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Attorney's Fees: Simplicity of Case Justifies Court's Reduction to $450 per Hour; No Award for Time Spent Preparing Fee Application

Lilly v. City of New York, No. 17-cv-2823 (2d Cir. Aug. 14, 2019).

The Second Circuit affirms the district court's reduction of attorney's fees-but vacates the lower court's award of fees for the time spent in preparing the fee application.

Kayheem Lilly (Lilly) filed a §1983 complaint against the city of New York and individual police officers based on alleged excessive force. He ultimately accepted a FRCP 68 offer of judgment for $10,101 plus reasonable attorneys fees, expenses and costs incurred "to the date of the offer." The parties could not agree on the attorney's fees so Lily filed a motion with the district court. The court granted the Lilly's application but reduced the total award from $34,000 for 50.3 hours of work plus expenses to $28,000 (a reduction from $625 per hour to $450 per hour) because of the relatively straightforward nature of the case.

The Second affirmed the reduction on appeal. It reviewed a lengthy history of Circuit and Supreme Court precedent on the issue of attorney's fees, including the Court's 12-point Johnson

factors. It's own primary precedent was Arbor Hill, in which the Circuit stated "the district court in exercising its considerable discretion should bear in mind all of the case specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate. . . . The reasonable hourly rate is the rate a paying client would be willing to pay. . . . The district court should also consider that such an individual might be able to negotiate with his or her attorneys using their desire to obtain the reputation all benefits that might accrue from being associated with the case."

The Second Circuit found no error in the district court's reduction of the attorney's hourly rate to $450 per hour, citing the simplicity of the case, which under Arbor Hill standards, would likely have been considered by a client.

Although it had not caselaw of its own specifically on point regarding the reduction of clerical work fees, the Circuit looked to Supreme Court precedent, where paralegal fees had been reduced because the work in question did not require any legal acumen whatsoever-and reduced Lilly's clerical fee request.

Finally the Circuit vacated the district court's award of fees for time spent in preparing the fee application. Although these are often granted, they could not be allowed in this case because the FRCP 68 settlement agreement expressly provided for attorney's fees "up to" the date of the agreement.

LINK

Eighth Amendment: County Jail Not Required to Provide Dental Procedures Beyond Tooth Extraction

Leachman v. Harris County, No. 20845 (5th Cir. Aug. 13. 2019).

Affirming the district court, the Fifth Circuit finds that the failure of a county jail to provide dental services to an inmate beyond mere tooth extraction did not violate Eighth Amendment standards or entitle the inmate to injunctive relief.

Matthew James Leachman (Leachman) was convicted by a Texas jury of aggravated sexual assault of a child in 1998 and sentenced to 40 years in prison. In 2015, the Southern District of Texas found Leachman had been denied his right to self-representation at trial and granted a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Leachman was transferred from the custody of the Texas Department of Criminal Justice ("TDCJ") to the Harris County (County) Jail while awaiting a new trial. Leachman asserted that in September 2016, a piece of his back molar broke off while he was chewing; he was seen by a jail dentist, who informed Leachman that it would be preferable to save the tooth rather than extract it but that the County jail had an "extractions only" policy. Accordingly, if Leachman wished to try to save the tooth, he would have to wait until he was released, wait until he returned to TDCJ's custody, or arrange for a private dentist to fill his teeth at the jail.

Leachman could not locate a private dentist to perform the work. The pain worsened, and he then allowed extraction of the decaying tooth. In 2018, he was told by a different dentist that he had three cavities; again, the jail dental facility did not perform fillings and did not have the proper equipment to do so, so extraction was the only option available.

Leachman refused extraction, arguing that the County was violating his Eighth Amendment rights. He sued the County, the sheriff, and several dentists who care for prisoners at the jail under 42 U.S.C. §1983. He also filed a motion for a preliminary injunction requiring the defendants "to

preserve the status quo by filling [his] cavities before decay progresses beyond salvageability." While he could not provide formal medical evidence on tooth decay, he noted that the district court could take judicial notice of the effects of tooth decay, emphasizing that it is common knowledge that if tooth decay is not treated, it will eventually lead to loss of the tooth. He cited *Baughman v. Garcia*, 254 F. Supp. 3d 848 (S.D. Tex. 2017), which states it is "undisputed that tooth decay, if left untreated, is progressive and can result in extreme pain, loss of tooth structure, and ultimately loss of the affected tooth."

The district court denied Leachman's motion, finding that he had not shown a substantial likelihood of success because the "difficult questions of law" at issue "create sufficient doubt regarding the probability of his success on the merits." It also determined Leachman had not established a substantial threat of irreparable injury.

The Fifth Circuit granted interlocutory appeal. It cited Supreme Court precedent on the issue of prisoner medical treatment: the Court has said prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when they demonstrate deliberate indifference to a prisoner's serious medical needs, amounting to an "unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To prevail on a claim of deliberate indifference to medical needs, the plaintiff must show the defendant denied him treatment, purposefully gave him improper treatment, or ignored his medical complaints; a prisoner's disagreement or dissatisfaction with his medical treatment generally will not suffice to show deliberate indifference "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (quoting Gamble, 429 U.S. at 103-04).

The Fifth Circuit had previously concluded a prisoner failed to state a claim under the Eighth Amendment based on the jail's provision of "extraction of his injured teeth" rather than "more expensive restorative treatment" and "even affirmed dismissal of that complaint as frivolous." The court noted that the Seventh Circuit has held likewise. The district court's denial of preliminary injunction was affirmed.

The lower court's denial of Leachman's demand for assistance of counsel was also affirmed: A district court is not required to appoint counsel for an indigent §1983 plaintiff "unless the case presents exceptional circumstances." To determine whether circumstances are sufficiently exceptional, courts consider (1) "the type and complexity of the case"; (2) the indigent's ability to adequately present the case; (3) the indigent's ability to investigate the case adequately; and (4) "whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination." Here, the district court determined that Leachman failed to present exceptional circumstances because the case was not complex and because he was in a position to adequately communicate and present his case. The Fifth Circuit agreed.

The Circuit could not consider Leachman's final challenge-the district court's order requiring him to provide a more definite statement. The appellate court lacked interlocutory jurisdiction because the lower court's order on this point was not a "final judgment." "A routine order requiring a plaintiff to provide additional factual detail is not inextricably intertwined with the interlocutory orders before us." Leachman's appeal on that issue was dismissed.

LINK

Public Meetings: Limiting Discussion about Mosque to Relevant Issues and Removing Disruptive Audience does not Violate Constitution

Youkhanna v. City of Sterling Heights, no. 18-1874 (6th Cir. Aug.14, 2019).

The Sixth Circuit affirms a lower court determination that, where a mayor required that city council meeting attendees limit their discussion about a mosque to relevant points and not attack the religion, where he removed the audience from the chamber after their repeated outbursts, and where one speaker was ejected for being overly disruptive, the process comported with Constitutional and Michigan Open Meetings requirements.

In 2015, the American Islamic Community Center (AICC) applied for zoning permission to build a mosque in Sterling Heights, Michigan (City), in a neighborhood otherwise zoned for residential use. The City Planning Commission (Commission) voted down AICC's application, giving the following reasons:

- "the location and height of the mosque interferes with and discourages the appropriate development and use of adjacent land and buildings,
- lack of size compatibility with established long term development patterns,
- a likely shortage of off-street parking when the principal and ancillary uses are combined, * additional parking spaces are required, and
- the scale of the mosque is not harmonious with the neighboring areas."

AICC sued the City, alleging violations of RLUIPA and the First Amendment. AICC and the City then reached a settlement giving AICC "special land use approval" to build the mosque, subject to certain conditions, and the district court entered a consent judgment.
In order to sign the settlement, however, the City Council had to vote its approval. The meeting during which the Council considered the settlement was recorded on video, was open to the public and well attended. Before the mosque agenda item began, the City Attorney explained the terms of the agreement and the City's reasons for settling the case. The Mayor then said the floor would open to public comment, although comments would be limited to two minutes and subject to the following ground rules:

> Speakers will be required to stay on point. Your comments during this agenda item must be related to this agenda item. This agenda item is to consider settlements, consent order, and consent judgments in these two cases . . . . If you fail to abide by the Council's Rules, you will be called out of order . . . and you will be asked to go back to your seat. If you do not go back to your seat, we will recess and you will be removed from the auditorium. So please don't make us do that . . . . Outbursts from the audience can be grounds for being called out of order . . . . So again, let's just please be as respectful as we can of each person. We do not need any comments about anybody's religion, that is not the purpose of this meeting tonight and any comments regarding other religions or disagreements with religions will be called out of order. It's simply not relevant to what's going on tonight.

During public comment, some people voiced concerns about issues such as traffic and noise; others disparaged Islam and AICC, calling them terrorists or terrorist-funded and saying that they wanted to "destroy the American Constitution." Comments and deliberation were punctuated by at least 26 audience outbursts, after which the Mayor cleared the chamber of all spectators, except the press, so that the Council could complete deliberation. (Spectators were able to remain in the vestibule.) The Council voted to settle the case, and the consent judgment was entered.

In March 2017, plaintiffs filed suit in the Eastern District of Michigan, seeking a judgment declaring the consent judgment invalid and unenforceable. They asserted seven claims, including First Amendment and Equal Protection Clause challenges to the restrictions on public comments at the meeting; a Fourth Amendment challenge to the removal of one outspoken participant from

the meeting; an Establishment Clause challenge to defendants' actions in toto; a Due Process Clause challenge to defendants' "impermissibl[e] circumventi[on of] procedural protections, including the failure to provide proper notice and an opportunity to be heard;" and a claim asserting violation of the Michigan Open Meetings Act.

In June 2017, the district court denied plaintiffs a preliminary injunction. After cross-motions for summary judgment, the district court granted defendants' motion and entered a judgment in their favor.

On appeal, the Sixth Circuit first reviewed plaintiffs' standing. Standing was easily apparent as to some of their claims, including the First Amendment and Fourth Amendment counts, and the claims challenging the validity of the consent judgment also survived standing inquiry: "We have no trouble finding that those plaintiffs who reside near the site of the mosque have standing to challenge the validity of the consent decree. The injury they allege is a particularized effect on their properties caused by the consent decree; a declaration that the consent decree is invalid, or an injunction barring its operation, would remedy that injury."

The Circuit found that the City's consent judgment with AlCC comported with due process and state law. The first procedural error alleged by plaintiffs was is a failure to consider the City zoning ordinances criteria for approval of a permit to build a house of worship in a residential area: including consideration of "harmony with the appropriate and orderly development of the surrounding neighborhood," traffic patterns and parking, the location and height of the building, and the new building's impact on "public health, safety and welfare." It was "abundantly clear from the record that the City Council did consider these and all other relevant criteria."

The City had originally rejected AlCC's application because it failed to comply, in the City's opinion, with certain criteria regulating noise, size and height of the building, parking, and traffic-each of which was addressed in the consent judgment by restricting the height of the mosque, stipulating to lot parking only and shuttles for large events, and banning outside sound projection.

Equally unavailing was plaintiffs' argument that the City Council erred by failing to make findings of fact as required by the zoning ordinance and Michigan law. During deliberation, City Council members and the Mayor considered and made findings on the relevant criteria, all of which were published in the meeting minutes. "We can find no authority requiring the findings to take a particular form, nor have plaintiffs pointed us to anything indicating these written findings are insufficient."

The court next considered plaintiffs' First Amendment and Equal Protection claims. The Mayor's admonition to limit discussion to the proposed consent judgment was not, as plaintiffs argued, a ban on talking about religion. This was clear from the fact that comments mentioning religion-including comments about Islam specifically-were allowed when they were relevant to zoning issues: for example, a person stated that he had lived near a mosque previously and that mosque had hosted celebrations for a holiday that involved noise and blocking of the streets. That comment was not was not interrupted, and that speaker was not called out of order.

The second rule enforced at the meeting was a rule against attacking persons or institutions. Plaintiffs argued that such a restriction constituted a content- and viewpoint-based prior restraint on speech that violated their First Amendment and Equal Protection rights. In order to assess this purported violation, the Circuit had to assess what type of forum was involved. "A City Council meeting is not a 'traditional public for[um] like parks and streets,' the sort of setting in which "the government's regulatory powers are at their weakest." Rather, City Council meetings constitute a 'designated' and 'limited' public forum: 'designated' because the government has 'intentionally open[ed]' it 'for public discourse,' and 'limited' because 'the State is not required to . . . allow persons to engage in every type of speech' in the forum."

Here, there were two content-based limitations on speech: the relevance rule and the rule forbidding attacks on people and institutions. The first rule was clearly acceptable: "We can think

of no content-based restriction more reasonable than asking that content be relevant." The second rule, which forbade attacks on people or institutions, was a more difficult case. "Certainly, this rule could be construed as viewpoint discrimination, although Mayor Taylor testified that the rule does not forbid 'disparaging comment[s],' but rather 'making an attack.'"

The court ultimately did not address this issue "because there is no dispute in the record that plaintiffs' comments were restricted by the entirely appropriate relevance rule." (Deposition testimony from various would-be speakers indicated that some of their comments would have attacked Islam and would nevertheless have been irrelevant to the issue at hand).

Plaintiffs' Equal-Protection arguments failed for the same reasons; the City had not preferred speakers with viewpoints it approved over those wishing to express less favored or more controversial views.

Also dismissed were plaintiffs' Establishment Clause claims. They argued that the City's actions led to an "unmistakable message of approval of adherents to Islam and disapproval of those who were not (in particular, the Chaldean Christians, such as [some of the] Plaintiffs)."

Plaintiffs' final two claims related to actions the Mayor and City Council took to maintain order during the meeting--they argued that the decision to remove the audience from the chambers violated Michigan's Open Meetings Act and that the decision to eject one speaker from the meeting was an unlawful seizure in violation of the Fourth Amendment. Both arguments failed.

Michigan's Open Meetings Act expressly states that "a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting and provides that "[a] person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting."

The video recordings confirmed that there was clearly a "breach of the peace" at the meeting, justifying relocation of the audience to the vestibule, where they could still observe the proceedings. And the undisputed facts regarding the removal of one speaker were that she approached the dais and engaged the Mayor during a recess, gesticulating and speaking loudly-the Mayor asked police to escort her out, which they did. At some point during the process of escorting her from the building, one of the officers "grabbed [her] arm" --she was removed from the building but not otherwise detained. She asserted that she was seized the moment the Mayor ordered her out, but the Circuit disagreed.

> In fact, Ms. Rrasi was not seized at all. Although she asserts that she did not feel "free to leave" during this encounter, "the Supreme Court has recognized [that] the 'free to leave' test may not be the best measure of a seizure where a person has no desire to leave the location of a challenged police encounter." *Salmon v. Blesser*, 802 F.3d 249, 253 (2d Cir. 2015). Indeed, the "free to leave" test is hardly applicable in this situation, where Ms. Rrasi wished to remain rather than leave."

While a person may be seized if officers use force beyond "guiding force," force that is "painful" and not necessitated by "resistance" on the part of the person being rejected, that was not the scenario here. The speaker had lost her privilege to remain in the otherwise-public meeting. She was not attempting to engage in calm and productive discussion but yelling disruptively. "It is common sense that a government body should be allowed to remove people who are disrupting a public meeting, and the Michigan Open Meetings Act allows for such a removal." There was no seizure, and no Fourth Amendment rights were violated.

LINK

State-Created Danger: Allegations of Police Conspiracy to Assist Unknown Murderer are Insufficient for §1983 and *Monell* Liability

Estate of Romain v. City of Grosse Pointe Farms; No. 18-1316 (6th Cir. Aug. 14. 2019).

Allegations that police knew of a murder before it occurred and took actions to obscure investigatory efforts were insufficient to support an action against police on a state-created danger theory.

In January 2010, police found a car registered to Joann Matouk Romain (Romain) alone in a church driveway around 9 pm. Suspecting that the car's driver may have walked to nearby Lake St. Claire, police followed footprints in the snow heading towards an embankment. The police department's dive team and U.S. Coast Guard searched, but did not find a body.

Two months later, a fisherman found Romain's body on the Canadian side of the Detroit River. Canadian and Michigan authorities performed autopsies, both concluding that Romain had drowned-but they could not determine the cause of death. The Michigan county medical examiner's office found that homicide was "less likely" than suicide because Romain had no significant injuries. An accident seemed "quite unlikely" because she had no reason to be near the water.

Authorities could not find answers and stopped investigating. But Romain's estate believed that an unknown person murdered Romain, and that police knew about the murder before it happened and botched the investigation to protect the killer. The estate relied on an affidavit from Romain's daughter stating that an unidentified officer arrived at her house about 30 minutes before the police reported following the footprints to the water. That officer, the affidavit said, asked about Romain-but the car was registered in her daughters' names, so the officer should not have known that Romain was missing based only on a license plate check. The estate asserted that a jury could infer from those facts that the officer knew about Joann's disappearance before it happened. That would make sense, the estate said, only if the officer knew about the murder plot.

As further proof, the estate said the police had Romain's spare keys that went missing a month before her disappearance. An officer claimed he picked up the keys from Romain's house the morning after she disappeared, but the estate insinuated that police were in contact with the person who took the keys or that they took the keys themselves.

The estate further challenged the account that a single set of footprints led to the lake, based on pictures showing many footprints by the water-- either there were more than one set of prints originally or police intentionally failed to preserve the original set.

The estate also suggested that the police ignored a struggle-Romain's purse was ripped and the autopsy report indicated a contusion on her upper left arm. The estate said that these facts are proof of a struggle that ended in murder, which the police discount. Finally, the estate criticized the police's failure to investigate various witness accounts, including a report of an underdressed man wearing a scarf running near the water on the night Romain disappeared.

Based on the alleged cover up, the estate sued the two investigating police departments and many officers, bringing a *Monell* claim and a § 1983 claim alleging that there was a state-created danger because the officers made "it known to Killer John Doe that they would immediately cover up the murder and rule it a suicide." The district court granted summary judgment to the defendants.

The Sixth Circuit found problems with the estate's arguments on appeal. After failing below, the estate changed lawyers and legal theories. On appeal, it argued that the police, as co-

conspirators, were directly responsible for the murder because it occurred during a conspiracy. The Circuit labeled the new strategy "A clever move, but not the one made below." Below, the estate sought relief for a cover up-not a murder. Alleging a "state-created danger," the estate's complaint claimed that the defendants increased the risk of harm to Romain by telling the unknown killer that they would cover up the crime. And in its summary judgment briefing, the estate identified an "overall conspiracy to not investigate [Romain's] disappearance as a crime."

As the district court explained, a state-created danger theory provides a narrow path for recovery. On appeal, the estate could not seek a more forgiving path and directly implicate the police in Romain's murder.

Taking the claim as presented below, the Circuit found that the estate could not recover under a state-created danger theory. That doctrine allows plaintiffs to bring due process claims under § 1983 for harms caused by private actors-an anomaly because neither the Fourteenth Amendment nor §1983 regulates private actors. As the Sixth Circuit sees it, "although the doctrine stems from a Supreme Court case, it does not have a strong foundation."

In *DeShaney v. Winnebago County Department of Social Services*, county authorities had returned a child to his abusive father who then beat the child again. The child and his mother sued the county and its employees, alleging a violation of the child's substantive due process rights. The Supreme Court rejected the claim because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." The Court also addressed an argument that a state may have a duty, arising out of "special relationships," to protect certain individuals-such as inmates. But the Court held that the precedent was limited to situations where a state holds a citizen against his will because then the state has affirmatively restrained the citizen's ability to care for himself. That logic did not apply in *DeShaney,* Chief Justice Rehnquist wrote, because "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."

The Sixth Circuit-and others-read the Rehnquist passage to define a new theory of constitutional liability-the state-created danger doctrine. Under that doctrine, plaintiffs can recover for private harms if they show: "(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff."

Here, the estate could not make the first showing, that the defendants' affirmative actions increased the risk of harm to Romain. At first blush, the estate seems to satisfy the requirement--If the alleged murderer knew that the police would cover up the crime, the reduced risk of penalty may have encouraged the murderer to proceed. But the estate failed to establish a genuine issue regarding the officers' alleged assurance that they would conceal the murder, citing only limited circumstantial evidence and asking the court to infer not only that the police knew beforehand of the plan to murder Romain, but also that the police told the killer that they would conceal the murder. No reasonable jury could make the speculative inferences required to reach that conclusion.

Because the estate's theories against the individual officers failed, the *Monell* count also failed.

CONCURRENCE: Judge Murphy added a lengthy concurrence, agreeing with the outcome but more vigorously questioning the viability of *DeShaney* as a source of third-party-based state liability and suggesting that the estate might have raised a more effective argument by citing "class of one" Equal Protection violations by the police.

LINK

Telecommunications: FCC Order that Small Cell Infrastructure Needs No Environmental or Historic Preservation Review is Arbitrary and Capricious

United Keetoowah Band of Cherokee Indians v. Federal Communications Commission, No. 18-1129 (D.C. Cir. Aug. 9, 2019).

The D.C. Circuit has found that the FCC's order advancing deployment of 5G infrastructure without any NEPA or NHPA review, and without consultation with tribal authorities is arbitrary and capricious.

Next generation wireless services-also known as 5G-require a shift from a system dependent on large macrocell towers to a network characterized by thousands of densely-spaced small wireless facilities (small cells). In an effort to expedite development of 5G service, the Federal Communications Commission (the Commission) removed many regulatory requirements for the construction of wireless facilities.

The parties in this case challenge one of the Commission's orders in the small cells proceeding: *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (Second Report & Order). The Order eliminated National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) review for small cells with the Commission concluding such review is not statutorily required, would impede the deployment of 5G, and that the cost of such review outweighed any benefit. The Order also limited Tribal involvement in NHPA Section 106 review for wireless facilities that did not fall under the small cell exemption.

Petitioners argue the Order violates NHPA, NEPA, and the Administrative Procedure Act (APA) because the elimination of historic preservation and environmental review was arbitrary and capricious, an unjustified policy reversal, and is contrary to the text of NEPA and NHPA. Petitioners argue that changing the Tribes' role in reviewing new construction was arbitrary and capricious, that the Commission arbitrarily and capriciously failed to engage in meaningful consultation with Tribes, and that the Order itself requires NEPA review.

The D.C. Circuit granted the petitions for review in part and denied in part. The Circuit held that the Order does not justify the Commission's determination that review of small cell deployments was not in the public interest, rendering the Order arbitrary and capricious. Specifically, the court found the Commission failed to justify its contention that small cells pose no cognizable risk to religious, cultural, or environmental interests as protected by statute, especially in light of "the Commission's mischaracterization of small cells' footprint, the scale of the deployment it anticipates, the many expedients already in place for low-impact wireless construction, and the Commission's decades-long history of carefully tailored review," the Commission's characterization of the Order as consistent with its longstanding policy was not 'logical and rational.'" Moreover, the Circuit found the Commission did not adequately address the potential harms of deregulation and the benefits of historic preservation and environmental review. The Commission failed to address key concerns brought to light by commenters in the record, and the Commission failed provide a justification for its material deviation from decades of Commission policy on wireless facilities review.

The D.C. Circuit held the deregulation of small cells to be arbitrary and capricious because the public interest analysis did not meet the standard of reasoned decision making. The court rejected the alternative grounds for finding the Order is arbitrary and capricious or otherwise violated the APA without evaluating the arguments.

LINK

IMLA Staff commentary: Although the Order at issue in this case is related to State and Tribal historic preservation officers, environmental protection efforts, and federally recognized tribes, this decision has value for local governments. The crux of this opinion attacks process and Administrative Procedure Act defects both in the Order and surrounding the promulgation of the Order. This Order is only one of three that arose from the Federal Communications Commission's wireless infrastructure order. Therefore, the rationale provided by the D.C. Circuit in this case may be beneficial to bolster process defect and Administrative Procedure Act arguments. The language the D.C. Circuit employs to discuss the Commission's decision making is telling and certainly worth a glance.

THIS JUST IN: More on the Second Amendment. An opinion piece in this morning's *New York Times* by Linda Greenhouse titled "The Supreme Court's Second Amendment Appetite" begins:

With the sound of gunshots still ringing in the country's ears, here's the question of the moment for the Supreme Court: Do the justices hear it too?
Back in January, I devoted my first column of the new year to the growing impatience of some members of the court for a chance to move the boundaries of the Second Amendment from the home - where its 2008 decision in District of Columbia v. Heller had located the amendment's protection of the right to bear arms - out to the wider world. A few weeks later, the court agreed to hear the first Second Amendment case in nearly a decade.

The case seemed so quirky that at first I didn't take this development very seriously. At issue is a New York City regulation that prohibited most licensed handgun owners from taking their guns out of the city, even to a second home or to a shooting range for target practice. No other jurisdiction has so restrictive a policy for those it deems worthy of owning a gun in the first place. A gun owners' group, the New York State Rifle & Pistol Association, challenged the regulation, which dates to 2001, and appealed to the Supreme Court after the federal courts in New York upheld it.

It would be easy for a court, if so inclined, to strike down this regulation while leaving all other gun restrictions intact. But as briefs from gun rights groups began arriving at the court, it became apparent something much more is at stake. Quirky as the regulation might be, this case is potentially the vehicle that Justices Samuel Alito, Clarence Thomas, Neil Gorsuch and Brett Kavanaugh have been waiting for - a chance to turn the ambiguous and quite narrow Heller decision into the constitutional charter for gun rights that the gun lobby had hoped for but has not yet obtained.

The full opinion piece is HERE.

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