked all households a question about citizenship. In a March 2018 memo Secretary Ross announced he would reinstate the question at the request of the Department of Justice (DOJ), “which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (VRA).”

According to the Court additional discovery revealed the following: “that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.”

The Court agreed “to a point” with the federal government that there was “nothing objectionable or even surprising in this.” But, the APA requires that federal agencies don’t act arbitrarily and capriciously. Here, “viewing the evidence as a whole,” Ross’s decision to include the citizenship question “cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA.”

The Bladensburg Peace Cross may stay the Supreme Court ruled in a 7-2 decision in [*American Legion v. American Humanist Association*](#).*

In 1918, residents of Prince George’s County, Maryland, decided to erect a memorial to honor soldiers from the county who died in World War I. The monument, completed in 1925, is a 32-foot tall Latin cross that sits on a large pedestal. Among other things, it contains a plaque listing the names of 49 local men who died in the war. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area. In 1961, the Maryland-National Capital Park and Planning Commission acquired the cross and the land it is on in order to preserve it and address traffic-safety concerns.

The American Humanist Association sued the Commission claiming the cross’s presence on public land and the Commission’s maintenance of it violates the Establishment Clause.

The Supreme Court disagreed. Significantly, the Court stated that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.”

According to the Court, the Bladensburg Cross doesn’t violate the constitution first because it “carries special significance in commemorating World War I.” Second, “with the passage of time” the cross “has acquired historical importance.” Third, the monument didn’t “deliberately disrespect[] area soldiers who perished in World War I” as no evidence indicates Jewish soldiers were excluded. Finally, according to the majority, “it is surely relevant that the monument commemorates the death of particular individuals.”

While the Court acknowledged that the cross “is undoubtedly a Christian symbol,” it opined “that fact should not blind us to everything else that the Bladensburg Cross has come to represent.”

In [*Nieves v. Bartlett*](#)* the Supreme Court held 6-3 that the existence of probable cause generally defeats a First Amendment retaliatory arrest case.

While police officer Luis Nieves and Russell Bartlett have different versions of what happened at Artic Man, a weeklong winter sports festival in Alaska, even the Ninth Circuit agreed that Sergeant Nieves had probable cause to arrest Bartlett. Sergeant Nieves knew Bartlett had been drinking and talking loudly when he saw Bartlett stand close to another officer and the officer push Bartlett away. But Bartlett claimed Sergeant Nieves really arrested him in violation of his First Amendment free speech rights because he had refused to speak to Sergeant Nieves previously, which Bartlett reminded Sergeant Nieves of when he was being arrested.

The Supreme Court held that probable cause *generally* defeats a retaliatory arrest claim. The Court relied primarily on *Hartman v. Moore* (2006), where it held that probable cause defeats retaliatory *prosecution* claims.

In *Hartman*, the Court noted that proving causation is difficult in retaliatory prosecution cases because “the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity.” Similarly, it is difficult to determine if protected speech is the cause of an arrest because “protected speech is often a ‘wholly legitimate consideration’ for officers when deciding whether to make an arrest.”

The Court’s caveat is the “no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”

In a 5-4 opinion in *Knick v. Township of Scott** the Supreme Court held that a property owner may proceed directly to federal court with a takings claim.

In *Knick* the Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985), which held that before a takings claim may be brought in federal court, a property owner must first seek just compensation under state law in state court.

The Township of Scott adopted an ordinance requiring cemeteries, whether located on public or private land, to be open and accessible to the public during the day. Code enforcement could enter any property to determine the “existence and location” of a cemetery. The Constitution’s Takings Clause states that “private property [shall not] be taken for public use, without just compensation.”

Rose Mary Knick sued the county in federal (rather than state) court claiming the ordinance was invalid per the Takings Clause after code enforcement went onto her property without a warrant looking for (and finding) a cemetery not open to the public during the day.

The Court overruled the state-litigation requirement of *Williamson County* reasoning the Takings Clause doesn’t say: “Nor shall private property be taken for public use, *without an available procedure that will result in compensation.*”

Conclusion

Perhaps the most interesting fact about the 2018-2019 term is that Justice Kavanaugh was the Justice most in the majority. Whether this is a sign that he will join Chief Justice Roberts to form a center right coalition on the Court is unclear. Notably, Justice Kavanaugh joined his more conservative colleagues in both of the big cases of the term (census and partisan gerrymandering) while Chief Justice Roberts joined his more liberal colleagues in the portion of the census opinion ruling Ross’s reasons for adding the citizenship question were pretextual. Only time will tell how the addition of Justice Kavanaugh will impact local governments in big and small cases.