

NLC-RISC Trustees Conference

Federal Regulatory, Legislative & Legal Update
May 16, 2019



NLC NATIONAL
LEAGUE
OF CITIES
CITIES STRONG TOGETHER



OUR MISSION

To strengthen local leadership, influence federal policy and drive innovative solutions.

WHAT DO WE DO?

- **Lobbying:** Meeting with federal decisionmakers and their staff
- **Advocacy:** Encouraging members to lobby on behalf of their communities
 - **Grass Roots:** Broad campaigns to encourage a large number of members to connect with their federal decision makers
 - **Grass Tops:** Narrow campaign to encourage a small number of members to connect with key federal decision makers

WHAT DO WE DO?

- **Filing Comments:** Providing feedback to agencies throughout the federal rulemaking process
- **Litigation:** Joining amicus curiae (“friend of the court”) briefs to cases before federal courts
- **Resource:** Keeping members and state municipal leagues up-to-date on what’s happening in Washington
- **Committee Work:** Managing the day-to-day activities of the seven NLC committees.

WHO ARE OUR LOBBYISTS / COMMITTEES



Irma Esparza Diggs
Director **(All)**



Brian Egan
Finance, Administration
and Intergovernmental
Relations **(FAIR)**



Carolyn Berndt
Energy, Environment and
Natural Resources **(EENR)**



Michael Wallace
Community and Economic
Development **(CED)**



**Stephanie Martinez-
Ruckman**
Human Development **(HD)**



Yucel (U-Jel) Ors
Public Safety and Crime
Prevention **(PSCP)**



Brittney Kohler
Transportation and
Infrastructure Services **(TIS)**



Angelina Panettieri
Information, Technology
and Communications **(ITC)**

WANT TO GET INVOLVED?

- **Connect with the Lobbyists** on issues that align with your work to see how you can get engaged
- **Attend or Present** at a committee meeting to share your work and ideas with the committee
- **Join a committee** and actively participate in the policy process.
- **Read the FA Update!**



Policy Focus for 2019



Current Political Landscape

- Fiscal Year 2020 Budget
 - September 20, 2019 deadline to pass
 - FY20 Budget Tracker
- 116th Congress
- 2020 Election Cycle

Rebuild With Us

- **Infrastructure is NLC's Top Priority in 2019**

- **Guiding Principles**

- Sustainable Investment
- Locally-Driven Projects
- Federal-Local Partnership
- Expand Revenue Tools
- Strong Communities
- Rebuild and Reimagine

- **Focus Areas**

- Transforming Transportation
- Preparing a Skilled Workforce
- Improving Broadband Access
- Ensuring Clean and Safe Water
- Supporting Community Resilience
- Investing in Infrastructure



Learn more at
www.nlc.org/infrastructure

NLC's Federal Agenda

- **Infrastructure:** urging Congress to *Rebuild with Us*
- **Housing:** Task Force examining federal & local levers; Opportunity Starts at Home Campaign
- **Opioids:** ensuring funding makes it to cities
- **Small Cell Deployment:** combatting federal preemption, H.R. 530
- **Census:** funding, citizenship question, the role of cities
- **Tax Policy:** municipal bonds, local priorities
- **Community Resilience:** climate change, disaster preparedness
- **Federal Program Reauthorizations:** flood insurance, FAST Act



Policy Areas of Interest for NLC-RISC



National Flood Insurance Program (NFIP)

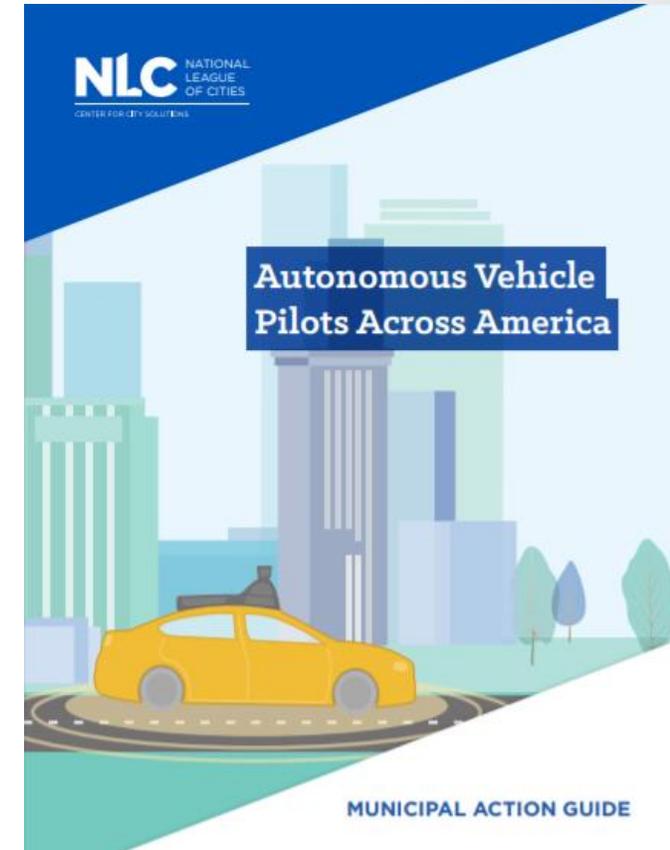
- This vital program helps millions of people recover from the flooding disasters occurring more frequently and drastically across the country.
- Since September 2017, Congress has passed seven short-term extensions for the NFIP, the last of which was in December 2018, but no long-term extension.
- NLC is concerned that without a long-term extension there will continue to be uncertainty about the fate of the program, flood insurance rates for businesses and residents and disaster resilience.

Affordable Care Act

- Legal Action
 - 5th Circuit Court of Appeals
- Legislative Action
 - Last week, the House passed H.R. 986, which blocks Administration guidance that allows for broad state waivers to allow subsidies for plans that fall outside of AVA benefit standards.
 - House voting this week on H.R. 987, which combines three drug pricing bills and four bills aimed at strengthening ACA marketplaces.

Autonomous Vehicles

- Congressional legislation to preempt **local AV testing pilots** was stopped last session but Senate leaders want to restart the conversation
- NLC has produced several reports on AVs, but most recently an update on [AV Pilots Across America](#)
- Additional lawsuit against Tempe after Uber incident is cause for concern of
 - [Tempe faces \\$10 million claim in Uber self-driving vehicle fatality](#)



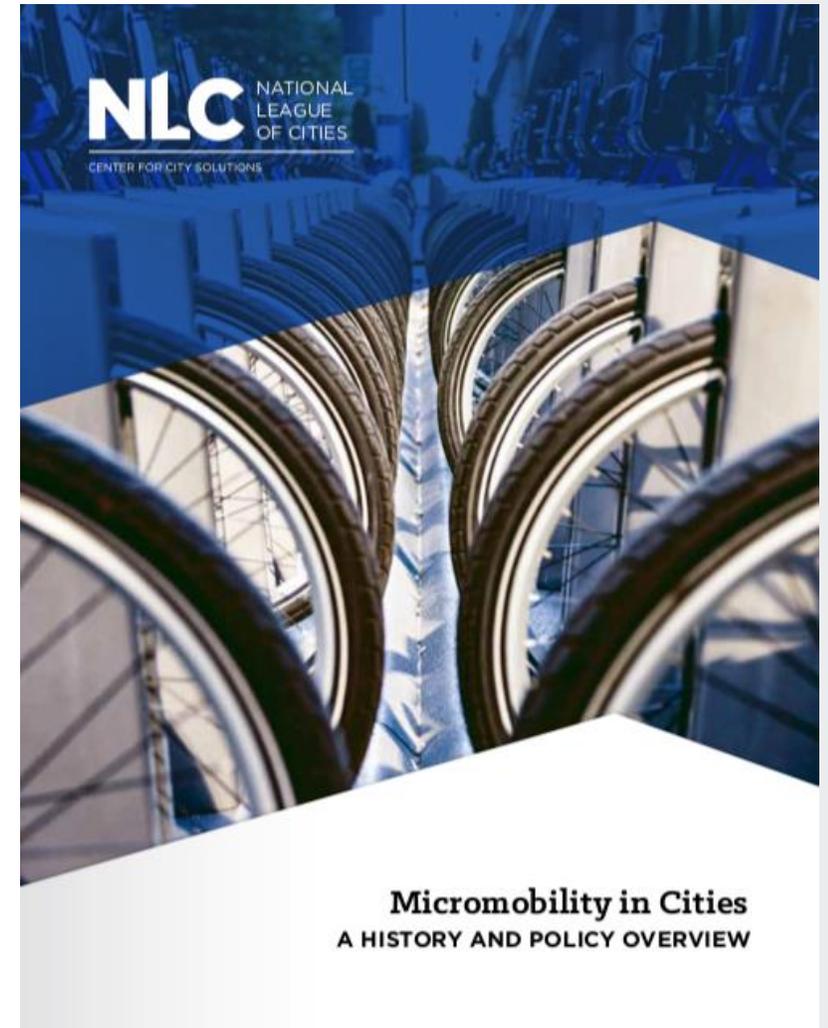
Drones

- With far more drones registered than aircraft, FAA is moving forward with Integrated Pilot Program that is starting **deliveries in Virginia** and the LAANC program which is **automating drone flight plan approvals**
- ***Singer v. City of Newton***
 - Massachusetts District Court Finds Portion of Local Drone Ordinance Preempted by FAA Regulation
- NLC representative sitting on FAA Drone Advisory Committee and working with members of Congress on drone bills

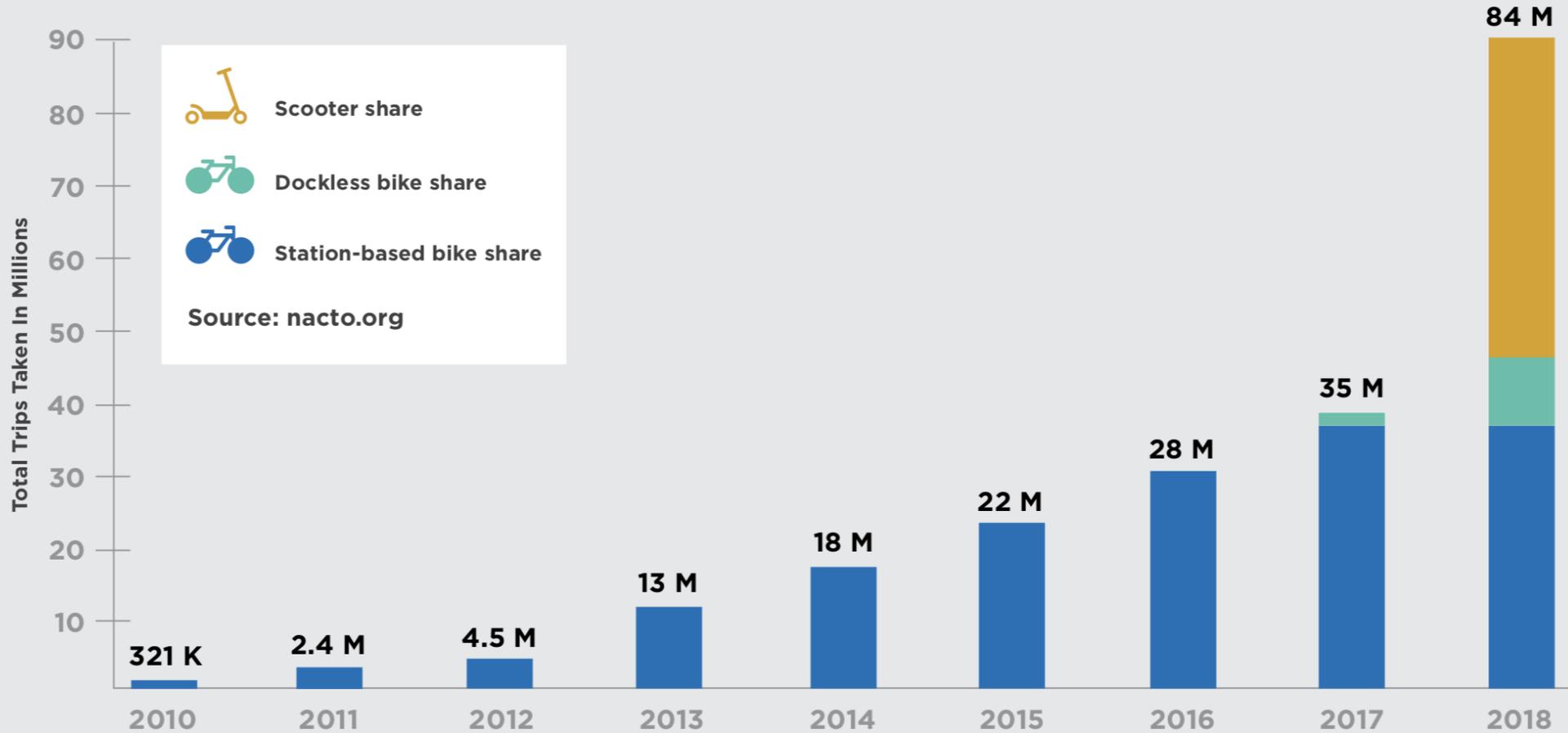


Micromobility

- 84 million trips on shared micromobility in 2018
- New [NLC Micromobility Municipal Guide](#) with:
 - The history of micromobility
 - Case studies from cities across the country
 - Recommendations for local leaders
- Examples of liability issues across cities with pilots and programs
 - [Seattle will launch a scooter-share pilot — if providers agree to key safety and liability conditions](#)
 - [Bird, Lime named in class-action lawsuit \(LA\)](#)



84 MILLION TRIPS ON SHARED MICROMOBILITY IN 2018



Micromobility Recommendations:

Get out in front of surprise deployments.

Utilize pilot programs to consider:

RIGHT OF WAY POLICY,
COST STRUCTURE,
SUSTAINABILITY AND
OPPORTUNITIES TO WORK WITH DIFFERENT COMPANIES.

Consider safety.

Develop a plan and agreement for trip data.

Reevaluate bike infrastructure.

Focus on equity.

Be proactive about learning from other cities.

Small Cell

- FCC Regulation
 - Preempting local authority over small cell wireless facilities and local rights of way
- Challenging the Order
 - H.R. 530

Other Topics

- Firefighter Cancer Presumption
- Opioids

QUESTIONS? GET IN TOUCH.

Stephanie Martinez-Ruckman

Program Director, Human Development

Federal Advocacy

National League of Cities

202-626-3098 | martinez-ruckman@nlc.org

NLC NATIONAL LEAGUE OF CITIES

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Supreme Court and Federal Case Update

Lisa Soronen
State and Local Legal Center

lsoronen@sso.org

Overview of Presentation

- New Supreme Court and what it means for pools
- Overview of Supreme Court term for pools
- Summary of important Supreme Court cases for pools
- Important issues in the federal courts for pools

New Supreme Court

Our Court through the end of July

Conservative

- Chief Justice Roberts
- Kennedy*
- Thomas
- Alito
- Gorsuch

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Million Dollar Question

- What does Justice Kennedy leaving the Court (and being replaced by someone predicted to be a reliable conservative) mean for local government risk pools and for the Court in general?

Where did Justice Kennedy Provide the Critical 5th Vote?

- Anything, everything
 - Gun rights
 - Death penalty
 - Affirmative action
 - Abortion
 - Same sex marriage
 - Land use
 - *Citizens United*
 - Public employment

Five Solid Conservatives

- We have had a conservative Supreme Court for my **entire lifetime**
- Never a **reliable** conservative Supreme Court
 - Powell ('71-'87)
 - O'Connor ('81-'06)
 - Kennedy ('87-08)

Conservatives are Often Good for Pools

Good for pools

- Pro-employer
- Pro-law enforcement (qualified immunity, Fourth Amendment)
- Pro-closing the courthouse door

Bad for pools

- Land use
- Free speech

Two Pool Relevant Cases From this Term

- Where Justice Kennedy's vote might have made a difference
- Kennedy will go down in history for being liberal on a lot of issues not that relevant to pools
 - LGBTQI issues
 - Death penalty
 - Race (sometimes)
 - Abortion (sometimes)
- His influence touched every issue

Nieves v. Bartlett

- Issue: does the existence of probable cause to arrest someone defeat a First Amendment retaliation claim
- Russell Bartlett was attending Arctic Man, an Alaskan snowmobile race, when he declined to talk to Police officer Luis Nieves who was patrolling the large outdoor party
- Officer Nieves later observed Bartlett yelling at a separate officer, Bryce Weight, and Weight pushing Bartlett away. Believing Bartlett posed a danger to Officer Weight, Officer Nieves arrested Bartlett. Bartlett alleges that Nieves said “bet you wish you had talked to me now” in the process of the arrest

Nieves v. Bartlett

- Supreme Court has twice faced this issue
- In *Reichle v. Howards* (2012) the Supreme Court failed to decide whether to adopt the no-probable-cause rule in First Amendment retaliatory arrest claims. Instead it gave qualified immunity to Secret Service agents who arrested Steven Howards for touching Vice President Dick Cheney and lying about it. Howards told Cheney his “policies in Iraq are disgusting.”
- In *Lozman v. Riviera Beach* (2018) the Court held that Fane Lozman, who was arrested at a city council meeting for refusing to stop talking, was not barred from bringing a First Amendment retaliatory arrest claim even though the city had probable cause to arrest him. Lozman claimed the city council arrested him as part of a strategy to intimidate him because he filed a lawsuit against the city. The Court declined to decide as a general rule whether probable cause is required to bring a more typical retaliatory arrest cases like *Nieves*.

Knick v. Township of Scott

- The Constitution's Takings Clause states that "private property [shall not] be taken for public use, without just compensation"
- Issue: Should the Supreme Court overturn *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985)?
- The Supreme Court held that before a takings claim may be brought in federal court landowners must comply with state law procedures and remedies enacted to provide just compensation in a takings case

Knick v. Township of Scott

- Why would pools prefer to litigation takings cases in state court:
 - Faster
 - Cheaper
 - State judges know state property law better
 - State judges will understand state statutory claims that often accompany takings claims better
 - Trump numerous, conservative federal judicial appointments

This Case in Context

- For at least two decades the property rights bar has tried to convince the Court to overturn *Williamson County*
- Requests went ignored
- Going theory is Justices Scalia and Kennedy liked *Williamson County*
- Was very hard for state and local governments to win land use/takings cases BEFORE Justice Kennedy left the Court
- Page one of the conservative/libertarian playbook is “property rights”

Three Big Questions

- What will such a Court do?
- How long will it last?
- From Orin Kerr, USC Gould School of Law
- How is it playing out already?

How is it Playing Out

- Have only a handful of ruling on the merits (in not particularly interesting case) since Kennedy left the Court
- A few decisions to take case or not take cases that are interesting
- Even more decisions where the Court decides to allow a law to stay in place or be put on hold while further litigation happens
 - Not a ruling on the merits of the law
 - Practically speaking are an indication of how the Justices view the law at a glance

Conservatives will Push their Causes

- Expect a lot of people with **conservative causes to push their cases to SCOTUS** to see what the new Court will do. These ideological windows may stay open only for a few years; think 1962-68, when there was a strong liberal majority and a whole lot happened...
- Gun case
- Abortion
- Expect to see the Court taking more **land use** cases and local governments to lose

June Medical Services v. Gee

- Louisiana law requires physicians who perform abortions in the state to have “active admitting privileges”
- Supreme Court struck down a similar requirement from Texas in 2016
- 5th Circuit held law constitutional—only one of the 6 abortion doctors in the state can’t get admitting privileges
- Three of the four challenging doctors say they can’t get admitting privileges
- Roberts and the liberal voted to prevent the law from going into effect
- Kavanaugh and the rest of conservatives would have allowed the law to go into effect to see if all the doctors could get admitting privileges

Liberals will Fight back

- A justice to watch: Elena Kagan. She's brilliant, and she has some centrist impulses. She'll presumably be looking to create a centrist block with Roberts to push for narrower rulings
 - Liberals will do damage control by pushing for narrow rulings
 - Too early to see how this plays out
- Death penalty case?

Roberts Will be Stuck in the Middle

- The **common wisdom that Roberts will be a check on this is correct**, I think. But note that the **conservative 4** excluding Roberts **are enough to get cert granted** -- and Roberts in most areas has been a reliable conservative.
 - Roberts is a moderate conservative; pragmatic conservative; **he as not been a conservative on social issues**
 - Sees himself as the institutional guardian of the Court
 - All Justices will now vote in controversial cases with the President who nominated him unless Roberts strays
 - What ever pressure he felt before Kavanaugh has doubled!
 - Four conservatives will try to push Roberts right by voting to grant petitions

All Eyes on Roberts

- Ian Millhiser, Think Progress, Chief Justice Roberts tells right-wing judges to slow their roll
- Bradford Betz, Fox News, Chief Justice Roberts' recent votes raise doubts about 'conservative revolution' on Supreme Court

All Eyes on Roberts

- Provided the 5th vote to prevent Louisiana's admitting privileges law from going into effect
- Voted with liberals in a death penalty case
- Voted to uphold precedent in *another* death penalty case where he had previously taken a position against the precedent

All Eyes on Roberts

- Spoke out against Trump calling a judge an Obama judge
- “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”
- Read: How Democracies Die by [Steven Levitsky](#) and [Daniel Ziblatt](#)

All Eyes on Roberts

- Provided the 5th vote to allow a federal district court decision ruling against Trump policy to deny asylum to those who cross the Mexican border illegally to stand when the ruling is being appealed to the Ninth Circuit
- Provided the 5th vote to allow Trump's ban on transgender persons in the military to stand while issue is being appealed to a federal appellate court
- Voted with the conservatives in a number of other death penalty cases

Sexual Orientation/Transgender Employment Cases

- Hot off the press brand new grants for next term
- *Zarda v. Altitude Express* (en banc 2d Circuit) (employees may bring sexual orientation discrimination claims under Title VII)
- *Bostock v. Clayton County Board of Commissioners* (11th Cir.) (discrimination on the basis of sexual orientation not actionable under Title VII)
- Discrimination on the basis of transgender and transitioning status is discrimination “on the basis of sex” under Title VII, *Harris Funeral Homes v. EEOC* (6th Cir.)

Where Will Roberts Come Down?

Pragmatist

- Why waste conservative chips on this issue?
- This ship has sailed, only employment not marriage
- Dictionary definition of “sex” may be different today than from the 1960s
- Many conservatives have embraced tolerance and non-discrimination of LGBTQ community

Social conservative

- We know how Roberts would have voted before
- Hard line position of dissent in same-sex marriage case
- Vote on transgender in the military ban
- Easy to blame Congress

Keep an Eye on Kavanaugh

- On some issues age makes a difference
- Kavanaugh has young children (for his age)

Who Knows How Long it Will Last

- The conservatives have a big age advantage w/ life tenure: The **two oldest Justices are on the left**, Breyer and Ginsburg (80 and 86)
- And who knows what will happen in 2020?
 - Will the new world order be that a **Supreme Court nominees only get through the Senate if the majority of the Senate is the same party as the President?**
 - Wrinkle will continue to be that Senators up for election in states predominated by the other party may feel they must vote for a nominee picked by a president from the opposite party

Overview of the Term for Pools

- Lots of cases impacting local governments
- 14 SLLC *amicus* briefs (might be a record)
- 5 cases where local governments are a named party
 - In at least two more the local government will be paying the bill for money the money
- Blockbuster case (census) goes to state and local governments

Overview of the Term for Pools

- Only two First Amendment cases
- Only one Fourth Amendment case
- Only one qualified immunity case
- Two employment cases involving local governments as parties
- Four cases where the Court is asked to overturn precedent
- Important takings case

Census Case and Pools

- Is it unlawful or unconstitutional to include a question about citizenship in the census?
- Worry is many members of the immigrant community won't participate
- Judge Furman summarizes the significance of having an accurate census for state and local governments in his 277-page opinion: “[The census] is used to allocate hundreds of billions of dollars in federal, state, and local funds. Even small deviations from an accurate count can have major implications for states, localities, and the people who live in them — indeed, for the country as a whole”

Census Case and Pools

- Many federal grants are allocated based on populations
- Same amount of federal dollars paid no matter who or how many people complete the census
- States and local governments will get more or less money than they should if certain populations don't complete the census
- Some of your pool members may lose revenue and your state may lose revenue over all (or vice versa)

Expect the Question to be Included

- At argument none of the five conservative Justices seemed particularly troubled by its inclusion

Decided Cases

Guido v. Mt. Lemmon Fire District

- Issue: does the federal Age Discrimination in Employment Act (ADEA) apply to state and local government employers with less than 20 employees?
- Supreme Court holds YES
- 8-0 opinion

Guido v. Mt. Lemmon Fire District

- The term “employer” is defined in the ADEA as a “person engaged in an industry affecting commerce who has 20 or more employees”
- The definition goes on to say “[t]he term **also means** (1) any agent of such a person, and (2) a State or political subdivision of a State”
- Is “State or political subdivision of a State” basically a stand alone category with no size limit

Guido v. Mt. Lemmon Fire District

- “Also means” is “additive” rather than “clarifying”
- The phrase is common in the U.S. Code and “typically carrying an additive meaning”
- The statute pairs states and their political subdivisions with agents, “a discrete category that, beyond doubt, carries no numerical limitation”

Why Care about this Case?

- Very small special districts are very common and can't be very flexible when it comes to budget cuts
- Large and medium size cities may rely on special districts (to do things more cheaply than they can)
- Many state age discrimination laws apply to all employers no matter what their size
- Now federal claims are possible as well

Legal Nerd Point

- Opinion written by Justice Ginsburg
- See the influence of Justice Scalia (textualist, plain language)
- Even where it defies common sense...

Timbs v. Indiana

- Supreme Court holds unanimously that the Excessive Fines Clause is incorporated against (or applies to) state and local government
- Case shouldn't be a big deal
 - Expected
 - Court didn't rule on whether the forfeiture in this case was excessive
 - Today “all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality”

Timbs v. Indiana

- Was a big deal because the case involved a **forfeiture**
- Doesn't shed light on the two most important question for states in this space:
 - What are fines (versus fees or taxes) under the Eighth Amendment?
 - When are they excessive?
- Expect more litigation about the meaning of **excessive** and what is a **fine**
- Only one case defines excessive and it is extreme--*United States v. Bajakajian*

Cert Petition to Watch *Lovelace v. Illinois*

- Is bail bond retention a fine or a fee? If it is a fine it can't be excessive
- Curtis Lovelace is a former prosecutor, school board member, and JAG Corps officer
- Accused of murder ultimately acquitted
- Bond set at \$3.5 million; court kept 10 percent even though he was exonerated
- Per state law if you live in a county with more than 3 million people court can only keep \$100
- Lower court held: Because the bail bond fee is not imposed as a punishment or as a result of a conviction, it is not a "fine," and the eighth amendment and proportionate penalties clause do not apply

Cases to be Decided

- Fun case
- Bread and butter case
- Yuck factor case

Enormous Cross Case

- *Maryland-National Capital Park and Planning Commission v. American Humanist Association*
- Has a local government has violated the First Amendment by displaying and maintaining a 93-year-old, 40-foot tall Latin cross memorializing soldiers who died in World War I?
- Lower court rules against the county

Here it is!



Enormous Cross Case

- Prince George's County citizens and an American Legion Post raised money to build the monument. In 1925 it was dedicated at a Christian prayer service. Over the years Christian religious services have been held at the cross.
- In 1961 the Maryland-National Capital Park and Planning Commission took title of the land and the cross because it is located in the middle of a busy traffic median. The cross is part of a park honoring veterans. Other monuments are located anywhere from 200 feet to a half-a-mile from the cross. None are taller than 10 feet.

Sour *Lemon* Test

- Mixture of government and religion is okay
 - Secular purpose
 - Reasonable observer would not understand religion to be advanced
 - No excessive entanglement between government and religion
- *Lemon* on the chopping block?
- Roberts Court has taken relatively few government and religion cases

Lemon Test: Pass Prong One

- Secular purpose: maintain safety near a busy highway intersection and preserves the memorial to honor World War I soldiers

Lemon Test: Fails Prong Two

- Reasonable observer would understand this cross to advance religion
 - The Latin cross is the “preeminent symbol of Christianity”
 - While the cross has secular elements (like the words valor, endurance, courage, and devotion inscribed on its base and a plaque at the base listing the memorialized soldiers), the “immense size and prominence of the Cross” “evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones”

Lemon Test: Fails Prong Three

- Excessive entanglement between government and religion
 - The Commission has spent \$117,000 to maintain and repair it; in 2008 it set aside an additional \$100,000 for renovations
 - “Second, displaying the Cross, particularly given its size, history, and context, amounts to excessive entanglement because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets”

Dissent

- Too much focus on size
 - “Although a reasonable observer would properly notice the Memorial’s large size, she would also take into account the plaque, the American Legion symbol, the four-word inscription, its ninety-year history as a war memorial, and its presence within a vast state park dedicated to veterans of other wars.”

Oral Argument

- Without really counting heads I think the county will win and the cross will stay
- Should the Court dump the *Lemon* test aka the dog's breakfast
 - Lawyers wanted to keep it
 - Gorsuch and Kavanaugh seemed most concerned about
- Breyer--everything we have now is okay but NO MORE
- Is the cross a secular symbol v. is it offense to say the cross is a secular symbol
- How common are these memorials?
 - *Kondratyev v. Pensacola* (Eleventh Circuit held Latin Cross in public park violates the Establishment Clause)

Fort Bend County v. Davis

- Title VII requires an employee with a federal employment discrimination claim (based on race, sex, national origin, religion, etc.) to file charges with the EEOC
- The EEOC investigates, tries to resolve the claim, and sometimes sues on behalf of the employee
- If it doesn't sue on behalf of the employee when the process is over the employee can sue
- Employee in this case complained to the EEOC about sexual harassment but not religious discrimination and the EEOC told her she should sue
- She sued her employer over sexual harassment and religious discrimination

Fort Bend County v. Davis

- County argues she failed to follow the proper process related to her religious discrimination claim and that it is barred
- Issue: if an employee fails to exhaust administrative remedies with the EEOC before filing a lawsuit is the lawsuit barred
- More technically is administrative exhaustion is a jurisdictional requirement, meaning if an employee fails to satisfy it a court cannot hear the case or is it a “waivable claim-processing requirement”

Fort Bend County v. Davis

- Parties disagree over whether the language used to describe administrative exhaustion indicates if it isn't met the claim is barred
- Employees mess up administrative exhaustion all the time—5th Circuit had a internal split over this issue

Fort Bend County v. Davis

- Sleeper case for pools
 - Lots of employees fail to exhaust administrative remedies
 - 50 cases filed in the federal courts since the petition was granted 2 months ago?
 - If their failure to do so (within the statute of limitations) means their case is barred this will be a boon for employers
- Post-argument
 - Seems unlikely the employer will win in this case

McDonough v. Smith

- Edward McDonough, former Democratic Commissioner of Rensselaer County Board of Elections, was accused of approving forged absentee ballot applications which he claims he didn't know had been falsified
- Youel Smith investigated and prosecuted McDonough
- McDonough claims Smith “engaged in an elaborate scheme to frame McDonough for the crimes by, among other things, fabricating evidence”
- After two trials, McDonough was ultimately acquitted
- McDonough waits until almost three years after he was acquitted to sue Smith
- Smith claims the three year statute of limitations started to run when McDonough found out false evidence was going to be used against him in trial

McDonough v. Smith

- Issue: whether the statute of limitations for a due process fabrication of evidence claim begins to run when the criminal proceedings terminate in the defendant's favor, or when the defendant becomes aware of the tainted evidence and its improper use
- Second Circuit said when the defendant becomes aware of the tainted evidence and its improper use
 - This is much better for pools than when criminal proceedings terminate because it is shorter
- Here is the problem: if the statute of limitations starts to run when the defendant find out--he may have to bring a lawsuit against the prosecutor while the defendant is still being prosecuted himself

McDonough v. Smith

- Court might dismiss the case as improvidently granted
- Court isn't sure what the elements of the underlying claim are and may want to figure out what it is in a separate case before deciding statute of limitations
- Everyone agrees malicious prosecution is a common law tort under the 4th Amendment
 - Prosecutors have absolute immunity from such claims
- Less clear fabrication of evidence is a common law tort, what its elements are, and what constitutional provision it falls under

McDonough v. Smith

- *Manuel v. Joliet*—when does the statute of limitations run on 4th Amendment false arrest claims?
- IMLA has four “when does the statute of limitations run” cases
- Case has huge YUCK factor
- Seems just as likely these cases would be brought against police officers versus prosecutors

Federal Court Cases of Interest

- Facebook case
- Use of force with mentally ill person
- Tire chalking case

Davison v. Randall

- Only federal court of appeals case addressing government official liability for banning people from social media
- County board member banned Facebook commenter for 12 hours where he criticized the school board
- Sued for violating the First Amendment; she loses

Davison v. Randall

- Facebook page used for communicating about county business was “under color of state law”
- Facebook page was a public forum
- She engaged in viewpoint discrimination
- No discussion of qualified immunity

Vos v. City of Newport Beach

- Cert stage case
- Sad suicide-by-cop case involving a schizophrenic young man high on drugs
- Officer told trainee with “less-lethal weaponry” to shoot; he did as did two other officers with “real” guns

Vos v. City of Newport Beach

- Does ADA require accommodations of suspects with mental illness?
- Should courts consider unreasonable police conduct before the use of force (here not trying to talk to the suspect) that foreseeably created the need to use force?
- Is officers interest in using deadly force under the 4th Amendment diminished if the suspect is mentally ill?
- *City and County of San Francisco v. Sheehan* (2015) raised similar issues; SCOTUS granted qualified immunity; no clearly established law required officers to accommodate mental illness

Taylor v. City of Saginaw

- Police officers chalking tires for parking enforcement is a **search**
- **Unreasonable** in violation of the Fourth Amendment because no exception to the warrant requirements applies
 - Chalking is a common-law trespass upon a constitutionally protected area to find information
 - Community caretaker exception doesn't apply
- Ruling only applies in the Second Circuit (Michigan, Ohio, Tennessee, Kentucky)

Taylor v. City of Saginaw

- Is this really a big deal?
 - How common is chalking these days?
 - Fourth Amendment expert Orin Kerr of the University of Southern California law school [tweeted](#), it “seems easy enough these days for parking enforcers to just take a photo of the car, or even just a close-up photo of the tire, rather than chalk it. . . . No 4A issues then.”
- Saginaw is seeking en banc review

Questions

Thanks for attending!