

# Supreme Court Review for States and Local Governments 2018

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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.

## Big Cases

In *South Dakota v. Wayfair*\*\* the Supreme Court ruled that states and local governments can require vendors with no physical presence in the state to collect sales tax. In a 5-4 decision, the Court concluded “economic and virtual contacts” are enough to create a “substantial nexus” with the state, allowing the state to require collection. In an opinion written by Justice Kennedy, the Court offered three reasons for why it was abandoning the physical presence rule from *Quill v. North Dakota* (1992). “First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be ‘applied to an activity with a substantial nexus with the taxing State.’ Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.” To require a vendor to collect sales tax, the vendor must still have a “substantial nexus” with the state. The Court found a “substantial nexus” in this case based on the “economic and virtual contacts” Wayfair has with the state, reasoning that a business could not do \$100,000 worth of business or 200 separate transactions in South Dakota “unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”

In *Abood v. Detroit Board of Education* (1977) the Supreme Court upheld “agency shop” arrangements where public employees who do not join a union are still required to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment. In *Janus v. AFSCME*, the Supreme Court overruled *Abood* in a 5-4 opinion. The Court also held that employees must “affirmatively consent” to join the union. In an opinion written by Justice Alito the Court repudiated the two main justifications for “fair share” in *Abood*: “labor peace” and avoiding free riders. In *Janus*, the Court pointed out that labor peace exists in federal employment, where agency fee is disallowed, and states without agency fee. The second defense for agency fee in *Abood* was to avoid free riders who “enjoy[] the benefits of union representation without shouldering the costs.”

But the Court pointed out *Janus*’ analogy that “he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.” More technically, the Court concluded the “First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.” Finally, the Court looked at the five factors it typically weighs when deciding whether to overturn precedent: the quality of the Court’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. Only one factor, the Court concluded, weighed in favor of keeping *Abood*. But that factor – reliance – “does not carry decisive weight.”

In a 5-4 decision in *Trump v. Hawaii*,\*\* the Supreme Court ruled in favor of President Trump’s travel ban. The third travel ban indefinitely prevents immigration from six countries: Chad, Iran, Libya, North Korea, Syria, and Yemen. Hawaii and others sued President Trump claiming the ban was illegal and unconstitutional. The Supreme Court, in an opinion written by Chief Justice Roberts, held that the travel ban fell “well within” the President’s authority under the Immigration and Nationality Act (INA). The INA allows the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.” The Court next addressed the challenge to the travel ban as violating the Establishment Clause of the First Amendment due to “anti-Muslim animus.” The Court acknowledged the anti-Muslim statements of the President and his advisers but stated the issue before the Court “is not whether to denounce the statements.” Because this case involved a “national security directive regulating the entry of aliens abroad” the Court only applied “rational basis review” where it would uphold the travel ban “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” According to the Court, “it cannot be said that it is impossible to ‘discern a relationship to legitimate state interests’ or that the policy is ‘inexplicable by anything but animus.’”

## First Amendment

In a 5-4 decision in *National Institute of Family and Life Advocates v. Becerra*,\*\* the Supreme Court ruled that a California law requiring licensed pregnancy clinics to disclose they don't offer abortions and unlicensed pregnancy clinics to disclose the fact they are unlicensed likely violates the First Amendment. California law requires that "licensed covered facilities" that provide family planning or pregnancy-related services must disseminate a notice stating that publicly-funded family planning services, including contraception and abortion, are available. It also requires "unlicensed covered facilities" to disseminate a notice they are unlicensed. The Supreme Court, in an opinion written by Justice Thomas, agreed that both notices likely violate the First Amendment. The Court held that notice requirements for licensed clinics are content-based, so strict scrutiny would apply (meaning the notice is presumptively unconstitutional). It rejected the lower court holding that lower (intermediate) scrutiny applied because the notices were "professional speech," stating it has never recognized a category of "professional speech." Regardless, it held the licensed notice requirement failed to pass even intermediate scrutiny because it doesn't apply to numerous other community clinics which serve low-income women, who are the intended target of the licensed notices. Regarding the unlicensed notices, the Court assumed but did not decide that the standard for disclosure-requirements from *Zauderer v. Office of Disciplinary Counsel* (1985) applies. Per *Zauderer*, disclosure requirements are unconstitutional if they are "unjustified or unduly burdensome." According to the Court, California's justification for the unlicensed notice is "purely hypothetical."

In a 7-2 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* the Supreme Court reversed a ruling against Phillips, the owner of a cake shop who refused to create a wedding cake for a same-sex couple because of his religious beliefs. The Court concluded the cake maker was entitled to but did not experience a "neutral decisionmaker who [gave] full and fair consideration to his religious objection." Charlie Craig and Dave Mullins filed a complaint against Masterpiece Cakeshop claiming it violated Colorado's public accommodations law, which prohibits discrimination in public accommodations on the basis of sexual orientation, when it refused to create a wedding cake for them. Before the Colorado Civil Rights Commission and the Colorado Court of Appeals, Masterpiece argued that being required to create cakes for same-sex weddings violates Phillips' First Amendment free speech and free exercise rights. Phillips lost in both venues. The Supreme Court, in an opinion written by Justice Kennedy, ruled in favor of Masterpiece, concluding that

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the Colorado Civil Rights Commission acted with hostility toward religion “inconsistent with the First Amendment’s guarantee that our laws be applied . . . neutral[ly] toward religion.” Specifically, a number of commissioners made anti-religion remarks at hearings including that faith is “one of the most despicable pieces of rhetoric that people can use.” Also, on at least three other occasions the commission allowed bakers to refuse to create cakes conveying disapproval of same-sex marriage, along with religious text because the cake makers deemed these messages offensive. According to the Court, “the Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs.”

In a 7-2 decision in *Minnesota Voter Alliance v. Mansky*,\*\* the Supreme Court struck down a Minnesota law which prohibits voters from wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. Andrew Cilek was temporarily prevented from voting for wearing two items: a T-shirt with the words “Don’t Tread on Me” and the Tea Party Patriots logo and a “Please I. D. Me” button. He argued before the Supreme Court that Minnesota’s ban on political speech at the polling place violates the First Amendment because it is overly broad. In an opinion written by Chief Justice Roberts, the Court concluded that the statute violates the First Amendment. The Court opined that states may ban some campaign-related clothing and accessories from the polling place but “must draw a reasonable line.” In short, states must be able to articulate “some sensible basis for distinguishing what may come in from what must stay out.” “[T]he unmoored use of the term ‘political’ in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail.”

In an 8-1 decision in *Lozman v. City of Riviera Beach*,\*\* the Supreme Court held that a citizen who was arrested for making comments at a city council meeting (possibly because the City had an official policy of retaliating against him) was not barred from bringing a First Amendment retaliatory arrest claim against the City even if it had probable cause to arrest him. Fane Lozman was an “outspoken critic” of the City of Riviera Beach’s proposed plan to redevelop the city-owned marina using eminent domain, and sued the City claiming it violated open meetings law. He alleged that the City Council held a closed-door meeting in which it devised an official plan to intimidate him in retaliation for his lawsuit. Five months after the closed-door meeting, a councilmember had Lozman arrested during the public comment period for discussing

issues unrelated to the City and refusing to leave the podium. Lozman conceded that the City had probable cause to arrest him, but he claimed the City should be liable for violating the First Amendment because its strategy to intimidate him to stop speaking was a “but for” cause of his arrest. In contrast, the City argued that Lozman could not sue it for retaliatory arrest under any circumstances if probable cause existed to arrest him. In an opinion written by Justice Kennedy, the Court declined to decide whether to extend either the “but for” cause rule proposed by Lozman or the absolute bar to retaliatory arrest claims proposed by the City to the “mine run” of First Amendment retaliatory arrest claims. Instead, the Court held that because of the unique facts of the case Lozman “need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.”

#### Fourth Amendment and Qualified Immunity

In *Carpenter v. United States*, the Supreme Court held 5-4 that the Fourth Amendment requires the government to get a warrant to obtain cell-site location information (CSLI). Robbery suspects gave the FBI Timothy Carpenter’s name and cell phone number as an accomplice who participated in a number of robberies. Prosecutors obtained Carpenter’s CSLI for over 100 days, and were able to show that Carpenter was located at four of the robberies at the exact time they occurred. Per the Stored Communications Act (SCA), prosecutors applied for a less-stringent court order rather than a warrant to obtain the records. In concluding that obtaining CSLI was a search, the Court rejected the argument that the “third-party” doctrine applies in this case. In previous cases, the Court had held that persons have no legitimate expectation of privacy in information voluntarily turned over to third parties, meaning such information isn’t protected by the Fourth Amendment. According to the Court, the information to which the Court applied the third-party doctrine in previous cases (bank records and dialed phone numbers) isn’t comparable to “the ability to chronicle a person’s past movements through the record of his cell phone signals.” The Court also concluded the government needs to obtain a warrant because warrants are typically required where “a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.” The SCA’s requirement to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation” “falls well short of the probable cause required for a warrant.”

In an 8-1 decision in *Collins v. Virginia*, the Supreme Court held that the Fourth Amendment automobile exception does not permit police officers to search vehicles parked in the

curtilage of a home without a warrant. Per the automobile exception to the Fourth Amendment, police officers may search vehicles without a warrant if they have probable cause to believe they will find contraband or a crime has been committed. But officers may not enter the curtilage of a home to gather evidence without a warrant. In an opinion written by Justice Sotomayor, the Supreme Court concluded that the automobile exception “extends no further than the automobile itself.” Two rationales justify the automobile exception: the “ready mobility” of vehicles and their “pervasive regulation.” “To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.”

In *Byrd v. United States*, the Supreme Court held unanimously that the driver of a rental car generally has a reasonable expectation of privacy in the rental car even if he or she isn't listed as an authorized driver on the rental agreement. A

state trooper pulled Terrance Byrd over for a possible traffic infraction. Byrd's name was not on the rental agreement, and he told the officer a friend had rented it. Officers searched the car and found 49 bricks of cocaine and body armor. While the Fourth Amendment prohibits warrantless searches, generally probable cause a crime has been committed is needed to search a car. To claim a violation of Fourth Amendment rights a defendant must have a “legitimate expectation of privacy in the premises” searched. The United States argued drivers not listed on rental agreements always lack an expectation of privacy based on the rental company's lack of authorization. The Supreme Court, in an opinion written by Justice Kennedy, rejected this argument, reasoning that “the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car.” The Court also noted that a legitimate expectation of privacy may be tied to property rights – including the right to exclude others. The United States agreed that Byrd could exclude third parties from the rental car even though he wasn't listed on the rental agreement.

In *District of Columbia v. Wesby*,\*\* a majority of the Supreme Court ruled D.C. police officers had probable cause to arrest individuals for holding a “raucous, late-night party in a house they did not have permission to enter.” All nine of the Justices

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ruled in favor of granting qualified immunity to the police officers. Police were called to a home in D.C. around 1:00 a.m. based on complaints of loud music and illegal activity. The house was dirty, with no furniture downstairs except a few metal chairs. In the living room the officers found “a makeshift strip club”; they found “more debauchery upstairs.” While many partygoers said they were there for a bachelor party, no one could identify the bachelor. Two of the women working the party said that “Peaches” was renting the house and had given them permission to be there. Police officers called Peaches, who told them she gave the partygoers permission to use the house. But she ultimately admitted that she had no permission to use the house herself; she was in the process of renting it. The landlord confirmed by phone that Peaches hadn’t signed a lease. The partygoers were charged with disorderly conduct. They sued D.C. for false arrest under the Fourth Amendment. The D.C. Circuit concluded there was no probable cause to arrest them. Peaches invited them, so the officers had no reason to believe the partygoers “knew or should have known” their “entry was unwanted.” The Supreme Court looked at the totality of the circumstances and concluded police officers made an “entirely reasonable inference” that the partygoers “were knowingly taking advantage of a vacant house as a venue for their late-night party.” The totality of the circumstances included: the condition of the house (filthy and empty); the partygoers’ conduct (makeshift strip club); their reaction to police presence (scattering, hiding in closets); their answers to questions (vague and implausible); and Peaches’ invitation (from a confirmed liar).

In *Kisela v. Hughes*, officers arrived at Amy Hughes’s house after being told a woman was hacking a tree with a kitchen knife. Officers saw Hughes emerge from her house carrying a large kitchen knife at her side. Hughes stopped no more than six feet away from her roommate, Sharon Chadwick. After officers told Hughes twice to drop the knife and she did not comply, Officer Kisela shot her four times. The Ninth Circuit ruled that Officer Kisela used unreasonable force in violation of the Fourth Amendment and denied him qualified immunity concluding the constitutional violation was obvious. The Supreme Court in a *per curiam* (unauthored) opinion disagreed. It assumed without deciding that Officer Kisela’s use of force was excessive. But the Court granted him qualified immunity noting this is “far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.” According to the Court, Officer Kisela believed Hughes was a threat to Chadwick, he had only seconds to assess the danger, Hughes had just been seen hacking a tree, and she failed to acknowledge two commands to drop the knife which were loud enough for her roommate to hear.

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In a unanimous *per curiam* (unauthored) opinion, the Supreme Court remanded *Sause v. Bauer* back to the lower court to reconsider its decision granting qualified immunity to police officers who ordered a person to stop praying. Officers visited Mary Anne Sause’s apartment in response to a noise complaint. According to the Court, they then allegedly “proceeded to engage in a course of strange and abusive conduct,” including ordering her to stop when she knelt and began to pray. Sause sued the officers for violating her First Amendment right to free exercise of religion. The Tenth Circuit affirmed a lower court granting the officers qualified immunity. Sause argued she had a clearly established right to pray. The Court agreed that the First Amendment protects the right to pray, but “there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place.” “When an officer’s order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.” In this case the Supreme Court concluded the lower court needed answers to numerous questions before it could decide whether Sause’s First Amendment or Fourth Amendment rights (to be free from an unlawful search) were violated.

## About the Author:

Lisa Soronen is the Executive Director of the State and Local Legal Center (SLLC). In this role, Lisa files *amicus curiae* briefs to the United States Supreme Court on behalf of members of the Big Seven (National Governors Association, National Conference of State Legislatures, Council of State Governments, National League of Cities, United States Conference of Mayors, National Association of Counties, and International City/County Management Association) in cases affecting state and local government. Prior to joining the SLLC, Lisa worked for the National School Boards Association, the Wisconsin Association of School Boards, and clerked for the Wisconsin Court of Appeals. She earned her J.D. at the University of Wisconsin Law School and is a graduate of Central Michigan University. Lisa grew up in the UP but considers Wisconsin home. Contact Lisa at [lsoronen@sso.org](mailto:lsoronen@sso.org)

\* Members include: the Council of State Governments, the International City/County Management Association, the National Governors Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the United States Conference of Mayors.

\*\*Indicates a case where the SLLC has filed or will file an *amicus* brief.



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