United States Supreme Court Local Government Update '23-'24 Recap / '24-'25 Preview

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IMLA:

- Nonprofit formed in 1935-serves 2500+ local governments
  - Conferences, webinars, workgroups, *Municipal Lawyer*, etc.
  - Amicus support-SCOTUS, Circuit Courts, state appellate courts
- Local Government Legal Center (LGLC):
  - NLC - 2,700+ elected city officials
  - NACo - 40,000+ elected county officials
  - GFOA - 20,000+ federal, state/provincial, local finance officers
  - ICMA - 13,000+ city/county managers
- LGLC's mission: raise awareness of SCOTUS cases important to local government / shape outcome of SCOTUS local government cases through persuasive advocacy

IMLA Legal Advocacy '23-'24 Summary

- Amicus briefs filed: 30+
- Originating states: 17 (FL, GA, AL, LA, VA, TX, MO, NV, UT, NM, OH, PA, MD, IN, CA, OR, ID)
- SCOTUS Briefs: 16 (including 10 LGLC Briefs)
  - Amendments: First, Second, Fourth, Fifth, Eighth, Fourteenth
  - Other: ADA, FLSA, Title VII, Gun Control Act, etc.
- Also Circuit Courts, State Supreme Courts/Appeals Courts

SCOTUS Local Government Decisions-'23-'24 Recap

- *Lindke v. Freed* / *O'Connor-Ratcliffe v. Garnier* (official's social media)
- *NRA v. Vullo* / *Murthy v. Missouri* (coercive government speech)
- *Gonzalez v. Trevino* (probable cause bar to retaliatory arrest)
- *United States v. Rahimi* (banning gun ownership by domestic abuser)
- *Chiaverini v. Evanoff* (probable cause and malicious prosecution)
- *Sheetz v. El Dorado County* (legislative impact fees as taking)
- *Grants Pass v. Johnson* (criminalizing camping on public property)
- *Muldrow v. St. Louis* (discrimination claim harm requirement)
- *Loper-Bright v. Raimondo* (Chevron deference)
- *Harrington v. Purdue Pharma* (nondebtor releases)

Lindke v. Freed, no. 22-611 (Mar. 15, 2024)

Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

- ***Facts*:** Freed created personal Facebook page in 2008; appointed City Manager of Port Huron, MI in 2014. Continued to post personal info but added official title/contact info and information about his job and the City, soliciting public comment. No public resources, funds or employees used.
  - Lindke criticized Covid policies; Freed deleted them, then blocked him.
- ***Suit***: FB page was public forum, blocking "under color of state law."
- ***Sixth Circuit Holding***: No state action. "The page neither derives from the duties of his office nor depends on his state authority."

Lindke v. Freed, cont'd.

Vacated and remanded, 9-0: Public official who prevents comment on official's social-media page engages in state action only if the official**:**

- **(1) possessed actual authority*** to speak on the state's behalf on a particular matter, and
- **(2) purported to exercise that authority** when speaking in the relevant social-media posts.

- **Barrett:** "An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage. . . **To misuse power, however, one must possess it in the first place**. . . Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage."

O'Connor-Ratcliff v. Garnier, no. 22-324 (Mar. 15, 2024)

Does public official engage 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 the public, but not pursuant to any governmental authority or duty?

- ***Facts*:** Two candidates for school district Board of Trustees created Facebook and Twitter accounts to run for office; after winning, used accounts to communicate with constituents. No public funds used.
  - Blocked parents, who sued: blocking was"under color of state law."
- ***Ninth Circuit Holding***: State action, because Trustees used their social media as public fora; clothed pages "in the authority of their offices."
  - emphasized "appearance and content"; accounts featured "official titles" and mainly addressed matters "relevant to Board decisions."

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

Vacated and remanded, per curiam: Because the approach that the Ninth Circuit applied is different from the one we have elaborated in *Lindke*, **we vacate the judgment below and remand** the case to the Ninth Circuit for further proceedings consistent with our opinion in that case.

Lindke / O'Connor-Ratcliff, cont'd.

IMLA amicus brief:

- Advocated for an **actual authority** test that would limit liability for local government officials--beyond that, sought clarity from various inconsistent Circuit Court tests, so officials have parameters to avoid claims of State Action.
- Challenged Ninth Circuit test as overly subjective (would be more difficult to define parameters and more likely that courts would find State Action and impose liability).
- Filed in support of neither party.

***Lindke / O'Connor-Ratcliff* practice pointers:**

- Merely sharing public information available elsewhere is unlikely to be construed as state action.
- Separate personal accounts is the gold standard--but officials have First Amendment rights, so this cannot be mandated.
- Discourage the use of government logos/email addresses and links to government websites on personal accounts.
- Prohibit the use of government staff or resources to run private social media pages.
- Discourage employees/officials from identifying themselves as employees of the City/County in personal accounts (but again, cannot be mandated). If they do so identify, require disclaimers.

National Rifle Ass'n v. Vullo, no. 22-842 (May 30, 2024)

Can government regulator threaten adverse actions for doing business with controversial speaker, due to (a) the government's hostility to the speaker's viewpoint or (b) perceived "general backlash" against the speaker's advocacy.

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

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**.**"
- Applied **four factor test** to determine coercion:
  (1) word choice and tone;
  (2) existence of regulatory authority;
  (3) whether the speech was perceived as a threat; and
  (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.

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

- **Reversed and remanded, 9-0: NRA plausibly alleged that New York violated First Amendment by coercing regulated entities to terminate NRA relationships to punish/suppress gun-promotion advocacy.**
- **Sotomayor:** Second Circuit did not "draw reasonable inferences in the NRA's favor. . . Just like the commission in *Bantam Books*, Vullo could initiate investigations and refer cases for prosecution and do much more . . . also had the power to . . . impose significant monetary penalties."
  - The Court **does not break new ground** . . . It only reaffirms the general principle from *Bantam Books* that where, as here, the complaint plausibly alleges coercive threats aimed at punishing or suppressing disfavored speech, the plaintiff states a First Amendment claim.

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

IMLA's amicus brief:

- Filed in support of neither party.
- Government speech plays a vital role in expressing the viewpoints of democratically elected and appointed local officials.
- Local governments regularly seek to influence private speech and doing so does not infringe the First Amendment rights of private citizens, absent threats or coercion.

Murthy v. Missouri, no. 23-411 (June 26, 2024)

Whether government's 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.
- ***Suit***: Three doctors, Louisiana and Missouri claimed Administration used coercion and caused "significant entanglement" in social media operations, converting the private social media platforms into state actors and interfering in the states' First Amendment rights.

Murthy v. Missouri, cont'd.

***Eastern District of Louisiana issued injunction*:**

- White House and Surgeon General prohibited from **urging, encouraging, pressuring, or inducing in any manner social media companies to change their guidelines** for removing, deleting, suppressing or reducing congtent containing protected free speech . . .

Murthy v. Missouri, cont'd.

Fifth Circuit Holding: upheld injunction against White House and Surgeon General:

- "[T]he government can speak for itself," which includes the right to "advocate and defend its own policies . . . . But, on one hand there is persuasion, and on the other there is coercion."
  - Applied Second Circuit four-factor test from *Vullo.*
- "[T]he White House, acting in concert with the Surgeon General's office, likely (1) coerced the platforms . . . by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment."

Murthy v. Missouri, cont'd.

Reversed and remanded, 6-3: Respondents lack Article III standing to seek an injunction.

- **Barrett: "**To establish standing, the **plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant** and redressable by the injunction they seek. Because no plaintiff has carried that burden, none has standing to seek a preliminary injunction."

Murthy v. Missouri, cont'd.

- **DISSENT:**
- **Alito**/Thomas/Gorsuch: "If the lower courts' assessment of the voluminous record is correct, **this is one of the most important free speech cases to reach this Court in years**."
- "The principle recognized in *Bantam Books* and *Vullo* requires a court to distinguish between permissible persuasion and unconstitutional coercion, and in *Vullo*, we looked to three leading factors . . . .(1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced. In this case, **all three factors point to coercion**."

Gonzalez v. Trevino, no. 22-1025 (June 20, 2024)

Can the probable-cause exception in *Nieves* be satisfied by evidence other than specific examples of arrests that never happened; and is *Nieves* is limited to split-second arrests.

- ***Facts*: Gonzalez was elected to city council for Castle Hills, TX and immediately called for removal of city manager via nonbinding petition. At her first meeting, she presented petitions--but was accused of obtaining signatures under false pretenses.
  - She surreptitiously retrieved petitions from Mayor's dais (visible on video), then denied she had them. Mayor had her arrested for violating Texas law: "**person commits an offense if he ... intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record**."
- ***Suit***: Arrest was in retaliation for her petition to remove city manager.

Gonzalez v. Trevino, cont'd.

General rule: probable cause defeats retaliatory arrest claim.

But, enter *Bartlett v. Nieves*—the saga of the Burning Man Festival

- ***Facts*: Bartlett was intoxicated and disorderly, then interfered in police speaking with underage drinker. Claimed that arrest by Officer Nieves was in retaliation for confrontational speech.
- "***Nieves Exception***": Supreme Court cited a "narrow qualification" to the general rule--where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so."
- Jaywalking example: almost no one is arrested for jaywalking; so arrest when exercising First Amendment rights might be retaliatory. Plaintiff showing "**that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech [were not arrested]**" can bring retaliatory arrest claim despite probable cause.

Gonzalez v. Trevino, cont'd.

- ***Fifth Circuit Holding*:** Gonzalez argued that for a decade, County had not used this statute to charge someone for trying to steal a government document (presented survey showing it had been used more than two hundred times in other contexts). But she could not show a close enough comparator—a person who had taken a document and wasn't prosecuted. This was not adequate "objective evidence" to satisfy *Nieves*.
- "Gonzalez cannot take advantage of the *Nieves* exception because . . . **she does not offer evidence of other similarly situated individuals** who mishandled a government petition but were not prosecuted under Texas Penal Code 37.10(a)(3)."

Gonzalez v. Trevino, cont'd.

- **Vacated and remanded, per curiam.** "**Gonzalez's survey is a permissible type of evidence** because the fact that no one has ever been arrested for engaging in a certain kind of conduct . . . makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past."
  - Narrow decision - retains general rule barring malicious prosecution claims where probable cause exists, but expands the type of objective evidence that will support a *Nieves* exception. Likely to result in increased malicious prosecution claims.

United States v. Rahimi, no. 22-915 (June 21, 2024)

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

- ***Facts*:** Texas court issued domestic violence restraining order against Rahimi after he assaulted girlfriend and warned he would shoot her if she told authorities. Order barred Rahimi from possessing firearm and notified him that, so long as order was in effect, gun possession might constitute federal felony. He confirmed that he understood the order.
  - Rahimi soon violated the order, threatening another woman and being involved in five separate shooting incidents. Officers obtained a warrant to search his home, finding several firearms and ammunition—and the order.

United States v. Rahimi, cont'd.

- Federal grand jury indicted Rahimi for possessing firearm while under 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, was convicted to six years' imprisonment, then challenged statute under Second Amendment.

United States v. Rahimi, cont'd.

- ***Fifth Circuit Holding***: Initially upheld Rahimi's conviction. But Supreme Court then issued *Bruen,* setting forth a new test:
- Does the challenged regulation or statute fall within the nation's "history and tradition" regarding gun possession?
  - Applying *Bruen,* Fifth Circuit reversed itself: 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.

- **Reversed and remanded, 8-1: An individual found by court to pose credible threat to physical safety of another may be temporarily disarmed consistent with the Second Amendment.**
- **DISSENT:**
- **Thomas:** Question is not whether Rahimi can be disarmed consistent with the Second Amendment. Instead, the question is **whether the Government can strip the Second Amendment right of anyone subject to a protective order—even if he has never been accused or convicted of a crime. It cannot.**
  - "The Court and Government do not point to a single historical law revoking a citizen's Second Amendment right based on possible interpersonal violence."

Chiaverini v. City of Napoleon, no. 23-50 (June 20, 2024)

Are malicious-prosecution claims governed by the 'charge-specific' rule

Two rules in malicious prosecution cases**:**

- "Charge-specific" rule: if any charge is baseless, can bring malicious prosecution claim.
- "Any charge rule: if any claim is meritorious, cannot bring claim.

- ***Facts*****:** Chiaverini owns pawn shop; received ring from person vouching ownership. Then alleged actual owner called, demanding return. When Chiaverini refused, caller arrived with police.
  - After investigation, municipal judge issued search warrant, then warrant for arrest on charges of operating without license, obtaining stolen property, and money laundering. **Money laundering charge based on falsified police report.**
- Chiaverini arrested, spent three nights in jail over a weekend.
  - **All charges were ultimately dropped.**

Chiaverini v. City of Napoleon, cont'd.

Suit**:** Chiaverini sued City under Fourth Amendment for malicious prosecution and false arrest.

- ***Sixth Circuit holding***: "Because probable cause existed to prosecute Chiaverini on at least one charge, his malicious prosecution and false-arrest claims fail."
  - Applies "any charge" rule, which favors government; conflicts with Second, Third, and Eleventh Circuits that follow "charge specific" rule and allow malicious prosecutionsuits if even one charge is baseless.
- **Vacated and remanded, 6-3**: Under Fourth Amendment and traditional common law, **the presence of probable cause for one charge in a criminal proceeding does not categorically defeat a malicious prosecution claim relating to another baseless charge**.

Sheetz v. County of El Dorado, no. 22-1074 (April 12, 2024)

Must legislatively-derived impact fees comply with *Nollan*/*Dolan* essential nexus and rough proportionality tests?

- ***Facts*****:** County required that Sheetz pay $23,4200 Traffic Impact Mitigation fee (TIM Fee) for permit to build residence
  - Fee based on legislature's rate card (matrix of factors, including location, size and type of structure, etc.), not on likely actual traffic impact caused by Sheetz's development
- ***Suit***: Sheetz sued on Fifth Amendment grounds: unconstitutional taking of private property for public use
  - must show proportionality and nexus
  - sought individualized analysis of impact caused by his development

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

- ***California Court of Appeal Holding***: *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.
- Distinguished legislative exactions from fees applied on *ad hoc* or adjudicative basis involving discretion, as in *Nollan* and *Dolan*. While *ad hoc* exactions require strict scrutiny, legislatively-derived permit fees are subject to lesser "reasonable relationship" 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.

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

- **Reversed and remanded, 9-0: legislatively-derived permit conditions are exactions that also must comply with *Nollan/Dolan***
- **Barrett:** "The Takings Clause does not distinguish between legislative and administrative permit conditions."
- **Kavanaugh**/Kagan, Jackson: "Today's decision *does not address or prohibit the common government practice of imposing permit conditions,* such as impact fees, on new developments through *reasonable formulas or schedules that assess the impact of classes of development* rather than the impact of specific parcels of property."

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

- Impact fees are an important tool to help local governments balance the need for smart growth against impacts of growth on the community: roads, utilities, sewers, schools, parks, police/fire stations, etc.
  - Allows new development to pay its pro-rata share of infrastructure costs without burdening the remainder of the community.
- A ruling adopting homeowner's broad arguments (ie requiring individualized impact analysis) would have significantly impacted local governments' ability to assess impact fees.
- Nevertheless, expect increased litigation in this area to determine questions left open by the decision.

City of Grants Pass v. Johnson, no. 22-1074 (June 28, 2024)

Whether the enforcement of generally applicable laws regulating camping on public property constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

- Eighth Amendment: "nor cruel and unusual punishments inflicted."
- ***Background*: *Martin v. Boise,* 902 F.3d 1031 (9th Cir. 2018)**
- ***Ninth Circuit holding***: the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."
- Indicated ruling did not apply to those who do have access to "adequate temporary shelter." And implied that reasonable time, place, and manner restrictions may be permissible.

City of Grants Pass v. Johnson, cont'd.

- ***Facts*:** Grants Pass, Oregon-historic city 60 miles north of California border, population 39,000.
  - Estimated 50 homeless, but could be as many as 600; outnumbered shelter beds
- Passed several ordinances related to the regulation of sleeping outside, which taken together made it nearly impossible to sleep outside with any form of bedding or shelter on public land in the City.
- Violations mostly led to fines (though there was one ordinance if certain preconditions were met could lead to criminal trespassing).

City of Grants Pass v. Johnson, cont'd.

- ***Ninth Circuit Holding:*** Concluded there was not enough shelter for all 600 individuals and thus certified the class of all "involuntarily homeless"* individuals in Grants Pass.
- Ordinances violated the cruel and unusual punishment clause because the civil fines could later become criminal offenses.
- The "anti-camping ordinance violated the cruel and unusual punishment clause to the extent it prohibited homeless persons from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"
  - *(But definition of "involuntarily homeless" is difficult: many refuse offer of shelter).

City of Grants Pass v. Johnson, cont'd.

Reversed and remanded, 6-3: The enforcement of generally applicable laws regulating camping on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment.

- **"[F]ederal courts [are] removed from realities on the ground, [and the] rules have produced confusion**." The Ninth Circuit's decisions have **interfered with "'essential considerations of federalism**,' taking from the people and their elected leaders difficult questions traditionally 'thought to be the[ir] province.'"
  - **LGLC brief cited nearly 20 times** in Gorsuch majority opinion
- Issue is not whether cities should ban public camping, it is about WHO should make decisions about homeless policy: Local elected leaders or unelected federal judges. But litigation will no doubt continue.

Muldrow v. City of St. Louis, no. 22-193 (April 17, 2024)

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.
- ***Suit***: Initial transfer and failure to transfer to 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.

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

- **Vacated and remanded, 9-0: no heightened harm standard under Title VII, but employee must show "some" harm from the forced transfer.**
- **Kagan**: "[T]ransferee must show **some harm** respecting an identifiable term or condition of employment. . . [but] transferee **does not have to show. . . that the harm incurred was 'significant.' Or serious, or substantial, or any similar adjective** suggesting that the disadvantage to the employee must exceed a heightened bar."
  - Rejects "no harm" standard argued by Muldrow. But **line between "some" and "serious"/"material"/"significant" is not clear**; opinion indicates this new standard lowers the bar to Title VII and notes many cases will now come out differently.
  - Unclear if elements like "less prestige" meet the standard; Court cites to change in schedule, loss of car, less prestige, uniform, etc. in total, and says together Muldrow meets the standard "with room to spare."

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

Alito, concurring: I have no idea what this means, and I can just imagine how this guidance will be greeted by lower court judges. . . . We do not typically say that we were harmed or injured by every unwanted experience. What would we think if a friend said, "I was harmed because the supermarket had run out of my favorite brand of peanut butter," or, "I was injured because I ran into three rather than the usual two red lights on the way home from work"?

- I see little if any substantive difference between the terminology the Court approves and the terminology it doesn't like. **The predictable result of today's decision is that careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years.**

Loper Bright Enterprises v. Raimondo, no. 22-451 (June 28, 2024)

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

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

- ***Facts*:** National Marine Fisheries Service implemented a comprehensive fishery management program requiring fishing industry to fund at-sea monitoring programs.
- Commercial fishing companies argue the enabling statute does not specify that industry may be required to bear such costs.

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.

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

Loper Bright Enterprises v. Raimondo, cont'd.

- **Vacated and remanded, 6-2: APA requires courts to exercise independent judgment in deciding whether agency has acted within its statutory authority; courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. *Chevron* is overruled.**
- **Roberts:** Congress enacted APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."
  - APA codifies "the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that **courts decide legal questions by applying their own judgment**."

Loper Bright Enterprises v. Raimondo, cont'd.

- **DISSENT:**
- **Kagan**: Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court.
- ***Consequence to Local Government***: Overruling *Chevron* means a smaller regulatory state; may return more power to local governments to enact democratically driven ordinances on particular issues, unencumbered by regulations.
- But in some cases, localities may prefer federal regulation.

Harrington v. Purdue Pharma L.P., no. 23-124 (June 27, 2024)

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

- ***Facts*:** Under Purdue's Plan of Reorganization, estate would distribute $10 billion to creditors; $6 billion of that from Sackler family members, who transferred $11 billion to accounts outside the US.
  - Sacklers have not declared bankruptcy, but require complete releases from all creditors of the estate—individual plaintiffs, local governments and others—who are being forced to grant absolute releases to non-debtors, without their consent.

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

- ***Second Circuit Holding***: Does the Bankruptcy Code permit nonconsensual third-party releases of direct claims against non-debtors, and if so, were such releases proper here? "**We answer both in the affirmative**." (Opinion emphasizes Bankruptcy Court's broad equitable powers under the Code).
  - **Circuit split**-Fifth, Ninth and Tenth (disallow releases) vs. Second, Sixth and Seventh (allow releases).

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

- **Reversed and remanded, 5-4: Bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants.**

DISSENT:

- **Kavanaugh (and Roberts/Kagan/Sotomayor):** The "**decision is wrong on the law and devastating for more than 100,000 opioid victims and their families**. . . rewrites the text of the U. S. Bankruptcy Code and restricts the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims. As a result, opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation."
  - "Nothing is more antithetical to the purpose of bankruptcy than destroying estate value to punish someone."

SCOTUS Local Government Cases–'24-'25 Preview

- *Ames v. Ohio Dept Youth Svces* (heightened standard for majority discrimination claim)
- *E.M.D. Sales v. Carrera* (exemption from overtime pay)
- *City/County of San Francisco v. EPA* (generic NPDES prohibitions)
- *Stanley v. Sanford* (retiree entitlement to ADA benefits)
- *McGlaughlin Chiropractic v. McKesson* (limit on challenges to FCC interpretation)
- *Lackey v. Stinnie* (Section 1988 attorney's fees)
- *Garland v. VanderStok* ("frames" as firearms under GCA)
- *FCC v. Consumers' Research* (Universal Service Fund/nondelegation)

Ames v. Ohio Dep't of Youth Services, no. 23-1039

Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

- ***Facts*:** Ames, a heterosexual woman, worked for the Ohio Department of Youth Services; in performance evaluation, supervisor said Ames "met expectations" in ten competencies and "exceeded expectations" in only one category.
  - She sought a promotion but was passed over; the Dept. hired a gay woman. Ames was later demoted on performance grounds and her replacement was a gay man.
- ***Suit***: Ames sued under Title VII claiming discrimination based on sexual orientation. While her immediate supervisor was gay, the two decisionmakers for the promotion and demotion were both heterosexual.

Ames v. Ohio Dep't of Youth Services, cont'd.

- ***Sixth Circuit holding*****:** Affirms summary judgment for Department.
- Ames met the prima facie factors for a typical discrimination claim under *McDonnell Douglas*. But, because Ames is heterosexual and part of the majority group, the Sixth Circuit required that she also show "**background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority**."
  - Plaintiffs typically make the additional showing with **evidence that a member of the relevant minority group (here, gay people) made the employment decision** at issue, or with statistical evidence showing a **pattern of discrimination** by the employer against members of the majority group.
- The court concluded she could not meet that burden as she conceded the ultimate decisionmakers were heterosexual and she pointed to no statistical evidence to support her claim.

E.M.D. Sales v. Carrera, no. 23-217

Whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.

- ***Facts*****:** FLSA requires overtime pay (time and a half) for more than 40 hours of work per week, but there are more than 30 exemptions from that rule.
  - Grocery store distributor claimed "outside sales" exemption applied to three sales reps, meaning overtime was not payable.
- ***Suit***: Employees sued arguing that employer must show applicability of exemption by "clear and convincing" standard; employer argued for "preponderance of the evidence" standard.

E.M.D. Sales v. Carrera, no. 23-217

- ***Fourth Circuit Holding***: "At present, we are bound to conclude that the district court properly applied the law of this circuit in requiring the defendants to prove their entitlement to the outside sales exemption by clear and convincing evidence."
- Court upheld lower court award of back pay plus two times liquidated damages.

- ***Implications***: FLSA claims are common, making up 45% of all new federal labor cases filed in court. They are also costly: failure to pay required overtime results in back pay plus double that amount in liquidated damages (or triple, for willing violation), plus attorney's fees.
  - Six Circuits (Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh) currently use the preponderance standard; Court should make that uniform across the nation.

City and County of San Francisco v. EPA, no.23-753

Whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

- ***Facts*:** EPA's NPDES permit for SF included numeric limitations and comprehensive management requirements, but also added two unspecific, generic prohibitions: a discharge may "not cause or contribute to a violation of any applicable water quality standard. . . ." and no "discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050."
- ***Suit*:** SF contends that EPA acted arbitrarily and capriciously, and contrary to the CWA, by including in the permit "general narrative prohibitions" on discharges that cause or contribute to violations of applicable standards for water quality.

City and County of San Francisco v. EPA, cont'd.

- ***Ninth Circuit holding*: "**We hold that the **CWA authorizes EPA to include in the Oceanside NPDES permit the challenged provisions**, and that EPA's decision to do so was **rationally connected to evidence** in the administrative record." Because Generic Prohibitions are "consistent with the CWA and its implementing regulations," the EPA and States may impose those prohibitions against violating water quality standards anytime they find it "necessary" to do so.
- **Implications for local government:** Clarity in NPDES permits is critical for local governments to comply with their obligations under the CWA.
  - **"Permit shield" protection unavailable** if locality is not deemed in compliance.
- CWA imposes severe consequences for violation. Even negligent violation can be punished criminally, and in civil enforcement actions, suit can seek civil penalties exceeding $66,000 per day for each permit violation, as well as injunctive relief.

Stanley v. City of Sanford, no.23-997

Whether a former employee can sue under Title I of the ADA for discrimination in post-employment distribution of fringe benefits.

- ***Facts*:** Stanley was a firefighter from 1999 until 2016, when she was diagnosed with Parkinson's disease; she became incapable of performing her job and was forced to take disability retirement in 2018.
  - Under the department's policy at the time Stanley joined, she was entitled to receive free healthcare until age 65 if she retired for a qualified disability reason. The City changed its policy in 2003 and under the new policy, which was effective when she went on disability leave, disability retirees are only entitled to free health insurance for 24 months after retiring.
- ***Suit*:** Ames sued after she retired on disability, arguing the City's decision to jettison the health insurance subsidy discriminated against her because of her disability.

Stanley v. City of Sanford, cont'd

- ***Eleventh Circuit Holding:*** a Title I plaintiff **must "hold[ ] or desire[ ]" an employment position with the defendant at the time of the defendant's allegedly wrongful act**. Because plaintiff Karyn Stanley is suing over the termination of retirement benefits when she neither held nor desired to hold an employment position with her former employer, the City of Sanford, *Gonzales* bars her claim. We therefore affirm the district court.
- ***Implications for local government***: Local governments need the flexibility to implement cost-saving mechanisms to balance budgets, and some may look to ballooning retirement / post-employment benefit liabilities as a place to potentially cut costs.

McGlaughlin Chiropractic Assoc. v. McKesson Corp. no.23-1226

Whether the Hobbs Act required a district court to accept the FCC's legal interpretation of a statute.

Facts: Telephone Consumer Protection Act makes it unlawful to use "telephone facsimile machine" to send unsolicited advertisements. McKesson used an online fax machine to send ads to McGlaughlin, but FCC ruled that online fax is not covered by the TCPA. FCC order is not reviewable in district court, must be appealed immediately at DC Circuit.

Relevance: Hobbs Act makes it nearly impossible for localities to challenge agency orders (must do so in DC Circuit w/in 60 days of the final rule). Also prevents localities from later arguing in district court the reasonableness and legality of those orders if a locality's actions are challenged down the line.

Circuit split: Fourth, Ninth, Eleventh all hold that Hobbs Act "unambiguously deprives" district courts of authority to question FCC orders, even in private enforcement proceedings. Other circuits allow for district court review.

Lackey v. Stinnie, no. 23-621

Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to preliminary relief, to be a prevailing party for Section 1988 attorney's fees; and whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988.

- ***Facts***: Class action challenged Virginia law suspending drivers' licenses for nonpayment of traffic fines; court granted preliminary injunction, then legislature repealed the law. Sought attorneys' fees of nearly $800,000.
- ***Fourth Circuit holding***: If a plaintiff wins preliminary relief enjoining a statute or practice, but the policy is permanently repealed or abandoned before final judgment making the matter moot, the elements of Section 1988 have been met.
- ***Implications***: Cost factor may limit willingness to defend, and may discourage voluntary changes in bad policies.

Garland v. VanderStok, no. 23A82

Whether a weapon parts kit that may readily be converted to expel a projectile by the action of an explosive," is a "firearm" regulated by the Gun Control Act of 1968, and "a partially complete, disassembled, or nonfunctional frame or receiver" that may readily be converted to function as a frame or receiver," is a "frame or receiver" regulated by the GCA.

Facts: GCA imposes licensing, background-check, recordkeeping, and serialization requirements on persons in the business of importing, manufacturing, or dealing in firearms; Congress delegated to the Attorney General the authority to promulgate "such rules and regulations as are necessary to carry out" the Act.

- ATF issued a regulation to clarify that the definition of firearm under the GCA includes products and kits that can "readily be converted" into an operational firearm or a functional frame or receiver.

Garland v. VanderStok, cont'd.

- ***Implications for local government***:
- There has been a massive increase in the availability and use of ghost guns. In 2022, DOJ recovered nearly 26,000 ghost guns domestically – 7,000 more than 2021 which was already a 1000% increase from the year 2017.
- Ghost gun kits are available online and allow minors and felons that are otherwise prohibited from purchasing firearms under federal law to obtain them without any background checks or serialization requirements.
  - Lack of serial numbers has created significant hurdles for law enforcement when a firearm is used in the commission of a crime.

FCC v. Consumers' Research, no. 22-354 (consolidated with *Schools, Health and Libraries Broadband Coalition v. Consumers' Research*)

Whether FCC's establishing Universal Service Fund and/or FCC's appointment of Universal Service Administrative Company to calculate percentages and distribute funds violates nondelegation rules.

Facts: Communications Act of 1935 requires FCC to make affordable telecom services available nationwide; to do so, FCC established the Universal Service Fund (USF) which receives payments from telecom providers and redistributes funds to enable rural, low income, healthcare, schools and libraries and other groups to pay for telecom and broadband service.

- FCC created Universal Service Administrative Company (USAC) to calculate each telecom company's respective share of USF contributions and to distribute funds.

FCC v. Consumers' Research, cont'd.

- ***Suit***: Consumers' Research challenges the USF as impermissible delegation by Congress and USAC as impermissible delegation by FCC.
- ***Fifth Circuit Holding***: On remand, found that Congress's controls over the FCC regarding USF were "minimal, contentless," and "a hollow shell," resulting in an **unconstitutional delegation of the taxing power, a "quintessentially legislative" function**. And FCC's controls over USAC caused a futher impermissible delegation of that authority.
- ***Implications for local government***: The Universal Service Fund provides funding for more than 100,000 schools across the country, and countless other rural and low income recipients via programs including "E-rate." A finding that USF violates the (rarely invoked) nondelegation doctrine could derail funding under these programs, which received more than $8.1 billion from USF in 2023.

Thanks again, SCMAA.

Please let us know if IMLA can be of amicus assistance (eeiselt@imla.org) and join us for our conferences in Washington DC in April 2025 and/or in New Orleans in September 2025.

IMLA