The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.

*Indicates a case where the SLLC has filed or will file an amicus brief.

**Big cases**

In *Rucho v. Common Cause* the Supreme Court held 5-4 that partisan gerrymandering claims are non-justiciable—meaning that a federal court cannot decide them. Chief Justice Roberts wrote the majority opinion which his conservative colleagues joined. According to the Chief Justice for federal courts to “inject [themselves] into the most heated partisan issues” by deciding partisan gerrymandering claims “they must be armed with a standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’” The inability of the Court to do just that is why the majority concluded these claims simply can’t be brought. According to the Court: “plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.”

In *Department of Commerce v. New York* five Justices held that the reasons Commerce Secretary Wilbur Ross gave for adding the citizenship question to the 2020 census were pretextual in violation of the Administrative Procedures Act (APA). Since 1950 the decennial census has not asked all households a question about citizenship. In a March 2018 memo Secretary Ross announced he would reinstate the question at the request of the Department of Justice (DOJ), “which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (VRA).” But additional discovery revealed the following: “that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency
would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.” The APA requires that federal agencies don’t act arbitrarily and capriciously. Here, according to the Court, “viewing the evidence as a whole,” Ross’s decision to include the citizenship question “cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA.” Before reaching this conclusion, a unanimous Court concluded that at least the states challenging inclusion of the question had standing because an undercount will result in the loss of federal funds. The Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct.” According to Court, the Enumeration Clause does not provide a basis to set aside the Secretary’s decision because it “vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’” and Congress “has delegated its broad authority over the census to the Secretary.” The Court held that adding the citizenship question to the census isn’t a question “committed to agency discretion by law,” that is unreviewable under the APA. Finally, the Court held the Secretary’s decision to add the question wasn’t “arbitrary and capricious” in violation of the APA because “evidence before the Secretary supported that decision.”

**States’ rights/state sovereignty**

In a 7-2 decision in *Gamble v. United States* the Court didn’t overrule the “dual-sovereignty” doctrine. The Double Jeopardy Clause provides that no person may be “twice put in jeopardy” “for the same offence.” Per the “dual-sovereignty” doctrine, the Supreme Court has long held that a “crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign.” Terance Gamble was prosecuted for and convicted of possession of a firearm by a convicted felon under both Alabama and United States law. He argued the “dual-sovereignty” doctrine should be overturned because founding-era common law forbid successive prosecutions by different sovereigns. Justice Alito, writing for the majority of the Court, disagreed. Before discussing founding-era common law, Justice Alito noted the text of the Double Jeopardy Clause protects jeopardy “for the same offence” not for the same conduct or actions. “[A]n ‘offence’ is defined by a law, and each law is defined by a sovereign.” Justice Alito also noted the Court has recognized the “dual-sovereignty” doctrine since 1847. Regarding common law, Justice Alito wasn’t convinced it was in Gamble’s favor. Regardless, *stare decisis* (let the decision stand) “is another obstacle.” Finally, the majority rejected the argument that incorporating the Double Jeopardy Clause against the states “washed away” the “dual-sovereignty” doctrine. Interpretation of the Double Jeopardy Clause “long included the dual-sovereignty doctrine, and there is no logical reason why incorporation should change it.”

In *Franchise Tax Board of California v. Hyatt* (Hyatt III) the Supreme Court overturned precedent to hold 5-4 that states are immune from private lawsuits brought in courts of other states. Since 1993 Gilbert Hyatt and the Franchise Tax Board of California (FTB) have been involved in a dispute over Hyatt’s 1991 and 1992 tax returns. FTB claims that Hyatt owes California taxes from income he earned in California. Hyatt claims he lived in Nevada during the relevant time period. Hyatt sued FTB in Nevada claiming FTB committed a number of torts during the audit. At the case’s third trip to the Supreme Court FTB claimed that it can’t be sued
in Nevada’s courts. In Nevada v. Hall (1979) the Supreme Court held that a state may be sued in the courts of another state without its consent. In Hyatt III the Supreme Court overruled Nevada v. Hall. Hyatt argued that before the Constitution was ratified states “had the power of fully independent nations to deny immunity to fellow sovereigns,” meaning other states could be sued in a state’s courts, and that the Constitution didn’t “alter[] that balance among the still-sovereign states.” A majority of the Supreme Court disagreed. According to Justice Thomas, writing for the majority: “The problem with Hyatt’s argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional ‘limitation[s] on the sovereignty of all of its sister States.’ One such limitation is the inability of one State to hale another into its courts without the latter’s consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design.”

In a unanimous decision in Timbs v. Indiana* the Supreme Court held that the Eighth Amendment’s Excessive Fines Clause is “incorporated” or applicable to states and local governments. Indiana sought to forfeit Tyson Timbs’ Land Rover which he used to transport heroin. The trial court concluded the forfeiture was unconstitutional under the Eighth Amendment’s Excessive Fines Clause because the value of the vehicle well exceeded the maximum statutory fine for the felony Timbs plead guilty to. The Indiana Supreme Court held the Excessive Fines Clause doesn’t apply to the states. In an opinion written by Justice Ginsburg the Supreme Court disagreed holding that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment. The Excessive Fines Clause is “fundamental to our scheme of ordered liberty” and “deeply rooted in the Nation’s history and tradition” because it traces its “venerable lineage” back to at least the Magna Carta in 1215, was reaffirmed in the English Bill of Rights in 1689, and was adopted almost verbatim from there in the Eighth Amendment. When the Fourteenth Amendment was adopted in 1868, 35 of the 37 states prohibited excessive fines. Today “all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.” The protection against excessive fines has been necessary “throughout Anglo-American history” because “exorbitant tolls undermine other constitutional liberties.”

**First Amendment**

The Bladensburg Peace Cross may stay the Supreme Court ruled in a 7-2 decision in American Legion v. American Humanist Association.* In 1918, residents of Prince George’s County, Maryland, decided to erect a memorial to honor soldiers from the county who died in World War I. The monument, completed in 1925, is a 32-foot tall Latin cross that sits on a large pedestal. Among other things, it contains a plaque listing the names of 49 local men who died in the war. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area. In 1961, the Maryland-National Capital Park and Planning Commission acquired the cross and the land it is on in order to preserve it and address traffic-safety concerns. The American Humanist Association sued the Commission claiming the cross’s presence on public land and the Commission’s maintenance of it violates the Establishment Clause. The
Supreme Court disagreed. Significantly, the Court stated that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.” According to Justice Alito, the Bladensburg Cross doesn’t violate the constitution first because it “carries special significance in commemorating World War I.” Second, “with the passage of time” the cross “has acquired historical importance.” Third, the monument didn’t “deliberately disrespect[] area soldiers who perished in World War I” as no evidence indicates Jewish soldiers were excluded. Finally, according to the majority, “it is surely relevant that the monument commemorates the death of particular individuals.” While the Court acknowledged that the cross “is undoubtedly a Christian symbol,” it opined “that fact should not blind us to everything else that the Bladensburg Cross has come to represent.”

In *Nieves v. Bartlett* the Supreme Court held 6-3 that the existence of probable cause generally defeats a First Amendment retaliatory arrest case. While police officer Luis Nieves and Russell Bartlett have different versions of what happened at Artic Man, a weeklong winter sports festival in Alaska, even the Ninth Circuit agreed that Sergeant Nieves had probable cause to arrest Bartlett. Sergeant Nieves knew Bartlett had been drinking and talking loudly when he saw Bartlett stand close to another officer and the officer push Bartlett away. But Bartlett claimed Sergeant Nieves really arrested him in violation of his First Amendment free speech rights because he had refused to speak to Sergeant Nieves previously, which Bartlett reminded Sergeant Nieves of when he was being arrested. The Supreme Court held that probable cause generally defeats a retaliatory arrest claim. Chief Justice Roberts, writing for the majority, relied primarily on *Hartman v. Moore* (2006), where the Court held that probable cause defeats retaliatory prosecution claims. In *Hartman*, the Court noted that proving causation is difficult in retaliatory prosecution cases because “the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity.” Similarly, it is difficult to determine if protected speech is the cause of an arrest because “protected speech is often a ‘wholly legitimate consideration’ for officers when deciding whether to make an arrest.” The Court’s caveat is the “no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”

In a 5-4 opinion in *Manhattan Community Access Corporation v. Halleck* the Supreme Court held that the First Amendment doesn’t apply to private entities running public access channels. New York City designated a private nonprofit, Manhattan Neighborhood Network (MNN), to operate the public access channels in Manhattan. MNN suspended two producers from its facilities and services after MNN ran a film they produced about MNN’s alleged neglect of the East Harlem community. The producers claimed MNN violated their First Amendment free speech rights when it “restricted their access to the public access channels because of the content of their film.” In an opinion written by Justice Kavanaugh the Court held that private operators of a public access cable channels aren’t state actors subject to the First Amendment. While the majority acknowledged that private entities may qualify as state actors in limited circumstances, including when the private entity performs a traditional, exclusive public function, the Court
concluded that exception doesn’t apply in this case. According to the Court, operating public access channels has not been “traditionally and exclusively” performed by government.

**Employment**

In *Fort Bend County, Texas v. Davis* the Supreme Court held unanimously that Title VII’s charge-filing requirement is not jurisdictional. Instead, it is “mandatory procedural prescription” that a court must consider if timely raised. According to the Court, Congress must clearly state a prescription is jurisdictional. Title VII’s charge-filing requirements “do not speak to a court’s authority,” or “refer in any way to the jurisdiction of the district courts.” Instead they “speak to . . . a party’s procedural obligations. They require complainants to submit information to the EEOC and to wait a specified period before commencing a civil action.”

In *Mt. Lemmon Fire District v. Guido* the Supreme Court ruled 8-0 that the federal Age Discrimination in Employment Act (ADEA) applies to state and local government employers with less than 20 employees. The term “employer” is defined in the ADEA as a “person engaged in an industry affecting commerce who has 20 or more employees.” The definition goes on to say “[t]he term also means (1) any agent of such a person, and (2) a State or political subdivision of a State.” The Supreme Court, in an opinion written by Justice Ginsburg, held that the phrase “also means” adds a new category to the definition of employer (that contains no size requirement) rather than clarifies that states and their political subdivisions are a type of person contained in the first sentence. The Court reasoned that “also means” is “additive” rather than “clarifying.” The Court noted the phrase “also means” is common in the U.S. Code “typically carrying an additive meaning.” Finally, the statute pairs states and their political subdivisions with agents, “a discrete category that, beyond doubt, carries no numerical limitation.”

**Section 1983/civil rights**

In *McDonough v. Smith* the Supreme Court held 6-3 that the statute of limitations for a fabrication of evidence claim begins running upon acquittal. Edward McDonough, commissioner of the county board of elections, processed forged absentee ballots, which he claimed he didn’t know were forged. Youel Smith was appointed to investigate and prosecute the matter. McDonough claims Smith “falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis to link McDonough to relevant ballot envelopes.” The first trial involving McDonough ended in a mistrial. He was acquitted in a second trial. Just under three years after his acquittal McDonough sued Smith claiming Smith violated his constitutional rights by using fabricated evidence against him. Smith argued McDonough’s case was untimely because the three-year statute of limitations began to run when the evidence was used against him. In an opinion written by Justice Sotomayor the Supreme Court held that the statute of limitations for a fabricated-evidence claim does not begin to run until the criminal proceedings against the defendant terminates in his or her favor. To determine when the statute of limitations should begin running the Court first turned to “common-law principles governing analogous torts.” The most analogous claim to fabrication of evidence is malicious prosecution. The statute of limitations in malicious prosecution cases does not begin to run until the underlying criminal proceedings are favorably resolved.
In *City of Escondido v. Emmons* the Supreme Court granted one police officer qualified immunity and instructed the Ninth Circuit to decide again whether another officer should have been granted qualified immunity. In April 2013 police arrested Maggie Emmons’ husband at their apartment for domestic violence. A few weeks later, after Maggie’s husband had been released, police received a 911 call from Maggie’s roommate’s mother, Trina. While Trina was on the phone with her daughter she overheard Maggie and her daughter yelling at each other and Maggie’s daughter screaming for help. When the officers knocked on the door no one answered but they were able to try to convince Maggie to open the door by talking to her through a side window. An unidentified male told Maggie to back away from the window. Officer Craig was the only officer standing outside the door when a man walked out of the apartment. Officer Craig told the man not to close the door but he did and he tried to brush past Officer Craig. Officer Craig stopped him, took him to the ground, and handcuffed him. The man was Maggie’s father, Marty Emmons. He sued Officer Craig and Sergeant Toth, another officer at the scene, for excessive force. The Ninth Circuit denied the officers qualified immunity in this case saying the “right to be free of excessive force was clearly established.” Regarding Sergeant Toth the Supreme Court held he should have been granted qualified immunity because he didn’t use any force against Emmons. Regarding Officer Craig the Court said the Ninth Circuit defined the right to be free from excessive force at too high a level of generality. Instead, the Ninth Circuit “should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances.” The lower court did cite to a Ninth Circuit case holding that persons have a right to be free from non-trivial force for engaging in passive resistance. But the Ninth Circuit “made no effort to explain how that case law prohibited Officer Craig’s actions in this case.” The Supreme Court vacated and remanded the Ninth Circuit’s denial of qualified immunity to Officer Craig.

**Preemption**

In 2009 in *Wyeth v. Levine* the Supreme Court held that federal law preempts state law failure to warn claims that a drug manufacturer failed to change a drug label if there is “clear evidence” the Food and Drug Administration (FDA) would not have approved the label change. In *Merck v. Albrecht* a unanimous Supreme Court held that a judge rather than a jury determines if the FDA would have approved the change. In this case more than 500 people who took Fosamax suffered atypical femoral fractures between 1999 and 2010. They claimed that Merck, the drug manufacturer, violated state law by failing to include a warning on the drug label until 2011. Merck claimed that their state law claims are preempted because the FDA would not have approved a change to the label warning about atypical femoral fractures until 2011. Both Merck and the FDA knew from the time the drug was approved in 1995 that it could theoretically cause atypical femoral fractures. But, according to Merck, until 2011 “both Merck and the FDA were unsure whether the developing evidence of a causal link between Fosamax and atypical femoral fractures was strong enough to require adding a warning to the Fosamax drug label.” And in 2008 and 2011 the FDA rejected Merck’s suggestion to add warning language about “stress fractures” for different reasons. The Third Circuit held that it is for a jury to decide whether the FDA, “in effect, has disapproved a state-law-required labeling change,” in which case the state law claims would be preempted. The Supreme Court disagreed in an opinion written by Justice
Breyer. According to the Court, this question is a legal one for a judge and not a jury. “The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination.”

The Supreme Court held 6-3 in *Virginia Uranium v. Warren* that Virginia’s statute prohibiting uranium mining isn’t preempted by the federal Atomic Energy Act (AEA). Virginia law “flatly” prohibits uranium mining in the state. The Supreme Court rejected Virginia Uranium’s arguments that the AEA preempts this ban. Looking at the text and the structure of the AEA the Court noted it grants “exclusive [federal] authority to regulate nearly every aspect of the nuclear fuel life cycle except mining.” Section 2021(k) states: “Nothing in this section [that is, §2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.” Virginia Uranium argued that under this provision any state law enacted for the purposes of protecting the public against “radiation hazards,” including Virginia’s uranium mining ban, is preempted. The plurality concluded the statute is much more narrow reasoning, “only state laws that seek to regulate the activities discussed in §2021 without an NRC agreement—activities like the construction of nuclear power plants—may be scrutinized to ensure their purposes aim at something other than regulating nuclear safety.” Virginia Uranium next argued that *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Commission* (1983) indicated the Court should look into the legislative intent to determine whether the Virginia legislature adopted the mining ban to address radiation safety. According to Justice Gorsuch: “It is one thing to do as *Pacific Gas* did and inquire exactly into state legislative purposes when state law prohibits a regulated activity like the construction of a nuclear plant, and thus comes close to trenching on core federal powers reserved to the federal government by the AEA. It is another thing to do as Virginia Uranium wishes and impose the same exacting scrutiny on state laws prohibiting an activity like mining far removed from the NRC’s historic powers.” Finally, the plurality rejected the argument that Virginia’s ban was preempted because it conflicts with the AEA. More specifically, Virginia Uranium argued that even if “the text of the AEA doesn’t touch on mining in so many words, but its authority to regulate later stages of the nuclear fuel life cycle would be effectively undermined if mining laws like Virginia’s were allowed.” According to the plurality, the text and the structure of the AEA don’t support this conflict preemption argument.

**Tax**

In *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust* the Supreme Court held unanimously that the presence of in-state beneficiaries alone does not allow a state to tax undistributed trust income where the beneficiaries have no right to demand that income and may never receive it. The Kimberley Rice Kaestner trust is governed by New York law and its trustee is a New York resident who has “absolute discretion” to distribute the trust. When the beneficiaries, Kimberley Rice Kaestner and her children, lived in North Carolina the state taxed the income of the trust even though no funds were distributed during the time period. The trust sued North Carolina seeking the $1.3 million it paid in taxes. The trust argued that the tax violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court agreed
with the trust that North Carolina lacked a sufficient minimum connection with the trust, based solely on the beneficiaries in-state residence, to tax its undistributed income. Writing for the Court, Justice Sotomayor noted that “when a tax is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset.” Here, the beneficiaries received no income from the trust, had no right to demand trust income, and could not necessarily count on receiving funds from the trust in the future.

In an unanimous decision the Supreme Court held in Dawson v. Steager that West Virginia violated a federal statute by taxing all the retirement benefits of former federal law enforcement employees but not certain state law enforcement employees. 4 U.S.C. § 111 allows states to tax the pay of federal employees only “if the taxation does not discriminate . . . because of the source of the pay or compensation.” James Dawson, a former U.S. Marshal, sued West Virginia alleging it violated this statute because it taxed his pension but not the pensions of certain state law enforcement employees. The West Virginia Supreme Court found no discrimination because relatively few state employees received the tax break and the statute’s intent was to benefit those state retirees not harm federal retirees. In an opinion written by Justice Gorsuch the Supreme Court struck down West Virginia’s statute and held that a state “violates §111 when it treats retired state employees more favorably than retired federal employees and no ‘significant differences between the two classes’ justify the differential treatment.” “West Virginia expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive.” And all parties agreed that there aren’t significant differences in the job duties of U.S. Marshals and the tax-exempt state law enforcement retirees.

**Capital punishment**

In Madison v. Alabama the Supreme Court held 5-3 that the Eighth Amendment prohibits a person who lacks a “rational understanding” due to mental illness for why the death penalty has been imposed to be put to death regardless of what mental illness the person is suffering from. Vernon Madison was sentenced to death for killing a police officer in 1985. Since then he has suffered a series of strokes and has been diagnosed with vascular dementia. He claims he no longer remembers the crime. In Ford v. Wainwright (1986), the Supreme Court held that the Eighth Amendment’s ban on cruel and unusual punishments disallows executing a person who has “lost his sanity” after sentencing. The Court “clarified the scope of that category in Panetti v. Quarterman [2007] by focusing on whether a prisoner can ‘reach a rational understanding of the reason for [his] execution.’” The majority of the Supreme Court agreed with Madison that be executed even if he could not remember his crime. Panetti “asks about understanding, not memory—more specifically, about a person’s understanding of why the State seeks capital punishment for a crime, not his memory of the crime itself.” Alabama initially argued that Madison could be executed because he suffers from dementia instead of psychotic delusions, which Ford and Panetti suffered from. Alabama ultimately conceded that a person suffering from dementia may be unable to rationally understand the reasons for his or her sentence. The Supreme Court agreed with Alabama that Panetti focuses on the effect of the mental disorder not its cause. The Supreme Court was unable to determine whether Madison’s execution could go
forward because the lower court didn’t determine whether Madison had a rational understanding of why Alabama sought to execute him.

In *Bucklew v. Precythe* the Supreme Court ruled 5-4 that Missouri wasn’t required to execute Russell Bucklew using a drug he claimed would cause him less pain due to his unusual medical condition, cavernous hemangioma. Bucklew was sentenced to death for killing a neighbor who was sheltering his former girlfriend and her children after she broke up with Bucklew. Cavernous hemangioma causes tumors to grow in Bucklew’s head, neck, and throat. He claims that the sedative Missouri intends to use in its lethal injection protocol will cause him feelings of suffocation and excoriating pain due to his disease for a longer amount of time than the alternative drug he suggests. The Eighth Amendment disallows “cruel and unusual punishment.”

The Supreme Court held in *Glossip v. Gross* (2015) that a state’s refusal to alter its lethal injection protocol may violate the Eighth Amendment if an inmate identifies a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain.” Bucklew first argued that he didn’t have to identify an alternative drug because his challenge wasn’t facial (applicable to all prisoners sentenced to death) but instead was only to the lethal injection protocol as applied to him. Justice Gorsuch, writing for the Court, disagreed noting that “Glossip expressly held that identifying an available alternative is ‘a requirement of all Eighth Amendment method-of-execution claims’ alleging cruel pain.” Bucklew ultimately identified nitrogen as an alternative drug. But the majority of the Court rejected it for two reasons. First, Bucklew failed to demonstrate Missouri could execute him “relatively easily and reasonably quickly” using nitrogen. Second, according to the Court, Missouri could legitimately refuse to switch drugs because nitrogen has never been used for an execution.

In an unauthored opinion in *Moore v. Texas II* the Supreme Court concluded Bobby James Moore has intellectual disability. According to the Supreme Court, “[a]t 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition.” For a court to find intellectual disability a person must have intellectual-functioning deficits and adaptive deficits that onset when the person was a minor. While the trial court found that Moore had adaptive deficits two or more standard deviations in all three adaptive skill sets (conceptual, social, and practical), the Texas Court of Criminal Appeals held that Moore had not proven that he “possessed the requisite adaptive deficits.” In *Moore v. Texas I* the Supreme Court criticized the Texas Court of Criminal Appeals for five errors including: overemphasizing Moore’s adaptive strengths, stressing Moore’s improved behavior in prison, concluding that Moore’s record of academic failure and child abuse detract from a “determination that his intellectual and adaptive deficits were related,” and “requiring Moore to show his adaptive deficits where not related to a personality disorder.” The final error the Supreme Court pointed to in *Moore I* was the Texas Court of Criminal Appeals relied on a number of factors from a 2004 Texas Court of Criminal Appeals court decision, *Ex parte Briseno*. The Supreme Court described factors as “having no grounding in prevailing medical practice,” and “invit[ing] ‘lay perceptions of intellectual disability’ and ‘lay stereotypes’ to guide assessment of intellectual disability.” In *Moore II* the Supreme Court held the Texas Court of Criminal Appeals made many of the same mistakes it made in its first decision. “We have found
in its opinion too many instances in which, with small variations, it repeats the analysis we
previously found wanting, and these same parts are critical to its ultimate conclusion.” With no
additional analysis, the Supreme Court agreed with Moore (and the prosecutor in this case) that
“on the basis of the trial court record, Moore has shown he is a person with intellectual
disability.”

Indian law

In 1868 the Crow Tribe ceded most of its territory in what is now Montana and Wyoming to the
United States in exchange for an agreement the Crow could “hunt on the unoccupied lands of the
United States.” Clayvin Herrera invoked this treaty to defend against a charge of off-season
hunting in Bighorn National Forest in Wyoming. In a 5-4 opinion in *Herrera v. Wyoming* the
Supreme Court held that the treaty’s hunting rights survived Wyoming’s statehood and that lands
in the Bighorn National Forest aren’t categorically “occupied” because they are in a national
reserve. Over 100 years ago in *Ward v. Race Horse* (1896) the Supreme Court ruled that
statehood extinguished hunting rights in an identical treaty between the Shoshone-Bannock
tribes and the United States. The Court in *Race Horse* relied on the fact that (1) new states were
admitted to the union on “equal footing” with existing states and (2) there was no evidence in the
treaty that Congress intended for treaty rights to continue in “perpetuity.” In 1999 in *Minnesota
v. Mille Lacs Band of Chippewa Indians* the Supreme Court explicitly rejected the “equal
footing” rationale of *Race Horse*. The Court in *Mille Lacs* also criticized the notion that treaty
rights fail to survive statehood if they are “temporary and precarious” because all treaty rights
can be unilaterally repudiated by Congress. According to the Supreme Court in *Herrera v.
Wyoming*, “although the decision in *Mille Lacs* did not explicitly say that it was overruling the
alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*’ analysis with the
Court’s prior reasoning in *Race Horse.*” Applying *Mille Lacs* rather than *Race Horse*, the Court
concluded Wyoming’s admission to the United States didn’t abrogate the Crow Tribe’s off-
reservation treaty hunting rights. “The Wyoming Statehood Act did not abrogate the Crow
Tribe’s hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty
itself defines the circumstances in which the right will expire. Statehood is not one of them. The
Court also concluded the Bighorn National Forest didn’t become categorically ‘occupied’ when
the national forest was created. Treaties are construed as “they would naturally be understood by
the Indians.” According to the Court, “[h]ere it is clear that the Crow Tribe would have
understood the word ‘unoccupied’ to denote an area free of residence or settlement by non-
Indians.”

In *Washington State Department of Licensing v. Cougar Den* the Supreme Court held 5-4 that a
treaty forbids the State of Washington from imposing a tax upon members of the Yakama Nation
that import fuel. An 1855 treaty between the United States and the Yakama Nation reserves to
the Yamakas “the right, in common with the citizens of the United States, to travel upon all
public highways.” A Washington statute taxes fuel importers who bring large quantities of fuel
into the state by ground transportation. Cougar Den is a wholesale fuel importer owned by a
Yakama member that transports fuel by truck from Oregon to Yakama-owned gas stations in
joined Justice Breyer’s plurality opinion that held this case involves a tax on travel with fuel. The tax violates the treaty for three reasons. First, the “in common with” treaty language could be read to mean that general legislation, like the legislation in this case, applies to Yakama and non-Yakama alike, but “that is not what the Yakama understood the words to mean in 1855.” Second, the historical record indicates the right to travel includes a right to travel with good for sale. Finally, imposing a tax upon travel with goods burdens the travel.

**Miscellaneous**

In a 5–4 opinion in *Knick v. Township of Scott* the Supreme Court held that a property owner may proceed directly to federal court with a takings claim. In *Knick* the Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985), which held that before a takings claim may be brought in federal court, a property owner must first seek just compensation under state law in state court. The Township of Scott adopted an ordinance requiring cemeteries, whether located on public or private land, to be open and accessible to the public during the day. Code enforcement could enter any property to determine the “existence and location” of a cemetery. The Constitution’s Takings Clause states that “private property [shall not] be taken for public use, without just compensation.” Rose Mary Knick sued the county in federal (rather than state) court claiming the ordinance was invalid per the Takings Clause after code enforcement went onto her property without a warrant looking for (and finding) a cemetery not open to the public during the day. In an opinion written by Chief Justice Roberts the Court overruled the state-litigation requirement of *Williamson County*. The Court reasoned the Takings Clause doesn’t say: “Nor shall private property be taken for public use, without an available procedure that will result in compensation.” The majority of the Court was willing to overturn precedent in this case because *Williamson County* wasn’t just “wrong.” “Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.

In *Mitchell v. Wisconsin* the Supreme Court held that generally when police officers have probable cause to believe an unconscious person has committed a drunk driving offense, warrantless blood draws are permissible. By the time the police officer got Gerald Mitchell from his car to the hospital to take a blood test he was unconscious. Wisconsin and twenty-eight other states allow warrantless blood draws of unconscious persons where police officers have probable cause to suspect drunk driving. Mitchell argued the police officer should have obtained a warrant before having his blood drawn. In *Missouri v. McNeely* (2013) the Court held that the fact that blood-alcohol evidence is always dissipating due to “natural metabolic processes” does not generally mean the exigent circumstances exception applies and warrantless BAC tests are allowed. But in *Schmerber v. California* (1966) the Court allowed a warrantless blood test of a drunk driver who had gotten into a car accident that “gave police other pressing duties,” because “‘further delay’ caused by a warrant application really ‘would have threatened the destruction of evidence.’” Reading these cases together Justice Alito, writing for a plurality of the Court, concluded an “exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.” According to the Court, unconsciousness does not just create pressing needs; it is
itself a medical emergency.” Instead of adopting a per se rule that no warrant is required when officers have probable cause an unconscious driver has driven drunk, the Court created a rebuttable presumption. “We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.”

In *Tennessee Wine and Spirits Retailers Association v. Thomas* the Supreme Court held 7-2 that Tennessee’s law requiring alcohol retailers to live in the state for two years to receive a license is unconstitutional. The dormant Commerce Clause prohibits state laws that unduly restrict interstate commerce. Section 2 of the Twenty-first Amendment prohibits the transportation or importation of alcohol into a state in violation of state law. Tennessee Wine and Spirits Retailers Association argued based on *Granholm v. Heald* (2005), where the Court struck down discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors, that §2 limits discrimination against out-of-state alcohol *products and producers* not alcohol distributors. The Court disagreed with this interpretation of *Granholm* writing, “On the contrary, the Court stated that the Clause prohibits state discrimination against all ‘out-of-state economic interests,’ and noted that the direct-shipment laws in question ‘contradict[ed]’ dormant Commerce Clause principles because they ‘deprive[d] citizens of their right to have access to the markets of other States on equal terms.’” Applying §2 the Court concluded Tennessee’s law is unconstitutional writing: “The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety.”

*Auer v. Robbins* (1997) deference, courts deferring to agencies’ reasonable interpretations of their ambiguous regulations, is alive following the Supreme Court’s decision in *Kisor v. Wilkie*. In part of the opinion joined by five Justices, the Supreme Court “reinforced” the limits of the *Auer* doctrine. Writing for herself, Justices Ginsburg, Breyer, Sotomayor, and Chief Justice Roberts, Justice Kagan explained exactly when *Auer* deference applies. First, a regulation must be “genuinely” ambiguous, meaning a court must exhaust all the “traditional tools” of constructing it including carefully considering its “text, structure, history, and purpose.” Second, an agency’s reading of the regulation must still be “reasonable,” meaning “it must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” Third, *Auer* deference is only available after a court makes an “independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.” According to the majority of the Court an agency interpretation of a regulation lacks “controlling weight” and should not be given *Auer* deference unless the interpretation is “authoritative” or its “official position.” The interpretation must also “in some way implicate” the agency’s “substantive expertise.” Finally, to receive *Auer* deference an agency’s reading of a rule must reflect “fair and considered judgment” instead of a “convenient litigating position” or “post hoc rationalization advanced” to “defend past agency action against attack.”

In an unauthored opinion in a case decided without oral argument, *Box v. Planned Parenthood*, the Supreme Court held that Indiana’s law disallowing fetal remains to be incinerated along with surgical byproducts is constitutional. The Seventh Circuit had invalidated this provision.
According to the Court, Planned Parenthood didn’t argue that this provision creates an undue burden on a woman’s right to obtain an abortion. Had Planned Parenthood argued so and had the Court agreed, it would have applied a more rigorous legal test, less deferential to Indiana’s law. Applying “ordinary rational basis review” the Court concluded the law was “rationally related to legitimate government interests.” The Supreme Court had previously acknowledged that a state has a “legitimate interest in the proper disposal of fetal remains.” According to the Court, Indiana’s law is rationally related, if not “perfectly tailored” to that interest. The Court didn’t decide whether Indiana may prohibit the “knowing provision of sex-, race-, and disability selective abortions by abortion providers.” The Court noted that only one federal appeals court has decided a case involving this issue. The Seventh Circuit stuck down this provision and its ruling will remain in effect.

The Supreme Court held that “critical habitat” under the Endangered Species Act (ESA) must also be habitat. In *Weyerhaeuser Co. v. United State Fish and Wildlife Service* the Court also held a federal court may review an agency decision not to exclude an area from critical habitat because of the economic impact. The United State Fish and Wildlife Service (Service) listed the dusky gopher frog as an endangered species. It designated as its “critical habitat” a site called Unit 1 in Louisiana owned or leased by Weyerhaeuser Company, a timber company. The frog hasn’t been seen at this location since 1965. As of today Unit 1 has all of the features the frog needs to survive except “open-canopy forests,” which the Service claims can be restored with “reasonable effort.” Weyerhaeuser argued Unit 1 could not be a “critical habitat” for the frog because it could not survive without an open-canopy forest. The Fifth Circuit disagreed holding that the definition of critical habitat contains no “habitability requirement.” The Supreme Court held unanimously that “critical habitat” must be habitat. The ESA states that when the Secretary lists a species as endangered he or she must also “designate any habitat of such species which is then considered to be critical habitat.” The Service argued that habitat includes areas like Unit 1 one which “require some degree of modification to support a sustainable population of a given species.” The Supreme Court sent this case back to the lower court to “interpret the term ‘habitat.’” The ESA requires the Secretary to consider the economic impact of specifying an area as a critical habitat and authorizes the Secretary to “exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” Weyerhaeuser Company claimed the Service failed to fully account for the economic impact of designating Unit 1. The lower court refused to review the Service’s decision-making process. The Supreme Court concluded it is reviewable. It “involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.”

In *Virginia House of Delegates v. Golden Bethune-Hill*, the Supreme Court held 5-4 that the Virginia House of Delegates lacks standing to appeal a ruling striking down Virginia’s redistricting plan because Virginia law does not allow it to displace the Attorney General and it is only a single chamber of a bicameral legislature. Voters sued a number of Virginia state agencies and elected officials over its state redistricting plan following the 2010 census. The Virginia House of Delegates intervened to defend the redistricting plan (but wasn’t a party who
must have standing). After losing before a three-judge court in 2018 the Virginia Attorney General decided not to appeal the case. The Virginia House wanted to defend the plan and keep litigating the case. The House first claimed it had standing to act as the state’s agent in litigation. Justice Ginsburg, writing for the majority, disagreed because “[a]uthority and responsibility for representing the State’s interests in civil litigation, Virginia law prescribes, rest exclusively with the State’s Attorney General.” The House next claimed that even if it lacked standing to appeal as the state’s agent it had standing “in its own right.” The Court’s majority responded: “This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law’s passage. The Court’s precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment.”

In Gundy v. United States the Supreme Court held 5-3 that the Sex Offender Registration and Notification Act’s (SORNA) delegation of authority to the Attorney General to apply SORNA’s requirements to pre-Act offenders doesn’t violate the constitution’s nondelegation doctrine. SORNA states “[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter.” In 2007 the Attorney General issued an interim rule stating that SORNA’s registration requirements apply in full to pre-Act offenders. Herman Gundy is a pre-Act offender who failed to register after being released from prison. He argued that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to “specify the applicability” of SORNA’s registration requirements to pre-Act offenders. Justice Kagan, writing for the plurality, concluded that Congress’s delegation of authority to the Attorney General in SORNA is constitutional. She laid out the standard as follows: Article I of the Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” Regardless, Congress may “obtain[] the assistance of its coordinate Branches”—and in particular, “may confer substantial discretion on executive agencies to implement and enforce the laws.” “So we have held, time and again, that a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’” Gundy claimed that SORNA “grants the Attorney General plenary power to determine SORNA’s applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.” Justice Kagan agreed that if SORNA in fact did this “we would face a nondelegation question.” But in a previous case, Reynolds v. United States (2012), the Supreme Court held that SORNA applied to pre-Act offenders but only when the Attorney General said it did. This was because “instantaneous registration” of pre-Act offenders “might not prove feasible.” So, the Attorney General’s role under SORNA was limited: to apply it to pre-Act offenders as soon as he or she thought it feasible to do so. Granting this authority to the Attorney General didn’t violate the non-delegation doctrine, Justice Kagan reasoned, because Congress set out an “intelligible principle” to guide the Attorney General’s exercise of authority. He or she had to require pre-Act offenders to register as soon as feasible.