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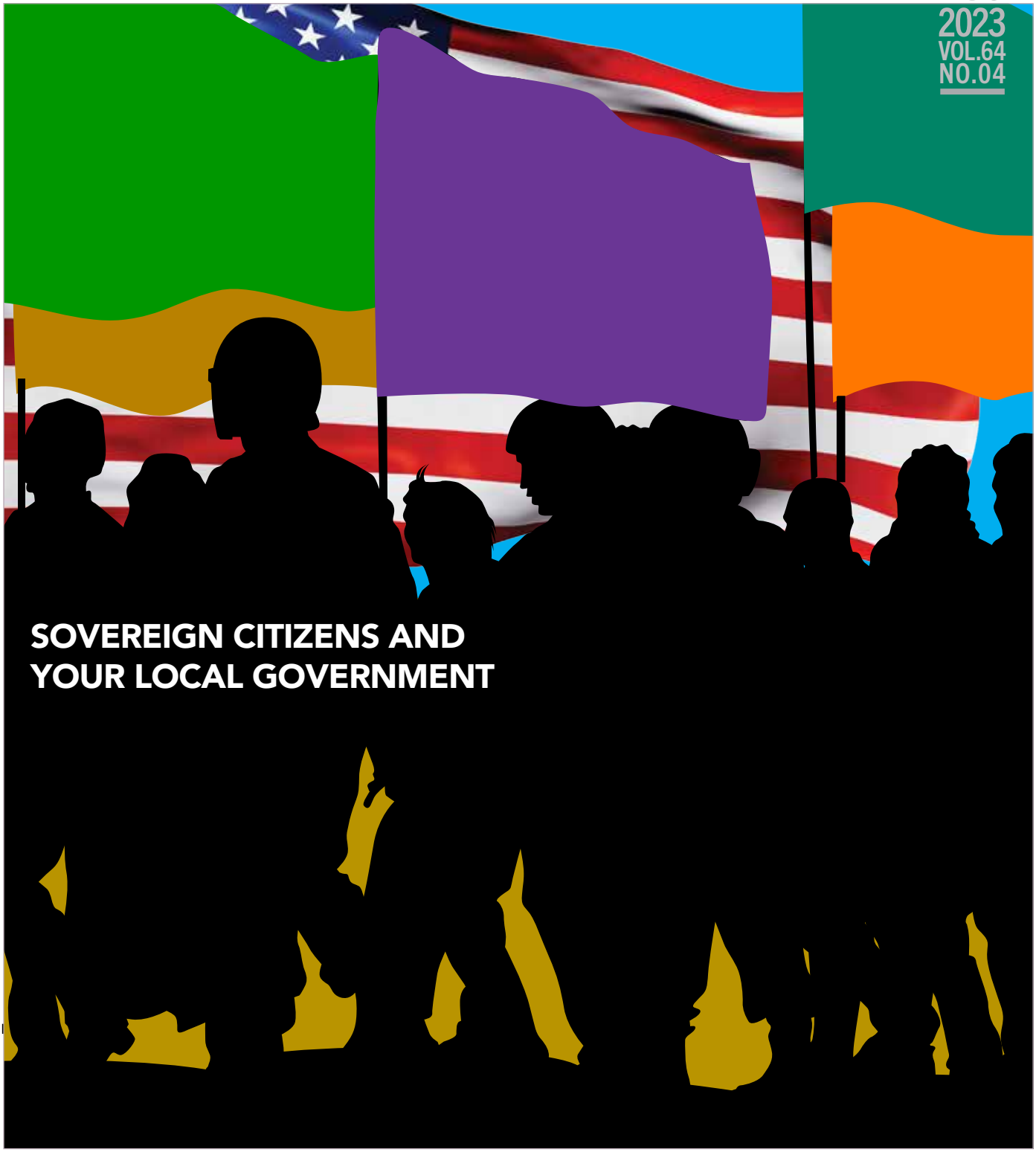

SOVEREIGN CITIZENS AND YOUR LOCAL GOVERNMENT

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As Americans debate the merits of liberal or conservative policies, the proper functioning of legislative, executive, and judicial branches, and the appropriate balancing of state versus federal authority, another faction disavows the very legitimacy of any government. Ignoring authority and challenging laws at every turn, the sovereign citizen presents unique challenges for local government attorneys.

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

2023 Supreme Court Term Preview: No Rest for Local Government Attorneys

Every Thursday morning in June, the Court issues decisions in cases that will impact local governments and society writ large.[1] And while we wait for those major decisions, the Court has also been busily filling its docket with significant cases for next Term as well. The Court has granted certiorari for next Term in several cases that will have major implications for local governments including a case asking the Court to overrule *Chevron v. Natural Resources Defense Council* as well as a pair of cases involving social media and the First Amendment.

Loper Bright Enterprises v. Raimondo

Chevron, a more than 40-year precedent, provides that courts should defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. More specifically, the Court in *Chevron* provided a two-step framework for analyzing agency regulations. First, courts must consider whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter..."[2] If the statute is ambiguous, step two in the *Chevron* analysis provides that "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3] Step two is known as *Chevron* deference.

When Congress enacts statutes, there are often ambiguities and there may be several reasons for this. Congress delegates authority to administrative agencies, which typically have more expertise in the regulated area than Congress, to fill in the gaps. As the Court recognized in *Chevron:*

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[4]

In the *Loper* case slated for next Term, the Court will decide an issue of monumental importance that ultimately centers on a somewhat obscure Congressional Act. This 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" in furtherance of its goal "to conserve and manage the fishery resources ... of the United States."[5] Key to the statutory scheme is the promulgation and enforcement of "fishery management plans."[6] Pursuant to the Act, the Service promulgated a rule that required the fishing industry to fund at-sea monitoring programs.[7]

A group of commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs.[8] The Service estimated industry costs to the herring fishery "at $710 per day," which in the aggregate could reduce annual returns by "approximately 20 percent."[9]

The D.C. Circuit applied *Chevon*'s two-step framework to analyze whether the agency had the authority under the Act to promulgate the new rule and require the industry to bear these costs. The court concluded the text of the statute was clear that the Service could direct vessels to carry at-sea monitors, but the text was ambiguous as to whether the Service could require the industry to bear the costs of at-sea monitoring mandated by a fishery management plan.[10] Because the text was ambiguous as to whether the agency had the authority to require industry to bear this cost, the court moved on to step two of the analysis. The court explained this is a deferential standard and so long as the agency's interpretation of the Act is reasonable, the agency will prevail.[11] In this case, the court found that various clauses of the Act read together including "necessary and appropriate" clauses supported the conclusion that the Service's interpretation of the Act was reasonable.[12]

The decision was 2-1, and the dissent argued that *Chevron's* step two should only come into play if the statute is ambiguous *and* Congress either "explicitly or implicitly delegated authority to cure that ambiguity."[13] The dissent argues that silence on a particular issue indicates an agency's lack of authority.[14]

Local governments are subject to agency regulations and for that reason,

this is an important case. But whether overruling *Chevron* is good or bad for local governments is not so simple. Under the petitioner's rule, if a statute does not contain unambiguously express authorization for a particular course of action, the agency would not have the authority to regulate. (The petition, like the dissent in *Loper*, argues that silence is not ambiguity). There are federalism principles that may favor overruling *Chevron* and, in many cases, local governments may benefit from less agency authority. For example, in the telecommunications context where the Federal Communications Commission ("FCC") has regularly sought to preempt local authority, applying *Chevron* deference to FCC regulations cuts against local government interests. There are other similar contexts where the expansion of federal regulatory authority can mean less authority for state and local governments.

However, in other contexts, some local governments have argued in favor of federal regulations. For example, some local governments have argued that the Environmental Protection Agency ("EPA") should have broad authority to regulate greenhouse gas ("GHG") emissions given that GHGs do not adhere to municipal or state boundaries and the burdens of climate change are likely to overwhelm localities seeking to reduce GHGs without federal support. Another area where local governments may support federal regulatory authority is in federal grants. The federal government awards hundreds of billions of dollars in grants each year to state and local governments on a wide array of public projects or in response to emergencies. For example, under the American Rescue Plan Act, Congress appropriated $350 billion to states, tribal governments, and local governments to help defray costs incurred responding to the pandemic emergency. The Treasury Department issued guidance that allowed local governments to recoup significant funds under a flexible standard to avert economic calamity.[15] Applying *Chevron* deference in these instances would likely benefit local governments. In still other situations, local governments may be split on whether a particular regulation would benefit them and that split may also vary depending on federal and local politics.

Another wrinkle to this case is how overruling *Chevron* may (or may not) impact judicial deference to state and local regulations. In some states, state courts defer to municipal interpretations of their own ordinances.[16] And there are examples of federal courts doing the same. For example, in *Beaulieu v. City of Alabaster,* the Eleventh Circuit explained that in construing the constitutionality of a city ordinance, the court "consider[s] the City's 'own authoritative construction of the ordinance, including its implementation and interpretation' and defer to that construction 'so long as its interpretation is based on a permissible construction.'"[17] And while the court in *Beaulieu* did not mention *Chevron,* the same logic seems to underpin both decisions. Overruling *Chevron* may not immediately impact deference to local government's interpretations of their own ordinances, but it would likely cast doubt on the practice where it exists.

The practical effect of overruling *Chevron* is that there would be a much smaller and weakened regulatory state. Whether that is ultimately a good thing for local governments is not clear.[18] But it will be significant. And while we do not know the outcome of the decision yet, it seems quite possible that the Court will overrule *Chevron,* given past writings by sitting Justices.[19] The *Loper* case will be argued in the fall of 2023 and a decision will be issued sometime before the end of June 2024.

Social Media Cases

In addition to the *Loper* case, the Supreme Court has also granted certiorari in two cases involving the question of when a public official engages in state action for the purposes of Section 1983 and therefore violates the First Amendment when they block or ban someone from the official's social media accounts. Somewhat oddly, the Supreme Court did not consolidate these cases and as of this writing, they will be argued separately. The two cases stemmed from circuits that offered different tests for these situations, but that would not ordinarily result in cases that present essentially the same issue to be argued separately. Perhaps there are factual differences in the cases that will lead to a more nuanced test. For example, one involves elected officials who were utilizing their social media accounts originally as campaign accounts which later morphed into their school district accounts while the other involves an unelected city manager. Might there be a different test for officials who are a part of a governing body and cannot act unilaterally versus those that have authority to do so? We will find out the test for what constitutes state action in these circumstances before the end of June 2024.

Lindke v. Freed

Mr. Freed had a Facebook page, which started out as private, but once he had more than 5,000 friends, he converted it to a "page" which allows for unlimited followers. His page was public (anyone could follow it) and for the page category, he chose "public figure." In 2014 (after he created the public Facebook page), he was appointed the city manager of Port Huron, Michigan and he added that information to his Facebook page. He listed his contact information as Port Huron's, including linking to the city website, city email, etc.

He used the page to post about personal and professional things, including things like his daughter's birthday pictures, but also the town's COVID-19 policies and articles on public-health measures as the pandemic continued.

Mr. Lindke was a citizen of Port Huron and unhappy with the City's COVID policies. Lindke would post negative comments on Mr. Freed's Facebook page and Freed would delete those comments. Freed eventually blocked Lindke from the page.

Lindke sued, claiming that blocking him from the Facebook page was "state ac-

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tion" for the purposes of a Section 1983 claim and that Freed had violated his First Amendment rights in doing so.

The Sixth Circuit concluded that Freed was not acting "under the color of state law" for the purposes of bringing a Section 1983 action.[20] The Sixth Circuit applies what it calls 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."[21] In concluding that Freed was not acting as a state official in using his Facebook post, the court emphasized that you must look at the page as a whole, not at individual posts in isolation.[22] The court reasoned that the Facebook page did not derive from his duties as city manager nor did it depend on his authority as city manager.[23] In further support of its finding that Freed was not acting under the color of state law, the court noted that Freed used no state or city funds or resources to run the page, no government employees helped him maintain it, and it was clear the page belonged to him and not the office of city manager (i.e., it will stay with him when he leaves his job).[24]

The court rejected Lindke's argument that the page helped Freed fulfill an official duty of communicating with constituents, pointing out that Freed is free to go to the hardware store in town and talk about his job and is not engaging in official state action when he does that.[25] The court also distinguished the case from the action brought against former President Trump several years ago where the former President was sued for blocking critics on Twitter.[26] The Sixth Circuit explained that the way then-President Trump had used the account created "substantial and pervasive governmental involvement with and control over" the Twitter account and that Freed was not using his account in the same manner.[27]

The Supreme Court granted certiorari to resolve the following question: 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

In this case, two school district officials created public Facebook and Twitter pages to promote their campaigns for office. They maintained separate private accounts for family/friends. After they won their elections, they used their public social media pages generally to promote school board business, solicit input on board decisions, invite the public to school board meetings, etc. The "about" section on the pages lists their positions as school trustees, and links to official trustee emails. Only the trustees themselves could post on their public Facebook pages, but members of the public could comment on a post or react to it (like, dislike, etc.).

The Garniers were members of the community with children in the school district. They would frequently write repetitive and critical comments on the school board officials' pages. For example, within ten minutes of the officials' posting a message on their pages, the Garniers would post over 200 identical replies. The school board officials deleted and hid the posts and then eventually blocked them from their social media accounts.

The Garniers sued under Section 1983, claiming the school board officials had violated their First Amendment rights by blocking them from their social media pages.

The Ninth Circuit concluded that the school board officials were acting under the color of state law for the purposes of Section 1983; therefore, blocking the Garniers from the officials' accounts because of the message the Garniers were promoting violated the First Amendment.[28] The Ninth Circuit analogized the situation to off-duty governmental employees, explaining that the question is 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."[29] The Ninth Circuit concluded that the social media pages were "overwhelmingly" geared toward providing official information and soliciting feedback on the same.[30] The court also rejected the argument that these were personal campaign pages even though that is how they started out.[31]

The issue in this case is similar to the *Lindke* case, but it is presented in a slightly different way. The question in this case is 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.

While the *Lindke* and *Garnier* cases will be argued separately, they both present an opportunity for clarity around an important issue for local government attorneys. Every local government has governmental officials who are using social media, whether it's the city/county manager, elected officials, or others. These cases should provide guidance as to when an account is considered personal in nature and when it would be considered a tool of governance such that constitutional principles, including the First Amendment apply. A rule that would sweep in largely private social media accounts and subject them to the First Amendment could create significant liability for local governments and also lead to administrative headaches.

IMLA plans to file an amicus brief in these cases in support of neither party and will advocate for a clear rule that will provide sufficient guidance to local officials in this area so that we can avoid liability moving forward. ML