Supreme Court Midterm 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 or likely will file an *amicus* brief.

Big cases: abortion and guns

In *Dobbs v. Jackson Women's Health Organization* the Supreme Court will decide whether "all pre-viability prohibitions on elective abortions are unconstitutional." Mississippi prohibits abortions, except in a medical emergency or in the case of a severe fetal abnormality, after 15 weeks gestational age. The Fifth Circuit affirmed the lower court's decision to invalidate Mississippi's law. Mississippi concedes that a fetus isn't viable at 15 weeks. In concluding the law is unconstitutional the Fifth Circuit stated: "In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban."

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 and Pistol Association v. Corlett** the U.S. Supreme Court will decide whether states may prevent persons from obtaining a concealed-carry license for self-defense if they lack "proper cause." Per New York state law, in order to carry a concealed handgun for self-defense purposes a person must show "proper cause." New York case law requires an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" to satisfy the proper cause standard. The challengers in this case want to carry a concealed handgun but lack proper cause. A federal district court ruled against the challengers based on Second Circuit precedent. In a very brief opinion, noting that same Second Circuit case, the Second Circuit affirmed. In *Kachalsky v. County of Westchester* (2012), the Second Circuit held that "New York's handgun licensing scheme . . . requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public" did not violate the Second Amendment. In *Kachalsky*, the Second Circuit applied intermediate scrutiny and upheld New York's law stating: "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention" and "the proper cause requirement is substantially related to these interests." According to the challengers, *Kachalsky* was wrongly decided for the reasons the D.C. Circuit stated in *Wrenn v. District of Columbia* (2017). In that case the D.C. Circuit didn't apply intermediate scrutiny to the District of Columbia's similar "good reason" limit to obtain a concealed carry license. The D.C. Circuit held "the law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun." According to the Second Circuit, the "argument that *Kachalsky* was wrongly decided fails under this Court's precedents."

First Amendment cases

In *Carson v. Makin* the U.S. Supreme Court will decide whether Maine has violated the U.S. Constitution by refusing to fund, as part of a generally available student-aid program, attending schools that provide religious, or "sectarian," instruction. More than half of Maine's "school administrative units" (SUA) don't operate public secondary schools of their own. Instead, Maine statutes allow them to pay for students to attend other public and private, nonsectarian schools. The challengers in this case, who want tuition assistance to send their children to religious

schools, claim that two recent U.S. Supreme Court cases indicate that the nonsectarian requirement violates their First Amendment free exercise of religion rights, among other constitutional rights. The First Circuit disagreed. In *Trinity Lutheran v. Comer* (2017), the Supreme Court held a state couldn't provide a subsidy for resurfacing preschool and daycare playgrounds and exclude religious entities. According to the Court, the program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" and held that the program must be subject to "the most exacting scrutiny." In *Espinoza v. Montana Department of Revenue* (2020), the Supreme Court struck down a state program giving tax credits to those who donated to organizations providing scholarships which couldn't be used at religious schools. *Espinoza* clarified, according to the First Circuit, both that discrimination based solely on "religious character" is discrimination based solely on religious "status" and that such discrimination is distinct from discrimination based on religious "use." The challengers claim that the non-sectarian requirement discriminates against them based on their religious status, per *Trinity Lutheran* and *Espinoza,* and fails strict scrutiny. The First Circuit disagreed concluding that the non-sectarian requirement imposes a use-based restriction rather than a status-based restriction. The current Maine Education Commissioner and Maine Attorney General agreed the "determination whether a school is 'nonsectarian' depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide." Likewise, the relevant statute does not make control by or affiliation with a religious institution determinative of a school's eligibility to receive tuition assistance payments from an SUA.

The City of Austin allows on-premises billboards to be digitized but not off-premises billboards. In *City of Austin, Texas v. Reagan National Advertising of Texas Inc.** two outdoor advertising companies claim that this distinction is "content-based" under the First Amendment. The City of Austin disagrees. In *Reed v. Town of Gilbert* (2015), the Supreme Court held that content-based restrictions on speech are subject to strict scrutiny, meaning they are "presumptively unconstitutional" under the First Amendment. In *Reed* the Court defined "content-based" broadly to include distinctions based on "function or purpose." Per Austin's Sign Code, "off-premises" signs advertise "a business, person, activity, goods, products or services not located on the site where the sign is installed." The City argued that the definition of off-premises is a time, place, or manner restriction based on the location of signs. The Fifth Circuit disagreed, stating: "*Reed* reasoned that a distinction can be facially content based if it defines regulated speech by its function or purpose. Here, the Sign Code defines 'off-premises' signs by their purpose: advertising or directing attention to a business, product, activity, institution, etc., not located at the same location as the sign."

The issue the Supreme Court will decide in *Shurtleff v. City of Boston** is whether flying a flag on a flagpole owed by a government entity is government speech. If it is, the city may refuse to fly a Christian flag. Boston owns and manages three flagpoles in an area in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of

Massachusetts flag on another flagpole, and its own flag on a third flagpole. Third parties may request to fly their flag instead of the city's flag in connection with an event taking place within the immediate area of the flagpoles. Camp Constitution seeks "to enhance understanding of the country's Judeo-Christian moral heritage." It asked the City twice to fly its Christian flag while it held an event near the flag. The City refused its request to avoid government establishment of religion. The First Circuit held that flying a third-party flag on a City Hall flag poll is government speech meaning the City didn't have to fly the Christian flag. According to the First Circuit, in two previous cases (*Pleasant Grove City v. Summum* (2009) and *Walker v. Texas Division, Sons of Confederate Veterans* (2015)) the Supreme Court has developed a three-part test for determining when speech is government speech. The Court looks at the history of governmental use, whether the message conveyed would be ascribed to the government, and whether the government "effectively controlled" the messages because it exercised "final approval authority over their selection." Regarding the history of governments using flags, the First Circuit stated "that a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable." The First Circuit also concluded that an observer would likely attribute the message of a third-party flag on the City's third flagpole to the City. The First Circuit had no difficulty concluding the City controlled the flags. "Interested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole."

In *Kennedy v. Bremerton School District*, the U.S. Supreme Court will decide whether the First Amendment protects a high school football coach who, joined by students, prayed after football games. According to Joseph Kennedy, his religious beliefs required him to pray at the end of each game. Students eventually joined him as he kneeled and prayed for about 30 seconds at the 50-yard line. When the school district found out the superintendent directed Kennedy not to pray with students. After widely publicizing his plan, Kennedy announced he would pray after a particular game even if students joined him. He was ultimately put on administrative leave and didn't apply to coach the next fall. The Ninth Circuit held that Kennedy had no First Amendment free speech right to pray because he was speaking as a "government employee" rather than as a "private citizen." And even if he was speaking as a private citizen the Ninth Circuit held the district could prevent him from praying because of Establishment Clause concerns. The Ninth Circuit concluded Kennedy was speaking as a public employee when he prayed. Kennedy "was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade. Thus, his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." The Ninth Circuit also held that even if Kennedy's speech was private, avoiding violating the Establishment Clause was an "adequate justification for treating Kennedy differently from other members of the general public." Per the Ninth Circuit an objective observer would know "Kennedy actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a

conspicuous prayer circle that included students." "Viewing this scene, an objective observer could reach *no other conclusion* than [the school district] endorsed Kennedy's religious activity by not stopping the practice."

In *Houston Community College System v. Wilson* the U.S. Supreme Court will decide whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech. David Wilson was an elected trustee of the Houston Community College System (HCC). In response to the board's decision to fund a campus in Qatar, he arranged robocalls and was interviewed by a local radio station expressing his disagreement with the decision. He filed a lawsuit against HCC after it allowed a trustee to vote via videoconference, which he contended violated the bylaws. He sued the board again when it allegedly excluded him from an executive session. The board publicly censured him for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct." Wilson sued HCC and the trustees, asserting that the censure violated his First Amendment right to free speech. HCC argued that "it had a right to censure Wilson as part of its internal governance as a legislative body and that Wilson's First Amendment rights were not implicated." However, the Fifth Circuit noted it has repeatedly held that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim." In this case, Wilson was censured because of his speech.

Medicare/Medicaid cases

In *Gallardo v. Marstiller** the U.S. Supreme Court will decide whether the federal Medicaid Act allows a state Medicaid program to recover reimbursement for Medicaid's payment of a beneficiary's past medical expenses by taking funds from the beneficiary's tort recovery that compensate for future medical expenses. 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 program has paid for almost $900,000 for her medical care. Her parents settled a case against multiple parties for $800,000. Per the settlement agreement, about $35,000 was for past medical expenses. The settlement also said some of its balance may represent compensation for future medical expenses. The Florida Agency for Health Care Administration (FAHCA) didn't participate in the settlement. The Medicaid statute requires states to enact third-party liability laws under which "the State is considered to have acquired the rights . . . to payment by any other party," "to the extent that payment *has been made* under the State plan for medical assistance." Per Florida law if a Medicaid recipient brings a tort action against a third party that results in a settlement, FAHCA is automatically entitled to half of the recovery (after 25 percent attorney's fees and costs), up to the total amount of medical assistance Medicaid has provided, from the settlement allocated for past and *future* medical expenses. FAHCA sought to recover not just the $35,000 specifically allocated by the parties for past medical expenses. It argued it was entitled to recover, to pay for past medical costs, the portion of the settlement representing compensation for Gallardo's future medical expenses. The Eleventh Circuit agreed. Gallardo argued that FAHCA could collect only the portion of the settlement allocated for past medical

expenses because of the past tense of the language in the Medicaid statute: states have a right to payment from third parties "to the extent that payment *has been made*." According to the Eleventh Circuit, this language "simply provides *for what* the state can get reimbursed now that it has a general assignment on all medical expenses—it can recover medical expenses it has already paid." "[W]hile the language of the federal Medicaid statutes clearly prohibits FAHCA from seeking reimbursement *for* future expenses it has not yet paid (which it is not seeking to do in this case), the language does not in any way prohibit the agency from seeking reimbursement *from* settlement monies for medical care allocated to future care."

The issue in *Becerra v. Empire Health Foundation* is whether the U.S. Department of Health and Human Services can, for calculating the disproportionate share hospital (DSH) payment, include in the Medicare fraction all of a hospital's patient days of individuals who qualify for Medicare Part A benefits, regardless of whether Medicare actually paid the hospital for those particular days. Medicare hospitals that "serve[s] a significantly disproportionate number of low-income patients," receive a DSH adjustment, which approximately reimburses them for the higher costs of providing care. The Medicare statute contains two fractions intended to capture a hospital's number of patient days attributable to two different groups of low-income patients—the Medicare fraction and the Medicaid fraction. The Medicare fraction looks at what proportion of the hospital's "patients who (for such days) were **entitled** to benefits under [Medicare] Part A" were also "**entitled**" to Supplemental Security income. In 2005 the HHS Secretary removed the word "covered" from the rule interpreting "entitled to [Medicare]" in the Medicare fraction. The practical effect was instead of counting only the hospital stay days *actually* paid for by Medicare Part A, all days Medicare theoretically *could have* paid for are counted. Someone who qualifies for and receives Medicare but whose hospital stay exceeds the 90 days allowed by Medicare theoretically could have their entire hospital stay covered by Medicare but in fact won't past 90 days. HHS argues that this rule is procedurally and substantively valid pursuant to the Administrative Procedure Act. The Ninth Circuit disagreed. The *Medicaid* fraction looks at what proportion of a hospital's non-Medicare patients, i.e., patients who are not "**entitled** to benefits under [Medicare] part A," were "**eligible** for [Medicaid]." Before HHS issued the rule at issue in this case, HHS contended that only patients who actually had their hospital stay paid for by Medicare or Medicaid would be considered "entitled to [Medicare]" or "eligible for [Medicaid]." In *Legacy Emanuel Hospital Health Center v. Shalala* (1996), the Ninth Circuit rejected HHS's interpretation of the word "eligible." In that case, "[w]e interpreted the word 'entitled' to mean that a patient has an 'absolute right . . . to payment.' In contrast, we interpreted the word 'eligible' to mean that a patient simply meets the Medicaid statutory criteria." In *Empire Health Foundation* the Ninth Circuit rejected HHS's interpretation of "entitled" as simply meeting the Medicare criteria, relying on *Legacy Emanuel*.

In *American Hospital Association v. Becerra* the U.S. Supreme Court will decide whether the Department of Health and Human Services (HHS) may set the reimbursement rates for drugs covered by Medicare based on acquisition cost and vary such rates by hospital type if HHS has

not collected hospital acquisition cost data. When hospitals provide outpatient care for those insured by Medicare Part B, the federal government reimburses the hospitals for the cost of care. Until 2018 the federal government reimbursed all hospitals for prescription drugs at the same rate. Then the federal government reduced the reimbursement rate for 340B hospitals, who serve underserved populations, by 28.5%. 340B hospitals can obtain drugs much more cheaply than other hospitals. Subclause I of the Medicare statute allows HHS to calculate reimbursement rates for covered drugs using acquisition **cost** "taking into account . . . **hospital acquisition cost survey data**." If acquisition cost survey data isn't available, Subclause II requires HHS to use the average **price** for the drug, "**adjusted** by [HHS] as necessary for purposes of this paragraph." Hospital acquisition cost data has never been available. So, until 2018, HHS used the average price metric to calculate one reimbursement rate. HHS points out that it has long understood average price to serve as a proxy for average acquisition cost. For 340B hospitals the average drug price exceeded the cost of the drugs. So, for 340B hospitals, per Subclause II, HHS "adjusted" payments "as necessary" based on cost. The American Hospital Association argued that reimbursing hospitals based on the cost of drugs is impermissible under Subclause II. "Because Congress required HHS to 'tak[e] into account' robust study data when setting [drug reimbursement] rates at average acquisition cost under subclause (I), the Hospitals argue, HHS cannot use its subclause (II) authority to adjust [the average sale price] in order to approximate acquisition cost." Applying *Chevron* deference, the D.C. Circuit concluded HHS's interpretation of Subclause II was reasonable. According to the D.C. Circuit: "For the Hospitals' argument to carry the day under *Chevron*, we would need to conclude that Congress unambiguously barred HHS from seeking to align reimbursements with acquisition costs under subclause (II), or that HHS's belief that it could do was unreasonable." "Given that the survey data contemplated by subclause (I) aims to assure the reliability of cost-acquisition data, we do not read the statute to foreclose an adjustment to [average sale price] under subclause (II) that is based on reliable cost measures of the kind undisputedly at issue here." The Supreme Courted added a second question regarding whether the American Hospital Association may even bring a lawsuit in this case. The relevant statute states "[t]here shall be no administrative or judicial review" of certain enumerated actions undertaken by HHS. HHS argues that changing the drug reimbursement rate is one of such unreviewable actions. The D.C. Circuit disagreed.

In *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita* the Court will decide whether private health insurance plans may treat dialysis coverage less favorably than other plan benefits. DaVita, a dialysis provider, claims that "Patient A" dropped her private health insurance with Marietta Memorial Hospital Employee Health Benefit Plan and switched to Medicare because her private plan offered less favorable dialysis coverage. In 1972, Congress made Medicare the primary payer for individuals with end-stage renal disease (ESRD). In 1981, Congress amended the Medicare Secondary Payer Act (MSPA) to require that private insurance plans covering ESRD are the primary payers for, currently, 30 months. Patient A has end-stage renal disease (ESRD) which requires dialysis. Patient A's health benefits plan disadvantages dialysis coverage by: considering all dialysis providers out-of-network, subjecting Patient A to

higher copayments, coinsurance amounts, and deductibles; reimbursing dialysis at 87.5% of the Medicare rate instead of paying the "reasonable and customary fee"; and subjecting dialysis to heightened scrutiny. DaVita argues that treating dialysis benefits less favorably than other benefits violates the MSPA. Marietta Memorial Hospital Employee Health Benefit Plan argues it hasn't violated the MSPA because it provides the same dialysis benefits to all plan participants and reimburses dialysis providers uniformly regardless of whether the patient has ESRD. The Sixth Circuit agreed with DaVita that the health plan may have violated three provisions of the MSPA. First, the MSPA states that a group health 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**." According to the Sixth Circuit, the "distinguishing feature of being diagnosed with ESRD is one's significant need for renal dialysis. Thus, the Plan discriminates against ESRD patients based on their need for dialysis by targeting the primary treatment that individuals with ESRD (1) need exclusively, with the exception of rare, non-ESRD patients, and (2) need with far greater frequency than those few non-ESRD dialysis-users." The Sixth Circuit also concluded that the "or in any other manner" language in the MSPA could support a disparate impact claim against the plan. The Sixth Circuit opined that the plan in this case "may have devised a reimbursement system that has the effect of singling out ESRD patients." Third, the MSPA states that a group health plan "**may not take into account** that an individual is entitled to or eligible for [Medicare benefits due to ESRD]" during the thirty-month period when the plan is primary to Medicare. According to the Sixth Circuit this provision may be violated because: "DaVita's central allegation in this case is that ESRD patients . . . are singled out for differential treatment because their costs are expensive and could be shifted to Medicare. If DaVita shows, through discovery, a 'near-perfect overlap' between Medicare-entitled patients (via ESRD diagnosis) and dialysis patients, then it may show that, compared to other Plan enrollees, Medicare-entitled individuals are subject to reduced benefits."

Intervention cases

In *Arizona v. San Francisco City and County of California* the Supreme Court will decide whether states with interests should be permitted to intervene to defend a rule when the United States ceases to defend the rule. One of the grounds for inadmissibility into the United States per the Immigration and Nationality Act (INA) is if a person is likely to become a "public charge." This term isn't defined in the INA. Using the notice and comment rulemaking process, in 2019 the Trump administration defined "public charge" more broadly than guidance from the Clinton administration. San Francisco and many others sued the Trump administration over the definition in federal courts throughout the United States. In February of 2021 the Supreme Court agreed to hear a case from the Second Circuit to decide whether the definition was unlawful. Shortly thereafter, the Biden administration decided not to defend the rule. It sought and received dismissal of all the challenges to the rule, including the challenge in the Supreme Court. In this case the Ninth Circuit had affirmed district court preliminary injunctions concluding the 2019

public charge rule was likely contrary to law. In January of 2021 the United States asked the Supreme Court to review the Ninth Circuit decision. On March 9, 2021, before the Court acted on the petition, the United States and San Francisco jointly asked the Supreme Court to dismiss the Ninth Circuit petition, which it did. The next day Arizona and 12 other states, which had not participated in the case previously, asked if they could intervene in the Ninth Circuit case so that they could petition the Supreme Court to review the Ninth Circuit decision. The Ninth Circuit denied Arizona's motion to intervene without issuing an opinion. A dissenting judge would have granted it. Applying the Federal Rules of Civil Procedure governing intervening, Judge Van Dyke concluded Arizona met all the requirements which include timeliness, having a "significant protectable interest" related to the litigation that may be impaired or impeded depending how the litigation is resolved, and whether existing parties will adequately represent the applicant's interests.

In *Berger v. North Carolina State Conference of the NAACP* the U.S. Supreme Court will decide whether the North Carolina legislature has a right to intervene in a lawsuit to defend North Carolina's voted ID law when the North Carolina Attorney General is already defending the law. In December of 2018 North Carolina adopted a new voter ID law. The North Carolina NAACP sued members of the state elections board in federal court claiming the law discriminates against black and Latino votes in violation of Section 2 of the Voting Rights Act. The North Carolina Attorney General represents state elections board members in the litigation. The President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives (Petitioners) sought to intervene in this lawsuit on behalf of the North Carolina General Assembly. Federal Rule of Civil Procedure 24 allows intervention as a matter of right where, among other factors, a potential intervenor's interest is not adequately represented by the existing parties. The Fourth Circuit applies a presumption of adequate representation when "the party seeking intervention has the same ultimate objective as a party to the suit." The Fourth Circuit concluded that the district court didn't abuse its discretion in concluding that the Attorney General has adequately defended the law. In their brief asking the Court to decide this case the Petitioners argue a "presumption of adequate representation is inconsistent with the text of Rule 24."

In *Cameron v. EMW Women's Surgical Center* the U.S. Supreme Court will decide whether an attorney general may be permitted to intervene in a lawsuit after a federal court of appeals invalidates a state statute when no other state actor will defend the law. In 2018 Kentucky passed an abortion law, and a lawsuit was brought against the Secretary of Health and Family Services to challenge the law. Lawyers from Health and Family Services and the Office of the Governor represented the Secretary in federal district court. Before oral argument in the Sixth Circuit, a Democratic governor (formerly the Attorney General) and a new Republican Attorney General were elected. The new Secretary retained lawyers from the Kentucky Attorney General's office to represent him in the Sixth Circuit. The Sixth Circuit ruled against the Secretary, and he decided not to appeal. The Attorney General moved to intervene in the case as a party to petition

the entire Sixth Circuit to rehear the case and the U.S. Supreme Court to hear it as well. The Sixth Circuit ruled against allowing the Attorney General to intervene because of a lack of timeliness. According to the Sixth Circuit: "the Attorney General's motion to intervene in this case comes years into its progress, after both the district court's decision and—more critically—this Court's decision. We rarely grant motions to intervene filed on appeal, and we agree with the D.C. Circuit that '[w]here . . . the motion for leave to intervene comes after the court of appeals has decided a case, it is clear that intervention should be even more disfavored.'"

Police cases

The question in *Vega v. Tekoh** is whether a police officer can be sued for money damages for failing to provide a *Miranda* warning. Terrance Tekoh was tried for unlawful sexual penetration. At trial he introduced evidence that his confession was coerced. A jury found him not guilty. Tekoh then sued the officer who questioned him, Deputy Carlos 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. The Ninth Circuit held Tekoh could bring a Section 1983 case. According to the Ninth Circuit, following *Miranda* there was much debate over whether *Miranda* warnings were "constitutionally required." In *Dickerson v. United States* (2000), the Supreme Court held that Congress could not overrule *Miranda* via a federal statute that provided confessions were admissible as long as they were voluntarily made, regardless of whether *Miranda* warnings had been provided. *Miranda*, the Supreme Court reasoned, was "a constitutional decision." According to the Ninth Circuit, the Supreme Court has subsequently "muddied" the waters since *Dickerson.* But since *Dickerson* only less than five Justices have said money damages aren't available for *Miranda* violations.

In *Thompson v. Clark** the Supreme Court will decide whether the rule that a plaintiff must await favorable termination before suing for unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence" or that the proceeding "ended in a manner that affirmatively indicates his innocence." Larry Thompson's sister-in-law, Camille, who was living with him, reported to 911 that Thompson was sexually abusing his week-old daughter. Thompson wouldn't let police into his apartment because they didn't have a warrant, blocked their path to entry, and allegedly shoved an officer. It was soon determined that Camille's report was false; she suffered from a mental illness which the officers "sensed" when they were in the apartment. Police arrested Thompson and he was charged with obstructing governmental administration and resisting arrest. The prosecutor dropped charges against him "in the interests of justice." The Second Circuit held that Thompson couldn't bring a malicious prosecution claim because he failed to prove that the prosecution against him terminated favorably. In a 2018 case, *Lanning v. City of Glens Falls*, the Second Circuit held that malicious prosecution claims require "affirmative indications of innocence to establish favorable termination." In this case Thompson's innocence wasn't established because the only reason the prosecutor gave for dismissing charges against him was "the interests of justice."

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 will decide whether the Environmental Protection Agency (EPA) had the authority to issue the Clean Power Plan (CPP) Rule. The Clean Air Act directs EPA to regulate powerplants that cause or contribute significantly to air pollution. In 2015 EPA adopted the CPP which regulates greenhouse gas emissions from existing fossil-fuel-fired powerplants. A key "building block" of CPP was "generation shifting" where emissions reductions occur because "the source of power generation shifts from higher-emission power plants to less-polluting sources of energy." In 2019 EPA repealed the CPP and replaced it with the Affordable Clean Energy (ACE) Rule. EPA concluded it had to repeal the CPP because "generation shifting" operates off site of power plants and "the plain meaning" of the Clean Air Act "unambiguously" limits emission reduction measures to only those "that can be put into operation *at* a building, structure, facility, or installation." A number of states, local governments, and others challenged the ACE Rule's conclusion that emission reduction measures must be implemented at and applied to power plants. West Virginia and others challenged the ACE Rule on other grounds. The D.C. Circuit held that the EPA didn't act lawfully in adopting the ACE Rule because repealing the CPP "hinged on a fundamental misconstruction" of the Clean Air Act, that generation shifting is not allowed. According to West Virginia, among other problems, the D.C. Circuit "gave short shrift to the clear-statement canons." West Virginia points to Judge Walker's dissent in this case where he opined that the lack of a clear statement from Congress allowing generation-shifting is fatal to the CPP: "Hardly any party in this case makes a serious and sustained argument that [the Clean Air Act] includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting. And because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it."

In *Biden v. Texas* the U.S. Supreme Court will decide whether a federal statute requires the Biden administration to implement the Migrant Protection Protocols (MPP). The Supreme Court will also decide whether the lower court erred in concluding that the Department of Homeland Security's (DHS) new decision to terminate MPP had no legal effect. Per MPP certain undocumented persons were removed to Mexico while awaiting removal proceedings. Before MPP, DHS release thousands of undocumented persons into the United States after instructing them to voluntarily appear for removal proceedings. On June 1, 2021, DHS terminated MPP. A federal district court ruled that DHS's decision to terminate MPP was arbitrary and capricious in violation of the Administrative Procedures Act and that terminating it violated the Immigration and Nationality Act (INA). On October 29, 2021, the DHS Secretary issued a new "38-page memorandum exhaustively describing his evaluation process and the reasons for his decision to [again] terminate" MPP. The Fifth Circuit held that terminating MPP violates the INA. 8 U.S.C. § 1225(b)(2)(A) states that an undocumented person "who is an applicant for admission" "*shall* be detained" if the person "is not clearly and beyond a doubt entitled to be admitted." Section

1225(b)(2)(C) states that if such a person arrives from Mexico or Canada the Attorney General "*may* return" the person to Mexico or Canada pending removal proceedings. The Fifth Circuit read 8 U.S.C. § 1225(b)(2)(A)'s "shall" language to require detention for undocumented persons seeking admissions. And it read Section 1225(b)(2)(C)'s "may" language as allowing "contiguous-territory return" (to Mexico or Canada) as a "permissible alternative to otherwise-mandatory detention." According to the Fifth Circuit, because DHS lacks the resources to detain every undocumented person seeking admissions to the United States at the southern border it must return such persons to Mexico. It must therefore implement MPP. Before the Fifth Circuit the United States argued that its October 29 memo cured the defects the district court identified in its June 1 decision, rendering the case moot. The Fifth Circuit rejected this argument concluding the October 29 memo has "*zero l*egal effect." According to the Fifth Circuit the district court vacated the June 1 decision rendering it void and meaning DHS couldn't rescind it.

The question the U.S. Supreme Court will decide in *Torres v. Texas Department of Public Safety* is whether a state may be sued in state court for allegedly violating the Uniform Services Employment and Reemployment Act (USERRA). Texas argued it was immune from such a lawsuit, and the Texas Court of Appeals agreed. Leroy Torres was employed by the Texas Department of Public Safety (DPS). After he finished a deployment in Iraq, which left him with a lung condition, he tried to get a different position with DPS. DPS only offered him his old job on a temporary basis. He sued DPS in state court alleging it violated USERRA by failing to offer him a job that would accommodate his service-related disability. Per the doctrine of sovereign immunity, private parties can't sue states in state court without their consent unless Congress has validly waived sovereign immunity. Congress must do so unequivocally, and relevant to this case, "pursuant to a constitutional provision granting Congress the power to abrogate." The Texas Court of Appeals held that Torres could not sue DPS in state court because Congress can't validly abrogate a state's sovereign immunity under its Article I War Powers. USERRA was "arguably" enacted pursuant to such authority. In *Alden v. Maine* (1999), the Supreme Court held that "[t]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." In that case the Supreme Court was considering whether Congress could validly abrogated Maine's sovereign immunity in the federal Fair Labor Standards Act (FLSA). The Supreme Court concluded it could not. After reviewing the "history, practice, precedent, and structure of the Constitution," the Supreme Court concluded that the states' "immunity from private suit in their own courts" is "beyond the congressional power to abrogate by Article I legislation." Before the Texas Court of Appeals Torres argued that *Alden*'s holding only applies to the "specific legislation considered in that case (the FLSA) and the specific Article I enumerated power under which that legislation was enacted (the interstate commerce clause)." "Torres contends that USERRA was enacted pursuant to Congress's War Powers, and that Congress could validly abrogate state immunity in its exercise of those powers because there is 'compelling evidence' that the States 'were required to surrender' War Powers to Congress 'pursuant to the constitutional design.'" The Texas Court of Appeals refused to read *Alden* narrowly.

In *United States v. Washington* the Supreme Court will decide whether Washington State may adopt a workers' compensation statute which applies exclusively to federal contract workers. Washington's statute applies to federal contractors working at Hanford, a decommissioned federal nuclear production site covering over 500 square miles in the state. It is easier for workers covered by the Hanford program to demonstrate they are entitled to benefits than those covered by Washington's regular workers' compensation program. The United States argues that this statute violates the doctrine of intergovernmental immunity. Per this doctrine, which derives from the Constitution's Supremacy Clause, state laws are invalid if they regulate the United States directly or discriminate against the federal government. The Ninth Circuit held that Washington state's statute doesn't violate the doctrine of intergovernmental immunity because it falls within 40 U.S.C. 3172(a)'s waiver of governmental immunity. Section 3172 permits the state authority charged with enforcing workers' compensation laws to apply those laws to federal land and facilities within the state "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State." Before the Ninth Circuit the United States argued that the phase "in the same way and to the same extent" is a "very limited waiver" of immunity. According to the United States, this text and the Court's opinion in *Goodyear Atomic Corp. v. Miller* (1988), "strongly suggest" that Section 3172 authorizes only the "extension of generally applicable laws," rather than "discrete" workers' compensation state laws that "single out" the federal Government and its contractors. The Ninth Circuit disagreed opining: "The plain text of § 3172 does not purport to limit the workers' compensation laws for which it waives intergovernmental immunity to only those that are 'generally applicable.'"

In *Cummings v. Premier Rehab Keller** the Supreme Court will decide whether people who are discriminated against in violation of Title VI, Title IX, Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, or the Affordable Care Act may sue for emotional distress damages. All these statues expressly incorporate the private right of action available to victims of discrimination under Title VI. Jane Cummings has been deaf since birth and is legally blind. She communicates mostly through American Sign Language (ASL). She contacted Premier, which offers physical therapy services, to treat her chronic back pain. She repeatedly requested that Premier provide an ASL interpreter, but it refused. She sued Premier under the Rehabilitation Act and the ACA for disability discrimination and sought emotional distress damages. The Fifth Circuit held that emotional distress damages aren't available under these statutes. The Rehabilitation Act and the ACA are Spending Clause legislation. According to the Fifth Circuit, the Supreme Court has "repeatedly" likened Spending Clause legislation to contract law—"in return for federal funds, the [recipients] agree to comply with federally imposed conditions." In *Barnes v. Gorman* (2002), the Supreme Court explained compensatory damages are available under Spending Clause legislation because federal-funding recipients are "on notice" that accepting such funds exposes them to liability for monetary damages under general contract law. In *Barnes*, the Supreme Court also held that punitive damages *aren't* available under Spending Clause legislation because they aren't generally available for breach of contract. So, federal funding recipients aren't "on notice" that they could be liable for punitive

damages. According to the Fifth Circuit, emotional distress damages, like punitive damages are "traditionally unavailable in breach-of-contract actions." So, the court held, federal-funding recipients aren't on notice of them and can't be held liable for them.

In *Oklahoma v. Castro-Huerta* the U.S. Supreme Court will decide whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country. Per the Major Crimes Act the federal government has exclusive authority to prosecute certain felonies committed by Indians in Indian country. The General Crimes Act provides the federal government with authority to prosecute general federal criminal law violations where either the defendant or the victim was an Indian and the other party was not. In *McGirt v. Oklahoma* (2019) the Court held that historical Creek territory in Oklahoma constituted Indian country for purposes of the Major Crimes Act, meaning the state has no authority to prosecute such crimes committed by Indians in Indian country. After *McGirt*, in *Bosse v. State* the Oklahoma Court of Criminal Appeals held that the "clear language" of the General Crimes Act preempts state prosecutions for crimes committed by non-Indians against Indians in Indian country. In *Oklahoma v. Castro-Huerta* Victor Castro-Huerta, who is non-Indian, was convicted in state court of child neglect occurring in Indian country (per *McGirt*) against his step-daughter, who is Indian. Relying on *Bosse*, the Oklahoma Court of Criminal Appeals concluded Oklahoma lacked jurisdiction to prosecute this case. The General Crimes Act states that, "[e]xcept 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." Oklahoma argues that "[n]othing in that text acts to relieve a State of its prosecutorial authority over non-Indians in Indian country. As the Court has explained, the phrase 'sole and exclusive jurisdiction' is used to 'describe the laws of the United States' that extend to Indian country; it does not concern the discrete question of who has prosecutorial authority within Indian country."

In *Ramirez v. Collier* the U.S. Supreme Court may decide whether Texas prison officials violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by disallowing John Henry Ramirez's spiritual advisor to vocalize prayers and lay his hands on Ramirez as Ramirez is executed by lethal injection. The Fifth Circuit ruled against Ramirez. Judge Owens noted that the Federal Bureau of Prisons would not allow Ramirez's requests. Judge Higginbotham pointed out that among other states using lethal injection "we find a nigh universal reluctance to allow individuals access to the execution chamber beyond the medical [and security] team." Judge Dennis dissented. He stated RLUIPA grants "expansive protection for religious liberty," offering inmates "greater protection" than the Supreme Court's First Amendment precedents. He concluded Ramirez "made a strong showing that he is likely to succeed on the merits" of his RLUIPA claim. RLUIPA states that the government shall not "impose a substantial burden" on an inmate's "religious exercise" unless the government shows that imposing such a burden can withstand strict scrutiny, meaning the policy "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental

interest." Turning to recent Supreme Court "shadow-docket" decisions, Judge Dennis concluded that Ramirez's religious exercise was substantially burdened. In *Gutierrez v. Saenz* (2020) and *Dunn v. Smith* (2021), Texas and Alabama, respectively, disallowed a spiritual advisor or minister to be present during an execution. In *Gutierrez,* the Supreme Court directed the district court to make factual findings regarding "whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution." In *Smith,* the Supreme Court allowed an order to stay in effect preventing Smith's execution from taking place without a minister present. Judge Dennis further opined that "no doubt . . . security of an execution is a 'compelling governmental interest.'" But, he stated, Texas officials were unable to meet the "demanding and specific burden" that Texas's policy of no vocalizing or laying hands is the "least restrictive means" available to achieve security. According to Judge Dennis: "[T]he State has largely offered general concerns about security." "It is not enough, as Chief Judge Owen and Judge Higginbotham suggest, for the State to argue that its policy is consistent with the Federal Bureau of Prisons' policy. Under RLUIPA and pertinent Supreme Court precedent, the State needs to show why its policy disallowing Pastor Moore from uttering any audible prayer or engaging in any touching, as applied specifically to Ramirez, is the least restrictive means of achieving its compelling interest."

In *Cassirer v. Thyssen-Bornemisza Collection Foundation* the U.S. Supreme Court will decide whether a federal court hearing state law claims brought under the Foreign Sovereign Immunities Act must apply the forum state's choice-of-law rules to determine what substantive law governs the claims, or whether it may apply federal common law. In 1939, the Nazis forced Lilly Cassirer to "sell" a painting by Camille Pissarro (paid to a blocked account she could never access) so that she could obtain exit visas for herself and her husband to flee Germany. In 2000, Lilly's grandson, Claude Cassirer, discovered that the Thyssen-Bornemisza Collection (TBC), a Spanish Museum, had the painting. To get the painting back, he sued TBC under the Foreign Sovereign Immunities Act in federal court asserting claims under state law. The Foreign Sovereign Immunities Act provides that where a foreign nation is not immune from jurisdiction in the courts of the United States, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." The Ninth Circuit applied Spanish law rather than California state law to decide the merits of the case. It concluded that because TBC didn't actually know that the painting was stolen it had good title to it and didn't have to return it to Claude. The Ninth Circuit applied federal common law choice-of-law rules to determine that Spanish law applied in this case. The Ninth Circuit's reasoning for why it applied federal common law was brief: "This Court has held that, when jurisdiction is based on the FSIA, 'federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws.'" Under the Second Restatement, Spain's substantive law governed TBC's claim that it was the rightful owner of the painting.

In *Viking River Cruises v. Moriana* the U.S. Supreme Court will decide whether an arbitration agreement waiving the right to bring a class action can be enforced where the employee brings a class action as a private attorney. Angie Moriana, a sales representative for Viking River Cruises, agreed any dispute arising out of her employment would be subject to arbitration. She also agreed to waive any right to bring a "representative" employment action against Viking, including a private attorney general action (PAGA). California's PAGA allows individuals to sue employers on behalf of themselves and others as private attorneys general. Moriana sued Viking for various labor code violations on behalf of the state and "all other similarly situated aggrieved employees" under PAGA. The California Court of Appeals held that the PAGA class/representative claims could not be compelled to individual arbitration. In 2014 in *Iskanian v. CLS Transportation Los Angeles, LLC* the California Supreme Court held that arbitration agreements that waive the right to bring PAGA representative actions in any forum are unenforceable. In *Epic Systems Corp. v. Lewis* (2018) the Supreme Court held that agreements requiring employees to arbitrate claims individually (and disallowing class actions) are enforceable. Viking argued that the Supreme Court's decision in *Epic* overruled *Iskanian*. The California Court of Appeals disagreed. It noted that *Epic* wasn't a PAGA case and "since *Epic* California courts continue to find private predispute waivers of PAGA claims unenforceable." Also, the California Court of Appeals previously reasoned the cause of action in *Epic* "differs fundamentally from a PAGA claim" because the real party in interest in a PAGA claim is the state.

In *Ysleta del Sur Pueblo v. Texas* the U.S. Supreme Court will decide whether federal law allows Texas to impose its bingo regulations on the Ysleta del Sur Pueblo Indian tribe. The Ysleta del Sur Pueblo Indian tribe owns the Speaking Rock Entertainment Center in El Paso, Texas. Texas concluded its electronic machines and live-called bingo did not comply with state law and bingo regulations. The Pueblo claimed their bingo operations doesn't have to comply Texas's regulations. The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987 restored the Pueblo tribe's federal tribal status. It prohibits the tribes from conducting "[a]ll gaming activities which are prohibited by the laws of the State of Texas." Texas argued that the Restoration Act controls the outcome of this case. According to Texas, per the Restoration Act, Texas gaming law "functions as surrogate federal law" on the land of Restoration Act tribes. A year after the Restoration Act was passed Congress enacted the Indian Gaming Regulatory Act (IGRA). IGRA allows Indian tribes "to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." The Pueblo argued that the IGRA controls in this case because the Restoration Act and the IGRA can't be applied harmoniously. The Restoration Act disallows gaming activities prohibited by state law. But Texas law regulates bingo, it doesn't prohibit it. The Fifth Circuit ruled in favor of Texas. The Fifth Circuit relied on a 25-year-old circuit case involving the same parties, which it described as "squarely on point." In *Ysleta I* the Fifth Circuit

held that "Congress—and the Tribe—intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas."

In *United States v. Vaello-Madero* the Supreme Court will decide whether Congress violated the constitution by failing to extend Supplemental Security Income (SSI) to Puerto Rico. SSI is a federal cash benefit program available to low-income individuals who are older than 65, blind, or disabled, paid for out of the general treasury. The SSI statute only allows "resident[s] of the United States" in the 50 states, DC, and the Northern Mariana Islands to receive SSI. The challenger in this case argues that the federal government has violated the equal-protection component of the Fifth Amendment's Due Process Clause by not extending SSI to residents of Puerto Rico. Discrimination in "economics and social welfare" must be "rationally related to a legitimate government interest" to be constitutional. The First Circuit rejected both reasons offered by the United States for excluding Puerto Rico residents from SSI. First, the federal government pointed out that Puerto Rico residents don't generally pay federal income tax. However, the First Circuit noted that Puerto Rico residents have "consistently made [payments to the federal treasury] in higher amounts than taxpayers in at least six states." Second, the federal government argued Puerto Rico residents should be excluded from SSI because of the cost of expanding the program. While the First Circuit acknowledged that cost may be a consideration "to improve the protection afforded to the entire benefited class," cost can't be the only factor. Moreover, deference to cost is inapplicable in this case, "where an entire segment of the would-be benefitted class is excluded."