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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Supreme Court: On to the Next Term

The Justices wrapped up another Term on July 1st, issuing consequential decisions involving public camping laws,[1] public officials' use of social media,[2] standards for discriminatory employee transfers,[3] and the Second Amendment,[4] among others. These decisions will shape local governments in more significant ways than whether Presidents are immune from criminal suit, though they don't garner quite as much attention. As we review the local government scorecard on how cities, counties, and towns fared this Term, some areas are clearer than others. In the win column, local governments in the Ninth Circuit will be afforded more autonomy and control over decisions surrounding homeless encampments and see a reprieve from lawsuits involving Eighth Amendment challenges under the Cruel and Unusual Punishment Clause to public camping laws.[5] And around the country, local government officials have more guidance about how to avoid First Amendment liability on their social media accounts.[6]

At the same time, the impacts of one of the bigger decisions this term – the Court's overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) – remains to be seen.[7] A smaller administrative state may benefit some local governments more than others and whether less agency deference helps local governments will depend on the issue and the locality. It may take years to fully understand the scope of the decision and its impacts.[8]

As the Justices wrap up their summer recess, it is time to look forward to the next Term, which begins in October. Every Term lately has had the descriptor "blockbuster" affixed to it. Looking ahead, the Court has granted 28 cases for argument, which approximates nearly 50% of its docket. Whether the upcoming Term will warrant being called a "blockbuster" remains to be seen. However, there are already several significant cases on the Court's docket that local government attorneys should be aware of. In the spirit of offering something for everyone, these cases include issues involving post-retirement employee health benefits,[9] the burden of proof to demonstrate a Fair Labor Standards Act exemption to overtime or minimum wage,[10] requirements for National Pollutant Discharge Elimination System permits under the Clean Water Act,[11] attorney's fees for preliminary injunctions under Section 1983, and ghost guns. While all of these present interesting and important issues for local governments, this article focuses on the last two.

***Garland v. VanderStok* - Ghost Guns**

More than 50 years ago, Congress enacted The Gun Control Act of 1968 (GCA), which imposes requirements involving licensing, background checks, recordkeeping, and serialization on firearm manufacturers and dealers.[12] "Firearm" is defined under the GCA to include "any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive," as well as "the frame or receiver of any such weapon."[13] The GCA directed that the Attorney General has the authority to issue "such rules and regulations as are necessary to carry out" the Act.[14]

Although there is a history in this country of individuals building their own firearms, technology has allowed companies to manufacture and sell "firearm parts kits" that have rapidly accelerated the use and ease with which firearms can be put together by individual purchasers. In fact, the manufacturers market their products to allow anyone to "quickly and easily" assemble the kits, often in just minutes.[15] These firearm part kits are known as ghost guns, and a number of the manufacturers claimed they are not "firearms" under the GCA and that they therefore did not have to comply with the requirements of the GCA. As a result, these easy to assemble kits are sold without background checks or records of sale, and the assembled firearms lack serial numbers.

To close the loophole, in 2022, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a regulation to clarify that the definition of "firearm" under the GCA includes products and kits that can "readily be converted" into an operational firearm or a functional frame or receiver.[16] The regulation also explained that the statutory term "frame or receiver" includes "a partially complete, disassem-

bled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver."[17]

The Solicitor General explained the regulation did not burden Second Amendment rights, but instead, meant to impose the same requirements on ghost gun manufacturers as those on companies that manufacture fully assembled firearms:

> The Rule's interpretation of the Act does not prohibit the manufacture of any firearm or the sale of a firearm to any individual lawfully entitled to possess one. Nor does it prohibit such a person from making a firearm at home. Instead, the Rule simply clarifies that the Act requires commercial manufacturers and sellers of covered weapon parts kits and partially complete frames or receivers to obtain licenses, mark their products with serial numbers, conduct background checks, and keep transfer records. Those are the same "conditions and qualifications on the commercial sale of arms," that around 80,000 manufacturers and distributors of firearms comply with in millions of transactions each year.[18]

The ghost gun manufacturers challenged the ATF's rule. The Fifth Circuit held the rule was inconsistent with the statutory text of the GCA and exceeded the agency's authority, thereby violating the Administrative Procedure Act.

The Supreme Court granted certiorari on the following issues:

1. Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive," 27 C.F.R. 478.11, is a "firearm" regulated by the Act.
2. Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. 478.12(c), is a "frame or receiver" regulated by the Act.

IMLA filed an amicus brief in this case authored by John Korzen, the Director of Appellate Advocacy at Wake Forest Law School. One point we make is that ghost guns present significant public safety concerns for local communities. While there is no way to know how many ghost guns are in circulation, law enforcement has seen a significant boom in ghost gun recoveries in the last several years. In 2022, the Department of Justice recovered nearly 26,000 ghost guns nationwide, which was 7,000 more than 2021, which in turn was already a 1000% increase from the year 2016.[20] These national increases are mirrored in local statistics. In Philadelphia for example, police recovered 575 unserialized guns while conducting criminal investigations in 2022. [21]

One of the public safety concerns related to ghost guns is the lack of background checks. Ghost gun kits are available online and allow minors and felons, including individuals convicted of violent crimes, that are otherwise prohibited from purchasing firearms under federal law to obtain them. IMLA's amicus brief highlighted several chilling examples of minors purchasing ghost guns and using them to kill or harm others, including but not limited to:

- A 16-year-old in Santa Clarita, California killed two students and injured three others with a ghost gun purchased online.
- In Darby, Pennsylvania, a, a fifteen-year-old with a ghost gun killed one teen and wounded another.
- In Milwaukee, Wisconsin, a fifteen-year-old shot and killed two other fifteen-year-olds with a ghost gun.[22]

Similarly, a separate brief filed by a group of large cities and counties in the case points out that ghost guns allow individuals convicted of violent crimes who are otherwise barred by federal and state law from possessing firearms to circumvent those laws, often with tragic consequences.[23] For example:

- "In April 2023, a Staten Island man with 'multiple violent felonies' that prohibited him from owning a firearm shot his neighbor with a ghost gun…
- In April 2021, a man with a criminal record for unlawfully carrying a concealed weapon used a ghost gun to shoot five people, killing one, in San Diego….
- In November 2020, a Baltimore man with a prior felony conviction was sentenced to 21 years in federal prison for a string of armed robberies committed using a ghost gun that had been assembled from a gun-building kit."[24]

Not only do ghost guns allow individuals prohibited under federal and state law from purchasing firearms to do so, their lack of serial numbers hinders law enforcements' efforts to solve crimes. The inability to determine the lawful owner of the firearm, or the absence of any history of ownership, has impeded law enforcement's apprehension of violent individuals, undermining public safety.

If the Supreme Court holds that the ATF regulation violates the APA, that will allow ghost guns to continue to proliferate in communities. Importantly, however, the case was not brought under the Second Amendment; it is a statutory and definitional debate. Therefore, if the ATF regulation is invalid, presumably Congress, states, and local governments may still work to regulate ghost guns.

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Urban Spaces *cont'd from page 19*

property taxes across the entire tax base, parkland dedication ordinances are much more politically favorable for existing residents with the added advantage of being "hidden" to new homebuyers.[38] Despite these benefits, several Texas municipalities and many counties have yet to adopt similar subdivision ordinances, and many that are failing to maximize this conservation tool's full potential.

The failure of most local governments in the Hill Country to optimize the financial potential of parkland dedications is surprising given their legal validation. In the early days of parkland dedication ordinances, there were several challenges to their legality in Texas. However, in 1984 the Texas Supreme Court concluded that requiring parkland dedication or fees-in-lieu was a valid exercise city authority because such ordinances are substantially related to the "health, safety, and general welfare of the people," as required by the Texas Constitution.[39] The amount a local government can require, however, must be "roughly proportional" to the proposed development, a burden that must be shown by the government entity.[40] This requires cities and counties to make "individualized determinations" that every parkland dedication effects a roughly proportional response to the demand generated by a development, a burden which may contribute to their lack of widespread adoption and failure of many localities to maximize their use. However, if a locality enacts a dedication using a quantitative method, the burden shifts to the developer to show that the exaction is inappropriate.[41] The challenge, however, is the method of calculation used by almost all Texas cities which have adopted such ordinances is arbitrary rather than empirically derived, and those that are empirical are far from uniform.[42]

The variability and lack of uniform adoption of these parkland dedication ordinances provides an opportunity for growing cities and counties alike. A 2022 audit done by the Texas A&M AgriLife Extension titled "Parkland Dedication: Optimizing an Underutilized Resource," identified a number of deficiencies in existing parkland ordinances causing local governments to charge only a fraction of what could legally be required under the "rough proportionality" requirement.[43] Among the deficiencies included the limited application of these ordinances to residential development, and minimal adoption of the additional development fee requirement in addition to the dedication or fee-in-lieu.[44] Additionally, only two Texas cities (Temple and Austin) have addressed affordability concerns, exempting certified affordable housing projects approved by the city.[45] Given the legal validation and economic, social, and ecological benefits provided by parkland dedication ordinances, there is little reason for both cities and counties not to maximize their

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***Lackey v. Stinnie* – Section 1988 Attorney's Fees**

Another case that should be on local government attorneys' radar is *Lackie v. Stinnie,* which involves the important question of whether a plaintiff who successfully obtains a preliminary injunction can obtain attorney's fees under Section 1988 if the defendant thereafter voluntarily changes its conduct and there is never a permanent injunction or full ruling on the merits. Because Section 1988 provides for attorney's fees in Section 1983 actions and those fees can sometimes outstrip the dollar value of the verdicts themselves, this is an important case for local governments.

In this case, five named plaintiffs brought a class action lawsuit against the Virginia Department of Motor Vehicles to challenge the constitutionality of a (now repealed) law, Section 46.2-395 of the Virginia Code. This law required courts to automatically suspend a convicted criminal's driver's license if they failed to pay certain court fines and fees. The plaintiffs alleged the law was unconstitutional by violating their procedural and substantive due process rights as well as other claims. They sought preliminary and permanent relief to prevent enforcement of the statute and sought reinstatement of the licenses for the Virginians' whose licenses had been suspended.

The district court granted a preliminary injunction, finding the plaintiffs were likely to succeed on the merits as to their procedural due process claims (one of the five claims brought). The court set the case for a bench trial, but before the trial, the Virginia General Assembly passed a Budget Amendment that suspended the enforcement of the law for one year. The court then stayed the case pending the next legislative session, which the Commissioner represented to the court was likely to result in a full repeal of the law. That subsequent repeal took place, and the court then dismissed the action as moot. The court therefore never issued a permanent injunction or declared the law unconstitutional (it was only ever found to be "likely" unconstitutional under the preliminary injunction standard).

After the case was dismissed, the plaintiffs sought attorney's fees under Section 1988. The appellate fees alone were over $767,000.

Under 42 U.S.C. § 1988(b), in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." In *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res,* the Supreme Court held for a party to "prevail" under Section 1988 for the purposes of attorney's fee awards, the relief must be "judicially sanctioned."[25]

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In other words, "[a] defendant›s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" to have prevailed under the statute.[26] Then, in *Sole v. Wyner,* the Supreme Court held that a party has not "prevailed" under Section 1988 through the award of a preliminary injunction if that injunction is later reversed by a final decision in the case.[27]

The district court denied the attorney's fees, following the Fourth Circuit's case law at the time which had a bright line rule indicating that preliminary injunction awardees are not entitled to attorney's fees as they are not prevailing parties under the statute. The Fourth Circuit, bound by its case law, initially affirmed. The Fourth Circuit then reheard the case en banc and reversed, creating a new rule for when a party may obtain attorney's fees after the award of a preliminary injunction.[31] That rule states:

> When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees.[33]

The court then explained that "all preliminary injunctions" are "solidly merits-based" and will satisfy the "judicial imprimatur" necessary under *Buckhannon*.[32] (Though the court did leave open the possibility that not all preliminary injunction awardees will be entitled to attorney's fees, but the result is that most will be). The court found in this case there was "little question that [the] preliminary injunction's 'alternation of the legal relationship of the parties'" satisfied the necessary standard as it provided precisely the relief the plaintiffs sought – the reinstatement of their licenses.[33]

The issues in *Lackey v. Stinnie* were left open by prior Supreme Court decisions. On appeal, the questions presented are: (1) whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988. IMLA filed an amicus brief in this case authored by Josh Skinner, Benjamin Gibbs, and Alexander Lindvall, with the City of Arlington, Texas. Attorney's fee awards directly impact the public fisc and the amounts can be as high, or even higher than the underlying liability—particularly in civil rights litigation. IMLA's amicus brief provided several examples of high attorney's fees awards local governments were forced to shoulder as a result of preliminary injunction victories.

Additionally, as the Court noted in *Buckhannon,* allowing attorney's fees awards in these scenarios can have a deterrent effect for governments to voluntarily alter their behavior. Governments may have already planned to change legislation or a policy or they may have done an assessment and decided the risks of continued litigation outweighed changing course. But in either scenario, the government may decide it is better served to continue litigating if it will be on the hook for attorney's fees no matter what. IMLA's amicus brief pointed out that this is particularly problematic in the context of preliminary injunctions which by their nature involve incomplete records and evidence and underdeveloped legal arguments. A limitation in fees under this scenario would represent a significant financial victory for local governments.

Notes

1. City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2216 (2024) (holding the Eighth Amendment's Cruel and Unusual Punishment Clause does not prohibit local governments from enforcing public camping bans).
2. Lindke v. Freed, 601 U.S. 187, 188 (2024) (setting forth new test to determine when a public employee's use of social media constitutes "state action" for the purposes of the First Amendment).
3. Muldrow v. City of St. Louis, Missouri, 144 S. Ct. 967, 972 (2024) (holding employee must demonstrate "some harm" in Title VII action based on forced transfer).
4. United States v. Rahimi, 144 S. Ct. 1889, 1891 (2024) (concluding that a federal statute that disarms certain individuals subject to domestic violence retraining orders is not facially unconstitutional under the Second Amendment as it fits within the Nation's regulatory tradition).
5. For example, in *Coal. on Homelessness v. City & Cnty. of San Francisco*, the Ninth Circuit vacated the district court's preliminary injunction related to the plaintiffs' cruel and unusual punishment claims. No. 23-15087, 2024 WL 3325655, at *1 (9th Cir. July 8, 2024).
6. Lindke v. Freed, 601 U.S. 187, 188 (2024).
7. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).
8. That said, in just over a month since it was decided, there were already 49 lower court decisions that cited to *Loper Bright*. For example, the Fifth Circuit recently reversed a district court decision relying on *Chevron* that involved the Department of Labor's rule related to ERISA and whether a fiduciary may consider "the economic effects of climate change and other environmental, social, or governance factors." *See* Utah v. Su, No. 23-11097, 2024 WL 3451820, at *1 (5th Cir. July 18, 2024). Another court in

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Texas recently granted Texas' motion for a preliminary injunction related to the DOL rule that raises the minimum salary for administrative, executive and professional employees to be exempt from overtime under the FLSA, noting *Chevron* no longer applies. Texas v. United States Dep't of Lab., No. 4:24-CV-499-SDJ, 2024 WL 3240618, at *7 (E.D. Tex. June 28, 2024).

9. Stanley v. City of Sanford, No. 23-997. The issue in this case is whether a former employee can sue under Title I of the Americans with Disabilities Act for alleged discrimination in post-employment distribution of fringe benefits.

10. E.M.D. Sales, Inc. v. Carrera, No. 23-217. The issue in this case is whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.

11. City & County of San Francisco v. Environmental Protection Agency, No. 23-753. The issue in this case is whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

12. 18 U.S.C. 921 et seq.

13. 18 U.S.C. 921(a)(3)(A) and (B).

14. 18 U.S.C. 926(a). The Attorney General in turn has delegated authority under the Act to the ATF) which is a part of the Department of Justice under the Attorney General's purview.

15. *See* Brief of Untied States, p. 7, available at: https://www.supremecourt.gov/DocketPDF /23/23- 852 /315742/20240625172334020_23-852%20VanDerStok.pdf.

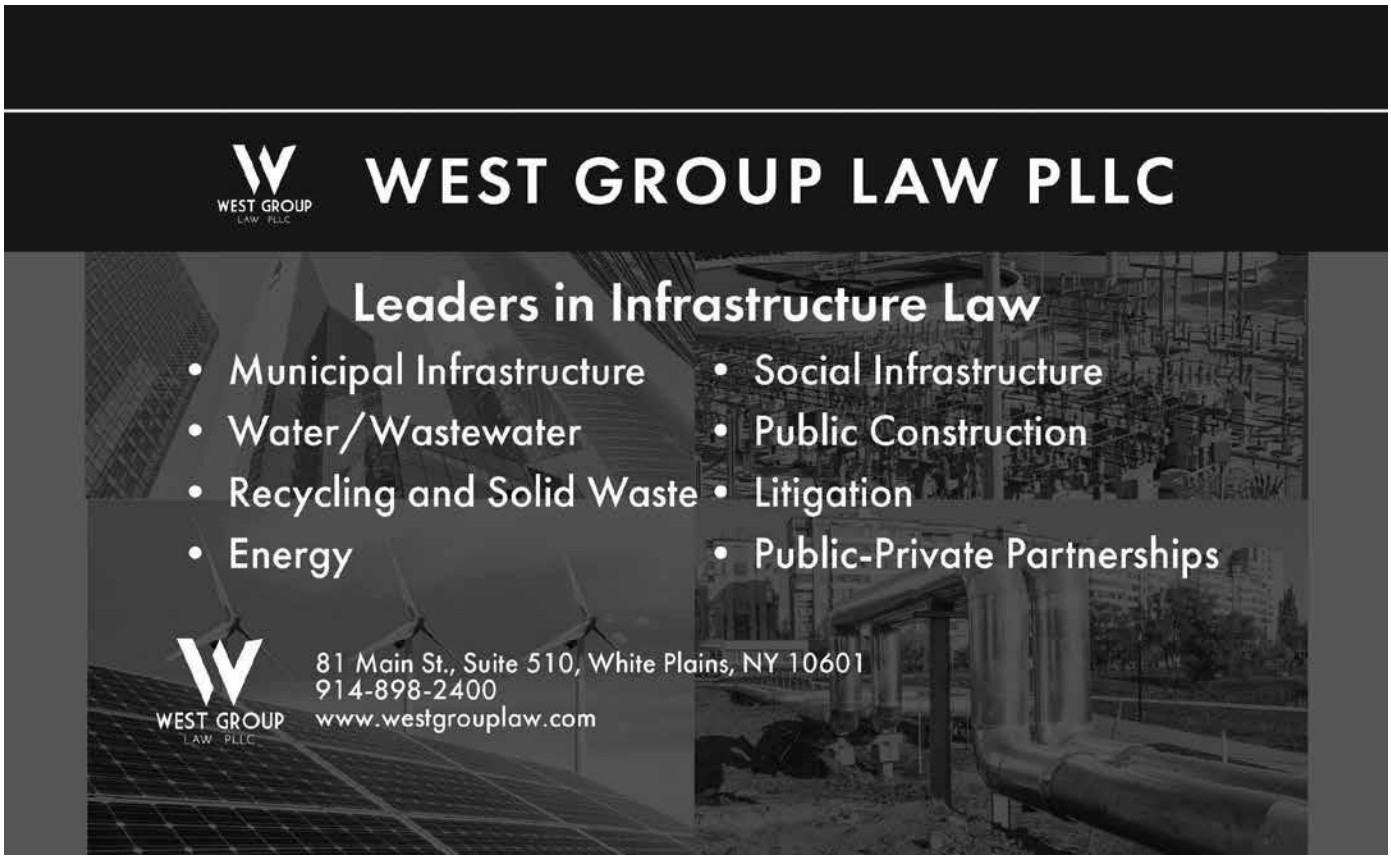
16. *See* 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified in relevant part at 27 C.F.R. 478.11, 478.12(c)).

17. 27 C.F.R. 478.12(c).

18. *See* Brief of Untied States in support of petition for certiorari, p. 8, available at: https://www.supremecourt.gov/DocketPDF/ 23/23-852/299970/20240207114349501_VanDerStok%20Petition%20v.2.6%201%20pm.pdf

19. *Id.* at p. I.

20. *See* Department of Justice, *Fact Sheet: Update on Justice Department's Ongoing Efforts to Tackle Gun Violence,* June 14, 2023, available at: https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence (providing ghost gun figures for 2022); Department of Justice, *Justice Department Announces New Rule to Modernize Firearm Definitions,* April 11, 2022, available at: https://www.justice.gov/opa/pr/justice-department-announces-new-rule-modernize-firearm-definitions#:~:text=To%20help%20re-



duce%20the%20number,firearms%20they%20take%20into%20inventory (providing ghost gun figures from 2016- 2021).
21. CBS News, *Philadelphia reaches settlement in case against 2 large suppliers of ghost guns,* April 12, 2024, available at: https://www.cbsnews.com/philadelphia/news/ghost-guns-settlement-polymer80-jsd-supply-philadelphia/
22. *See* Brief of the Local Government Legal Center, p. 20-21, available at: https://www.supremecourt.gov/DocketPDF /23/23-852/316175/20240702104637030_23-852%20FINAL%20Ami%20Brief%20as%20filed%20PDFA.pdf
23. Brief of 20 Major Cities, et. al., p. 13-15, available at: https://www.supremecourt.gov/DocketPDF/ 23/23-852/316235/20240702145232136_23-852%20PDF%20A%20Amicus%20Brief%20of%2020%20Major%20Cities%20et%20al..pdf
24. *Id.*
25. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001).
26. *Id.* at 605.
27. Sole v. Wyner, 551 U.S. 74, 83, (2007).
28. Stinnie v. Holcomb, No. 3:16-CV-00044, 2021 WL 2292807, at *4 (W.D. Va. June 4, 2021), *aff'd*, 37 F.4t h 977 (4th Cir. 2022), *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), and *vacated and remanded*, 77 F.4th 200 (4th Cir. 2023).
29. Stinnie v. Holcomb, 37 F.4th 977, 981 (4th Cir. 2022), *reh'g en banc granted*, No. 21-1756, 2022 WL 3210714 (4th Cir. Aug. 9, 2022), and *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), *cert. granted sub nom. Lackey v. Stinnie*, 144 S. Ct. 1390 (2024).
30. Stinnie v. Holcomb, 77 F.4th 200, 210 (4th Cir. 2023).
31. *Id.*
32. *Id.* at 213.
33. *Id.* at 211.

Inside Canada *cont'd from page 29*

Court directed the registrar to provide notice to the Plaintiff that in review of his statement of claim, the Court was considering the action as frivolous or vexatious or an abuse of the court's process.

HELD: Action dismissed.

DISCUSSION: The Ontario Rules of Civil Procedure provides a mechanism for addressing occasions where a litigant advances a claim that is frivolous, vexatious or otherwise an abuse of process. Pursuant to Rule 2.1.01, the Court may on its own initiative stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of process of the court, *Gao v. Ontario (Workplace Safety and Insurance Board),* 2014 ONSC 6100. The Court identified several issues with the Plaintiff's statement of claim: First, the allegations lacked material facts, particularly concerning three of the named City Staff defendants, who were not substantively connected to the claims. Second, the action was time-barred, as it was brought well beyond the two-year limitation period specified in the *Limitations Act,* 2002 S.O. 2002, c. 24, with no submissions as to why the actions should not be barred by the *Act*. Third, the claims were based on serious allegations without supporting material facts, rendering them vexatious. Lastly, the Court noted that the Plaintiff had a history of unsuccessful litigation on similar matters against the City, reinforcing the conclusion that this case was an abuse of the judicial process. The Court's decision emphasizes the importance of ensuring that legal proceedings are based on substantive and timely claims to prevent misuse of judicial resources. The action was dismissed for being frivolous, vexatious or otherwise an abuse of process.



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