

State & Local Legal Center



Supreme Court for Local Governments 2021-22

July 2022

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.

In [*New York State Rifle & Pistol Association v. Bruen*](#)* the U.S. Supreme Court held 6-3 that states and local governments may not require “proper cause” to obtain a license to carry a handgun outside the home. In New York to have “proper cause” to receive a conceal-carry handgun permit an applicant must “demonstrate a special need for self-protection distinguishable from that of the general community.” Justice Thomas, writing for the Court, articulated the standard the Court would apply to determine whether New York’s law violates the Second Amendment. “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” Both parties agreed that the Second Amendment guarantees a general right to public carry. As Justice Thomas pointed out “[n]othing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms.” So, the burden fell to New York to show that its proper-cause requirement is “consistent with this Nation’s historical tradition of firearm regulation.” The Court looked at gun regulation from the following time periods: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries. It concluded there is no historical tradition justifying a “proper cause” requirement. “Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late 19th-century jurisdictions, the

historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”

First Amendment cases

In *Kennedy v. Bremerton School District** the U.S. Supreme Court held 6-3 that the First Amendment protects an assistant football coach who “knelt at midfield after games to offer a quiet prayer of thanks.” The Supreme Court also overruled *Lemon v. Kurtzman* (1971). The majority and the dissent disagree about the facts of this case. Both sides agree assistant football coach Joseph Kennedy had a long history of praying alone and with students at midfield after football games and praying with students in the locker room pregame and postgame. When directed to, Kennedy stopped the latter practice. But he told the district he felt “compelled” to continue offering a “post-game personal prayer” midfield. The district placed Kennedy on leave for praying on the field after three particular games. Justice Gorsuch, writing for the Court, concluded Kennedy was able to make the initial showing that the school district violated his free exercise of religion and free speech rights by not allowing him pray on the field after games. Regarding Kennedy’s Free Exercise Clause claim, the Court concluded the school district burdened his sincere religious practice pursuant to a policy that is neither “neutral” nor “generally applicable.” The district’s actions weren’t neutral because “[b]y its own admission, the District sought to restrict Mr. Kennedy’s actions at least in part because of their religious character.” The district’s actions weren’t “generally applicable” either the Court concluded. While the district stated it refused to rehire Kennedy because he “failed to supervise student-athletes after games,” the district “permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls.” Regarding Kennedy’s Free Speech Clause claim, the Court first had to decide whether Kennedy was speaking as a government employee (who isn’t protected by the First Amendment) or as a citizen (who receives some First Amendment protection). The Court determined Kennedy was acting as a citizen. “When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.” While the Court would have normally shifted the burden to the school district to defend its actions under the Free Exercise and Free Speech Clauses, the Court didn’t in this case noting that under whatever test it applied the school district would lose. The district explained it suspended Kennedy because of Establishment Clause concerns namely that a “reasonable observer” would conclude the district was endorsing religion by allowing him to pray on the field after games. In response the Court overturned the so-called *Lemon* test. *Lemon* “called for an examination of a law’s purposes, effects, and potential for entanglement with religion. In time, the approach also

came to involve estimations about whether a ‘reasonable observer’ would consider the government’s challenged action an ‘endorsement’ of religion.” In its place the Court stated it has adopted a view of the Establishment Clause that “accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers.” The Court also found insufficient evidence students were coerced to pray.

In [*City of Austin, Texas v. Reagan National Advertising*](#)* the U.S. Supreme Court held 6-3 that strict (fatal) scrutiny doesn’t apply to Austin allowing on-premises but not off-premises signs to be digitized. Austin’s sign code prohibits any new off-premises signs but has grandfathered such existing signs. On-premises signs, but not off-premises signs, may be digitized. Reagan National Advertising argued that this distinction violates the First Amendment’s Free Speech Clause. Per *Reed v. Town of Gilbert* (2015), a regulation of speech is content based, meaning strict scrutiny applies, if the regulation “applies to particular speech because of the topic discussed or the idea or message expressed.” According to the Fifth Circuit because the City’s on-/off premises distinction required a reader to determine “who is the speaker and what is the speaker saying,” the distinction was content based. According to the Court the lower court’s interpretation of *Reed* was “too extreme.” In *Reed*, the Town of Gilbert’s sign code “applied distinct size, placement, and time restrictions to 23 different categories of signs.” For example, ideological signs were treated better than political signs and temporary directional signs were most restricted. The Court reasoned these categories were content based because Gilbert “single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter.” Justice Sotomayor, writing for the Court, opined: “Unlike the sign code at issue in *Reed* . . . the City’s provisions at issue here do not single out any topic or subject matter for differential treatment. A sign’s substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and non-profit organizations. Rather, the City’s provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign’s relative location.”

In [*Shurtleff v. City of Boston*](#)* the U.S. Supreme Court held unanimously that Boston’s refusal to fly a Christian flag on a flagpole outside city hall violated the First Amendment. On the plaza, near Boston City Hall entrance, stands three 83-foot flagpoles. Boston flies the American flag on one (along with a banner honoring prisoners of war and soldiers missing in action) and the Commonwealth of Massachusetts flag on the other. On the third it usually flies Boston’s flag. Since 2005 Boston has allowed third parties to fly flags during events held in the plaza. Most flags are of other countries, marking the national holidays of Bostonians’ many countries of origin. Third-party flags have also been flown for Pride Week, emergency medical service workers, and a community bank. When Camp Constitution asked to fly a Christian flag Boston refused, for the first time ever, citing Establishment Clause concerns. The flag has a red cross on

a blue field against a white background. Camp Constitution sued arguing that Boston opens its flagpole for citizens to express their views in which case it can't refuse to fly Camp Constitution's flag based on its (religious) viewpoint. Boston argued it "reserved the pole to fly flags that communicate governmental messages" and was "free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause." The Supreme Court held that Boston's flag-raising program doesn't constitute government speech, meaning the First Amendment applies and it couldn't reject Camp Constitution's flag based on its viewpoint. Justice Breyer, writing for the majority, noted that "[t]he boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program." Conducting a "holistic inquiry" which considered "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression," he didn't find government speech. According to the Court the "general history" of flying flags "particularly at the seat of government" favors Boston. But "even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here" where "Boston allowed its flag to be lowered and other flags to be raised with some regularity." While neither of these two factors resolved the case, Boston's record of not "actively control[ling] these flag raisings and shap[ing] the messages the flags sent" was "the most salient feature of this case." Boston had "no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate."

In a unanimous opinion in [*Houston Community College v. Wilson*](#), the U.S. Supreme Court held that when a government board censures a member it doesn't violate the First Amendment. As Justice Gorsuch describes in his opinion David Wilson's tenure on the Houston Community College board was "stormy." He accused the board of violating its bylaws and ethics rules in the media, he hired a private investigator to determine whether another board member lived in the district which elected her, and he repeatedly sued the board. The board censured him stating his conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible." The Supreme Court held that Wilson has no actionable First Amendment free speech claim arising from the Board's purely verbal censure. The Court began its analysis by noting that "elected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment." The Court also reasoned that Wilson could only have a First Amendment claim if he had been subject to an adverse action. The Court concluded a censure of a board member by a board isn't an adverse action. First, "[i]n this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes." Second, Wilson can't use the First Amendment "as a weapon to silence" his board colleagues who want to "speak freely on questions of government policy," just as he does.

In [Carson v. Makin](#) the U.S. Supreme Court held 6-3 that Maine’s refusal to provide tuition assistance payments to “sectarian” schools violates the First Amendment’s Free Exercise Clause. Maine’s constitution and statutes require that students receive a free public education. Fewer than half of Maine’s school administrative units (SAUs) operate their own public secondary schools. If those SAUs don’t contract with a particular public or private school, they must “pay the tuition . . . at the public school or the approved private school of the parent’s choice.” To be approved a private school must be “nonsectarian.” Two sets of Maine parents argued that the religious schools where they send or want to send their children can’t be disqualified from receiving state tuition payments because they are religious. In an opinion written by Chief Justice Roberts the U.S. Supreme Court agreed. The Court began its analysis by noting that “we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” The Court then concluded that the “unremarkable” principles applied in two recent U.S. Supreme Court cases “suffice to resolve this case.” In *Trinity Lutheran Church of Columbia v. Comer* (2017) the lower court held Trinity Lutheran Church’s preschool wasn’t allowed to receive a state playground resurfacing grant because it was operated by a church. The Supreme Court reversed holding the Free Exercise Clause did not permit Missouri to “expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” In *Espinoza v. Montana Department of Revenue* (2020) the Montana Supreme Court held that to the extent a Montana program providing tax credits to donors who sponsored private school tuition scholarships included religious schools, it violated a provision of the Montana Constitution which barred government aid to religious schools. The U.S. Supreme Court reversed stating: “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” The U.S. Supreme Court opined that the facts of this case are very similar to those in *Trinity Lutheran* and *Espinoza*: “Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, [the religious schools at issue in this case] are disqualified from this generally available benefit “solely because of their religious character.” The U.S. Supreme Court concluded Maine’s exclusion of religious schools doesn’t comply with strict scrutiny because “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.”

Police cases

In [Vega v. Tekoh](#)* the U.S. Supreme Court held 6-3 that police officers can’t be sued for money damages for failing to recite *Miranda* rights. The State and Local Legal Center (SLLC) filed an [amicus brief](#) in this case arguing for this result. Terrance Tekoh was tried for unlawful sexual penetration. The parties disagree about whether Deputy Carlos Vega used “coercive investigatory techniques” to obtain a confession from Tekoh, but they agree Deputy Vega didn’t

inform Tekoh of his *Miranda* rights. His confession was admitted into evidence and Tekoh was acquitted. Tekoh sued Deputy Vega under 42 U.S.C. Section 1983 claiming Vega violated his Fifth Amendment right against self-incrimination by not advising him of his *Miranda* rights. In an opinion written by Justice Alito the Court held failing to recite *Miranda* doesn't provide a basis for a claim under §1983 because the failure isn't a violation of the Fifth Amendment. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Per Supreme Court precedent it "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant" and "also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" According to the Court, "[i]n *Miranda*, the Court concluded that additional procedural protections were necessary to prevent the violation of this important right when suspects who are in custody are interrogated by the police." So, *Miranda* imposed a set of prophylactic rules. "At no point in the opinion did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation." The Court rejected Tekoh's argument that *Dickerson v. United States* (2000) "upset the firmly established prior understanding of *Miranda* as a prophylactic decision." In *Dickerson* the Court held that Congress couldn't abrogate *Miranda* by statute because *Miranda* was a "constitutional decision" that adopted a "constitutional rule." Despite the Court using the term "constitutional decision" and "constitutional rule," "the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation."

In a 6-3 decision in *Thompson v. Clark** the U.S. Supreme Court held that to demonstrate a favorable termination of a criminal prosecution in order to bring a Fourth Amendment malicious prosecution case a plaintiff need only show that his or her prosecution ended without a conviction. Larry Thompson's sister-in-law, who lived with him and suffers from mental illness, reported to 911 that he was sexually abusing his one-week-old daughter. Thompson refused to let police in his apartment without a warrant. After a "brief scuffle" police arrested Thompson and charged him with obstructing governmental administration and resisting arrest. Medical professionals at the hospital determined Thompson's daughter had diaper rash and found no signs of abuse. Before trial the prosecutor moved to dismiss the charges and the trial judge agreed to do so without explaining why. Thompson then sued the officers who arrested him for malicious prosecution under the Fourth Amendment. Per Second Circuit precedent a malicious prosecution case can only be brought if the prosecution ends not merely without a conviction but with some affirmative indication of innocence. In an opinion written by Justice Kavanaugh the Supreme Court disagreed with the Second Circuit and held that a Fourth Amendment malicious prosecution case may be brought as long as there is no conviction. Thompson brought his Fourth Amendment malicious prosecution case under 42 U.S.C. §1983, which was adopted in 1871. One of the elements of a malicious prosecution claim is "favorable termination" of the underlying criminal prosecution. The other elements include whether the prosecution was

“instituted without any probable cause” and was motivated by “malice.” According to the Court, to determine what favorable termination entails, the Court had to determine what courts required in 1871. The parties “identified only one court that required something more, such as an acquittal or a dismissal accompanied by some affirmative indication of innocence.” So, the Supreme Court reasoned, no conviction is enough for a prosecution to be favorably terminated.

In [*Rivas-Villegas v. Cortesluna*](#) the Court reversed the Ninth Circuit’s denial of qualified immunity to Officer Rivas-Villegas. A girl told 911 she, her sister, and her mother had shut themselves into a room because their mother’s boyfriend, Ramon Cortesluna, was trying to hurt them and had a chainsaw. Officers ordered Cortesluna to leave the house. They noticed he had a knife sticking out from the front left pocket of his pants. Officers told Cortesluna to put his hands up. When he put his hands down, they shot him twice with a beanbag shotgun. Cortesluna then raised his hands and got down as instructed. Officer Rivas-Villegas placed his left knee on the left side of Cortesluna’s back, near where Cortesluna had the knife in his pocket, and raised both of Cortesluna’s arms up behind his back. Another officer removed the knife and handcuffed Cortesluna. Rivas-Villegas had his knee on Cortesluna’s back for no more than eight seconds. The Ninth Circuit concluded that circuit precedent, *LaLonde v. County of Riverside*, indicated that leaning with a knee on a suspect who is lying face-down on the ground and isn’t resisting is excessive force. The Supreme Court disagreed that *LaLonde* clearly established that Officer Rivas-Villegas couldn’t briefly place his knee on the left side of Cortesluna’s back. The Supreme Court reasoned *LaLonde* is “materially distinguishable and thus does not govern the facts of this case.” “In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, *LaLonde* was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. *LaLonde*, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.”

In [*City of Tahlequah v. Bond*](#), the Supreme Court held that two officers who shot Dominic Rollice after he raised a hammer “higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers” were entitled to qualified immunity. Dominic Rollice’s ex-wife told 911 that Rollice was in her garage, intoxicated, and would not leave. While the officers were talking to Rollice he grabbed a hammer and faced them. He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers yelled to him to drop it. Instead, he came out from behind a piece of furniture so that he had an unobstructed path to one of the officers. He then raised the hammer higher back behind his head and took a stance as if he was about to throw it or charge at the officers. Two officers fired their weapons and killed him. The Tenth Circuit concluded that a few circuit court cases—*Allen v. Muskogee* in particular—clearly established

that the officers' use of force was excessive. The Supreme Court disagreed. "[T]he facts of *Allen* are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer."

Miscellaneous

In [*West Virginia v. EPA*](#) the U.S. Supreme Court held 6-3 that the Environmental Protection Agency (EPA) lacked the statutory authority to issue the Clean Power Plan (CPP). Per the Clean Air Act, for new and existing powerplants EPA may come up with air-pollution standards which reflect "the best system of emission reduction" (BSER). Before the CPP when EPA regulated under this provision of the Clean Air Act it required existing powerplants to make technological changes—like adding a scrubber—to reduce pollution. In the 2015 EPA released the Clean Power Plan which determined that the BSER to reduce carbon emissions from existing powerplants was "generation-shifting." This entailed shifting electricity production from coal-fired power plants to natural-gas-fired plants and wind and solar energy. The Court, in an opinion written by Chief Justice Roberts, held that generation shifting exceeds EPA's authority under the Clean Air Act because Congress didn't give EPA "clear congressional authorization" to regulate in this matter. "As a matter of 'definitional possibilities,' generation shifting can be described as a 'system'—'an aggregation or assemblage of objects united by some form of regular interaction' capable of reducing emissions. But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents." EPA had to show it had "clear congressional authorization" to adopt the CPP because the Court applied the major questions doctrine. This doctrine applies, according to the Court, in "extraordinary cases"—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. The Court opined this is a major questions doctrine case because "[i]n arguing that [the relevant provision of the Clean Air Act] empowers it to substantially restructure the American energy market, EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.' It located that newfound power in the vague language of an 'ancillary provision[]' of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."

In *Cummings v. Premier Rehab Keller** the U.S. Supreme Court held 6-3 that emotional distress damages aren't available if funding recipients violate four federal statutes adopted using Congress's Spending Clause authority. The relevant statutes include Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, the Section 1557 of the Affordable Care Act, and Title IX of the Education Amendments Act of 1972. Depending upon the statute, they prohibit funding recipients from discriminating on the basis of race, color, national origin, sex, disability, or age. Jane Cummings is deaf and legally blind. She sought physical therapy from Premier Rehab Keller and requested it provide an American Sign Language interpreter at her appointments. Premier Rehab Keller declined to do so. She sued claiming disability discrimination in violation of the Rehabilitation Act and the Affordable Care Act. Among other remedies she sought emotional distress damages. None of the four statutes relevant to this case expressly provides victims of discrimination a private right of action to sue the funding recipient for money damage so they don't list available damages. In *Cannon v. University of Chicago* (1979) the Supreme Court found an implied right of action in Title VI and Title IX, which the Supreme Court later concluded Congress ratified. The Rehabilitation Act and the Affordable Care Act expressly incorporate the rights and remedies available under Title VI. In an opinion written by Chief Justice Roberts, emotional distress damages aren't available under these statutes because a funding recipient wouldn't have had clear notice it might face such liability. According to the Chief Justice, the Supreme Court has applied a "contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages" in Spending Clause cases. Spending Clause legislation operates based on consent: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." A particular remedy is available in a private Spending Clause action "only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." In *Barnes v. Gorman* (2002) the Supreme Court held that punitive damages are unavailable in private actions brought under the statutes at issue in this case because such damages aren't "usual" contract remedies. Similarly, according to the Court, it is "hornbook law that 'emotional distress is generally not compensable in contract.'"

In *Oklahoma v. Castro-Huerta* the U.S. Supreme Court held 5-4 that states (along with the federal government) may prosecute crimes committed by non-Indians against Indians in Indian country. Victor Manuel Castro-Huerta is a non-Indian who lived in Tulsa, Oklahoma. He was sentenced to 35 years imprisonment after Oklahoma convicted him for child neglect of his stepdaughter who is a Cherokee Indian. A federal grand jury indicted Castro-Huerta for the same conduct. He accepted a plea agreement for a 7-year sentence and removal from the United States. Following the Supreme Court's decision in *McGirt v. Oklahoma* (2020), that Congress never properly disestablished the Creek Nation's reservation in eastern Oklahoma, Tulsa is now recognized as Indian country. Castro-Huerta argued the federal government has exclusive jurisdiction to prosecute crimes committed by a non-Indian against an Indian in Indian country and that therefore Oklahoma lacked jurisdiction to prosecute him. In an opinion written by Justice Kavanaugh the Court disagreed. The Court began its analysis by noting "the Court's

precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country." The Court applied a two-part test to determine whether a state's jurisdiction in Indian country may be preempted in this case "(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." The Court concluded it could not. Castro-Huerta argued that the General Crimes Act and Public Law 280 preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country. The General Crimes Act states: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country." According to the Court, "[b]y its terms, the Act does not preempt the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country. The text of the Act simply 'extend[s]' federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country." Castro-Huerta also argued that Public Law 280, which grants certain states broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country, is a source of preemption. The Court responded: "Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country." The Supreme Court has held that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if "the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." Per *White Mountain Apache Tribe v. Bracker* (1980) the Court considers tribal interests, federal interests, and state interests. First, the Court opined that the exercise of state jurisdiction here would not infringe on tribal self-government because tribes generally can't prosecute crimes committed by non-Indians even when non-Indians commit crimes against Indians in Indian country. Second, a state prosecution of a non-Indian won't harm the federal interest in protecting Indian victims because state prosecution would supplement not supplant federal authority. Third, states have "a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims."

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The U.S. Supreme Court's 2021-22 docket, which included abortion and guns, was historic. These most significant cases of the term impact local governments but will likely have a greater impact on states and ordinary Americans. This article summarizes four local government cases all of which will impact the day-to-day operations of local governments. All, remarkably, involve the First Amendment.

In [*Kennedy v. Bremerton School District*](#)* the U.S. Supreme Court held 6-3 that the First Amendment protects an assistant football coach who “knelt at midfield after games to offer a quiet prayer of thanks.” The Supreme Court also overruled *Lemon v. Kurtzman* (1971).

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According to the Fifth Circuit because the City’s on-/off premises distinction required a reader to determine “who is the speaker and what is the speaker saying,” the distinction was content based. According to the U.S. Supreme Court the lower court’s interpretation of *Reed* was “too extreme.”

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Camp Constitution sued arguing that Boston opens its flagpole for citizens to express their views in which case it can't refuse to fly Camp Constitution's flag based on its (religious) viewpoint. Boston argued it "reserved the pole to fly flags that communicate governmental messages" and was "free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause."

The Supreme Court held that Boston's flag-raising program doesn't constitute government speech, meaning the First Amendment applies and it couldn't reject Camp Constitution's flag based on its viewpoint.

Justice Breyer, writing for the majority, conducting a "holistic inquiry" which considered "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."

According to the Court the “general history” of flying flags “particularly at the seat of government” favors Boston. But “even if the public would ordinarily associate a flag’s message with Boston, that is not necessarily true for the flags at issue here” where “Boston allowed its flag to be lowered and other flags to be raised with some regularity.”

While neither of these two factors resolved the case, Boston’s record of not “actively control[ing] these flag raisings and shap[ing] the messages the flags sent” was “the most salient feature of this case.” Boston had “no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate.”

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The board censured him stating his conduct was “not consistent with the best interests of the College” and “not only inappropriate, but reprehensible.”

The Court held that Wilson has no actionable First Amendment free speech claim arising from the Board’s purely verbal censure. It noted that “elected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson’s has ever been widely considered offensive to the First Amendment.”

Conclusion

The most significant doctrinal change from any of these cases is the overruling of *Lemon*. Every time a local government faces an issue involving Establishment

Clause concerns it now has to apply the Court's new historical test. The Court has offered little guidance as to how this test is to be applied and no guidance as to the status of all the precedent which relied in whole or in part on *Lemon*.

State & Local Legal Center



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Supreme Court for the States 2021-22

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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: abortion and guns

In a 6-3 decision in [*Dobbs v. Jackson Women's Health Organization*](#) the U.S Supreme Court held there is no right to an abortion under the U.S. Constitution. Justice Alito wrote the decision for Court which overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). These decisions allowed women to obtain an abortion until “viability” (about 22-23 weeks). According to the Court: “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” The Court opined the right to an abortion isn’t deeply rooted in our nation’s history and tradition or implicit in the right to liberty. “Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of ‘liberty.’ *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being.’” The Court rejected adhering to *Roe* and *Casey* because they are precedent. Justice Alito wrote: “*Roe* was

egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”

Texas’s S.B. 8 prohibits abortion after approximately six weeks in contradiction with *Roe v. Wade* (1973). The question in [*Whole Woman’s Health v. Jackson*](#) was whether abortion providers can sue any state government officials in federal court before the law went into effect. S.B. 8 is generally enforced by private parties and not state government officials. All the Supreme Court Justices except Thomas agree that abortion providers may sue executive licensing officials because they have some enforcement authority under S.B. 8. Justice Gorsuch began the Court’s analysis by pointing out that states are generally immune from lawsuits per the Eleventh Amendment and sovereign immunity. However, in *Ex parte Young* (1908), the Court created an exception to sovereign immunity holding that private parties could sue state officials to prevent them from enforcing state laws that violate federal law. The abortion clinics argued that per *Ex parte Young* they should be able to sue state-court judges or clerks, the Attorney General, and licensing officials. The majority of the Court disagreed regarding state-court judges or clerks and the Attorney General. Regarding state-court judges or clerks, the majority reasoned, *Ex parte Young*’s “exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties.” Regarding the Attorney General, according to the majority, the abortion clinics failed to “direct this Court to any enforcement authority the attorney general possesses in connection with S.B. 8 that a federal court might enjoin him from exercising.” The Court allowed a pre-enforcement challenge in federal court to go forward against executive licensing officials because they “may or must take enforcement actions” against abortion clinics if they violate S.B. 8.

In [*New York State Rifle & Pistol Association v. Bruen*](#)* the U.S. Supreme Court held 6-3 that states and local governments may not require “proper cause” to obtain a license to carry a handgun outside the home. In New York to have “proper cause” to receive a conceal-carry handgun permit an applicant must “demonstrate a special need for self-protection distinguishable from that of the general community.” Justice Thomas, writing for the Court, articulated the standard the Court would apply to determine whether New York’s law violates the Second Amendment. “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” Both parties agreed that the Second Amendment guarantees a general right to public carry. As Justice Thomas pointed out “[n]othing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms.” So, the burden fell to New York to show that its proper-cause requirement is “consistent with this Nation’s historical tradition of firearm regulation.” The Court looked at gun

regulation from the following time periods: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries. It concluded there is no historical tradition justifying a “proper cause” requirement. “Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late 19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”

First Amendment cases

In [*Carson v. Makin*](#) the U.S. Supreme Court held 6-3 that Maine’s refusal to provide tuition assistance payments to “sectarian” schools violates the First Amendment’s Free Exercise Clause. Maine’s constitution and statutes require that students receive a free public education. Fewer than half of Maine’s school administrative units (SAUs) operate their own public secondary schools. If those SAUs don’t contract with a particular public or private school, they must “pay the tuition . . . at the public school or the approved private school of the parent’s choice.” To be approved a private school must be “nonsectarian.” Two sets of Maine parents argued that the religious schools where they send or want to send their children can’t be disqualified from receiving state tuition payments because they are religious. In an opinion written by Chief Justice Roberts the U.S. Supreme Court agreed. The Court began its analysis by noting that “we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” The Court then concluded that the “unremarkable” principles applied in two recent U.S. Supreme Court cases “suffice to resolve this case.” In *Trinity Lutheran Church of Columbia v. Comer* (2017) the lower court held Trinity Lutheran Church’s preschool wasn’t allowed to receive a state playground resurfacing grant because it was operated by a church. The Supreme Court reversed holding the Free Exercise Clause did not permit Missouri to “expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” In *Espinoza v. Montana Department of Revenue* (2020) the Montana Supreme Court held that to the extent a Montana program providing tax credits to donors who sponsored private school tuition scholarships included religious schools, it violated a provision of the Montana Constitution which barred government aid to religious schools. The U.S. Supreme Court reversed stating: “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” The U.S. Supreme Court opined that the facts of this case are very similar to those in *Trinity Lutheran* and *Espinoza*: “Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance

payments here. And like the daycare center in *Trinity Lutheran*, [the religious schools at issue in this case] are disqualified from this generally available benefit “solely because of their religious character.” The U.S. Supreme Court concluded Maine’s exclusion of religious schools doesn’t comply with strict scrutiny because “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.”

In *Kennedy v. Bremerton School District** the U.S. Supreme Court held 6-3 that the First Amendment protects an assistant football coach who “knelt at midfield after games to offer a quiet prayer of thanks.” The Supreme Court also overruled *Lemon v. Kurtzman* (1971). The majority and the dissent disagree about the facts of this case. Both sides agree assistant football coach Joseph Kennedy had a long history of praying alone and with students at midfield after football games and praying with students in the locker room pregame and postgame. When directed to, Kennedy stopped the latter practice. But he told the district he felt “compelled” to continue offering a “post-game personal prayer” midfield. The district placed Kennedy on leave for praying on the field after three particular games. Justice Gorsuch, writing for the Court, concluded Kennedy was able to make the initial showing that the school district violated his free exercise of religion and free speech rights by not allowing him pray on the field after games. Regarding Kennedy’s Free Exercise Clause claim, the Court concluded the school district burdened his sincere religious practice pursuant to a policy that is neither “neutral” nor “generally applicable.” The district’s actions weren’t neutral because “[b]y its own admission, the District sought to restrict Mr. Kennedy’s actions at least in part because of their religious character.” The district’s actions weren’t “generally applicable” either the Court concluded. While the district stated it refused to rehire Kennedy because he “failed to supervise student-athletes after games,” the district “permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls.” Regarding Kennedy’s Free Speech Clause claim, the Court first had to decide whether Kennedy was speaking as a government employee (who isn’t protected by the First Amendment) or as a citizen (who receives some First Amendment protection). The Court determined Kennedy was acting as a citizen. “When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.” While the Court would have normally shifted the burden to the school district to defend its actions under the Free Exercise and Free Speech Clauses, the Court didn’t in this case noting that under whatever test it applied the school district would lose. The district explained it suspended Kennedy because of Establishment Clause concerns namely that a “reasonable observer” would conclude the district was endorsing religion by allowing him to pray on the field after games. In response the Court overturned the so-called *Lemon* test. *Lemon* “called for an examination of a law’s purposes, effects, and potential for entanglement with religion. In time, the approach also

came to involve estimations about whether a ‘reasonable observer’ would consider the government’s challenged action an ‘endorsement’ of religion.” In its place the Court stated it has adopted a view of the Establishment Clause that “accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers.” The Court also found insufficient evidence students were coerced to pray.

In [*City of Austin, Texas v. Reagan National Advertising*](#)* the U.S. Supreme Court held 6-3 that strict (fatal) scrutiny doesn’t apply to Austin allowing on-premises but not off-premises signs to be digitized. Austin’s sign code prohibits any new off-premises signs but has grandfathered such existing signs. On-premises signs, but not off-premises signs, may be digitized. Reagan National Advertising argued that this distinction violates the First Amendment’s Free Speech Clause. Per *Reed v. Town of Gilbert* (2015), a regulation of speech is content based, meaning strict scrutiny applies, if the regulation “applies to particular speech because of the topic discussed or the idea or message expressed.” According to the Fifth Circuit because the City’s on-/off premises distinction required a reader to determine “who is the speaker and what is the speaker saying,” the distinction was content based. According to the Court the lower court’s interpretation of *Reed* was “too extreme.” In *Reed*, the Town of Gilbert’s sign code “applied distinct size, placement, and time restrictions to 23 different categories of signs.” For example, ideological signs were treated better than political signs and temporary directional signs were most restricted. The Court reasoned these categories were content based because Gilbert “single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter.” Justice Sotomayor, writing for the Court, opined: “Unlike the sign code at issue in *Reed* . . . the City’s provisions at issue here do not single out any topic or subject matter for differential treatment. A sign’s substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and non-profit organizations. Rather, the City’s provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign’s relative location.”

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Medicare/Medicaid cases

States participating in Medicaid must require Medicaid beneficiaries to assign the state “any rights . . . to payment for medical care from any third party.” In [*Gallardo v. Marstiller*](#)* the U.S. Supreme Court held 7-2 that states may collect from third party tortfeasors settlements allocated for the cost of future (not only past) medical care. Gianinna Gallardo has been in a persistent vegetative state since she was hit by a pickup truck getting off the school bus. Florida’s Medicaid agency has paid over \$800,000 for her initial medical expenses. Gallardo’s parents settled a case against multiple parties for \$800,000. A little over \$35,000 of the settlement was designated as compensation for past medical expenses. The parties agreed an unspecified amount may represent compensation for future medical expenses. Florida law allows the state to recover half of a Medicaid beneficiary’s total settlement, after deducting 25% for attorney’s fee and costs. It presumes, though the presumption may be rebutted, that this amount represents the portion of the recovery for “past and *future* medical expenses.” While Medicaid beneficiaries must allow the state to collect payments from tortfeasors for medical care costs, Medicaid’s “anti-lien provision” prohibits states from recovering medical payments from a beneficiary’s “property.” Gallardo argued that Florida may only collect \$35,000 from the settlement because Medicaid’s anti-lien provision preempts Florida’s law to the extent it allows Florida to recover future medical expenses. The Court, in an opinion written by Justice Thomas, disagreed. According to Justice Thomas the “plain text” of the Medicaid Act indicates Florida may seek reimbursement from settlement amounts representing past or future medical care payments. Per the Medicaid Act, states must acquire from each Medicaid beneficiary an assignment of “any rights . . . of the individual . . . to support . . . for the purpose of medical care . . . and to payment for medical care from any third party.” Interpreting this language, the Court opined: “Nothing in this provision purports to limit a beneficiary’s assignment to ‘payment for’ *past* ‘medical care’ already paid for by Medicaid. To the contrary, the grant of ‘any rights . . . to payment for medical care’ most naturally covers not only rights to payment for past medical expenses, but also rights to payment for future medical expenses. The relevant distinction is thus ‘between medical and nonmedical expenses,’ not between past expenses Medicaid has paid and future expenses it has not.”

In [*Becerra v. Empire Health Foundation*](#) the U.S. Supreme Court held 5-4 that patients whom Medicare insures but does not pay for on a given day are counted in the Medicare fraction for purposes of computing a hospital’s disproportionate-patient percentage. Disproportionate-share hospitals (DSH) which serve an “unusually high percentage of low-income patients” and receive greater Medicare payments. According to the Court the regulation which it agrees “correctly construes the statutory language at issue” will for most hospitals, decrease DSH payments. The Medicare fraction and the Medicaid fraction must be calculated to determine whether a hospital qualifies for DSH payments. The Medicare fraction “roughly speaking” measures the hospital’s low-income senior-citizen population and the Medicaid fraction measures the hospital’s low-income non-senior population. Specifically, the Medicare statute describes the Medicare fraction as: “the numerator of which is the number of [a] hospital’s patient days for [the fiscal year]

which were made up of patients who (**for such days**) were **entitled to** benefits under part A of [Medicare] and were entitled to [SSI] benefits[], and the denominator of which is the number of such hospital's patient days for such fiscal year which were made up of patients who (for such days) were entitled to benefits under [Medicare] part A." In short, the numerator is the number of patient days attributable to Medicare patients who are poor. The denominator is the number of patient days attributable to all Medicare patients. The statute describes the Medicaid fraction as "the numerator of which is the number of [a] hospital's patient days for [the fiscal year] which consist of patients who (for such days) were **eligible for** medical assistance under [Medicaid], but who were not entitled to benefits under part A of [Medicare], and the denominator of which is the total number of the hospital's patient days for such [fiscal year]." In other words, the numerator is the number of patient days attributable to non-Medicare patients who are poor. The denominator is the total number of patient days. In 2004 by regulation the Department of Health and Human Services began interpreting "entitled to [Medicare Part A] benefits," in the Medicare fraction to include patients whom Medicare insures but does not pay for on a given day. Patients may be insured by Medicare, but it may not be paying for them because private insurance is paying or they have used up their allotted Medicare coverage. Empire Health argued that the regulation is "inconsistent with the statutory fraction descriptions." According to Empire, the Medicare fraction contains the word "entitled" which means something different from the word "eligible" used in the Medicaid fraction. To be "eligible" for a benefit, Empire posits, is to be "qualified" to seek it; to be "entitled" to a benefit means to have an "absolute right" to its payment. According to the Court Empire's argument "even if plausible in the abstract, does not work in the Medicare statute. In this statute, "'entitled to benefits' is essentially a term of art, used over and over to mean qualifying (or, yes, being eligible) for benefits—i.e., being over 65 or disabled." Likewise, Empire argued that the parenthetical phrase "for such days" in the Medicare fraction indicates only days Medicare pays for should be included in the Medicare fraction. The Court rejected this argument writing: "[T]hose three little words do not accomplish what Empire would like, having the much less radical function of excluding days of a patient's hospital stay before he qualifies for Medicare (e.g., turns 65)."

In [*American Hospital Association v. Becerra*](#) the U.S. Supreme Court held unanimously that if Health and Human Services (HHS) wants to reimburse Section 340B hospitals for certain outpatient prescription drugs provided to Medicare patients at a different rate than other hospitals it must conduct a survey of hospitals' drug acquisition costs. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 describes how HHS sets Medicare drug reimbursement rates. Per option 1, if the HHS Secretary "tak[es] into account the hospital acquisition cost survey data" the reimbursement rate is the "average acquisition cost for the drug for that year," which importantly, the Secretary may "vary by hospital group." Per option 2, if the Secretary doesn't conduct a survey, drugs must be reimbursed based on the "average price for the drug" "as calculated and adjusted by the Secretary as necessary." HHS has never done a cost survey. Until 2018 HHS followed option 2 and set reimbursement rates for each drug based on the average-sales-price data provided by manufacturers and reimbursed all hospital at the

same rates. In 2018 HHS decided to reduce reimbursement rates for 340B hospitals, which generally serve low-income or rural communities. Federal law requires drug manufacturers to sell prescription drugs to 340B hospitals at prices below those paid by other hospitals. According to HHS, “the uniform reimbursement rates [under option 2] combined with the discounted prices paid by 340B hospitals for prescription drugs meant that 340B hospitals were able to ‘generate significant profits’ when they provided the prescription drugs to Medicare patients.” HHS argued that per option 2 even if HHS doesn’t conduct the survey, it may still “adju[s]t” the average price “as necessary for purposes of” this statutory provision,” which includes varying drug reimbursement rates for different types of hospitals. The Supreme Court disagreed in a brief opinion written by Justice Kavanaugh. The Court looked to the text to explain why per option 2 the Secretary can’t vary reimbursement by hospital group. “[Option 2] requires reimbursement in an ‘amount’ that is equal to ‘the average price for the drug in the year.’ The text thus requires the reimbursement rate to be set drug by drug, not hospital by hospital or hospital group by hospital group. The only item that the agency is allowed to adjust is the ‘average price for the drug in the year.’” The Court also explained that Congress’s option 1 and 2 scheme makes little sense if HHS can skip the survey under option 1 and vary the reimbursement rate by hospital type regardless. Finally, HHS argued that the Medicare statute precludes judicial review of the reimbursement rates. The Court disagreed opining “the detailed statutory formula for the reimbursement rates undermines HHS’s suggestion that Congress implicitly granted the agency judicially unreviewable discretion to set the reimbursement rates.”

In *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita* the U.S. Supreme Court held 7-2 that group health plans which offer all participants the same limited outpatient dialysis benefits don’t violate the Medicare Secondary Payer statute. In 1972 Medicare began covering those with end-stage renal disease, regardless of age or disability. In the early 1980s Congress passed the Medicare Secondary Payer statute which makes Medicare the “secondary” payer to an individual’s health insurance plan for dialysis, if the plan covers dialysis. According to Justice Kavanaugh, writing for the Court, “Congress recognized that a [private health] plan might try to circumvent the statute’s primary-payer obligation by denying or reducing coverage for an individual who has end-stage renal disease, thereby forcing Medicare to incur more of those costs.” To prevent this, per the statute, a plan “may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner.” Also, a plan “may not take into account that an individual is entitled to or eligible for” Medicare due to end-stage renal disease. DaVita, one of the two major dialysis providers in the United States, sued the Marietta Memorial Hospital Employee Health Benefit Plan arguing that it “(i) differentiates between individuals with and without end-stage renal disease and (ii) takes into account the Medicare eligibility of individuals with end-stage renal disease in violation of the Medicare Secondary Payer statute.” While Marietta’s plan provides the same outpatient dialysis coverage to all its participants it subjects dialysis to “relatively limited reimbursement rates.” The Court first rejected DaVita’s differentiation argument. The “statutory language prohibits a

plan from differentiating in benefits between individuals with and without end-stage renal disease. For example, a group health plan may not single out plan participants with end-stage renal disease by imposing higher deductibles on them, or by covering fewer services for them. If a plan does not differentiate in the benefits provided to individuals with and without end-stage renal disease, then a plan has not violated that statutory provision, and the differentiation inquiry ends there.” DaVita argued that even if the plan limits benefits uniformly it still violates the statute if it has a disparate impact on those with end-stage renal disease. The Court rejected this argument noting that the statute’s text “cannot be read to encompass a disparate-impact theory” and that a disparate-impact theory would be “all but impossible to fairly implement.” The Court also rejected DaVita’s argument that a plan providing limited coverage for outpatient dialysis impermissibly “take[s] into account” the Medicare eligibility of plan participants with end-stage renal disease in violation of the statute. “Because the Plan provides the same out-patient dialysis benefits to all Plan participants, whether or not a participant is entitled to or eligible for Medicare, the Plan cannot be said to ‘take into account’ whether its participants are entitled to or eligible for Medicare.”

Intervention cases

In *Berger v. North Carolina State Conference of the NAACP* the U.S. Supreme Court held 8-1 that two leaders of North Carolina’s state legislature may participate as intervenors in a challenge to North Carolina’s voter identification (voter-ID) law. In November 2018, North Carolinians amended their State Constitution to require voter-ID. The governor vetoed legislation implementing the amendment, and the attorney general voted against an earlier voter-ID law when he was a state legislator. The NAACP sued the governor and the state board of elections. The attorney general is defending the elections board. The speaker of the State House of Representatives and president pro tempore of the State Senate (legislative leaders) moved to intervene in the case. Federal Rules of Civil Procedure Rule 24(a)(2) states a “court must permit anyone to intervene” who, (1) “[o]n timely motion,” (2) “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest,” (3) “unless existing parties adequately represent that interest.” The parties agreed the legislative leaders’ motion to intervene was timely. Justice Gorsuch, writing for the Court, concluded that they met the Rule’s other two requirements. Regarding whether “legislative leaders have claimed an interest in the resolution of this lawsuit that may be practically impaired or impeded without their participation” state law indicates they do, according to the Court. “North Carolina has expressly authorized the legislative leaders to defend the State’s practical interests in litigation of this sort. State law provides that ‘[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice,’ ‘shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.’” To determine whether the legislative leaders’ interests in this lawsuit are

“adequately represent[ed]” by the attorney general the lower court applied a “presumption” they were and held that the leaders could not overcome this presumption. The Court concluded that “a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law.” After the Court ignored the presumption of adequate representation it explained how “this litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court.”

In [*Cameron v. EMW Surgical Center*](#) the U.S. Supreme Court held 8-1 that the Kentucky’s Attorney General (AG) may intervene in a lawsuit as a party to defend a state law when the Kentucky Secretary of Health and Family Service refused. An abortion clinic and two of its doctors sued a variety of state defendants over Kentucky’s abortion law. The parties agreed to dismiss the AG from the lawsuit, and he didn’t defend the law on behalf of the Kentucky Secretary of Health and Family Services. Kentucky lost, and while the appeal was pending the AG became the governor and appointed a new Secretary. The new AG argued the appeal for the new Secretary. The new Secretary lost the appeal and decided to not further appeal. The new AG sought to intervene as a party on behalf of the state and requested a rehearing of the case. After determining it had jurisdiction to hear this case, the Supreme Court held the lower court should not have denied the AG’s motion to intervene. No statute or rule provides a standard to determine when intervention on appeal should be allowed. According to Justice Alito, writing for the Court, the Court considers “policies underlying intervention” in the district courts, including the legal “interest” that a party seeks to “protect” through intervening on appeal. The Court noted that states have retained sovereign powers to “enact and enforce any laws that do not conflict with federal law.” Respect for state sovereignty, the Court reasoned, “must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court.” Per Kentucky law the authority to defend the constitutionality of this statute was shared by the Secretary and the AG, who is deemed Kentucky’s “chief law officer” with the authority to represent the state “in all cases.” The lower court found that the AG’s motion to intervene wasn’t timely because it came after years of litigation. The Court rejected this conclusion reasoning that “the most important circumstance relating to timeliness is that the attorney general sought to intervene ‘as soon as it became clear’ that the Commonwealth’s interests ‘would no longer be protected’ by the parties in the case.” The AG sought to intervene two days after learning the Secretary would not continue to defend the law.

Police cases

In [*Vega v. Tekoh*](#)* the U.S. Supreme Court held 6-3 that police officers can’t be sued for money damages for failing to recite *Miranda* rights. The State and Local Legal Center (SLLC) filed an [*amicus brief*](#) in this case arguing for this result. Terrance Tekoh was tried for unlawful sexual penetration. The parties disagree about whether Deputy Carlos Vega used “coercive investigatory techniques” to obtain a confession from Tekoh, but they agree Deputy Vega didn’t inform Tekoh of his *Miranda* rights. His confession was admitted into evidence and Tekoh was

acquitted. Tekoh sued Deputy Vega under 42 U.S.C. Section 1983 claiming Vega violated his Fifth Amendment right against self-incrimination by not advising him of his *Miranda* rights. In an opinion written by Justice Alito the Court held failing to recite *Miranda* doesn't provide a basis for a claim under §1983 because the failure isn't a violation of the Fifth Amendment. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Per Supreme Court precedent it "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant" and "also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" According to the Court, "[i]n *Miranda*, the Court concluded that additional procedural protections were necessary to prevent the violation of this important right when suspects who are in custody are interrogated by the police." So, *Miranda* imposed a set of prophylactic rules. "At no point in the opinion did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation." The Court rejected Tekoh's argument that *Dickerson v. United States* (2000) "upset the firmly established prior understanding of *Miranda* as a prophylactic decision." In *Dickerson* the Court held that Congress couldn't abrogate *Miranda* by statute because *Miranda* was a "constitutional decision" that adopted a "constitutional rule." Despite the Court using the term "constitutional decision" and "constitutional rule," "the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation."

In a 6-3 decision in [*Thompson v. Clark*](#)* the U.S. Supreme Court held that to demonstrate a favorable termination of a criminal prosecution in order to bring a Fourth Amendment malicious prosecution case a plaintiff need only show that his or her prosecution ended without a conviction. Larry Thompson's sister-in-law, who lived with him and suffers from mental illness, reported to 911 that he was sexually abusing his one-week-old daughter. Thompson refused to let police in his apartment without a warrant. After a "brief scuffle" police arrested Thompson and charged him with obstructing governmental administration and resisting arrest. Medical professionals at the hospital determined Thompson's daughter had diaper rash and found no signs of abuse. Before trial the prosecutor moved to dismiss the charges and the trial judge agreed to do so without explaining why. Thompson then sued the officers who arrested him for malicious prosecution under the Fourth Amendment. Per Second Circuit precedent a malicious prosecution case can only be brought if the prosecution ends not merely without a conviction but with some affirmative indication of innocence. In an opinion written by Justice Kavanaugh the Supreme Court disagreed with the Second Circuit and held that a Fourth Amendment malicious prosecution case may be brought as long as there is no conviction. Thompson brought his Fourth Amendment malicious prosecution case under 42 U.S.C. §1983, which was adopted in 1871. One of the elements of a malicious prosecution claim is "favorable termination" of the underlying criminal prosecution. The other elements include whether the prosecution was "instituted without any probable cause" and was motivated by "malice." According to the Court,

to determine what favorable termination entails, the Court had to determine what courts required in 1871. The parties “identified only one court that required something more, such as an acquittal or a dismissal accompanied by some affirmative indication of innocence.” So, the Supreme Court reasoned, no conviction is enough for a prosecution to be favorably terminated.

In [*Rivas-Villegas v. Cortesluna*](#) the Court reversed the Ninth Circuit’s denial of qualified immunity to Officer Rivas-Villegas. A girl told 911 she, her sister, and her mother had shut themselves into a room because their mother’s boyfriend, Ramon Cortesluna, was trying to hurt them and had a chainsaw. Officers ordered Cortesluna to leave the house. They noticed he had a knife sticking out from the front left pocket of his pants. Officers told Cortesluna to put his hands up. When he put his hands down, they shot him twice with a beanbag shotgun. Cortesluna then raised his hands and got down as instructed. Officer Rivas-Villegas placed his left knee on the left side of Cortesluna’s back, near where Cortesluna had the knife in his pocket, and raised both of Cortesluna’s arms up behind his back. Another officer removed the knife and handcuffed Cortesluna. Rivas-Villegas had his knee on Cortesluna’s back for no more than eight seconds. The Ninth Circuit concluded that circuit precedent, *LaLonde v. County of Riverside*, indicated that leaning with a knee on a suspect who is lying face-down on the ground and isn’t resisting is excessive force. The Supreme Court disagreed that *LaLonde* clearly established that Officer Rivas-Villegas couldn’t briefly place his knee on the left side of Cortesluna’s back. The Supreme Court reasoned *LaLonde* is “materially distinguishable and thus does not govern the facts of this case.” “In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, *LaLonde* was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. *LaLonde*, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.”

In [*City of Tahlequah v. Bond*](#), the Supreme Court held that two officers who shot Dominic Rollice after he raised a hammer “higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers” were entitled to qualified immunity. Dominic Rollice’s ex-wife told 911 that Rollice was in her garage, intoxicated, and would not leave. While the officers were talking to Rollice he grabbed a hammer and faced them. He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers yelled to him to drop it. Instead, he came out from behind a piece of furniture so that he had an unobstructed path to one of the officers. He then raised the hammer higher back behind his head and took a stance as if he was about to throw it or charge at the officers. Two officers fired their weapons and killed him. The Tenth Circuit concluded that a few circuit court cases—*Allen v. Muskogee* in particular—clearly established that the officers’ use of force was excessive. The Supreme Court disagreed. “[T]he facts of *Allen*

are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer.”

Death penalty cases

In [*Ramirez v. Collier*](#) the U.S. Supreme Court held 8-1 that John Ramirez’s claim is likely to succeed that Texas violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by not allowing his pastor to audibly pray and lay hands on him while he is being executed. Ramirez admitted to stabbing Pablo Castro 29 times at the convenience store where Castro worked. A jury sentenced Ramirez to death. Ramirez sued the prison arguing it violated his religious exercise rights under RLUIPA by not allowing his long-time pastor to pray with him and lay hands on him during the execution. Per RLUIPA a state prison may not impose a substantial burden on the religious exercise of an inmate unless the burden is the least restrictive means of furthering a compelling governmental interest. Texas argued it had numerous compelling reasons to disallow audible prayer and touching. The Court, in an opinion written by Chief Justice Roberts, didn’t dispute that all were likely compelling but was skeptical any were narrowly tailored. Texas argued it has a compelling interest in disallowing audible prayer because it may impede prison officials “ability to hear subtle signs of trouble or prove distracting during an emergency” and the spiritual advisor might exploit the opportunity to “make a statement to the witnesses or officials” rather than pray. According to the Court, there is a less restrictive means of handling these concerns than banning audible prayer: “Prison officials could impose reasonable restrictions on audible prayer in the execution chamber—such as limiting the volume of any prayer so that medical officials can monitor an inmate’s condition, requiring silence during critical points in the execution process . . . , allowing a spiritual advisor to speak only with the inmate, and subjecting advisors to immediate removal for failure to comply with any rule.” Texas likewise argued it has three compelling interests in disallowing a spiritual advisor to touch an inmate: security, preventing unnecessary suffering, and avoiding further emotional trauma to the victim’s family. Regarding security, Texas is concerned a spiritual advisor close enough to touch an inmate might “tamper with the prisoner’s restraints or yank out an IV line.” According to the Court, “[u]nder Texas’s current protocol, spiritual advisors stand just three feet from the gurney in the execution chamber. A security escort is posted nearby, ready to intervene if anything goes awry. We do not see how letting the spiritual advisor stand slightly closer, reach out his arm, and touch a part of the prisoner’s body well away from the site of any IV line would meaningfully increase risk.” Texas also argued Ramirez’s pastor might harm Ramirez by accidentally interfering with the IV line. The Court opined reasonable measures “short of banning *all* touch” could address this concern. “For example, Texas could allow touch on a part of the body away from IV lines, such as a prisoner’s lower leg.” Finally, Texas argued that allowing Ramirez to be touched by his pastor might further traumatize the

victim's family members by "reminding them that their loved one received no such solace." According to the Court, "what is at issue is allowing Pastor Moore to respectfully touch Ramirez's foot or lower leg inside the execution chamber. Respondents do not contend that this particular act will result in trauma."

In *Nance v. Ward* the U.S. Supreme Court held 5-4 that a capital inmate may bring a method-of-execution case under 42 USC §1983 rather than federal habeas even when the alternative method proposed isn't allowed under state law. The holding of this case benefits inmates because the habeas statute contains procedural requirements §1983 lacks which may require dismissal of a claim. Supreme Court precedent allows death row inmates to challenge a state's proposed method of execution under the Eighth Amendment. The inmate must "identify a readily available alternative method of execution that would significantly reduce the risk of severe pain." He or she may propose a method used in other states. If the alternative method proposed is already authorized under state law the Court has held the inmate may bring his or her claim under §1983. Michael Nance was sentenced to death for shooting and killing a bystander while fleeing from a bank robbery. He claims that lethal injection will create a substantial risk of severe pain for him and has proposed that he be executed by firing squad. Georgia only allows capital inmates to be executed by lethal injection; four other states allow execution by firing squad. The Supreme Court has previously held that an inmate must proceed to habeas and may not bring a §1983 case when the relief sought would "necessarily imply the invalidity of his conviction or sentence." According to Justice Kagan, writing for the Court, Nance may bring his case under §1983 even though Georgia law doesn't allow the firing squad because he isn't seeking to invalidate his sentence. In *Nelson v. Campbell* (2004) and *Hill v. McDonough* (2006) the Court held that method-of-execution claims could be brought under §1983 where inmates requested that the state use a different lethal injection protocol (not a different execution method). Except for the Georgia statute, the Court reasoned, "this case would even more clearly than *Nelson* and *Hill* be fit for §1983" since when those cases were decided the Court had not yet required those challenging the method of execution to identify alternative methods. The Court reasoned: "The substance of the [method-of-execution] claim, now more than ever, thus points toward §1983. The prisoner is not challenging the death sentence itself; he is taking the validity of that sentence as a given. And he is providing the State with a veritable blueprint for carrying the death sentence out. If the inmate obtains his requested relief, it is because he has persuaded a court that the State could readily use his proposal to execute him. The court's order therefore does not, as required for habeas, 'necessarily prevent' the State from carrying out its execution." This is true even if Georgia must change its law to allow death by firing squad the Court opined. It did admit "amending a statute may require some more time and effort than changing an agency protocol, of the sort involved in *Nelson* and *Hill*."

Indian law cases

In *Oklahoma v. Castro-Huerta* the U.S. Supreme Court held 5-4 that states (along with the federal government) may prosecute crimes committed by non-Indians against Indians in Indian country. Victor Manuel Castro-Huerta is a non-Indian who lived in Tulsa, Oklahoma. He was sentenced to 35 years imprisonment after Oklahoma convicted him for child neglect of his stepdaughter who is a Cherokee Indian. A federal grand jury indicted Castro-Huerta for the same conduct. He accepted a plea agreement for a 7-year sentence and removal from the United States. Following the Supreme Court's decision in *McGirt v. Oklahoma* (2020), that Congress never properly disestablished the Creek Nation's reservation in eastern Oklahoma, Tulsa is now recognized as Indian country. Castro-Huerta argued the federal government has exclusive jurisdiction to prosecute crimes committed by a non-Indian against an Indian in Indian country and that therefore Oklahoma lacked jurisdiction to prosecute him. In an opinion written by Justice Kavanaugh the Court disagreed. The Court began its analysis by noting "the Court's precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country." The Court applied a two-part test to determine whether a state's jurisdiction in Indian country may be preempted in this case "(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." The Court concluded it could not. Castro-Huerta argued that the General Crimes Act and Public Law 280 preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country. The General Crimes Act states: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country." According to the Court, "[b]y its terms, the Act does not preempt the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country. The text of the Act simply 'extend[s]' federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country." Castro-Huerta also argued that Public Law 280, which grants certain states broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country, is a source of preemption. The Court responded: "Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country." The Supreme Court has held that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if "the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." Per *White Mountain Apache Tribe v. Bracker* (1980) the Court considers tribal interests, federal interests, and state interests. First, the Court opined that the exercise of state jurisdiction here would not infringe on tribal self-government because tribes generally can't prosecute crimes committed by non-Indians even when non-Indians commit crimes against Indians in Indian country. Second, a state prosecution of a non-Indian won't harm the federal interest in protecting Indian victims because state prosecution would supplement not supplant federal authority. Third, states have "a strong

sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims.”

In [*Ysleta Del Sur Pueblo v. Texas*](#) the U.S. Supreme Court held 5-4 that per the Restoration Act Texas may only prohibit particular types of gaming on Indian reservations where Texas law prohibits that type of gaming throughout the rest of the state. The Ysleta del Sur Pueblo is one of three federally recognized Indian Tribes in Texas. In 2016 it began to allow electronic bingo until Texas shut down its operations. Under Texas law bingo is permissible “only for charitable purposes and only subject to a broad array of regulations.” Six months before Congress passed the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration (Restoration Act) the U.S. Supreme Court decided *California v. Cabazon Band of Mission Indians* (1987). That case involved Public Law 280 which allowed a “handful of States to enforce some of their criminal—but not certain of their civil—laws on particular tribal lands.” Applying the statute to Indian gaming Court held that, if a state law *prohibits* a particular game, it falls within Public Law 280’s grant of criminal jurisdiction and a state may prohibit the game on tribal lands. But if a state law merely “*regulate* a game’s availability,” Public Law 280 does not allow a state to enforce its gaming rules on tribal lands. Subsection 107(a) of the Restoration Act states: “All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.” Subsection 107(b) states: “Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.” Texas argued the Restoration Act subjects the tribe to the “entire body of Texas gaming laws and regulations.” The tribe argued that consistent with *Cabazon*, “if Texas merely regulates a game like bingo, it may offer that game—and it may do so subject only to the limits found in federal law and its own law, not state law.” A majority of the Supreme Court, in an opinion written by Justice Gorsuch, agreed with the tribe. The Court reasoned: “Subsection (a) says that gaming activities prohibited by state law are also prohibited as a matter of federal law (using some variation of the word “prohibited” no fewer than three times). On the other hand, subsection (b) insists that the statute does not grant Texas civil or criminal regulatory jurisdiction with respect to matters covered by this ‘section,’ a section concerned exclusively with gaming. The implication that Congress drew from *Cabazon* and meant for us to apply its same prohibitory/regulatory framework here seems almost impossible to ignore.” Beyond *Cabazon*, the majority noted that Texas doesn’t prohibit bingo. “From this alone, it would seem to follow that Texas’s laws fall on the regulatory rather than prohibitory side of the line—and thus may not be applied on tribal lands under the terms of subsection (b).”

Miscellaneous

In [*West Virginia v. EPA*](#) the U.S. Supreme Court held 6-3 that the Environmental Protection Agency (EPA) lacked the statutory authority to issue the Clean Power Plan (CPP). Per the Clean Air Act, for new and existing powerplants EPA may come up with air-pollution standards which

reflect “the best system of emission reduction” (BSER). Before the CPP when EPA regulated under this provision of the Clean Air Act it required existing powerplants to make technological changes—like adding a scrubber—to reduce pollution. In the 2015 EPA released the Clean Power Plan which determined that the BSER to reduce carbon emissions from existing powerplants was “generation-shifting.” This entailed shifting electricity production from coal-fired power plants to natural-gas-fired plants and wind and solar energy. The Court, in an opinion written by Chief Justice Roberts, held that generation shifting exceeds EPA’s authority under the Clean Air Act because Congress didn’t give EPA “clear congressional authorization” to regulate in this matter. “As a matter of ‘definitional possibilities,’ generation shifting can be described as a ‘system’—‘an aggregation or assemblage of objects united by some form of regular interaction’ capable of reducing emissions. But of course almost anything could constitute such a ‘system’; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.” EPA had to show it had “clear congressional authorization” to adopt the CPP because the Court applied the major questions doctrine. This doctrine applies, according to the Court, in “extraordinary cases”—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority. The Court opined this is a major questions doctrine case because “[i]n arguing that [the relevant provision of the Clean Air Act] empowers it to substantially restructure the American energy market, EPA ‘claim[ed] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’ It located that newfound power in the vague language of an ‘ancillary provision[.]’ of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”

In [*Biden v. Texas*](#) the U.S. Supreme Court held 5-4 that the Biden administration may end the Migrant Protection Protocols (MPP). MPP was a Trump administration program which provided for the return to Mexico of non-Mexicans who were detained attempting to enter the United States at the United States-Mexico border. On Inauguration Day President Biden announced he would suspend the program the next day, and he ultimately sought to terminate it. Texas and Missouri argued that MPP can’t be rescinded. The Supreme Court disagreed in an opinion written by Chief Justice Roberts. The statutory basis for MPP is Section 1225(b)(2)(C) of the Immigration and Nationality Act (INA) which states: “In the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary] *may* return the alien to that territory pending a proceeding under section 1229a.” Both sides agree that the “may” language in Section 1225(b)(2)(C) makes it discretionary. But Texas and Missouri point to Section 1225(b)(2)(A) which states “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under

section 1229a of this title.” Texas and Missouri argue that because Section 1225(b)(2)(A) makes detention mandatory, “the otherwise-discretionary return authority in section 1225(b)(2)(C) becomes mandatory when the Secretary violates that detention mandate.” The Court rejected this argument first noting “[t]he problem is that the statute does not say anything like that.” “If Congress had intended section 1225(b)(2)(C) to operate as a mandatory cure of any non-compliance with the Government’s detention obligations, it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term ‘may.’”

In *Torres v. Texas Department of Public Safety* the U.S. Supreme Court held 5-4 that Congress’s war powers allow it to subject non-consenting states to money damages lawsuits under the Uniformed Services Employment and Reemployment Rights Act (USERRA). While deployed in Iraq, Le Roy Torres was exposed to toxic burn pits which caused him to have health problems and no longer be able to work in his old job as a state trooper. He asked his former employer, Texas Department of Public Safety (Texas), to reemploying him in a different role, which it refused to do so. Torres sued Texas claiming it violated USERRA’s mandate that state employers re-hire returning servicemembers, use “reasonable efforts” to accommodate a service-related disability, or find an “equivalent” position if a disability prevents the veteran from holding his or her prior position. Invoking sovereign immunity, Texas claimed it can’t be sued under USERRA. In an opinion written by Justice Breyer the Court held that Texas waived its sovereign immunity. Congress enacted USERRA as part of its U.S. Constitution Article I authority “[t]o raise and support Armies” and “[t]o provide and maintain a Navy.” Sovereign immunity prevents courts from hearing a suit brought by any person against a nonconsenting State. But there are many exceptions to sovereign immunity, including “structural waivers.” As relevant to this case, Justice Breyer stated that per *Alden v. Maine* (1999) states may be sued if they agreed their sovereignty would yield as part of the “plan of the Convention,” that is, if “the structure of the original Constitution itself” reflects a waiver of states’ sovereign immunity. In *PennEast Pipeline Co. v. New Jersey* (2021) the Court articulated the test for structural waiver as whether the federal power at issue is “complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention.” According to Justice Breyer, the Constitution’s text, history, and Supreme Court precedent demonstrate that “when the States entered the federal system, they renounced their right to interfere with national policy” in the area of war. Regarding text, the Court noted that “across several Articles,” the Constitution “strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense.” History, the Court reasoned, “teaches the same lesson.” “The Founders recognized, first and foremost, ‘that the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by the[ir] own authority,’ because Congress lacked the power to marshal and maintain a fighting force ‘fit for defence.’” Finally, an “unbroken line of precedents” supports the conclusion “Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces.”

In [*Cummings v. Premier Rehab Keller*](#)* the U.S. Supreme Court held 6-3 that emotional distress damages aren't available if funding recipients violate four federal statutes adopted using Congress's Spending Clause authority. The relevant statutes include Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, the Section 1557 of the Affordable Care Act, and Title IX of the Education Amendments Act of 1972. Depending upon the statute, they prohibit funding recipients from discriminating on the basis of race, color, national origin, sex, disability, or age. Jane Cummings is deaf and legally blind. She sought physical therapy from Premier Rehab Keller and requested it provide an American Sign Language interpreter at her appointments. Premier Rehab Keller declined to do so. She sued claiming disability discrimination in violation of the Rehabilitation Act and the Affordable Care Act. Among other remedies she sought emotional distress damages. None of the four statutes relevant to this case expressly provides victims of discrimination a private right of action to sue the funding recipient for money damage so they don't list available damages. In *Cannon v. University of Chicago* (1979) the Supreme Court found an implied right of action in Title VI and Title IX, which the Supreme Court later concluded Congress ratified. The Rehabilitation Act and the Affordable Care Act expressly incorporate the rights and remedies available under Title VI. In an opinion written by Chief Justice Roberts, emotional distress damages aren't available under these statutes because a funding recipient wouldn't have had clear notice it might face such liability. According to the Chief Justice, the Supreme Court has applied a "contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages" in Spending Clause cases. Spending Clause legislation operates based on consent: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." A particular remedy is available in a private Spending Clause action "only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." In *Barnes v. Gorman* (2002) the Supreme Court held that punitive damages are unavailable in private actions brought under the statutes at issue in this case because such damages aren't "usual" contract remedies. Similarly, according to the Court, it is "hornbook law that 'emotional distress is generally not compensable in contract.'"

In [*United States v. Washington*](#) the U.S. Supreme Court held unanimously that Washington State workers' compensation law, which makes it easier for federal contractors to receive unemployment compensation, violates the U.S. Constitution's Supremacy Clause. Washington State's Hanford site was used to develop and produce nuclear weapons. The federal government is currently in the process of cleaning up the site. In 2018 Washington enacted a workers' compensation law applicable to only Hanford site federal government contract workers. This law makes it easier for them to receive workers' compensation as compared to the state workers' compensation regime. The Supremacy Clause generally immunizes the federal government from state laws that directly regulate or discriminate against it. However, Congress can waive this immunity. It has waived immunity regarding state workers' compensation laws insofar as a "state authority charged with enforcing . . . the state workers' compensation laws . . . appl[ies] the laws" to land or projects "belonging to the [Federal] Government, in the same way and to the

same extent as if the premises were under the exclusive jurisdiction of the State.” Washington State argued that its workers’ compensation law falls “within the scope of this congressional waiver.” In an opinion written by Justice Breyer, with no dissents or concurrences, the Supreme Court disagreed. The Court first determined that Washington State’s law discriminates against the federal government. “On its face, the law applies only to a ‘person, including a contractor or subcontractor, who was engaged in the performance of work, either directly or indirectly, for the United States.’ The law thereby explicitly treats federal workers differently than state or private workers.” The law consequently violates the Supremacy Clause, Justice Breyer reasoned, unless Congress has consented to it by waiver. According to the Court, “Congress has authorized regulation that would otherwise violate the Federal Government’s inter-governmental immunity ‘only when and to the extent there is a clear congressional mandate.’” The Court found no such clear and unambiguous waiver of immunity in this case. “One can reasonably read the statute as containing a narrower waiver of immunity, namely, as only authorizing a State to extend its generally applicable state workers’ compensation laws to federal lands and projects within the State.”

In [*Cassirer v. Thyssen-Bornemisza Collection Foundation*](#) the U.S. Supreme Court held unanimously that in a Foreign Sovereign Immunities Act (FSIA) case against a foreign state raising non-federal claims a court must apply whatever choice-of-law rule the court would use if the foreign state was a private party. In this case that means applying California’s choice-of-law rule, not a rule deriving from federal common law. In 1939 in order to leave Germany Lilly Cassirer had to surrender to the Nazis a Camille Pissarro painting, now worth tens of millions of dollars. In 1999 Lilly’s grandson Claude discovered that the Thyssen-Bornemisza Collection Foundation, created and controlled by Spain, had the painting. Claude sued the Foundation in federal court in California to recover it. The Foundation is an “instrumentality” of Spain so Claude’s complaint “invoked the FSIA to establish the court’s jurisdiction.” This statute determines whether a foreign state or instrumentality may be sued in an American court. A foreign state or instrumentality is immune from suit unless an exception applies. Here a court has determined the exception for cases involving “rights in property taken in violation of international law” applies. The question in this case is which substantive law applies to determine who owns the painting. The Cassirer plaintiffs urged the use of California’s choice-of-law rule meaning, they claim, that California property law would apply, and they would win. The Foundation argued that the federal choice-of-law rule applied, meaning Spanish law must be used to resolve ownership, and the Foundation was the rightful owner of the painting. The Ninth Circuit agreed with the Foundation. According to Justice Kagan, writing for the Court, per the FSIA the same substantive law applies against a foreign state as a private party.

In [*Viking River Cruises v. Morigana*](#) the U.S. Supreme Court held 8-1 that the Federal Arbitration Acts (FAA) preempt a holding of the California Supreme Court “insofar as it precludes division of [California private attorney general] actions into individual and non-individual claims through an agreement to arbitrate.” California’s Labor Code Private Attorneys General Act (PAGA)

allows an employee to bring a lawsuit on behalf of himself and herself and other current or former employees as an “agent or proxy” of the state. Angie Moriana brought a PAGA action in federal court claiming Viking River Cruises failed to pay her final wages within 72 hours and committed a number of different labor code violations involving other employees. When she was hired, Moriana agreed to arbitrate any disputes arising from her employment. She also agreed to a class action waiver stating she wouldn’t bring a PAGA action in arbitration. The waiver contained a severability clause stating that if it was invalid PAGA actions could be litigated in court and that if any portion of the waiver was valid it would be enforced in arbitration. Viking moved to compel arbitration of Moriana’s “individual” PAGA claims and to dismiss her other PAGA claims. Relying on a 2014 California Supreme Court decision, *Iskanian v. CLS Transp. Los Angeles*, the California Court of Appeals refused. In *Iskanian* the California Supreme Court held that waivers of the right to bring PAGA claims are invalid. *Iskanian* secondary rule, as described by Justice Alito writing for the U.S. Supreme Court, invalidates agreements to separately arbitrate or litigate individual PAGA claims “on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA.” Applying *Iskanian*’s primary holding the California Court of Appeals concluded the waiver to not bring PAGA actions was invalid. Per *Iskanian*’s secondary holding, according to the California Court of Appeals, Moriana’s individual PAGA claim couldn’t be arbitrated because it couldn’t be separated from the other PAGA claims she brought. Section 2 of the FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” According to the U.S. Supreme Court the FAA preempts *Iskanian*’s secondary rule prohibiting individual and non-individual PAGA claims from being heard apart. “This prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine ‘the issues subject to arbitration’ and ‘the rules by which they will arbitrate,’ and does so in a way that violates the fundamental principle that ‘arbitration is a matter of consent.’” Therefore, Viking is entitled to compel arbitration of Moriana’s individual claim. The U.S. Supreme Court concluded that *Iskanian*’s holding that the waiver is invalid isn’t preempted by the FAA. It also held that Moriana’s non-individual claims should be dismissed due to a lack of standing.

In [*United States v. Vaello Madero*](#) the U.S. Supreme Court held 8-1 that Congress hasn’t violated the equal-protection component of the Fifth Amendment’s Due Process Clause by failing to make Supplemental Security Income (SSI) benefits available to Puerto Rico residents. Through SSI the federal government makes monthly cash payments to qualifying low-income individuals who are over 65 years old, blind, or disabled. To receive SSI an individual must be a “resident of the United States,” which the statute defines as the 50 states, the District of Columbia, and the Northern Mariana Islands. When Jose Luis Vaello Madero moved from New York to Puerto Rico he was no longer eligible to receive SSI. He claimed excluding Puerto Rican residents from SSI is unconstitutional. In a very brief opinion written by Justice Kavanaugh the Court disagreed citing to the “text of the Constitution, longstanding historical practice, and this Court’s precedents.” Regarding the constitution’s text, the Territory Clause states that Congress may

“make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.” According to Justice Kavanaugh, “[t]he text of the Clause affords Congress broad authority to legislate with respect to the U.S. Territories.” Regarding precedent, in *Califano v. Torres* (1978) the Court held that Congress’s refusal to extend SSI to Puerto Rico didn’t violate the constitutional right to interstate travel. In that case the Court applied the “deferential” rational-basis test and explained that Congress had exempted Puerto Rican residents from federal taxes. Likewise, in *Harris v. Rosario* (1980) “the Court again ruled that Congress’s differential treatment of Puerto Rico in a federal benefits program did not violate the Constitution—this time, the equal-protection component of the Fifth Amendment’s Due Process Clause.” According to the Court, the above two cases determine the result in this case and that the rational-basis test applies. “Puerto Rico’s *tax* status—in particular, the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program.”

State & Local Legal Center



Supreme Court for the States 2021-22

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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.

The U.S. Supreme Court's 2021-22 term was by any measure historic. All of the terms big cases involve the states and will affect them indefinitely. This article summarizes the most significant cases for the states involving abortion, guns, climate change regulation, and vouchers.

In a 6-3 decision in [*Dobbs v. Jackson Women's Health Organization*](#) the U.S. Supreme Court held there is no right to an abortion under the U.S. Constitution.

Justice Alito wrote the decision for Court which overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). These decisions allowed women to obtain an abortion until "viability" (about 22-23 weeks).

According to the Court: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee

some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”

The Court opined the right to an abortion isn’t deeply rooted in our nation’s history and tradition or implicit in the right to liberty. “Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of ‘liberty.’ *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being.’”

The Court rejected adhering to *Roe* and *Casey* because they are precedent. Justice Alito wrote: “*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”

In [*New York State Rifle & Pistol Association v. Bruen*](#)* the Court held 6-3 that states may not require “proper cause” to obtain a license to carry a handgun outside the home.

In New York to have “proper cause” to receive a conceal-carry handgun permit an applicant had to “demonstrate a special need for self-protection distinguishable from that of the general community.”

According to Justice Thomas, writing for the Court: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its

regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”

Both parties agreed that the Second Amendment guarantees a general right to public carry. So, the burden fell to New York to show that its proper-cause requirement is “consistent with this Nation’s historical tradition of firearm regulation.”

The Court concluded there is no historical tradition justifying a “proper cause” requirement. “Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late 19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”

In [*West Virginia v. EPA*](#) the Court held 6-3 that the Environmental Protection Agency (EPA) lacked the statutory authority to issue the Clean Power Plan (CPP).

Per the Clean Air Act, for new and existing powerplants, EPA may come up with air-pollution standards which reflect “the best system of emission reduction” (BSER). Before the CPP when EPA regulated under this provision of the Clean Air Act it required existing powerplants to make technological changes—like adding a scrubber—to reduce pollution.

In the 2015 EPA released the CPP which determined that the BSER to reduce carbon emissions from existing powerplants was “generation-shifting.” This entailed shifting electricity production from coal-fired power plants to natural-gas-fired plants and wind and solar energy.

The Court, in an opinion written by Chief Justice Roberts, held that generation shifting exceeds EPA’s authority under the Clean Air Act because Congress didn’t give EPA “clear congressional authorization” to regulate in this matter.

EPA had to show it had “clear congressional authorization” to adopt the CPP because the Court applied the major questions doctrine. This doctrine applies, according to the Court, in “extraordinary cases” —cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority.

The Court opined this is a major questions case because “[i]n arguing that [the relevant provision of the Clean Air Act] empowers it to substantially restructure the American energy market, EPA ‘claim[ed] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’ It located that newfound power in the vague language of an ‘ancillary provision[]’ of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”

In [Carson v. Makin](#) the Court held 6-3 that Maine’s refusal to provide tuition assistance payments to “sectarian” schools violates the First Amendment’s Free Exercise Clause.

Maine’s constitution and statutes require that students receive a free public education. Fewer than half of Maine’s school administrative units (SAUs) operate their own public secondary schools. If those SAUs don’t contract with a particular public or private school, they must “pay the tuition . . . at the public school or the approved private school of the parent’s choice.” To be approved a private school must be “nonsectarian.” Two sets of Maine parents argued that the religious schools where they send or want to send their children can’t be disqualified from receiving state tuition payments because they are religious.

In an opinion written by Chief Justice Roberts the Court agreed noting that “we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” The Court reasoned that the “unremarkable” principles applied in two recent U.S. Supreme Court cases “suffice to resolve this case.”

In *Trinity Lutheran Church of Columbia v. Comer* (2017) the lower court held Trinity Lutheran Church's preschool wasn't allowed to receive a state playground resurfacing grant because it was operated by a church. The U.S. Supreme Court reversed holding the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."

In *Espinoza v. Montana Department of Revenue* (2020) the Montana Supreme Court held that to the extent a Montana program providing tax credits to donors who sponsored private school tuition scholarships included religious schools, it violated a provision of the Montana Constitution which barred government aid to religious schools. The U.S. Supreme Court reversed stating: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

The U.S. Supreme Court opined that the facts of this case are very similar to those in *Trinity Lutheran* and *Espinoza*: "Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, [the religious schools at issue in this case] are disqualified from this generally available benefit "solely because of their religious character."

Conclusion

Only time will tell the impact these cases will have on the states and on American law and culture. The Court will certainly decide numerous additional abortion, guns, major questions, and religion cases. Future cases on these and other topics maybe decided differently than they otherwise would have based on these newly minted precedents. In *Dobbs* the Court overruled precedent, and in all four of these cases the Court made significant doctrinal clarifications and/or shifts.