

**Supreme Court Midterm for Local Governments 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 [*New York State Rifle and Pistol Association v. Corlett*](https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-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 a unanimous opinion in [*Houston Community College v. Wilson*](https://www.supremecourt.gov/opinions/21pdf/20-804_j426.pdf), 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 [*City of Austin, Texas v. Reagan National Advertising*](https://www.supremecourt.gov/opinions/21pdf/20-1029_i42k.pdf)\* 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*](https://www.supremecourt.gov/opinions/21pdf/20-1800_7lho.pdf)\* 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, stand 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 constitutes 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 [*Kennedy v. Bremerton School District*](https://www.scotusblog.com/case-files/cases/kennedy-v-bremerton-school-district-2/),\* 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.”

**Police cases**

The question in [*Vega v. Tekoh*](https://www.scotusblog.com/case-files/cases/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 a 6-3 decision in [*Thompson v. Clark*](https://www.supremecourt.gov/opinions/21pdf/20-659_3ea4.pdf)\* 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*](https://www.supremecourt.gov/opinions/21pdf/20-1539_09m1.pdf) 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*](https://www.supremecourt.gov/opinions/21pdf/20-1668_19m2.pdf)*,* 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*](https://www.scotusblog.com/case-files/cases/west-virginia-v-environmental-protection-agency/) 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](https://www.supremecourt.gov/DocketPDF/20/20-1530/176915/20210429133443663_2021.04.29%20-%20West%20Virginia%20v.%20EPA%20Petition.pdf), 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 [*Cummings v. Premier Rehab Keller*](https://www.supremecourt.gov/opinions/21pdf/20-219_1b82.pdf)*\** 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*](https://www.scotusblog.com/case-files/cases/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*](https://law.justia.com/cases/oklahoma/court-of-appeals-criminal/2021/pcd-2019-124.html)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*](https://www.scotusblog.com/case-files/cases/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](https://www.supremecourt.gov/DocketPDF/21/21-429/192789/20210917145304296_Castro_pet.pdf) 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.”