The U.S. Supreme Court will decide six big cases this term—five of them will directly impact the states. Redistricting and preemption cases are also popular with the court this term. The Supreme Court will decide four redistricting cases—including a “big” redistricting case—and four preemption cases. Justice Scalia’s death is likely to impact the outcome of many of the cases important to the states.

Most U.S. Supreme Court terms have their fair share of significant cases and the court’s 2015–2016 term is no exception. What is different about the big cases of this term is that there are more of them than usual. Also, this term’s big cases are not as big as last term’s big cases, specifically the same-sex marriage case and the Affordable Care Act—or ACA—case, which had it gone the other way might have meant the demise of the law. But what is no different about the big cases this term is that all but one of them, again involving the ACA, affect the states directly. This term the court will decide four redistricting cases. One of those cases is in the big cases category. Another noteworthy trend is that this term the Supreme Court has agreed to decide a number of preemption cases. Topics range from energy to health care claims data statutes. In the last few years the court’s preemption docket has been very thin.

But the biggest difference of all this term is not the number of big cases important to the states it is, of course, the loss of Justice Scalia, who died in February. As any court-watcher knows, the Supreme Court often decides big cases 5-4. In cases where the court is now 4-4 it has two choices: affirm the lower court’s decision in a non-precedential decision or wait for the new Justice to join the court and hold oral argument in the case again. Only time will tell which option the court picks in which cases.

The Big Cases
In *Reynold v. Sims* (1964) the court established the principle of “one-person, one-vote” requiring state legislative districts to be apportioned equally. The question in *Evenwel v. Abbott* is what population is
relevant—total population or voter-eligible population. The maximum total-population deviation between Texas Senate districts was about 8 percent; the maximum eligible-voters deviation between districts exceeded 40 percent. The unanimous opinion concluding Texas may redistrict using total population is “based on constitutional history, this Court’s decisions, and longstanding practice.” Section 2 of the 14th Amendment explicitly requires that the U.S. House of Representatives be apportioned based on total population. “It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.” In no previous cases alleging a state or local government failed to comply with “one-person, one-vote” had the court determined if a deviation was permissible based on eligible- or registered-voter data. And states and local governments redistricting based on total population is a settled practice.

In *Friedrichs v. California Teachers Association* the court issued a non-precedential 4-4 opinion affirming by an equally divided court the lower court’s decision to not overrule *Abood v. Detroit Board of Education* (1977). In Abood the Supreme Court held that the First Amendment does not prevent “agency shop” arrangements where public employees who do not join the union are still required to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment. The rationale for an agency fee is that the union may not discriminate between members and nonmembers in performing these functions. So no free-riders are allowed. In two recent cases, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014), in 5-4 opinions written by Justice Alito and joined by the other conservative Justices (including Justice Scalia and Justice Kennedy), the court was very critical of Abood. The court heard oral argument in this case in January before Justice Scalia died, and the five more conservative Justices seemed poised to overrule Abood. Justice Scalia, who ultimately didn’t participate in this case, likely would have voted to overrule Abood.

The issue in *Whole Women’s Health v. Hellerstedt* is whether Texas’ admitting privileges and ambulatory surgical center requirements create an undue burden on women seeking abortions and are reasonably related to advancing women’s health. Texas claims, and the Fifth Circuit agreed, that women’s health is advanced if doctors performing abortions have admitting privileges at a nearby hospital and if abortion clinics must comply with standards set for ambulatory surgical centers. Whole Women’s Health argues that the Fifth Circuit erred in refusing to consider “whether and to what extent” Texas law actually serves its purported interest in achieving safer abortions. Whole Women’s Health also argues that these requirements create an undue burden on those seeking abortions. Fewer than 10 of Texas’ more than 40 abortion clinics will remain open and those that do will be inaccessible to many and will be unable to keep up with demand for abortions. The Fifth Circuit found no undue burden even though 17 percent of women of reproductive age would face travel distances of 150 miles or more to receive abortions.

For the second time the Supreme Court has agreed to decide whether the University of Texas at Austin’s race-conscious admissions policy is unconstitutional in *Fisher v. University of Texas at Austin*. Per Texas’ Top Ten Percent Plan, the top 10 percent of Texas high school graduates are automatically admitted to UT Austin, which fills about 80 percent of the class. Unless an applicant has an “exceptionally high Academic Index,” he or she will be evaluated through a holistic review where race is one of a number of factors. The court has held that the use of race in college admissions is constitutional if it is used to further the compelling government interest of diversity and is narrowly tailored. In the first hearing of the case, the court held that the Fifth Circuit, which upheld UT Austin’s admissions policy, should not defer to UT Austin’s argument that its use of race is narrowly tailored. When the Fifth Circuit reviewed UT Austin’s admissions policy it again concluded that it is narrowly tailored. The court determined that the Top Ten Percent Plan works well at
increasing minority student enrollment because Texas schools are so segregated. But a number of well-qualified students are excluded—specifically minority students who performed well at majority-white schools but aren’t in the top ten percent of their class. If race wasn’t considered during holistic review almost every student admitted would be white because of the test score gap between white and minority students. And as a result of holistic review, a much higher percent of white students are admitted, but generally between 25 and 30 percent of the overall number of black and Hispanic students are admitted through holistic review.

In *United States v. Texas* the Court will decide whether President Obama’s deferred action immigration program violates federal law or is unconstitutional. The Deferred Action for Parents of Americans, or DAPA, program allows certain undocumented immigrants who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents to lawfully stay and work temporarily in the United States. The United States argues that the states lack “standing” to challenge the DAPA program. The Fifth Circuit concluded that the cost of issuing drivers licenses to DAPA program participants is a particular harm states will face, which provides the basis for standing. States also challenged the DAPA program as violating the Administrative Procedures Act, or APA, notice-and-comment requirement and claim it is arbitrary and capricious in violation of the APA. The lower court concluded the states were likely to succeed on both claims because DAPA is a substantive rule and it is “foreclosed by Congress’s careful plan” in the Immigration and Nationality Act. The states also argue DAPA violates the Constitution’s Take Care Clause because it is contrary to federal law; the president is failing to “take care” that federal law is followed.

Per the so-called “birth control mandate,” the ACA has been interpreted to require employers to offer contraception coverage to women at no cost. The federal government has accommodated religious nonprofits that object to providing contraception by allowing them to complete a form objecting to the coverage. Their health insurance plan must then provide free access to contraception without the nonprofits’ involvement. The Religious Freedom Restoration Act, or RFRA, prohibits the federal government from substantially burdening a person’s exercise of religion except to further a compelling interest in the least restrictive way. Religious nonprofits claim that this accommodation process makes them complicit in providing coverage to which they object and therefore substantially burdens their exercise of religion in violation of RFRA. They suggest the federal government could rely on a variety of less restrictive options to provide birth control that would not involve them at all. The court accepted seven cases, including *Zubik v. Burwell*, which the court’s decision likely will be titled, involving the question of whether the birth control mandate violates RFRA. All the lower courts deciding this issue, except the Eighth Circuit, ruled in favor of the federal government.

**Redistricting**

In *Harris v. Arizona Independent Redistricting Commission*, the Arizona redistricting commission claims that it underpopulated some minority districts to strengthen minorities’ ability to elect a candidate of their choice, so that the U.S. Department of Justice would be more likely to preclear its plan. The plaintiffs claim the commission underpopulated minority ability-to-elect districts to favor Democrats. The plaintiffs also argue that partisan gerrymandering can’t justify deviating from one person, one vote and that violating one person, one vote to obtain preclearance under the Voting Rights Act, or VRA, wasn’t a legitimate justification before or after the Supreme Court’s 2013 decision in *Shelby County v. Holder*, holding the VRA’s coverage formula unconstitutional. Two of the three judges found that the commission was primarily motivated by a desire to obtain preclearance. So it did not matter that the commission also was motivated by a desire to favor Democrats. A majority of the court concluded that trying to comply with the VRA could justify minor population deviations when protecting incumbent legislators can justify such deviations. A majority of the judges concluded Shelby County has no impact because it had not yet been decided when the map was drawn up in this case.

When the Virginia Legislature redrew congressional voting districts following the 2010 census it increased the number of minority voters in District 3, the state’s only majority-minority district, from 53.1 to 56.3 percent. Plaintiffs argue in *Wittman v. Personhuballah* that the plan unconstitutionally packed minority voters into District 3, thus diluting their ability to influence races in other districts. The lower court ruled that the plan was unconstitutional, finding that race was the predominant consideration for the district. Per strict scrutiny, the lower court held that complying with the VRA is a compelling state interest, but increasing the minority population wasn’t narrowly
tailored as District 3 is a “safe” minority-majority district. The Virginia legislators appealed claiming that the Supreme Court’s 2001 decision in *Easley v. Cromartie* requires plaintiffs to “show a conflict between race and traditional principles, including politics, that the legislature resolved by redistricting in a way that sacrificed traditional principles to race,” which plaintiffs did not and could not show in this case. In *Shapiro v. McManus*, the Supreme Court held unanimously that a three-judge court must be convened to decide a constitutional challenge to a redistricting plan even if the judge to which the request was made doesn’t think the challenger will win. Stephen Shapiro, dissatisfied with Maryland’s “crazy-quilt gerrymandering,” sued Maryland arguing its congressional redistricting plan violated his First Amendment right of political association. Per federal law, three judges “shall be convened” to hear challenges to the constitutionality of a congressional or statewide redistricting plan “unless [the judge whom the request for three judges is made] determines that three judges are not required.” The Supreme Court reasoned that “the mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.” The “unless [the judge whom the request for three judges is made] determines that three judges are not required” language means that the judge receiving the request for a three-judge court needs to examine the complaint to make sure it alleges a claim regarding whether a district is constitutionally apportioned, even if the claim doesn’t seem particularly winnable.

**Preemption Cases**

In *Hughes v. PPL EnergyPlus* and *CPV Maryland v. PPL EnergyPlus*, the Maryland Public Service Commission offered the successful power plant development bidder a 20-year “contract for differences.” The power plant would sell its capacity at the Federal Energy Regulatory Commission-regulated auction price. If the auction price was lower than its bid price, local utilities would make up the difference. If it was higher, the developer would rebate the utilities who would pass the cost recovery onto retail customers. Per the Federal Power Act, the Federal Energy Regulatory Commission, or FERC, has the authority to regulate interstate wholesale rates. FERC claims that Maryland’s program amounts to rate-setting and is field and conflict preempted by the U.S. Constitution’s Supremacy Clause. The Fourth Circuit concluded that Maryland’s program is barred based on “field preemption” because it “effectively supplants the rate generated by the auction with an alternative rate preferred by the state.” It is conflict preempted because it disrupts FERC-controlled federal markets by setting the price the bidder receives for a substantial time period.

In an 8-2 decision in *FERC v. Electric Power Supply Association* the Supreme Court ruled that the Federal Energy Regulatory Commission (FERC) has the authority to regulate wholesale “demand response” and that demand response bidders may receive the same compensation as electricity producers. “Demand response” is a practice in which operators in wholesale markets pay electricity consumers to not use power at certain times. Per the Federal Power Act, FERC regulates wholesale rates of electricity but states regulate retail rates. Electric Power Supply Association (EPSA) argued that through demand response FERC is “effectively” setting retail prices because when a consumer is deciding whether to buy electricity at retail the consumer will now consider both the cost of making the purchase and the cost of forgoing a demand response payment. The court disagreed stating that “the rate is what it is”: “the price paid, not the price paid plus the cost of a foregone economic opportunity.” No matter what they bid, successful demand response bidders receive the wholesale rate. EPSA argued that demand response bidders are receiving a “double-payment” and that they should only receive the wholesale price less the savings they net by not buying electricity on the retail market. FERC reasoned that demand response bidders should receive the same compensation as electricity generators because they are providing the same value. The court concluded that FERC’s judgment wasn’t “arbitrary and capricious” because regulating energy is technical and FERC provided reasons supporting its position and responded to EPSA’s proposed alternative.

The Supreme Court held 6-2 in *Gobeille v. Liberty Mutual Insurance Company* that the Employee Retirement Income Security Act (ERISA) preempts Vermont’s all-payers claims database (APCD) law. Seventeen other states collect health care claims data. ERISA preempts all state laws that “relate” to any employee benefits plan. Vermont’s APCD law requires health insurers to report to the
state information related to health care costs, prices, quality, and utilization, among other things. In an opinion written by Justice Kennedy the court concluded ERISA preempts Vermont’s APCD law “to prevent States from imposing novel, inconsistent, and burdensome reporting requirements on plans.” Justice Ginsburg, joined by Justice Sotomayor, dissented. She cited the State and Local Legal Center amicus brief which, in her words, pointed out that APCD laws “serve compelling interests, including identification of reforms effective to drive down health care costs, evaluation of relative utility of different treatment options, and detection of instances of discrimination in the provision of care.” In DIRECTV v. Imburgia the Supreme Court held 6-3 that a California state court interpretation of California law that class action arbitration is unenforceable is preempted by the Federal Arbitration Act, or FAA. Two DIRECTV customers sued DIRECTV claiming its early termination fees violate California law. Their service agreement stated that all claims would be resolved by arbitration and that class arbitration would be prohibited. But, if the “law of your state” made waiver of class arbitration unenforceable, the entire arbitration provision was unenforceable. In 2008, when the DIRECTV customers sued DIRECTV, a 2005 California Supreme Court case, Discover Bank v. Superior Court, holding class-arbitration waivers unenforceable was good law. But in 2011 in AT&T Mobility v. Concepcion, the U.S. Supreme Court held that the FAA preempted and invalidated that ruling. The U.S. Supreme Court ruled that the FAA preempts the California Court of Appeals’ interpretation of California law. While the Supreme Court agreed that parties could choose to have contracts governed by pre-Concepcion California law (or the law of Tibet or pre-revolutionary Russia), the ordinary meaning of “law of your state” is valid state law.

Conclusion
While not relevant to all states, this term’s death penalty docket is also unusually large. But about half of the Supreme Court’s death penalty cases raise issues not unique to capital punishment. Perhaps the most noteworthy case of the court’s term though is the one not taken. The Supreme Court refused to hear a case holding that a city could ban assault weapons and large capacity magazines. It is just a matter of time until the court rules again on gun control. The Court’s new Justice, whoever he or she may be, will have an influence on the death penalty, gun control, and many other issues of importance to the states.

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