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UNITED STATES SUPREME COURT LOCAL GOVERNMENT UPDATE

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South Carolina Municipal Attorneys Association Conference
Columbia, South Carolina / December 8, 2023

United States Supreme Court Local Government Update-Agenda

- Introducing IMLA
- The Supreme Court Amicus Brief
- Brief Review: Local Government Decisions from the '22-'23 Term
- Preview: Local Government Cases for the '23-'24 Term

Introducing IMLA

- Nonprofit membership organization formed in 1935 serving more than 2500 local governments nationwide
- Provide webinars, conferences, workgroups, *Municipal Lawyer*, other educational services
- Amicus support at Supreme Court, federal circuits, and state appellate courts, filing about 40 amicus briefs annually
- Recently formed **Local Government Law Center (LGLC)**, adding NLC, NACo, GFOA: LGLC's mission is to raise awareness of the importance of Supreme Court cases to local governments and to help shape the outcome of cases of significance to local governments at the Supreme Court through persuasive and effective advocacy

IMLA's Role as Amicus-Grounds for Certiorari

- Supreme Court Rule 10: **Considerations Governing Review on Certiorari**

  The following . . . indicate the character of the reasons the Court considers:

  (a) Circuit Court **conflicts with another Circuit Court**; has decided important federal question **in conflict with state court of last resort**; or has "so far departed from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's supervisory power;

  (b) state court of last resort has decided important federal question **in conflict with another state court of last resort or Circuit Court**; or

  (c) state court or Circuit Court has decided an important question of federal law that has not been, but **should be, settled by this Court**, or **conflicts with relevant decisions of this Court.**

IMLA's Role as Amicus-Impact of Amicus Briefs

- **Petition Stage**
  - Court receives 8,000+ petitions for certiorari each year.
  - Fewer than 1% are granted; excluding *in forma pauperis*, fewer than 5% are granted.*
  - Amicus support for Petitioner is extremely valuable-some studies show petitions with significant amicus support are **five times more likely** to be granted cert.
  - Important in framing the Question Presented.
- **Merits Stage**
  - In support of Petitioner, Respondent, or Neither Party

*Conferences now occurring—for example, on September 29, Court granted cert for 12 cases and denied cert for more than 800 cases.

IMLA's Role as Amicus-the Amicus Brief

- Supreme Court Rule 37: Brief for an Amicus Curiae

  An amicus curiae brief that brings to the attention of the Court **relevant matter not already brought to its attention** by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.

- Seventh Circuit: **"ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs"** *Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003).

IMLA's Role as Amicus-the Amicus Brief

- Detrimental effect on local government
  - Cost/Inefficiency
  - Usurpation of local autonomy
  - Policy arguments-federalism, separation of powers
- Additional context
  - National perspective/practice in other jurisdictions
  - Statistics/data/surveys/diagrams
  - Academic/scholarly commentary
  - News/website materials

Local Government Decisions - '22-'23 Term

- *Sackett v. EPA* (defining "Waters of the United States")
- *Tyler v. Hennepin County* (real estate proceeds forfeiture)
- *National Pork Producers v. Ross* (commerce clause)
- *Groff v. DeJoy* (religious accommodation)
- ***303 Creative v. Elenis*** (free speech/free expression)
- *HHC v. Marion County* (nursing homes/private right of action)
- *Moore v. Harper* (independent state legislature)
- ***Students for Fair Admissions v. Harvard/UNC*** (college admissions/affirmative action)

303 Creative LLC v. Elenis, 600 U.S. 570 (June 30, 2023)/no. 19-1413 (10th Cir. Jul. 26, 2022)

Whether public accommodation law requiring artist to speak or stay silent violates Free Speech clause.

- ***Facts***: Colorado Anti-Discrimination Act prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait.
- Lorie Smith, a Colorado website designer, refuses to produce marriage sites for same-sex couples due to her religious beliefs (will work with LGBTQ clients generally). Sought to enjoin CADA based on First Amendment free speech and free exercise grounds.
- ***Holding***: Tenth Circuit denied injunction. "We hold that CADA satisfies strict scrutiny, and thus permissibly compels Appellants' speech. We also hold that CADA is a neutral law of general applicability, and that it is not unconstitutionally vague or overbroad."

303 Creative LLC v. Elenis, cont'd.

- **Reversed and remanded. 6-3 majority holds that CADA violates First Amendment:**
- **Gorsuch/**Roberts, Alito, Thomas, Barrett, Kavanaugh**:** "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."
- Cited *Barnette* (WVA compelled flag salute case) and *Hurley* (Boston veterans parade compelled gay participation case).
- **Sotomayor**/Kagan, Jackson: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."

303 Creative LLC v. Elenis, cont'd.

"Michigan hair salon Studio 8 turns away trans clients, limiting service for LGBTQ patrons" (*USA Today*, July 13, 2023)

- The salon, Studio 8 Hair Lab in Traverse City in the northwestern part of the state, **announced on social media it will no longer serve clients who identify "as anything other than a man/woman,"** and made derogatory comments about transgender people.
- The salon's Instagram page, now set to private, says it is "A private CONSERVATIVE business that does not cater to woke ideologies."
- "You are not welcome at this salon. Period," the salon wrote in a now deleted Facebook post. "Should you request to have a particular pronoun used please note we may simply refer to you as 'hey you.'"

303 Creative LLC v. Elenis, cont'd.

"Texas judge who doesn't want to perform gay marriage ceremonies hopes web designer's Supreme Court case helps her fight" (*Texas Tribune*, July 13, 2023**)**

Notice of Supplemental Authority in *Hensley v. State Commission on Judicial Conduct*, No. 22-1145

Dear Mr. Hawthorne: Petitioner Dianne Hensley respectfully advises the court of the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, No. 21-476 (2023).

- *"303 Creative* was interpreting the First Amendment's Speech Clause rather than the Texas Religious Freedom Restoration Act. **Its holding is nonetheless instructive because it rejects the idea of a 'compelling interest' in forcing wedding vendors to participate in same-sex and opposite-sex marriage ceremonies on equal terms.**"

303 Creative LLC v. Elenis, cont'd.

- ***Consequence to local government***: will require review / revision of state and local policies prohibiting discrimination in expressive services
- Scope - discrimination on basis of sexual orientation only, or other forms of discrimination?
- Scope - will have right to refuse services based on expressive freedoms?
- Not based specifically on religious beliefs—prohibits compelling artists to express any "message" with which they disagree: what about other public-facing "expressive businesses" such as photographers, hairstylists, dress designers, florists, bakers, etc.?" Can exclusions be placed in advertisements / websites? Speech versus conduct?

Students for Fair Admissions v. Harvard, no. 19-2005 (1st Cir. Nov. 12, 2020) – no. 20-1199 (opinion June 29, 2023) / ***SFFA v. UNC***, no. 14-cv-954 (M.D.N.C Oct. 18, 2021) – no. 21-707 (opinion June 29, 2023)

[Whether Harvard/UNC's consideration of race in admissions violates Fourteenth Amendment Equal Protection clause]

- ***Facts***: SFFA argues that the admissions policies at Harvard and UNC violate Fourteenth Amendment's Equal Protection clause and Title VI of the Civil Rights Act of 1964: Harvard's policies discriminate against Asian American applicants; UNC's policies discriminate in favor of African-American applicants, to the detriment of white and Asian-American applicants.
- Harvard and UNC argue that student body diversity remains a compelling interest, *stare decisis* compels the Court to honor it's 2003 decision in *Grutter v. Bollinger* (Michigan Law School).
- ***Holding***: First Circuit holds that Harvard's policies survive strict scrutiny, do not discriminate; Middle District of North Carolina upholds UNC's policies.

Students for Fair Admissions v. Harvard / UNC, cont'd.

Reversed and remanded. 6-3 majority finds Harvard/UNC policies violate Equal Protection

- **Roberts**/Thomas, Alito, Gorsuch, Kavanaugh, Barrett**: Harvard/UNC policies are not narrowly tailored and fail strict scrutiny.** Although training new leaders, providing better education, etc. "are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny."
- Thomas: equates affirmative action in higher education with segregation- "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.'"
- **Sotomayor**/Kagan, Jackson: "At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law."

Students for Fair Admissions v. Harvard / UNC, cont'd.

***Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 220 cv 0004 (E.D. Tenn. July 19, 2023):**

- SBA's "rebuttable presumption of social disadvantage" for 8(a) minority applicants stricken-8(a) applicants now need "social disadvantage narrative."

***American Alliance for Equal Rights v. Perkins Coie*, no. 23-01877 (N.D. Tex. Aug. 23, 2023)**:

- Complaint argues that firm has been racially discriminating against future lawyers for decades. The firm's "diversity fellowships" for 1Ls and 2Ls exclude certain applicants based on their skin color. These prestigious positions are six-figure jobs that include five-figure stipends. Yet applicants do not qualify unless they are "students of color," "students who identify as LGBTQ+," or "students with disabilities." [*SFFA*] reaffirms "[e]liminating racial discrimination means eliminating all of it." (Firm then dropped program).

Students for Fair Admissions v. Harvard / UNC, cont'd.

Landscape Consultants of Texas, Inc. v. City of Houston, (S.D. Tex. Sept. 19, 2023):

- City policy to "stimulate the growth of local minority, women, and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting." Houston Code § 15-81(a). (MBEs/ WBEs / SBEs)
- MBE program enjoined: "Although most of Landscape Consultants' and Metropolitan's employees are racial minorities, the owners are not. These businesses are thus placed at a disadvantage just because their owners are not from a preferred race. Picking winners and losers based on race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution."

Preview: Local Government Cases for the '23-'24 Term

- ***Lindke v. Freed / O'Connor-Ratcliff v. Garnier*** (First Amendment / public officials' use of social media / state action)
- ***Murthy v. Missouri / NRA v. Vullo*** (First Amendment / state action)
- ***Gonzalez v. Trevino*** (First Amendment / retaliatory arrest)
- ***Muldrow v. City of St. Louis*** (Title VII / discrimination / materiality)
- ***Sheetz v. El Dorado County*** (Takings / impact fees / legislative exactions)
- ***Loper Bright Enterprises v. Raimondo*** (agency deference / *Chevron*)
- ***United States v. Rahimi*** (Second Amendment / domestic abuser rights)
- ***Harrington v. Purdue Pharma*** (bankruptcy / third party releases)

Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022); no. 22-621 (argued Oct. 31, 2023)

Whether public official's social media activity constitutes state action only if official uses the account to perform a governmental duty or under the authority of office.

- ***Facts***: City Manager Freed blocked Lindke due to anti-Covid comments; Freed had created Facebook page long before gaining office, had 5,000 followers—provided government information and used official title but continued posting personal photos and news; no use of office funds/people/resources.
- ***Sixth Circuit Holding***: Sixth Circuit applied "state official" test—was the official "performing an actual or apparent duty of his office or if he could not have behaved as he did without the authority of his office." No-"**the page neither derives from the duties of his office nor depends on his state authority**."

O'Connor-Ratcliff v. Garnier, 41 F.4th 1158 (9th Cir. 2022); no. 22-314 (argued Oct. 31, 2023)

Whether public official engages in state action by blocking individual from official's personal social-media account, when official uses account to feature job and communicate about job-related matters with public, but does not do so pursuant to any governmental duty or authority.

- ***Facts:*** School district Trustees created public Facebook/Twitter pages to run for office, then used pages to communicate with constituents. "About" section listed their positions as Trustees, linked to official Trustee emails. Trustees could post; public could only comment. Trustees used filters to preclude comments with certain words. No negative comments, just reactions. Garniers had posted negative comments; Trustees blocked them. No use of public funds/resources.

O'Connor-Ratcliff v. Garnier, cont'd.

- ***Ninth Circuit Holding***: Ninth Circuit applied "close nexus" test, finding that Trustees **"us[ed] their social media pages as public fora" because "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties."** The court emphasized "appearance and content"- the accounts prominently featured Trustees' "official titles" and "contact information" and predominantly addressed matters "relevant to Board decisions."

Lindke v. Freed* / *O'Connor-Ratcliff v. Garnier, cont'd.

Two Tests:

- **Sixth Circuit:** Freed was not acting under the color of state law. Test is the "State duty and authority test," which asks if the official "is performing an actual or apparent duty of his office or if he could not have behaved as he did without the authority of his office."
- **Ninth Circuit:** School district officials were acting under the color of state law. Test is whether the public official's conduct, even if "seemingly private," is sufficiently related to the performance of his or her official duties to create "a close nexus between the State and the challenged action," or whether the public official is instead "pursu[ing] private goals via private actions."

Lindke v. Freed* / *O'Connor-Ratcliff v. Garnier, cont'd

Consequence to local government:

- resolve differing Circuit analyses and provide clarity as to what parameters constitute state action-more restrictive standard is clearly beneficial to governmental interests. (LGLC filed in support of neither party, seeking greater clarity and rule which limits Section 1983 State Action liability).

Differing results to question: Is Banning/Blocking from Public Official's Social Media Account "State Action" for Purposes of Section 1983/First Amendment?

✓Second Circuit – Yes. *Knight Institute v. Trump,* 928 F.3d 226 (2019)

✓Fourth Circuit – Yes. *Davison v. Randall,* 912 F.3d 666 (2019)

XSixth Circuit – No. *Lindke v. Freed,* 37 F.4th 1199 (6th Cir. 2022)

XEighth Circuit – No. *Campbell v. Reisch,* 986 F.3d 822 (8th Cir. 2021)

✓Ninth Circuit – Yes. *Garnier v. O'Connor-Ratcliff,* 41 F.4th 1158 (9th Cir. 2022)

Murthy v. Missouri, no. 23-30445 (5th Cir. Sept. 8, 2023), no. 23A243

Whether the government's challenged conduct transformed private social media companies' content-moderation decisions into state action and violated respondents' First Amendment rights.

- ***Facts***: White House, Surgeon General, CDC, FBI, and other Administration entities requested social media companies to remove posts with alleged misinformation about COVID and elections; some were removed. Individuals and two states sued, claiming Administration used coercion and caused "significant entanglement" in their operations, converting the private social media platforms into state actors and interfering in the states' First Amendment rights.
- ***Fifth Circuit Holding***: Fifth Circuit upheld district court injunction against White House, Surgeon General, CDC, and FBI seeking to influence social media posts.

Murthy v. Missouri, cont'd.

- ***Fifth Circuit Holding***: The Fifth Circuit upheld the district court injunction as against the White House, Surgeon General, CDC, and FBI seeking to influence social media posts.
- "[T]he government can speak for itself," which includes the right to "advocate and defend its own policies." [citations omitted]. "But, on one hand there is persuasion, and on the other there is coercion and significant encouragement."
- "The Plaintiffs allege that federal officials ran afoul of the First Amendment by coercing and significantly encouraging 'social-media platforms to censor disfavored [speech],' including by 'threats of adverse government action' like antitrust enforcement and legal reforms. We agree."
- Also applied Second Circuit four-factor test (see *Vullo*, next).

National Rifle Ass'n v. Vullo, 49 F.4th 700 (2d Cir. 2022) no. 22-842 (docketed Nov. 3, 2023)

Whether the First Amendment allows a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy.

- ***Facts***: NY Dep't of Financial Services investigated NRA-endorsed "Carry Guard" insurance programs that insured licensed firearm users against personal/property claims and criminal defense costs-even if insured acted with criminal intent. After Parkland, DFS issued statement telling banks and insurance companies to consider "reputational risks" of business with NRA or "gun promotion organizations."
- Insurance carriers signed Consent Decrees with DFS, dropping Carry Guard.
- NRA argues that carriers were coerced into discontinuing NRA business.

National Rifle Ass'n v. Vullo, cont'd.

- ***Second Circuit Holding***: Governments must refrain from speech that "**can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.**"
- Second Circuit's applies **four factor test** to determine if the government official's speech crosses the constitutional line into coercion:
  (1) word choice and tone;
  (2) the existence of regulatory authority;
  (3) whether the speech was perceived as a threat; and, perhaps most importantly,
  (4) whether the speech refers to adverse consequences."
- Applying those factors, Vullo's statements did not amount to coercion, and even if they had, she was entitled to Qualified Immunity—the contours of that Constitutional violation were not clearly established.

Gonzalez v. Trevino, 42 F.4th 487 (5th Cir. 2022) no. 22-842 (docketed Oct. 13, 2023)

Whether (1) the probable-cause exception in *Nieves v. Bartlett* can be satisfied by objective evidence other than specific examples of arrests that never happened; and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

- ***Facts*:** Gonzalez (Castle Hills, TX city council member) obtained petitions to remove city manager, presented them to Mayor at council meeting which later became contentious—partly because a speaker alleged that Gonzalez obtained a signature by false pretenses.
- Gonzalez surreptitiously retrieved the petitions from the Mayor's dais, then denied she had them. She was later arrested for violating Texas law: "[a] person commits an offense if he ... intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record."

Gonzalez v. Trevino, cont'd.

- ***Fifth Circuit Holding*:** Fifth Circuit reverses in favor of the City, applying *Nieves*: a retaliatory arrest plaintiff must generally prove absence of probable cause; but there is a "narrow qualification" for situations where law enforcement has probable cause to arrest but "typically exercise their discretion not to do so."
  - Example: Jaywalking-if a person is arrested for jaywalking while expressing an unpopular message, while other jaywalkers who aren't expressing that view are not arrested, arrestee can point to "objective evidence" that similarly situated others not engaged in the same protected speech are not arrested, and can bring a retaliatory arrest claim despite probable cause).
- Gonzalez argued that for a decade, the county had not used this statute to charge someone trying to steal a government document. But she could not show a close enough comparator—a person who mishandled a document and wasn't prosecuted. This was not adequate "objective evidence" to satisfy *Nieves*. The Fifth Circuit rejected her invitation to infer that because no one else was prosecuted under the statute, her arrest must be retaliatory.

Muldrow v. City of St. Louis, 30 F.4th 680 (8th Cir. 2022) no. 22-193 (argued Dec. 6, 2023)

Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

- ***Facts:*** A new St. Louis police commissioner made staffing changes, including transfer of seventeen male and five female officers to new assignments.
- Muldrow, a police sergeant, was laterally transferred out of the Intelligence Division to the Fifth District, where more sergeants were needed—same pay and rank, a supervisory role, and responsibility for investigating violent crimes.
- She sought a transfer to the Second District but was denied (position was unfilled due to staffing shortage)-she was eventually transferred back to the Intelligence Division.
- Muldrow sued, claiming both the initial transfer and failure to transfer her to her desired district violated Title VII of the Civil Rights Act.

Muldrow v. City of St. Louis, cont'd.

- ***Governing Law*:** Title VII's anti-discrimination provision states:

  703(a): "It shall be an unlawful employment practice for an employer-

  (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against** any individual with respect to his compensation, **terms, conditions, or privileges of employment**, because of such individual's race, color, religion, sex, or national origin. . ."
- ***Eighth Circuit Holding*:** The Eighth Circuit affirmed lower court's grant of City's motion to dismiss:

  "[M]inor changes in duties or working conditions, even unpalatable or unwelcome ones, **which cause no materially significant disadvantage**, do not rise to the level of an adverse employment action."

Muldrow v. City of St. Louis, cont'd.

IMLA's amicus brief arguments include:

- Local governments are collectively among the largest employers in the nation. They must have the ability to assign employees where needed, given the critical nature of governmental services. This is especially true for public safety employees; the nationwide shortage of law enforcement personnel makes flexibility in deployment even more important.
- Petitioner's proposed rule is that any change in employment conditions, even trivial ones, can result in a Title VII lawsuit. A ruling in favor of the employee will create huge increases in potential litigation and liability for cities and counties, and a significant drain on local government resources in responding to these complaints.
- Allowing Title VII claims in these types of situations will turn courts into the overseers of everyday operations of city employee management.

Sheetz v. County of El Dorado, 84 Cal.App.5th 394 (Cal. Ct. App. 2022) no. 22-1074 (argument Jan. 9, 2024)

Whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation.

- ***Facts*:** County adopted a General Plan requiring builders to pay for road improvements needed to mitigate traffic impacts from such development, including a traffic impact mitigation (TIM) fee to finance the construction of new roads and the widening of existing roads.
- The TIM fee is set by formula and generally based on the location and type of the project. The County does not make "individualized determinations" as to the nature and extent of the traffic impacts on state and local roads.
- Sheetz paid for a permit to build a home on his property, then sued, challenging the TIM fee as a Taking under the Fifth Amendment.

Sheetz v. County of El Dorado, cont'd.

Legal Background: The Supreme Court has identified "land-use exactions" as a special kind of taking under the Fifth Amendment.

- A land use-exaction occurs when the government demands real property or money from an applicant as a condition of obtaining a development permit.
- Courts apply the doctrine of "unconstitutional conditions," which holds that the government may not request a person to give up a constitutional right "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."
- In *Koontz*, the Court held "[u]nder *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an **essential nexus** and **rough proportionality** to those impacts."

Sheetz v. County of El Dorado, cont'd.

- ***California Court Holding***: The California Court of Appeals held that the *Nollan* and *Dolan* "essential nexus" and "rough proportionality" tests do not apply to legislative exactions that are generally applicable to a broad class of property owners like the TIM fee.
- The court distinguished legislative exactions from fees applied on an ad hoc or adjudicative basis involving discretion, as in *Nollan* and *Dolan*. While ad hoc exactions require strict scrutiny, legislatively-derived permitting fees are subject to a lesser "reasonable relationship" standard of review; for one reason, legislators are subject to being replaced if they allow unreasonable permitting fees.
- Here, the legislative process for TIM fees had provided for public hearing and nexus tests to validate the fee structure, further justifying the 'reasonable relationship" standard.

Loper Bright Enterprises v. Raimondo, 45 F.4th 459 (D.C. Cir. 2022) - no. 22-451 (argument Jan. 17, 2024)

Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Under *Chevron v. NRDC* (U.S. 1984), where enabling Act is ambiguous, Court defers to "any permissible construction" of the statute adopted by the Agency ("Chevron deference").

- ***Facts*:** Magnuson-Stevens Fishery Conservation and Management Act of 1976 (Act), authorizes Secretary of Commerce and National Marine Fisheries Service (Service) to implement a comprehensive fishery management program. Pursuant to the Act, the Service promulgated rule requiring fishing industry to fund at-sea monitoring programs.
- Four commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs, which in the aggregate could reduce annual returns by "approximately 20 percent."

Loper Bright Enterprises v. Raimondo, cont'd.

- ***DC Circuit Holding***: DC Circuit upheld the agency's authority despite ambiguity in the Act:

  > We affirm the district court's grant of summary judgment to the Service **based on its reasonable interpretation of its authority** and its adoption of the Amendment and the Rule through a process that afforded the requisite notice and opportunity to comment.

- But dissent argues that Congress must "explicitly or implicitly" grant authority to cure ambiguity; blanket deference to the agency's interpretations is not authorized.

*On October 13, 2024 Court granted cert in ***Relentless, Inc. v. Dep't of Commerce***—essentially asking the same question (perhaps because Justice Jackson had recused herself in *Loper Bright*).

United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) - no. 22-915 (argued Nov. 7, 2023)

Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

- ***Facts***: A Texas court issued a domestic violence restraining order against Rahimi after he assaulted his girlfriend and warned her that he would shoot her if she told authorities about the attack. The order barred Rahimi from possessing a firearm and notified him that, while the order was in effect, his gun possession might constitute a felony under federal law. He acknowledged receipt and comprfehension of the order.
- Rahimi soon violated the restraining order, threatening another woman and being involved in five separate hooting incidents. Officers obtained a warrant to search his home, finding several firearms and ammunition.

United States v. Rahimi, cont'd.

- Federal grand jury indicted Rahimi for possessing a firearm while under a domestic violence restraining order, in violation of 18 U.S.C. §922(g)(8):
  - Unlawful for any person subject to a court order that "includes a finding that such person represents a credible threat to the physical safety of [an] intimate partner or child" to possess "any firearm or ammunition…"
  - (Statute requires that the person subject to the order have the opportunity to participate in a hearing regarding the order).
- Rahimi pleaded guilty and was convicted to six years' imprisonment, then challenged the statute under the Second Amendment.

United States v. Rahimi, cont'd.

- ***Fifth Circuit Holding***: The Fifth Circuit initially upheld Rahimi's conviction, but the Supreme Court thereafter issued *Bruen,* setting forth a new test for how firearm regulations should be analyzed under the Second Amendment.
- The test is now whether the challenged regulation or statute falls within the nation's "history and tradition" regarding gun possession.
- Applying *Bruen,* the Fifth Circuit reversed itself, finding the statute unconstitutional under the Second Amendment: none of the historical analogues identified by the federal government supported depriving Rahimi of his right to possess firearms.

United States v. Rahimi, cont'd.

- ***Supreme Court Argument***: At argument on November 7, 2023, Solicitor General Elizabeth Prelogar appeared to find a receptive audience among a majority of Justices by arguing that, although there was no precise historical analogue to the statute in question, there were numerous regulations prohibiting firearm possession by "dangerous" persons.
- Most commentators appear to believe that the statute in question will survive. Whether the "history and tradition" analogue requirement will be broadened more generally is a different question.

United States v. Rahimi, cont'd.

Implications for local governments:

- Local governments and local government officials have varied views on firearm regulations…
- But apart from larger Second Amendment questions, we know that responding to domestic violence incidents is one of the most dangerous calls for law enforcement --the presence of a firearm significantly increases the risk of death for law enforcement in these cases.
- A DOJ analysis of law enforcement fatalities from 2010 to 2016 concluded: "[C]alls related to domestic disputes and domestic-related incidents represented the highest number of fatal types of calls for service . . . ."

Harrington v. Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023) - no. 23-124 (argued Dec. 4, 2023)

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.

- ***Facts*:** Facing billions of dollars in opioid claims from local governments, tribes, individual claimants and others, Purdue Pharma—the manufacturer of Oxycontin—declared bankruptcy in 2019.
- Under the Plan of Reorganization proposed by Purdue, the estate will distribute roughly $10 billion to creditors. About $6 billion of this will come from the Sackler family members, who transferred some $11 billion to accounts outside the US during their ownership and management of Purdue. In exchange, they will receive complete releases from personal liability from any would-be claimants.
- But the Sacklers have not themselves declared bankruptcy, meaning that creditors of the estate--individual plaintiffs, local governments and others--are being forced to grant absolute releases to non-parties. This violates traditional bankruptcy law principles.

Harrington v. Purdue Pharma L.P., cont'd.

- ***Second Circuit Holding***: "*First*, does the Bankruptcy Code permit nonconsensual third-party releases of direct claims against non-debtors, and, *Second*, if so, were such releases proper here in light of all equitable considerations and the facts of this case. We answer both in the affirmative." Emphasizes Bankruptcy Court's broad equitable powers.
- ***Stay***: The US Trustee objected and sought a stay. Solicitor General Prelogar contended that if the Second Circuit's confirmation of the Plan was allowed to stand, it "would leave in place a roadmap for wealthy corporations and individuals to misuse the bankruptcy system to avoid mass tort liability."
- Also, it would "raise serious constitutional questions by extinguishing private property rights" – potential claims against the Sackler family – "without providing an opportunity for the rights holders to opt in or out of the release."
- In August, the Court granted the Administration's request for a stay, docketing the case. It may resolve a Circuit split-Fifth, Ninth and Tenth (disallow releases) vs. Sixth and Seventh – and Second (allow releases).

Harrington v. Purdue Pharma L.P., cont'd.

- ***Implications for Local Government*:** Results can cut both ways. The Court has increasingly questioned the breadth of Bankruptcy Court authority, and if it rejects the releases, the entire Plan could be jeopardized or significantly reduced in terms of funding. Many localities are concerned about this prospect.
- On the other hand, allowing the Sacklers to be released from liability against nondebtor parties seems inequitable given their role in the opioid epidemic. It is possible that if the Sacklers are not released under the current Plan structure, they will contribute additional funds to achieve consensual releases. Some creditors have expressed that view.

Questions?

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Thanks again, SCMAA.

Please let us know if IMLA can be of amicus assistance (info@IMLA.org) - and join us in Washington DC in April 2024 for our Mid-year Seminar.