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.