



## Supreme Court Review for States 2018

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

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

### **Big Cases**

In [\*South Dakota v. Wayfair\*](#)\* the Supreme Court ruled that states and local governments can require vendors with no physical presence in the state to collect sales tax. In a 5-4 decision, the Court concluded “economic and virtual contacts” are enough to create a “substantial nexus” with the state, allowing the state to require collection. In an opinion written by Justice Kennedy, the Court offered three reasons for why it was abandoning the physical presence rule from [\*Quill v. North Dakota\*](#) (1992). “First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be ‘applied to an activity with a substantial nexus with the taxing State.’ Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.” To require a vendor to collect sales tax, the vendor must still have a “substantial nexus” with the state. The Court found a “substantial nexus” in this case based on the “economic and virtual contacts” Wayfair has with the state, reasoning that a business could not do \$100,000 worth of business or 200 separate transactions in South Dakota “unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”

In [\*Abood v. Detroit Board of Education\*](#) (1977) the Supreme Court upheld “agency shop” arrangements where public employees who do not join a union are still required to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment. In [\*Janus v. AFSCME\*](#), the Supreme Court overruled *Abood* in a 5-4 opinion. The Court also held that employees must “affirmatively consent” to join the union. In an opinion written by Justice Alito the Court repudiated the two main justifications for “fair share” in

*Abood*: “labor peace” and avoiding free riders. In *Janus*, the Court pointed out that labor peace exists in federal employment, where agency fee is disallowed, and states without agency fee. The second defense for agency fee in *Abood* was to avoid free riders who “enjoy[] the benefits of union representation without shouldering the costs.” But the Court pointed out *Janus*’ analogy that “he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.” More technically, the Court concluded the “First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.” Finally, the Court looked at the five factors it typically weighs when deciding whether to overturn precedent: the quality of the Court’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. Only one factor, the Court concluded, weighed in favor of keeping *Abood*. But that factor—reliance—“does not carry decisive weight.”

In a 6-3 decision in [\*Murphy v. National Collegiate Athletic Association\*](#),\* the Supreme Court declared the federal Professional and Amateur Sports Protection Act (PASPA) unconstitutional. PASPA, adopted in 1992, prohibited states from authorizing sports gambling. The New Jersey governor asked the Third Circuit and the Supreme Court to declare PASPA unconstitutional per the anticommandeering doctrine. An opinion written by Justice Alito admitted that the anticommandeering doctrine “sounds arcane,” but explained it is simply the notion that Congress lacks the power to “issue orders directly to the States.” The Court concluded PASPA violates the anticommandeering rule by telling states they could not authorize sports gambling (either outright or by repealing bans on the books). “[PASPA] unequivocally dictates what a state legislature may and may not do. . . . [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”

In a 5-4 decision in [\*Trump v. Hawaii\*](#),\* the Supreme Court ruled in favor of President Trump’s travel ban. The third travel ban indefinitely prevents immigration from six countries: Chad, Iran, Libya, North Korea, Syria, and Yemen. Hawaii and others sued President Trump claiming the ban was illegal and unconstitutional. The Supreme Court, in an opinion written by Chief Justice Roberts, held that the travel ban fell “well within” the President’s authority under the Immigration and Nationality Act (INA). The INA allows the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.” The Court next addressed the challenge to the travel ban as violating the Establishment Clause of the First Amendment due to “anti-Muslim animus.” The Court acknowledged the anti-Muslim statements of the President and his advisers but stated the issue before the Court “is not whether to denounce the statements.” Because this case involved a “national security directive regulating the entry of aliens abroad” the Court only applied “rational basis review” where it would uphold the travel ban “so long as it can reasonably be understood

to result from a justification independent of unconstitutional grounds.” According to the Court, “it cannot be said that it is impossible to ‘discern a relationship to legitimate state interests’ or that the policy is ‘inexplicable by anything but animus.’”

## **Voting**

In *Husted v. A. Philip Randolph Institute*,\* the Supreme Court held that Ohio’s process of removing people from the voter rolls does not violate federal law. If a person doesn’t vote for two years Ohio sends them a confirmation notice. If they don’t respond to the notice and don’t vote in the next four years, Ohio removes them from the voter rolls. The National Voter Registration Act (NVRA) allows states to remove voters if they don’t respond to a confirmation notice and don’t vote in the next two federal election cycles. But the “Failure-to-Vote Clause” says a state program “shall not result in the removal of the name of any person . . . by reason of the person’s failure to vote.” Two advocacy groups and an Ohio resident claimed Ohio’s process violate the NVRA’s Failure-to-Vote Clause because “the failure to vote plays a prominent part in the Ohio removal scheme.” They argued failure to vote is used as a trigger for sending the confirmation notice and as a requirement for removal. In a 5-4 opinion written by Justice Alito, the Court concluded the Ohio process doesn’t violate the NVRA. First, it is undisputed the Ohio process follows the NVRA “to the letter.” Second, Justice Alito pointed to language in the NVRA stating that registrants may not be removed “solely by reason of a failure to vote.” According to the Court, the NVRA “simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. Instead, as permitted by [the NVRA], Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice.”

In *Gill v. Whitford*, five challengers argued the Wisconsin legislature engaged in unconstitutional partisan gerrymandering by “packing” and “cracking” Wisconsin Democrats into legislative districts to give Republicans a statewide advantage. The challengers based their argument on the “efficiency gap” which compares each party’s respective “wasted” votes across all legislative districts. The challengers claimed that the “large and unnecessary efficiency gap” in favor of Republicans violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. In an opinion written by Chief Justice Roberts, the Court concluded that the challengers would have to show they were harmed by living in a “packed” or “cracked” district to have standing in this case. The named challenger in this case, William Whitford, testified he didn’t live in such a district. Four other challengers *claimed* they lived in such districts but failed to *prove* they did. According to the Court, these challengers could not rely on a theory of statewide injury—the efficiency gap—to prove standing. The problem with the efficiency gap, according to the Court, is that it measures harm to political parties but not individuals.

In *Benisek v. Lamone* Republicans in Maryland’s Sixth Congressional District asked a federal district court for a preliminary injunction in May 2017, arguing the 2011 map drawn by the Democrat-controlled Maryland General Assembly was unconstitutionally gerrymandered to retaliate against them for their political views. The district court denied the motion for a preliminary injunction. The Supreme Court agreed for three reasons in a *per curiam* (unauthored)

decision. First, the challengers had not shown “reasonable diligence” in seeking a preliminary injunction by waiting for six years and three general elections before seeking it. Second, by the time the district court was able to rule on the motion the time needed to create a new map “had already come and gone.” Finally, the district court did not abuse its discretion by waiting until the Supreme Court decided *Gill v. Whitford* due to the “legal uncertainty” surrounding partisan gerrymandering.

A group representing minority voters challenged the Texas Legislature’s 2011 original redistricting plan claiming it discriminated against black and Hispanic voters in violation of the Constitution’s Equal Protection Clause and the Voting Rights Act. A Texas federal district court issued a remedial redistricting plan which the Supreme Court [vacated](#) in 2012. The Texas district court then drew a second temporary redistricting plan, which the Texas legislature adopted in 2013 as its redistricting plan. Meanwhile, a D.C. court refused to preclear Texas’s now abandoned 2011 legislative-redistricting plan. The current case, *Abbott v. Perez*, arose when another group sued alleging the new districts in Texas were still racially discriminatory. After a trial, the Texas district court concluded the 2013 legislature could not show that it had “purged the taint” of the initial discriminatory maps. The district court asked the state legislature to redraw, and Texas appealed to the Supreme Court. The Supreme Court, in an opinion written by Justice Alito, held that the challengers, not Texas, had to prove whether the Texas Legislature had a discriminatory intent in adopting its 2013 plan. The Supreme Court found that the Legislature’s direct evidence of intention—that it wanted the litigation to end as expeditiously as possible—was “understandable and proper.” While the lower court had concluded that the “strategy” of the 2013 Legislature was to “insulate [the plans] from further challenge, regardless of [the plans’] legal infirmities,” the Supreme Court found “no evidence that the Legislature’s aim was to gain acceptance of plans that it knew were unlawful.”

In *North Carolina v. Covington*, the Supreme Court upheld a North Carolina district court decision to redraw four racially gerrymandered state legislative districts, but reversed the district court’s decision to redraw five other districts in Wake and Mecklenburg Counties. In a long-running dispute over the North Carolina 2010 redistricting process, the district court first ordered the General Assembly to redraw 28 racially gerrymandered districts. Challengers in *Covington* claimed four districts in the redrawn map still segregated voters unconstitutionally on the basis of race. Additionally, they challenged five other redrawn districts in Wake and Mecklenburg Counties that weren’t racial gerrymanders, arguing that the legislature’s decision to redraw them violated the North Carolina Constitution’s prohibition against mid-decade redistricting. The district court appointed a special master. North Carolina challenged the district court’s adopting of the special master’s recommendations. In a *per curiam* (unsigned) opinion, the Supreme Court agreed with the district court’s conclusion that the legislature had improperly considered race in the four challenged districts, and found it permissible to adopt the special master’s race-based recommendations to remedy the issue. However, the Supreme Court concluded that the district court’s decision to redraw districts in Wake and Mecklenburg Counties was outside of the scope

of its authority in the case. “Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina’s legislative districting process was at an end.”

### **First Amendment**

In a 5-4 decision in [\*National Institute of Family and Life Advocates v. Becerra\*](#),\* the Supreme Court ruled that a California law requiring *licensed* pregnancy clinics to disclose they don’t offer abortions and *unlicensed* pregnancy clinics to disclose the fact they are unlicensed likely violates the First Amendment. California law requires that “licensed covered facilities” that provide family planning or pregnancy-related services must disseminate a notice stating that publicly-funded family planning services, including contraception and abortion, are available. It also requires “unlicensed covered facilities” to disseminate a notice they are unlicensed. The Supreme Court, in an opinion written by Justice Thomas, agreed that both notices likely violate the First Amendment. The Court held that notice requirements for licensed clinics are content-based, so strict scrutiny would apply (meaning the notice is presumptively unconstitutional). It rejected the lower court held that lower (intermediate) scrutiny applied because the notices were “professional speech,” stating it has never recognized a category of “professional speech.” Regardless, it held the licensed notice requirement failed to pass even intermediate scrutiny because it doesn’t apply to numerous other community clinics which serve low-income women, who are the intended target of the licensed notices. Regarding the unlicensed notices, the Court assumed but did not decide that the standard for disclosure-requirements from [\*Zauderer v. Office of Disciplinary Counsel\*](#) (1985) applies. Per *Zauderer*, disclosure requirements are unconstitutional if they are “unjustified or unduly burdensome.” According to the Court, California’s justification for the unlicensed notice is “purely hypothetical.”

In a 7-2 decision in [\*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission\*](#) the Supreme Court reversed a ruling against the owner of a cake shop who refused to create a wedding cake for a same-sex couple because of his religious beliefs. The Court concluded the cake maker was entitled to but did not experience a “neutral decisionmaker who [gave] full and fair consideration to his religious objection.” Charlie Craig and Dave Mullins filed a complaint against Masterpiece Cakeshop claiming it violated Colorado's public accommodations law, which prohibits discrimination in public accommodations on the basis of sexual orientation, when it refused to create a wedding cake for them. Before the Colorado Civil Rights Commission and the Colorado Court of Appeals, Masterpiece argued that being required to create cakes for same-sex weddings violates Phillips’ First Amendment free speech and free exercise rights. Phillips lost in both venues. The Supreme Court, in an opinion written by Justice Kennedy, ruled in favor of Masterpiece, concluding that the Colorado Civil Rights Commission acted with hostility toward religion “inconsistent with the First Amendment’s guarantee that our laws be applied . . . neutral[ly] toward religion.” Specifically, a number of commissioners made anti-religion remarks at hearings including that faith is “one of the most despicable pieces of rhetoric that people can use.” Also, on at least three other occasions the commission allowed bakers to refuse to create cakes conveying disapproval of same-sex marriage, along with religious text because the cake makers deemed these messages offensive. According to the

Court, “the Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs.”

In a 7-2 decision in [\*Minnesota Voter Alliance v. Mansky\*](#),\* the Supreme Court struck down a Minnesota law which prohibits voters from wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. Andrew Cilek was temporarily prevented from voting for wearing two items: a T-shirt with the words “Don’t Tread on Me” and the Tea Party Patriots logo and a “Please I. D. Me” button. He argued before the Supreme Court that Minnesota’s ban on political speech at the polling place violates the First Amendment because it is overly broad. In an opinion written by Chief Justice Roberts, the Court concluded that the statute violates the First Amendment. The Court opined that states may ban some campaign-related clothing and accessories from the polling place but “must draw a reasonable line.” In short, states must be able to articulate “some sensible basis for distinguishing what may come in from what must stay out.” “[T]he unmoored use of the term ‘political’ in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail.”

In an 8-1 decision in [\*Lozman v. City of Riviera Beach\*](#),\* the Supreme Court held that a citizen who was arrested for making comments at a city council meeting (possibly because the City had an official policy of retaliating against him) was not barred from bringing a First Amendment retaliatory arrest claim against the City even if it had probable cause to arrest him. Fane Lozman was an “outspoken critic” of the City of Riviera Beach’s proposed plan to redevelop the city-owned marina using eminent domain, and sued the City claiming it violated open meetings law. He alleged that the City Council held a closed-door meeting in which it devised an official plan to intimidate him in retaliation for his lawsuit. Five months after the closed-door meeting, a councilmember had Lozman arrested during the public comment period for discussing issues unrelated to the City and refusing to leave the podium. Lozman conceded that the City had probable cause to arrest him, but he claimed the City should be liable for violating the First Amendment because its strategy to intimidate him to stop speaking was a “but for” cause of his arrest. In contrast, the City argued that Lozman could not sue it for retaliatory arrest under any circumstances if probable cause existed to arrest him. In an opinion written by Justice Kennedy, the Court declined to decide whether to extend either the “but for” cause rule proposed by Lozman or the absolute bar to retaliatory arrest claims proposed by the City to the “mine run” of First Amendment retaliatory arrest claims. Instead, the Court held that because of the unique facts of the case Lozman “need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.”

#### **Fourth Amendment and Qualified Immunity**

In a [\*Carpenter v. United States\*](#), the Supreme Court held 5-4 that the Fourth Amendment requires the government to get a warrant to obtain cell-site location information (CSLI). Robbery suspects gave the FBI Timothy Carpenter's name and cell phone number as an accomplice who participated in a number of robberies. Prosecutors obtained Carpenter's CSLI for over 100 days, and were able to show that Carpenter was located at four of the robberies at the exact time they occurred. Per the Stored Communications Act (SCA), prosecutors applied for a less-stringent court order rather than a warrant to obtain the records. In concluding that obtaining CSLI was a search, the Court rejected the argument that the "third-party" doctrine applies in this case. In previous cases, the Court had held that persons have no legitimate expectation of privacy in information voluntarily turned over to third parties, meaning such information isn't protected by the Fourth Amendment. According to the Court, the information to which the Court applied the third-party doctrine in previous cases (bank records and dialed phone numbers) isn't comparable to "the ability to chronicle a person's past movements through the record of his cell phone signals." The Court also concluded the government needs to obtain a warrant because warrants are typically required where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." The SCA's requirement to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation" "falls well short of the probable cause required for a warrant."

In an 8-1 decision in [\*Collins v. Virginia\*](#), the Supreme Court held that the Fourth Amendment automobile exception does not permit police officers to search vehicles parked in the curtilage of a home without a warrant. Per the automobile exception to the Fourth Amendment, police officers may search vehicles without a warrant if they have probable cause to believe they will find contraband or a crime has been committed. But officers may not enter the curtilage of a home to gather evidence without a warrant. In an opinion written by Justice Sotomayor, the Supreme Court concluded that the automobile exception "extends no further than the automobile itself." Two rationales justify the automobile exception: the "ready mobility" of vehicles and their "pervasive regulation." "To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles."

In [\*Byrd v. United States\*](#), the Supreme Court held unanimously that the driver of a rental car generally has a reasonable expectation of privacy in the rental car even if he or she isn't listed as an authorized driver on the rental agreement. A state trooper pulled Terrance Byrd over for a possible traffic infraction. Byrd's name was not on the rental agreement, and he told the officer a friend had rented it. Officers searched the car and found 49 bricks of cocaine and body armor. While the Fourth Amendment prohibits warrantless searches, generally probable cause a crime has been committed is needed to search a car. To claim a violation of Fourth Amendment rights a

defendant must have a “legitimate expectation of privacy in the premises” searched. The United States argued drivers not listed on rental agreements always lack an expectation of privacy based on the rental company’s lack of authorization. The Supreme Court, in an opinion written by Justice Kennedy, rejected this argument, reasoning that “the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car.” The Court also noted that a legitimate expectation of privacy may be tied to property rights—including the right to exclude others. The United States agreed that Byrd could exclude third parties from the rental car even though he wasn’t listed on the rental agreement.

In *District of Columbia v. Wesby*,\* a majority of the Supreme Court ruled D.C. police officers had probable cause to arrest individuals for holding a “raucous, late-night party in a house they did not have permission to enter.” All nine of the Justices ruled in favor of granting qualified immunity to the police officers. Police were called to a home in D.C. around 1AM based on complaints of loud music and illegal activity. The house was dirty, with no furniture downstairs except a few metal chairs. In the living room the officers found “a makeshift strip club”; they found “more debauchery upstairs.” While many partygoers said they were there for a bachelor party, no one could identify the bachelor. Two of the women working the party said that “Peaches” was renting the house and had given them permission to be there. Police officers called Peaches, who told them she gave the partygoers permission to use the house. But she ultimately admitted that she had no permission to use the house herself; she was in the process of renting it. The landlord confirmed by phone that Peaches hadn’t signed a lease. The partygoers were charged with disorderly conduct. They sued D.C. for false arrest under the Fourth Amendment. The D.C. Circuit concluded there was no probable cause to arrest them. Peaches invited them—so the officers had no reason to believe the partygoers “knew or should have known” their “entry was unwanted.” The Supreme Court looked at the totality of the circumstances and concluded police officers made an “entirely reasonable inference” that the partygoers “were knowingly taking advantage of a vacant house as a venue for their late-night party.” The totality of the circumstances included: the condition of the house (filthy and empty); the partygoers’ conduct (makeshift strip club); their reaction to police presence (scattering, hiding in closets); their answers to questions (vague and implausible); and Peaches’ invitation (from a confirmed liar).

In *Kisela v. Hughes*, officers arrived at Amy Hughes’s house after being told a woman was hacking a tree with a kitchen knife. Officers saw Hughes emerge from her house carrying a large kitchen knife at her side. Hughes stopped no more than six feet away from her roommate, Sharon Chadwick. After officers told Hughes twice to drop the knife and she did not comply, Officer Kisela shot her four times. The Ninth Circuit ruled that Officer Kisela used unreasonable force in violation of the Fourth Amendment and denied him qualified immunity concluding the constitutional violation was obvious. The Supreme Court in a *per curiam* (unauthored) opinion disagreed. It assumed without deciding that Officer Kisela’s use of force was excessive. But the Court granted him qualified immunity noting this is “far from an obvious case in which any



competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.” According to the Court, Officer Kisela believed Hughes was a threat to Chadwick, he had only seconds to assess the danger, Hughes had just been seen hacking a tree, and she failed to acknowledge two commands to drop the knife which were loud enough for her roommate to hear.

In a unanimous *per curiam* (unauthored) opinion, the Supreme Court remanded [Sause v. Bauer](#) back to the lower court to reconsider its decision granting qualified immunity to police officers who ordered a person to stop praying. Officers visited Mary Anne Sause’s apartment in response to a noise complaint. According to the Court, they then allegedly “proceeded to engage in a course of strange and abusive conduct,” including ordering her to stop when she knelt and began to pray. Sause sued the officers for violating her First Amendment right to free exercise of religion. The Tenth Circuit affirmed a lower court granting the officers qualified immunity. Sause argued she had a clearly established right to pray. The Court agreed that the First Amendment protects the right to pray, but “there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place.” “When an officer’s order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.” In this case the Supreme Court concluded the lower court needed answers to numerous questions before it could decide whether Sause’s First Amendment or Fourth Amendment rights (to be free from an unlawful search) were violated.

### **Tribal**

In [Upper Skagit Indian Tribe v. Lundgren](#), the Supreme Court held 7-2 that [County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation](#) (1992) does not hold that Indian tribes lack sovereign immunity in “in rem” or “against or about a thing” (here land) lawsuits. In 2013 the Upper Skagit Indian Tribe bought land adjacent to the Lundgrens. The Lundgrens sued the tribe to establish ownership of part of the land which the Lundgrens had taken care of for decades but the tribe claimed to own. The tribe argued that because it has sovereign immunity the court had no jurisdiction to hear this case. The Supreme Court of Washington ruled for the Lundgrens, reasoning that sovereign immunity does not apply to cases where a judge “exercis[es] in rem jurisdiction” to resolve a dispute over title in a parcel of land owned by a tribe. The Washington Supreme Court read *County of Yakima* as “establish[ing] the principle that . . . courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.” According to the Supreme Court, in an opinion written by Justice Gorsuch, relying on *Yakima* was a mistake because it did not address the scope of tribal sovereign immunity. “Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887.” The Supreme Court left it to the Washington Supreme Court to decide on remand whether at common law sovereigns lack immunity from lawsuits involving immovable property.

In the mid-1800s, Indian tribes in the Pacific Northwest entered into treaties guaranteeing them a right to off-reservation fishing. In [\*Washington v. United States\*](#) the Supreme Court failed to decide whether the “fishing clause” guarantees “that the number of fish would always be sufficient to provide a ‘moderate living’ to the tribes.” Instead, the Court affirmed the judgment of the Ninth Circuit by an equally divided vote. The “fishing clause” of the Stevens Treaties guaranteed “the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” In 2001, the United States and a number of tribes sued Washington State claiming that it violated the treaty by building culverts that prevented salmon from reproducing, leading to the salmon supply significantly plummeting. Washington State argued it has no “treaty-based duty to avoid blocking salmon-bearing streams.” The Ninth Circuit disagreed, construing the treaty in favor of the Indian Tribes. “The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs.”

## **Water**

In [\*National Association of Manufacturers v. Department of Defense\*](#), the Supreme Court held unanimously that a legal challenge to the definition of “waters of the United States” (WOTUS) must begin in a federal district court, not a federal court of appeals. In 2015 the Obama administration issued a new WOTUS definitional rule per the Clean Water Act (CWA). While most challenges to EPA actions must be filed in federal district court first, the CWA lists seven categories of EPA actions where “review lies directly and exclusively” in the federal courts of appeals. One of the categories providing courts of appeals exclusive jurisdiction is an EPA action “in approving or promulgating any effluent limitation or other limitation” under various sections of the CWA. The Court rejected the argument the WOTUS rule is an “effluent limitation or other limitation” because both terms refer to EPA restrictions on the discharge of pollutants. The second category providing courts of appeals exclusive jurisdiction is an EPA action “in issuing or denying any permit” under a particular section of the CWA. According to the court, the WOTUS rule “neither issues nor denies a permit” under the EPA permitting program at issue.

In [\*Texas v. New Mexico\*](#), the Supreme Court allowed the United States to intervene as a party in an interstate compact dispute implicating Western water rights and a treaty with Mexico. Writing for a unanimous Court, Justice Gorsuch concluded that the United States has sufficient interests in the dispute over the Rio Grande Compact to intervene. The Rio Grande Compact was formed between Colorado, New Mexico, and Texas with the approval of the federal government in the 1930s. It was adopted after the United States agreed in a separate treaty to provide Mexico water annually from the Elephant Butte Reservoir. Texas claims New Mexico has breached its Compact duty to deliver water to the Reservoir for Texas by allowing users to siphon off water. The United States sought to intervene as a party with similar arguments as Texas. A Court-appointed special master recommended the Court dismiss the United States from the suit because the Compact “does not confer on the United States the power to enforce its terms.” The Court

disagreed and concluded that the United States could join the suit for four reasons. First, “the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact’s terms” because this “allows the United States to meet its duties” under other agreements. Second, “New Mexico has conceded that the United States plays an integral role in the Compact’s operation.” Third, “a breach of the Compact could jeopardize the federal government’s ability to satisfy its treaty obligations” with Mexico. Finally, “the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State’s objection.”

In a 5-4 opinion written by Justice Breyer, the Court in [Florida v. Georgia](#) held that a special master had used too high a standard of review for “redressability” in resolving a water dispute between Florida and Georgia. Florida claims that Georgia has been using too much water from the Apalachicola-Chattahoochee-Flint River system. The Army Corps of Engineers regulates the flow of the water system in certain areas of the river system, but is not a party to the case. The special master held that Florida had “not proven by clear and convincing evidence” that putting a cap on how much water Georgia could consume would actually improve the water benefit to Florida or that Florida could achieve an effective remedy without the Corps being a party. According to the Court: “unless and until the Special Master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm significantly, the complaining State should not have to prove with specificity the details of an eventually workable decree by ‘clear and convincing’ evidence. Rather, the complaining State should have to show that, applying the principles of ‘flexibility’ and ‘approximation’ we discussed above, it is likely to prove possible to fashion such a decree.” The Court also concluded that an “equity-based cap on Georgia’s use of the Flint River would likely lead to a material increase in streamflow from the Flint River into Florida’s Apalachicola River; and (5) the amount of extra water that reaches the Apalachicola may significantly redress the economic and ecological harm that Florida has suffered.”

### **Miscellaneous**

Federal Rule of Civil Procedure 28 U.S.C 1367(d) states that statutes of limitations for state law claims pending in federal court shall be “tolled” for a period of 30 days after they are dismissed (unless state law provides a longer tolling period). The Supreme Court held 5-4 in [Artis v. District of Columbia](#)\* that “tolled” under 28 U.S.C 1367(d) means suspended or that the clock is stopped. Under the stop-the-clock interpretation, the state statutes of limitations freeze on the day the federal suit is filed and unfreeze with the addition of 30 days when the federal lawsuit is dismissed. Under the grace-period theory, if the state statutes of limitations would have expired while the federal case was pending, a litigant has 30 days from federal court dismissal to refile in state court. Among other reasons, it noted that Black’s Law Dictionary defines “toll” as “to suspend or stop temporarily,” legislatures know how to write statutes adopting a grace-period, and D.C. “has not identified any federal statute in which a grace-period meaning has been ascribed to the word ‘tolled’ or any word similarly rooted.”

The Prison Litigation Reform Act (PLRA) states that when a prisoner wins a civil rights case, “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy” his or her attorney’s fees award. In [\*Murphy v. Smith\*](#), the Supreme Court ruled 5-4 that this statute means “the court must pay the attorney’s entire fee award from the [prisoner’s] judgment until it reaches the 25% cap and only then turn to the [prison guards].” A jury awarded inmate Charles Murphy about \$300,000 in damages relating to an officer crushing his eye socket and leaving him unconscious in a cell without checking his condition. The trial judge awarded Murphy’s attorney about \$100,000 in fees and allocated 10 percent of Murphy’s damages award to attorney’s fees. The prison guards argue that the PLRA requires that 25 percent of the judgment in favor of Murphy to be allocated to Murphy’s attorney’s fees. The Supreme Court agreed with the prison guards in an opinion written by Justice Gorsuch. The Court focused on the “to satisfy” language in the statute. “[W]e know that when you purposefully seek or aim ‘to satisfy’ an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full.”

In [\*Sveen v. Melin\*](#), the Supreme Court held 8-1 that applying Minnesota’s revocation-on-divorce statute to a life insurance beneficiary designation made before the statute’s enactment does not violate the Constitution’s Contracts Clause. Mark Sveen and Kaye Melin married in 1997. In 1998 Sveen purchased life insurance and named Melin as his primary beneficiary with two children from a previous marriage as contingent beneficiaries. In 2002, Minnesota adopted a revocation-on-divorce statute that cancelled beneficiary designations of a spouse upon divorce. Sveen and Melin divorced in 2007. His divorce decree made no mention of the life insurance policy, and he never revised the beneficiary designation. In 2011 Sveen died. Sveen’s children and his ex-wife both claimed entitlement to the insurance proceeds. The children argued that Minnesota’s revocation-on-divorce statute canceled Melin’s beneficiary designation. Melin noted that the law didn’t even exist when her ex-husband bought the policy, and argued that applying the later-enacted revocation-on-divorce statute to the policy would violate the Contracts Clause. In an opinion written by Justice Kagan, the Supreme Court concluded that the Contracts Clause does not prevent a revocation-on-divorce law from applying to a preexisting beneficiary designation. The Contract Clause provides that “[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts.” Laws affecting pre-existing contracts violate the Contracts Clause only if they “operate[] as a substantial impairment of a contractual relationship.” The Court concluded that Minnesota’s revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements for three reasons. “First, the statute is designed to reflect a policyholder’s intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder’s expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment.”

In [\*United States v. Sanchez-Gomez\*](#) the Supreme Court held unanimously that cases brought by four criminal defendants challenging the use of full restraints during pretrial proceedings were

moot. Defendants sought “class-like relief” in a “functional class action,” as the challenged practice was “capable of repetition, yet evading review.” Because the underlying criminal cases came to an end before the Ninth Circuit could rule on the merits of their constitutional claims, the defendants were no longer subject to the shackling policy. The Ninth Circuit held the cases weren’t moot relying on [Gerstein v. Pugh](#) (1975). *Gerstein* involved a class action brought under the Federal Rules of Civil Procedure challenging pretrial detention where the detainees’ claims may have been moot at the time of class certification. Nevertheless, the Supreme Court held the claims remained live because “pretrial custody was inherently temporary and of uncertain length, such that we could not determine ‘that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.’” In an opinion written by Chief Justice Roberts, the Court refused to extend *Gerstein*’s exception to mootness outside the class action context, noting “[w]e have repeatedly tied *Gerstein*’s rule to the class action setting from which it emerged.”

In a *per curiam* opinion the Supreme Court held that if a collective bargaining agreement contains a general durational clause, retiree health insurance benefits last the duration of the agreement and aren’t vested for life. In [CNH Industrial N. V. v. Reese](#), CNH Industrial N.V. agreed to a six-year collective bargaining agreement providing those who retired under the pension plan health insurance but no other insurance benefits. The Sixth Circuit held the agreement was ambiguous as to whether retiree health insurance vested for life because it “carved out certain benefits” like life insurance “and stated that those coverages ceased at a time different than other provisions.” Extrinsic evidence supported lifetime vesting. In 2015 in [M&G Polymers v. Tackett](#), the Supreme Court rejected the Sixth Circuit’s use of so-called *Yard-Man* inferences that often lead the court to conclude that collective bargaining agreements vested retiree health benefits for life. According to the Supreme Court, “the Sixth Circuit held that the same *Yard-Man* inferences it once used to presume lifetime vesting can now be used to render a collective-bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting.” The Court disagreed concluding there was no ambiguity in this collective bargaining agreement. “If the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not.”