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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2024
VOL.65 NO.02



Public Good Meets Private Property: the Hydra-Headed Takings Clause

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By: Ravinder Arneja, IMLA Associate Counsel

The Supreme Court recently declared that constitutional questions are to be analyzed through the societal lens in effect when that seminal document was written. A current firearms case illustrates the complexity of applying Eighteenth Century norms in a contemporary context. An opinion later this Term should provide further insights into the Court's "history and tradition" jurisprudence.

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PRIVATE PROPERTY AND PUBLIC GOOD: THE HYDRA-HEADED TAKINGS CLAUSE

By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy

America's founders enshrined in twelve words the principle that private property may not be taken for public use without just compensation. That tenet continues to spawn ever-increasing debate, challenging the meaning of property, the parameters of a Taking, and the character of use. Local governments are at the epicenter of that conflict.

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Lower Profile, but Important on Main Street: the Supreme Court's Local Government Cases

The 2023-2024 Supreme Court Term will likely be dominated with headlines about former President Trump's legal cases, which involve issues related to whether a state can bar him from the ballot under the Fourteenth Amendment as well as his claims of broad immunity from federal prosecution.[1] On top of that, the Court will decide two abortion cases and two cases involving the regulation of firearms. The word "blockbuster" gets thrown around a lot when talking about the Supreme Court, but this Term certainly seems to fall into that category.

While those issues will dominate the headlines, they are not nearly as relevant to local governments as many of the other lower profile cases on the Court's docket. These include: several First Amendment cases;[3] a Takings case;[2] a question related to the opioid settlement and Purdue Pharma's bankruptcy;[4] a Title VII employment discrimination case;[5] whether the Court should overrule *Chevron*;[6] the viability of the EPA's "Good Neighbor Plan" related to greenhouse gas emissions;[7] whether local governments must provide post-seizure probable cause hearings related to asset forfeitures;[8] and the contours of a federal criminal bribery law for state and local officials.[9] In addition to these cases, several of which have been previously summarized in *Municipal Lawyer*, the Court finalized its 2023-2024 Term docket by adding two more cases of relevance to local governments. *Grants Pass v. Johnson*[10] is a case involving the Eighth Amendment and homeless encampments and *Chiaverini v. City of Napoleon*[11] involves a Section 1983 malicious prosecution claim.

Grants Pass v. Johnson

The Supreme Court has agreed to hear *Grants Pass v. Johnson,*[12] which will answer "whether the enforcement of generally applicable laws regulating camping on public property constitutes 'cruel and unusual punishment' prohibited by the Eighth Amendment.[13] The story begins with the Ninth Circuit's holding in *Martin v. Boise,* which held that "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" because such conduct is involuntary and "the state may not 'criminalize conduct that is the unavoidable consequence of being homeless.'"[14] The court left open the possibility for reasonable time, place, and manner restrictions on camping and also emphasized that its holding did not extend to those that did have access to "adequate temporary shelter."[15] Then, in *Johnson,* the Ninth Circuit reaffirmed *Martin,* applied it to a request for a pre-enforcement injunction on a class-wide basis and applied it to a series of ordinances that for the most part resulted in fines (though could eventually escalate to criminal penalties for trespass).[16]

In granting certiorari, the Supreme Court will decide whether the Eighth Amendment has anything to say about these ordinances. The decisions have created a tremendous amount of uncertainty and litigation in the Ninth Circuit. Localities face questions over what constitutes "adequate shelter," who is actually "involuntarily homeless," and how should they handle situations where shelter is declined but the person nevertheless refuses to vacate an encampment that has been deemed a health or safety hazard? In addition, localities face competing lawsuits from disability rights advocates who argue that failing to clear encampments from sidewalks violates the Americans with Disabilities Act as well as lawsuits from local businesses and residents near encampments that argue that failing to clear the encampments creates a public nuisance under state law.[17]

If the Supreme Court reverses *Martin* and *Johnson,* the decision will not solve the problem of homelessness. What it will do is return the issue to local governments and policymakers without an added layer of federal judicial intervention. Localities will continue to grapple with the complex issues associated with homelessness and will seek solutions that work for their communities. The case will be argued in April, and we should expect a decision before the end of June.

Chiaverini v. City of Napoleon

Over the years, the Supreme Court has wrestled with difficult questions related to malicious prosecutions. The first issue the Court tackled was whether such a common law tort could be brought under Section 1983 in the first place. After all, Section 1983 provides a cause of action for deprivations of rights secured by the Constitution. But there is no specific right to be free from malicious prosecutions in the text of the Constitution. Thus, to bring a malicious prosecution claim, the Court had to determine where such a claim would reside within the Constitution, if at all.

In *Albright v. Oliver,* the Court rejected the argument that a malicious prosecution claim could be brought under the Fourteenth Amendment.[18] More recently, in *Manuel v. Joliet,* the Court held that the petitioner's malicious prosecution claim challenging his pre-trial detention based on alleged fabricated evidence could proceed under the Fourth Amendment.[19] The Court reasoned that a person detained based on police officers' false statements or fabricated evidence is "confined without constitutionally adequate justification" and that claim was therefore a natural fit for the Fourth Amendment.[20] Although *Manuel* shed light as to which constitutional provision governed malicious prosecution claims, the Court left for another day the elements of, and rules associated with, an action seeking damages for its violation."[21]

The Supreme Court's most recent malicious prosecution case involved a question of what constitutes a favorable termination, a necessary element for a malicious prosecution claim. The Court held in *Thompson v. Clark* that a plaintiff "need only show that his prosecution ended without a conviction" rather than needing to show there was some affirmation of innocence.[22] *Thompson* set forth the Court's process for analyzing the elements of a malicious prosecution claim. In *Thompson,* the Court explained that to determine the elements of a malicious prosecution claim (or any constitutional claim under Section 1983), courts should "look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with 'the values and purposes of the constitutional right at issue.'"[23]

It is against this backdrop that the Court will hear *Chiaverini v. City of Napoleon.* In this case, Chiaverini managed a jewelry store in Napolean, Ohio. He purchased a men's ring and diamond earrings from Burns for $45.[24] Burns claimed to be the owner and Chiaverini had him fill out a "buy card" certifying that he was the lawful owner.[25] That same day, David and Christina Hill called Chiaverini to see if anyone had sold him their stolen ring.[26] He told them to make a police report and denied buying the ring.[27]

Both parties called the police. Chiaverini told the police "he believed he may have had the Hills' property" but clarified that he did not know if it had been stolen but that he wanted an officer to come help sort it out.[28] The officers came to the store and informed Chiaverini that the items were stolen and told him not to sell them.[29]

Officer Steward wrote an initial report on the incident and subsequently added an additional statement to the report noting that Chiaverini had allegedly said he thought the ring had been stolen when he bought it.[30] Chiaverini claims the added statement is false and that he never said that he believed the item was stolen.[31] Thereafter, the police sent a "hold letter" to Chiaverini telling him to "hold" the item as it is evidence in a crime, but the letter also said to "release it to David and Christina Hill."[32] Chiaverini thought this was inconsistent and claims he did not know what to do so he did not return the ring to the Hills even though they asked for it back.[33] The police also returned in person and instructed him to release the items back to the Hills, but Chiaverini refused.[34]

Chiaverini then confronted the police chief about the contradictory information in the letter. In talking to the chief, Chiaverini hinted that he did not have a precious metal license, as required by Ohio law.[35] After this conversation, the Chief confirmed on the Ohio Department of Commerce's website that Chiaverini's precious-metals-dealers license was inactive.[36] The officers sent the police reports to the City's law director who reviewed them and concluded Chiaverini's potential criminal offenses of receiving stolen property, operating without a valid license, and money laundering.[37]

One of the officers then applied for a search warrant and a municipal judge signed search and arrest warrants.[38] The officers searched Chiaverini's store and seized the Hills' stolen jewelry as well as items related to sales, purchases, and licenses and Chiaverini spent 3 days in jail.[39] A few days later, the same municipal judge held a preliminary hearing during which Chiaverini challenged the police narrative and testi-

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Amicus *cont'd from page 23*

mony that he had allegedly indicated he believed the items were stolen when he bought them.[40] The municipal judge concluded that probable cause existed for all charges and bound them over for trial.[41] Later, however, a court dismissed the charges without prejudice for failure to be timely presented to a grand jury.[42]

Chiaverini then sued the officers and the City under Section 1983 for malicious prosecution. The Sixth Circuit upheld the district court's grant of summary judgment based on the existence of probable cause to arrest Chiaverini.[43] Even though the municipal judge and federal district court both found probable cause existed to arrest Chiaverini for all three charges, the Sixth Circuit only analyzed two of the charges, relying on a rule from the Circuit that if probable cause supports one or more of the three charges, then dismissal of the claim for all charges is appropriate.[44] The court reasoned:

> If probable cause did exist for at least one of the charges, we can conclude that he was no more seized when [he was] detained to await prosecution for several charges than if he were seized for just one valid charge. For that reason, even tacked-on meritless charges . . . [do] not change the nature of the seizure.[45]

The Sixth Circuit found that probable cause supported the charges of receipt of stolen property and the license violation and dismissed the malicious prosecution claim.[46] In terms of the receipt of stolen property charge, the court explained that under Ohio law, retention of stolen property falls under the statute so even if he did not know it was stolen when he received it (as he claimed), once he was on notice that it was stolen and refused to return it, there was probable cause to believe he had committed the crime. *Id.* at *5. The court simply did not reach the question of probable cause for the money laundering charge, finding it did not need to decide that issue based on the "any charge" rule followed by the Circuit.[47] There is no evidence in the case that Chiaverini's detention would have been any shorter without the additional money laundering charge.

Chiaverini petitioned the Supreme Court for certiorari, arguing that there is a circuit split on the question of whether "Fourth Amendment malicious-prosecution claims are governed by the charge-specific rule," "under which a malicious prosecution claim can proceed as to a baseless criminal charge, even if other charges brought alongside the baseless charge are supported by probable cause."[48] The Institute for Justice, which filed an amicus brief in support of the petition at the certiorari stage argued that even if the addition of charges that are not supported by probable cause resulted in no additional detention or other damages, the plaintiff would be entitled to nominal damages under Section 1983 for the charge that lacked probable cause.[49]

However, as IMLA will argue in its amicus brief in this case, the petitioner and IJ's position is counter to the "values and purposes" of the Fourth Amendment, which the *Thompson* case instructs must be a part of the analysis. If Chiaverini's detention was not prolonged by the additional charge that (arguably) lacked probable cause, there simply cannot be a Fourth Amendment violation as the seizure would be reasonable.

The Petition points out that hundreds of district court cases per year involve malicious prosecution claims.[50] If these claims may be brought for cases involving no actual increased detention and only nominal damages, local governments will be subject to significantly more risk exposure. Given that Section 1983 claims carry with them the ability to recoup attorney's fees under Section 1988, these claims can be expensive, and plaintiffs' attorneys will be incentivized to bring them and the potential liability for local governments therefore is anything but nominal. As with the *Johnson* case discussed above, this case will be argued in April, and we can expect a decision before the end of June. ML

Notes

1.On February 28, the Court granted cert in Trump v. United States, No. 23-939; the Question Presented is "Whether and if so to what extent does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."
2. Gonzalez v. Trevino, No. 22-1025 (First Amendment retaliatory arrests), Lindke v. Freed, No. 22-611 (when is a public official's social media account governmental in nature and subject to the constraints of the First Amendment); O'Connor-Ratcliff v. Garnier, No. 22-324 (accord); National Rifle Association of America v. Vullo, No. 22-842 (the issue involves government speech versus government coercion and threats); Murthy v. Missouri, No. 23-411 (accord).
3. Sheetz v. County of El Dorado, No. 22-1074 (the issue involves impact fees and the Takings Clause).
4. Harrington v. Purdue Pharma, No. 23-124.
5. Muldrow v. City of St. Louis, No. 22-193.
6. Relentless v. Department of Commerce, No. 22-1219; Loper Bright Enterprises v. Raimondo, No. 22-451.
7. Ohio v. EPA, No. 23A349.
8. Culley v. Marshall, No. 22-585.
9. Snyder v. United States, No. 23-108.
10. City of Grants pass v. Johnson, No. 23-175.
11. Chiaverini v. City of Napoleon, No. 23-50.
12. Grants Pass was previously discussed in the January-February 2023

issue of *Municipal Lawyer* when it was still in the lower courts, but now that the Supreme Court has taken the case, this article will briefly discuss the case and its importance to local governments. For additional information about the case, please refer to Amanda Karras, Litigation Trends Surrounding Homelessness, 64 Muni Lawyer (Jan.-Feb. 2023) at 18.

13. See Petition for Writ of Certiorari, available at: https://www.supremecourt.gov/DocketPDF/23/23-175/275911/20230823153037814_Grants%20Pass%20v.%20Johnson_cert%20petition_corrected.pdf.

14. Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019).

15. Id. at 617, n8.

16. Johnson v. City of Grants Pass, 72 F.4th 868, 888-891 (9th Cir. 2023).

17. *See e.g.*, Claire Rush, *Portland, Oregon, to Clear Sidewalk Tents to Settle Suit with People with Disabilities*, Associated Press (June 2, 2023), https://apnews.com/article/portland-ada-lawsuit-homelesstents-sidewalks-aee2d079440d5f9427a18d9e4771d92a (detailing settlement regarding Portland ADA lawsuit); Freddy Brown, et al. v. City of Phoenix, No. CV2022-010439 (Maricopa Cnty. Superior Ct. May 10, 2023) (ordering Phoenix to clear encampments and require homeless individuals to leave the encampment).

18. Albright v. Oliver, 510 U.S. 266, 275 (1994).

19. Manuel v. Joliet, 580 U.S. 357, 360 (2017).

20. Id. at 367.

21. Id. at 370.

22. Thompson v. Clark, 596 U.S. 36, 39 (2022).

23. Id. at 43.

24. Chiaverini v. City of Napoleon, Ohio, No. 21-3996, 2023 WL 152477, at *1 (6th Cir. Jan. 11, 2023).

25. Id.

26. Id.

27. Id.

28. Id.

29. Id.

30. Id. at *2.

31. Id. The officers for their part claim they omitted this statement from the original narrative because at the time, Burns was the suspect, not Chiaverini..

32. *Id.*

33. *Id.*

34. *Id.*

35. Id.

36. Id.

37. Id.

38. Id. at *3.

39. Id.

40. Id.

41. Id.

42. Id.

43. Id. at *4.

44. Id. Although the Sixth Circuit did not reach the money laundering charge, the judge overseeing the criminal charges found probable cause to arrest existed for all three charges before binding them over for trial. *See* Chiaverini v. City of Napoleon, No. 3:17-CV-2527, 2021 WL 4502730, at *9 (N.D. Ohio Sept. 30, 2021). And then, the federal district court examining the malicious prosecution claim relied on that conclusion and held that plaintiff's malicious prosecution claims were barred based on the existence of probable cause for all three charges. *See Id.* at *10.

45. Chiaverini, No. 21-3996, 2023 WL 152477, at *4. (internal quotations omitted).

46. *Id.*

47. *Id.*

48. *See* Petition for Writ of Certiorari, available at: https://www.supremecourt.gov/DocketPDF/23/23-50/272074/20230714130421379_No.%2023-__%20Chiaverini%20Petition.pdf

49. *See* Brief of Institute for Justice as Amicus Curiae Supporting Petitioners, p. 7, available at: https://www.supremecourt.gov/DocketPDF/23/23-50/272844/20230725114439371_Brief%20of%20the%20Institute%20for%20Justice%20as%20Amicus%20Curiae%20Supporting%20Petitioners.pdf.

50. *See* Petition, *supra* note 48, at 26.

EPLORE LAKE COMO, ITALY WITH IMLA IN 2024

Join IMLA for our can't miss Comparative Law Conference at Lake Como, Italy—October 16, 2024. IMLA will be partnering with Unione Nazionale Avvocati Enti Pubblici (UNAEP), Italy's National Association of Laval Government Attorneys. More details to follow!

