Supreme Court Review for Local Governments 2020-21

July 2021

By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

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

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

Fourth Amendment

In a 5-3 decision in *Torres v. Madrid** the U.S. Supreme Court held that a person may be "seized" by a police officer per the Fourth Amendment even if the person gets away. In this case, police officers intended to execute a warrant in an apartment complex. Though they didn't think she was the target of the warrant, they approached Roxanne Torres in the parking lot. Torres got in a car. According to Torres, she was experiencing methamphetamine withdrawal and didn't notice the officers until one tried to open her car door. Though the officers wore tactical vests with police identification, Torres claimed she only saw the officers had guns. She thought she was being car jacked and drove away. She claimed the officers weren't in the path of the vehicle, but they fired 13 shots, hitting her twice. Torres drove to a nearby parking lot, asked a bystander to report the attempted carjacking, stole another car, and drove 75 miles to a hospital. Torres sued the police officers claiming their use of force was excessive in violation of the Fourth Amendment's prohibition against "unreasonable searches and seizures." The officers argued, and the lower court agreed, that Torres couldn't bring an excessive force claim because she was never "seized" per the Fourth Amendment since she got away. The rule the Supreme Court adopted in this case, as articulated by Chief Justice Roberts, is the "application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." Citing to an English case from 1828, the Court "independently" concluded that "the common law rule identified in [*California v. Hodari D.* (1991)] that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately)

proclaim that '[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.'"

In a four-page opinion the U.S. Supreme Court held unanimously in *Caniglia v. Strom** that police community caretaking duties don't justify warrantless searches and seizures in the home. During an argument with his wife, Edward Caniglia put a handgun on their dining room table and asked his wife to "shoot [him] now and get it over with." After spending the night at a hotel Caniglia's wife couldn't reach him by phone and asked police to do a welfare check. Caniglia agreed to go to the hospital for a psychiatric evaluation after officers allegedly promised not to confiscate his firearms. The officers went into his home and seized his guns regardless. Caniglia sued the officers for money damages claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. In *Cady v. Dombrowski* (1973), the Court held that a warrantless search of an impounded vehicle for an unsecured firearm didn't violate the Fourth Amendment. According to the Court in that case "police officers who patrol the 'public highways' are often called to discharge noncriminal 'community caretaking functions,' such as responding to disabled vehicles or investigating accidents." The First Circuit ruled in favor of the police officers in *Caniglia* extending *Cady*'s "community caretaking exception" to the warrant requirement beyond the automobile and to the home. Justice Thomas, writing for the Court, rejected the First Circuit's extension of *Cady*. Justice Thomas noted the *Cady* opinion repeatedly stressed the "constitutional difference" between an impounded vehicle and a home. "In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car 'parked adjacent to the dwelling place of the owner.'"

In *Lange v. California*, the U.S. Supreme Court held that pursuit of a fleeing misdemeanor suspect does not always justify entry into a home without a warrant. Rather, "[a]n officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency." All nine justices agreed with the result. Arthur Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer followed Lange and put on his overhead lights, signaling Lange to pull over. Lange kept driving to his home which was about 100 feet away. The officer followed Lange into the garage and conducted field sobriety tests after observing signs of intoxication. A later blood test showed Lange's blood-alcohol content was three times the legal limit. Lange argued that the warrantless entry into his garage violated the Fourth Amendment. California argued that pursuing someone suspected of a misdemeanor, in this case failing to comply with a police signal, always qualifies as an exigent circumstance authorizing a warrantless home entry. The California Court of Appeals agreed. The Supreme Court, in an opinion written by Justice Kagan, rejected a categorical approach. Instead, in instances of a misdemeanants' flight, "[w]hen the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting." The Court noted that "when it comes to the Fourth Amendment, the home is first among equals." In *United States v. Santana* (1976), the Court upheld a warrantless entry into a home of a fleeing felon but said nothing about fleeing misdemeanants. And misdemeanors vary widely and may be minor. In *Welsh v. Wisconsin* (1984), the "Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless

home entry." Likewise, "[t]hose suspected of minor offenses may flee for innocuous reasons and in non-threatening ways." Finally, the Court pointed out that "[t]he common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit."

In a *per curiam* (unauthored) opinion in *Lombardo v. City of St. Louis, Missouri* the U.S. Supreme Court ordered the Eighth Circuit to decide again whether police officers used excessive force when restraining Nicholas Gilbert on his stomach for 15 minutes and if so whether the officers should receive qualified immunity. Gilbert was arrested for trespassing in a condemned building and failing to appear in court for a traffic ticket. Officers tried to handcuff Gilbert after it appeared he was trying to hang himself in his cell. Gilbert was only 5'3" and 160 pounds but he struggled with multiple officers. Ultimately, they were able to handcuff Gilbert and put him in leg irons. They moved him face down on the floor and held his limbs down at the shoulders, biceps, and legs. At least one officer placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, "It hurts. Stop." After 15 minutes of struggling in this position, Gilbert's breathing became abnormal and he stopped moving. The officers rolled Gilbert over and checked for a pulse. Finding none, they performed chest compressions and rescue breathing. Gilbert was pronounced dead at the hospital. Gilbert's parents sued the officers claiming they violated the Fourth Amendment by using excessive force. A federal district court ruled the officers were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time. The Eighth Circuit ruled in favor of the officers, holding they did not apply unconstitutionally excessive force. According to the Supreme Court the Eighth Circuit cited the correct factors in determining whether the use of force was reasonable. However, it was "unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is per se constitutional so long as an individual appears to resist officers' efforts to subdue him." The Eighth Circuit also described as "insignificant" the fact that Gilbert was handcuffed and leg shackled when officers kept him in the prone position for 15 minutes. According to the Supreme Court these details matter because "St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation," "well-known police guidance recommend[s] that officers get a subject off his stomach as soon as he is handcuffed because of that risk," and that "guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." According to the Court: "Having either failed to analyze such evidence or characterized it as insignificant, the court's opinion could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law. Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent."

First Amendment

The U.S. Supreme Court held unanimously in *Fulton v. Philadelphia** that the City of Philadelphia violated the First Amendment when it refused to contract with Catholic Social Service (CSS) to certify foster care families because CSS refuses to work with same-sex couples. When the city discovered that CSS wouldn't certify same-sex couples to become foster parents because of its religious beliefs the city refused to continue contracting with CSS. The city noted CSS violated the non-discrimination clause in its foster care contract. CSS sued the city claiming

its refusal to work with CSS violated the Free Exercise and Free Speech Clauses of the First Amendment. Chief Justice Roberts, writing for the Court, concluded that the city violated CSS's free exercise of religion rights. He noted that in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." But, the Court held, *Smith* didn't apply in this case because the city's non-discrimination clause allowed for exceptions, meaning it wasn't generally applicable. Because *Smith* didn't apply, the city's refusal to contract with CSS had to be evaluated under strict scrutiny. The city cited three interests in ensuring non-discrimination when certifying foster families: maximizing the number of foster parents, protecting the city from liability, and ensuring equal treatment of prospective foster parents and foster children. According to the Court: "Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices." As for equal treatment of prospective foster parents and foster children, Chief Justice Roberts wrote: "We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.' On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its nondiscrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."

Fifth Amendment Takings

In *Cedar Point Nursery v. Hassid**the Supreme Court held 6-3 that a California regulation allowing union organizers access to agriculture employers' property to solicit support for unionization up to three hours a day, 120 days a year is a per se physical taking under the Fifth and Fourteenth Amendments. The Fifth Amendment Taking Clause, applicable to the states through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation." In this case agriculture employers argued California's union access regulation "effected an unconstitutional per se physical taking . . . by appropriating without compensation an easement for union organizers to enter their property." The Supreme Court agreed. According to Chief Justice Roberts, writing for the majority, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." But when the government "instead imposes regulations that restrict an owner's ability to use his own property" the restrictions don't require "just compensation" unless they go "too far." The Court held the access regulation "appropriates a right to invade the growers' property" and therefore constitutes a per se physical taking rather than a regulatory taking. "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." The Court noted that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." "Given the central importance to property ownership of the right

to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation."

The U.S. Supreme Court filed a unanimous *per curiam* (unauthored) opinion overturning the Ninth Circuit decision in *Pakdel v. City of San Francisco*. The lower court concluded the City of San Francisco didn't make a "final" decision regarding plaintiffs' takings case because plaintiffs failed to comply with the city's administrative procedures, meaning plaintiffs couldn't yet bring their takings case in federal court. According to the Supreme Court, this ruling contradicted its recent decision in *Knick v. Township of Scott* (2019). San Francisco agreed to allow plaintiffs to convert their tenancy-in-common to condominiums as long as they offered their renters a lifetime lease. A few months after agreeing to do so, plaintiffs asked the city to either excuse them from the lifetime lease or compensate them, and the city refused. They sued the city in federal court claiming the lifetime-lease requirement was an unconstitutional regulatory taking. In *Knick* the Supreme Court overturned *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985) and held that exhausting administrative remedies is not a prerequisite to bringing a takings case in federal court. The Ninth Circuit noted that *Knick* didn't disturb *Williamson County*'s alternative holding that plaintiffs may challenge only "final" government decisions in federal court. According to the Ninth Circuit, although the city had twice denied plaintiffs' requests for an exemption, its decision "was not truly 'final' because [plaintiffs] had made a belated request for an exemption at the end of the administrative process instead of timely seeking one 'through the prescribed procedures.'" "In other words, a conclusive decision is not really 'final' if the plaintiff did not give the agency the opportunity to exercise its 'flexibility or discretion' in reaching the decision." The Supreme Court concluded the Ninth Circuit's "view of finality is incorrect. The finality requirement is relatively modest." Plaintiffs must merely show "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" In this case the city was clear. Plaintiffs had to "execute the lifetime lease" or face an "enforcement action."

Procedural

In *Uzuegbunam v. Preczewski** the Supreme Court held 8-1 that to have a "redressable injury" required to bring a lawsuit, a plaintiff need only ask for nominal damages ($1). Chike Uzuegbunam was threatened with disciplinary action for speaking about his religion in the "free speech expression areas" at Georgia Gwinnett College, a public college where he was enrolled. He and Joseph Bradford, another student, who decided not to speak about his religion because of what happened to Uzuegbunam, sued the college claiming its campus speech policies violated the First Amendment. They asked for nominal damages and an injunction requiring the college to change its speech policies. The college got rid of the challenged policies and argued the case was now moot. To establish standing, among other requirements, a plaintiff must ask for a remedy that is redressable, meaning likely to address his or her past injuries. In an opinion written by Justice Thomas the Court held that Uzuegbunam's claim for nominal damages is intended to redress a past injury. According to the Court the prevailing rule, "well established" at common law, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage." The Court stated a request for nominal

damages doesn't "guarantee[] entry to court" as it only addressed whether nominal damages satisfy the redressability element of standing. The Court also didn't decide whether Bradford could pursue a nominal damages claim, noting nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury."

In *B.P. v. Mayor and City Council of Baltimore** the U.S. Supreme Court ruled 7-1 that a federal court of appeals may review any grounds the district court considered for removing a case to federal court if one of the grounds was federal officer or civil rights removal. The mayor and City of Baltimore sued various energy companies in Maryland state court "for promoting fossil fuels while allegedly concealing their environmental impacts." Defendants may "remove" a case brought in state court to federal court if the federal court has jurisdiction over it. In federal district court, BP argued for federal court jurisdiction on numerous grounds, including the federal officer removal statute. As Justice Gorsuch explains, this statute "promises a federal forum for any action against" a private defendant acting at the "federal government's behest." The federal district court rejected all the grounds BP alleged supported removing the case to federal court. It remanded the case back to Maryland state court, and B.P. appealed. Federal appellate courts generally lack the power to review a district court order remanding a case to state court. However, 28 U.S.C. §1447(d) includes two exceptions: "an order remanding a case to the State court from which it was removed pursuant to [the federal officer removal statute or the civil-rights removal statute] shall be reviewable by appeal." The Fourth Circuit only reviewed the part of the district court's order discussing federal officer removal. The Supreme Court concluded that if a defendant relies on the federal officer removal statute (or the civil rights removal statute) when trying to remove a case to federal court, the appellate court "may review the merits of all theories for removal that a district court has rejected." The Court looked to the statute's use of the term "order." An "order" is a "written direction or command delivered by . . . a court or judge." The district court order in this case "rejected all of the defendants' grounds for removal," so "the statute allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces."

In an unauthored opinion in *Trump v. New York*, the U.S. Supreme Court refused to decide whether President Trump could lawfully and constitutionally direct the Secretary of Commerce to provide information to him about the number of undocumented persons so he could exclude them from the census apportionment base. Federal law requires the Secretary of Commerce to "take a decennial census of population" and report to the President "[t]he tabulation of total population by States." The President then transmits to Congress a "statement showing the whole number of persons in each State." President Trump wanted to exclude undocumented persons from this census number which is used to apportion U.S. House of Representatives seats to the states. He asked the Secretary of Commerce to provide him the information he needed to do so. States and local governments and others sued the President claiming he violated federal statutes governing the census and the U.S. Constitution. The Court refused to decide this case describing it as "riddled with contingencies and speculation that impede judicial review." The Court noted that while the President "has made clear his desire to exclude aliens without lawful status from the apportionment base," he has qualified the directive to gather the necessary information with language including "to the extent practicable" and "to the extent feasible." According to the Court, "the record is silent on which (and how many) aliens have administrative records that

would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner." Subsequent to this decision President Biden issued an executive order reversing President Trump's policy of excluding undocumented persons from the census apportionment base.

In *City of San Antonio, Texas v. Hotels.com** the U.S. Supreme Court held unanimously that federal district courts may not alter a court of appeals' allocation of appellate costs. The City of San Antonio won in federal district court a class action lawsuit against online travel companies (OTCs) after they collected hotel occupancy taxes on the wholesale rate rather than the retail rate consumers paid. The OTCs were ordered to pay $55 million. To avoid paying the judgment while they appealed, the OTCs purchased a bond. On appeal, the Fifth Circuit ruled against San Antonio. Federal Rule of Appellate Procedure 39(a) states that unless the "court orders otherwise" the party losing on appeal pays appellate costs, including bond premium costs. When describing its judgment against San Antonio, the Fifth Circuit didn't "depart[] from the default allocation" of costs. Before the district court, San Antonio argued the court had discretion to not require San Antonio to pay some or all of the appellate costs. The district court and the Fifth Circuit disagreed. Before the Supreme Court, San Antonio argued the appellate court may say "who can receive costs (party A, party B, or neither)" but lacks "authority to divide up costs," instead the district court has this discretion. The OTCs argued that the appellate court has the discretion to divide up appellate costs "as it deems appropriate and that a district court cannot alter that allocation." The Supreme Court, in an opinion written by Justice Alito, agreed with the OTCs, focusing on the "orde[r] otherwise" language in the federal rules. According to the Court: "This broad language does not limit the ways in which the court of appeals can depart from the default rules, and it certainly does not suggest that the court of appeals may not divide up costs." Understanding that courts of appeals may allocate appellate costs, "it is easy to see why district courts cannot exercise a second layer of discretion. Suppose that a court of appeals, in a case in which the district court's judgment is affirmed, awards the prevailing appellee 70% of its costs. If the district court, in an exercise of its own discretion, later reduced those costs by half, the appellee would receive only 35% of its costs—in direct violation of the court of appeals' directions."

In *Carney v. Adams** the Supreme Court held unanimously that James Adams lacked standing to challenge a Delaware constitutional provision requiring that appointments to Delaware's major courts reflect a partisan balance. Delaware's Constitution states that no more than a bare majority of members of any of its five major courts may belong to any one political party. It also requires, with respect to three of those courts, that the remaining members belong to "the other major political party." So, as a practical matter, to be on three of Delaware's courts a person must belong to one of the two major political parties. James Adams, a Delaware lawyer and political independent, sued Governor Carney claiming Delaware's major party requirement is unconstitutional. The Court, in an opinion written by Justice Breyer, concluded Adams lacks standing to bring this lawsuit. To have standing a litigant must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." For Adams to prove he was harmed he had to "at least show that he is likely to apply to become a judge in the reasonably foreseeable future if

Delaware did not bar him because of political affiliation." According to Justice Breyer, "the record evidence fails to show that, at the time he commenced the lawsuit, Adams was 'able and ready' to apply for a judgeship in the reasonably foreseeable future."

Miscellaneous

In an 8-0 decision in *City of Chicago v. Fulton*,* the U.S. Supreme Court held that the City of Chicago didn't violate the Bankruptcy Code's automatic stay provision by holding onto a vehicle impounded after a bankruptcy petition was filed. The City of Chicago impounds vehicles where debtors have three or more unpaid fines. Robbin Fulton's vehicle was impounded for this reason. She filed for bankruptcy and asked the City to return her vehicle; it refused. The Seventh Circuit held the City violated the Bankruptcy Code's automatic stay provision. The Supreme Court unanimously reversed. When a bankruptcy petition is filed, an "estate" is created which includes most of the debtor's property. An automatic consequence of the bankruptcy petition is a "stay" which prevents creditors from trying to collect outside of the bankruptcy forum. The automatic stay prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The Bankruptcy Code also has a "turnover" provision which requires those in possession of property of the bankruptcy estate to "deliver to the trustee, and account for" that property. The Supreme Court held that "mere retention" of a debtor's property after a bankruptcy petition is filed doesn't violate the automatic stay. According to Justice Alito, "[t]aken together, the most natural reading of . . . 'stay,' 'act,' and 'exercise control'—is that [the automatic stay provision] prohibits *affirmative acts* that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." However, the Court conceded it did not "maintain that these terms definitively rule out" an alternative interpretation. According to the Court, "[a]ny ambiguity in the text of [the automatic stay provision] is resolved decidedly in the City's favor" by the turnover provision. First, reading "any act . . . to exercise control" in the automatic stay provision "to include merely retaining possession of a debtor's property would make that section a blanket turnover provision," rendering the turnover provision "largely superfluous." Second, the turnover provision includes exceptions that the automatic stay provision doesn't include. "Under respondents' reading, in cases where those exceptions to turnover . . . would apply, [the automatic stay provision] would command turnover all the same."

In *PennEast Pipeline v. New Jersey** the U.S. Supreme Court held 5-4 that the federal government may constitutionally grant pipeline companies the authority to condemn necessary rights-of-way in which a state has an interest. Pipeline companies likewise may sue states to obtain the rights-of-way. Per the Natural Gas Act (NGA) natural gas companies, upon a showing of "public convenience and necessity," may receive a certificate from the Federal Energy Regulatory Commission allowing them to use federal eminent domain power to obtain land to locate a pipeline. After receiving such a certificate, PennEast filed a complaint to condemn land in which New Jersey has an interest. New Jersey claimed sovereign immunity prevented PennEast from being able to sue the state in federal court. In an opinion written by Chief Justice Roberts the Supreme Court held that the NGA follows precedent allowing private parties to exercise federal eminent domain over state land and that sovereign immunity doesn't bar the

lawsuit in this case. Regarding the NGA following precedent the Court cited to *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* (1941), holding that federal eminent domain applies to state land. Likewise, in *Cherokee Nation v. Southern Kansas Railroad Co.* (1890), the Court stated that a private party could exercise federal eminent domain over state land. Eleventh Amendment sovereign immunity prohibits states from being sued with some exceptions. According to the Court, "a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" The Court opined that the cases discussed above show the states "consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates."

In *United States v. Cooley* the U.S. Supreme Court held unanimously that an Indian tribe police officer may temporarily detain and search a non-Indian on a public right-of-way that runs through an Indian reservation, based on a suspected violation of state or federal law. A tribal officer approached a vehicle stopped on a public right-of-way within the Crow Reservation to offer assistance. The officer ordered Joshua James Cooley, who appeared to be a non-Indian, out of the car and conducted a pat down search after he noticed two semiautomatic rifles lying on the front seat. While waiting for backup to arrive, the officer saw in the vehicle a glass pipe and plastic bag that contained methamphetamine. A federal grand jury indicted Cooley on gun and drug violations. The Ninth Circuit suppressed the drug evidence holding the tribal officer had no authority to investigate "nonapparent" violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The tribal officer in this case didn't ask Cooley whether he was non-Indian. The Supreme Court reversed the Ninth Circuit and held that tribal police officers may detain and search non-Indians traveling on public rights-of-way running through a reservation. Justice Breyer wrote the majority opinion. He noted that in *Montana v. United States* (1981), the Court articulated the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." But that general rule has two exceptions including "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." According to the Court, this exception "fits the present case, almost like a glove." "To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats."

In a very brief, unauthored opinion the Supreme Court denied qualified immunity in *Taylor v. Riojas* to a number of correctional officers who confined Trent Taylor to a "pair of shockingly unsanitary cells" for six days. Trent Taylor claimed the first cell he was confined in was covered in feces "all over the floor, the ceiling, the window, the walls," and even inside the water faucet. The second, frigidly cold cell, "was equipped with only a clogged drain in the floor to dispose of bodily wastes." The Fifth Circuit held that Taylor's confinement conditions violated the Eighth Amendment's prohibition on cruel and unusual punishment. The Fifth Circuit granted the officers qualified immunity because "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." The Supreme Court reversed the Fifth Circuit's grant of qualified immunity because "no reasonable correctional

officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."