

Inquiry & ANALYSIS

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SUPREME COURT UPDATE

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The Supreme Court's 2010-2011 term included some highs and lows for school districts, and a number of decisions from this term affect school districts at the margins. Arguably the most significant favorable decision for school districts is *Borough of Duryea v. Guarnieri* where the Court held that Petition Clause claims brought by public employees must involve a matter of public concern. Probably the most significant unfavorable decision for school districts is *Arizona Christian School Tuition Organization v. Winn*, which makes it easier for states to funnel public money to private schools through tax credits and similar schemes. A good example of a case

from this term affecting school districts at the margins is *Snyder v. Phelps* where the Court held that the First Amendment protected the Westboro Baptist Church's picketing near a soldier's funeral service. This particular church also has targeted public school districts for protests.

As described in more detail in the box on page five, NSBA submitted four *amicus curiae* briefs to the Supreme Court this term. The majority opinion in *Borough of Duryea v. Guarnieri* cites NSBA's *amicus* brief.

The importance of the Supreme Court's 2011-2012 term for school districts is

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ABOUT THE NSBA COUNCIL OF SCHOOL ATTORNEYS

Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

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yet to be determined. Unlike terms of the recent past, to date, the Court has only accepted one case that may have implications for some school districts.

2010–2011 Term Decisions

*Arizona Christian School Tuition Organization v. Winn*¹

In this case the Court held 5–4 that Arizona taxpayers do not have standing to bring an Establishment Clause challenge to tax credits for contributions to “school tuition organizations” (STOs) that give scholarships to students attending private school.

Arizona allows taxpayers to claim up to a \$1,000 tax credit for contributions to STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious. Arizona taxpayers filed suit alleging the STO scholarship tax credit program violates the Establishment Clause. The Ninth Circuit ruled the taxpayers had standing and that the tax credit scheme violated the Establishment Clause.

Justice Kennedy’s majority opinion reversed the Ninth Circuit and concluded the taxpayers in this case have no standing because the exception to taxpayer standing for Establishment Clause challenges applies only to government expenditures, which do not include tax credits. The majority first pointed out that in general taxpayers have no standing to sue the government alleging it has spent their taxes in a manner that violates the Constitution. However, in *Flast v. Cohen*² the Court adopted a “narrow exception” to the rule against taxpayer standing in Establishment Clause cases. According to the majority, this exception only includes government expenditures where a taxpayer’s property is “transferred through the Government’s Treasury to a sectarian entity.”³ The majority concluded a tax credit is not a tax expenditure “implicat[ing] individual taxpayers in sectarian activities.”⁴ According to the Court, when a tax is collected, a dissenter’s tax dollars are spent on something he or she does not agree with. But “[w]hen the government declines to impose a tax . . . there is no such connection between dissenting taxpayer and the alleged establishment.”⁵

In her strongly worded dissent, Justice Kagan claimed the majority’s “novel distinction” between the government spending tax dollars versus offering tax breaks “has as

little basis in principle as it has in our precedent.”⁶ She pointed out that the Supreme Court has “over and over again” heard Establishment Clause cases challenging tax credits, deductions, and exemptions and has “reached the merits in these claims.”⁷

Justice Kagan in her dissent very succinctly stated the implications of this case:

The Court’s opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax [credit, deduction, or exemption], and *Flast* will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.⁸

In short, following this decision it may be possible for state legislatures nationwide to fund private religious schools through tax credit, deduction, or exemption schemes that no one will have the standing to object to.

*Borough of Duryea v. Guarnieri*⁹

In this case the Court held 8–1 that retaliation by a government employer for a public employee’s exercise of the right of access to the courts is only protected by the Petition Clause if the “petition” involves a matter of public concern.

Charles Guarnieri, Chief of Police in Duryea, Pennsylvania, filed a union grievance after he was terminated. After an arbitrator ordered his reinstatement, the borough council issued directives concerning how Guarnieri was to perform his duties. Guarnieri filed another successful grievance. He then filed suit under 42 U.S.C. § 1983 alleging that the first grievance was a petition protected by the First Amendment’s Petition Clause and that the council directives were retaliation for that protected activity. The council then refused to pay Guarnieri overtime which the Department of Labor ultimately determined he was owed. Guarnieri amended his complaint to also state his § 1983 lawsuit was a petition and the denial of overtime constituted retaliation for his filing a petition. The Third Circuit affirmed a jury verdict in favor of Guarnieri concluding that a public employee who petitions the government through a lawsuit or grievance “is protected under the Peti-

tion Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern."¹⁰

The Court disagreed with the Third Circuit and held that the Free Speech Clause's public concern test applies to Petition Clause claims brought by public employees asserting retaliation for filing grievances or lawsuits. According to the Court, "[t]he substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause."¹¹ Justice Kennedy's majority opinion pointed out that petitions—particularly in the form of lawsuits against a government employer—are disruptive "to the efficient and effective operation of government."¹² The Court concluded that the public concern test, "used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right."¹³ The Court remanded the case for application of the public concern test to the facts of this case.

As the Court pointed out when it cited NSBA's *amicus* brief in its opinion, school districts and other public employers are the frequent target of employment-related grievances (and lawsuits). The Court's holding that such "petitions" must be a matter of public concern for public employers to be successfully sued for retaliation under the Petition Clause should reduce the possibility of legal liability when a public employer takes an adverse employment action against an employee who has filed a lawsuit or grievance.

*Staub v. Proctor Hospital*¹⁴

In *Staub v. Proctor Hospital* the Court unanimously held that an employer can be liable for the discriminatory animus of a supervisor who influenced, but did not make, the ultimate employment decision "if a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action"¹⁵

Vincent Staub was an angiography technician employed by Proctor Hospital and a member of the U.S. Army Reserve. Staub alleged he was wrongly issued a directive and wrongly accused of not following it by his supervisors due to their hostility

towards his military obligations. However, the vice president of human resources, and not his supervisors, decided to fire Staub, after reviewing his personnel file.

The Seventh Circuit observed that Staub brought a "cat's paw" case under the Uniform Services Employment and Reemployment Rights Act (USERRA), seeking to hold Proctor liable "for the animus of a supervisor who was not charged with making the ultimate employment decision."¹⁶ The Seventh Circuit reversed a jury verdict in favor of Staub and held that Proctor was not liable because under its precedent a "cat's paw" case could only succeed if the nondecisionmaker exercised "singular influence" over the decisionmaker. In this case, the vice president of human resources was not singularly influenced by Staub's biased supervisors because she conducted her own investigation into the relevant facts, albeit not a "robust" one.

The Supreme Court reversed the Seventh Circuit decision and held that an employer will be liable under the "cat's paw" theory if a supervisor performs an act motivated by discriminatory animus that is intended to cause and is in fact the proximate cause of an adverse employment action. Justice Scalia, writing for the majority, relied on intentional tort principles to determine the viability and standard of liability for "cat's paw" cases. According to the Court, if "the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA."¹⁷ Likewise, the ultimate decisionmaker's exercise of judgment does not "automatically render[] the link to the supervisor's bias 'remote' or 'purely contingent'"¹⁸ and therefore not a proximate cause.

Finally, the majority of the Court, over the objections of Justices Alito and Thomas, "decline[d] to adopt . . . a hard-and-fast rule" that an employer conducting an independent investigation "has a claim-preclusive effect."¹⁹ However, the Court also did not entirely dismiss the notion that an independent investigation can be used in some circumstances to defend against a "cat's paw" case, noting that if an employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action, the employer will not be liable.

School boards are likely targets of "cat's paw" cases because state law often requires them to be the ultimate decisionmaker in

adverse employment actions, which they must make upon the advice of supervisors who may be, unbeknownst to the board, motivated by discriminatory animus. Even though the Supreme Court did not hold that independent investigations will immunize employers from "cat's paw" liability, school boards are wise to try to determine through independent investigations whether and how discriminatory bias played a role in a supervisor's recommended adverse employment act. If bias is discovered, the board may decide not to take the recommended adverse employment action and thus avoid a "cat's paw" lawsuit.

*Thompson v. North American Stainless*²⁰

In this case the Court held that a closely associated third party, such as a spouse or fiancé, has standing as an aggrieved person to bring a Title VII lawsuit for retaliation where an employee engaged in protected activity and the employer retaliated against the closely associated third party.

Miriam Regalado filed sex discrimination charges against North American Stainless (NAS) with the Equal Employment Opportunity Commission (EEOC). Three weeks later NAS fired Eric Thompson, Regalado's fiancé. Thompson sued NAS under Title VII claiming he was fired in retaliation against Regalado for her filing a charge with the EEOC. The Sixth Circuit affirmed the district court's holding that Title VII does not permit third party retaliation claims.

The 8-0 decision written by Justice Scalia answered two questions: whether the firing was unlawful retaliation and whether Title VII provided a cause of action. In answer to the first question, the Court followed its ruling in *Burlington N. & S.R.F. Co. v. White*, 548 U.S. 53 (2006), that "Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct."²¹ The Court noted that even NAS did not dispute the "obvious" conclusion that "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."²² The Court recognized the difficult line-drawing problem of determining which types of relationships are entitled to protection. While declining to identify a "fixed class of relationships" for which third-party reprisals would violate Title VII, the Court stated firing a close family member will almost always be a violation while a milder reprisal for a mere acquaintance will almost never be.

Title VII allows actions to be brought by "the person claiming to be aggrieved." The Court held that Title VII encompasses the "zone of interests" test which enables suits by plaintiffs with an interest "arguably [sought] to be protected by the statutes."²³ The Court concluded Thompson falls within the "zone of interests" protected by Title VII because he was a NAS employee, Title VII is intended to protect employees from their employer's unlawful actions, and Thompson was not an accidental victim of retaliation—"hurting him was the unlawful act by which the employer punished [Regalado]."²⁴

To the extent school districts often employ spouses, parents, children, or persons with other close relationships, this ruling presents the significantly expanded possibility of third party claims of retaliation when taking adverse employment actions. School districts should be mindful of any protected activity taken by close co-workers before taking an adverse employment action against an employee. Even if the protected activity of one employee is not motivating the adverse employment action against his or her spouse or close friend, per *Thompson*, a retaliation claim may still survive summary judgment.

*Kasten v. Saint-Gobain Performance Plastics Corporation*²⁵

In this case the Court held 6-2 that the anti-retaliation provision of the Fair Labor Standards Act (FLSA) protects workers who make oral complaints.

The FLSA prohibits retaliation against an employee where he or she has "filed any complaint" under or relating to the Act. Kevin Kasten sued Saint-Gobain Performance Plastics Corporation under this provision claiming that he was terminated in retaliation for making numerous oral complaints to his supervisor, human resource employees, and the operations manager about the location of time clocks. The Seventh Circuit agreed with the district court that the FLSA's anti-retaliation provision does not protect oral complaints.

The Court held the term "filed any complaint" includes both oral and written complaints. Justice Breyer, writing for the majority, first concluded the "text, taken alone, cannot provide a conclusive answer"²⁶ to whether the phrase "filed any complaint" encompasses oral complaints. The Court then concluded that "an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic

objectives."²⁷ The objectives of the Act are to set standards for wage, hour, and overtime which are enforced by employee complaints. According to the Court, Congress would not want to limit the effectiveness of this enforcement scheme by "inhibiting the use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers."²⁸ The Court also stated that for an oral or written complaint to give fair notice to the employer it must "be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."²⁹

Justice Scalia, joined by Justice Thomas, dissented opining that the FLSA only protects complaints made to a court or agency, not complaints made to an employer. The majority did not address this argument because Saint-Gobain did not discuss it in response to Kasten's *certiorari* petition.

In light of *Kasten*, school boards should modify anti-retaliation policies and practices to reflect the validity of oral complaints under the FLSA.

*NASA v. Nelson*³⁰

In *NASA v. Nelson* the Court unanimously held that a government background investigation that included questions regarding treatment or counseling for recent illegal drug use and open-ended questions sent to employees' designated references did not violate contract employees' constitutional right to informational privacy.

Contract employees of a research laboratory owned by the National Aeronautics and Space Administration (NASA) and operated under government contract by the California Institute of Technology alleged that NASA's use of the National Agency Check with Inquiries (NACI) as a background investigation method violated their constitutional right to informational privacy. The NACI, which has long been required for all government civil service employees, requires, among other things, disclosure of treatment and counseling received by any applicant who indicates he or she has "used, possessed, supplied, or manufactured illegal drugs" in the past year, and poses a series of open-ended inquiries to designated references and landlords requesting "any adverse information" about the applicant's "honesty or trustworthiness," "violations of the law,"

"financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters."³¹ The Ninth Circuit held that inquiries into drug treatment furthered no legitimate interest and was likely to be held unconstitutional, and that the open-ended questions regarding adverse information were not narrowly tailored enough to meet the government's interests in verifying contractors' identities and ensuring security.

The Supreme Court reversed the Ninth Circuit and held that the government may ask reasonable employment-related questions, including those challenged in this case, in a background investigation subject to the Privacy Act's safeguards against public disclosures. Justice Alito, writing for the majority, did not define the scope of a constitutional right to informational privacy, but opined that any such right was not violated in this case. According to the Court, asking about recent illegal drug use is reasonable because the government, like any employer, "is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties."³² Asking about treatment or counseling for recent illegal drug use is also reasonable as the government may "use drug treatment as a mitigating factor in its contractor credentialing decisions."³³ Likewise, open-ended inquiries about "adverse information" about the applicant "are reasonably aimed at identifying capable employees who will faithfully conduct the Government's business."³⁴ The Court also rejected the argument that its "broad authority in managing its affairs should apply with diminished force"³⁵ to contractors versus civil servants because as a "practical" matter no "relevant distinctions" exist between the two groups. Finally, the Court noted the Privacy Act sufficiently protects against public disclosure of any background information collected about individuals by NASA. Justices Scalia and Thomas concurred, opining that a federal constitutional right to informational privacy does not exist.

It is unclear how *NASA v. Nelson* will apply to background checks conducted by school districts. After all, the Privacy Act does not apply to school districts. State open records and personnel records laws instead govern what information contained in records about public employees may or must be revealed to the public. These laws may offer much more limited privacy protection to

employees than the Privacy Act. This case does however set a standard—albeit a fairly general one—for employee background checks conducted by the government which school districts should apply to their hiring practices. According to the Court, back-

ground investigations must be reasonable and employment-related.

*Camreta v. Greene*²⁶

In *Camreta v. Greene* the Court determined moot the question of whether an in-school

interview by a child protective services case-worker and a deputy sheriff of a student suspected of being molested by her father conducted without a warrant, court order, parental consent, or exigent circumstances was an unreasonable seizure in violation of

NSBA Submits Four *Amicus* Briefs to the Supreme Court This Term

Since June 1, 2010, NSBA has submitted 10 *amicus* briefs to courts across the country, including four in the Supreme Court. While some of NSBA's *amicus* briefs are written in-house, NSBA's program would not exist without significant participation from members of the Council of School Attorneys.

If you are interested in writing or reviewing an NSBA *amicus* brief or if you would like to submit a case for consideration for an NSBA *amicus* brief please contact NSBA Deputy General Counsel Naomi Gittins at (703) 838 – 6209 or ngittins@nsba.org. NSBA's *amicus* briefs filed in the last few years are available on NSBA's website at: <http://www.nsba.org/SchoolLaw/AmicusBriefs>.

NSBA *Amicus* Briefs Filed in Supreme Court Cases

Borough of Duryea v. Guarnieri

The brief in this case was written by NSBA attorneys **Francisco Negron, Naomi Gittins, and Sonja Trainor**. The Court cited NSBA's brief in its opinion when it explained a policy reason for rejecting the employee's argument.

Staub v. Proctor Hospital

The brief in this case was written by NSBA attorney **Lisa Soronen**. In his concurring opinion Justice Alito discusses favorably an argument by NSBA that employers should be able to defend themselves in "cat's paw" cases by adopting internal grievance procedures.

Arizona Christian School Tuition Organization v. Winn

The following Hogan Lovells attorneys wrote NSBA's *amicus* brief in this case: **John Borkowski, Maree Sneed, Christopher Lott, and Claire Sullivan**.

Camreta v. Greene

Matt Wright and **David Pauole** of Holm, Wright, Hyde & Hays wrote NSBA's *amicus* brief in this case.

NSBA *Amicus* Briefs Recently Filed in Lower Court Cases

Case Name	Court	Author	Issue
C.H. v. Heyward	Fourth Circuit	NSBA attorneys Lisa Soronen & Nancy Dinsmore	Student disciplined for wearing Confederate flag apparel
Purdham v. Fairfax County School Board	Fourth Circuit	NSBA attorney Lisa Soronen & Nancy Dinsmore	Is an hourly employee/coach a volunteer under the FLSA?
Johnson v. Poway Unified School District	Ninth Circuit	Tom Hutton , Patterson Buchanan	Teacher directed to remove classroom banners with religious references
Dydell v. Taylor	Missouri Supreme Court	Missouri School Boards Association attorney Kelli Hopkins	Applicability of Coverdell Teacher Protection Act to school administrators when disciplining students
Payne v. Peninsula School District	Ninth Circuit	Lenore Silverman , Fagen Friedman & Fulfroost	Parents failed to obtain a due process hearing before filing an IDEA case in federal court
Morgan v. Swanson	Fifth Circuit	Chris Gilbert , Thompson Horton	Qualified immunity for administrators who disallowed student distribution of items with religious messages in the classroom

the Fourth Amendment.

In response to a report that her father was sexually abusing her, an Oregon child protective services caseworker, Bob Camreta, and a deputy sheriff, James Alford, interviewed a nine-year old student, S.G., at school regarding the allegations. S.G.'s mother sued Camreta and Alford under 42 U.S.C. § 1983 claiming the interview breached the Fourth Amendment's proscription on unreasonable seizures. The Ninth Circuit held that there was a breach because of the absence of a warrant, court order, parental consent, or exigent circumstances. However, the Ninth Circuit granted Camreta and Alford qualified immunity "because no clearly established law had warned them of the illegality of their conduct."³⁷ Camreta and Alford sought Supreme Court review of the Ninth Circuit's ruling on the Fourth Amendment issue.

Justice Kagan, writing for a 7-2 majority, concluded the Fourth Amendment question in this case is moot because S.G. "is no longer in need of any protection from the challenged practice."³⁸ S.G. has moved to Florida, has no intention of relocating back to Oregon, and is almost 18 years of age. In short, "she faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation."³⁹

While Camreta and Alford lost their Fourth Amendment challenge before the Ninth Circuit they were prevailing parties because they were granted qualified immunity. Five Justice, including Justice Kagan, concluded Camreta has Article III standing despite being a prevailing party because he is still a child protective services caseworker who has to comply with this adverse constitutional ruling when he performs child abuse investigations. While the Supreme Court normally declines to hear cases at the request of prevailing parties as a "matter of practice and prudence," these five Justice concluded the Court, at its discretion, may review unfavorable constitutional determinations by prevailing parties in qualified immunity cases. According to the Court, "bending our usual rule" is permissible because constitutional determinations in qualified immunity cases are "self-consciously" designed, with the Supreme Court's permission, to have a "significant future effect on the conduct of public officials . . . and the policies of the government units to which they belong."⁴⁰ Justices Kennedy and Thomas objected to

the Court indicating it may review constitutional claims where qualified immunity has been granted claiming that the Court is "accept[ing] that *obiter dictum* is not just binding precedent but a judgment susceptible to plenary review."⁴¹

School districts and school district officials will likely at some point benefit from the Supreme Court's decision to hear cases where government officials lost on the constitutional claim but were granted qualified immunity. However, even though the school district was not a party in this case, school districts would have benefited from a ruling on the merits in this case. In some states, child abuse interviews conducted at school without warrants are routine occurrences.

*Nevada Commission on Ethics v. Carrigan*⁴²

In this case the Court unanimously held that a legislator has no First Amendment right to vote on any given matter.

Nevada's Ethics in Government Law requires public officials to recuse themselves from debate or voting on any matter where "the independence of judgment of a reasonable person . . . would be affected by . . . commitment in a private capacity to the interests of others."⁴³ This private commitment to others includes a third party who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his or her household; or has a substantial or continuing business relationship with the officer or "[a]ny other commitment or relationship that is substantially similar."⁴⁴

The Nevada Commission on Ethics censured Michael Carrigan, an elected City Council member, under the "substantially similar relationship" provision due to his failure to abstain from voting on a project application when his long-time friend and campaign manager worked as a paid consultant for the company proposing the project. Carrigan sued the Nevada Commission on Ethics claiming that the "substantially similar relationship" provision was unconstitutional under the First Amendment. The Nevada Supreme Court held that voting was protected by the First Amendment, applied strict scrutiny, and found that the challenged provision was unconstitutionally overly broad.

The Court, in an opinion written by Justice Scalia, held that a legislator's vote is not protected speech under the First Amend-

ment because voting is a legislative function, not "an act of communication." According to the Court, "a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."⁴⁵ To further support the conclusion that the First Amendment does not apply to legislative voting, Justice Scalia discussed at length the lack of a "single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years."⁴⁶

School board members in every state are restricted as to when they can vote by conflict of interest laws and regulations, which are often less than clear. Given the Court's holding that elected officials, including school board members, have no First Amendment right to vote in a particular matter, successfully challenging such requirements may be difficult.

*Los Angeles County v. Humphries*⁴⁷

In this case the Supreme Court held 8-0 that the "policy or custom" requirement for suing municipal entities under 42 U. S. C. § 1983 applies when plaintiffs seek prospective relief rather than monetary damages.

The Humphries were accused of child abuse and were listed in the state's Child Abuse Central Index per the California Child Abuse and Neglect Act. They were later exonerated and sought to have their names removed from the Index. However, neither the Act, the State of California, nor Los Angeles County had created procedures for removal. The Humphries sued a number of defendants, including Los Angeles County, under § 1983 seeking damages, an injunction, and declaratory relief. The Ninth Circuit granted the Humphries declaratory relief and ordered Los Angeles County to pay a portion of their attorney's fees. Los Angeles County argued it was not liable because a state policy rather than a county policy was responsible for plaintiffs' deprivation. The Ninth Circuit concluded it did not matter whether a county policy was responsible because the plaintiffs were not required to prove a "policy or custom" was responsible for claims for prospective relief.

In *Monell v. New York City Department*

of *Social Services*, 436 U.S. 658 (1978), the Court held that, in a case involving monetary damages, a municipality can be liable for violations of federal law only when the injury was caused by a municipal "policy or practice." In this case the Supreme Court reversed the Ninth Circuit concluding that "*Monell's* holding applies to § 1983 claims against municipalities for prospective relief as well as claims for damages."⁴⁸ Justice Breyer, writing for the Court, relied on the language of § 1983 read in light of *Monell's* understanding of legislative history. Specifically, "[n]othing in the text of § 1983 suggests the causation requirement contained in the statute should change with the form of the relief sought."⁴⁹ Likewise, the *Monell* Court thought Congress intended that municipalities be liable for their own violations and not the violations of others, and the "custom or policy" requirement rests on that distinction. According to the Court, finding that requirement inapplicable where prospective relief is at issue would undermine *Monell's* logic. "For whether an action or omission is a municipality's 'own' has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court."⁵⁰

The fact the Court cites two § 1983 cases involving school districts where lower courts considered whether *Monell's* "policy or practice" requirement applied to prospective relief illustrates the significance of this issue for school districts. With the answer to a narrow legal question, the Court has closed a potentially wide gap of liability for school districts.

*J.D.B. v. North Carolina*⁵¹

In this case the Court held 5-4 that police must take into account the age of a child, as long as it was known or would have been objectively apparent to a reasonable officer, when determining whether the child is in custody and therefore must be given *Miranda* warnings.

J.D.B., a 13-year-old middle school student, was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by a police officer in the presence of another police officer and two school administrators for at least 30 minutes about two home break-ins. Prior to questioning, J.B.D. was neither given the opportunity to speak to his grandmother, his legal guardian, nor was he given *Miranda* warnings or told he was free to leave the room. Over

the course of the questioning, and after being urged by the assistant principal to "do the right thing," J.D.B. admitted to breaking into the homes in question. After his confession, an officer informed J.D.B. that he could refuse to answer questions and was free to leave. Two juvenile petitions were filed against J.D.B. as a result of the questioning. The North Carolina Supreme Court upheld a trial court ruling that J.D.B. was not in custody at the time of the schoolhouse questioning and his statements were voluntary and could not be suppressed. The court "declined to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police."⁵²

The Court disagreed with the North Carolina Supreme Court about whether age is relevant to determining custody holding that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of the test."⁵³ Justice Sotomayor, writing for the majority, stated that "in some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"⁵⁴ The Court noted there are many instances where the law treats children differently than adults and concluded that excluding age from the custody calculus would "deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."⁵⁵ The Court instructed the lower court to determine on remand whether J.D.B. was in custody "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time."⁵⁶

Assuming school resource officers have the authority to put students "in custody," they too likely will have to consider a student's age when determining if a student is in custody and must be read *Miranda* warnings. Another implication of this case for school districts is that it may make police interrogations at school more desirable for police officers. As Justice Alito points out in his dissent, it will be easy for police officers who question students at school to determine a student's age: they can simply ask a school administrator.

*Snyder v. Phelps*⁵⁷

In *Snyder v. Phelps* the Court held 8-1 that the First Amendment protects from tort

liability picketing near a soldier's funeral service that "addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials."⁵⁸

Fred Phelps, founder of Westboro Baptist Church, and a number of parishioners picketed Matthew Snyder's funeral. Snyder was killed in Iraq in the line of duty. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in the American military, and has picketed nearly 600 funerals. The Westboro picketers carried signs with messages such as "Thank God for Dead Soldiers," "You're Going to Hell," and "God Hates Fags." The church notified authorities in advance of its intent to picket and complied with all police instructions in staging their demonstration. Snyder's father brought a variety of tort claims against Westboro. The Fourth Circuit reversed a jury decision against Westboro, holding that the speech was protected under the First Amendment because the statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.

Chief Justice Roberts, writing for the majority, agreed with the Fourth Circuit that Westboro's picketing was protected by the First Amendment. According to the Court, whether Westboro's speech was protected "turns largely on whether that speech is of public or private concern."⁵⁹ While the Court concluded that Westboro's messages "may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and the scandals involving the Catholic clergy—are matters of public import."⁶⁰ While Westboro picketed at a funeral to use it "as a platform to bring their message to a broader audience" this did not change the fact that "church members had the right to be where they were," "picketing peacefully on matters of public concern at a public place adjacent to a public street."⁶¹

School districts are occasionally picketed by groups with unpleasant messages. In fact, some school districts have been picketed by the Westboro church. Recently, Westboro picketed outside of a high school in Maryland, standing on a public sidewalk with signs such as "You Hate Your Children" and "God is Your Enemy."⁶² Per *Snyder*,

school districts may have to tolerate such protests if they are peaceful, on a matter of public concern, and located on public property near the school in compliance with local requirements.

2011–2012 Term Cases Accepted

*Knox v. Service Employees International Union*⁶³

In this case the Supreme Court will decide whether a special union assessment for political and ideological expenditures may be issued to union members and agency fee payers without notice or an opportunity to object.

During the summer of 2005 the California chapter of the Service Employees International Union (SEIU), the exclusive bargaining agent for California state employees, issued a special assessment to fund union political mobilization and lobbying against proposed "anti-union" state legislation. This special assessment was not included in the annual *Hudson* notice, which provides a breakdown of chargeable and non-chargeable union expenditures for the most recently audited prior year, and was charged to members and agency fee payers without additional notice or opportunity to object.

Nonunion employees claimed that the union's annual *Hudson* notice was inadequate, but the Ninth Circuit disagreed. The Ninth Circuit rejected the "district court fault[ing] the Union for failing to make an accurate prediction in its June 2005 *Hudson* notice of its actual expenditures in the remainder of that fee year due to a subsequent enactment of the temporary increase,"⁶⁴ noting that the annual *Hudson* notice is based on the union's chargeable expenditures for the previous year. Likewise the Ninth Circuit rejected the "district court's direction that a union must issue a second *Hudson* notice when it intends 'to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature'"⁶⁵ as "practically unworkable."⁶⁶

The relevance of this case for school districts depends on how common special assessments for political expenditures are for teacher unions in the state, whether non-members are charged for such special assessments, and whether the union provides notice and an opportunity for non-members to object to such special assessments. **I&A**

End Notes

1. 131 S. Ct. 1436 (2011).
2. 392 U.S. 83 (1968).
3. 131 S. Ct. at 1438.
4. *Id.* at 1447.
5. *Id.*
6. *Id.* at 1450.
7. *Id.* at 1452.
8. *Id.* at 1462.
9. No. 09–1476, 2011 WL 2437008 (U.S. June 20, 2011).
10. *Id.* at *1.
11. *Id.*
12. *Id.* at *8.
13. *Id.* at *13.
14. 131 S. Ct. 1186 (2011).
15. 131 S. Ct. at 1194.
16. *Id.* at 1190.
17. *Id.* at 1192.
18. *Id.*
19. *Id.* at 1193.
20. 131 S. Ct. 863 (2011).
21. 131 S. Ct. at 868.
22. *Id.*
23. 131 S. Ct. at 870 citing *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998).
24. 131 S. Ct. at 870.
25. 131 S. Ct. 1325 (2011).
26. 131 S. Ct. at 1327.
27. *Id.* at 1333.
28. *Id.*
29. *Id.* at 1335.
30. 131 S. Ct. 746 (2011).
31. *Id.* at 753.
32. 131 S. Ct. at 759–60.
33. *Id.* at 760.
34. *Id.* at 761.
35. *Id.* at 760.
36. 131 S. Ct. 2020 (2011).
37. 131 S. Ct. at 2023.
38. *Id.* at 2034.
39. *Id.*
40. *Id.* at 2024.
41. *Id.* at 2045.
42. 131 S. Ct. 2343 (2011).
43. 131 S. Ct. at 2346.
44. *Id.*
45. *Id.* at 2350.
46. *Id.* at 2348.
47. 131 S. Ct. 447 (2010).
48. 131 S. Ct. at 452.
49. *Id.*
50. *Id.* at 453.
51. 131 S. Ct. 2394 (2011).
52. 131 S. Ct. at 2400.
53. *Id.* at 2406.
54. *Id.* at 2397.
55. *Id.* at 2408.
56. *Id.*
57. 131 S. Ct. 1207 (2011).
58. 131 S. Ct. at 1212.
59. *Id.* at 1215.
60. *Id.* at 1217.
61. *Id.* at 1217–18.
62. Kristi King & Paul Shinkman, *Westboro Baptist Protests 'Brute-Beast' Ft. Meade Students, WTOP*, Apr. 14, 2011, available at <http://www.wtop.com/?nid=41&sid=2344962>.
63. 628 F.3d 1115 (9th Cir. 2010), cert. granted, 79 U.S.L.W. 3554 (U.S. Jun 27, 2011) (No. 10–1121).
64. 628 F.3d at 1121.
65. *Id.* at 1122.
66. *Id.*

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Visit the Council's website at www.nsba.org/cosa for more information and to download a nomination form. Deadline for nominations is **October 28, 2011**.

Recognizing Council Members

The Council thanks **Seamus Boyce** and **Andrew Manna**, Church Church Hittle & Antrim, for their article *School Liability for Bullying and Harassment*, and **Karla Schultz**, Walsh Anderson Brown Gallegos & Green, for her article *Free to Be Mean? What Are the First Amendment Rights of Bullies?* that appeared in the August 2011 issue of NSBA's National Affiliate newsletter, *Leadership Insider*.

Thanks also to **Michael E. Smith** and **Dulcinea Grantham**, Lozano Smith, for their article *Play Ball! Hiring and Supervising Athletic Coaches* that appeared in the August 2011 issue of NSBA's *American School Board Journal*.