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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.

First Amendment

In *Trinity Lutheran Church of Columbia, Inc. v. Comer* the Supreme Court held 7-2 that Missouri violated Trinity Lutheran Church's free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires. Trinity's preschool ranked fifth among 44 applicants to receive a grant from Missouri's Scrap Tire Program. Missouri's Department of Natural Resources (DNR) informed the preschool it didn't receive a grant because Missouri's constitution prohibits public funds from being used "directly or indirectly, in aid of any church, sect, or denomination of religion." Trinity sued the DNR claiming it violated the Church's First Amendment free exercise of religion rights. The Supreme Court sided with the church. As the policy expressly discriminated against otherwise eligible recipients on the basis of religion, the Court reached the "unremarkable" conclusion that it must be able to withstand "the most exacting scrutiny." It did not because the DNR "offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns."

Section 2(a) of the Lanham Act bars the Patent and Trademark Office (PTO) from registering trademarks that disparage persons or institutions. Simon Tam named his band The Slants to "reclaim" and "take ownership" of Asian stereotypes. The PTO refused to register the band name, concluding a "substantial composite of people" would find it offensive. In *Matal v. Tam*, Tam sued the PTO arguing that Section 2(a) violates the First Amendment Free Speech Clause. In rejecting the argument that trademarks are government speech, the Court noted that none of the factors present in *Walker v. Texas* (2005) are present in this case. Specifically, license plates

have long been used to convey state messages; are closely identified with the state as they are manufactured, owned, and generally designed by the state; and Texas directly controlled the messages conveyed on specialty plates. The Supreme Court has upheld the constitutionality of government programs that subsidize speech expressing a particular viewpoint like federal grants to artists or libraries. The Court rejected the argument that the federal registration of trademarks is anything like these programs. Notably, the PTO charges people to register trademarks; it does not pay people seeking trademark registration. Applying the First Amendment the Court concluded that the "disparagement clause" is unconstitutional because it is not "'narrowly drawn' to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*."

In *Packingham v. North Carolina** the Supreme Court ruled unanimously that a North Carolina law making it a felony for a registered sex offender to access social networking sites where minors can create profiles violates the First Amendment Free Speech Clause. Lester Packingham was charged with violating the North Carolina statute because he praised God on Facebook when a parking ticket was dismissed. The Supreme Court reasoned that this law violates the free speech rights of sex offenders because it is too broad. "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." The Supreme Court assumed the statute was content-neutral but held that it is too broad to withstand even less rigorous intermediate scrutiny. The Court assumed sex offenders would not be able to use very common social networking sites like Facebook, LinkedIn, and Twitter. And the Court noted that it has never approved a statute "as broad in its reach" as this one.

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."

Preemption

In *Coventry Health Care of Missouri v. Nevils** the Supreme Court held unanimously that the Federal Employees Health Benefits Act (FEHBA) preemption clause overrides state laws prohibiting subrogation and reimbursement and that the preemption clause is consistent with the Supremacy Clause. FEHBA allows the federal government to contract with private insurance carriers for federal employees' health insurance. FEHBA preempts state law related to the "nature, provision, and extent of coverage of benefits." The Court focused on the plain language of FEHBA to conclude it preempts state reimbursement and subrogation laws. "Contractual provisions for subrogation and reimbursement 'relate to . . . payments with respect to benefits' because subrogation and reimbursement rights yield just such payments. When a carrier exercises its right to either reimbursement or subrogation, it receives from either the beneficiary or a third party 'payment' respecting the benefits the carrier had previously paid. The carrier's very provision of benefits triggers the right to payment." The Court also rejected the argument that FEHBA violates the Supremacy Clause, which states that federal laws are the supreme law of the land, "by assigning preemptive effect to the terms of a contract, not to the laws of the United States." According to the Court it is the statute and not a contract that "strips state law of its force."

In *Kindred Nursing Centers v. Clark* the Supreme Court held 7-1 that an arbitration agreement entered into by a power of attorney may still be valid even if the power of attorney doesn't specifically say the representative may enter into arbitration agreements. Beverly Wellner and Janis Clark moved their husband and mother, respectively, into a nursing home using their powers of attorney. Both wanted to sue the nursing home in court after their relative died. But both had signed contracts stating that any claims would be resolved through arbitration. The Kentucky Supreme Court concluded that Wellner's power of attorney wasn't broad enough to allow her to enter into an arbitration agreement but Clark's was. Regardless, the court held that both arbitration agreements were invalid because "a power of attorney could not entitle a representative to enter into an arbitration agreement without specifically saying so." According to the Kentucky Supreme Court, this is because the right to a jury trial under the Kentucky Constitution is the only right declared "sacred" and "inviolate." The Federal Arbitration Act (FAA) makes arbitration agreements irrevocable; they may not be invalidated based on legal rules that only apply to arbitration. The Supreme Court reversed the Kentucky Supreme Court concluding that its "clear-statement rule" "fails to put arbitration agreements on an equal plane with other contracts."

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 of 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.

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."

In *Hernandez v. Mesa* the Supreme Court ruled that the lower court erred in granting qualified immunity to a police officer based on facts unknown at the time of the shooting, but favorable to the officer. 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. Hernandez's family argued, among other things, that Agent Mesa violated their son's Fifth Amendment due process rights. The Fifth Circuit granted Agent Mesa qualified immunity relying on the fact that Hernandez was "an alien who had no significant voluntary connection to . . . the United States." But Agent Mesa didn't know Hernandez's nationality and the extent of his ties to the United States at the time of the shooting. In a *per curiam* (unauthored) opinion the Court noted that "[f]acts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant" to the qualified immunity analysis.

In *Ziglar v. Abbasi*, the Supreme Court in a 4-2 decision granted a number of high level federal executive agency officials qualified immunity related to a claim they conspired to violate the equal protection rights of a number of undocumented immigrants held on suspicion of a connection to terrorism after September 11, 2001. Six men of Arab or South Asian descent, five who are Muslims, brought a variety of legal claims against former Attorney General John Ashcroft, former FBI Director Robert Mueller, former Immigration and Naturalization Service Commissioner James Ziglar, and two federal prison wardens. According to the Court "[t]he gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in . . . harsh conditions." Among other things the detainees claimed that the federal officials violated 42 U.S.C. 1985(3) by engaging in a conspiracy to violate the detainees' equal protection rights. According to the majority of the Justices deciding this case two factors weighed in favor of qualified immunity. First, the alleged conspiracy was between officials in the same branch and department of the government. In antitrust law, per the intracorporate-conspiracy doctrine, no conspiracy can exist between agents from the same legal entity. While the lower courts are split on whether this doctrine applies in the Section 1985 context, the split indicates the law on this question isn't clearly established. Second, the Court noted that the government officials in this case discussed matters of "general and far-reaching policy." "[O]pen discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue."

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."

Redistricting

In *Cooper v. Harris* the Supreme Court held 5-3 that a North Carolina District Court correctly ruled that North Carolina relied too heavily on race in designing two majority-minority congressional districts. Following the 2010 census the North Carolina legislature increased the number of black voting-age population from over 40% to over 50% in Districts 1 and 12. North Carolina, practically speaking, conceded that race predominated in the drawing of District 1. The state argued it had a "strong basis in evidence" to conclude District 1 had to be majority-minority to avoid vote dilution. But to prove vote dilution a district's white majority must vote as a bloc to usually defeat the minority's preferred candidate. Here the Court pointed out that for the last two decades District 1 was "an extraordinarily safe district for African-American preferred candidates." North Carolina argued that District 12 was a political gerrymander and not a racial gerrymander. But the Supreme Court agreed with the lower court that numerous evidence in the record indicated otherwise including statements of the redistricting committee chairs.

In a 7-1 decision in *Bethune-Hill v. Virginia State Board of Elections* the Supreme Court rejected the notions that race predominates in redistricting only when there is an actual conflict between traditional redistricting criteria and race and that the predominance analysis should apply only to new district lines that appear to deviate from traditional redistricting criteria. Regarding District 75, where the lower court determined race did predominate, the Supreme Court agreed the State's use of race was narrowly tailored because it had "good reasons to believe" that a target of a 55% black voting-age population (BVAP) was necessary to avoid diminishing the ability of black voters to elect their preferred candidate.

In *North Carolina v. Covington* the Supreme Court issued a three-page unauthored opinion ordering a North Carolina district court to reconsider its decision to remedy unconstitutional racial gerrymandering by truncating existing legislators' terms and holding a special election. In August 2016, a district court in the Middle District of North Carolina ruled race was unconstitutionally used as the predominant factor in the design of 28 majority-black state legislative districts created following the 2010 census. The court did not order the districts redrawn before the 2016 election. But three weeks after the election it issued an additional order which, among other things, limited to one year the term of any legislator elected in 2016 in a district modified by the forthcoming redistricting and required a special election in the fall of 2017 to select new legislators in the affected districts for one-year terms. The Supreme Court vacated and remanded the district court's

order because it "failed to meaningfully weigh any equitable considerations." The Supreme Court directed the district court to reconsider its order in light of "the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty."

Capital Punishment

In a 5-3 decision in a capital case the Supreme Court rejected a Texas court's reliance on a 1992 definition of intellectual disability and the use of a number of factors as indicators of intellectual disability which the Court described an "invention…untied to any acknowledged source." In 1980, Bobby Moore was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a robbery. The Texas Court of Criminal Appeals (CCA) rejected another court's conclusion that Moore is intellectually disabled. The CCA concluded Moore doesn't have significantly subaverage intellectual functioning because he scored 74 on an IQ test. Relying on a 2004 CAA case *Ex parte Briseno*, the CCA considered Moore's adaptive deficits based on a 1992 manual defining intellectual disability. The CAA also relied on "seven evidentiary factors" for assessing adaptive functioning set out in *Briseno*. In *Moore v. Texas* the Supreme Court, in an opinion written by Justice Ginsburg, rejected both the CAA's conclusion that Moore's IQ score establishes that he isn't intellectually disabled and the CAA's reliance on *Briseno*. In *Hall v. Florida* (2014) the Court held that when an IQ score adjusted for the standard error of measurement is below 70 courts must consider other evidence of intellectual disability. Moore's score of 74, adjusted for standard error of measurement, yields a range of 69-74. Regarding adaptive functioning, the Supreme Court pointed out that a number of the CAA's conclusions based on the 1992 definition of intellectually disabled are not consistent with current views of the medical community. Finally, the Supreme Court rejected the seven evidentiary factors set forth in *Briseno* for assessing adaptive functioning. One of the factors included asking friends and family members their opinion if the defendant is mentally retarded—which the Court stated just leads to stereotyping.

In *McWilliams v. Dunn* the Supreme Court disagreed 5-4 with a lower court's determination that a capital defendant received all the mental health expert assistance the Constitution requires. James Edmond McWilliams, Jr., was convicted of capital murder in Alabama 31 years ago. A volunteer psychologist suggested the defense attorney file a motion for McWilliams to receive neurological and neuropsychological testing before sentencing. The test results, received two days before sentencing, revealed that while McWilliams "exaggerate[d] his neuropsychological problems," it was "quite apparent that he ha[d] some genuine neuropsychological problems." The trial judge refused to grant McWilliams's attorney's request for a continuance to further prepare McWilliams's defense and found no factors mitigated against a death sentence. In *Ake v. Oklahoma* (1985) the Supreme Court held that once an indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination

and assist in evaluation, preparation, and presentation of the defense." McWilliams argued he didn't receive the expert assistance *Ake* requires. The Alabama Court of Criminal Appeals disagreed. Justice Breyer, writing for the majority, concluded McWilliams didn't receive three of the four aspects of a defense he was supposed to receive under *Ake* including: "[1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense."

In a three-page *per curiam* (unauthored) opinion in *Bosse v. Oklahoma*, the Supreme Court reversed the Oklahoma Court of Criminal Appeals' decision to allow victims' relatives to recommend to the jury that they sentence a defendant to death. In *Booth v. Maryland* (1987) the Supreme Court held that during sentencing capital juries could only hear victim impact evidence that relates directly to the circumstances of the crime. Four years later in *Payne v. Tennessee* the Court changed course holding that capital juries could hear evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family. In *Payne* the Court stated that it didn't reconsider its holding in *Booth* that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. Regardless, the Oklahoma Court of Criminal Appeals held that *Payne* "*implicitly* overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence." The Supreme Court reminded the Oklahoma Court of Criminal Appeals that the Supreme Court alone overrules its precedent.

Miscellaneous

In *Murr v. Wisconsin** the Supreme Court concluded 5-3 that no taking occurred where state law and local ordinance "merged" nonconforming, adjacent lots under common ownership, meaning the property owners could not sell one of the lots by itself. The Murrs owned contiguous lots E and F, which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. State law and a St. Croix County merger ordinance prohibit the individual development or sale of adjacent lots under common ownership that are less than one acre total. The Murrs claimed the ordinance resulted in an unconstitutional uncompensated taking. According to the Court, the question in this case was whether the lots should be viewed as a single parcel when concluding whether a taking took place. The Court applied a three-factor test which lead it to conclude that the lots should be viewed as one parcel. First, state law and local ordinance treat the property as one for a "specific and legitimate purpose." Second, the physical characteristics of the property in this case indicate the parcels should be combined for purposes of takings analysis. Third, the "special relationship of the lots is further shown by their combined valuation." Lot E appraised at $40,000; lot F at $373,000; but the combined lots appraise at $689,300. Looking at the parcels as a whole the Court concluded no compensable taking occurred in this case. The Murrs could still build a bigger house on the combined lots, and they cannot claim they "reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

Most states, including Colorado, and the federal government have a "no-impeachment" rule which prevents jurors from testifying after a verdict about what happened during deliberations with limited exceptions that do not include that a juror expressed racial bias. A jury found Miguel Angel Pena-Rodriguez guilty of unlawful sexual contact and harassment involving two teenage sisters. Subsequent to his conviction, two jurors alleged that another juror made numerous statements during deliberations indicating he believed Pena-Rodriguez was guilty because he is Mexican. Justice Kennedy, writing for the 5-3 Court in *Pena-Rodriguez v. Colorado* concluded that the "Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." "An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."

In *Town of Chester v. Laroe Estates** the Supreme Court held that an intervenor must possess Article III standing to intervene in a lawsuit as a matter of right if he or she wishes to pursue relief not requested by the plaintiff. Steven Sherman sued the Town of Chester alleging an unconstitutional taking as the town "obstructed his plans" to build a subdivision. Laroe Estates paid $2.5 million to Sherman for the property while Sherman went through the regulatory process. Laroe Estates sought to intervene in the lawsuit. The Supreme Court assumed that Laroe Estates lacked Article III standing. Both parties and the Court agreed that it "follows ineluctably from our Article III case law" that if interveners seek different relief from plaintiffs they are required to have standing. Here, it is unclear whether Laroe Estates wants the damages Sherman requested (damages for Sherman) or damages in Laroe Estates' name.

In *Nelson v. Colorado* the Supreme Court struck down a Colorado law requiring defendants whose criminal convictions have been invalidated to prove their innocence by clear and convincing evidence in order to receive a refund of fees, court costs, and restitution. According to the Court in a 7-1 opinion, this scheme violates the Fourteenth Amendment's guarantee of due process. Shannon Nelson was convicted on a number of charges from the alleged sexual and physical abuse of her children. Her conviction was reversed due to a trial court error; a new jury acquitted her of all charges. Louis Alanzo Madden was convicted of two sex crimes. The Colorado Supreme Court reversed his conviction; the state did not appeal or retry the case. The only way Nelson or Madden could recover fees, court costs, and restitution was filing a civil claim under Colorado's Exoneration Act, which requires them to show by clear and convincing evidence their actual innocence. The Court concluded that Colorado's scheme doesn't comport with due process, applying a three-part balancing test from *Mathews v. Eldridge* (1976). Nelson and Madden have an "obvious interest" in regaining the money they paid to Colorado. There is a risk they will be erroneously deprived of their funds because they must prove their innocence by clear and convincing evidence. "But to get their money back, defendants should not be saddled with any proof burden. Instead . . . they are entitled to be presumed innocent." Finally, "Colorado

has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right."

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 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.

In *Pavan v. Smith*, a *per curiam* (unauthored) decision, the U.S. Supreme Court reversed an Arkansas Supreme Court judgment that an Arkansas statute, which allows only the biological mother of a child born to a same-sex married couple to be listed on the birth certificate, is constitutional. Terrah and Marisa Pavan married in New Hampshire in 2011, and Terrah gave birth to a child in Arkansas in 2015. The Arkansas Department of Health issued a certificate bearing only Terrah's name based on a provision of the Arkansas code specifying that "[i]f the mother was married at the time of either conception or birth . . . the name of [her] husband shall be entered on the certificate as the father of the child." This provision applies even if a child is conceived through artificial insemination, as the Pavan's daughter was, and it is impossible that the mother's husband is the child's biological father. In *Obergefell v. Hodges* (2015) the Supreme Court held that the Constitution allows same-sex couples to have civil marriages "on the same terms and conditions as opposite-sex couples." According to the Court, Arkansas's birth certificate law denies same-sex couples the "constellation of benefits that the Stat[e] ha[s] linked to marriage." This is because an opposite-sex couple similarly situated to the Pavan's – applying for a birth certificate after giving birth to a baby conceived through artificial insemination – would receive what the Pavan's were denied: a birth certificate bearing the name of the mother and the mother's spouse.