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NCOSEA Voice

Supreme Court Review for State Boards of Education

The Supreme Court's 2014 term ended June 29, 2015. In addition to high-profile Affordable Care Act and marriage equality cases, the court issued 74 other opinions; of these, the largest number, 20, involved criminal law and procedure. While none involved education law, many of these cases will be important to state boards of education. While precisely how this term will affect state boards is not immediately clear, a couple of cases that flew under the radar deserve the attention of state boards and their legal counsel.

In *Michigan v. EPA*, the court considered an Environmental Protection Agency regulation of power plant emissions. The Clean Air Act authorized the EPA to regulate to protect public health but also required EPA to determine that the regulation was "appropriate and necessary" to achieve that end. The EPA refused to consider cost as part of this determination, and the Supreme Court has now declared this refusal to be unreasonable. The court concluded that the EPA must consider the cost of emissions regulations before it can determine whether the regulations are "appropriate." Whenever a proposed federal regulation may impose costs on state boards and local school districts, *Michigan v. EPA* is a reminder to consult the statutory authority for the regulation. If the statute contains language that may require the issuing agency to consider costs of compliance, this case supports an argument that the agency must do so before regulating.

The US Department of Education issues many guidance documents, some of which spell out changes in agency policy. In *Perez v. Mortgage Bankers Association*,

the court rejected a requirement that federal agencies engage in the notice-and-comment process before issuing a new interpretation of regulations that "deviates significantly" from a previous one. While the notice-and-comment process does not apply to issuing or revising guidance documents, state boards may wish to review new guidance documents to determine whether a policy change is so drastic that it is, in effect, a new rule, which must undergo a rule-making process (requiring notice and comment), a possibility *Perez* recognized.

In *Walker v. Sons of Confederate Veterans*, the court upheld Texas's refusal to issue Confederate flag license plates. It concluded that license plates were "government speech," which Texas was free to control. This case serves as a reminder that the First Amendment's free speech clause does not constrain the policy positions state boards adopt: In setting science standards that include discussions of climate change, for example, a state board need not offer "equal time" in standards to climate-change deniers.

Finally, for state boards whose membership is based on congressional or other districts, two cases deserve note. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the court upheld the use of independent commissions to draw congressional districts. *Alabama Legislative Black Caucus v. Alabama* held, in relevant part, that the proper unit of analysis in claims of racial gerrymandering in violation of the equal protection clause is not the state as a whole but individual districts. ■