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 *New York State Rifle & Pistol Association Inc. v. City of New York, New York* the Supreme Court will decide whether New York City’s ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel. The Second Circuit held the law is constitutional on all accounts. Applying intermediate scrutiny, the Second Circuit held the rule was “substantially related to the achievement of an important governmental interest.” It seeks to “protect public safety and prevent crime.” And the court agreed with the former Commander of the License Division that premises license holders “are just as susceptible as anyone else to stressful situations,” including driving situations that can lead to road rage, “crowd situations, demonstrations, family disputes,” and other situations “where it would be better to not have the presence of a firearm.” The Second Circuit concluded the rule doesn’t discriminate against interstate commerce in violation of the Commerce Clause. First, it does not facially discriminate against interstate commerce. Licensees may still patronize out-of-state firing ranges—they just can’t bring their gun licensed in New York City. Second, no evidence suggests the rule was intended to protect the economic interests of the City’s firing range industry. Finally, the challengers failed to offer evidence that the rule has had a discriminatory effect on interstate commerce. While the challengers claim they have not attended out-of-city shooting events with their gun they may have attended them *without* their gun. The Second Circuit rejected the challengers’ right to travel argument “for much the same reasons as does their parallel invocation of the dormant Commerce Clause.”

In *Department of Homeland Security v. Regents of the University of California* the Supreme Court will decide whether the Department of Homeland Security’s (DHS) decision to end the
Deferred Action for Childhood Arrivals (DACA) program is judicially reviewable and lawful. Three lower courts have concluded ending the policy is both reviewable and unlawful. DACA was established through a DHS Memorandum during the Obama presidency. The program allowed undocumented persons who arrived in the United States before age 16 and have lived here since June 15, 2007, to stay, work, and go to school in the United States without facing the risk of deportation for two years with renewals available. DHS rescinded DACA in September 2017 after receiving a letter from the Attorney General stating the program was unconstitutional and created “without proper statutory authority.” The United States argues that a court can’t review DHS’s decision to rescind DACA because the federal Administrative Procedures Act precludes review of agency actions “committed to agency discretion by law.” According to the United States, DHS’s decision to discontinue DACA “falls comfortably within the types of agency decisions that traditionally have been understood as ‘committed to agency discretion’”—particularly because this decision arose in the immigration context. The United States argues DACA may be rescinded because it is unlawful as it is a legislative rule which should have been promulgated through notice-and-comment rulemaking and is “substantively inconsistent” with the Immigration and Nationality Act.

The issue the Supreme Court will decide in June Medical Services LLC v. Gee is whether Louisiana’s law requiring physicians performing abortions to have admitting privileges at a local hospital conflicts with Supreme Court precedent. In 2016 in a 5-4 decision in Whole Woman’s Health v. Hellerstedt the Supreme Court struck down Texas’s admitting privileges law. In June Medical Services LLC v. Gee the Fifth Circuit upheld Louisiana’s law noting that the “facts in the instant case are remarkably different” from the facts in the Texas case. Louisiana’s Unsafe Abortion Protection Act requires physicians performing abortions to have admitting privileges, meaning be a member of the hospital in good standing able to perform surgery on patients, at a hospital not further than 30 miles from the abortion clinic. In Whole Woman’s Health the Supreme Court reiterated its previous holding that while the state has a legitimate interest in seeing that abortions are performed safely, unnecessary health regulations may not impose an undue burden on the right to seek an abortion. In June Medical Services LLC v. Gee the Fifth Circuit concluded the benefits conferred by the Louisiana law “are not huge.” But, unlike Texas, the Louisiana law promotes women's health because “the credentialing function performed by hospitals [is more rigorous than] the credentialing performed by clinics.” The Fifth Circuit found no undue burden in this case. It concluded that if most of the abortion doctors in Louisiana put forth a good-faith effort they should be able to get admitting privileges. According to the Fifth Circuit, of the five abortion doctors in Louisiana one has admitting privileges, another put forth a good-faith effort and was denied, and three failed to put forth a good-faith effort but probably could receive admitting privileges if they did. If Louisiana was down one abortion doctor, the Fifth Circuit concluded, no clinics would close and the other abortion doctors in the state could absorb his capacity.

**Employment**

Title VII prohibits discrimination “because of . . . sex.” In Zarda v. Altitude Express the Second Circuit held that discrimination on the basis of sexual orientation violates Title VII. The main opinion in Zarda concluded the question in this case is whether sexual orientation is “properly
understood” as a “subset of actions taken on the basis of sex.” The court concluded it was by looking at the statute’s text. According to the court: “the most natural reading of the statute's prohibition on discrimination ‘because of . . . sex’ is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions.” In Bostock v. Clayton County Board of Commissioners the Eleventh Circuit reaffirmed its previous holding that discrimination on the basis of sexual orientation doesn’t violate Title VII.

In EEOC v. R.G. & G.R. Harris Funeral Homes the Sixth Circuit held discriminating against transgender persons violates Title VII because it amounts to discrimination on the basis of sex stereotyping. The court also held that transgender status is protected under Title VII. The Supreme Court will review both lower court holdings. Title VII prohibits discrimination “because of . . . sex.” In Price Waterhouse v. Hopkins (1989) the Supreme Court held that employees may bring sex discrimination claims based on sex stereotyping under Title VII. In 2004 the Sixth Circuit extended Price Waterhouse’s reasoning to transgender persons as they are also engaging in “non sex-stereotypical behavior.” So that previous case controlled the outcome of Harris Funeral Homes. The Sixth Circuit also held that transgender status is a protected class under Title VII. Harris Funeral Homes argued that transgender status refers to “a person's self-assigned ‘gender identity’” rather than a person's sex, and therefore such a status is not protected under Title VII. The Sixth Circuit disagreed noting “it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.”

The question presented in Comcast Corp. v. National Association of African American-Owned Media is whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation. Section 1981 states “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Per its so-called “mixed-motive” theory, Title VII of the Civil Rights Act of 1964 disallows race, color, religion, sex, or national origin to be “a motivating factor for any employment practice, even though other factors also motivated the practice.” In this case an African American-owned operator of television networks sued Comcast under Section 1981 claiming its refusal to contract with the networks was racially motivated. Comcast argued that it could only be sued under Section 1981 if racial discrimination was the “but-for” reason it would not contract with the networks. The Ninth Circuit disagreed and applied the “mixed-motive” framework from Title VII to Section 1981 despite the fact that Section 1981 contains no “motivating factor” language like Title VII. In a case decided the same day where the same networks sued Charter Communications, the Ninth Circuit noted that Section 1981 guarantees “the same right” to contract “as is enjoyed by white citizens.” According to the Ninth Circuit: “If discriminatory intent plays any role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the same right as a white citizen.”
The question the Supreme Court will decide in *Colorado Department of State v. Baca* and *Chiafalo v. Washington* is whether state law can force presidential electors to vote for the winner of the state’s popular vote for President. When Michael Baca of Colorado voted for John Kasich he was removed as an elector and his vote was discarded. When Peter Chiafalo of Washington State voted for Collin Powell he was fined $1,000. Baca and Chiafalo challenge the constitutionality of their state’s faithless elector statute. Before lower courts Baca won and Chiafalo lost. The Tenth Circuit first held that Baca has standing to sue. According to the court, he “has asserted an injury in fact” because his vote for President was cancelled, he was not allowed to cast a vote for Vice President, and he was “removed him from his duly-appointed office as a presidential elector.” Baca claims that the Colorado law violates Article II and the Twelfth Amendment to the United States Constitution. The Tenth Circuit agreed. Article II states: “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” The Twelfth Amendment states that electors “vote by [distinct] ballot for President and Vice-President.” The Tenth Circuit concluded that Colorado lacks the authority to require electors to vote for the candidate receiving the most votes because “the definitions of elector, vote, and ballot [contained in Article II and the Twelfth Amendment] have a common theme: they all imply the right to make a choice or voice an individual opinion.” Before the Supreme Court, Chiafalo argues that Washington’s law is unconstitutional because “a state has no power to legally enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.” Regarding the First Amendment claim, the Washington Supreme Court held that “the First Amendment is not implicated when an elector casts a vote on behalf of the State in the Electoral College.” The court reasoned: “The power of electors to vote comes from the State, and the elector has no personal right to that role.”

In *Espinoza v. Montana Department of Revenue* the Supreme Court will decide if a state-aid program violates a state constitutional prohibition against mixing church and state because religious institutions may participate, does discontinuing that program violate the federal constitution’s Free Exercise or Equal Protection Clauses. Montana statutes allow taxpayers to receive tax credits for contribution to Student Scholarship Organizations (SSO) that give students scholarships to attend private schools, including religious schools. The Montana Department of Revenue adopted Rule 1 disallowing religious schools to participate in the program because it concluded their participation would violate Montana’s Constitution. The Montana Supreme Court held that the Tax Credit Program violates the Montana Constitution. According to the court, the provision of the Montana Constitution entitled “Aid prohibited to sectarian schools,” is a “broader and stronger” prohibition against aid to sectarian schools than other states.” The court concluded: “Although the Tax Credit Program provides a mechanism of attenuating the tax credit from the SSO’s tuition payment to a religiously-affiliated [schools], it does not comport with the constitutional prohibition on indirectly aiding sectarian schools.” In one sentence the Montana Supreme Court stated that prohibiting state aid to religious schools in this case doesn’t violate the federal constitution.
Delaware’s Constitution requires that three state courts be balanced between the two major political parties. The main question before the Supreme Court in Carney v. Adams is whether this scheme violates the First Amendment. Per Delaware’s Constitution no more than half of the members of the Delaware Supreme Court, Superior Court, or Chancery Court may be of the same major political party. Delaware attorney James Adams wants to be a judge in Delaware but he is an Independent. Adams claims that the First Amendment prohibits the governor from making judicial appointments based on political party. In three previous cases the Supreme Court has explained “the limits on a government employer’s ability to consider a job candidate’s political allegiance.” Based on those cases the Third Circuit focused on whether judges are policymakers as First Amendment protections do not apply to them. The Third Circuit concluded judges aren’t policymakers. According to the lower court the “purpose of the policymaking exception is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration.” But, “[i]ndependence, not political allegiance, is required of Delaware judges.” Per the Delaware Constitution only a bare majority of family court and court of common pleas judges may be from the same political party, but the “major political party” rule doesn’t apply to them. The Third Circuit concluded that the “bare majority” rule isn’t severable from the unconstitutional “major political party” rule. According to the Third Circuit the question of severability turns on legislative intent. “For nearly seventy years, the bare majority component and the major political party component have been intertwined.” Finally, the Supreme Court will decide whether Adams has standing to bring this case. He has not applied for any judicial position since becoming an Independent in 2017.

The question the Supreme Court will decide in Barr v. American Association of Political Consultants is whether allowing robocalls for government-debt only violates the First Amendment. The Telephone Consumer Protection Act (TCPA) prohibits automatic dialing or prerecorded calls to cell phones with three exceptions—emergencies, consent, and debt collection owed to or guaranteed by the United States. The American Association of Political Consultants claims the third exception violates the First Amendment. In Reed v. Town of Gilbert (2015), the Supreme Court held that strict-scrutiny applies to content-based restrictions on speech, and the Court defined content-based broadly. Applying Reed, the Fourth Circuit concluded that this exception is content-based because “automated calls made to cell phones that deal with other subjects — such as efforts to collect a debt neither owed to nor guaranteed by the United States — do not qualify for the debt-collection exemption and are prohibited by the automated call ban.” The court then held that the debt-collection exception fails strict scrutiny because it is “fatally underinclusive for two related reasons. First, by authorizing many of the intrusive calls that the automated call ban was enacted to prohibit, the debt-collection exemption subverts the privacy protections underlying the ban. Second, the impact of the exemption deviates from the purpose of the automated call ban and, as such, it is an outlier among the other statutory exemptions.”

**Fourth Amendment**

The Supreme Court has held that excessive force violates the Fourth Amendment’s prohibition against “unreasonable searches and seizures.” The question in Torres v. Madrid is whether police have “seized” someone who they have used force against who has gotten away. In this
case police officers approached Roxanne Torres thinking she may be the person they intended to arrest. At the time Torres was “tripping” from using meth for several days. She got inside a car and started the engine. One of the officers repeatedly asked her to show her hands but could not see her clearly because the car had tinted windows. When Torres “heard the flicker of the car door” handle she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the wind shield. The other officer shot at Torres as well to avoid being crushed between two cars and to stop Torres from driving toward the other officer. Torres was shot twice. After she hit another car, she got out of the car she was in and laid on the ground attempting to “surrender” to the “carjackers.” She asked a bystander to call the police but left the scene because she had an outstanding warrant. She then stole a car, drove 75 miles, and checked into a hospital. The Tenth Circuit found no excessive force in this case because Torres wasn’t successfully “seized.” In a previous case the Tenth Circuit held that “a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim.” This is so, because “a seizure requires restraint of one's freedom of movement.” Therefore, an officer's intentional shooting of a suspect isn’t a seizure unless the “gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.”

In Kansas v. Glover the Supreme Court will decide whether it is reasonable, under the Fourth Amendment, for an officer to suspect that the registered owner of a vehicle is the one driving it absent any information to the contrary. Officer Mark Mehrer ran the license plate of a vehicle that was being driven lawfully. He discovered that the vehicle’s owner, Charles Glover, had a suspended license. He pulled the driver over and discovered he was in fact Charles Glover. Glover claimed the officer violated his Fourth Amendment rights because the officer lacked reasonable suspicion of illegal activity to pull over the car. The Kansas Supreme Court agreed. Kansas argued in favor of an “owner-is-the-driver presumption.” The Kansas Supreme Court rejected it because it is based on the “stacking” of “unstated assumptions”—that the registered owner is likely the primary driver of the vehicle and owners will “likely disregard the suspension or revocation order and continue to drive.” Assumption aren’t enough under the Fourth Amendment. The Kansas Supreme Court also noted that the presumption rests in part on what the driver does not know—who is actually driving the car. “And in evaluating whether the State has met its burden to prove the lawfulness of a search or seizure, courts cannot ‘draw inferences from the lack of evidence in the record’ because doing so may relieve the State of its burden and shift the burden to the defendant to establish why reasonable suspicion did not exist.”

Environment

In County of Maui, Hawaii v. Hawaii Wildlife Fund* the Supreme Court will decide whether the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. Maui County injects treated wastewater from wells into the groundwater. Some of the treated wastewater reaches the Pacific Ocean. The Hawaii Wildlife Fund sued the County arguing it was required to obtain an NPDES permit under the CWA for these discharges. A party must obtain an NPDES permit if it discharges a pollutant from a point source to a navigable water. Wells are point sources and the Pacific Ocean is a navigable water. The Ninth Circuit assumed without deciding groundwater isn’t a point source or
Navigable waters. The Ninth Circuit held that the CWA requires Maui to get an NPDES permit in this case. It concluded that the discharges in this case are point source discharges because “nonpoint source pollution” excludes, for example, roadway runoff that isn’t “collected, channeled, and discharged through a point source.” Here the pollutants are collected in wells. According to the lower court, they are also “fairly traceable” from the point source to the navigable water and reach the navigable water at “more than de minimis levels.”

The Anaconda Smelter, now owned by ARCO, processed copper ore from Butte for nearly one hundred years before shutting down in 1980. That same year Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund law. EPA required ARCO to pursue particular remedies. Landowners located within the bounds of the site sought two additional remedies beyond what EPA required. In Atlantic Richfield Co. v. Christian, ARCO argues that two provisions of CERCLA prevent the landowners from obtaining additional remedies in this case. ARCO also argues that CERCLA preempts state common-law claims for restoration beyond EPA-ordered remedies. The Supreme Court of Montana rejected all of ARCO’s arguments. ARCO first claimed the landowners were “challenging” EPA’s remedial plan. The Superfund statute jurisdictionally bars courts from hearing “challenges.” The court found no “challenge” in this case because “the Property Owners are not seeking to interfere with [EPA’s] work, nor are they seeking to stop, delay, or change the work EPA is doing.” ARCO next claimed the property owners are “Potentially Responsible Parties” (PRP), even though the EPA has never ordered them to pay for the cleanup. The Superfund statute prohibits PRPs from “conducting any remedial action that is inconsistent with EPA’s selected remedy without EPA’s consent.” The Montana Supreme Court noted the property owners have “never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years since the Property Owners’ property was designated as being within the Superfund site.” Finally, the Montana Supreme Court rejected the argument CERCLA preempts state common-law remediation claims pointing out that CERCLA has two savings clauses which “expressly contemplate the applicability of state law remedies.”

Preemption

In Rutledge v. Pharmaceutical Care Management Association the Supreme Court will decide whether states’ attempts to regulate pharmacy benefit managers’ (PBMs) drug-reimbursement rates are preempted by the Employee Retirement Income Security Act (ERISA). PBMs are an intermediary between health plans and pharmacies. Among other things, they set reimbursement rates to pharmacies dispensing generic drugs. Contracts between PBMs and pharmacies create pharmacy networks. According to the Eighth Circuit, “[b]ased upon these contracts and in order to participate in a preferred network, some pharmacies choose to accept lower reimbursements for dispensed prescriptions.” So, in some instance pharmacies lose money. Arkansas passed a law requiring that pharmacies “be reimbursed for generic drugs at a price equal to or higher than the pharmacies’ cost for the drug based on the invoice from the wholesaler.” The Pharmaceutical Care Management Association sued arguing that ERISA preempts this law. The Eighth Circuit agreed. According to the Eighth Circuit, ERISA preempts “any and all State laws insofar as they … relate to any employee benefit plans.” A state law “relates to” an ERISA plan by having “a connection with or a reference to such a plan.” The Eighth Circuit concluded that Arkansas’s law...
“ma[de] implicit reference to ERISA” because it regulates “PBM[s who administer benefits for . . . entities, which, by definition, include health benefit plans and employers, labor unions, or other groups . . . subject to ERISA regulation.” According to Arkansas, the Eighth Circuit got the implicit-reference preemption test wrong. The proper test, according to Arkansas, is a state law implicitly refers to ERISA if it “acts immediately and exclusively upon ERISA plans[,] or where the existence of ERISA plans is essential to the law’s operation[.]” Arkansas points out its pharmacy reimbursement law covers “far more than those PBMs that administer benefits for ERISA plans,” so it can’t be subject to implicit-reference ERISA preemption.

The Immigration Reform and Control Act (IRCA) states that any information contained in the Form I-9, which is used to verify a person’s eligibility to work in the United States, may only be used for limited federal enforcement. The question the Supreme Court will decide in Kansas v. Garcia is whether the IRCA preempts states from using information contained in the I-9 to prosecute a person under state law (in this case for identity theft). A police officer pulled over Ramiro Garcia for speeding, and Garcia disclosed he worked at Bonefish Grill. An officer obtained Garcia’s I-9 and discovered the social security number he used to complete the form wasn’t his own. Kansas prosecuted Garcia for violating a state statute prohibiting identity theft. Kansas claimed it didn’t rely on the I-9 to prosecute Garcia as he also used the social security number on his state tax forms. Garcia argued the prosecution was preempted by the IRCA. The Kansas Supreme Court agreed holding that the IRCA expressly preempts using information in the I-9 to pursue state law violations. According to the court: “The language in [the IRCA] explicitly prohibited state law enforcement use not only of the I–9 itself but also of the ‘information contained in’ the I–9 for purposes other than those enumerated.” The fact the information from the I-9 was available from other sources, according to the Kansas Supreme Court, does not “alter the fact that it was also part of the I-9.” The Supreme Court added a question about whether the IRCA impliedly preempts Kansas’s prosecution of Garcia.

Crime and punishment

The question in Kahler v. Kansas is whether the Eighth and Fourteenth Amendments permit a state to abolish a defense to criminal liability that mental illness prevented a defendant from knowing his or her actions were wrong. James Kahler was sentenced to death for fatally shooting his wife, her grandmother, and his two daughters. Kahler presented the testimony of a forensic psychiatrist who stated that Kahler was suffering from severe major depression at the time of the crime and that “his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did.” Kahler claims he should have been able to assert an insanity defense but wasn’t allowed to under Kansas law. Prior to 1996, Kansas had adopted the M’Naghten rule for an insanity defense. Under that rule “the defendant is to be held not criminally responsible (1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act.” In 1996 Kansas adopted the mens rea approach which “allows evidence of mental disease or defect as it bears on the mental element of a crime but abandons lack of ability to know right from wrong as a defense.” In a 2003 case the Kansas Supreme Court rejected Kahler’s argument that the mens rea approach “violates the Due Process Clause because it offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”
In *Miller v. Alabama* (2014) the Supreme Court held that juvenile offenders convicted of homicide can’t receive a *mandatory* sentence of life imprisonment without parole. Instead the sentencing court must take into account how children are different from adults and only sentence the “rare juvenile offender whose crime reflects irreparable corruption” to life imprisonment without parole. In *Montgomery v. Louisiana* (2016) the Supreme Court held that Miller’s rule applies retroactively to juveniles convicted and sentenced before Miller was decided. The question in *Malvo v. Mathena* is whether Lee Boyd Malvo may have his sentences of life imprisonment without the possibility of parole, issued before Miller, reconsidered under Miller even though they weren’t mandatory. In 2002 Malvo was seventeen years old when he and John Muhammad killed twelve people over the course of seven weeks. In 2003 Malvo was convicted of two counts of capital murder for his crimes in Fairfax County, Virginia. The jury choose life imprisonment without parole instead of the death penalty. Subsequently, Malvo pled guilty to capital murder in another Virginia jurisdiction and received two additional terms of life imprisonment without parole. Malvo seeks to have his sentences remanded for a determination of whether he is “one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his ‘crimes reflect permanent incorrigibility.’” Warden Mathena objects to resentencing arguing that Malvo’s sentences weren’t mandatory and that “Miller’s new rule explicitly applies to *mandatory* life-without-parole sentences.” Mathena claims Malvo’s sentences weren’t mandatory because Virginia judges have the discretion to suspend capital sentences. Malvo responds that judges weren’t aware of their power to do so at the time. The Fourth Circuit agreed with Malvo that regardless of whether his sentence was mandatory, broad language in Montgomery indicates that Miller “is not limited to mandatory life-without-parole sentences but also applies . . . to all life-without-parole sentences where the sentencing court did not resolve whether the juvenile offender was ‘irretrievably corrupt’ or whether his crimes reflected his ‘transient immaturity.’” Specifically, Montgomery states that Miller “rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.”

In *Apodaca v. Oregon* (1972) and *Johnson v. Louisiana* (1972), five Justices agreed that the Sixth Amendment requires unanimous jury verdicts in federal criminal cases. Five Justices also agreed that jury verdicts in state criminal cases don’t have to be unanimous. In *Ramos v. Louisiana* the Supreme Court will consider overruling the latter holding in Apodaca and Johnson. Evangelisto Ramos was convicted 10-2 of second-degree murder based solely on circumstantial evidence and was sentenced to life in prison without the possibility of parole. Ramos argues that the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict against the states. In *Apodaca* four Justices, in an opinion written by Justice White, looked at the “function served by the jury in a contemporary society” and rejected incorporation. Justice Powell, writing alone, adopted what Ramos describes as a “never-used-before-never-used-since theory of partial incorporation of the Sixth Amendment. Justice Powell believed that the Sixth Amendment required unanimity at the Founding, and in federal cases, but opined that the protections guaranteed by the Fourteenth Amendment were less than those offered by the Sixth Amendment.” Ramos argues that there has been “a sea change in constitutional exegesis” with regard to the application of the Bill of Rights to the states. According to Ramos, since Apodaca the Court has focused on a constitutional right’s “historic
origins” rather than its “functional purpose.” “The historical record is clear that unanimity was an essential component of what was conceived of when the Constitution referred to juries.” Ramos also argues that since Apodaca the Supreme Court has “rejected the notion of partial incorporation or watered down versions of the Bill of Rights.”

In McKinney v. Arizona the Supreme Court will decide whether a jury rather than a judge must weigh the factors mitigating against imposing a death sentence when the law at the time a person was convicted allowed a judge to weigh mitigating factors. The Court also has agreed to decide whether a trial court rather than an appellate court must correct the failure to weigh relevant mitigating factors. A jury found James Erin McKinney guilty of first-degree murder related to two separate burglaries and murders committed in 1991. McKinney had PTSD from his “horrific” childhood but the Arizona Supreme Court disallowed the sentencer to consider non-statutory mitigating evidence (including family background and mental condition) unconnected to the crime. In 1996 the trial court found the evidence of PTSD to be unconnected to the crime and sentenced McKinney to death. In 2015 the Ninth Circuit held en banc that the Arizona Supreme Court’s “causal nexus” to the crime test for applying non-statutory mitigating factors violates Eddings v. Oklahoma (1982), which held that a sentencer in a death penalty case may not “refuse to consider, as a matter of law, any relevant mitigating evidence.” The Ninth Circuit ordered that McKinney be resentenced. The Arizona Supreme Court resentenced McKinney again to death after considering his family background and PTSD. McKinney argues he should be resentenced by a jury instead of the Arizona Supreme Court because in Ring v. Arizona (2002) the Supreme Court held juries—rather than judges “are required to make the findings necessary to impose the death penalty.” The Arizona Supreme Court concluded Ring did not apply because McKinney’s conviction became final in 1996, prior to Ring. McKinney also argued that the Eddings violation in this case, where the trial court failed to consider relevant mitigating evidence, should be remanded to the trial court for resentencing not decided by the Arizona Supreme Court.

**Miscellaneous**

In Georgia v. Public.Resource.org the Supreme Court will decide whether a state may copyright statutory annotations. Georgia, through a Code Revision Commission, made up of the Lieutenant Governor, the Speaker of the House, members of the Senate and House, and others, contracts with Lexis to draft the statutory annotations published in the Official Code of Georgia Annotated (OCGA). Georgia claims it may copyright these annotations. Public.Resource.org disagrees and has, among other things, copied and uploaded the OCGA on its website and made it publicly available for free. While the Eleventh Circuit noted annotations don’t carry the force of law it nevertheless held Georgia may hold no copyright to them. First, while a private party, Lexis, is responsible for drafting the annotations it does so under the “highly detailed instruction” of the Code Revision Commission. Second, while the annotations don’t carry the force of law they are “law-like.” “Having been merged by the General Assembly with the statutory text into a single, unified edict, stamped with the state’s imprimatur, and created and embraced by the same body that wrote the text that they explicate, the annotations have been suffused with powerful indicia of legal significance that is impossible to ignore.” Finally, the annotations are created using a process “very closely related” “to the process by which the statutory provisions were made into
binding law.” “[T]he annotations are prepared by the Commission outside of the normal channels of the legislative process . . . and are not voted on individually in the way that Georgia session laws are.” But the Georgia General Assembly votes to adopt annotations like it would any other law.

A 2013 final rule exempted churches from the Affordable Care Act (ACA) so-called contraceptive mandate. The rule included an accommodations process which allowed women covered by exempted plans to still receive covered contraception. In 2017 a number of federal agencies issued, without notice and a public comment period, two interim final rules that “expanded the existing exemption and Accommodation framework, made the Accommodation process voluntary, and offered similar protections to organizations with moral objections to contraceptives.” In Trump v. Pennsylvania and Little Sister of the Poor Saints Peter and Paul Home v. Pennsylvania two states sued the agencies noting that thousands of women will be without birth-control coverage due to these rules and may turn to state-funded programs to receive contraception. The Trump administration lost on all the issue litigated in this case in the Third Circuit. On the question of whether there is statutory authority to expand the conscience exemption the court concluded that “neither of the statutes upon which the Agencies rely, the ACA and RFRA [Religious Freedom Restoration Act], authorize or require the Final Rules.” The Administrative Procedures Act (APA) requires agencies to engage in notice-and-comment rulemaking unless the statute authorizes no notice-and-comment or the agency has good cause. The Trump administration argued that the Health Insurance Portability and Accountability Act (HIPAA) allowed it to avoid notice-and-comment. The Third Circuit disagreed noting that HIPAA “contains no express language supplanting APA procedures, and the sole reference to ‘interim final rules’ does not confer a license to ignore APA requirements.” The Trump administration also argued it had good cause to waive notice and comment based on “(1) the urgent need to alleviate harm to those with religious objections to the current regulations; (2) the need to address ‘continued uncertainty, inconsistency, and cost’ arising from ‘litigation challenging the previous rules’; and (3) the fact that the Agencies had already collected comments on prior Mandate-related regulations.” The Third Circuit concluded “[n]one of these assertions meet the standard for good cause.” Finally, the Third Circuit agreed with the district court decision to issue a nationwide injunction. “Many individuals work in a state that is different from the one in which they reside. An injunction geographically limited to the States alone will not protect them from financial harm, as some share of their residents who work out-of-state will lose contraceptive coverage originally provided through employers in non-enjoined states who will exempt themselves.”

The question the Supreme Court will decide in City of Chicago, Illinois v. Fulton* is whether a local government must return a vehicle impounded because of code violations immediately upon a debtor filing for bankruptcy. 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 turn over her vehicle; it refused. Fulton claims the Bankruptcy Code’s “automatic stay” provision requires the City to immediately return her vehicles even though she didn’t pay her outstanding tickets. The Seventh Circuit agreed. The “automatic stay” provision of the Bankruptcy Code provides that a bankruptcy petition “operates as a stay, applicable to all entities, of … 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.” In a previous case decided in 2009, Thompson v. General Motors Acceptance Corp., the Seventh Circuit concluded that “exercise control” includes holding onto an asset and that “exercise control” isn’t limited to “selling or otherwise destroying the asset.” So, the court reasoned in this case, the City of Chicago “exercised control” over Fulton’s car in violation of the automatic stay by not returning it after she filed the bankruptcy petition. The Seventh Circuit next concluded that the bankruptcy stay becomes effective immediately upon filing the petition, without the debtor bringing a “turnover action.” Another section of the Bankruptcy Code requires the creditor to request “adequate protection” of its interest in property subject to a bankruptcy petition. According to the Seventh Circuit in Thompson: “[I]f a creditor is allowed to retain possession, then this burden is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession.”

The issue the Supreme Court will decide in Lomax v. Ortiz-Marquez* is whether dismissal without prejudice for failure to state a claim counts as a strike under the Prison Litigation Reform Act (PLRA). Arthur Lomax filed three lawsuits alleging a variety of constitutional violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility. The federal district court dismissed the first and second lawsuits as barred by Heck v. Humphrey, which holds that a litigant cannot bring a lawsuit challenging his or her conviction's legitimacy until that conviction has been dismissed. The third lawsuit was dismissed for a failure to state a claim. The first two cases were dismissed without prejudice (meaning Lomax is not permanently barred from bringing them again). The PLRA contains a three-strikes rule disallowing an inmate who can’t pay filing fees upfront from filing a fourth lawsuit when he or she has filed three previous lawsuits which were dismissed on the grounds that they were “frivolous, malicious, or fail[] to state a claim upon which relief may be granted.” Lomax argues he should be able to bring another lawsuit without paying filing fees upfront regardless of the three-strikes rule because two of his previous lawsuits were dismissed without prejudice. The Tenth Circuit ruled against Lomax, relying on “long standing precedent” holding that “the fact that two of the dismissals were without prejudice is immaterial.”

In Kelly v. United States the Supreme Court will decided whether a public official “defrauds” the government of its property by advancing a “public policy reason” for an official decision that is not the subjective “real reason” for making the decision. Former New Jersey Governor Chris Christie’s Deputy Executive Director of the Port Authority of New York and New Jersey, the Port Authority’s Director of Interstate Capital Projects, and Christie’s Deputy Chief of Staff for Intergovernmental Affairs orchestrated “Bridgegate.” Under the guise of conducting a traffic study, they conspired to reduce traffic lanes from the George Washington Bridge (the busiest bridge in the world) to Fort Lee the first week of Fort Lee’s school year, because the mayor of Fort Lee refused to endorse Governor Christie for governor. Two of the former employees were convicted of violating a number of federal fraud statutes; one was a cooperating witness. The Third Circuit accepted the United States’ argument that these convictions should stand because the former employees deprived the Port Authority of tangible property. Specifically, the court concluded the time and wages of the former employees and the 14 Port Authority employees they “conscripted” in the scheme was sufficient to deprive the Port Authority of money or property. In their certiorari petition the former employees argue that the Third Circuit read the
fraud statutes too broadly. They claim it can’t be that “any official (federal, state, or local) who conceals or misrepresents her subjective motive for making an otherwise-lawful decision—including by purporting to act for public-policy reasons without admitting to her ulterior political goals, commonly known as political ‘spin’—has thereby defrauded the government of property (her own labor if nothing else).” If using government resources while misrepresenting a subjective motive is fraud they continue, “nearly limitless array of routine conduct” will be criminal.

In Allen v. Cooper the Supreme Court will decide whether states can be sued in federal court for copyright violations. North Carolina owns a ship pirate Blackbeard captured, renamed Queen Anne’s Revenge, and sunk between 1717-18. In the late 1990s North Carolina permitted a private research and salvage firm to photograph the ship. North Carolina continued to own the shipwreck and its artifacts. The company could make money from the sale of media related to the ship. Frederick Allen, who was hired by the salvage firm to take photos and videos of the ship, sued North Carolina for infringing on images Allen copyrighted. Allen claims North Carolina can be sued in federal court for infringing on his copyright because Congress abrogated states’ sovereign immunity in the Copyright Remedy Clarification Act. Both parties agree that Congress made a clear statement of intent to abrogate sovereign immunity. So, the only issue in the case is whether Congress validly exercised its power to abrogate sovereign immunity. The Fourth Circuit concluded Congress did not. In the Copyright Remedy Clarification Act Congress invoked the U.S. Constitution Article I Patent and Copyright Clause. But the Fourth Circuit pointed out that in Seminole Tribe v. Florida (1996), the Supreme Court held that Congress can’t use its Article I power to abrogate Eleventh Amendment immunity. Allen also argued Congress validly enacted the Copyright Remedy Clarification Act under the authority granted to it in § 5 of the Fourteenth Amendment. North Carolina countered Congress did not validly exercise its § 5 power in enacting the Act because (1) it did not purport to rely on its § 5 authority, and (2) it did not tailor the Act to an “identified, widespread pattern of conduct made unconstitutional by the Fourteenth Amendment.” The Fourth Circuit agreed with North Carolina that in adopting the Act Congress found no widespread pattern of states infringing on copyrights “that presumably violated the Fourteenth Amendment’s Due Process Clause.”

In Moda Health Plan v. United States the Supreme Court will decide whether Congress may enact appropriations riders restricting the sources of funding available to pay health insurers for losses incurred that were supposed to be paid per federal law. The Affordable Care Act’s (ACA) risk corridor program provided that if a health insurance plan participating in the exchange lost money between 2014 and 2016 it would receive a payment from the federal government based on a formula defined in the statute. If it made money the plan had to pay the federal government based on a formula. The Government Accountability Office (GAO) identified a particular funding source the federal government could use to make payments. Congress passed appropriations riders for all three years disallowing that funding source to be used to make risk corridor payments. Over the three-year period the risk corridor program was short $12 billion. Moda Health Plan claims it is owed $290 million. The Federal Circuit held that the federal government is not obligated to pay the statutory formula for what it owes insurers under the risk corridor program because of the appropriations riders. The Federal Circuit concluded that the section of the ACA related to the risk corridor program is “unambiguously mandatory” and
requires the federal government to “make payments at the full amount indicated by the statutory formula if payments in fell short.” However, the federal government suspended its obligation to pay the full formula amount through the riders. “Congress clearly indicated its intent here. It asked GAO what funding would be available to make risk corridors payments, and it cut off the sole source of funding identified beyond payments in. It did so in each of the three years of the program’s existence.”

The question the Supreme Court will decide in McGirt v. Oklahoma may sound familiar: “whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction.” The Supreme Court agreed to decide this very same question last term in Sharp v. Murphy. But the Court didn’t decide that case, presumably because it was deadlocked 4-4; Justice Gorsuch didn’t participate. Per the Major Crimes Act states lack jurisdiction to prosecute Native Americans who commit particular crimes in “Indian country.” Oklahoma prosecuted Jimcy McGirt, a member of the Seminole/Creek nation, for a number of sex crimes. He claims Oklahoma lacked jurisdiction to prosecute him because he committed his crimes in Indian country. The Oklahoma Court of Criminal Appeals ruled against him noting that this is the same argument being made to, but not yet adopted by, the Supreme Court in the Sharp v. Murphy. Per the Major Crimes Act “Indian country” includes “all lands within the limits of any Indian reservation.” Congress may disestablish or diminish Indian reservations. Allotment on its own does not disestablish or diminish a reservation. In Solem v. Barlett (1984) the Supreme Court established a three-part test to determine when Congress has diminished a reservation. First, courts “must examine the text of the statute purportedly disestablishing or diminishing the reservation.” In Sharp v. Murphy, Murphy argued that Congress never diminished the 1866 territorial boundaries of the Creek Nation where he committed his crimes. The Fifth Circuit agreed. It reviewed eight statutes allotting Creek land and creating the State of Oklahoma. The court concluded that the statutory text “fails to reveal disestablishment.” “Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders.”

In a per curiam (unauthored) opinion in Thompson v. Hebdon the Supreme Court instructed the Ninth Circuit to decide again whether Alaska law, which limits the amount an individual can contribute to a candidate for political office or to an election-oriented group other than a political party to $500 per year, violates the First Amendment. The Ninth Circuit previously upheld the law. According to the Supreme Court the Ninth Circuit failed to apply the Supreme Court’s most recent precedent involving non-aggregated contribution limits, Randall v. Sorrell (2006). In that case the Supreme Court invalidated a Vermont law that limited individual contributions on a per-election basis to: $400 to a candidate for Governor, Lieutenant Governor, or other statewide office; $300 to a candidate for state senator; and $200 to a candidate for state representative. The plurality opinion in Randall explained that the problem with very low limits is that they can “prevent[] challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” In Randall the Court identified “danger signs” indicating a contribution limit might be unconstitutional. According to the Court, Alaska’s law shares some of these characteristics. First, Alaska’s limit is less than two-thirds of the lowest contribution limit the Court has upheld. Second, Alaska’s law is the most-restrictive in the country for individual-to-candidate limits. Finally, Alaska’s law is not adjusted for inflation.