

# SCOTUS Police Cases

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Organized by the **State and Local Legal Center**

Hosted by the **National Association of Counties**

Featuring **Shay Dvoretzky** and **David Gans**

# About the Webinar

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- Speakers' bios and handouts
- Questions
- Recording
- Technical difficulties
- The views expressed in this webinar do not necessarily reflect the views any of the sponsoring organizations



# About the SLLC

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- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- National Association of Counties
- National League of Cities
- U.S. Conference of Mayors
- International City/County Management Association
- International Municipal Lawyers Association
- Government Finance Officers Association

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- **NACo strengthens America's counties**, serving nearly 40,000 county elected officials and 3.6 million county employees. Founded in 1935, NACo unites county officials to:
  - **Advocate county priorities** in federal policymaking
  - **Promote exemplary county policies** and practices
  - **Nurture leadership skills** and expand knowledge networks
  - **Optimize county and taxpayer resources** and cost savings, and
  - **Enrich the public's understanding** of county government.

# About the Speakers

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- Shay Dvoretzky, Skadden, Arps, Slate, Meagher & Flom
- David Gans, Constitutional Accountability Center



# SCOTUS Police Cases

## State & Local Legal Center

Skadden

7/29/2021

Presented by Shay Dvoretzky, Partner, Supreme Court and Appellate Litigation



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1

*Caniglia v. Strom*

**Issue:** Whether the “community caretaking” exception to the Fourth Amendment’s warrant requirement extends to the home.

2

*United States v. Cooley*

**Issue:** Whether a tribal police officer may investigate and detain a non-tribe member within a reservation for a suspected violation of state or federal law.

3

*City of Chicago v. Fulton*

**Issue:** Whether an entity violates 11 U. S. C. §362(a)(3) by retaining possession of a debtor’s property after a bankruptcy petition is filed.

# *Caniglia v. Strom*

9-0 Opinion Authored by Justice Thomas

Decided May 17, 2021

## Factual Background

- After an argument with his wife in which Edward Caniglia produced a gun and asked her to “get [him] out of [his] misery,” Mr. Caniglia’s wife left the home and, the following day, asked the police to conduct a welfare check.
- Upon sending Mr. Caniglia – against his wishes – to the hospital, the officers entered the home and seized Mr. Caniglia’s guns.
- Mr. Caniglia sued the city and the officers for violating his Fourth Amendment rights.
- The First Circuit held for the officers, upholding their assertion of the “community caretaking” exception as the basis for their actions.

## Key Takeaways

- The Court held unanimously that the “community caretaking” exception to the Fourth Amendment does not justify warrantless intrusions into the home.
- The broad array of amici in support of Mr. Caniglia underscores the diverse interests at stake: the ACLU, the Cato Institute, the American Society for Suicidology, and the Firearms Policy Coalition.
- The Court’s holding reaffirms the sanctity of the home.
- Officers can still rely on the “exigent circumstances” doctrine in appropriate cases.



# *United States v. Cooley*

9-0 Opinion Authored by Justice Breyer  
Decided June 1, 2021

## Factual Background

- In February 2016, Officer James Saylor of the Crow Tribe Police Department approached a truck parked on the shoulder of a public road inside of the Crow Reservation.
- Officer Saylor found guns, methamphetamines, and a child in the cab of the truck, and observed the driver, Mr. Cooley, to be in an impaired state.
- Officer Saylor placed Mr. Cooley into his patrol vehicle and contacted state authorities.
- Before trial, Mr. Cooley moved to suppress the evidence found by Officer Saylor, arguing that the seizure violated the Indian Civil Rights Act of 1968.
- The District Court granted Mr. Cooley's motion to suppress, and the Ninth Circuit affirmed.

## Key Takeaways

- The Supreme Court held unanimously that a tribe retains power over non-member conduct if that conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
- The Court applied this test, which it developed for civil cases in *Montana v. United States*, in the criminal context.
- The Court's opinion addresses concerns about practicality and safety.
- The Court left open questions about the standard applicable to officers' conduct—same as Fourth Amendment or different?

# *City of Chicago v. Fulton*

8-0 Opinion Authored by Justice Alito (Justice Barrett did not participate)

Decided January 14, 2021

## Factual Background

- The City of Chicago impounded respondents' vehicles for failure to pay fines.
- Respondents filed bankruptcy petitions and requested the return of their vehicles.
- The City refused, and in each case, a Bankruptcy Court held that the City acted in violation of §362(a)(3) of the Bankruptcy Code, which prohibits creditors from exercising control over the property of debtors.

## Key Takeaways

- The Court held unanimously that the City's passive possession of the impounded vehicles did not amount to a violation of the Bankruptcy Code's automatic stay.
- Justice Sotomayor's concurrence highlighted the consequences and potential unfairness of the Court's ruling for debtors, and suggested the possible need for reforms.

1

## Consensus among Justices in opinions for the Court

Unanimous decisions across ideological lines

2

## Narrow holdings but separate writings

Concurrences highlight particular concerns and note questions left unanswered

3

## Brief opinions

4 pages in *Caniglia*, 9 pages in *Cooley*, 6 pages in *Fulton*



# 4<sup>th</sup> Amendment at the Supreme Court —2020 Term

State and Local  
Legal Center

CONSTITUTIONAL   
ACCOUNTABILITY CENTER

**David Gans**

Director of the Human Rights, Civil Rights & Citizenship Program at  
Constitutional Accountability Center

# Key Takeaways

1

Individuals raising 4<sup>th</sup> Amendment claims won each one.

2

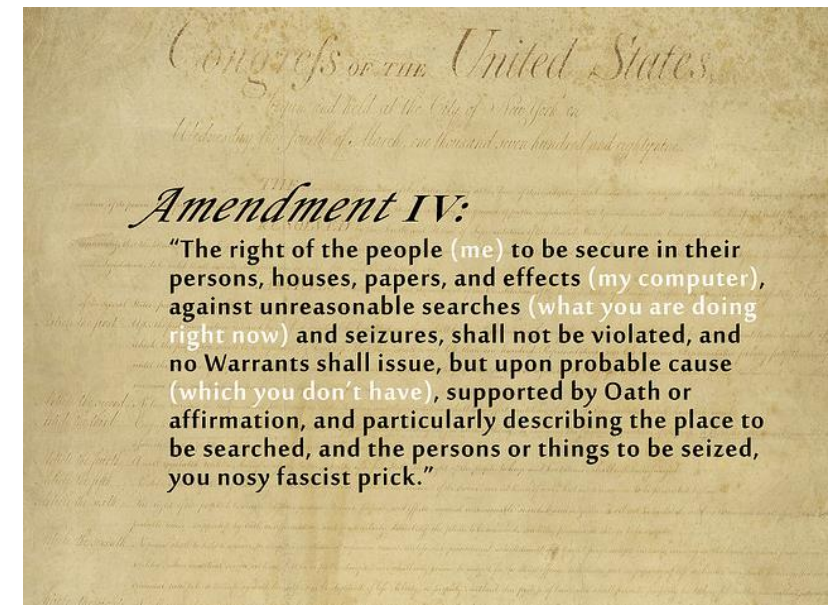
Growing commitment to originalism in Fourth Amendment adjudication.

3

The Justices are increasingly paying attention to the common law circa 1789 in interpreting the Fourth Amendment.

4

Narrow, minimalist rulings both on the merits docket and the shadow docket.



# Lange v. California

7-2 Ruling Authored by Justice Kagan, Decided June 23, 2021



## Factual Background

- Arthur Lange drove by a California highway patrol officer, who heard Lange playing loud music and honking his horn. The officer followed Lange into his home and questioned him, resulting in Lange's arrest.
- California state courts ruled that an officer trying to make a misdemeanor arrest may *always* pursue that person into the home without obtaining a warrant.



## Key Holdings

- Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always justify a warrantless entry into a home.
- When the totality of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry.



# Torres v. Madrid

5-3 Ruling Authored by Chief Justice Roberts, Decided March 25, 2021



## Factual Background

- Roxanne Torres fled New Mexico police officers she believed were carjackers. The officers shot her twice in the back and later apprehended her at the hospital where she sought medical care.
- The Tenth Circuit held that, because Torres eluded capture after being shot, the police shooting was not a seizure for purposes of the Fourth Amendment.



## Key Holdings

- When a police officer shoots a person with intent to restrain the individual, the officer has conducted a “seizure” that triggers constitutional scrutiny under the Fourth Amendment even if the individual eludes capture.

# Taylor v. Riojas

Per Curiam, Decided November 2, 2020



## Factual Background

- Trent Taylor was kept in the prison psychiatric unit in Lubbock, Texas, where he was forced to live in shockingly unsanitary conditions for nearly a week.
- The Fifth Circuit held that the officers were entitled to qualified immunity because the right not to be subjected to such conditions for “so short” a period as six days was not clearly established.



## Key Holdings

- SCOTUS summarily reversed the Fifth Circuit and held that the court of appeals erred in granting the officers qualified immunity.
- The Court called Taylor’s treatment “particularly egregious” and concluded that “any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.”

# McCoy v. Alamu

No. 20-31, Decided March 26, 2021



## Factual Background

- Prince McCoy, Sr., an asthmatic prisoner, was attacked, unprovoked, by a prison guard with a can of mace.
- The Fifth Circuit held that the officer was entitled to qualified immunity.



## Key Holdings

- SCOTUS granted, vacated and remanded for further proceedings in light of *Taylor v. Riojas*.



# Lombardo v. St. Louis

Per Curiam, Decided June 28, 2021



## Factual Background

- St. Louis City police officers held Nicholas Gilbert handcuffed, shackled and face-down on the ground and pressed into his back for fifteen minutes until he suffocated to death.
- The Eighth Circuit held that the force employed was not excessive and granted summary judgment to the defendants.



## Key Holdings

- SCOTUS summarily granted, vacated and remanded the case for further proceedings.
- The Justices refused to decide whether the police use of force was unconstitutional, but vacated the ruling because it appeared that the lower court had applied a *per se* rule that ignored the specific facts and circumstances of the case.

# Questions?

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Thanks for attending!



## Supreme Court Review for States 2020-21

July 2021

By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

*The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.*

\*Indicates a case where the SLLC has filed an *amicus* brief.

### **Big Cases**

In a 7-2 opinion in [\*California v. Texas\*](#) the Supreme Court held that neither the individual nor the state plaintiffs had standing to challenge as unconstitutional the Affordable Care Act's (ACA) requirement to obtain health insurance following Congress setting the penalty at \$0 in 2017. As originally enacted in 2010, the ACA required most Americans to obtain "minimum essential health insurance coverage" or pay a penalty. In [\*NFIB v. Sebelius\*](#) (2012) the Supreme Court held this requirement was a constitutional tax. In this case, the individual and state plaintiffs argued that the ACA's requirement to obtain health insurance is no longer a tax now that the penalty is eliminated, and as a result the entire ACA is unconstitutional. In an opinion written by Justice Breyer, the Court held the challengers in this case lacked standing to bring their case because they couldn't meet the "fairly traceable" element of the test for standing. According to the Court, a plaintiff has standing if he or she can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." The individual plaintiffs in this case claimed they had standing because they were harmed by having to buy health insurance. This alleged injury wasn't traceable to the ACA, the Court reasoned, because while the ACA tells them to buy insurance, it has no penalty. The state plaintiffs, Texas and over a dozen other states, claimed they had standing because of two pocketbook injuries: people's increased use of state-operated health insurance and "administrative and related expenses required . . . by the minimum essential coverage provision." According to the Court, the state plaintiffs failed to show that the minimum coverage provision, "without any prospect of penalty," will in fact lead to more individuals using state insurance. So, this alleged injury wasn't fairly traceable to the ACA's health insurance coverage requirement. States also pointed to costs related to "providing beneficiaries of state health plans with information about their health insurance coverage, as well as the cost of furnishing the IRS with that related information."

According to the Court, these costs weren't fairly traceable to the ACA's minimum coverage provision because they are required by other provisions of the ACA.

In [\*Brnovich v. Democratic National Committee\*](#) the U.S. Supreme Court held 6-3 that Arizona's requirement that ballots cast in the wrong precinct and ballots collected by anyone other than a limited group of people not be counted didn't violate §2 of the Voting Rights Act. The Democratic National Committee (DNC) sued the Arizona Attorney General claiming that Arizona's refusal to count ballots cast in the wrong precinct and ballots collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation of §2. The DNC also alleged the ballot-collection restriction was enacted with discriminatory intent in violation of §2. Section 2(a) disallows voting practices that "results in a denial or abridgement of the right" to vote based on race or color. Section 2(b) states a violation occurs only where "the political processes leading to nomination or election" are not "equally open to participation" by members of the relevant protected group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." According to Justice Alito, writing for the majority, "it appears that the core of §2(b) is the requirement that voting be 'equally open.'" The Court offered five non-exhaustive factors to determine whether voting is "equally open." Those factors include: the size of the burden imposed by the rule, whether the rule departs from standard voting practice in 1982 when §2 was amended, the disparity of impact on different racial or ethnic groups, the openness of the state's entire voting system, and the strength of the state interests served by the rule. Applying the above five factors, the Court concluded neither Arizona's out-of-precinct rule nor its ballot-collection law violates §2. Regarding out-of-precinct ballots, the Court found "[h]aving to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting'" particularly when considering Arizona's "political processes" as a whole. While in 2016 over 1% of voters of color versus .5% of white voters voted out of precinct, according to the Court, "[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open." Finally, not counting out-of-precinct votes "induces compliance" with the requirement that voters vote at their assigned polling place. Precinct-based voting furthers important state interests including distributing voters more evenly at polling places and reducing wait times. Regarding limits on ballot collection, the Court noted that Arizonans who receive early ballots have numerous options to cast their ballots, can rely on multiple proxies, and have 27 days to vote. The DNC was unable to provide statistical evidence that limits on ballot collection have had a disparate impact on minority voters. Finally, the Court pointed out that "third-party ballot collection can lead to pressure and intimidation." The Supreme Court agreed the federal district court's finding of a lack of discriminatory intent in enacting the ballot-collection restriction "had ample support in the record." According to the Court, what happened after the airing of a former Arizona State Senator's "unfounded and often far-fetched allegations of ballot collection fraud" and a "racially-tinged" video created by a private party "was a serious legislative debate on the wisdom of early mail-in voting."



## **First Amendment**

In [\*Americans for Prosperity Foundation v. Bonta\*](#) the U.S. Supreme Court held 6-3 that California violated the First Amendment by requiring charitable organizations to disclose their major donors to the state attorney general. To operate and raise funds in California, charities must register annually with the Attorney General. Regulations require them to submit a copy of their Internal Revenue Service Form 990, including Schedule B, which lists the names of donors who have contributed more than \$5,000 or, in some cases, more than 2 percent of an organization's total contributions. A number of charities sued California's Attorney General claiming requiring them to turn over this information violated the First Amendment. The Supreme Court, in an opinion written by Chief Justice Roberts, agreed that being compelled to disclose this information violated the charities' First Amendment freedom of association rights. According to Roberts in the first "compelled disclosure" case the Court applied "exacting scrutiny." Per this standard, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." While the parties argued that exacting scrutiny incorporates a "least restrictive means test" the Supreme Court disagreed. It concluded that the Court's early compelled disclosure cases set forth that disclosure requirements must be "narrowly tailored to the government's asserted interest." Applying exacting scrutiny, the Court held that California's "blanket demand" for Schedule Bs is facially unconstitutional. California argued it had an interest in preventing charitable fraud and self-dealing, and that "the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General's important regulatory efforts." The Court didn't doubt California had a substantial interest in preventing fraud. But, the Court opined, "[t]here is a dramatic mismatch . . . between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end." "California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. "California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement." In most facial challenge cases the challenger must "establish that no set of circumstances exists under which the [law] would be valid." According to the Court, "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." The Court had "no trouble" concluding that the Attorney General's disclosure requirement in this case is overbroad. The Attorney General argued its disclosure requirement was unlikely to chill donors because the state keeps the Schedule Bs confidential. But the Court cited to precedent stating that disclosure requirements can chill association "[e]ven if there [is] no disclosure to the general public."

The Supreme Court held unanimously in [\*Fulton v. Philadelphia\*](#)\* that the City of Philadelphia violated the First Amendment when it refused to contract with Catholic Social Service (CSS) to certify foster care families because CSS refuses to work with same-sex couples. When the city discovered that CSS wouldn't certify same-sex couples to become foster parents because of its religious beliefs the city refused to continue contracting with CSS. The city noted CSS violated the non-discrimination clause in its foster care contract. CSS sued the city claiming its refusal to

work with CSS violated the Free Exercise and Free Speech Clauses of the First Amendment. Chief Justice Roberts, writing for the Court, concluded that the city violated CSS's free exercise of religion rights. He noted that in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." But, the Court held, *Smith* didn't apply in this case because the city's non-discrimination clause allowed for exceptions, meaning it wasn't generally applicable. Because *Smith* didn't apply, the city's refusal to contract with CSS had to be evaluated under strict scrutiny. The city cited three interests in ensuring non-discrimination when certifying foster families: maximizing the number of foster parents, protecting the city from liability, and ensuring equal treatment of prospective foster parents and foster children. According to the Court: "Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices." As for equal treatment of prospective foster parents and foster children, Chief Justice Roberts wrote: "We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.' On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its nondiscrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."

In [\*Mahanoy Area School District v. B. L.\*](#), the U.S. Supreme Court held 8-1 that a public school could not discipline a student who transmitted to her Snapchat friends, outside of school hours and away from the school's campus, vulgar language and gestures criticizing the school and the school's cheerleading team. In *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court held that schools have a special interest in regulating student speech that "materially disrupts class work or involves substantial disorder or invasion of the rights of others." The Third Circuit held that *Tinker* doesn't extend to off-campus speech. The Supreme Court didn't go that far. In an opinion written by Justice Breyer, the Court stated "three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." First, while a school may stand in place of a parent or guardian when the student is on school grounds during school hours, such is rarely the case when the student speaks off campus. Second, if the school can regulate both on- and off-campus speech, a student's speech is subject to school regulation 24 hours a day. Finally, schools have an interest in protecting student's unpopular expressions, particularly off-campus, because "America's public schools are nurseries of democracy." After not making the varsity cheerleading team or getting her preferred softball position, on a weekend at a convenience store, B. L. posted on Snapchat an image of her and a friend with their middle fingers raised and the caption "Fuck school fuck softball fuck cheer fuck everything." The Court concluded that the school disciplining B. L. for her speech violated the First Amendment. According to the Court, B. L.'s speech "did not involve features that would place it outside the First Amendment's

ordinary protection.” Also, B. L.’s posts occurred outside school hours, away from school, to only a private circle of Snapchat friend, and she did not “identify the school in her posts or target any member of the school community with vulgar or abusive language.” The school’s interests in teaching good manners and punishing vulgar speech were “weakened considerably by the fact that B. L. spoke outside the school on her own time.” Additionally, little evidence suggested the posts caused substantial disruption in the classroom or on the cheerleading team.

#### **Fourth Amendment**

In a 5-3 decision in [\*Torres v. Madrid\*](#)\* the U.S. Supreme Court held that a person may be “seized” by a police officer per the Fourth Amendment even if the person gets away. In this case, police officers intended to execute a warrant in an apartment complex. Though they didn’t think she was the target of the warrant, they approached Roxanne Torres in the parking lot. Torres got in a car. According to Torres, she was experiencing methamphetamine withdrawal and didn’t notice the officers until one tried to open her car door. Though the officers wore tactical vests with police identification, Torres claimed she only saw the officers had guns. She thought she was being car jacked and drove away. She claimed the officers weren’t in the path of the vehicle, but they fired 13 shots, hitting her twice. Torres drove to a nearby parking lot, asked a bystander to report the attempted carjacking, stole another car, and drove 75 miles to a hospital. Torres sued the police officers claiming their use of force was excessive in violation of the Fourth Amendment’s prohibition against “unreasonable searches and seizures.” The officers argued, and the lower court agreed, that Torres couldn’t bring an excessive force claim because she was never “seized” per the Fourth Amendment since she got away. The rule the Supreme Court adopted in this case, as articulated by Chief Justice Roberts, is the “application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.” Citing to an English case from 1828, the Court “independently” concluded that “the common law rule identified in [*California v. Hodari D.* (1991)] that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that ‘[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.’”

In a four-page opinion the U.S. Supreme Court held unanimously in [\*Caniglia v. Strom\*](#)\* that police community caretaking duties don’t justify warrantless searches and seizures in the home. During an argument with his wife, Edward Caniglia put a handgun on their dining room table and asked his wife to “shoot [him] now and get it over with.” After spending the night at a hotel Caniglia’s wife couldn’t reach him by phone and asked police to do a welfare check. Caniglia agreed to go to the hospital for a psychiatric evaluation after officers allegedly promised not to confiscate his firearms. The officers went into his home and seized his guns regardless. Caniglia sued the officers for money damages claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. In *Cady v. Dombrowski* (1973), the Court held that a warrantless search of an impounded vehicle for an unsecured firearm didn’t violate the Fourth Amendment. According to the Court in that case “police officers who patrol the ‘public highways’ are often called to discharge noncriminal ‘community caretaking

functions,’ such as responding to disabled vehicles or investigating accidents.” The First Circuit ruled in favor of the police officers in *Caniglia* extending *Cady*’s “community caretaking exception” to the warrant requirement beyond the automobile and to the home. Justice Thomas, writing for the Court, rejected the First Circuit’s extension of *Cady*. Justice Thomas noted the *Cady* opinion repeatedly stressed the “constitutional difference” between an impounded vehicle and a home. “In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car ‘parked adjacent to the dwelling place of the owner.’”

In [\*Lange v. California\*](#), the U.S. Supreme Court held that pursuit of a fleeing misdemeanor suspect does not always justify entry into a home without a warrant. Rather, “[a]n officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency.” All nine justices agreed with the result. Arthur Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer followed Lange and put on his overhead lights, signaling Lange to pull over. Lange kept driving to his home which was about 100 feet away. The officer followed Lange into the garage and conducted field sobriety tests after observing signs of intoxication. A later blood test showed Lange’s blood-alcohol content was three times the legal limit. Lange argued that the warrantless entry into his garage violated the Fourth Amendment. California argued that pursuing someone suspected of a misdemeanor, in this case failing to comply with a police signal, always qualifies as an exigent circumstance authorizing a warrantless home entry. The California Court of Appeals agreed. The Supreme Court, in an opinion written by Justice Kagan, rejected a categorical approach. Instead, in instances of a misdemeanants’ flight, “[w]hen the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting.” The Court noted that “when it comes to the Fourth Amendment, the home is first among equals.” In *United States v. Santana* (1976), the Court upheld a warrantless entry into a home of a fleeing felon but said nothing about fleeing misdemeanants. And misdemeanors vary widely and may be minor. In *Welsh v. Wisconsin* (1984), the “Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry.” Likewise, “[t]hose suspected of minor offenses may flee for innocuous reasons and in non-threatening ways.” Finally, the Court pointed out that “[t]he common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit.”

In a *per curiam* (unauthored) opinion in [\*Lombardo v. City of St. Louis, Missouri\*](#) the U.S. Supreme Court ordered the Eighth Circuit to decide again whether police officers used excessive force when restraining Nicholas Gilbert on his stomach for 15 minutes and if so whether the officers should receive qualified immunity. Gilbert was arrested for trespassing in a condemned building and failing to appear in court for a traffic ticket. Officers tried to handcuff Gilbert after it appeared he was trying to hang himself in his cell. Gilbert was only 5’3” and 160 pounds but he struggled with multiple officers. Ultimately, they were able to handcuff Gilbert and put him in leg irons. They moved him face down on the floor and held his limbs down at the shoulders, biceps, and legs. At least one officer placed pressure on Gilbert’s back and torso. Gilbert tried to raise his chest, saying, “It hurts. Stop.” After 15 minutes of struggling in this position, Gilbert’s breathing became abnormal and he stopped moving. The officers rolled Gilbert over and checked

for a pulse. Finding none, they performed chest compressions and rescue breathing. Gilbert was pronounced dead at the hospital. Gilbert's parents sued the officers claiming they violated the Fourth Amendment by using excessive force. A federal district court ruled the officers were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time. The Eighth Circuit ruled in favor of the officers, holding they did not apply unconstitutionally excessive force. According to the Supreme Court the Eighth Circuit cited the correct factors in determining whether the use of force was reasonable. However, it was "unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." The Eighth Circuit also described as "insignificant" the fact that Gilbert was handcuffed and leg shackled when officers kept him in the prone position for 15 minutes. According to the Supreme Court these details matter because "St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation," "well-known police guidance recommend[s] that officers get a subject off his stomach as soon as he is handcuffed because of that risk," and that "guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." According to the Court: "Having either failed to analyze such evidence or characterized it as insignificant, the court's opinion could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law. Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent."

### **Fifth Amendment Takings**

In [\*Cedar Point Nursery v. Hassid\*](#)\* the Supreme Court held 6-3 that a California regulation allowing union organizers access to agriculture employers' property to solicit support for unionization up to three hours a day, 120 days a year is a *per se* physical taking under the Fifth and Fourteenth Amendments. The Fifth Amendment Taking Clause, applicable to the states through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation." In this case agriculture employers argued California's union access regulation "effected an unconstitutional *per se* physical taking . . . by appropriating without compensation an easement for union organizers to enter their property." The Supreme Court agreed. According to Chief Justice Roberts, writing for the majority, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." But when the government "instead imposes regulations that restrict an owner's ability to use his own property" the restrictions don't require "just compensation" unless they go "too far." The Court held the access regulation "appropriates a right to invade the growers' property" and therefore constitutes a *per se* physical taking rather than a regulatory taking. "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." The Court noted that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." "Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation."



The U.S. Supreme Court filed a unanimous *per curiam* (unauthored) opinion overturning the Ninth Circuit decision in [Pakdel v. City of San Francisco](#). The lower court concluded the City of San Francisco didn't make a "final" decision regarding plaintiffs' takings case because plaintiffs failed to comply with the city's administrative procedures, meaning plaintiffs couldn't yet bring their takings case in federal court. According to the Supreme Court, this ruling contradicted its recent decision in *Knick v. Township of Scott* (2019). San Francisco agreed to allow plaintiffs to convert their tenancy-in-common to condominiums as long as they offered their renters a lifetime lease. A few months after agreeing to do so, plaintiffs asked the city to either excuse them from the lifetime lease or compensate them, and the city refused. They sued the city in federal court claiming the lifetime-lease requirement was an unconstitutional regulatory taking. In *Knick* the Supreme Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985) and held that exhausting administrative remedies is not a prerequisite to bringing a takings case in federal court. The Ninth Circuit noted that *Knick* didn't disturb *Williamson County*'s alternative holding that plaintiffs may challenge only "final" government decisions in federal court. According to the Ninth Circuit, although the city had twice denied plaintiffs' requests for an exemption, its decision "was not truly 'final' because [plaintiffs] had made a belated request for an exemption at the end of the administrative process instead of timely seeking one 'through the prescribed procedures.'" "In other words, a conclusive decision is not really 'final' if the plaintiff did not give the agency the opportunity to exercise its 'flexibility or discretion' in reaching the decision." The Supreme Court concluded the Ninth Circuit's "view of finality is incorrect. The finality requirement is relatively modest." Plaintiffs must merely show "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" In this case the city was clear. Plaintiffs had to "execute the lifetime lease" or face an "enforcement action."

### **Crime and Punishment**

In [Jones v. Mississippi](#) the U.S. Supreme Court held 6-3 that sentencing a juvenile convicted of homicide to life without parole doesn't require a separate factual finding of permanent incorrigibility or an on-the-record explanation with an implicit finding of permanent incorrigibility. In [Miller v. Alabama](#) (2012), the Supreme Court held that the Eighth Amendment requires that life-without-parole sentences for juveniles convicted of homicide not be mandatory. In [Montgomery v. Louisiana](#) (2016), the Supreme Court held that *Miller* applies retroactively to sentences issued before 2012. In 2004 fifteen-year-old Brett Jones killed his grandfather. He was sentenced to life in prison without parole. After *Miller* was decided a trial court resentenced him to life in prison without parole. The Mississippi Court of Appeals rejected Jones's argument that the trial court should have made a separate factual that he was permanently incorrigible. According to Justice Kavanaugh, writing for the majority, a sentencer's use of discretion to impose a life-without-parole sentence on a juvenile homicide offender, without a finding of permanent incorrigibility, satisfies the Eighth Amendment. Justice Kavanaugh concluded the Court's following statements in *Montgomery* resolve this case: "*Miller* did not impose a formal factfinding requirement" and "a finding of fact regarding a child's incorrigibility . . . is not required." Quoting *Miller*, the Court further reasoned that it required "only that a sentencer

follow a certain process—considering an offender’s youth and attendant characteristics—before imposing” a life-without-parole sentence.

In [\*Edwards v. Vonnay\*](#) the U.S. Supreme Court held 6-3 that no new rules of criminal procedure apply retroactively on federal collateral review. For this reason the Supreme Court’s holding in [\*Ramos v. Louisiana\*](#) (2020), that state court jury verdicts for convictions of serious crimes must be unanimous, does not apply retroactively to cases on federal collateral review. In 2007 Thedrick Edwards was convicted of kidnapping, sexual assault, and robbery by a nonunanimous Louisiana jury and sentenced to life in imprisonment without parole. By 2011 Edwards had exhausted his first round of appeals meaning he was only able to challenge his conviction on “collateral review.” Before the Supreme Court Edwards argued that *Ramos* applies retroactively to overturn final convictions on federal collateral review. In *Teague v. Lane* (1989), the Court held that a new criminal procedural rule applies retroactively on federal collateral review only if it constitutes a “watershed” rule. The Court, in an opinion written by Justice Kavanaugh, rejected Edwards’ argument that the right to a unanimous jury is a watershed rule given the significance of the right, that it relies on the original meaning of the constitution, and that it may prevent racial discrimination. According to the Court, it “has already considered and rejected those kinds of arguments in prior retroactivity case.” More significantly, the Court overturned *Teague v. Lane* concluding “no new rules of criminal procedure can satisfy the watershed exception.” The Court noted that in the 32 years since *Teague* was decided “the Court has never found that any new procedural rule actually satisfies that purported exception.” The Court only identified one pre-*Teague* procedural rule as watershed—the right to counsel recognized in *Gideon v. Wainwright* (1963). According to the Court: “Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts.”

### **Procedural**

In [\*B.P. v. Mayor and City Council of Baltimore\*](#)\* the U.S. Supreme Court ruled 7-1 that a federal court of appeals may review any grounds the district court considered for removing a case to federal court if one of the grounds was federal officer or civil rights removal. The mayor and City of Baltimore sued various energy companies in Maryland state court “for promoting fossil fuels while allegedly concealing their environmental impacts.” Defendants may “remove” a case brought in state court to federal court if the federal court has jurisdiction over it. In federal district court, BP argued for federal court jurisdiction on numerous grounds, including the federal officer removal statute. As Justice Gorsuch explains, this statute “promises a federal forum for any action against” a private defendant acting at the “federal government’s behest.” The federal district court rejected all the grounds BP alleged supported removing the case to federal court. It remanded the case back to Maryland state court, and B.P. appealed. Federal appellate courts generally lack the power to review a district court order remanding a case to state court. However, 28 U.S.C. §1447(d) includes two exceptions: “an order remanding a case to the State court from which it was removed pursuant to [the federal officer removal statute or the civil-rights removal statute] shall be reviewable by appeal.” The Fourth Circuit only reviewed the part of the district court’s order discussing federal officer removal. The Supreme Court concluded that if a defendant relies on the federal officer removal statute (or the civil rights removal statute) when trying to remove a case to federal court, the appellate court “may

review the merits of all theories for removal that a district court has rejected.” The Court looked to the statute’s use of the term “order.” An “order” is a “written direction or command delivered by . . . a court or judge.” The district court order in this case “rejected all of the defendants’ grounds for removal,” so “the statute allows courts of appeals to examine the whole of a district court’s ‘order,’ not just some of its parts or pieces.”

In *Uzuegbunam v. Preczewski*\* the Supreme Court held 8-1 that to have a “redressable injury” required to bring a lawsuit, a plaintiff need only ask for nominal damages (\$1). Chike Uzuegbunam was threatened with disciplinary action for speaking about his religion in the “free speech expression areas” at Georgia Gwinnett College, a public college where he was enrolled. He and Joseph Bradford, another student, who decided not to speak about his religion because of what happened to Uzuegbunam, sued the college claiming its campus speech policies violated the First Amendment. They asked for nominal damages and an injunction requiring the college to change its speech policies. The college got rid of the challenged policies and argued the case was now moot. To establish standing, among other requirements, a plaintiff must ask for a remedy that is redressable, meaning likely to address his or her past injuries. In an opinion written by Justice Thomas the Court held that Uzuegbunam’s claim for nominal damages is intended to redress a past injury. According to the Court the prevailing rule, “well established” at common law, was “that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.” The Court stated a request for nominal damages doesn’t “guarantee[] entry to court” as it only addressed whether nominal damages satisfy the redressability element of standing. The Court also didn’t decide whether Bradford could pursue a nominal damages claim, noting nominal damages “are unavailable where a plaintiff has failed to establish a past, completed injury.”

In an unauthored opinion in *Trump v. New York*, the U.S. Supreme Court refused to decide whether President Trump could lawfully and constitutionally direct the Secretary of Commerce to provide information to him about the number of undocumented persons so he could exclude them from the census apportionment base. Federal law requires the Secretary of Commerce to “take a decennial census of population” and report to the President “[t]he tabulation of total population by States.” The President then transmits to Congress a “statement showing the whole number of persons in each State.” President Trump wanted to exclude undocumented persons from this census number which is used to apportion U.S. House of Representatives seats to the states. He asked the Secretary of Commerce to provide him the information he needed to do so. States and local governments and others sued the President claiming he violated federal statutes governing the census and the U.S. Constitution. The Court refused to decide this case describing it as “riddled with contingencies and speculation that impede judicial review.” The Court noted that while the President “has made clear his desire to exclude aliens without lawful status from the apportionment base,” he has qualified the directive to gather the necessary information with language including “to the extent practicable” and “to the extent feasible.” According to the Court, “the record is silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner.” Subsequent to

this decision, President Biden issued an executive order reversing President Trump's policy of excluding undocumented persons from the census apportionment base.

In [\*City of San Antonio, Texas v. Hotels.com\*](#)\* the U.S. Supreme Court held unanimously that federal district courts may not alter a court of appeals' allocation of appellate costs. The City of San Antonio won in federal district court a class action lawsuit against online travel companies (OTCs) after they collected hotel occupancy taxes on the wholesale rate rather than the retail rate consumers paid. The OTCs were ordered to pay \$55 million. To avoid paying the judgment while they appealed, the OTCs purchased a bond. On appeal, the Fifth Circuit ruled against San Antonio. Federal Rule of Appellate Procedure 39(a) states that unless the "court orders otherwise" the party losing on appeal pays appellate costs, including bond premium costs. When describing its judgment against San Antonio, the Fifth Circuit didn't "depart[] from the default allocation" of costs. Before the district court, San Antonio argued the court had discretion to not require San Antonio to pay some or all of the appellate costs. The district court and the Fifth Circuit disagreed. Before the Supreme Court, San Antonio argued the appellate court may say "who can receive costs (party A, party B, or neither)" but lacks "authority to divide up costs," instead the district court has this discretion. The OTCs argued that the appellate court has the discretion to divide up appellate costs "as it deems appropriate and that a district court cannot alter that allocation." The Supreme Court, in an opinion written by Justice Alito, agreed with the OTCs, focusing on the "orde[r] otherwise" language in the federal rules. According to the Court: "This broad language does not limit the ways in which the court of appeals can depart from the default rules, and it certainly does not suggest that the court of appeals may not divide up costs." Understanding that courts of appeals may allocate appellate costs, "it is easy to see why district courts cannot exercise a second layer of discretion. Suppose that a court of appeals, in a case in which the district court's judgment is affirmed, awards the prevailing appellee 70% of its costs. If the district court, in an exercise of its own discretion, later reduced those costs by half, the appellee would receive only 35% of its costs—in direct violation of the court of appeals' directions."

In [\*Carney v. Adams\*](#)\* the Supreme Court held unanimously that James Adams lacked standing to challenge a Delaware constitutional provision requiring that appointments to Delaware's major courts reflect a partisan balance. Delaware's Constitution states that no more than a bare majority of members of any of its five major courts may belong to any one political party. It also requires, with respect to three of those courts, that the remaining members belong to "the other major political party." So, as a practical matter, to be on three of Delaware's courts a person must belong to one of the two major political parties. James Adams, a Delaware lawyer and political independent, sued Governor Carney claiming Delaware's major party requirement is unconstitutional. The Court, in an opinion written by Justice Breyer, concluded Adams lacks standing to bring this lawsuit. To have standing a litigant must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." For Adams to prove he was harmed he had to "at least show that he is likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation." According to Justice Breyer, "the

record evidence fails to show that, at the time he commenced the lawsuit, Adams was ‘able and ready’ to apply for a judgeship in the reasonably foreseeable future.”

### **Miscellaneous**

In a unanimous decision the U.S. Supreme Court held in [\*Rutledge v. Pharmaceutical Care Management Association\*](#) that states may regulate the price at which pharmacy benefit managers (PBMs) reimburse pharmacies for the cost of prescription drugs without violating the Employee Retirement Income Security Act (ERISA). PBMs act as an intermediary between prescription-drug plans and pharmacies. When a pharmacy fills a prescription, the PBM reimburses the pharmacy less the co-pay. The prescription drug plan then reimburses the PBM. PBMs’ contracts with pharmacies typically set the reimbursement rates, which may not cover the price the pharmacy paid to purchase that drug from a wholesaler. In 2015 Arkansas passed a law requiring PBMs to reimburse Arkansas pharmacies at a price equal to or higher than that which the pharmacy paid to buy the drug. The Pharmaceutical Care Management Association sued Arkansas claiming that its law is preempted by ERISA. The Supreme Court disagreed in an opinion written by Justice Sotomayor. ERISA pre-empts “any and all State laws insofar as they . . . relate to any employee benefit plan” covered by ERISA. “[A] state law relates to an ERISA plan if it has a connection with or reference to such a plan.” According to Justice Sotomayor, “[b]ecause [Arkansas’s law] has neither of those impermissible relationships with an ERISA plan, ERISA does not pre-empt it. Arkansas’s law does have an “impermissible connection” with an ERISA plan, the Court reasoned, because in previous cases the Court has held that “ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage.” Arkansas’s law is “merely a form of cost regulation.” Arkansas’s law also doesn’t “refer to” ERISA, the Court opined. A law refers to ERISA if it “acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law’s operation.” According to the Court, Arkansas’s law “does not act immediately and exclusively upon ERISA plans because it applies to PBMs whether or not they manage an ERISA plan. Indeed, the Act does not directly regulate health benefit plans at all, ERISA or otherwise. It affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract.”

In [\*NCAA v. Alston\*](#), the U.S. Supreme Court held unanimously that the National Collegiate Athletics Association (NCAA) cannot restrict certain education-related benefits schools may offer student-athletes. A group of current and former student-athletes sued the NCAA claiming that its rules limiting education-related benefits violate the Sherman Act which prohibits “contract[s], combination[s], or conspiracy[ies] in restraint of trade or commerce.” The NCAA limits scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships. In an opinion written by Justice Gorsuch, the Supreme Court agreed with the federal district court that these limits violate federal antitrust law. Per the rule of reason, the plaintiff (student-athletes in this case) must prove the restraint has a substantial anticompetitive effect. The burden then “shifts to the defendant [here the NCAA] to show a procompetitive rationale for the restraint.” Finally, “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less



anticompetitive means.” The federal district court concluded educational-related benefits couldn’t be “confused with a professional athlete’s salary.” So, disallowing caps on them “would be substantially less restrictive than the NCAA’s current rules and yet fully capable of preserving consumer demand for college sports.” The NCAA offered three specific objections to the district court’s holding the educational-related benefits cap violated anti-trust law, all of which the Court rejected. First, the NCAA was concerned that schools will use internships “as a way of circumventing limits on payments that student-athletes may receive for athletic performance.” But following the district court opinion, the NCAA adopted a rule only allowing a “conference or institution” (rather than a sneaker company or auto dealership) to fund post-eligibility internships. Second, the NCAA objected to the district court’s ruling that aggregate limits on “academic or graduation” achievement awards must be no lower than aggregate limit on athletic awards (currently \$5,980 per year). According to the Court, “[t]he NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary.” Finally, the NCAA was concerned that allowing schools to offer scholarships for graduate degrees or vocational school and to pay for things like computers and tutoring might lead to schools giving student-athletes “luxury cars” “to get to class” and “other unnecessary or inordinately valuable items” only “nominally” related to education. The Court disagreed that this would be possible, noting “the NCAA is free to forbid in-kind benefits unrelated to a student’s actual education; nothing stops it from enforcing a ‘no Lamborghini’ rule.”

In [\*PennEast Pipeline v. New Jersey\*](#)\* the U.S. Supreme Court held 5-4 that the federal government may constitutionally grant pipeline companies the authority to condemn necessary rights-of-way in which a state has an interest. Pipeline companies likewise may sue states to obtain the rights-of-way. Per the Natural Gas Act (NGA), natural gas companies, upon a showing of “public convenience and necessity,” may receive a certificate from the Federal Energy Regulatory Commission allowing them to use federal eminent domain power to obtain land to locate a pipeline. After receiving such a certificate, PennEast filed a complaint to condemn land in which New Jersey has an interest. New Jersey claimed sovereign immunity prevented PennEast from being able to sue the state in federal court. In an opinion written by Chief Justice Roberts the Supreme Court held that the NGA follows precedent allowing private parties to exercise federal eminent domain over state land and that sovereign immunity doesn’t bar the lawsuit in this case. Regarding the NGA following precedent, the Court cited to *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* (1941), holding that federal eminent domain applies to state land. Likewise, in *Cherokee Nation v. Southern Kansas Railroad Co.* (1890), the Court stated that a private party could exercise federal eminent domain over state land. Eleventh Amendment sovereign immunity prohibits states from being sued with some exceptions. According to the Court, “a State may be sued if it has agreed to suit in the ‘plan of the Convention,’ which is shorthand for ‘the structure of the original Constitution itself.’” The Court opined that the cases discussed above show the states “consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.”

In an 8-0 decision in [\*City of Chicago v. Fulton\*](#)\*, the U.S. Supreme Court held that the City of Chicago didn’t violate the Bankruptcy Code’s automatic stay provision by holding onto a vehicle

impounded after a bankruptcy petition was filed. The City of Chicago impounds vehicles where debtors have three or more unpaid fines. Robbin Fulton's vehicle was impounded for this reason. She filed for bankruptcy and asked the City to return her vehicle; it refused. The Seventh Circuit held the City violated the Bankruptcy Code's automatic stay provision. The Supreme Court unanimously reversed. When a bankruptcy petition is filed, an "estate" is created which includes most of the debtor's property. An automatic consequence of the bankruptcy petition is a "stay" which prevents creditors from trying to collect outside of the bankruptcy forum. The automatic stay prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The Bankruptcy Code also has a "turnover" provision which requires those in possession of property of the bankruptcy estate to "deliver to the trustee, and account for" that property. The Supreme Court held that "mere retention" of a debtor's property after a bankruptcy petition is filed doesn't violate the automatic stay. According to Justice Alito, "[t]aken together, the most natural reading of . . . 'stay,' 'act,' and 'exercise control'—is that [the automatic stay provision] prohibits *affirmative acts* that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." However, the Court conceded it did not "maintain that these terms definitively rule out" an alternative interpretation. According to the Court, "[a]ny ambiguity in the text of [the automatic stay provision] is resolved decidedly in the City's favor" by the turnover provision. First, reading "any act . . . to exercise control" in the automatic stay provision "to include merely retaining possession of a debtor's property would make that section a blanket turnover provision," rendering the turnover provision "largely superfluous." Second, the turnover provision includes exceptions that the automatic stay provision doesn't include. "Under respondents' reading, in cases where those exceptions to turnover . . . would apply, [the automatic stay provision] would command turnover all the same."

In [\*United States v. Cooley\*](#) the U.S. Supreme Court held unanimously that an Indian tribe police officer may temporarily detain and search a non-Indian on a public right-of-way that runs through an Indian reservation, based on a suspected violation of state or federal law. A tribal officer approached a vehicle stopped on a public right-of-way within the Crow Reservation to offer assistance. The officer ordered Joshua James Cooley, who appeared to be a non-Indian, out of the car and conducted a pat down search after he noticed two semiautomatic rifles lying on the front seat. While waiting for backup to arrive, the officer saw in the vehicle a glass pipe and plastic bag that contained methamphetamine. A federal grand jury indicted Cooley on gun and drug violations. The Ninth Circuit suppressed the drug evidence holding the tribal officer had no authority to investigate "nonapparent" violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The tribal officer in this case didn't ask Cooley whether he was non-Indian. The Supreme Court reversed the Ninth Circuit and held that tribal police officers may detain and search non-Indians traveling on public rights-of-way running through a reservation. Justice Breyer wrote the majority opinion. He noted that in *Montana v. United States* (1981), the Court articulated the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." But that general rule has two exceptions including "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." According to the Court, this exception "fits the present case, almost like a glove." "To deny a tribal police

officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.”

In a very brief, unauthored opinion the Supreme Court denied qualified immunity in [\*Taylor v. Riojas\*](#) to a number of correctional officers who confined Trent Taylor to a “pair of shockingly unsanitary cells” for six days. Trent Taylor claimed the first cell he was confined in was covered in feces “all over the floor, the ceiling, the window, the walls,” and even inside the water faucet. The second, frigidly cold cell, “was equipped with only a clogged drain in the floor to dispose of bodily wastes.” The Fifth Circuit held that Taylor’s confinement conditions violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The Fifth Circuit granted the officers qualified immunity because “[t]he law wasn’t clearly established” that “prisoners couldn’t be housed in cells teeming with human waste” “for only six days.” The Supreme Court reversed the Fifth Circuit’s grant of qualified immunity because “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.”



## Supreme Court Review for Local Governments 2020-21

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*The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.*

\*Indicates a case where the SLLC has filed an *amicus* brief.

### **Fourth Amendment**

In a 5-3 decision in [\*Torres v. Madrid\*](#)\* the U.S. Supreme Court held that a person may be “seized” by a police officer per the Fourth Amendment even if the person gets away. In this case, police officers intended to execute a warrant in an apartment complex. Though they didn’t think she was the target of the warrant, they approached Roxanne Torres in the parking lot. Torres got in a car. According to Torres, she was experiencing methamphetamine withdrawal and didn’t notice the officers until one tried to open her car door. Though the officers wore tactical vests with police identification, Torres claimed she only saw the officers had guns. She thought she was being car jacked and drove away. She claimed the officers weren’t in the path of the vehicle, but they fired 13 shots, hitting her twice. Torres drove to a nearby parking lot, asked a bystander to report the attempted carjacking, stole another car, and drove 75 miles to a hospital. Torres sued the police officers claiming their use of force was excessive in violation of the Fourth Amendment’s prohibition against “unreasonable searches and seizures.” The officers argued, and the lower court agreed, that Torres couldn’t bring an excessive force claim because she was never “seized” per the Fourth Amendment since she got away. The rule the Supreme Court adopted in this case, as articulated by Chief Justice Roberts, is the “application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.” Citing to an English case from 1828, the Court “independently” concluded that “the common law rule identified in [*California v. Hodari D.* (1991)] that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately)

proclaim that “[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.”

In a four-page opinion the U.S. Supreme Court held unanimously in *Caniglia v. Strom*\* that police community caretaking duties don’t justify warrantless searches and seizures in the home. During an argument with his wife, Edward Caniglia put a handgun on their dining room table and asked his wife to “shoot [him] now and get it over with.” After spending the night at a hotel Caniglia’s wife couldn’t reach him by phone and asked police to do a welfare check. Caniglia agreed to go to the hospital for a psychiatric evaluation after officers allegedly promised not to confiscate his firearms. The officers went into his home and seized his guns regardless. Caniglia sued the officers for money damages claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. In *Cady v. Dombrowski* (1973), the Court held that a warrantless search of an impounded vehicle for an unsecured firearm didn’t violate the Fourth Amendment. According to the Court in that case “police officers who patrol the ‘public highways’ are often called to discharge noncriminal ‘community caretaking functions,’ such as responding to disabled vehicles or investigating accidents.” The First Circuit ruled in favor of the police officers in *Caniglia* extending *Cady*’s “community caretaking exception” to the warrant requirement beyond the automobile and to the home. Justice Thomas, writing for the Court, rejected the First Circuit’s extension of *Cady*. Justice Thomas noted the *Cady* opinion repeatedly stressed the “constitutional difference” between an impounded vehicle and a home. “In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car ‘parked adjacent to the dwelling place of the owner.’”

In *Lange v. California*, the U.S. Supreme Court held that pursuit of a fleeing misdemeanor suspect does not always justify entry into a home without a warrant. Rather, “[a]n officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency.” All nine justices agreed with the result. Arthur Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer followed Lange and put on his overhead lights, signaling Lange to pull over. Lange kept driving to his home which was about 100 feet away. The officer followed Lange into the garage and conducted field sobriety tests after observing signs of intoxication. A later blood test showed Lange’s blood-alcohol content was three times the legal limit. Lange argued that the warrantless entry into his garage violated the Fourth Amendment. California argued that pursuing someone suspected of a misdemeanor, in this case failing to comply with a police signal, always qualifies as an exigent circumstance authorizing a warrantless home entry. The California Court of Appeals agreed. The Supreme Court, in an opinion written by Justice Kagan, rejected a categorical approach. Instead, in instances of a misdemeanants’ flight, “[w]hen the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting.” The Court noted that “when it comes to the Fourth Amendment, the home is first among equals.” In *United States v. Santana* (1976), the Court upheld a warrantless entry into a home of a fleeing felon but said nothing about fleeing misdemeanants. And misdemeanors vary widely and may be minor. In *Welsh v. Wisconsin* (1984), the “Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless



home entry.” Likewise, “[t]hose suspected of minor offenses may flee for innocuous reasons and in non-threatening ways.” Finally, the Court pointed out that “[t]he common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit.”

In a *per curiam* (unauthored) opinion in [Lombardo v. City of St. Louis, Missouri](#) the U.S. Supreme Court ordered the Eighth Circuit to decide again whether police officers used excessive force when restraining Nicholas Gilbert on his stomach for 15 minutes and if so whether the officers should receive qualified immunity. Gilbert was arrested for trespassing in a condemned building and failing to appear in court for a traffic ticket. Officers tried to handcuff Gilbert after it appeared he was trying to hang himself in his cell. Gilbert was only 5’3” and 160 pounds but he struggled with multiple officers. Ultimately, they were able to handcuff Gilbert and put him in leg irons. They moved him face down on the floor and held his limbs down at the shoulders, biceps, and legs. At least one officer placed pressure on Gilbert’s back and torso. Gilbert tried to raise his chest, saying, “It hurts. Stop.” After 15 minutes of struggling in this position, Gilbert’s breathing became abnormal and he stopped moving. The officers rolled Gilbert over and checked for a pulse. Finding none, they performed chest compressions and rescue breathing. Gilbert was pronounced dead at the hospital. Gilbert’s parents sued the officers claiming they violated the Fourth Amendment by using excessive force. A federal district court ruled the officers were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time. The Eighth Circuit ruled in favor of the officers, holding they did not apply unconstitutionally excessive force. According to the Supreme Court the Eighth Circuit cited the correct factors in determining whether the use of force was reasonable. However, it was “unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers’ efforts to subdue him.” The Eighth Circuit also described as “insignificant” the fact that Gilbert was handcuffed and leg shackled when officers kept him in the prone position for 15 minutes. According to the Supreme Court these details matter because “St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation,” “well-known police guidance recommend[s] that officers get a subject off his stomach as soon as he is handcuffed because of that risk,” and that “guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers’ commands.” According to the Court: “Having either failed to analyze such evidence or characterized it as insignificant, the court’s opinion could be read to treat Gilbert’s ‘ongoing resistance’ as controlling as a matter of law. Such a *per se* rule would contravene the careful, context-specific analysis required by this Court’s excessive force precedent.”

### **First Amendment**

The U.S. Supreme Court held unanimously in [Fulton v. Philadelphia](#)\* that the City of Philadelphia violated the First Amendment when it refused to contract with Catholic Social Service (CSS) to certify foster care families because CSS refuses to work with same-sex couples. When the city discovered that CSS wouldn’t certify same-sex couples to become foster parents because of its religious beliefs the city refused to continue contracting with CSS. The city noted CSS violated the non-discrimination clause in its foster care contract. CSS sued the city claiming

its refusal to work with CSS violated the Free Exercise and Free Speech Clauses of the First Amendment. Chief Justice Roberts, writing for the Court, concluded that the city violated CSS's free exercise of religion rights. He noted that in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." But, the Court held, *Smith* didn't apply in this case because the city's non-discrimination clause allowed for exceptions, meaning it wasn't generally applicable. Because *Smith* didn't apply, the city's refusal to contract with CSS had to be evaluated under strict scrutiny. The city cited three interests in ensuring non-discrimination when certifying foster families: maximizing the number of foster parents, protecting the city from liability, and ensuring equal treatment of prospective foster parents and foster children. According to the Court: "Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices." As for equal treatment of prospective foster parents and foster children, Chief Justice Roberts wrote: "We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.' On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its nondiscrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."

### **Fifth Amendment Takings**

In *Cedar Point Nursery v. Hassid*\* the Supreme Court held 6-3 that a California regulation allowing union organizers access to agriculture employers' property to solicit support for unionization up to three hours a day, 120 days a year is a per se physical taking under the Fifth and Fourteenth Amendments. The Fifth Amendment Taking Clause, applicable to the states through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation." In this case agriculture employers argued California's union access regulation "effected an unconstitutional per se physical taking . . . by appropriating without compensation an easement for union organizers to enter their property." The Supreme Court agreed. According to Chief Justice Roberts, writing for the majority, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." But when the government "instead imposes regulations that restrict an owner's ability to use his own property" the restrictions don't require "just compensation" unless they go "too far." The Court held the access regulation "appropriates a right to invade the growers' property" and therefore constitutes a per se physical taking rather than a regulatory taking. "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." The Court noted that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." "Given the central importance to property ownership of the right

to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation.”

The U.S. Supreme Court filed a unanimous *per curiam* (unauthored) opinion overturning the Ninth Circuit decision in [Pakdel v. City of San Francisco](#). The lower court concluded the City of San Francisco didn’t make a “final” decision regarding plaintiffs’ takings case because plaintiffs failed to comply with the city’s administrative procedures, meaning plaintiffs couldn’t yet bring their takings case in federal court. According to the Supreme Court, this ruling contradicted its recent decision in *Knick v. Township of Scott* (2019). San Francisco agreed to allow plaintiffs to convert their tenancy-in-common to condominiums as long as they offered their renters a lifetime lease. A few months after agreeing to do so, plaintiffs asked the city to either excuse them from the lifetime lease or compensate them, and the city refused. They sued the city in federal court claiming the lifetime-lease requirement was an unconstitutional regulatory taking. In *Knick* the Supreme Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985) and held that exhausting administrative remedies is not a prerequisite to bringing a takings case in federal court. The Ninth Circuit noted that *Knick* didn’t disturb *Williamson County*’s alternative holding that plaintiffs may challenge only “final” government decisions in federal court. According to the Ninth Circuit, although the city had twice denied plaintiffs’ requests for an exemption, its decision “was not truly ‘final’ because [plaintiffs] had made a belated request for an exemption at the end of the administrative process instead of timely seeking one ‘through the prescribed procedures.’” “In other words, a conclusive decision is not really ‘final’ if the plaintiff did not give the agency the opportunity to exercise its ‘flexibility or discretion’ in reaching the decision.” The Supreme Court concluded the Ninth Circuit’s “view of finality is incorrect. The finality requirement is relatively modest.” Plaintiffs must merely show “there [is] no question . . . about how the ‘regulations at issue apply to the particular land in question.’” In this case the city was clear. Plaintiffs had to “execute the lifetime lease” or face an “enforcement action.”

### **Procedural**

In [Uzuegbunam v. Preczewski](#)\* the Supreme Court held 8-1 that to have a “redressable injury” required to bring a lawsuit, a plaintiff need only ask for nominal damages (\$1). Chike Uzuegbunam was threatened with disciplinary action for speaking about his religion in the “free speech expression areas” at Georgia Gwinnett College, a public college where he was enrolled. He and Joseph Bradford, another student, who decided not to speak about his religion because of what happened to Uzuegbunam, sued the college claiming its campus speech policies violated the First Amendment. They asked for nominal damages and an injunction requiring the college to change its speech policies. The college got rid of the challenged policies and argued the case was now moot. To establish standing, among other requirements, a plaintiff must ask for a remedy that is redressable, meaning likely to address his or her past injuries. In an opinion written by Justice Thomas the Court held that Uzuegbunam’s claim for nominal damages is intended to redress a past injury. According to the Court the prevailing rule, “well established” at common law, was “that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.” The Court stated a request for nominal

damages doesn't "guarantee[] entry to court" as it only addressed whether nominal damages satisfy the redressability element of standing. The Court also didn't decide whether Bradford could pursue a nominal damages claim, noting nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury."

In [\*B.P. v. Mayor and City Council of Baltimore\*](#)\* the U.S. Supreme Court ruled 7-1 that a federal court of appeals may review any grounds the district court considered for removing a case to federal court if one of the grounds was federal officer or civil rights removal. The mayor and City of Baltimore sued various energy companies in Maryland state court "for promoting fossil fuels while allegedly concealing their environmental impacts." Defendants may "remove" a case brought in state court to federal court if the federal court has jurisdiction over it. In federal district court, BP argued for federal court jurisdiction on numerous grounds, including the federal officer removal statute. As Justice Gorsuch explains, this statute "promises a federal forum for any action against" a private defendant acting at the "federal government's behest." The federal district court rejected all the grounds BP alleged supported removing the case to federal court. It remanded the case back to Maryland state court, and B.P. appealed. Federal appellate courts generally lack the power to review a district court order remanding a case to state court. However, 28 U.S.C. §1447(d) includes two exceptions: "an order remanding a case to the State court from which it was removed pursuant to [the federal officer removal statute or the civil-rights removal statute] shall be reviewable by appeal." The Fourth Circuit only reviewed the part of the district court's order discussing federal officer removal. The Supreme Court concluded that if a defendant relies on the federal officer removal statute (or the civil rights removal statute) when trying to remove a case to federal court, the appellate court "may review the merits of all theories for removal that a district court has rejected." The Court looked to the statute's use of the term "order." An "order" is a "written direction or command delivered by . . . a court or judge." The district court order in this case "rejected all of the defendants' grounds for removal," so "the statute allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces."

In an unauthored opinion in [\*Trump v. New York\*](#), the U.S. Supreme Court refused to decide whether President Trump could lawfully and constitutionally direct the Secretary of Commerce to provide information to him about the number of undocumented persons so he could exclude them from the census apportionment base. Federal law requires the Secretary of Commerce to "take a decennial census of population" and report to the President "[t]he tabulation of total population by States." The President then transmits to Congress a "statement showing the whole number of persons in each State." President Trump wanted to exclude undocumented persons from this census number which is used to apportion U.S. House of Representatives seats to the states. He asked the Secretary of Commerce to provide him the information he needed to do so. States and local governments and others sued the President claiming he violated federal statutes governing the census and the U.S. Constitution. The Court refused to decide this case describing it as "riddled with contingencies and speculation that impede judicial review." The Court noted that while the President "has made clear his desire to exclude aliens without lawful status from the apportionment base," he has qualified the directive to gather the necessary information with language including "to the extent practicable" and "to the extent feasible." According to the Court, "the record is silent on which (and how many) aliens have administrative records that

would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner.” Subsequent to this decision President Biden issued an executive order reversing President Trump’s policy of excluding undocumented persons from the census apportionment base.

In [\*City of San Antonio, Texas v. Hotels.com\*](#)\* the U.S. Supreme Court held unanimously that federal district courts may not alter a court of appeals’ allocation of appellate costs. The City of San Antonio won in federal district court a class action lawsuit against online travel companies (OTCs) after they collected hotel occupancy taxes on the wholesale rate rather than the retail rate consumers paid. The OTCs were ordered to pay \$55 million. To avoid paying the judgment while they appealed, the OTCs purchased a bond. On appeal, the Fifth Circuit ruled against San Antonio. Federal Rule of Appellate Procedure 39(a) states that unless the “court orders otherwise” the party losing on appeal pays appellate costs, including bond premium costs. When describing its judgment against San Antonio, the Fifth Circuit didn’t “depart[] from the default allocation” of costs. Before the district court, San Antonio argued the court had discretion to not require San Antonio to pay some or all of the appellate costs. The district court and the Fifth Circuit disagreed. Before the Supreme Court, San Antonio argued the appellate court may say “who can receive costs (party A, party B, or neither)” but lacks “authority to divide up costs,” instead the district court has this discretion. The OTCs argued that the appellate court has the discretion to divide up appellate costs “as it deems appropriate and that a district court cannot alter that allocation.” The Supreme Court, in an opinion written by Justice Alito, agreed with the OTCs, focusing on the “orde[r] otherwise” language in the federal rules. According to the Court: “This broad language does not limit the ways in which the court of appeals can depart from the default rules, and it certainly does not suggest that the court of appeals may not divide up costs.” Understanding that courts of appeals may allocate appellate costs, “it is easy to see why district courts cannot exercise a second layer of discretion. Suppose that a court of appeals, in a case in which the district court’s judgment is affirmed, awards the prevailing appellee 70% of its costs. If the district court, in an exercise of its own discretion, later reduced those costs by half, the appellee would receive only 35% of its costs—in direct violation of the court of appeals’ directions.”

In [\*Carney v. Adams\*](#)\* the Supreme Court held unanimously that James Adams lacked standing to challenge a Delaware constitutional provision requiring that appointments to Delaware’s major courts reflect a partisan balance. Delaware’s Constitution states that no more than a bare majority of members of any of its five major courts may belong to any one political party. It also requires, with respect to three of those courts, that the remaining members belong to “the other major political party.” So, as a practical matter, to be on three of Delaware’s courts a person must belong to one of the two major political parties. James Adams, a Delaware lawyer and political independent, sued Governor Carney claiming Delaware’s major party requirement is unconstitutional. The Court, in an opinion written by Justice Breyer, concluded Adams lacks standing to bring this lawsuit. To have standing a litigant must “prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.” For Adams to prove he was harmed he had to “at least show that he is likely to apply to become a judge in the reasonably foreseeable future if



Delaware did not bar him because of political affiliation.” According to Justice Breyer, “the record evidence fails to show that, at the time he commenced the lawsuit, Adams was ‘able and ready’ to apply for a judgeship in the reasonably foreseeable future.”

### **Miscellaneous**

In an 8-0 decision in [\*City of Chicago v. Fulton\*](#),\* the U.S. Supreme Court held that the City of Chicago didn’t violate the Bankruptcy Code’s automatic stay provision by holding onto a vehicle impounded after a bankruptcy petition was filed. The City of Chicago impounds vehicles where debtors have three or more unpaid fines. Robbin Fulton’s vehicle was impounded for this reason. She filed for bankruptcy and asked the City to return her vehicle; it refused. The Seventh Circuit held the City violated the Bankruptcy Code’s automatic stay provision. The Supreme Court unanimously reversed. When a bankruptcy petition is filed, an “estate” is created which includes most of the debtor’s property. An automatic consequence of the bankruptcy petition is a “stay” which prevents creditors from trying to collect outside of the bankruptcy forum. The automatic stay prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” The Bankruptcy Code also has a “turnover” provision which requires those in possession of property of the bankruptcy estate to “deliver to the trustee, and account for” that property. The Supreme Court held that “mere retention” of a debtor’s property after a bankruptcy petition is filed doesn’t violate the automatic stay. According to Justice Alito, “[t]aken together, the most natural reading of . . . ‘stay,’ ‘act,’ and ‘exercise control’—is that [the automatic stay provision] prohibits *affirmative acts* that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.” However, the Court conceded it did not “maintain that these terms definitively rule out” an alternative interpretation. According to the Court, “[a]ny ambiguity in the text of [the automatic stay provision] is resolved decidedly in the City’s favor” by the turnover provision. First, reading “any act . . . to exercise control” in the automatic stay provision “to include merely retaining possession of a debtor’s property would make that section a blanket turnover provision,” rendering the turnover provision “largely superfluous.” Second, the turnover provision includes exceptions that the automatic stay provision doesn’t include. “Under respondents’ reading, in cases where those exceptions to turnover . . . would apply, [the automatic stay provision] would command turnover all the same.”

In [\*PennEast Pipeline v. New Jersey\*](#)\* the U.S. Supreme Court held 5-4 that the federal government may constitutionally grant pipeline companies the authority to condemn necessary rights-of-way in which a state has an interest. Pipeline companies likewise may sue states to obtain the rights-of-way. Per the Natural Gas Act (NGA) natural gas companies, upon a showing of “public convenience and necessity,” may receive a certificate from the Federal Energy Regulatory Commission allowing them to use federal eminent domain power to obtain land to locate a pipeline. After receiving such a certificate, PennEast filed a complaint to condemn land in which New Jersey has an interest. New Jersey claimed sovereign immunity prevented PennEast from being able to sue the state in federal court. In an opinion written by Chief Justice Roberts the Supreme Court held that the NGA follows precedent allowing private parties to exercise federal eminent domain over state land and that sovereign immunity doesn’t bar the

lawsuit in this case. Regarding the NGA following precedent the Court cited to *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* (1941), holding that federal eminent domain applies to state land. Likewise, in *Cherokee Nation v. Southern Kansas Railroad Co.* (1890), the Court stated that a private party could exercise federal eminent domain over state land. Eleventh Amendment sovereign immunity prohibits states from being sued with some exceptions. According to the Court, “a State may be sued if it has agreed to suit in the ‘plan of the Convention,’ which is shorthand for ‘the structure of the original Constitution itself.’” The Court opined that the cases discussed above show the states “consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.”

In [\*United States v. Cooley\*](#) the U.S. Supreme Court held unanimously that an Indian tribe police officer may temporarily detain and search a non-Indian on a public right-of-way that runs through an Indian reservation, based on a suspected violation of state or federal law. A tribal officer approached a vehicle stopped on a public right-of-way within the Crow Reservation to offer assistance. The officer ordered Joshua James Cooley, who appeared to be a non-Indian, out of the car and conducted a pat down search after he noticed two semiautomatic rifles lying on the front seat. While waiting for backup to arrive, the officer saw in the vehicle a glass pipe and plastic bag that contained methamphetamine. A federal grand jury indicted Cooley on gun and drug violations. The Ninth Circuit suppressed the drug evidence holding the tribal officer had no authority to investigate “nonapparent” violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The tribal officer in this case didn’t ask Cooley whether he was non-Indian. The Supreme Court reversed the Ninth Circuit and held that tribal police officers may detain and search non-Indians traveling on public rights-of-way running through a reservation. Justice Breyer wrote the majority opinion. He noted that in *Montana v. United States* (1981), the Court articulated the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” But that general rule has two exceptions including “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” According to the Court, this exception “fits the present case, almost like a glove.” “To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.”

In a very brief, unauthored opinion the Supreme Court denied qualified immunity in [\*Taylor v. Riojas\*](#) to a number of correctional officers who confined Trent Taylor to a “pair of shockingly unsanitary cells” for six days. Trent Taylor claimed the first cell he was confined in was covered in feces “all over the floor, the ceiling, the window, the walls,” and even inside the water faucet. The second, frigidly cold cell, “was equipped with only a clogged drain in the floor to dispose of bodily wastes.” The Fifth Circuit held that Taylor’s confinement conditions violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The Fifth Circuit granted the officers qualified immunity because “[t]he law wasn’t clearly established” that “prisoners couldn’t be housed in cells teeming with human waste” “for only six days.” The Supreme Court reversed the Fifth Circuit’s grant of qualified immunity because “no reasonable correctional

officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.”

# Supreme Court term marked by unexpected alignments and incrementalism

By Shay Dvoretzky, Esq., and Emily Kennedy, Esq., Skadden

JULY 26, 2021

The Court's October 2020 Term opened with drama: Mourning Justice Ruth Bader Ginsburg, adjusting to a new colleague, bracing for the accompanying shift in the Court's long-time balance of power, and anticipating a contentious election — all in the pandemic-induced arena of telephonic arguments and conferences. But this Term's controversy and discord ended up being more subtle than the Term's beginnings foreboded.

The bulk of the Court's decisions were characterized by consensus and cautious incrementalism. The Court issued more unanimous decisions than last Term (26 vs. 18), including in several controversial cases. But it often forged agreement on narrower grounds than expected — likely reflecting the Court's distaste for being seen as another political actor in a highly polarized and volatile time. In *Fulton v. City of Philadelphia*, for example, the Court unanimously held that requiring a Catholic group to certify same-sex couples as foster parents violates the First Amendment but dodged more controversial and sweeping questions about the constitutional framework for religious exemptions.

And in *Ford Motor Company v. Montana Eighth Judicial District Court*, the Court unanimously held that plaintiffs could sue Ford in the state where their car accident occurred, even though Ford hadn't made or sold the allegedly defective vehicle there, but left open broader questions about the ramifications of internet transactions for assessing personal jurisdiction. Similarly, in *Mahanoy Area School District Board v. B.L.*, a highly anticipated First Amendment decision about a high school cheerleader's profanity-laced Snapchat rant, the Court ruled 8-1 for the cheerleader but did not ban schools from punishing all online student speech.

Even in divided cases, the Court often achieved agreement through narrow holdings and unexpected coalitions. Four conservative Justices joined Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan to uphold the Affordable Care Act in *California v. Texas* but did so on technical grounds. And in *Van Buren v. United States*, the three youngest conservative Justices teamed up with their more liberal colleagues to narrow the scope of a statute prohibiting unauthorized computer use.

In several cases, Chief Justice John Roberts and Justice Brett Kavanaugh voted with Justices Breyer, Sotomayor, and Kagan, leaving their other conservative colleagues to dissent on an array

of questions, from what counts as a Fourth Amendment seizure to procedural technicalities about judicial review of agency decisions.

Against this backdrop, Justice Amy Coney Barrett's arrival produced less of a tidal wave than many predicted. She voted with the majority 91% of the time and cast the fifth vote in only four 5-4 decisions. Although one Term is too early to make confident predictions, Justice Barrett's voting pattern so far suggests that she, like Chief Justice Roberts and Justice Kavanaugh, is more likely than the other conservatives to join her more liberal colleagues to forge narrow consensus.

To be sure, the Court decided a number of cases that were polarized along ideological lines — including upholding two Arizona voting-rights restrictions, invalidating the California Attorney General's policy requiring charities to disclose their major donors, expanding takings law to include a California regulation granting labor organizations access to employers' property, and rejecting further restrictions on sentencing juveniles to life without parole.

But the more surprising controversies this Term came through the subtler avenue of separate writings, several of which were uncharacteristically caustic. While the vote was unanimous in *Lange v. California*, a case limiting the authority of the police to enter a home in hot pursuit of a suspect, Chief Justice Roberts' separate concurrence (joined by Justice Samuel Alito) reads more like a dissent, denouncing the majority decision as "absurd and dangerous."

And in *Edwards v. Vannoy*, Justices Kavanaugh and Kagan openly sparred in their majority and dissenting opinions. *Edwards* held that the jury-unanimity rule announced in *Ramos v. Louisiana* (a case from just last Term) does not apply retroactively to habeas petitioners. Justice Kavanaugh accused Justice Kagan of hypocrisy for arguing that a decision she did not join applies retroactively, and Justice Kagan chastised Justice Kavanaugh for judicial "scorekeeping."

This Term also saw Chief Justice Roberts' first lone dissent in his 16 years on the Court. In *Uzuegbunam v. Preczewski*, the Chief Justice criticized the majority for "turning judges into advice columnists" by holding that a request for nominal damages can satisfy Article III standing.

The Term's separate writings also suggest growing fractures among the conservative Justices. While *Fulton's* holding in favor of a Catholic group was unanimous, Justice Alito drafted a 77-page concurrence (joined by Justices Clarence Thomas and Neil Gorsuch) condemning the Court for not going further. And in *Caniglia v. Strom*, the Court issued an unusually concise four-page opinion unanimously holding that the so-called "community caretaking" exception to the Fourth Amendment's warrant requirement does not extend to homes. But Chief Justice Roberts, Justice Alito, and Justice Kavanaugh collectively spilled nearly thrice the ink penning their own separate concurrences to explain the limits of the Court's decision.

In addition to muddying guidance for lower courts, all of this creates both challenges and opportunities for advocates before the Court. Advocates still need to present strong doctrinal arguments, which can sometimes lead to sweeping positions. At the same time, knowing that some Justices are thinking incrementally, advocates also need to be strategic about offering narrower approaches for deciding a case. That may include thinking about how to appeal to some of the Justices to vote against stereotype in a way that builds institutional legitimacy but does not undermine their long-term worldview. This past Term has shown us that there are often unexpected ways to count to five votes.

We may see this play out in high-profile cases next Term, in cases such as *Dobbs v. Jackson Women's Health Organization*. While the parties' arguments will put *Roe v. Wade* in the crosshairs, the Court could take a more incremental approach and uphold the Mississippi law without rejecting *Roe's* holding that the Constitution provides some protection to a woman's decision to have an abortion.

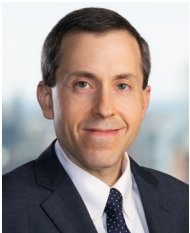
Incrementalism and unexpected alignments may play out in business cases, too. *City of Austin v. Reagan National Advertising of Texas* is about the validity of Austin's distinction between on-premise and off-premise digital signs, which the plaintiffs claim impermissibly discriminates between signs based on their content. The Court will not be writing on a blank slate: The cert grant in this case follows from confusion generated by multiple separate writings in the 2015 case, *Reed v. Town of Gilbert*.

While *Reed* was unanimous, three concurrences (representing the views of six Justices) expressed very different understandings of the Court's opinion and, in particular, what it means for a distinction to be "content-based." Several Justices likely will be concerned about respecting so recent an opinion, so the outcome of *Reagan* may hinge as much on first principles as on which side offers the least disruptive interpretation of *Reed*.

Other upcoming cases, like *American Hospital Association v. Becerra*, invite the Justices to make broad or narrow pronouncements about agency deference, which in turn may impact regulatory challenges by businesses.

If Justice Breyer retires, which now seems unlikely before next spring, the voting permutations will shift again and advocates will (again) face the challenge of learning to persuade a new Justice. One prediction seems safe, however: Replacing Justice Breyer would probably have the greatest impact on criminal justice cases, where Justice Breyer has been more pro-government than a nominee by President Biden is likely to be. Of course, if Congress decides to expand the Court, all bets are off.

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JURISPRUDENCE

# The One Area Where Supreme Court Jurisprudence Is Actually Improving Thanks to Originalism

BY DAVID H. GANS

JULY 22, 2021 11:17 PM

For decades, the Supreme Court has repeatedly deferred to the police when judging the validity of searches and seizures by the government. For that reason, it is no small feat that, in the recently concluded Supreme Court term, individuals challenging abuse of police authority won every one of the Fourth Amendment cases on the Supreme Court's merits docket. Surprisingly—but quietly and without much fanfare—progressives have racked up a number of important victories before a deeply conservative Supreme Court, succeeding in reversing a string of lower court rulings that had sided with the police.

This is an important development, one that observers have hardly raised in discussion of a Supreme Court term justifiably dominated by tragically [bad rulings on voting rights](#) and [other issues](#). Nevertheless, this story is all the more compelling because it may reflect a shared observance of originalist principles in Fourth Amendment adjudication that has led to progressive outcomes.

The hallmark of this past term's Fourth Amendment rulings is a form of originalism highly sensitive to the common law at the time of the drafting of the Fourth Amendment. As Justice Elena Kagan observed in [Lange v. California](#), one of the term's notable rulings, “the Framers’ view provides a baseline for our own day.” By carefully considering the scope of the common law at the Founding, this approach, [pioneered by Justice Antonin Scalia](#), seeks to ensure that individuals enjoy the protections for personal security and privacy that existed at the Founding, even as policing grows in ways the Founders could scarcely have imagined.

This is a significant and potentially far-reaching development. At the Founding, police did not exist and law enforcement of any kind was skeletal. Warrantless searches and seizures were few and far between. An approach that takes seriously the project of ensuring that individuals retain “[at a minimum the degree of protection](#)” the Fourth Amendment “[afforded when it was adopted](#)” can help to check police abuse of power, curb government surveillance, and shrink the vast footprint of modern policing.

That is what the Roberts Court has begun to do in small but significant ways.

In recent years, the Roberts Court has applied this approach to put constraints on the surveillance state, insisting on the need to keep “attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools.” In [Carpenter v. United States](#), the Roberts Court held that the government could not acquire cell phone records detailing

a person's movements for a criminal investigation without obtaining a search warrant supported by probable cause. The ruling recognized that new technologies cannot be employed to vitiate the right to be secure promised by the Fourth Amendment.

## ADVERTISEMENT

This past term, the Roberts Court applied this same approach in new contexts, once again taking steps to keep the law in line with the Fourth Amendment's text and history. Strikingly, justices—right, left, and center—applied an originalist approach to help reinvigorate the protections of the Fourth Amendment. This past term's cases suggest that the Fourth Amendment might be one area of law where “we are all originalists,” [as Justice Kagan put it in her confirmation hearing](#) more than a decade ago. That alone makes these Fourth Amendment developments quite important.

In [Torres v. Madrid](#), Chief Justice Roberts's majority opinion held that the police had seized Roxanne Torres by firing a gun at her, even though Torres temporarily eluded capture. Roberts drew on the fact that the common law recognized what he called a “mere-touch rule”: the use of force effectuated a seizure, however slight. It did not matter that common law courts at the Founding did not encounter shootings by law enforcement. The Fourth Amendment, Roberts stressed, “preserves personal security with respect to methods of apprehension old and new.”

In dissent, Justice Neil Gorsuch accused the majority of deciding the case based on “penumbras of “privacy” and “personal security,” but the chief justice insisted that “the *text* of the Fourth Amendment expressly guarantees the ‘right of the people to be *secure* in their *persons*’” and that a police shooting represents a particular flagrant deprivation of personal security. As Roberts put it, “there is nothing subtle about a bullet.” “We will not,” he insisted, “carve out this greater intrusion on personal security from the mere-touch rule just because founding-era courts did not confront apprehension by firearm.” When the police fire a gun to restrain a person, Roberts insisted, the Constitution's limits on police violence kick in.

In *Lange*, the Supreme Court invoked the common law's protection of the home as a castle—what Kagan called “the idea behind the Fourth Amendment”—to refuse to “print a new permission slip for entering the home without a warrant.” Seven justices signed Justice Kagan's majority opinion, which held that police officers may not in all cases pursue a fleeing person suspected of committing a misdemeanor, citing the common law history collected in a [brief](#) submitted by the Constitutional Accountability Center. Under the common law, Kagan stressed, officers had the authority to pursue a fleeing felon into a home, but no such exception applied to misdemeanors. Because the common law rule did not give police the same degree of authority when minor infractions were at issue, Justice Kagan concluded that, absent a showing of exigency, “when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.”

In [Caniglia v. Strom](#), another case about police invasion of the home, the Supreme Court unanimously held that the so-called “community caretaking exception” to the warrant rule—which originated in a Burger Court ruling in the automobile context—did not apply to the home. Refusing to create a sweeping warrant exception, Justice Clarence Thomas's opinion for the court made clear that the police officers do not possess “an open-ended license” to invade the

privacy of the home simply because they are performing “caretaking” functions in the interests of the community. The court [cabined prior precedent that had swelled police power](#), insisting that the privacy of the home lies at core of what the Fourth Amendment safeguards.

The court’s rulings in *Torres*, *Lange*, and *Caniglia* are significant, but they are also narrow and minimalist. Their holdings leave open important questions and admit exceptions, which could be important in the future. *Torres* held that the police shooting triggered Fourth Amendment scrutiny, but did not clarify the constitutional standard governing police violence or whether the officers were entitled to qualified immunity—issues to which the court has been avoiding giving extended consideration. *Lange* and *Caniglia* both made it harder for police to invade the home, but also suggested that, in some circumstances, police may intrude on the security of the home without a warrant in a genuine emergency.

But the trio of originalist rulings during this past term represent a shift from the dominant and deferential approach that has characterized Fourth Amendment doctrine in recent decades. In an angry separate opinion in *Lange*—labelled as a concurrence but closer in spirit to a dissent—Roberts called the majority’s reasoning “absurd and dangerous,” claiming that it would “override decades of guidance to law enforcement,” impose “risks to officer safety,” while “[a]ffording suspects the opportunity to evade arrest by winning the race.” In past decades, concerns such as these repeatedly led the court to expand police power across the board. Broad invocations of the need to defer to the police, this term’s cases suggest, no longer always carry the day. And this is a good thing.

How far the new Fourth Amendment originalism will go is very much up for grabs. But it will certainly be an area that deserves close attention.