

State & Local Legal Center



## Supreme Court Preview 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.

In its 2021-22 term the U.S. Supreme Court has already agreed to hear a case involving abortion and a case involving guns. Adding to the intrigue of these cases on controversial topics is that the questions presented in both cases are very broad. In the abortion case the Court may significantly narrow *Roe v. Wade*, if not overturn it. In the gun case the Court may rule that states and local governments can't limit concealed-carry permits based on cause. This article summarizes these two cases important for the states along with a Medicaid case and a school choice case.

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."

In [\*New York State Rifle and Pistol Association v. Corlett\*](#)\* the 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.

Relying on circuit precedent, the Second Circuit ruled this requirement doesn’t violate the Second Amendment. The Second Circuit cited to *Kachalsky v. County of Westchester* (2012), where it 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.”

In [\*Gallardo v. Marsteller\*](#)\* the 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.”

In *Carson v. Makin* the 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.

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.”

## **Conclusion**

Many speculate that next term the U.S. Supreme Court will issue sweeping conservative rulings in the abortion and gun cases. Only time will tell. During the 2020-21 term the Court issued mostly narrow, non-6-3 rulings in its most controversial cases. Regardless of how these two

particular cases are decided, as always, next term the Court will hear many other cases important to the states, like the Medicaid case, that aren't as likely to be decided on ideological lines.