

# Federal Advocacy and U.S. Supreme Court Update

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# 2022 NLC-RISC Trustees Conference

Federal Advocacy Update

Carolyn Berndt  
[berndt@nlc.org](mailto:berndt@nlc.org)

**NLC** NATIONAL  
LEAGUE  
OF CITIES  

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CITIES STRONG TOGETHER



- American Rescue Plan Act
- Bipartisan Infrastructure Law
- Cybersecurity
- Public Safety
- Substance Use & Mental Health
- Flood Insurance
- Climate Risk Disclosure
- Public Sector Workforce

During an unprecedented time, NLC delivered  
unprecedented results for our members.

\$65 billion of DIRECT aid to  
**EVERY** city, town or village  
across the country.

**NLC** **DELIVERS**



# What is the American Rescue Plan Act (ARPA)?

- COVID-19 recovery package signed into law on March 11, 2021, with \$1.9 trillion of programming for emergency stabilization and economic recovery.
- Includes Coronavirus State and Local Fiscal Recovery Fund Grants (SLFRF) .
- ARPA Fiscal Recovery Grants are not competitive – every city is *entitled* to one. However, these grants to come with significant new requirements and responsibilities.

## Implementation Benchmarks

1. Assess community needs
2. Asset map existing community resources
3. Review Treasury guidance and NLC resources
4. Host stakeholder meetings for community POV's
5. Communicate with overlapping and neighboring jurisdictions for regional POV's
6. Propose a recovery plan
7. Publicize plan for community feedback
8. Implement plan and track expenditures
9. Build in opportunities to reassess, amend, and pivot plans in case of unanticipated needs, unforeseen setbacks, or weak outcomes

- NLC crafted and delivered a comment letter to the U.S. Department of the Treasury in July 2021, sharing feedback and concerns.
- Many positions addressed in the comment letter were either addressed in comments or enacted in the final rule. The final rule significantly expanded to cover both activities that grantees *can* do and provides significant new direction and examples of *how* to do it.
- Many expenditures that were implied in the IFR are allowed and spelled out in the Final Rule.
- All local governments must be in compliance with the final rule beginning April 1, 2022.

- Provides more direction and greater certainty for local governments.
- Makes it easier for small cities and towns (NEUs) to spend in familiar ways.
- More accurately reflects municipal budgeting by expanding sources of revenue.
- Expands eligible water, sewer, and broadband projects.
- Incentivizes expenditures for disproportionately impacted residents and for equitable outcomes.



# CHECK OUT OUR ARPA Spending Tracker

[www.nlc.org/resource/local-government-arpa-investment-tracker/](http://www.nlc.org/resource/local-government-arpa-investment-tracker/)

# of Local Governments

152

# of Projects

2334

Total \$ Tracked

\$18.4bn

% of Funding Budgeted

48.6%

National Sample Average ⓘ

GOVERNMENT  
OPERATIONS  
37.9%

INFRASTRUCTURE  
12.1%

HOUSING  
12.7%

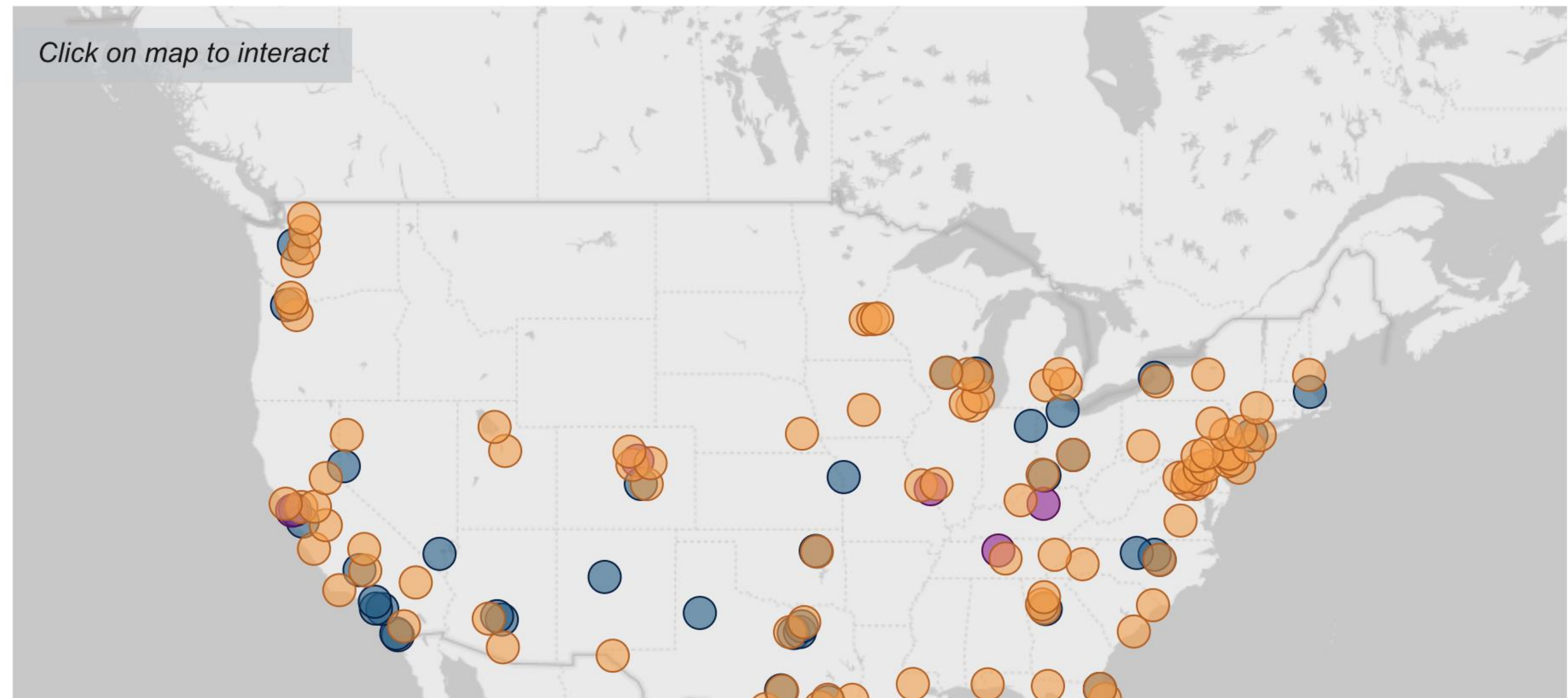
ECONOMIC &  
WORKFORCE DEV  
10.5%

COMMUNITY AID  
12.3%

PUBLIC SAFETY  
2.3%

Local Gov Type ● City ● Consolidated City-County ● County

Click on map to interact





- President Biden signed the Infrastructure Investment and Jobs Act (IIJA), commonly known as the **Bipartisan Infrastructure Law (BIL)**, on November 15, 2021.
- This BIL marks **historic access for local governments** to federal infrastructure programs.
- BIL includes **\$1.2 trillion for America's infrastructure** - including \$550 billion in new funding.





# Partnership

The federal government cannot build a better America alone – it needs local and state leadership to act as coordinators and apply for transformative infrastructure funding that your city can access directly.



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BUILDING A BETTER AMERICA

BUILD.GOV

FACT SHEET:

Competitive Infrastructure Funding Opportunities for Local Governments

The Bipartisan Infrastructure Law includes billions of dollars in competitive funding available to cities, towns, and municipalities across dozens of new and existing programs. As local governments begin to rebuild and reinvest in their communities, the Biden-Harris Administration stands ready to support local leaders as they combine funding streams, organize around their priorities, and build local support for long overdue infrastructure projects.

At the U.S. Conference of Mayors Winter Meeting, White House Infrastructure Implementation Coordinator and former New Orleans Mayor Mitch Landrieu will highlight 25 already available or soon-to-be-available sources of funding that local governments – particularly cities – can compete or apply for directly. Listed below is the latest available information on these key programs, including links to agency websites, application timing, and descriptions. Highlighted programs were selected based on their size and cross-cutting objectives. Using these available sources of funds, cities can begin

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A GUIDEBOOK TO THE BIPARTISAN INFRASTRUCTURE LAW FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS, AND OTHER PARTNERS

Program Search

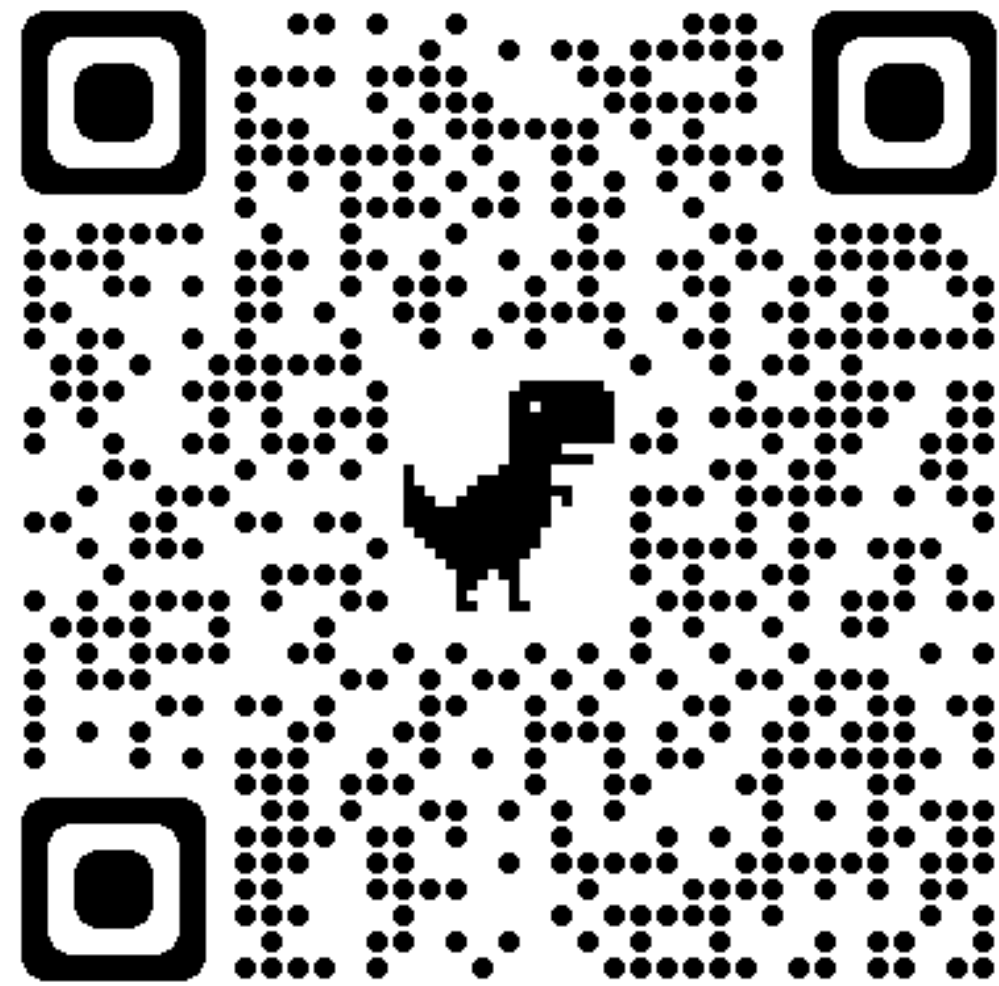
[Download the guidebook data \(CSV\).](#)

SHOW 10 ENTRIES

SEARCH:

CATEGORY	PROGRAM NAME	AGENCY NAME	BUREAU NAME	FUNDING AMOUNT	FUNDING MECHANISM	NEW?
+ Airports and Federal Aviation Administration Facilities	Airport Infrastructure Grants	Department of Transportation	Federal Aviation Administration	\$15,000,000,000	Grant	Yes
+ Airports and Federal Aviation Administration Facilities	Airport Terminal Program	Department of Transportation	Federal Aviation Administration	\$5,000,000,000	Grant	Yes
+ Airports and Federal Aviation Administration Facilities	Facilities and Equipment	Department of Transportation	Federal Aviation Administration	\$5,000,000,000	Contract	No





Hold Your Phone's Camera Up to the QR  
Code to Visit NLC's Ready to Rebuild Site

- [NLC Summary: What's in the Infrastructure Bill for Cities](#)
- ["Ready to Rebuild" Webinar Series](#)
- [Infrastructure Bill Insights Tool](#)
- [Citiespeak Infrastructure Blogs](#)
- [Have a Question? Submit it here!](#)

# What's In the Bipartisan Infrastructure Law (BIL)

 Improves Water Systems

 Investments in Passenger Rail

 High-Speed Internet Access

 Network of EV Chargers

 Better Roads and Bridges

 Upgrade Power Infrastructure

 Investments in Public Transit

 Resilient Infrastructure

 Upgrade Airports and Ports

 Investments in Environment





## Begin your infrastructure journey....

- Which programs are right for my community?
- What is the timeline and cadence of the programs/grants we are seeking?
- Who do I need or want to partner with to apply or make my case?
- How does the infrastructure investment strengthen equity, and how can that be measured?
- Are local government staff prepared for the federal procurement process or do they need training?



- State and Local Cybersecurity Improvement Act – \$1B in bipartisan infrastructure law for cybersecurity planning & improvement
- New rules to come on reporting requirements from FY2022 omnibus appropriations law – within 72 hours of a significant incident for qualifying critical infrastructure entities
- Emerging Issue – impacts to water sector
  - [Industrial Control Systems Cybersecurity Initiative – Water and Wastewater Sector Action Plan](#)
  - [EPA Cybersecurity Best Practices for the Water Sector](#) (including free TA for utilities)



- Police Reform Legislation and Qualified Immunity
- On April 5, Senators John Cornyn (R-TX) and Sheldon Whitehouse (D-RI) introduced the Law Enforcement De-escalation Training Act (S. 4003)

- On April 21, the Administration released the [“National Drug Control Strategy to Save Lives, Expand Treatment, and Disrupt Trafficking”](#)
- National 9-8-8 hotline for mental health crises
  - Established by the National Suicide Hotline Designation Act of 2020
  - 9-8-8 “goes live” July 2022
  - SAMHSA released \$282 million in funding to support 988 implementation
    - \$177 million to strengthen and expand existing Lifeline network operations and infrastructure
    - \$105 million to build up staffing across states and territories’ local crisis call centers

- In March, U.S. Senators Bill Cassidy, M.D. (R-LA) and Kirsten Gillibrand (D-NY) introduced the **Flood Insurance Pricing Transparency Act**.
- On April 1, U.S. Congressman Garret Graves (R-LA) introduced The **Stop Flood Insurance Rate Hikes Act**.
- The **National Flood Insurance Program Reauthorization and Reform Act of 2021** was introduced in the Senate and the **National Flood Insurance Program Reauthorization and Reform Act** was introduced in the House.
- Congress must reauthorize the NFIP by no later than 11:59 p.m. on Sept. 30, 2022.



- FEMA has released two new publicly-available guides, providing improved transparency into RR2.0 risk factor inputs and values:
  1. Rate Explanation Guide
  2. Discount Explanation Guide
- Downloadable under “technical documents” section of FEMA’s RR2.0 webpage: <https://www.fema.gov/flood-insurance/risk-rating>.

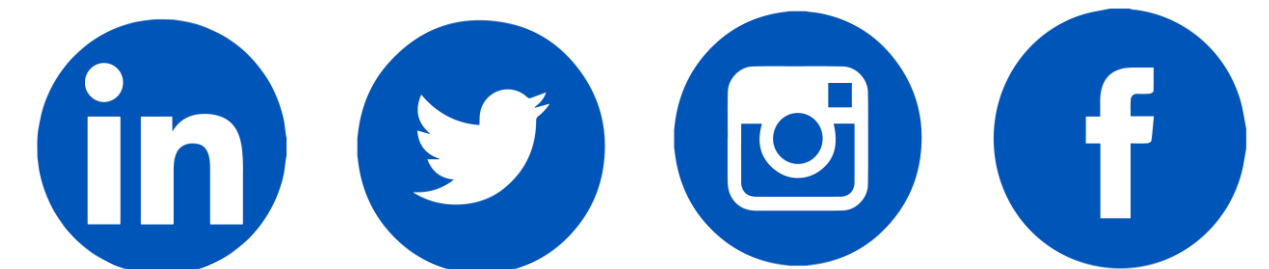
- Treasury Leadership Roundtable on The Climate Transition: Federal Policy and State and Local Best Practices (March)
- [Fact sheet](#) on Treasury's work to support states and local governments in the transition to a clean energy economy.
- **4 Key Take Aways:**
  - Issuers are using local and regional **Climate Action Plans to define climate impact goals and to plan initiatives**, which are then operationalized through capital improvement plans and the budgeting process.
  - Issuer experience with **green bond designation varies widely**; while some municipalities report positive benefits from green labeled bond issuances, other municipalities may be hesitant to formally pursue green bond designation due to unresolved disclosure requirements associated with issuing green bonds and the lack of a clear price advantage.
  - State and local governments generally support the **voluntary disclosure of material climate risk information to the public**, but are working to better understand emerging frameworks, costs, and risks associated with enhanced ESG disclosure.
  - Some municipal issuers are exercising strategies and policy tools to advance **innovative climate transition and mitigation projects within their communities**, including leveraging cross-sectoral, regional, or federal partnerships to strengthen total impact.
- NLC blog: [Do Green Bonds Make Sense for Your City?](#)
- NLC blog: [Economic Development in a Changing Climate](#)



- Public Service Freedom to Negotiate Act
  - Prohibits states and localities from preventing government workers from organizing



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# Supreme Court and Pools

Lisa Soronen

State and Local Legal Center

[lsoronen@sso.org](mailto:lsoronen@sso.org)



# Overview of Presentation

Big picture thoughts on SCOTUS and pools

SCOTUS and qualified immunity

SCOTUS and the First Amendment

Very big Section 1983 cop case



# When We Last Talked in May of 2019

Justice Kavanaugh had just joined the bench

We were going to have a 5-4 conservative indefinitely with Roberts in the middle

Fast-forward to 2022 and we have a 6-3 conservative Court

- Justice Ginsburg died right before the 2020 election and is replaced by Justice Barrett

We are only beginning to understand what a 6-3 conservative court means generally

What about Justice Jackson?

# Conservatives are Generally Good for Pools

## **Good for pools**

- Pro-employer
- Pro-law enforcement (qualified immunity, Fourth Amendment)
- Pro-closing the courthouse door

## **Bad for pools**

- Land use
- Free speech
- Religion



# Pet Project of this Supreme Court

## **Affect pools more**

- First Amendment
  - Free speech, free exercise of religion, government speech, etc.
- Religion
- Legal process (Fourth Amendment/due process claims)

## **Affect pools less**

- War on the administrative state
- Take down of Kennedy, O'Connor opinions



# What is Qualified Immunity?

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Federal law makes government employees and officials personally liable for money damages if they violate a person's federal constitutional rights

Qualified immunity is generally available if the law a government official violated isn't "clearly established"

Only the "plainly incompetent" and those who knowingly violate the law don't receive qualified immunity

Qualified immunity is a **powerful** defense in these cases

Until this year, in only **two cases** since 1982 did the Supreme Court hold that police officers violated clearly established law



# QI in Trouble at SCOTUS?

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Starting a few years ago the Supreme Court started receiving petitions saying not that the lower court had wrongly applied QI, but instead that QI should be **overruled** or **modified**

In **October 2019**, the Court started holding a number of these petitions indicating it might take a bunch of the cases together and do something big on qualified immunity

On **June 15, 2020**, the Court denied all the petitions; we don't know why



# QI Recent Win Loss Record

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## Last term

- Wins: 0
- Losses: 3

## This term

- Wins: 2
- Losses: 0



## *Taylor v. Riojas* (Last Term)

- Correctional officers who confined Trent Taylor to a “pair of shockingly unsanitary cells” for six days
- Fifth Circuit granted the officers qualified immunity because “[t]he law wasn’t clearly established” that “prisoners couldn’t be housed in cells teeming with human waste” “for only six days”
- SCOTUS reverses: “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time”



# Technically not QI Denials (Last Term)

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## *McCoy v. Alamu*

- Officer chemical sprays inmate after a **different inmate** threw water at the officer
- Fifth Circuit grants qualified immunity
- Remanded for reconsideration in light of *Taylor v. Riojas*

## *Lombardo v. City of St. Louis, Missouri*

- Officers restrain Nicholas Gilbert on his stomach for 15 minutes and he dies
- Federal district court grants the officers qualified immunity
- The Eighth Circuit rules no excessive force
- SCOTUS sends case back to lower court to redetermine excessive force/QI



This  
Term—  
SCOTUS  
Reverses  
Two QI  
Denials

Lower court says that circuit court precedent “clearly established” that the officers use of force was excessive

Supreme Court disagreed

These aren’t close cases IMHO



# *Rivas-Villegas v. Cortesluna* (9<sup>th</sup> Circuit)

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- A girl told 911 she, her sister, and her mother had shut themselves into a room because their mother's boyfriend, Cortesluna, was trying to hurt them and had a chainsaw
- Officers ordered Cortesluna to leave the house
- They noticed he had a knife sticking out from the front left pocket of his pants
- Officers told Cortesluna to put his hands up. When he put his hands down, they shot him twice with a beanbag shotgun
- Cortesluna then raised his hands and got down as instructed
- Officer Rivas-Villegas placed his left knee on the left side of Cortesluna's back, near where Cortesluna had the knife in his pocket, and raised both of Cortesluna's arms up behind his back
- Another officer removed the knife and handcuffed Cortesluna. Rivas-Villegas had his knee on Cortesluna's back for no more than eight seconds



# Two Ships Passing in the Night

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- The Ninth Circuit concluded that circuit precedent, *LaLonde v. County of Riverside*, indicated that leaning with a knee on a suspect who is lying face-down on the ground and isn't resisting is excessive force
- The Supreme Court reasoned *LaLonde* is “materially distinguishable and thus does not govern the facts of this case”
- In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, *LaLonde* was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. *LaLonde*, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.



# *City of Tablequah v. Bond* (10<sup>th</sup> Circuit)

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- Dominic Rollice's ex-wife told 911 that Rollice was in her garage, intoxicated, and would not leave
- While the officers were talking to Rollice he grabbed a hammer and faced them
- He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level
- The officers yelled to him to drop it
- Instead, he came out from behind a piece of furniture so that he had an unobstructed path to one of the officers
- He then raised the hammer higher back behind his head and took a stance as if he was about to throw it or charge at the officers
- Two officers fired their weapons and killed him



# Two Ships Passing in the Night

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- *Allen v. Muskogee* circuit court precedent
- “[T]he facts of *Allen* are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer.”



# Are Pools Educating Cops on Circuit Court Precedent?

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- But police officers **aren't actually educated about the facts and holdings of cases** that “clearly establish” the law, so it makes no sense that victims of police misconduct are denied relief unless and until they can find them.
- I examined hundreds of use-of-force policies, trainings and other educational materials received by California law enforcement officers. **I found officers are educated about watershed decisions like Graham but are not regularly or reliably educated about court decisions interpreting those watershed decisions** – the very types of decisions that are necessary to clearly establish the law for qualified immunity purposes.
- Joanna Schwartz, *Supreme Court just doubled down on flawed qualified immunity rule. Why that matters*, USA Today



# QI Worst Case Scenario

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Newer conservative Justices join Thomas in wanting to get rid of/modify qualified immunity because it isn't included in statute

- No indication YET Gorsuch, Kavanaugh, or Barrett are interested in this argument

Justice Jackson is anti-qualified immunity

- Don't be worried—read *Kyle v. Bedlion*



# First Amendment Cases I am Not Going to Talk About

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- First Amendment is HOT; Religion is the HOTTEST
- Here are two cases what I am NOT going to talk about (there are more)
- *Kennedy v. Bremerton School District*—**biggest SCOTUS public employment case in 15 years** (undecided)
  - Whether the First Amendment protects a high school football coach who, joined by students, prayed after football games
- *City of Austin v. Reagan National Advertising*—(almost) **every sign code in the US is similar to Austin's** (win)
  - The distinction between on-premises signs and off-premises signs in the city of Austin's sign code is facially content-neutral under the First Amendment



# *Houston Community College v. Wilson*

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Holding: a verbal censure of a board member doesn't violate  
the First Amendment



# Why?

“[E]lected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson’s has ever been widely considered offensive to the First Amendment”

The Court concluded a censure of a board member by a board isn’t an adverse action

“In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes”

Wilson can’t use the First Amendment “as a weapon to silence” his board colleagues who want to “speak freely on questions of government policy,” just as he does



# Court's Decision is VERY Narrow

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- In rejecting Mr. Wilson's claim, we do not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim. It may be, for example, that **government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms.** Likewise, we do not address today questions concerning **legislative censures accompanied by punishments,** or those aimed at **private individuals.** Nor do we pass on the First Amendment implications of censures or reprimands issued by government bodies against **government officials who do not serve as members of those bodies.**



# Would These violate the First Amendment?

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Kicked off the  
board

Privileges taken  
away

Fined

Jailed—this came  
up A LOT at oral  
argument

Censured for  
matters unrelated  
to board business



# *Shurtleff v. City of Boston*

Holding: Boston's refusal to fly a Christian flag on a flagpole outside city hall violated the First Amendment

(Mercifully) short, unanimous opinion written by Justice Breyer

A win disguised as (unanimous) loss???



# Facts

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On the plaza, near Boston City Hall entrance, stand three 83-foot flagpoles

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Boston flies the American flag on one (along with a banner honoring prisoners of war and soldiers missing in action) and the Commonwealth of Massachusetts flag on the other

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On the third it usually flies Boston's flag

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Since 2005 Boston has allowed third parties to fly flags during events held in the plaza

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Most flags are of other countries, marking the national holidays of Bostonians' many countries of origin

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Third-party flags have also been flown for Pride Week, emergency medical service workers, and a community bank



# Camp Constitution Wanted to Fly a Christian Flag

- And the city said NO for the first time  
EVER citing Establishment Clause  
concerns





# Forum or Government Speech?

Forum=no viewpoint discrimination

Government speech=First Amendment  
doesn't apply; ban any flag!!

“The boundary between government speech  
and private expression can blur when, as  
here, a government invites the people to  
participate in a program”



# Government Speech “Holistic Inquiry”

History of the  
expression at issue

The public’s likely  
perception as to who  
(the government or a  
private person) is  
speaking

Extent to which the  
government has  
actively shaped or  
controlled the  
expression



# No Government Speech Here

- The “general history” of flying flags “particularly at the seat of government” favors Boston
- But “even if the public would ordinarily associate a flag’s message with Boston, that is not necessarily true for the flags at issue here” where “Boston allowed its flag to be lowered and other flags to be raised with some regularity”
- While neither of these two factors resolved the case, Boston’s record of not “actively control[ing] these flag raisings and shap[ing] the messages the flags sent” was “the most salient feature of this case
- Boston had “no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate”



# Bottom Line

No local government wants to fly the Russian flag right now!

Most local governments don't have third-party flag programs

BUT Governments regularly invite people to speak while the government is speaking as well (city Facebook page that allows comments)

The line between government speech and non-government speech will never be crystal clear (especially when governments invite others to speak with them)

Breyer suggests a written policy could make it clearer a third-party flag program is government speech

- “Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities’ flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its ‘flag-poles are not intended to serve as a forum for free expression by the public,’ and lists approved flags that may be flown ‘as an expression of the City’s official sentiments.’”

Must/should local governments always have a written disclaimer **in all contexts** that speech is intended as government speech?



# What's Going on with Religion?

## Gorsuch & Thomas

- **Not a single Member of the Court seeks to defend Boston's view that a municipal policy allowing all groups to fly their flags, secular and religious alike, would offend the Establishment Clause. How did the city get it so wrong?** To be fair, at least some of the blame belongs here and traces back to *Lemon v. Kurtzman*, 403 U. S. 602 (1971).
- In time, this Court came to recognize these problems, **abandoned *Lemon***, and returned to a more humble jurisprudence centered on the Constitution's original meaning. **Yet in this case, the city chose to follow *Lemon* anyway.** It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts.

## Kavanaugh

- As this Court **has repeatedly made clear**, however, a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like.
- Under the Constitution, **a government may not treat religious persons, religious organizations, or religious speech as second-class.**

# *Vega v. Tekoh*

Issue: whether a police officer can be sued for money damages for failing to provide a *Miranda* warning

Key to understanding this case: local governments officials can be sued for money damages for obtaining a coerced confession

But can they be sued over merely not reciting Miranda?



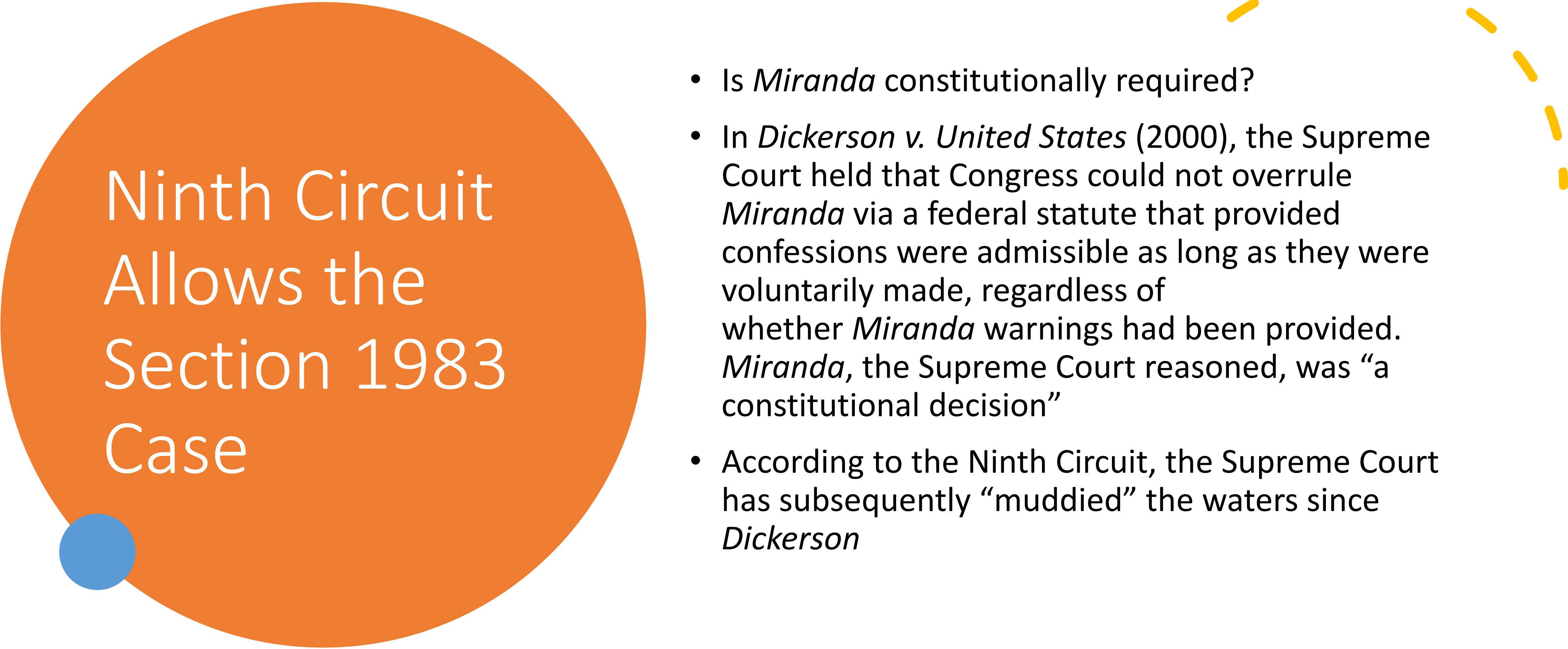
# Alleged Facts are Horrendous

Terrance Tekoh was tried for unlawful sexual penetration

At trial he introduced evidence that his confession was coerced

A jury found him not guilty

Tekoh then sued the officer who questioned him, Deputy Carlos Vega, under Section 1983 claiming Vega violated his Fifth Amendment right against self-incrimination by not advising him of his *Miranda* rights



## Ninth Circuit Allows the Section 1983 Case

- Is *Miranda* constitutionally required?
- In *Dickerson v. United States* (2000), the Supreme Court held that Congress could not overrule *Miranda* via a federal statute that provided confessions were admissible as long as they were voluntarily made, regardless of whether *Miranda* warnings had been provided. *Miranda*, the Supreme Court reasoned, was “a constitutional decision”
- According to the Ninth Circuit, the Supreme Court has subsequently “muddied” the waters since *Dickerson*



# SLLC *Amicus* Brief Arguments

Exclusionary rule is the remedy for *Miranda* violations

Police officers must constantly decide whether *Miranda* rights must be read

Not all that clear when someone is in “custody”

Not really fair police officers can be sued if a prosecutor and a judge include at trial a coerced confession where *Miranda* rights weren't read