United States Supreme Court Local Government Update 2023-24 Term

Erich Eiselt, Deputy General Counsel / Director of Legal Advocacy
International Municipal Lawyers Association

MAMA / GLS Conference
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IMLA

- Membership organization formed in 1935 to provide local governments with legal advocacy and educational services.
- **Advocacy** - File 30-40 amicus briefs each year in lower appellate courts and at the Supreme Court in support of local governments.
- **Education** - Serve local government attorneys via conferences, webinars, work groups, *Municipal Lawyer* and more. Join us in Orlando in September 2024; New Orleans in 2025, and Salt Lake City in 2026!

Local Government Legal Center

- Coalition between NLC, NACo, IMLA, and GFOA.
- Mission is to raise awareness of the importance of Supreme Court cases to local governments and help shape the outcome of cases of significance to local governments at the Supreme Court through persuasive advocacy.
- Serves as a resource to local governments and their officials on issues related to the Supreme Court.

2023-24 Supreme Court Term

-***Lindke v. Freed / O'Connor-Ratcliff v. Garnier*** (First Amendment / social media)

-***NRA v. Vullo / Murthy v. Missouri*** *(*First Amendment / state action)

-***Gonzalez v. Trevino*** (First Amendment / retaliatory arrest)

-***United States v. Rahimi*** (Second Amendment / criminal possession)

-***Chiaverini v. Evanoff*** (Fourth Amendment / malicious prosecution)

-***Sheetz v. El Dorado County*** (Fifth Amendment / takings)

-***Grants Pass v. Johnson*** (Eighth Amendment / homelessness)

-***Muldrow v. City of St. Louis*** (Title VII / job transfers)

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

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.

Freed's page was public (anyone could follow it). And for the page category, he chose "public figure."

In 2014, Freed was appointed as City Manager of Port Huron, Michigan and he added that information to his Facebook page.

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

More *Lindke* Facts

Freed continued to post primarily about his personal life, but also information related to his job -- and solicited feedback from the public on issues of concern, often responding to comments on his posts.

Lindke - a Port Huron resident – disagreed the City's COVID policies and posted negative comments on Freed's Facebook page.

Freed deleted those comments and eventually blocked Lindke from his page.

Sixth Circuit: Was Freed acting "Under the Color of State Law"?

- Sixth Circuit applied 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 Freed's account was **NOT** State Action (no state law compelling it, no use of state resources, no reliance on state authority).

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

School district officials created public Facebook / Twitter pages to promote their campaigns for office-(kept private accounts for family/friends).

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

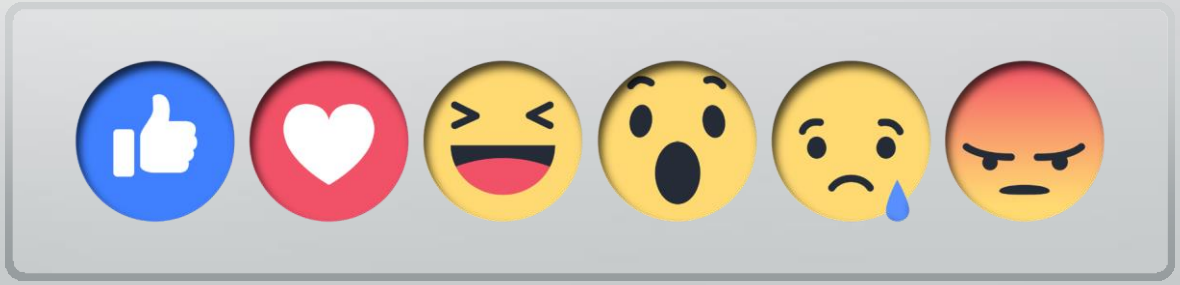
"About" section lists their positions as school trustees, and links to official trustee emails.

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

Garnier: public criticism and officials' response

The Garniers posted repetitive and lengthy comments / replies critical of the School Board.

The Trustees deleted the posts at first and then blocked the Garniers entirely.



Garnier: Not Personal Campaign Pages

After their election in 2014, the Trustees rarely 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; Eighth Circuit held official was using page 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 after gaining office.

Ninth Circuit: Trustees engaged in State Action

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

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. *Knight Institute v. Trump*, 928 F.3d 226 (2019)
- ✓ Fourth Circuit – Yes. *Davison v. Randall*, 912 F.3d 666 (2019)
- X Sixth Circuit – No. *Lindke v. Freed*, 37 F.4th 1199 (2022)
- X Eighth Circuit – No. *Campbell v. Reisch*, 986 F.3d 822 (2021).
- ✓ Ninth Circuit – Yes. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (2022)

Two Tests / Two Holdings

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

Lindke and *O'Connor-Ratcliff* : Two Very Similar Cases

***Lindke v. Freed*, no. 22-611**

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*, no. 22-324**

Issue: Whether a public official engages in state action by blocking an individual from the official's personal social-media account, when the official uses the account to communicate about job-related matters with the public, but not pursuant to governmental authority or duty.

LGLC Amicus Brief (IMLA/ NACo/ NLC)

-Advocated for an actual authority test that would limit liability for local government officials--beyond that, sought clarity so officials have parameters to avoid claims of State Action.

-Challenged the 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.

Supreme Court Holding 9-0

- Freed did not relinquish his First Amendment rights when he became City Manager.
- **Test**: A public official who prevents someone from commenting on the official's social-media page engages in state action only if the official both (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.
- Derived from Section 1983 -- authority comes from law, regulation, ordinance or well-established custom.
- Remanded to both Circuits to apply new test.

Practice Pointers

- Merely sharing public information available elsewhere is unlikely to be state action.
- Separate accounts is the gold standard--but officials have 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 or resources to run private social media pages.
- Discourage employees/officials from identifying themselves as employees of the City/County in private accounts (but again, cannot be mandated). If they do so identify, **require disclaimers**.

Vullo and *Murthy*: testing the limits of government speech

- ***National Rifle Association v. Vullo*** involves statements by a state regulator that resulted in insurance companies ceasing to do business with the NRA: did the government coerce the insurers and limit the NRA's speech?
- ***Murthy v. Missouri*** involves communications by the Administration that resulted in social media companies deleting certain posts: did that convert the social media companies into "state actors?"
- Cases were not consolidated.

Vullo Facts

NY Department of Financial Services investigated NRA-endorsed affinity insurance programs that provided insurance for licensed firearm users to defend them if sued – in some cases even if insured was found to have acted with criminal intent.

While investigation into insurance programs was ongoing, and in the wake of the Parkland shootings, Vullo (Superintendent of DFS) made public anti-NRA statements, along with Governor Cuomo.

Insurers entered into Consent Decrees with DFS, acknowledging invalidity of programs and paying fines; Vullo also wrote to the insurers encouraging them to cease all relationships with gun interests including the NRA. Insurers ceased NRA business.

NRA sued, arguing governmental coercion was suppressing NRA's First Amendment rights—but Second Circuit held that Vullo's communications were permissible government speech.

National Rifle Ass'n v. Vullo, no. 22-342

- **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.

IMLA Amicus Brief

-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.

-Filed in support of neither party.

Supreme Court Holding 9-0

- Vacated and remanded. Test is whether governmental speaker has actual authority to penalize or incentivize speech by third parties, and whether the government's communication is reasonably construed as threat of detrimental action.
- Here, Vullo was hostile to the NRA, and had power via her role in DFS to penalize third parties that continued to do business with the NRA, effectively limiting NRA's gun-advocacy messaging.
- No new standard limiting government speech-relies on longstanding precedent in *Bantam Books v. Sullivan.*

Murthy v. Missouri Facts

- Federal government (White House, CDC, FBI, and Surgeon General) requested social media firms to take down posts containing alleged misinformation about COVID and elections.
- Individuals and states claimed the requests crossed into coercion and "significant entanglement," interfering in the states' First Amendment rights and making the social media platforms state actors when they removed information from their sites.

W.D. Louisiana granted injunction, prohibiting Government from:

- meeting with social-media companies for the purpose of **urging, encouraging, pressuring, or inducing** in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms;
- flagging content or posts on social-media platforms and/or forwarding such to social-media companies **urging, encouraging, pressuring, or inducing** in any manner for removal, deletion, suppression, or reduction of content containing protected free speech;
- **urging, encouraging, pressuring, or inducing** in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech;

Supreme Court grants cert

- Stays the Louisiana District Court injunction pending Supreme Court determination as to whether Administration's actions constitute coercion.

Murthy v. Missouri, no. 23-411

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

Gonzalez v. Trevino- Facts

Gonzalez was elected to the city council for Castle Hills, Texas (population under 5,000) and called for removal of the city manager via nonbinding petition. During her first meeting when the petition was presented to the Mayor, Gonzalez was accused of obtaining petition signatures under false pretenses. The meeting grew confrontational.

After the meeting, Gonzalez left her belongings on the dais and went to speak to a constituent. Mayor Trevino could not find the petition which had been among his papers, and asked Gonzalez if she had it. She looked through her belongings and was surprised to find the petition there. Video shows her taking the papers from the Mayor's desk.

More *Gonzalez* Facts

Mayor Trevino filed a criminal complaint for taking the petition without consent, under Texas Penal Code: "[a] person commits an offense if he … intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a government record." Investigation took more than a month, including review of video evidence.

Gonzalez sued under Section 1983, arguing she was arrested in retaliation for her protected speech--this 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.

Retaliatory arrest– *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.

Fifth Circuit Ruling

- Held: This case does **not fall within *Nieves* 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." She failed to provide evidence of others who had mishandled a government petition and were not prosecuted.
- Instead, she provided survey of 215 prosecutions by the County under the statute and argued that no one had been prosecuted for what she did-their offenses were different from 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.
- Conflicts with Seventh and Ninth Circuits, which allow more generalized comparators (objective evidence of disparate treatment) to support claims of retaliatory arrest and prosecution.

Gonzalez v. Trevino, no. 22-1025

- **Issues**: (1) Whether the probable-cause exception in *Nieves v. Bartlett* can be satisfied by objective evidence other than specific examples of arrests that never happened; and

  (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

Gonzalez Supreme Court Holding (9-0)

- Vacated and remanded. "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—especially when the criminal prohibition is longstanding and the conduct at issue is not novel—makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past."
- Remanded to allow Fifth Circuit to apply test to Gonzalez's evidence.
- 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.
- Did not decide second Question Presented – is *Nieves* limited to officers' split-second decisionmaking?

United States v. Rahimi - Facts

- A Texas court issued a domestic violence restraining order against Zackey 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 violated the restraining order, threatened another woman with a gun, and was involved in five separate shooting incidents leading officers to obtain a warrant to search his home, where they found numerous weapons.

More *Rahimi* 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 subject have the opportunity to participate in a hearing regarding the order).
- Rahimi pleaded guilty and challenged the statute under the Second Amendment.

Rahimi - Fifth Circuit Ruling

- The Fifth Circuit initially upheld Rahimi's lower court conviction. But the Supreme Court then 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.
- *Bruen* says: "The government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."
- The Fifth Circuit found none of the historical analogues identified by the federal government applied.

United States v. Rahimi, no. 22-915

- **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.

Rahimi Supreme Court Holding (8-1)

- Reversed and remanded. "When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."
- "*Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. Indeed, *Heller* stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful."
- Rejects the Government's contention that Rahimi may be disarmed simply because he is not "responsible."

Chiaverini v. Evanoff Facts

- Jascha Chiaverini operated jewelry store/pawn shop and received stolen ring. Owner called, demanding ring be returned; when Chiaverini refused, police were summoned.
- Following law enforcement investigation, a municipal judge issued arrest and search warrants for retaining stolen property, operating without a license, and money laundering. The money laundering charge was based on falsified police report.
- Chiaverini was arrested and spent 3 days in detention over a weekend. All charges were ultimately dropped.
- Chiaverini sued, alleging malicious prosecution and false arrest.

Chiaverini - Sixth Circuit Ruling

- "Because probable cause existed to prosecute Chiaverini on at least one charge, his malicious-prosecution and false-arrest claims fail." (The "any charge" rule--favors government).
- Conflict: Other circuits allow malicious-prosecution and false-arrest claims to proceed if even one charge lacks probable cause. (The "charge specific" rule—favors defendants).

Chiaverini Supreme Court Holding (6-3)

- Vacated and remanded: The presence of probable cause for one charge in a criminal proceeding does not categorically defeat a Fourth Amendment malicious prosecution claim relating to another, baseless charge.
- Provides example—arrest on drug and gun possession charges; detained due to gun charge, which is then dropped for lack of probable cause, but already detained. Should be able to bring claim on baseless gun charge.

Sheetz v. El Dorado - Facts

- El Dorado 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 (TIM) fee to finance the construction of new roads and the widening of existing roadways 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.

More *Sheetz* 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 $23,000 TIM fee.

He paid, obtained the permit, then challenged the TIM fee under the Takings Clause.

Background: *Nollan* and *Dolan* Tests

- Under Supreme Court precedent, a public entity must show that a permit fee for development bears an **essential nexus** and **rough proportionality** to the impact of that development" (*Nollan/Dolan tests*, as enunciated in *Koontz.*)

Sheetz- California Court of Appeal Holding

- Upheld the El Dorado TIM Fee.
- *Nollan* and *Dolan* apply to administrative/ ad hoc permitting scenarios, but fees imposed on a broad class of property owners through legislative action do not need to meet the *Nollan/Dolan* "rough proportionality" and "essential nexus" tests.

Sheetz v. El Dorado County, no. 22-1074

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

Sheetz 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.
- 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.

Significance to Local Governments

- Impact fees are an important tool to help local governments balance the need for smart growth against impacts of that 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 the homeowner's broad arguments in this case (ie requiring individualized impact analysis) would negatively impact local governments' ability to assess impact fees as they would have to meet more demanding legal standards than most states currently require.
- Expect increased litigation in this area to determine questions left open by the decision.

Grants Pass v. Johnson Facts

- Grants Pass, Oregon-population 38,000: at least 50 are homeless (may be as many as 600).
- The number of homeless persons outnumbers the available shelter beds.
- City passed ordinances making 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 that could lead to criminal trespassing).

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."
- Opinion indicated that 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.

Ninth Circuit Ruling

- 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.'"

Grants Pass- Amicus Brief Points (LGLC brief joined by numerous jurisdictions)

-Federalism - federal judiciary is dictating local policy. Local authorities know best avenues for success.

-Sanctions are a necessary tool in homelessness programs.

-Other stakeholders also bring suit against the local government-businesses, ADA, residents, etc.

-Confusion – what does "adequate shelter" or "involuntarily homeless" mean? Substantial percentage of those offered shelter refuse it.

Grants Pass v. Johnson, no. 23-175

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

Muldrow v. St. Louis Facts

New St. Louis police commissioner announced staffing changes, including transfer of seventeen male / five female officers to new assignments.

Sgt. Muldrow was transferred from Intelligence Division to Fifth District (Department needed more sergeants). Retained pay/rank, supervisory role, investigation of violent crimes.

She then sought transfer to Second District but was denied (position remained unfilled due to staffing shortages) and was eventually transferred back to the Intelligence Division.

Muldrow – Implications for Local Government

- Local governments are collectively among the largest employers in the nation.
- New rule will result in increased Title VII litigation and liability for cities and counties, costing resources in responding to these complaints.
- Has public safety implications, given the shortage of police officers around the country. Chiefs and Sheriffs need to transfer staff without risk of Title VII suits.

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

- Muldrow 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."

Muldrow v. St. Louis, no. 22-193

- **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 significant disadvantage.

Muldrow Supreme Court Holding (9-0)

- 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."

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Loper-Bright 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."

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.

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 ("*Chevron* deference."

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 *Loper-Bright* / Implications for Local Government

Overruling *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.

Lightning Round?

Garland v. Cargill (bump stocks)

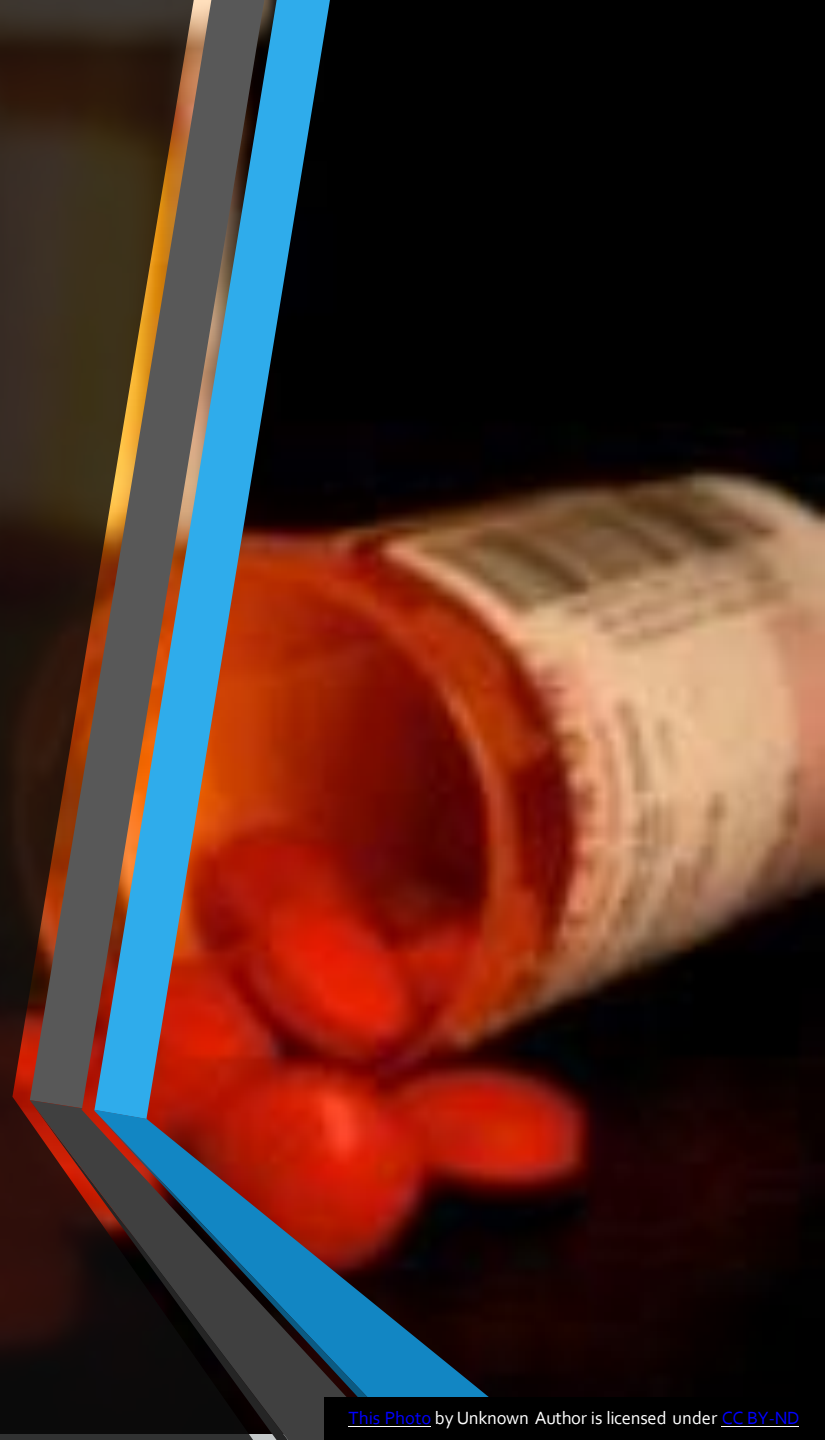
- **Issue**: Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. § 5845(b).
- This is a statutory interpretation case and not a Second Amendment case.
- The Fifth Circuit concluded that a plain reading of the statutory language compelled the holding that a bump stock device does not fall within the definition of machine gun.
- Supreme Court affirms, 6-3.

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.

Harrington v. Purdue Pharma

- Bankruptcy by Purdue Pharma, manufacturer of Oxycontin.
- Under the plan of reorganization proposed by Purdue, Sackler family who transferred $11 billion to accounts outside the US during their ownership/management of Purdue, will receive complete releases from personal liability in exchange for contributing $6 billion to the estate.
- 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, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.



Thank you, MAMA/GLS!

Questions?

- Erich Eiselt: eeiselt@imla.org or 202-742-1018