Supreme Court Update 2023-2024 Term

By: Amanda Karras (Executive Director / General Counsel)

International Municipal Lawyers Association

IMLA

Membership organization for local government attorneys. Provide education and advocacy services for local governments.

File 30-40 amicus briefs in the lower courts and at the Supreme Court each year in support of local governments.

Put on conferences and webinars for local government attorneys. Come to Orlando in September 2024; New Orleans in 2025 and Salt Lake City in 2026!

Local Government Legal Center

- New Coalition formed between NLC, NACo, IMLA, and GFOA to advocate on behalf of local governments at the Supreme Court.
- The 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
- The LGLC will serve as a resource to local governments and local government officials on issues related to the Supreme Court.

2023 Term

- *O'Connor-Ratcliff v. Garnier / Lindke v. Freed (1st. A.* public officials' use of social media)
- *Grants Pass v. Johnson* (homelessness / Eighth Amendment)
- *Muldrow v. City of St. Louis* (Title VII employment law case)
- *Sheetz v. El Dorado County* (Takings / legislative exactions)
- *Gonzalez v. Trevino* (First Amendment / retaliatory arrest)
- *Murthy v. Missouri & NRA v. Vullo (1st A. State Action)*
- *Loper Bright Enterprises v. Raimondo* (overruling *Chevron*)
- *United States v. Rahimi* (Second Amendment case)
- *Garland v. Cargill* (bump stocks)
- *Ohio v. EPA (*EPA's Good Neighbor Rule)
- *Chiaverini v. Evanoff* (malicious prosecution / 1983)
- *Harrington v. Purdue Pharma* (opioid litigation / bankruptcy)
- *Culley v. Attorney General of Alabama (*civil forfeiture / due process)
- *Snyder v. US (*criminal law & gratuities)

Social Media Cases – Two Nearly Identical Cases But Not Consolidated

***Lindke v. Freed* Issue**: 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.

***O'Connor-Ratcliff v. Garnier* Issue**: Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

Is the Act of Banning/Blocking Someone from a Public Official's Social Media Account "State Action" for the Purposes of Section 1983/First Amendment?

- ✓ Second Circuit – Yes. *See Knight Institute v. Trump*, 928 F.3d 226 (2019)
- ✓ Fourth Circuit – Yes. *See Davison v. Randall*, 912 F.3d 666 (2019)
- X Sixth Circuit – No. *Lindke v. Freed*, 37 F4th 1199 (6th Cir. 2022)
- X Eighth 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).

Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022) - Facts

Facebook page started out as private, but Freed had more than 5,000 friends so he converted it to a "page" which allows for unlimited followers.

His page was public (anyone could follow it). And for the page category, chose "public figure."

In 2014, he was appointed the city manager of Port Huron, Michigan and he added that to his Facebook page.

Contact information listed as Port Huron's (linked to the city website, city email, etc).

Facts

Posted about personal and professional things, including daughter's birthday pictures, but also COVID-19 policies.

Lindke was a citizen and unhappy with the City's COVID policies.

He would post negative comments on Freed's Facebook page and Freed deleted those comments and eventually blocked Lindke from the page.

Sixth Circuit: Was he Acting "Under the Color of State Law"?

- Sixth Circuit applies the "state-official 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."
- Sixth Circuit Concluded His Account was **NOT** State Action (no state law compelling it, no use of state resources, no use of state authority).

Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022)

Two school district officials created public Facebook and Twitter pages to promote their campaigns for office. (They had separate private accounts for family/friends)

After they won, they used their public social media pages generally promote School Board business.

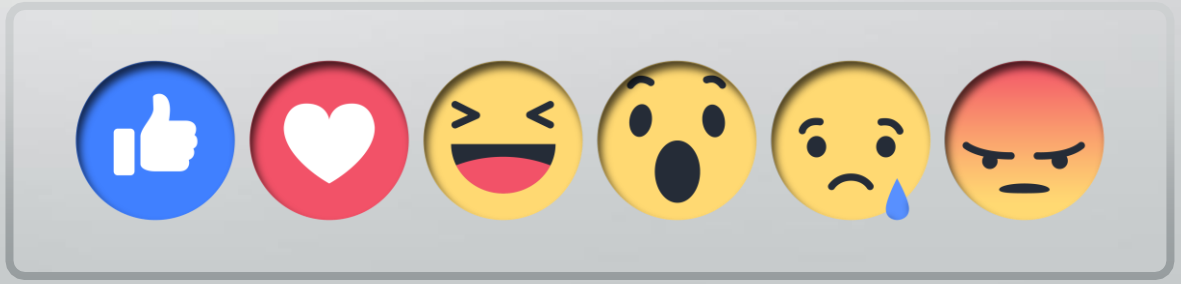
About section lists their positions as school trustees, and links to official trustee emails.

Only trustees themselves could post on their public Facebook pages, but members of the public could comment on a post (or react to it).

Trolling & the First Amendment

The Garniers would post repetitive lengthy comments / replies

The trustees deleted these at first and then blocked the Garniers.



Ninth Circuit Held that they Engaged in State Action

- The court reasoned that Petitioners had "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 Petitioners' "official titles" and "contact information" and predominantly addressed matters "relevant to Board decisions."
- They were exercising their apparent authority related to their duties.

Not Personal Campaign Pages

After their election in 2014, the Trustees virtually never posted overtly political or self-promotional material on their social media pages. Rather, their posts either concerned official District business or promoted the District generally.

Contrast with *Campbell v. Reisch.* Very similar facts and Eighth Circuit held she was using it for campaign purposes – fact of her election did not "magically alter the account's character." She used the account to maintain and promote herself even once in office.

The Two Tests / Holdings

- **Sixth Circuit:** Freed was not acting under the color of state law. Test = 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= 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."

LGLC Amicus Brief (IMLA/ NACo/ NLC)

Advocated for a test that would limit liability for local government officials but more than anything we want a clear test so that we can help train officials and avoid liability.

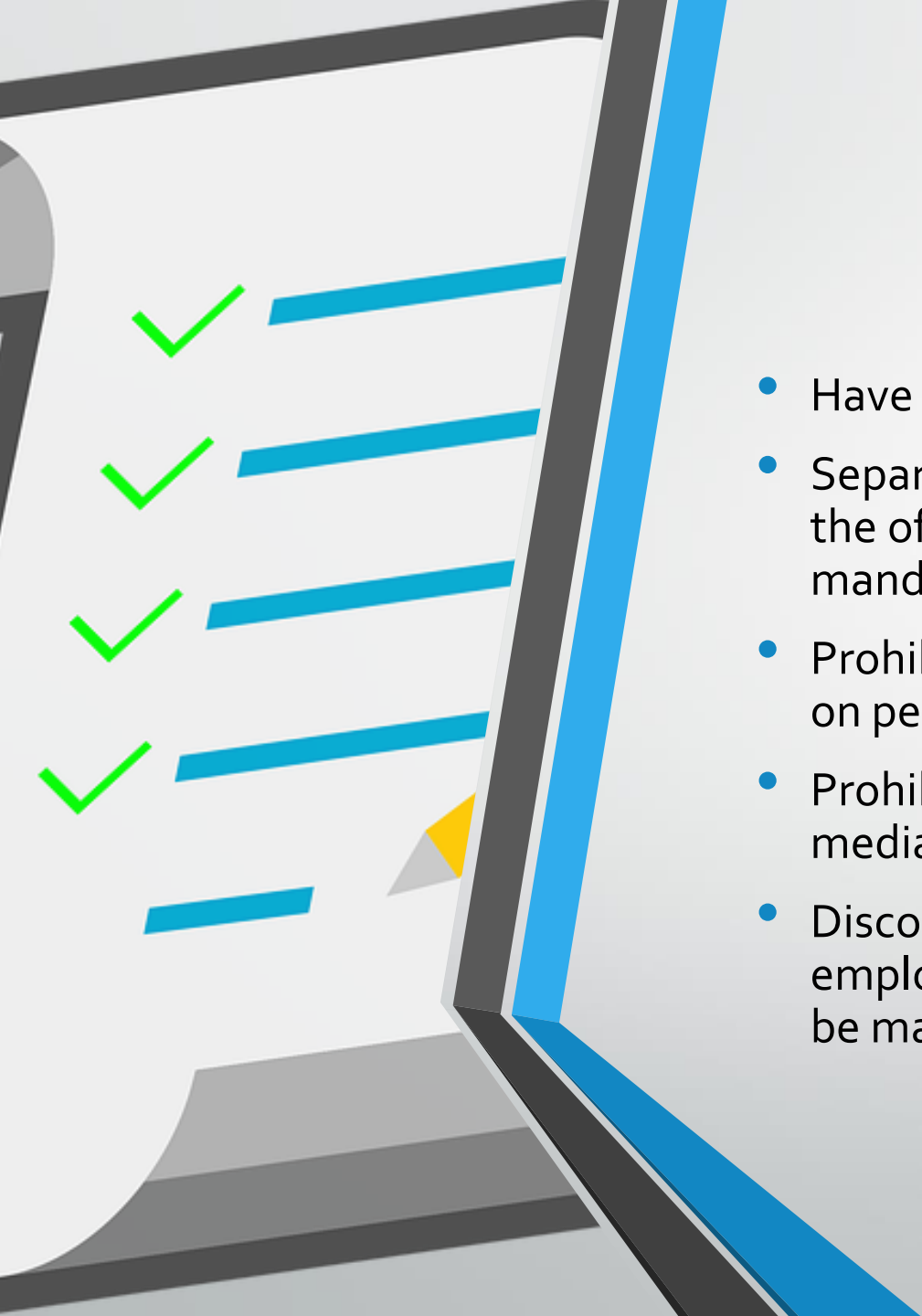
The Ninth Circuit test is too subjective and would be more difficult to train officials and also easier for courts to find state action and therefore liability.

Supreme Court Holding 9-0

- **Test**: Government official's social media posts are attributable to the State only if: "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media"
- Derived from the text of Section 1983.
- Authority therefore comes from law, regulation, ordinance or well-established custom.
- Authority needs to be specifically related to the speech on social media in question.

Guidance from Decision

- Merely sharing publicly available information is unlikely to be state action.
- Use of labels and disclaimers will create a "heavy (though not irrebuttable) presumption" that the page is personal.
- When using social media in a mixed way, be extra careful of blocking versus deleting.



Practice Pointers

- Have a policy and train officials and employees on it.
- Separate accounts is the gold standard (3 for elected officials). But, the officials have their own First Amendment rights so this cannot be mandated.
- Prohibit the use of government logos, email addresses and websites on personal accounts.
- Prohibit the use of government staff & resources to run private social media pages.
- Discourage employees/officials from identifying themselves as employes of the City/County in private accounts (but again, cannot be mandated). If they do so identify, **require disclaimers**.

Grants Pass v. Johnson

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

Background: *Martin v. Boise*, 902 F.3d 1031 (9th Cir. 2018)

- Eighth Amendment: "nor cruel and unusual punishments inflicted."
- **Held**: 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.

Facts (*Grants Pass*)

Grants Pass is a small city in Oregon with a population of about 38,000, of whom at least fifty are homeless (though the number may be as many as 600).

The number of homeless persons outnumber the available shelter beds.

The City 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).

Ninth Circuit Ruling

- Concluded not enough shelter for all 600 individuals and thus certified the class of all "involuntary homeless" individuals in Grants Pass.
- Ordinances violated the cruel and unusual punishment clause as 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.'"

Implication for Local Governments

- Federalism implications- federal judiciary dictating local policy.
- Encampments can pose public health and safety risks and it is not always clear if they can be removed under the Ninth Circuit's rule.
- Confusion – nobody knows what "adequate shelter" or "involuntarily homeless" means. Has led to paralysis in many cases.
- Competing lawsuits – public nuisance, ADA, etc.

Muldrow v. St. Louis

- **Issue**: Whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a signification disadvantage.

Facts

A new police commissioner for St. Louis announced staffing changes, which included transferring a total of seventeen male and five female officers to new assignments.

One such transferee was Muldrow, a police sergeant. She was transferred out of the Intelligence Division and was laterally transferred to the Fifth District, where the Department needed additional sergeants. She retained her pay and rank, a supervisory role, and responsibility for investigating violent crimes.

Thereafter, she sought a transfer to the Second District and that was denied (the position remained unfilled due to a staffing shortage) and she was eventually transferred back to the Intelligence Division.

Title VII Operative Language

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 Decision

- She sued claiming both the initial transfer and failure to transfer her to her desired district violated Title VII of the Civil Rights Act.
- The Eighth Circuit held in favor of the City, concluding she did not experience an adverse employment action.
- "[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."

Supreme Court Holding (6-3)

- Held there is no "heightened" harm standard under Title VII but the employee must show "some" harm from the forced transfer. Rejects no harm standard argued by employee.
- Line between "some" and "serious"/ "material" / "significant" is not clear but majority indicates this new standard lowers the bar to Title VII and notes many cases will now come out differently.
- Court does not explain if things like less prestige meet its standard because it lumps all of Respondent's harm together (change in schedule, loss of car, less prestige, uniform, etc.) and says together she meets the standard "with room to spare."

Implications for Local Governments

- Local governments are collectively one of the largest employers in the nation.
- The new rule will result in increased Title VII litigation and liability for cities and counties. This in turn will cost local government resources in responding to these complaints.
- There are also public safety implications for local governments. Shortage of police officers around the country. Chiefs and Sheriffs need to transfer staff where needed without the risk of Title VII suits.

Sheetz v. El Dorado County

- **Issue**: The question presented is 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 that required new development to pay for road improvements necessary to mitigate the traffic impacts from such development, including a traffic impact mitigation fee (TIM) to finance the construction of new roads and the widening of existing roads within its jurisdiction.
- The amount of the fee is set by formula and generally based on the location of the project and the type of project.
- In assessing the fee, the County does not make any "individualized determinations" as to the nature and extent of the traffic impacts caused by a particular project on state and local roads.

Facts

Mr. Sheetz applied for a building permit to construct a single-family home on his property.

The County agreed to issue the permit on the condition that he pay a TIM fee.

He paid and the permit was issued, but he then challenged the TIM fee as invalid under the Takings Clause of the Fifth Amendment.

Nollan and *Dolan* Test

- The Court explained in *Koontz*, "[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." Thus, the government must satisfy an "essential nexus" between the government's legitimate interest and the exaction (*Nollan*) and it must show "rough proportionality" between the exactions and proposed impact of the development (*Dolan*).

California Court of Appeals Holding

- Court 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 one at issue in this case.
- The court distinguished legislative exactions from those fees that are done on an individual or ad hoc basis and which require discretion like the ones imposed in *Nollan* and *Dolan*.
- The court reasoned that the heightened scrutiny required under *Nollan* and *Dolan* is not applicable where there is no discretion involved in the fee process, as is the case with legislatively enacted fees. Because the fee applied to all new development projects in the County and did not require discretion, the court used a lower standard to review it and upheld the fee.

Significance to Local Governments

- Impact fees have become an important tool to help local governments balance the need for smart growth with the impacts of that growth on the community.
- Impact fees often cover things like roads, utilities, sewers, schools, parks, police and fire stations and are assessed on new development to help offset the need to expand capital infrastructure.
- When done prudently, impact fees can help each new development pay for their pro-rata share of the costs of this infrastructure which allows communities to have the growth help pay for itself without burdening the remainder of the community.
- A ruling in favor of the homeowner's broad arguments in this case would negatively impact all local governments' ability to assess impact fees as they would have to meet more demanding legal standards than most states currently require.

Supreme Court Holding (9-0)

- Very narrow holding: Legislatively enacted permit conditions are not exempt from *Nollan* and *Dolan.*
- Therefore, must still show essential nexus and rough proportionality.
- Remanded to consider all other aspects of the case and arguments, including whether individualized inquiries are necessary for impact fees.
- The decision does not prevent local governments from enacting reasonable permit conditions via legislation – just need to ensure you satisfy *Nollan* and *Dolan* in doing so.
- Expect increased litigation in this area to determine questions left open by the decision.

Gonzalez v. Trevino

- **Issues**: (1) Whether the probable-cause exception in Nieves v. Barlett 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.

Background – Nieves v. Bartlett – Remember the Arctic Man Festival?

- Supreme Court held that a plaintiff must *generally* plead and prove the absence of probable cause to move forward with a retaliatory arrest claim under the First Amendment. But, the Court left open a "narrow qualification" for the situation where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so."
- Jaywalking example. The Court explains that because so few people are arrested for jaywalking, if a plaintiff can demonstrate "**objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been**" then the plaintiff cam proceed with a retaliatory arrest claim even if the officer had probable cause to arrest.

Facts

Gonzalez was elected to a seat on the city council for Castle Hills, Texas, a town with fewer than 5,000 residents. As her first act in office, she called for the removal of the city manager by organizing a nonbinding petition. During her first city council meeting, a resident submitted the petition to remove the city manager to council. The council meeting grew contentious.

After the meeting, Gonzalez left her belongings on the dais and went to speak to a constituent. The Mayor, Edward Trevino, who was supposed to have the petition, asked Gonzalez to look for the petition in her belongings and she was surprised to find the petition there.

Facts

The Mayor informed the police that he wished to file a criminal complaint for taking the petition without consent. The police officer investigating the allegation determined that Gonzalez violated Texas Penal Code §§37.10(a)(3) and (c)(1), which provide that "[a] person commits an offense if he … intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record." The investigation took over a month.

Gonzalez sued under Section 1983, claiming that she was arrested in retaliation for her protected speech. Gonzalez claims that this criminal statute has not been used in the county to criminally charge someone trying to steal a nonbinding or expressive document in the last decade. While there were 215 grand jury indictments under the statute, she claims none remotely resembled the facts of this case.

Fifth Circuit Ruling

- Held that this case does not fall within the *Nieves* exception because Gonzalez did not present "objective evidence that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." The court reasoned that she failed to provide evidence of others who had mishandled a government petition and were not prosecuted.
- Instead, she provided evidence of who was prosecuted under the statute and argued their offenses were different than hers. The Fifth Circuit rejected her invitation to infer that because nobody else was prosecuted for similar conduct her arrest must have been motivated by her speech.

Murthy v. Missouri

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

Murthy Facts

Communications between the federal government (the White House, Surgeon General, CDC, and FBI) and private social media companies requesting the private companies take down certain posts on their sites pertaining to alleged misinformation related to COVID and elections.

What constitutes legitimate government speech versus governmental threats and coercion which converts private speech to state action?

Individuals and two states sued the federal government, claiming the communications with social media sites crossed the line into coercion and "significant entanglement," converting the private social media platforms into state actors and interfering in the states' First Amendment rights when the social media companies removed certain information from their sites.

National Rifle Ass'n v. Vullo

- **Issue**: 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.

Vullo Facts

NY Department of Financial Services investigating NRA-endorsed affinity insurance programs that provided insurance for licensed firearm use to protect persons/property even if insured was found to have acted with criminal intent.

Head of DFS made anti-NRA statements publicly in the wake of Parkland school shooting but after the investigations into these insurance companies had begun.

Entered into Consent Decree with insurance carriers.

Threats/Coercion – where is the line between government speech and threats if you have the power to regulate?

Loper Bright Enterprises v. Raimondo & Relentless v. Department of Commerce

- **Issue**: Whether the Court should overrule *Chevron v. Natl Resources Defense Council*, 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.

Chevron's Framework

Under *Chevron*, if a statute considered as a whole is ambiguous, then the court defers to any "permissible construction of the statute" adopted by the agency. This is known as *Chevron* deference.

Facts

- The case involves the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (the "Act"), which authorizes the Secretary of Commerce, and the National Marine Fisheries Service ("the Service") to implement a comprehensive fishery management program.
- Pursuant to the Act, the Service promulgated a rule that required the fishing industry to fund at-sea monitoring programs.
- A group of commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs , which they estimate are "at $710 per day," and which in the aggregate could reduce annual returns by "approximately 20 percent."

DC Circuit

- The court concluded that the text of the statute was clear that the Service could direct vessels to carry at-sea monitors, but it was unclear whether the Service could require the industry to bear the costs of at-sea monitoring mandated by a fishery management plan.
- The court explained *Chevron* is a deferential standard and so long as the agency's interpretation of the Act is reasonable, it will prevail.
- In this case, the court found that various clauses of the Act read together including "necessary and appropriate" clauses supported the conclusion that the agency's interpretation of the Act was reasonable.

Significance of the Case / Implication for Local Governments

If the Court overrules *Chevron*, it will mean a smaller regulatory state. Whether that is good for local governments depends on the regulation in many cases and can carry political implications.

In general, overruling *Chevron* may return more power to local governments to enact democratically driven ordinances on particular issues, unencumbered by regulations.

At the same time, there may be instances in which local governments prefer federal regulations (e.g., to address climate change) in certain areas where local governments cannot or do not want to regulate or because the regulations are favorable to local governments.

United States v. Rahimi

- Issue: 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.
- Shortly thereafter, he broke the restraining order, threatened another woman with a gun, and then was involved in 5 separate shooting incidents leading officers to search his home with a warrant and where they found numerous weapons.

Facts

- A 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).
- The statute makes it 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…" (The statute requires that the person subject to the order have the opportunity to participate in a hearing regarding the order).
- Rahimi pleaded guilty and challenged the statute under the Second Amendment.

Fifth Circuit Ruling

- The Fifth Circuit initially upheld the lower court conviction but then, the Supreme Court issued its decision in *Bruen*, which set forth a new test for how firearm regulations should be analyzed under the Second Amendment.
- Applying *Bruen*, the Fifth Circuit reversed itself and found the statute unconstitutional under the Second Amendment.
- The question is whether the regulation / statute falls within the nation's history and tradition regarding gun possession. The Fifth Circuit found none of the historical analogues identified by the federal government applied.

Lightning Round

Garland v. Cargill (bump stocks)

- **Issue**: Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. § 5845(b).
- This is a statutory interpretation case and not a Second Amendment case.
- The Fifth Circuit concluded that a plain reading of the statutory language compelled the holding that a bump stock device does not fall within the definition of machine gun.

Ohio v. EPA

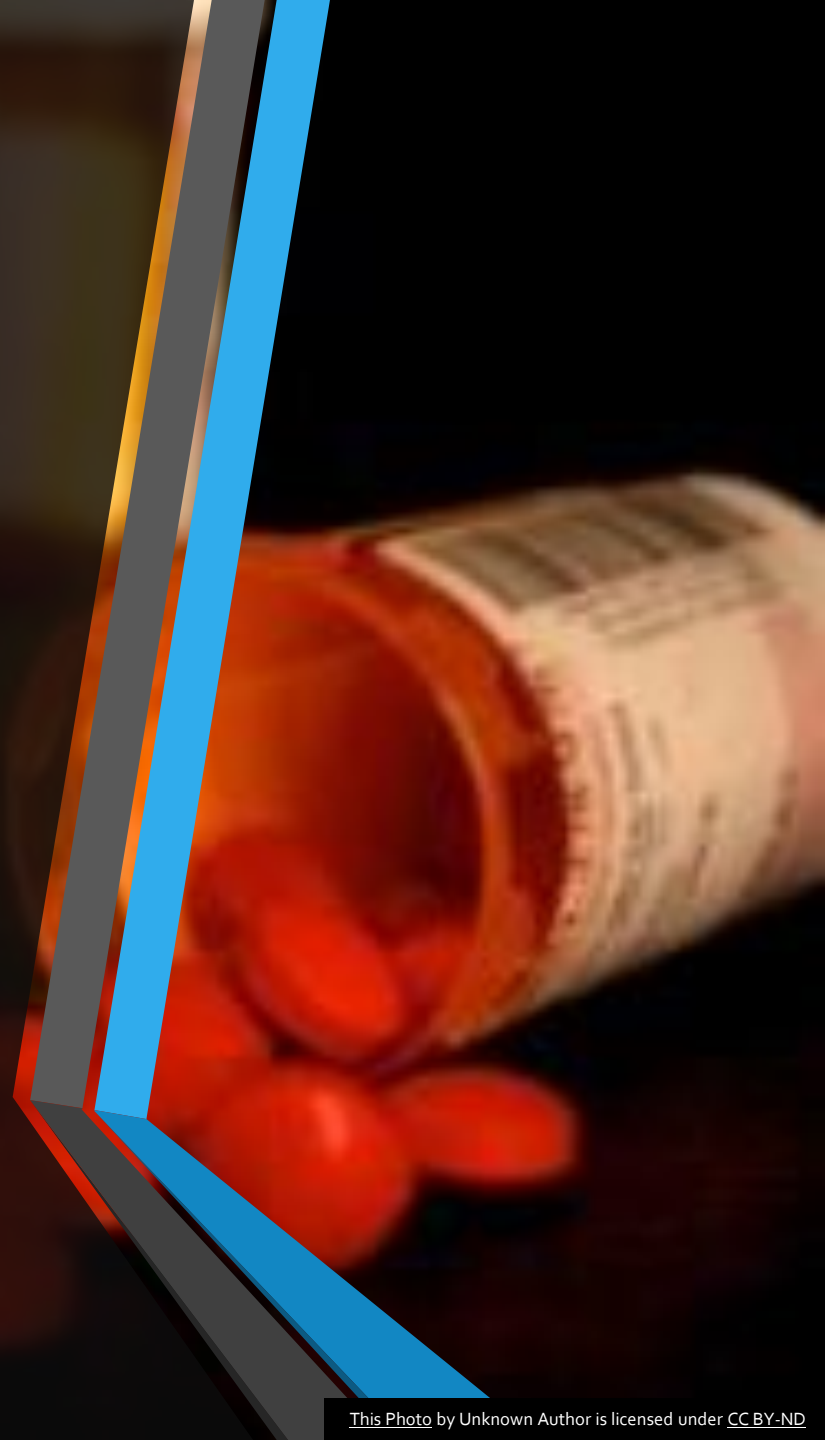
- **Issue:** whether the EPA's federal emission reductions rule, the Good Neighbor Plan, is lawful.
- Under the Clean Air Act, the EPA sets national air quality standards for the levels of some pollutants. States must then create and submit a plan to ensure that they comply with those levels.
- The act's "good neighbor" provision requires a state's plan to limit emissions that will cause a state downwind from it to run afoul of the federal air quality standards.
- In 2023, the EPA determined that 21 states failed to properly address downwind pollution.

Chiaverini v. Evanoff & City of Napoleon

- **Issue**: Whether Fourth Amendment malicious-prosecution claims are governed by the charge-specific rule, under which a malicious prosecution claim can proceed as to a baseless criminal charge even if other charges brought alongside the baseless charge are supported by probable cause, or by the "any-crime" rule, under which probable cause for even one charge defeats a plaintiff's malicious-prosecution claims as to every other charge, including those lacking probable cause.
- Section 1983 case which will equate to liability for cities and counties depending on the rule adopted by the Court.
- The Petitioner is also arguing for a rule that would apply even in cases of nominal damages but this would still be expensive as attorney's fees are available.

Harrington v. Purdue Pharma

- This case arises out of the opioid epidemic and the resulting bankruptcy by Purdue Pharma, manufacturer of Oxycontin.
- Under the plan of reorganization proposed by Purdue, the Sackler family members, who transferred some $11 billion to accounts outside the US during their ownership and management of the company, will receive complete releases from personal liability in exchange for their contribution of $6 billion to the estate.
- But the Sacklers have not themselves declared bankruptcy.
- Issue: 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.
- Implications of the case cut both ways for local governments but most opposed the federal government seeking to disrupt the plan.



Questions?

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