UNITED STATES SUPREME COURT LOCAL GOVERNMENT UPDATE

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International Municipal Lawyers Association

Michigan Bar Government Law Section and
Michigan Association of Municipal Attorneys Conference
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United States Supreme Court
Local Government Update-Agenda

- IMLA's Role as Supreme Court Amicus
- IMLA's Amicus Filings in Recent Supreme Court Cases
- Trends for Local Government

Introducing IMLA

- Nonprofit membership organization formed in 1935 serving more than 2500 local governments nationwide
- Provide webinars, conferences, workgroups, *Municipal Lawyer*, and other educational services
- Provide amicus support at United States Supreme Court, federal circuits, and state appellate courts, filing 30-40 amicus briefs annually
- Recently formed Local Government Law Center (LGLC), adding National League of Cities, National Association of Counties, Government Finance Officers Association

IMLA's Role as Amicus

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.**

IMLA's Role as Amicus

- Impact on local government
  - Cost
  - Inefficiency
  - Usurpation of local autonomy

- Additional context
  - National perspective/practice in other jurisdictions
  - Statistics
  - Academic/scholarly commentary
  - News articles

IMLA's Role as Amicus

- Petition stage briefs (upwards of 8,000 per year)
  - Circuit split
  - Need for guidance and uniformity

- Merits stage briefs (fewer than 1% of petitions are granted)
  - Interests of local government
  - In support of Petitioner, Respondent, or Neither Party

IMLA's Recent Amicus Filings-2022 Term

- *Sackett v. EPA* (waters of the United States)
- *Tyler v. Hennepin County* (real estate 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 home §1983 actions)
- *Moore v. Harper* (independent state legislature)

Sackett v. Environmental Protection Agency, no. 21-458 (Ninth Circuit) (decided May 25, 2023)

- **Whether Ninth Circuit applied proper test re: wetlands as WOTUS under CWA**
- CWA prohibits discharge into WOTUS without permit; WOTUS includes "wetlands" that are "adjacent" to navigable waters and their tributaries
- Sacketts backfilled lot near ditch leading to Priest Lake, ID; EPA violation
- Ninth Circuit considered analyses from *Rapanos v. United States* (2006):
  - Scalia: "relatively permanent, standing or flowing bodies of water;" wetlands w/"continuous surface connection" to permanent waters
  - Kennedy: "significant nexus" test--do wetlands "significantly affect the chemical, physical, and biological integrity" of navigable waters
- Ninth Circuit applied significant nexus test, upheld EPA violation

Sackett v. Environmental Protection Agency, cont'd

- IMLA seeks clarity that state/local governmental infrastructure (wastewater/stormwater, etc.) is not governed by CWA
- **Reversed and remanded.** Unanimous holding that Sackett's property is not covered by CWA, but only 5-4 majority agree as to scope of WOTUS
- Alito/Thomas, Roberts, Gorsuch, Barrett: "continuous surface test"- "adjacent" wetlands are "as a practical matter indistinguishable" from WOTUS
- Kavanaugh/Kagan, Jackson, Sotomayor: "adjacent" does not mean "adjoining"- WOTUS includes waters separated only by berm, dike, dune, etc.
- Kagan/Jackson, Sotomayor: CWA is "all-encompassing program of water pollution regulation," wetlands critical to purify water/ slowing runoff

Sackett v. Environmental Protection Agency, cont'd

- ***Consequence to local government*:**
- 53 million acres of wetlands no longer under EPA jurisdiction
- state and local protections will need to fill the vacuum
  - EarthJustice: States with weakest wetlands laws—Colorado, Kentucky, Missouri, Nebraska, Nevada, Oklahoma, Texas. States with more than 3 million acres of wetlands and/or more than 4% of state are wetlands: Alabama, Alaska, Delaware, Georgia, Louisiana, Mississippi, Montana, South Carolina, South Dakota, Texas
- unclear if local infrastructure (drinking water, wastewater, stormwater) is part of WOTUS and subject to CWA

Tyler v. Hennepin County, no. 22-166 (Eighth Circuit) (decided May 25, 2023)

- **Whether retaining surplus from real estate sale after satisfying unpaid property tax is unconstitutional taking/ fine**
- The county auditor . . . purchases each parcel . . . for . . . the delinquent taxes, penalties, costs, and interest owed . . . [T]itle vests in the State "subject only to the rights of redemption" allowed by statute. During the statutory redemption period—which is three years for most properties—the former owner may redeem the property for the amount of delinquent taxes, penalties, costs, and interest . . . A former property owner who . . . cannot afford to do so may make a "confession of judgment,". . . agree[ing] to entry of judgment for all delinquent taxes . . . to be paid in installments over five to ten years.
- **If the former owner does not redeem her property or make a confession of judgment, then final forfeiture occurs . . . vest[ing] "absolute title" in the State** and cancels all taxes, penalties, costs, interest, and special assessments against the property. For six months following final forfeiture, a former owner may apply to repurchase the forfeited property.

Tyler v. Hennepin County, no. 22-166 (Eighth Circuit) (decided May 25, 2023)

- **If the county sells the property, the proceeds of the sale do not satisfy any of the former owner's tax debt because the tax deficiency was cancelled at final forfeiture.** Instead, the county auditor distributes any net proceeds in accordance with Minn. Stat. § 282.08 for various purposes.
- We conclude that any common-law right to surplus equity . . . has been abrogated by statute. In 1935, the Minnesota legislature augmented its tax-forfeiture plan with detailed instructions regarding the distribution of all "net proceeds from the sale and/or rental of any parcel of forfeited land."

Tyler v. Hennepin County, no. 22-166 (Eighth Circuit) (decided May 25, 2023)

- Tyler did not respond to overdue tax notices-after 1 year, County obtained judgment; Tyler did not redeem in 3 years, did not sign confession of judgment or enter long-term payment plan, lost of title
- Tax sale: delinquency $15K, sold for $40K; County retained surplus-split with town and school district
- IMLA: ample due process protections; locality incurs costs to rehabilitate and sell
- **Reversed and remanded, 9-0**; Chief Justice Roberts: retaining surplus is taking of private property for public use (fines issue not discussed)

Tyler v. Hennepin County, cont'd

- ***Consequence to local government*:**
- Revisions to property tax forfeiture laws-PLF says "this type of tax forfeiture abuse, called home equity theft, is completely legal in 13 states. In Alabama, Colorado, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Oregon, and Wisconsin, governments . . . keep the surplus . . . In Arizona, Colorado, Illinois, Massachusetts, and Nebraska, private investors often reap the gains of home equity theft."
  - Court has already issued GVRs in two Nebraska Supreme Court cases, requiring reconsideration in light of *Tyler*
- Drop in state and local revenues - PLF estimates $1 Billion+ improperly retained since 2014 - refunds / class actions?
- Will government be responsible to maintain/rehabilitate foreclosed properties, assume costs of sale, creating incentive to abandon property?

Tyler v. Hennepin County, cont'd

- **Compare *Hall v. Meisner,* no. 21-1700 (6th Cir. Oct. 13, 2022)**
- Michigan General Property Tax Act: if tax unpaid for 2 years, state or county can petition to foreclose; if owner does not redeem, absolute title vests in state/county, which can sell at public auction
- Hall owed $22K; Oakland County foreclosed, sold to Southfield Neighborhood Revitalization Initiative for $1, which sold for $308K--no surplus to Hall
- Hall and 2 others brought Takings claim; County argued that it was the "foreclosing governmental unit" and had not received the surplus
- Sixth Circuit reversed: "In sum, the Takings Clause 'is addressed to every sort of interest the citizen may possess.' *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The plaintiffs' equitable title to their homes was such an interest."
- US Supreme Court denied Cert as to excessive fines claim on June 21, 2023

National Pork Producers Council v. Ross, no. 21-468 (Ninth Circuit) (decided May 11, 2023)

- **Whether California law that pork must come from hogs given adequate space violates dormant Commerce Clause**
- Complaint alleges extraterritorial effect and discrimination against out of state producers: cannot distinguish which pork goes to California, must change farm dimensions everywhere, raising costs 9%
- IMLA joins amicus brief pointing out many local ordinances that would be invalidated under Pork Producers' dormant Commerce Clause interpretation:
  - Short-term rentals-no "transient" renters
  - Puppy mills-can only sell animals from approved breeders
  - Spray paint-sale prohibited to avoid graffiti

National Pork Producers Council v. Ross, cont'd.

- **Affirmed, 5-4;** Gorsuch/Thomas, Sotomayor, Kagan, Barrett: California law does not discriminate purposefully against out of state economic interests and equally affects California producers, so no dormant Commerce Clause violation
- Four separate concurrences, differing views on *Pike* balancing test (burden vs. benefit)
- ***Consequence to local government*:**
- greater freedom to retain/enact laws promoting local policies even where incidentally affecting out-of-state entities

Groff v. Dejoy, no. 22-174 (Third Circuit) (argued April 18, 2023)

- **Whether *de minimis* cost/undue burden *Hardison* standard in Title VII religious accommodation cases should be abandoned**
- Postal worker refused to work Sundays; others declined to modify their schedules
- Post office would have to make significant hiring and rescheduling changes, would inconvenience work force
- IMLA argued that *de minimis* standard has functioned for 45 years and creates appropriate balancing between employer and employee, requiring accommodation but not undermining essential functions

Groff v. Dejoy, no. 22-174 (Third Circuit) (argued April 18, 2023)

- ***Consequence to local government*:**
- greater costs, potential exposure under Title VII
- many city/county functions rely on 24/7/365 scheduling with little flexibility-fire/EMS/law enforcement
- will religious accommodation allow selective refusal to service certain events/constituents

303 Creative LLC v. Elenis, no. 21-476 (Tenth Circuit) (argued December 5, 2022)

- **Whether public accommodation law requiring artist to speak or stay silent violates Free Speech clause**
- Colorado marriage website designer refuses to serve same-sex couples based on religious beliefs, states refusal on her website
- Colorado Anti-Discrimination Act prohibits businesses from refusing to serve clients due sexual orientation-includes stating that policy
- IMLA: public accommodation laws promote diverse communities; strict scrutiny protection of "expressive conduct" is unworkable; only speech should be protected

303 Creative LLC v. Elenis, cont'd

- ***Consequence to local government***:
- will require revision and limitation on state and local policies prohibiting discrimination in expressive services on basis of sexual orientation
- scope: will photographers, hairstylists, dress designers, florists, etc. claim right to refuse services based on expressive freedoms?

Health and Hospital Corp. of Marion County v. Talevski, no. 21-806 (Seventh Circuit) (decided June 8, 2023)

- **Whether Federal Nursing Home Reform Act allows private right of action under 42 U.S.C. §1983**
- Nursing home violated FNHRA provisions (administered psychotropic drugs, did not follow predischarge notice procedures); Talevski brought §1983 action: HHCM's acts violated statutory right under color of law
- Typical recourse for violation by Sending Clause-funded programs is to cut funding, unless legislation unambiguously creates individual rights.
- IMLA joined brief arguing for limited private right of action under Spending Clause-funded programs unless very clear legislative mandate
- **Affirmed, 7-2**. FNHRA creates "presumptively enforceable" §1983 rights

Health and Hospital Corp. of Marion County v. Talevski, cont'd

- **Consequence to local government:**
- increased individual litigation against government nursing facilities
- potential increase of §1983 actions against broader spectrum of Spending Clause-funded programs

Moore v. Harper, no. 22-174 (North Carolina Supreme Court) (argued December 7, 2022)

- **Whether state courts have authority to review state legislatures' actions regarding federal elections, including redistricting**
- Article 1, Clause 1 of the Constitution states: "the Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislatures thereof…"
- Legislature approved redistricting map that trial court found was more partisan than "99.99%" of General Assembly's own models
- NC Supreme Court rejected maps, required redrawing; petitioners argue state court has no authority to apply state constitution to federal elections
- IMLA: will reduce local voting opportunities, disenfranchise local voters, create two levels of election oversight

Moore v. Harper, cont'd

- ***Consequence to local government*:**
- disenfranchises localities' voters, creates two levels of election oversight, undermines local roles and procedures in managing federal elections
- encourages gerrymandering and impairs representative government

Moore v. Harper, cont'd

- **Is *Moore v. Harper* moot?**
- November 2022 elections resulted in 5-2 majority Republican North Carolina Supreme Court
- After US Supreme Court argument, NC Supreme Court overturned prior decision redrawing state's congressional districts, reversing the decision under review by the U.S. Supreme Court in *Moore v. Harper*
- U.S. Supreme Court asked parties and Solicitor General: "What is the effect on this Court's jurisdiction of the April 28, 2023 order of the North Carolina Supreme Court?"
- *Allen v. Milligan* (6/8/2023) 5-4 Roberts-upholds Section 2 of Voting Rights Act, Alabama's redistricting plan likely impermissibly discriminatory

IMLA's Recent Amicus Filings-2023 Term

- *Lindke v. Freed / O'Connor-Ratcliff v. Garnier* (government official use of social media)
- *Culley v. Marshall* (civil asset forfeiture)
- *Duarte v. City of Stockton* (*Heck* bar in diversion programs)

- *Loper-Bright Enterprises v. Raimondo* (*Chevron* deference)*

Lindke v. Freed, no. 22-621 (Sixth Circuit) / *O'Connor-Ratcliff v. Garnier*, no. 22-314 (Ninth Circuit) (docketed April 24, 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**
- ***Lindke***: City manager Freed blocked Lindke after anti-Covid comments; Freed had used site before gaining office--used his title on page but also included personal photos; no use of office funds or resources
- Sixth Circuit applied "state official" test—was Freed performing a governmental duty or acting under governmental authority—and found he was not: "the page neither derives from the duties of his office nor depends on his state authority."

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

- ***O'Connor-Ratcliff***: school district Trustees created social media accounts to run for office and thereafter used accounts to communicate with constituents; subsequently used filters to limit critical comments and finally blocked parents posting criticisms of school Board
- Ninth Circuit applied "close nexus" test, finding that Trustees used accounts solely to perform official functions and did not clearly disavow official role despite receiving no public funding; followed similar analyses as Second, Fourth, and Eighth Circuits
- IMLA: seeks clarity as to permissible parameters of public officials' social media use to avoid state action liability

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

Culley v. Marshall, no. 22-585 (Eleventh Circuit)(docketed December 23, 2022)

- **Whether due process requires pre-trial probable cause hearing in vehicle forfeiture cases, and if so, what standard should apply**
- Two vehicles involved in drug arrests were seized under Alabama's Civil Asset Forfeiture laws and held for lengthy periods
- Innocent car owners did not utilize Alabama's bond procedures to retrieve or take other actions to hasten return of their vehicles
- Eleventh Circuit applied the "speedy trial" standard under *Barker v. Wingo*, in contrast to more stringent *Mathews v. Eldredge* test used in numerous other circuits (Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth)

Culley v. Marshall, cont'd

- ***Consequence to local government*:**
- federalism: imposition of mandatory minimum hearing period will undermine state autonomy
- Increased administrative costs, potential exposure

Duarte v. City of Stockton, no. 21-16929 (Ninth Circuit)(petition)

- **Whether *Heck* bar should apply where plaintiff pleads guilty to crime forming the basis of Section 1983 claim**
- *Heck v. Humphrey* forecloses §1983 claim which necessarily implies invalidity of underlying "conviction" or "sentence"
- Duarte signed *nolo* form pleading guilty to resisting arrest, was given diversion in lieu of criminal sentence
- After Duarte completed community service, prosecutor did not enter order; Duarte sued for excessive force, but Ninth Circuit applied *Heck*
- IMLA argues for application of *Heck* to factors which are equivalent to "conviction" or "sentence"

Duarte v. City of Stockton, cont'd

- ***Consequence to local government***:
- failure to foreclose §1983 actions by defendants who plead nolo and/or accept diversion will discourage those alternatives and encourage prosecutors to seek convictions
- greater judicial and incarceration costs
- defendants receive criminal records which hamper return to society

Loper Bright Enterprises v. Raimondo, no. 22-451 (DC Circuit) (docketed May 1, 2023)

- ***Whether enabling Act's silence on an issue constitutes ambiguity allowing for agency deference***
- Under *Chevron*, where enabling Act is ambiguous, agency's reasonable interpretation will be applied
- National Marine Fisheries Service issued rule requiring fisheries to allow at-sea monitoring; enabling Act confers broad fishery management authority, but is silent on monitoring payment question
- Fisheries industry challenged agency authority to impose payment responsibility; DC Circuit upheld agency but dissent said that Congress must "explicitly or implicitly" grant authority to cure ambiguity

Loper Bright Enterprises v. Raimondo, cont'd

- ***Consequence to local government:***
- Less federal oversight, more state and local autonomy
- Positive: reduce FCC authority to require public right of way access?
- Negative: reduce agency authority over beneficial funding?

Trends for Local Government

Takings in focus

- *Per se* physical takings/right to exclude-*Cedar Point Nursery*
- "Essential nexus" and "rough proportionality"-*Nollan/Dolan/Koontz*

Free Exercise wins over Establishment

- *Kennedy*-facts favor coach but *Garcetti* is still good law

Second Amendment time travels back to 1789

- *Bruen*-history prevails; cannot consider public safety implications

Qualified Immunity continues

- *Rivas-Villegas* and *Tahlequah*-reverse circuit excessive force findings-cannot satisfy "clearly established" at "too high a level of generality"

Questions?

Thank you-

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