Recent U.S. Supreme Court Decisions and Other Current Issues for Local Governments

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I. INTRODUCTION

This report summarizes the Supreme Court cases of interest to local governments from the current Term as well as the prior Term. IMLA has participated as an amicus, acting on approval of its Legal Advocacy Committee, in some of these cases where noted. Included as well are brief summaries of other significant Circuit Court and Supreme Court petition stage cases where IMLA has filed as an amicus. The report begins with a note about appellate practice before the Supreme Court generally and the role of amici.

While this report does not list the other signatories on the amicus briefs discussed, it is common for IMLA to collaborate with entities whose amicus participation will add impact and context to the brief. Foremost among those is the Local Government Legal Center (LGLC), a coalition in 2023 between IMLA, the National Association of Counties (NACo), the National League of Cities (NLC), and the Government Finance Officers Association (GFOA). The LGLC's mission is to raise awareness of the importance of Supreme Court cases to local governments and to help shape the outcome of cases of significance to local governments at the Supreme Court through persuasive and effective advocacy. In appropriate cases, the LGLC will provide a strong and unified voice to the Supreme Court regarding local government issues and help educate the Supreme Court in cases involving issues that impact local governments. The LGLC also serves as a resource to local governments and local government officials on issues related to the Supreme Court.

II. PRACTICE BEFORE THE U.S. SUPREME COURT

Practice before the Supreme Court has become specialized over the past twenty or so years. A party seeking review by the Court, opposing its review, or participating in a case where the Court has granted certiorari should recognize that the Court is not a court of error. The Court receives almost 10,000 petitions each year. Of these, it grants certiorari in about 70-75 cases and schedules oral argument for about 60-65 cases, meaning that fewer than 1% of the petitions filed are granted. Unpaid *in forma pauperis* petitions filed by prisoners and others make up the largest number of petitions with the Court; if only paid cases filed with the Court are considered, the number increases to about 4%. In other words, the chances of getting the Court to take your case are slim.

While rudimentary, counsel should review Rule 10 of the Supreme Court Rules as part of any consideration as to whether to seek certiorari. The Rule provides a guide to how counsel might structure a petition and ought to provide insight into whether to file a petition at all. The Rule provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

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> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Justice Alito pointed this out in his concurrence in the denial of certiorari in *Salazar-Limon v. City of Houston.* The Court may also decline to grant certiorari in cases that have procedural or ancillary issues that the Court would need to consider before getting to the merits. This is sometimes referred to as "vehicle problems."

Framing the issue in a petition for certiorari ought to be the second step after reviewing the Rule. As noted, the Court must weed through several thousand requests to find the very few cases it wants to decide. Four Justices must vote to grant certiorari and each of their votes is precious and well considered. A Justice may believe that an issue ought to be decided but will withhold the vote to grant certiorari for many reasons. These can include fear that the issue will be decided adversely to the Justice's views for a variety of reasons including that the arguments advancing the issue in the petition seem leaden and unlikely to attract a majority; or a belief that another case frames the issue better.

The petitions in *Lane v. Franks* and *Integrity Staffing Solutions v. Busk* offer two different approaches to framing an issue. The Court granted both petitions. In *Lane,* the issue was framed succinctly and without prelude; counsel couched the issue in viscerally and intellectually compelling language. In *Integrity Staffing Solutions* counsel offered a prelude to the similarly succinct issue offering a bit of important background to what might have otherwise appeared a very dull question. Each of these attorneys is a respected Supreme Court counsel who is a sought-after advocate for a reason.

While the Court denies certiorari to many similarly succinct and well phrased issues, many of the petitions it denies are garbled and include far too many issues for the Court's consideration. A case generally has one compelling reason that can attract the Court's attention and as with *Lane* a corollary issue attendant to it. Petitions that offer the Court an opportunity to decide more than two issues are rarely granted and framing the petition to include myriad issues may enjoy client approval but will rarely find success.

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Because the Court receives so many petitions, finding amicus support can often help get the Court's attention and show that the case has a broader impact. Hearing the Petitioner make that argument can certainly be persuasive, but proof that the issue affects more than just the litigants says much more. Finding an amicus can often be difficult where there is a circuit split, because there will be many potential amici who don't want to see the law changed in their circuit, or to the contrary, their state court has adopted a rule with which they are happy. The more diverse the group the amicus represents the more likely the Court will recognize the need for deciding the issue.

The Court's rules do not limit the amici to arguing the record and in large measure the Court's practice encourages amici to bring to the Court's attention relevant facts, treatises and studies both at the petition and merits stage. In *Comptroller v. Wynne*, IMLA filed an amicus brief at the petition stage in support of the State of Maryland and several Maryland counties and the Court sought the views of the Solicitor General. The Solicitor General filed his views in early April 2014, suggesting that the Court grant certiorari and reverse the Maryland court; he cited facts offered by IMLA in its amicus brief that were not part of the record. The Court granted certiorari and decided the case as a part of its 2014 Term. Similarly, in *Murr v. Wisconsin*, Justice Kennedy cited the IMLA amicus brief, which listed over 100 examples of merger provisions from around the country in rejecting the Petitioner's argument. And in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), Justice Alito referred several times to IMLA's amicus brief and to a survey IMLA conducted of its members to support his decision in an important government speech case. IMLA completed a similar survey for a government speech case more recently in *Shurtleff v. Boston*.

As a Respondent, when the Petitioner files with the Supreme Court, counsel first must consider whether to file a response or waive doing so. Advice on this topic varies, with some counseling to file a response and others counseling against filing. Filing a response draws attention to the issue and for that reason alone, many counsel against it. On the other hand, the Court will ask for a response in cases it considers might merit certiorari. Because it only takes one Justice to ask for a response, the request may not indicate that certiorari will be granted, but certiorari will not be granted where there is not a response, and the request draws attention to the issue. So, in cases where counsel believes a response will be requested, it is best to be proactive and file and not waive the response. The response needs to recognize that the question for the Court at this stage is whether to grant certiorari, not whether the lower court was wrong in its decision. Going back to Rule 10, counsel for the Respondent should describe why the case does not fit. In *Plumhoff v Rickard*, the Court asked the Respondent to file a response. That response provided little help to the Court and may be a model of how not to write a Respondent's brief at the petition stage. In contrast, the City of Chicago filed a model response in *Hillman v. City of Chicago* and the Court denied certiorari.

Unlike a Petitioner seeking certiorari and trying to draw attention to the issue, the Respondent tries to cover itself in anonymity. So, in addition to the reasons for filing or not filing a response already discussed, because the goal of the Respondent is to have the Court deny certiorari, it is an

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extremely rare case that a Respondent should consider obtaining amicus support at the certiorari stage as doing so only draws attention to the case and increases the chances that the Justices will take a closer look at the case. Additionally, the Respondent may want to look at the Court's schedule. Timing a response can reap some rewards. For example, timing a response or waiver to get into the "long conference" could make a difference in the quest for anonymity.

During its term, the Court holds private conferences to discuss whether to grant certiorari. The long conference is the first conference of the Term and is usually held the Friday before the Court's first oral arguments in the Term. At the long conference, the Court reviews thousands of petitions that have stacked up during the summer recess. At other conferences during the year the numbers are about a hundred or so, which makes anonymity at the long conference statistically more likely. When the Court conferences, the Chief Justice circulates a list of cases for discussion and each Justice may add to that list. If a case scheduled for that conference is not on the discussion list, certiorari will be denied.

If the Court grants certiorari, the first thing counsel should do is contact the Georgetown Supreme Court Institute and ask for a moot court. The Institute provides this service free of charge and to the first party to contact it; although, its new policy is to toss a coin in those cases where each party contacts it within 24 hours, so contacting them quickly cannot be over emphasized. (If you would like to schedule a moot in your case, call or email the Director, Debbie Shrager (202-662-9350 or des113@georgetown.edu). Merits briefs can be due in very short order. This means that counsel should be prepared by having lined up amici and possibly engaging Supreme Court counsel. Getting Supreme Court counsel and amici for the merits stage will be much easier than at the petition stage. Attorneys practicing before the Court often want to increase the number of arguments on their resume and may be willing to handle a case pro bono. Amici will often line up unbidden to file either for or against an issue. Coordinating the amicus effort for the client should be an important part of the advocacy. Rather than each amicus writing on the same subpart of an argument, each can take an argument, support it and expand it, avoiding repetition. Counsel for a party cannot write an amicus brief in the case, so while discussion and coordination are important, those discussions and coordination cannot direct the amicus brief in detail.

In the last several years, the Ninth Circuit generated the most merits cases of any circuit, and its reversal rate has been high. In the 2018 Term, the Ninth Circuit generated both the highest number of cases on the Court's docket (19%) and was reversed at the highest rate (86%). Similarly in the 2019 Term, cases from the Ninth Circuit made up 14% of the Court's docket, though the Second Circuit was close behind at 12%. The Ninth Circuit was reversed 90% of the time that year. In the 2020 Term the trend continued and decisions from the Ninth Circuit comprised 23% of the Court's docket and it was reversed 94% of the time. For context, the Fifth Circuit generated the second highest share of the Court's docket in 2020 at 10%, and it was reversed 71% of the time. And in the 2021 Term, the Ninth Circuit again generated the most merits cases at 18% and was reversed 100% of the time. In fairness, most cases the Court accepts are reversed. The 2021 Term saw an 82% reversal rate overall, which is fairly consistent to other years. So, the odds are, if you were victorious below and the Court accepts certiorari, you may be in for a reversal.

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Scotusblog.com (from which these statistics are derived) provides a great resource on the Court and provides statistical reports for much of its activity that can be vital to understanding the Court.

The Scotusblog.com statistics provided information for the above statistics through a "Stat Pack" publication, but unfortunately, the blog last produced the Stat Pack in 2021. Scotusblog statistics also show who has argued cases before the Court and their experience. Many of the premier practitioners before the Court have experience in the Office of Solicitor General, some having been Solicitor General at one time. As noted, practice before the Court has become more specialized, and in the 2021 term, 72% of the oral advocates were considered "experts" (defined as having argued at least five cases before the Court).

2. Supreme Court 2023 Term

Lindke v. Freed – Social Media / First Amendment

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 and his dog, but also things related to his job, like the town's COVID-19 policies.

Mr. Lindke was a citizen of Port Huron and unhappy with the City's COVID policies. Mr. Lindke would post negative comments on Mr. Freed's Facebook page and Mr. Freed would delete those comments. Mr. Freed eventually blocked Mr. Lindke from the page. Mr. Lindke sued, claiming blocking him from the Facebook page was "state action" for the purposes of a Section 1983 claim and that Mr. Freed had violated his First Amendment rights in doing so.

The Sixth Circuit concluded that Mr. Freed was not acting "under the color of state law" for the purposes of bringing a Section 1983 action. 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." In concluding that Mr. 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. 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. Mr. Freed also 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 the city manager (i.e., it will stay with him when he leaves his job).

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

The issue in this case is 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.

In a unanimous decision authored by Justice Barrett, the Supreme Court rejected the Ninth Circuit's subjective "appearance and content" test and concluded that a government official's social media posts are "attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." The Court noted that the "appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first." The authority must be "real, not a mirage." The analysis will hinge on substance and not the mere label of public official and the Court explains, it will require a fact-intensive inquiry.

The Court noted that the line between private and state action can be "difficult to draw." The difficulty is magnified, the Court explained, because of the nature of some public officials' work, which can make it seem like "they are always on the clock." But the Court emphasized that public officials have their own First Amendment rights, including rights to speak about their employment, that they do not relinquish simply by becoming public officials. The burden is on the plaintiff to show the official is "purporting to exercise state authority in specific posts." Additional factors, such as the use of governmental staff and resources may help demonstrate the use of that authority.

The Court explained that its test is derived from the text of Section 1983, which provides a cause of action where "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State deprives someone of a federal constitutional or statutory right." (internal quotations omitted). Thus, a public official has the authority to speak on behalf of the government if based on a written law, regulation, or ordinance which authorizes that person to make official announcements or if there was a well-established custom such that the "power to do so has become permanent and well settled." (internal quotations omitted). The Court noted in situations where an account belongs to the government or is passed down to the occupier of the particular office, those would be government accounts subject to the First Amendment.

The Court admonished lower courts not to rely on "excessively broad job descriptions" to conclude that authority to speak on behalf of the government exists. The question should be

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"whether making official announcements is actually part of the job that the State entrusted the official to do."

The Court provided hypotheticals to try to illustrate its point. It explained that in cases where someone has the authority to communicate with their residents, for state action to exist and First Amendment liability to attach, "there must be a tie between the official's authority and the gravamen of the plaintiff's complaint." For example, if someone had no authority over public health and that person was posting about local restaurants with health-code violations and deleted unwanted comments on those posts, they would not be acting with any state authority and would not violate the First Amendment. More obviously, if a mayor posts something expressly invoking the authority of the City or State, the action takes immediate legal effect, and is not otherwise available elsewhere, that post would likely be state action. On the other hand, if the official is merely sharing information that is otherwise publicly available, it is far less likely to be state action.

Public officials may use labels and disclaimers on their social media pages such as "this is the personal page" of the individual or "the views expressed are strictly my own" which, according to the Court would entitle the official to "a heavy (though not irrebuttable) presumption that all of the posts on his page were personal." However, the Court noted such a disclaimer cannot provide cover to conduct government business on a personal page such as by live streaming a council meeting only on that "personal" page.

Because Mr. Freed's page did not have a disclaimer and his page was used for a variety of things including both private and those related to his job, a fact-intensive inquiry is necessary to determine if when he deleted comments or blocked Mr. Lindke, he was engaged in state action. The Court also noted that lower courts will need examine both activities that he engaged in on the social media account: deleting and blocking. The Court cautions that because blocking is a blunt instrument, when officials use social media in a mixed way, as Mr. Freed did, there is a greater potential to expose themselves to liability as the court must analyze the entire social media page. Deleting on the other hand, is more precise and the only relevant inquiry for First Amendment purposes pertains to those posts for which the comments were deleted.

Because the test the Court issued was new, the Court vacated the judgment of the Sixth Circuit and remanded the case for consideration in light of its opinion.

IMLA filed an amicus brief in support of neither party, advocating for a clear and workable test that would be easy for local government officials to understand and apply. IMLA's test focused on authority rather than the appearance of a page. The brief was authored by Caroline Mackie & Robert Hagemann of Poyner Spruill LLP.

***O'Connor-Ratcliff v. Garnier* - – Social Media / First Amendment**

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This case presents a substantially similar issue as the *Lindke* case but was argued and briefed separately from it. The issue as framed 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.

Unlike *Lindke,* this case involves elected officials. 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 and therefore that blocking the Garniers from their account because of the message the Garniers were promoting violated the First Amendment. 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." The Ninth Circuit, focusing on the appearance of the pages, concluded that the social media pages were "overwhelmingly" geared toward providing official information and soliciting feedback on the same. The court also rejected the argument that these were personal campaign pages even though that is how they started out.

The Supreme Court issued a per curiam short decision vacating the Ninth Circuit's judgment and remanding the case to consider in light of the new test adopted by the Court in *Lindke*.

IMLA filed an amicus brief in support of neither party, advocating for a clear and workable test that would be easy for local government officials to understand and apply. IMLA's test focused

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on authority rather than the appearance of a page. The *Lindke* brief was also authored by Caroline Mackie & Robert Hagemann of Poyner Spruill LLP.

***City of Grants Pass, Oregon v. Johnson* – Homeless Encampments / Eighth Amendment**

The issue in this case is whether the enforcement of generally applicable laws regulating camping on public property constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

This case involves an extension of the Ninth Circuit's already challenging decision in *Martin v. Boise* from several years ago involving anti-camping ordinances seeking to address the problem of homelessness. Grants Pass is a small city in Oregon with a population of about 38,000, of whom at least fifty are homeless (though the number may be as many as 600). Regardless, the number of individuals experiencing homelessness outnumber the available shelter beds. The City passed several ordinances related to the regulation of sleeping outside, which taken together made it nearly impossible to sleep outside with any form of bedding or shelter on public land in the City. *See* GPMC 5.61.020; GPMC 5.61.030; GPMC 6.46.090.

A violation of these ordinances resulted in fines, which would escalate if left unpaid. The "park exclusion" ordinance allowed police officers to bar someone from a city park for 30 days if they received two or more citations for violating park ordinances within one year. GPMC 6.46.350(A). If someone had received a park exclusion ordinance and was later found in a park, that could result in criminal trespass. The City amended its camping ordinance after *Martin* (discussed below) to make it clear that the involuntary act of sleeping without shelter in a park was not prohibited, rather what was prohibited was "camping" – i.e., sleeping with any bedding / shelter.

The City had four temporary shelters, but two were explicitly religious and required residents to attend Christian worship services. Another was a "sobering center," which was just a place for intoxicated people to sober up and did not have beds. The fourth was a youth shelter. It was undisputed that the City did not have enough beds for its homeless population and really did not have any shelter for adults that did not wish to stay somewhere that was overtly religious.

Prior to this case, in September 2018, a three-judge panel issued *Martin v. City of Boise,* 902 F.3d 1031 (9th Cir. 2018), holding "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." *Id*. at 1048. Although the decision was both novel and sweeping, the opinion did offer a modicum of comfort to local governments that they could still regulate camping on public property by way of a footnote where it stated:

> Naturally, our holding does not cover individuals who **do** have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest

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> that a jurisdiction with insufficient shelter can **never** criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible… So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes.

Shortly after the *Martin* decision was issued, three homeless individuals in Grants Pass filed a class action lawsuit on behalf of those that are "involuntarily homeless" against the City, arguing its ordinances are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause and Excessive Fines Clause (among other arguments). The Ninth Circuit held that the district court did not abuse its discretion by certifying a class action in the case despite *Martin* appearing to require an individualized inquiry into whether the person was involuntarily homeless. The Ninth Circuit reasoned that the class was defined as only those that were "involuntarily homeless" and therefore, no individualized inquiry was necessary as the City did not claim to have adequate shelter for all 600 homeless individuals in Grants Pass.

The Ninth Circuit also concluded that the City's ordinances violated the Cruel and Unusual Punishment Clause and a "local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses." The court did not address ordinances that solely provided civil infractions. The Ninth Circuit affirmed the district court's holding that "the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"

The dissent points out that the class certification was inappropriate under *Martin's* requirement for an individualized inquiry into whether adequate shelter was available to the homeless person.

IMLA filed an amicus brief authored by Brandon Rain with the City of Seattle Law Department. IMLA argued that the Ninth Circuit's rubric is unworkable and undermines principles of federalism.

***Muldrow v. City of St. Louis, Missouri* – Title VII / Employee Transfers**

The issue in this case is whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.

In 2017, the newly appointed interim police commissioner of the City of St. Louis announced various staffing changes as he took over the St. Louis Police Department. A total of seventeen

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male and five female officers were transferred to new assignments. One such transferee was Sergeant Muldrow. She was one of four officers—two male and two female—transferred out of the Intelligence Division. Muldrow was laterally transferred to the Fifth District, where the Department needed additional sergeants. She retained her pay and rank, a supervisory role, and responsibility for investigating violent crimes. However, her previous position was a Monday – Friday role that was mostly 9 am – 5 pm, while the new position required some weekend work. Additionally, in her prior role, she could wear plain clothes, but in the new role, she was required to wear her uniform. She was later transferred back to her former position in the Intelligence Division, having spent eight months in the Fifth District.

Muldrow then brought a gender-discrimination claim under Title VII of the Civil Rights Act of 1964. She asserted that her transfer to the Fifth District violated § 703(a)(1) of the Act, which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex[.]"

The Eighth Circuit affirmed the district court's grant of summary judgment to the City, agreeing with the lower court that Muldrow failed to submit evidence allowing a jury to find that "she experienced an adverse employment action." It held that "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage…[M]inor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action."

The Circuit listed factors to be considered when examining whether an "involuntary transfer" or "denial of a sought-after transfer" rises to the level of an adverse employment action: whether it results in (or would have resulted in) "a change in supervisory duties, prestige, schedule and hours, or promotion potential." The differences between positions must be "material" to give rise to a discrimination claim, not "minor" or "trivial." The Eighth Circuit held that Muldrow failed to support her assertion that Fifth District work was "more administrative and less prestigious," or that she "suffered a significant change in working conditions or responsibilities." In sum, the supposed denial of Muldrow's transfer request did not amount to an adverse employment action.

Muldrow argued at the Supreme Court that Title VII covers any transfer in employment, regardless of whether there were any material adverse consequences to the transfer, if the transfer was done based on discrimination. IMLA filed an amicus brief authored by the IMLA legal team, including Amanda Karras, Erich Eiselt, Deanna Shahnami, and Ravinder Arneja, arguing that the petitioner's rule would not only result in significant increased liability for local governments, but it would also undermine public safety by placing federal courts in supervisory roles over police chiefs and Sheriffs as they transfer employees from one area to another for a variety of reasons.

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Sheetz v. County of El Dorado, California – **Takings / Impact Fees**

This case involves the question of whether *Nollan / Dolan* should apply in the context of legislative exactions (as opposed to adjudicative and discretionary ones). A conclusion that the heightened requirements from these cases would apply to legislative exactions would put more impact fees in jeopardy of being struck down. That would in turn have a significant impact on local government budgets, economic development, and the ability to improve infrastructure and meet community demands for services.

El Dorado County adopted a General Plan that required new development to pay for road improvements necessary to mitigate the traffic impacts from such development. The General Plan was then amended to include a traffic impact mitigation fee (TIM) to finance the construction of new roads and the widening of existing roads within its jurisdiction. The amount of the fee is set by formula and generally based on the location of the project (i.e., the specific geographic zone within the County) and the type of project (e.g., single-family residential, multi-family residential, general commercial). In assessing the fee, the County does not make any "individualized determinations" as to the nature and extent of the traffic impacts caused by a particular project on state and local roads.

Mr. Sheetz, a resident of the County, applied for a building permit to construct a single-family home on his property. The County agreed to issue the permit on the condition that he pay a TIM fee. He paid and the permit was issued, but he then challenged the TIM fee as invalid under the Takings Clause of the Fifth Amendment. He argued that the TIM fee was an unconstitutional condition under *Nollan* and *Dolan* as the County did not make an individualized determination that an "essential nexus" and "rough proportionality" existed between the traffic impacts caused by his project and the need for improvements to state/local roads.

The Supreme Court has identified "land-use exactions" as a special kind of taking under the Fifth Amendment. A land use-exaction occurs when the government demands real property or money from a land-use permit applicant as a condition of obtaining a development permit. The leading examples of "exactions" come from the Supreme Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard,* 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595 (2013).

To determine if an exaction violates the Takings Clause, courts apply the doctrine of "unconstitutional conditions," which sets forth that the government may not request a person to give up a constitutional right "in exchange for a discretionary benefit conferred by the government where the benefit sought has little of no relationship to the property." The Court explained in *Koontz,* "[u]nder *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." Thus, the government must satisfy an "essential nexus" between the government's legitimate interest and the exaction (*Nollan*) and it

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must show "rough proportionality" between the exactions and proposed impact of the development (*Dolan*).

Against this backdrop, the California Court of Appeals held that the *Nollan* and *Dolan* "essential nexus" and "rough proportionality" tests do not apply to legislative exactions that are generally applicable to a broad class of property owners like the one at issue in this case. The court distinguished legislative exactions from those fees that are done on an individual or ad hoc basis, and which require discretion like the ones imposed in *Nollan* and *Dolan.* The court reasoned that the heightened scrutiny required under *Nollan* and *Dolan* is not applicable where there is no discretion involved in the fee process, as is the case with legislatively enacted fees. Because the fee applied to all new development projects in the County and did not require discretion, the court used a lower standard to review it and upheld the fee.

The issue in this case is whether a building-permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard, Oregon* simply because it is authorized by legislation.

IMLA filed an amicus brief authored by Austin Yang, Kristen Jensen, and Giula Gualco-Nelson of the San Francisco City Attorney's Office. The amicus brief sought to educate the Court on the importance of impact fees and the manner in which they are enacted.

***Gonzalez v. Trevino* – First Amendment / Retaliatory Arrests**

This case concerns a question left open by the 2019 Supreme Court decision, *Nieves v. Bartlett*. In *Nieves,* officers arrested a partygoer, Bartlett, at an extreme sporting event after a heated exchange whereby the officers took Bartlett's actions to be hostile and aggressive. The prosecutor found there was probable cause to arrest, but Bartlett sued (after charges were dismissed) claiming the arrest was in retaliation for his speech, in violation of the First Amendment. The Supreme Court held that a plaintiff must *generally* plead and prove the absence of probable cause to move forward with a retaliatory arrest claim under the First Amendment.

However, the Court left open a "narrow qualification" for the situation where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so." The Court provided an example of someone who is complaining about the police and then jaywalks. The Court goes on to explain that because so few people are actually arrested for jaywalking, if a plaintiff can demonstrate "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," then the plaintiff cam proceed with a retaliatory arrest claim even if the officer had probable cause to arrest.

In this case, Sylvia Gonzalez was elected to a seat on the city council for Castle Hills, Texas, a town with fewer than 5,000 residents. As her first act in office, she called for the removal of the

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city manager by organizing a nonbinding petition. During Gonzalez's first city council meeting, a resident submitted to council the petition to remove the city manager.. A resident at the meeting accused Gonzalez of getting her to sign the petition under false pretenses. The council meeting grew contentious.

After the meeting, Gonzalez left her belongings on the dais and went to speak to a constituent. When the Mayor, Edward Trevino could not find the petition among his papers (he was supposed to have the petition), he asked Gonzalez to look for the petition in her belongings. She found the petition with her belongings. The Mayor informed the police two days later that he wished to file a criminal complaint against Gonzalez for taking the petition without consent. The police officer investigating the allegation determined that Gonzalez violated Texas Penal Code §§37.10(a)(3) and (c)(1), which provide that "[a] person commits an offense if he ... intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record." The investigation took over a month as the officer interviewed witnesses and reviewed video footage.

The officer secured a warrant and instead of issuing a summons for a nonviolent crime, booked Gonzalez into the jail, where she spent the day. The warrant referenced her speech (noting she was antagonistic with the city manager).

Gonzalez sued under Section 1983, claiming that she was arrested in retaliation for her protected speech. To fall within the *Nieves* exception, Gonazlez claims that this criminal statute has not been used in the county to criminally charge someone trying to steal a nonbinding or expressive document in the last decade. While there were 215 grand jury indictments under the statute, she claims none remotely resembled the facts of this case.

The Fifth Circuit held that this case does not fall within the *Nieves* exception because Gonzalez did not present "objective evidence that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." The court reasoned that she failed to provide evidence of others who had mishandled a government petition and were not prosecuted. Instead, she provided evidence of who was prosecuted under the statute and argued their offenses were different than hers. The Fifth Circuit rejected her invitation to infer that because nobody else was prosecuted for similar conduct her arrest must have been motivated by her speech. The court emphasized that the Supreme Court requires "objective evidence" of "otherwise similarly situated individuals" who engaged in the same criminal conduct but were not arrested. And here, she came up short.

The issues in this case are: (1) Whether the probable-cause exception in *Nieves v. Barlett* can be satisfied by objective evidence other than specific examples of arrests that never happened; and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

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IMLA filed an amicus brief drafted by Harker Rhodes and Mariel Brookins with Clement & Murphy arguing that the *Nieves* exception should be narrowly interpreted.

***Relentless v. Department of Commerce / Loper Bright Enterprises v. Raimondo – Chevron /* Agency Deference.**

This case presents the question of whether the Supreme Court should overrule *Chevron v. Natural Resources Defense Council*, a more than 40-year precedent which provides that courts should defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. If the Court does not overrule *Chevon,* petitioner asks the Court to at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

The effort to overturn *Chevron* arises in two cases challenging a rule promulgated by the National Marine Fisheries Service requiring the herring industry to pay the costs of observers on fishing boats. Each of the Circuits below (DC Circuit for *Loper Bright* and First Circuit for *Relentless*) found the agency's reading to be a reasonable interpretation of federal law.

IMLA declined to participate as an amicus in this case, recognizing that *Chevron*-based agency authority can cut both ways, sometimes as a benefit to local governments, and sometimes as a detriment. Regardless, if the outcome of *Relentless*/*Loper Bright* is to materially limit agency deference, it seems clear that regulatory authority will be curtailed and commercial interests will enjoy greater autonomy.

***U.S. v. Rahimi* – Second Amendment**

The issue in this case is whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment on its face.

In 2020, a Texas court issued a domestic violence restraining order against Zackey Rahimi after he assaulted his girlfriend and warned her that he would shoot her if she told authorities about the attack. The order barred Rahimi from possessing a firearm and notified him that, while the order was in effect, his gun possession might constitute a felony under federal law.

Rahimi acknowledged receipt of the restraining order and its prohibition against gun possession but did not comply. In August 2020, he approached the girlfriend's house in the middle of the night, prompting state police to arrest him. In November 2020, he threatened another woman with a gun, leading the State of Texas to charge him with aggravated assault with a deadly weapon. Rahimi was subsequently involved in five separate shooting incidents in Arlington, Texas including shooting a gun in a Whataburger when his friend's credit card was declined and

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shooting into someone's house because he did not like a social media post. When officers searched his house pursuant to a warrant, they found numerous weapons and ammunition.

A federal grand jury indicted Rahimi for possessing a firearm while under a domestic violence restraining order in violation of 18 U.S.C. §922(g)(8), which makes it unlawful for any person subject to a court order that "includes a finding that such person represents a credible threat to the physical safety of [an] intimate partner or child" to possess "any firearm or ammunition..." (The statute requires that the person subject to the order have the opportunity to participate in a hearing regarding the order). Rahimi pleaded guilty, receiving a sentence of more than six years behind bars but then challenged the conviction by arguing that the federal statute violates the Second Amendment.

The Fifth Circuit initially upheld the lower court conviction, finding the regulation met intermediate scrutiny, but shortly thereafter, the Supreme Court released its opinion in *New York Pistol and Rifle Club v. Bruen*. Rahimi sought rehearing of the decision and the Second Circuit, applying *Bruen*, reversed itself and vacated its prior order.

The federal government raised numerous arguments which were rejected. Its assertion that the Second Amendment only applies to "law abiding, responsible citizens" failed; references to "law-abiding," "responsible," and "ordinary" citizens in *Heller* and *Bruen* did not create "an implied gloss that constricts the Second Amendment's reach." *Bruen's* new paradigm also required an analysis of whether § 922(g)(8) fell within the nation's historical tradition regarding gun possession. The Circuit analyzed three classes of historical analogues proffered by the government, seeking antecedents that imposed "comparable burdens" and were "comparatively justified" as the current law: "(1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws." It found that none applied; they were either too old, too unspecific, too focused on terrorism, or did not actually result in forfeiture of gun possession.

IMLA filed an amicus brief authored by Professor Lawrence Rosenthal of Chapman University Law School emphasizing practical arguments about the danger to law enforcement in responding to domestic violence issues where there are firearms present.

***Harrington v. Purdue Pharma L.P.* – Opioid Litigation / Bankruptcy**

The issue in this case is whether the Bankruptcy Code authorizes a court to approve, as part of a Plan of Reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.

This case arises out of the opioid epidemic and the resulting bankruptcy by Purdue Pharma, manufacturer of Oxycontin. Under the Plan of Reorganization proposed by Purdue, the Sackler family members, who transferred some $11 billion to accounts outside the U.S. during their

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ownership and management of the company, will receive complete releases from personal liability in exchange for their contribution of $6 billion to the estate. The controversy arises because the Purdue family members, some of whom were directors and officers of the company, have not themselves declared bankruptcy, meaning that creditors of the estate-individual plaintiffs, local governments and others, are being forced to grant absolute releases to non-parties. This is contrary to traditional bankruptcy law.

In May, the Second Circuit approved the Purdue bankruptcy Plan, including the family member releases. But the federal government did not agree with that architecture, and the Solicitor General sought relief at the Supreme Court.

1,300 multi-state governmental entities which included cities, counties, tribal nations, and other governmental entities opposed granting certiorari in this case as they wanted to receive payments from the estate sooner rather than later.

Recognizing that IMLA's members may have differing views as to whether the Plan should be disrupted, IMLA did not participate as an amicus in this case.

***Murthy v. Missouri* – Government Speech / Threats & Coercion / First Amendment**

This case involves communications between the federal government (White House, Surgeon General, CDC, and FBI) and private social media companies, and what constitutes legitimate government speech versus governmental threats and coercion which converts private speech to state action. Individuals and two states sued the federal government, claiming the Administration's communications with social media sites crossed the line into coercion and "significant entanglement," converting the private social media platforms into state actors and interfering in the states' First Amendment rights. when the private social media companies removed the challenged information from their sites.

The action was initially brought by a group of medical professionals after their social media posts criticizing governmental Covid policies and mandates were replaced by federal government Covid messaging. Missouri and Louisiana then joined, alleging that they and their residents were harmed by the social media platforms' censorship of their speech. While the Administration contended that it was merely attempting to "mitigate the hazards of online misinformation" by flagging content that violated the social media platforms' own policies, the plaintiffs argued that the government "coerced, threatened, and pressured" the social media platforms into suppressing their views, making the platforms state actors and violating the First Amendment.

The Fifth Circuit applied a four-factor test to distinguish "attempts to convince" from "attempts to coerce," evaluating "(1) the speaker's 'word choice and tone'; (2) 'whether the speech was perceived as a threat'; (3) 'the existence of regulatory authority'; and, 'perhaps most importantly, (4) whether the speech refers to adverse consequences.'" (citation omitted). It found that the

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White House had coerced: "[T]he officials threatened—both expressly and implicitly—to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply." The White House had also "encouraged" its policies by becoming entangled in the social media sites' operations.

While the Circuit referenced a significant factual record in analyzing White House communications, its review of FBI activity was much more cursory. It found that the FBI had implicit power to coerce, and that "the platforms clearly perceived the FBI's messages as threats." For example, before the 2022 congressional election, "the FBI warned the platforms of 'hack and dump' operations from 'state-sponsored actors' that would spread misinformation through their sites. In doing so, the FBI officials leaned into their inherent authority."

In its application for a stay, the federal government argued that the decision put "unprecedented limits on the ability of the President's closest aides to use the bully pulpit to address matters of public concern, on the FBI's ability to address threats to the Nation's security, and on the CDC's ability to relay public-health information at platforms' request." In late October, the Court granted the Administration's request for a stay until the case is decided.

The government's coercion of a private party's speech occurs when the government makes a "threat of invoking legal sanctions" or employs "other means of coercion, persuasion, and intimidation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). The Court has since remarked that when the government has coerced a private party's action, that party is treated as a state actor subject "to the constraints of the First Amendment." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1933 (2019). Apart from coercion, governmental offers or implications of significant benefits for accommodating the government's viewpoint can also be impermissible state action: *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (private conduct will constitute state action if the government "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State").

The issues in this case are: (1) Whether respondents have Article III standing; (2) whether the government's challenged conduct transformed private social media companies' content-moderation decisions into state action and violated respondents' First Amendment rights; and (3) whether the terms and breadth of the preliminary injunction are proper.

IMLA filed an amicus brief in support of neither party authored by Meaghan VerGow, Daniel Lautzenheiser, and Nina Oat of O'Melveny & Myers, arguing for the importance of the preservation of government speech but taking no position on the particular outcome of this case.

National Rifle Association of America v. Vullo – **First Amendment / Government Speech / Coercion & Threats**

This case presents substantially similar issues to the *Murthy* case (above).

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In September 2017, the New York County DA's Office advised the New York Department of Financial Services (DFS) of the possible illegality of an NRA-endorsed affinity insurance program called "Carry Guard." Carry Guard provided coverage for losses caused by licensed firearm use, including criminal defense costs resulting from using a firearm with excessive force to protect persons or property, even if the insured was found to have acted with criminal intent.

The next month, DFS opened an investigation into Carry Guard, focusing on Lockton and Chubb (the insurance companies). The investigation revealed that Carry Guard and at least two other NRA-endorsed programs violated New York insurance law for providing, among other things, insurance coverage for intentional criminal acts. By November 17, 2017, both Lockton and Chubb suspended the Carry Guard program and stopped offering it to New York residents for purchase.

The investigation also revealed that a third entity, the insurance marketplace Lloyd's of London ("Lloyd's"), served as underwriter for at least eleven other NRA-endorsed programs with similar policy coverages, including providing liability defense coverage for criminal proceedings resulting from firearm use even where the insured acted with criminal intent. Lockton administered these insurance programs for Lloyd's.

On February 14, 2018, while the investigation was ongoing, the Parkland school shooting occurred. Just before the shooting, Vullo, then Superintendent of DFS, met with senior executives of Lloyd's where she "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." She also explained the basis for her belief that Lloyd's was violating several provisions of New York insurance law. She then explained how Lloyd's could come into compliance and "avoid liability" for its regulatory infractions, including by no longer "providing insurance to gun groups" like the NRA. Vullo also sought Lloyd's aid in "DFS's campaign against gun groups."

Two months after the Parkland shooting and six months after DFS opened its investigation into the NRA-endorsed insurance programs -- Vullo weighed in publicly on the issue of gun violence. She issued a pair of guidance letters addressed to DFS-regulated insurance entities and DFS-regulated financial institutions (the "Guidance Letters"). The Guidance Letters referenced the Parkland shooting and other mass shootings and condemned the increasing "tragic devastation caused by gun violence" as a "public safety and health issue." The Guidance Letters encouraged DFS-regulated entities to "continue evaluating and managing their risks, including reputational risks, which may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." The Guidance Letters did not refer to any ongoing investigations or enforcement.

In May 2018, Lockton and Chubb entered into consent decrees with DFS and they agreed that some NRA-endorsed insurance programs they offered violated New York insurance law, they

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would no longer provide those or other illegal insurance programs to the NRA or New York residents, and they would pay fines. Notably, each Consent Decree expressly allowed the entities to continue to do business with the NRA.

The NRA sued Vullo, arguing she "established an unconstitutional implicit censorship regime in an effort to chill the NRA's protected speech" and that she "unconstitutionally retaliated against the NRA for its protected speech."

The Second Circuit concluded that Vullo did not violate the First Amendment because none of her statements in any of the meetings, guidance letters, or consent decrees amounted to "implied threats to employ coercive state power to stifle protected speech." The court noted there are two sets of free speech rights implicated by the case, those of the NRA and those of the government officials. And the court emphasized that "the First Amendment does not impose a viewpoint-neutrality requirement on the government's own speech" which the court noted would "antithetical to a healthy representative democracy."

However, the court explained there are circumstances where government speech may go too far and infringe on private speech, where the government "engages in unjustified threats or coercion to stifle speech." Thus, governments must refrain from speech that "can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." The Second Circuit looks at four factors to determine if the government official's speech crosses the constitutional line into coercion: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences."

Here the court found Vullo's statements could not "reasonably be construed as being unconstitutionally threatening or coercive." The court highlighted the language she employed in each instance and found it was all permissible governmental speech. The court noted she did have regulatory authority over the audience of her statements (in so far as the guidance letters were concerned) but the letters did not refer to any possible regulatory action or investigations and thus the mere fact that she could regulate them was not sufficient to be unconstitutionally coercive.

The court did note the meeting with Lloyd's leading up to the consent decree was a "closer call." But importantly, because the investigation started months before the consent decrees and were triggered from a referral from the DA, her statements did not violate the NRA's First Amendment rights.

The issue in this case is whether the First Amendment allows a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy.

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IMLA filed an amicus brief in support of neither party, also authored by Meaghan VerGow, Daniel Lautzenheiser, and Nina Oat of O'Melveny & Myers, arguing for the importance of the preservation of government speech but taking no position on the particular outcome of this case.

Chiaverini v. City of Napoleon – **Section 1983 / Malicious Prosecutions**

Chiaverini managed a jewelry store in Napoleon, Ohio. He purchased a men's ring and diamond earring from Burns for $45. Burns claimed to be the owner and Chiaverini had him fill out a "buy card" certifying that he was the lawful owner. That same day, David and Christina Hill called Chiaverini to see if anyone had sold him their stolen ring. He told them to make a police report and denied buying the ring.

Both the Hills and Chiaverini called the police. Chiaverini indicated "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. Mr. Hill arrived at the store with two officers. The officers confirmed that the items were stolen and told Chiaverini not to sell them.

Officer Steward wrote an initial report on the incident and later added to the report that Chiaverini had said he thought the ring had been stolen when he bought it. Chiaverini denies making this statement. 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." Chiaverini thought this was inconsistent and did not know what to do so he did not return the ring to the Hills even though they asked for it back. The police also returned in person and instructed him to release the items back to the Hills, but he refused.

Chiaverini then confronted the police chief about the contradictory information in the letter. In talking to the Chief, Chiaverini alluded to the fact that he did not have a precious metal license. After this conversation, the Chief confirmed on the Ohio Department of Commerce's website that Chiaverini's precious-metals-dealers license was inactive. 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.

One of the officers then applied for a search warrant and a municipal judge signed search and arrest warrants. The officers searched Chiaverini's store and seized the Hills' stolen jewelry as well as items related to sales, purchases, and licenses. Chiaverini spent 3 days in jail. Ten days later, the same municipal judge held a preliminary hearing and concluded that probable cause existed for all charges and bound them over for trial. Later, however, a court dismissed the charges without prejudice for failure to be timely presented to a grand jury.

After the charges were dismissed, Chiaverini sued the officers and the City under Section 1983 for malicious prosecution. The Sixth Circuit upheld the district court's grant of summary

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judgment based on the existence of probable cause to arrest Chiaverini. The Sixth Circuit also found that if probable cause supports one or more of the three charges, then dismissal of the claim for all charges is appropriate. 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."

The Sixth Circuit found that probable cause supported the charges of receipt of stolen property (because 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, he had notice it was stolen and refused to return it) and the license violation. The court 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. (Money laundering is a felony while the other two charges are misdemeanors). There is no evidence that he would have spent less time in jail had the money laundering charge not been brought.

The issue in this case is 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, or by the "any-crime" rule, under which probable cause for even one charge defeats a plaintiff's malicious-prosecution claims as to every other charge, including those lacking probable cause.

IMLA filed an amicus brief authored by Gregory Garre, Jordan Goldberg, and Joseph Sitzmann with Latham & Watkins. The amicus brief argued that where there is no prolonged or added detention due to additional charges, the Fourth Amendment cannot be violated and there can therefore be no malicious prosecution claim.

***Culley v. Marshall* – Asset Forfeiture / Due Process**

These consolidated cases involve the seizure and forfeiture of cars that were involved in illegal activity. In both, the person driving the car was found with drugs and arrested; in both, the owner of the vehicle was not in the car, was not involved in the crime, and was not arrested. Instead, they were made defendants under Alabama's Civil Asset Forfeiture ("CAF") statute. Ala. Code § 20-2-93. In both CAF cases in Alabama state courts, the plaintiffs prevailed on summary judgment by asserting the innocent owner defense available under the CAF. However, they had to wait many months to prevail on the merits in the underlying CAF cases. (The plaintiffs could have retrieved their vehicles by posting a bond equal to twice the vehicles' value but did not do so).

The Eleventh Circuit held that the Sixth Amendment "speedy trial" standard articulated in *United States v. $8850,* 461 U.S. 553 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) allows the State to retain property seized incident to arrest without holding a prompt post-deprivation probable cause hearing that the property will ultimately be forfeitable.

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The Supreme Court granted certiorari and the issues presented to the Court are: 1) Whether the Due Process clause requires a state or local government to provide a post-seizure probable-cause hearing prior to a statutory judicial-forfeiture proceeding and, 2) if so, when such a hearing must take place, should it apply the "speedy trial" test employed in *United States v. $8,850* and *Barker v. Wingo* or the *Mathews v. Eldridge* three-part due process framework.

IMLA filed an amicus brief authored by Gilbert Dickey, Frank Chang, & C'Zar Bernstein with Consovoy McCarthy. The brief explained the importance of asset forfeiture as a law enforcement tool both historically and at present.

Snyder v. U.S. – **Criminal Bribery / Gratuities for Local Officials**

This case involves the interpretation of 18 USC § 666(a)(1)(B), which makes it a crime for state and local officials to "corruptly solicit[,] demand[,] … or accept[] … anything of value" in order to be "influenced or rewarded in connection with" government business "involving anything of value of $5,000 or more."

Snyder was elected mayor of Portage, Indiana, a city of about 38,000, and took office in January 2012. In December 2012 and November 2013, his administration announced that it would purchase garbage trucks for the city through public bidding. Both contracts were awarded to Great Lakes Peterbilt ("GLPB"), a Portage truck dealer owned by two brothers, Robert and Stephen Buha. The mayor put his longtime friend Randy Reeder in charge of the bidding process. Reeder testified at trial that he drafted the bid specifications to favor GLPB. Evidence at trial also showed that Mayor Snyder was in frequent contact with the Buha brothers—but no other bidders—during the bidding process.

Less than three weeks after the second contract was awarded, GLPB paid Snyder $13,000. Snyder maintains that this payment was made pursuant to a consultant agreement that he entered into with GLPB after the contracts were awarded. (Under relevant state and local law, the Mayor was allowed to pursue other employment). Snyder provided several shifting stories about what consulting services he provided to GLPB and GLPB employees later testified that they received no consulting services.

Snyder was convicted by a jury under 18 USC §666 for bribery. The Seventh Circuit upheld the charge. During the trial, the prosecutors did not allege a *quid pro quo* whereby Mayor Snyder agreed to accept $13,000 in exchange for delivering bid awards to Peterbilt. Instead, the theory was that "under 666, the government does not have to prove a quid pro quo," only a gratuity. The court "held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes.'" The court explained that quid pro quo bribery encompasses agreements to exchange something of value "for influence in the future." Pet.App.37a. By contrast, a gratuity is "a reward for actions the payee has already taken or is already committed to take." The court found given the irregularities in the bidding process, the timing of the $13,000 payment, the shifting explanations for the

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payment, and lack of corroborating evidence for Snyder's consulting claims, a reasonable jury could find that these payments constituted a bribe or gratuity for steering the contracts to GLPB.

The issue in this case is whether section 18 U.S.C. § 666(a)(1)(B) criminalizes gratuities, i.e., payments in recognition of actions a state or local official has already taken or committed to take, without any quid pro quo agreement to take those actions.

IMLA typically does not get involved in criminal matters and did not file an amicus brief in this case.

Ohio v. Environmental Protection Agency – **Clean Air Act**

Issue(s): (1) Whether the court should stay the Environmental Protection Agency's federal emission reductions rule, the Good Neighbor Plan; and (2) whether the emissions controls imposed by the rule are reasonable regardless of the number of states subject to the rule. This case was granted on an emergency application for a stay without any merits briefing. There is also no lower court decision in this case, which is unusual. IMLA did not participate as an amicus in this case.

Garland v. Cargill – **Bump Stocks / Statutory Interpretation**

The Gun Control Act of 1968 provides that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1). The Act defines machinegun as follows:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The statutory definition of a machinegun also includes devices that convert an ordinary firearm into a machinegun. A bump stock is an accessory that attaches to a semi-automatic weapon and assists the shooter to engage in bump firing. Bump firing results in an increased rate of fire.

In the aftermath of one of the Nation's deadliest mass shootings in Las Vegas, which involved the use of a bump stock, the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), promulgated a new rule indicating the federal prohibition on machineguns extended to bump stocks. This was a reversal of ATF's original position on bump stocks, which it had originally interpreted to not be included under the definition of machineguns.

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Cargill was a lawful owner of bump stocks, and he turned them in after the new regulation was issued but then he sued ATF, claiming the rule violated the Administrative Procedure Act.

The Fifth Circuit concluded that a plain reading of the statutory language compelled the holding that a bump stock device does not fall within the definition of machine gun. The court concluded that the statute was unambiguous, and it therefore did not need to apply *Chevron*. But the court found that even if the statute was ambiguous, *Chevron* (which the Supreme Court is considering overruling in a separate case) would not apply because of the criminal context of the statute and because the federal government did not argue that *Chevron* applies.

The issue in this case is whether a bump stock device is a "machinegun" as defined in 26 U.S.C. § 5845(b) because it is designed and intended for use in converting a rifle into a machinegun, i.e., into a weapon that fires "automatically more than one shot ... by a single function of the trigger."

IMLA did not participate as an amicus in this case because this is a case of statutory interpretation of a federal law and that interpretation will not impact any state or local laws that may also regulate bump stocks – i.e., local governments will remain free to regulate bump stocks regardless of how the Court rules in this case.

3. Supreme Court 2022 Term

***303 Creative v. Elenis* - Free Speech / Anti-Discrimination Laws**

In this case, the Supreme Court held that Colorado's public accommodation law violates the First Amendment's Free Speech Clause by compelling the speech of a business owner engaged in expressive activity. This case was a fight construing whether the creation and sale of a wedding website to the public is considered speech, which would be protected under the First Amendment, or commercial activity / conduct that incidentally implicates speech, which would not be protected.

In this case, Lorie Smith designs websites for her company 303 Creative. She wanted to start creating wedding websites, but she did not want to create websites that celebrate same-sex marriage due to her sincerely held religious beliefs. She also wanted to publish a statement on her website that she will not create wedding websites for same-sex couples as doing so would compromise her religious beliefs.

Like most States, Colorado has a law, Colorado's Anti-Discrimination Act (CADA), that prohibits public accommodations from refusing to provide services based on several protected characteristics, including sexual orientation. CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.

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At the time of litigation, Smith had yet to begin creating wedding websites because she indicated doing so would force her to convey a message with which she disagrees. Instead, she sued the State in a pre-enforcement challenge, seeking to enjoin the State from enforcing CADA against her.

In a 6-3 decision authored by Justice Gorsuch, the Supreme Court held that a State cannot "use its public accommodations statute to deny speakers the right "to choose the content of [their] own message[s].'" In other words, insofar as CADA would require Smith to create a wedding website that celebrates same sex marriage, it violates the First Amendment by compelling Smith to convey a message with which she disagrees.

The majority relies on bedrock First Amendment principles to support its decision. For example, the majority begins with the reminder that "[i]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas." (internal citations omitted). And on this front, the majority underscores that our Nation's First Amendment values (and the Court's precedents) protect all speakers, including those "whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive."

To support its holding, the Court relies on several First Amendment precedents. In *West Virginia Bd. of Ed. v. Barnette*, the Court concluded the State violated the First Amendment by forcing students to salute the American flag on pains of expulsion and fines or jail for their parents. Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court concluded that the State's public accommodation law could not be used to compel private parade organizers to include LGBT individuals in their parade, as doing so would violate the parade organizer's constitutionally protected speech rights. And in *Boy Scouts of America v. Dale*, the Court held that forcing the Boy Scouts to include a gay scoutmaster would "interfere with [its] choice not to propound a point of view contrary to its beliefs."

Here, the majority concluded that Smith was engaged in "pure speech," not speech incidental to conduct as the dissent argues. And the majority explained that the principles from the above cases dictate that Colorado cannot compel Smith's speech by forcing her to create same-sex wedding websites. As the Court put it, the State demanded a choice from Smith that represented an "impermissible abridgement of the First Amendment's right to speak freely." Namely, "[i]f she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs."

The majority noted the "vital role public accommodations laws play in realizing the civil rights of all Americans" and that eliminating discrimination in places of public accommodation is a compelling state interest. And the Court indicated that States may continue to protect individuals as they seek goods and services in the public market. The Court also explained that its holding will not apply to "a vast array of businesses." But, the Court warns, "public accommodations

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statutes can sweep too broadly when deployed to compel speech." The Court's holding is thus limited to those businesses that create expression / speech.

The Court rejected Colorado's argument that the case merely implicates conduct – i.e., "the sale of an ordinary commercial product," and any burden on Smith's speech is purely incidental. First, the Court noted that the parties stipulated to the fact that Smith sought to sell "customized and tailored" speech for each couple. Second, the Court noted that it does not matter that someone is offering their speech for pay – i.e., that they have entered the commercial market when it comes to the First Amendment. The Court noted that these commercial speakers do not lose their First Amendment protections. Simply, Colorado cannot "force an individual to utter what is not in her mind" and the government may not alter her message. (internal quotations omitted).

Justice Sotomayor dissented, joined by Justices Kagan and Jackson, calling the majority's opinion "profoundly wrong." The dissent proposed a straightforward principle: "if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination. In particular, the state may ensure that groups historically marked for second-class status are not denied goods or services on equal terms." Under the dissent's view, the public accommodation law targets conduct not speech, and it therefore would not violate the First Amendment under the Court's precedent as the "Constitution contains no right to refuse service to a disfavored group."

IMLA filed an amicus brief authored by Aileen McGrath with Akin Gump Strauss arguing that exceptions to public accommodations laws would be unworkable.

***National Pork Producers Council v. Ross* –Dormant Commerce Clause**

The issues in this case were: (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court's decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*

In its holding, the Supreme Court rejected an overly expansive view of the dormant Commerce Clause. Justice Gorsuch, writing for the majority, declined the pork producers' arguments which would have "fashion[ed] two new and more aggressive constitutional restrictions on the ability of States [and local governments] to regulate goods sold within their borders." As he put it, "[w]hile the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list."

This case involves California's Proposition 12, which prevents the sale of "[w]hole pork meat" in the state unless the meat was produced in compliance with "specified sow confinement

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restrictions." Specifically, under the law, the breeding pigs cannot be confined in stalls so small that the pigs cannot lie down, stand up, or turn around. Proposition 12 was intended to prevent animal cruelty.

The National Pork Producers Council sued the state, claiming that Proposition 12 violates the dormant Commerce Clause. The Constitution vests Congress with the power to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. The parties all agree that Congress has the power to regulate the interstate sale of pork under the Commerce Clause. But here, Congress has been silent, so the pork producers are seeking to invoke what is known as the dormant Commerce Clause to invalidate the State law.

Specifically, the pork producers allege that the California law violated the dormant Commerce Clause by impermissibly regulating extraterritorial conduct outside of the State and that the law imposes an undue burden on interstate commerce. In support, they allege that the pork industry is highly interconnected and that "[t]o ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with Proposition 12." The result, they claim, is that all suppliers must either comply with California's law or incur additional costs to segregate their products. The plaintiffs claim the law will result in a 9.2 % increase in production cost for pork.

In a 5-4 decision, the Supreme Court held that while States (and local governments) may not use their laws to "discriminate purposefully against out-of-state economic interests", in this case, the parties agreed that California's law was not discriminatory as it applied equally to in-state producers of pork, and it therefore did not violate the dormant Commerce Clause. The Court rejected what it called the pork producers' more "ambitious theories," including the "extraterritoriality doctrine." Under this doctrine, the petitioners argued that the dormant commerce clause has an "'almost per se' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State,' even when those laws do not purposely discriminate against out-of-state economic interests." The Court flatly rejected this argument, concluding its case law did not support the theory. The Court explained that antidiscrimination principles, which prevent economic protectionism, are the "very core" of its dormant Commerce Clause jurisprudence.

In rejecting the petitioner's broad extraterritoriality theory, the Court noted such an application could invalidate a host of laws in the country's "interconnected national marketplace." According to the Court, these could include state income tax laws, environmental laws, securities requirements, quarantine laws, inspection laws, franchise laws, torts laws, among others. Any of these laws can have a "considerable influence on commerce outside their borders."

After rejecting a broad extraterritoriality rule, the Court turned to the petitioner's next argument: that the law should be struck down under what is known as the *Pike* balancing test, coming from

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Pike v. Bruce Church, Inc., 397 U. S. 137 (1970). Under *Pike*, if a law's burdens are "'clearly excessive in relation to the putative local benefits," then the law violates the dormant commerce clause and will be struck down. Here, the five Justice majority agreed that the California law did not violate *Pike,* but the majority splintered and offered various theories as to why. It appears three of the Justices (Justices Gorsuch, Thomas, and Barrett) would do away with *Pike* as they questioned the ability of judges to weigh competing interests like economic interests on one side and a state's moral choices on the other. Justices Sotomayor and Kagan did not join this portion of the majority; thus, *Pike* remains good law. What the five Justice majority agreed on is that *Pike* may help reveal a discriminatory purpose if the law does not discriminate against interstate commerce on its face. And here, the pork producers had disavowed any discriminatory purpose, and its practical effects reveal no such discrimination. While the majority may not have agreed as to why the petitioners could not state a claim under *Pike,* five Justices agreed they could not, and thus affirmed the Ninth Circuit's decision.

And while the Court may not have completely agreed on the rationale, the five Justice majority did agree with an important federalism principle: "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only "'where the infraction is clear.'"

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson concurred in part and dissented in part. They agreed with the majority's rejection of a broad "extraterritoriality rule," but they would have found the complaint plausibly alleged a violation under *Pike* and would have remanded the case for further consideration.

Justice Kavanaugh wrote a concurrence in part and dissent in part arguing that the majority's approach undermines federalism. According to Justice Kavanaugh, the majority's decision may usher in "a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands."

IMLA filed an amicus brief drafted by John Korzen with Wake Forest University School of Law arguing against a broad extraterritorial rule which could jeopardize countless local laws.

***Moore v. Harper* – Partisan Gerrymandering / Independent State Legislature Doctrine**

In this case, the Supreme Court rejected the Independent State Legislature Theory (ISLT) and held that the Federal Elections Clause "does not insulate state legislatures from the ordinary exercise of state judicial review."

Following the 2020 census the North Carolina legislature redistricted. A group of voters and non-profits challenged the map, claiming they reflected an unconstitutional partisan gerrymander under the North Carolina constitution, which provides that "[a]ll elections shall be free." Art. I, §10. In Harper I, the North Carolina Supreme Court agreed that the legislature had engaged in

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unconstitutional partisan gerrymandering under the North Carolina constitution and struck down the maps, remanding the case to the lower courts to oversee the redrawing of new maps. The North Carolina Supreme Court in Harper I also rejected the argument that "the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps." This argument is the basis for the ISLT theory.

Thereafter, the North Carolina legislature sought review by the U.S. Supreme Court, advancing the ISLT theory. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

While the case was pending before the U.S. Supreme Court, the makeup of the North Carolina Supreme Court changed after an election and the defendants in *Harper I* sought rehearing with the North Carolina Supreme Court. The North Carolina Supreme Court reheard the case and reversed course, concluding that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina constitution. But the North Carolina Supreme Court did not revisit the decision in *Harper I* that "the Federal Elections Clause does not shield state legislatures from review by state courts for compliance with state constitutional provisions." Because of the subsequent North Carolina Supreme Court decision, the U.S. Supreme Court asked the parties to brief whether it still had jurisdiction over the case.

In a 6-3 decision authored by the Chief Justice, the U.S. Supreme Court concluded that it continued to have jurisdiction over the case / it was not moot because the question of whether the Federal Elections Clause prevents state courts from reviewing state legislative redistricting undertaken pursuant to the Federal Elections Clause was not disturbed by the second North Carolina ruling. In fact, as the Court pointed out, by overruling *Harper I,* the North Carolina Supreme Court "reaffirmed that it retains the authority to review congressional districting plans for compliance with state law."

Turning to the question on the merits, the majority held that going back to *Marbury v. Madison*, "courts have recognized their duty to evaluate the constitutionality of legislative acts." And in this case, state court authority to review state legislative acts undertaken pursuant to the Federal Elections Clause are no different. The Court reasoned that history, state court decisions at the time of founding, and writings from around the time of the founding supported its conclusion that courts may review legislative action and that the Federal Elections Clause does not create an exception to that fundamental principle.

In so holding, the Court also relied on its own precedents, which have already considered the "interplay between state constitutional provisions and a state legislature's exercise of authority under the Elections Clause." The Court indicated three key decisions supported its decision: *Ohio ex rel. Davis v. Hildebrant, Smiley v. Holm, Arizona State Legislature v. Arizona Independent Redistricting Comm'n.* In *Hildebrant*, the Court held that the Elections Clause did

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not prevent a state popular referendum from overriding a redistricting law. Similarly, in *Smiley*, in considering the effect of a Governor veto over a state redistricting plan, the Supreme Court held that a "state legislature's exercise of authority under the Elections Clause…must be in accordance with the method which the State has prescribed for legislative enactments." And finally, more recently in *Arizona State Legislature*, the Supreme Court upheld the state's creation of an independent redistricting commission, which the legislature challenged under the Federal Elections Clause. Pertinent to this case, the Court in *Arizona State Legislature* concluded "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."

Thus, the Court concluded based on the Nation's history and its own precedent that "[a] state legislature may not 'create congressional districts independently of 'requirements imposed 'by the state constitution with respect to the enactment of laws.'" The Court rejected the legislature's arguments that it is only constrained by the Federal Constitution. On this point, the Court noted that the Framers recognized that Legislatures "are the mere creatures of the State Constitutions, and cannot be greater than their creators." The state legislatures are therefore bound by both the Federal Constitution (as they concede) and their own state constitutions, which created them.

Finally, the Court noted that although "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein." State courts should not "read state law in such a manner as to circumvent federal constitutional provisions." This word of caution may be related to the remedies the North Carolina Supreme Court originally ordered, but the U.S. Supreme Court did not decide whether in this case, the North Carolina Supreme Court had "strayed beyond the limits derived from the Elections Clause."

IMLA filed an amicus brief authored by John Korzen of Wake Forest University School of Law arguing that the adoption of the Independent State Legislature Theory would lead to administrability problems for elections and a two-tiered election system for state and federal elections.

***Tyler v. Hennepin County* - Takings / Excessive Fines**

In a unanimous opinion, the Supreme Court concluded that Hennepin County, Minnesota violated the Takings Clause by keeping the surplus equity in a condominium that it sold after the homeowner failed to pay her property taxes (and failed to regain title to that property pursuant to state law). The Taking occurred not with the sale of the property for failure to pay property taxes or when the County kept the tax debt (including interest and penalties), but rather, the County violated the Takings Clause by keeping the surplus equity. As Chief Justice Roberts put it, "[t]he taxpayer must render unto Caesar what is Caesar's, but no more."

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Under Minnesota law, property taxes become a lien against the property once they are assessed. Minn. Stat. § 272.31. If property taxes are not paid during the year in which they are due, they become delinquent the following year, at which point, a county may obtain a judgment against the property. Minn. Stat. § 279.03 subd. 1. As a matter of notice and procedure, each year, the county auditor creates a delinquent tax list, which identifies the properties on which taxes are owed, the taxpayer(s), and the amount of taxes/penalties owed. The delinquent tax list is published twice and mailed to all delinquent taxpayers. A lawsuit is commenced against delinquent taxpayers and if there is no answer, the court enters a judgment against the property.

At this point, delinquent taxpayers have several avenues to avoid forfeiture. First, while title in the property vests in the state after judgment is entered, that title is subject to the right of redemption, which is a 3-year period during which the taxpayer may redeem the property for the amount of delinquent taxes, penalties, costs, and interest. Minn. Stat. §§ 281.01–281.02, 281.17. Second, a property owner seeking to avoid forfeiture who cannot afford to redeem the property, can make a "confession of judgment," which then allows the property owner to consolidate the debt /tax delinquency and pay in installments over five to ten years. If a property owner fails to pursue either of these avenues, absolute title vests in the state and all outstanding taxes, penalties, interest, etc. are canceled. Under Minnesota's tax foreclosure scheme, former property owners have no way to claim any proceeds from the sale of the property in excess of the tax debt.

Geraldine Tyler owned a condominium in Minneapolis and stopped paying taxes in 2010. At the time the County sought judgment under the statutory scheme, she owed $15,000 in unpaid state property taxes, penalties, costs, and interest. She received the statutorily prescribed notice of foreclosure, failed to answer, and then never tried to redeem the property during the 3-year period. She also did not seek to repurchase the property. Thereafter, Hennepin County sold the property for $40,000, and kept the surplus (and distributed it) pursuant to state law.

Ms. Tyler sued the County, claiming that keeping the surplus equity violated both the Takings and Excessive Fines Clauses of the Constitution. In addition to arguing that keeping the surplus equity did not violate the Constitution, the County argued that Ms. Tyler did not have standing as she had additional encumbrances and liens on the property for an outstanding mortgage and HOA lien that amounted to more than the so-called equity in her property.

In a 9-0 decision, the Supreme Court rejected the County's standing arguments and held that the County violated the Takings Clause. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const., Amdt. 5. The Court noted at the outset that the imposition of taxes does not constitute a Taking and that a state or local government may also impose interest and late fees when a taxpayer fails to pay taxes. Furthermore, the Court indicated that a state or local government may also seize property to recover a tax debt without running afoul of the Takings Clause.

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The question in this case was whether a homeowner whose property is sold pursuant to a valid state procedure for failure to pay a tax debt has any property interest in the excess value (after satisfying the tax debt, interest, and fees) of that home. Does that equity or excess value constitute a property interest such that keeping it runs afoul of the Takings Clause?

The Court tells us to answer that question, it looks to state law as an "important source" to understand property rights, but that state law cannot be "the only source." Because "[o]therwise, a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." The Court therefore looks to not just state law to determine if there is a property interest, but also historical practices and the Court's precedent. The Court explains that history dating back to Magna Carta supports the notion that a "government may not take more from a taxpayer than she owes…" And this principle continued in the early adoption of state laws at the time of the founding and at the time of the passage of the Fourteenth Amendment.

In addition to history, the Court relied on its precedents to support its holding (including *United States v. Taylor,* 104 U.S. 216 (1881) and *United States v. Lawton,* 110 U.S. 146 (1884). The Court distinguished *Nelson v. City of New York*, 352 U.S. 103 (1956). In *Nelson*, New York City foreclosed on properties for unpaid water bills and kept the excess. The Court explained in *Nelson,* the property owner had nearly 2 months after the City filed for foreclosure to request the surplus from the sale. In *Nelson*, the homeowners failed to make such a request, so the Court concluded that they forfeited their right to the surplus. In this case, Minnesota law provides no such opportunity for the homeowner to recover the equity surplus once absolute title transfers / after the property is sold. As a result, the Court concluded that *Nelson* is readily distinguishable.

The Court also noted that although Minnesota law would indicate that the surplus equity is not a property right in this case, in other contexts, Minnesota law does recognize that a property owner is entitled to the surplus equity after satisfying a debt (for example, when a bank forecloses on a property for failure to pay a mortgage). The Court reasons that the state cannot manipulate property rights in this manner and make an exception only for itself.

Because the Court concluded that the County violated the Takings Clause, it did not reach the Excessive Fines question. However, Justices Gorsuch and Jackson concurred in the decision and wrote separately to indicate that they would have likely found an Excessive Fines violation.

IMLA filed an amicus brief authored by John Baker and Katherine Swenson of Greene Espel underscoring the impractical and unmanageable aspects of petitioner's arguments.

Groff v. DeJoy **–Title VII / Religious Accommodation**

In an important employment law case, a unanimous Supreme Court "clarified" *Trans World Airlines, Inc. v. Hardison's* "more than . . . de minimis" language, concluding that it does not suffice to establish an "undue hardship" under Title VII. Instead, the Court held that to demonstrate an "undue hardship," an employer must show "a burden is substantial in the overall

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context of an employer's business." While the Court did not overrule *Hardison*, this clarification of its meaning will likely result in new EEOC Guidance and require employers to immediately review and update any employment policies and practices that rely on the de minimis standard.

In this case, Gerald Groff was hired by USPS as a Rural Carrier Associate (RCA). The work for a RCA is as needed and the job requires flexibility. During Groff's employment, USPS contracted with Amazon to deliver packages, including on Sundays. USPS indicated that the success of the Amazon Sunday delivery was critical to USPS.

Groff's sincere religious beliefs dictate that Sunday is meant for a day of worship and rest. He therefore informed USPS that he was unable to work on Sundays. USPS had to find other employees to cover Groff's Sunday shifts, including the postmaster, whose job does not involve delivering mail. USPS was able to find other employees to cover his Sunday shifts for some of the time. Ultimately, Groff was disciplined for failing to work on those days and he resigned from USPS. Groff then sued alleging violations of Title VII for failing to accommodate his religion.

Title VII makes it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." 42 U. S. C. §2000e–2(a)(1) (1964 ed.). Title VII was amended to clarify that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. §2000e(j) (1970 ed., Supp. II). "Undue hardship" is not defined in the statute.

In *Trans World Airlines, Inc. v. Hardison*, a 1977 case, the Supreme Court interpreted what "undue hardship" means under the statute. The *Hardison* decision stated that undue hardship for the employer was "any effort or cost that is 'more than …de minimis.'" Since that time, most lower courts have interpreted "undue hardship" as anything more than de minimis, including the Third Circuit in this case.

In a unanimous decision authored by Justice Alito, the Supreme Court reversed the Third Circuit and clarified what *Hardison* meant, without overruling it. The test the Court adopts today is that an "undue hardship is shown when a burden is substantial in the overall context of an employer's business." The Court stressed that this continues to be a fact intensive inquiry, and courts will need to consider "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of [an] employer." (internal quotations omitted).

While the Court squarely rejected the de minimis standard from *Hardison*, it explained that the decision could not be "reduced to that one phrase." The Court noted that it was "doubtful" that

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this one line in *Hardison* was meant to take on such a "large role." The Court explained that the governing standard from *Hardison*, which it adopts, was that an accommodation is not required "when it entails substantial costs or expenditures" (internal quotations omitted). The de minimis language, the Court explains, was just a point the majority made in reference to Justice Marshall's dissent, but lower courts have then "latched on" to that standard, despite the conflicting language in the *Hardison* majority regarding "substantial costs."

The Court noted that a textualist reading of the statute supports its decision that the correct standard to determine whether an accommodation request is an "undue hardship" is if it presents "substantial costs" in the overall context of the employer's business. After all, the Court explains "undue hardship… means something very different from a burden that is merely more than de minimis, i.e., something that is 'very small or trifling.'" (citing Black's Law Dictionary). The Court also stressed throughout the opinion that the Solicitor General (who represented the employer) did not advocate for the de minimis standard.

One of the other issues in the case was whether courts can consider an accommodation request's impacts to coworkers. On this point, the Court notes that "an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis without examining" those business ramifications. The Court also pointed out that considerations of coworkers' dislike for religion or animosity to religion cannot be considered "undue" in the analysis.

Additionally, while the Court changed the de minimis standard to the "substantial cost" standard, it did not disturb *Hardison's* holding regarding seniority rights. In *Hardison*, the Court held that Title VII does not require a unionized employer to deprive senior employees of their seniority rights under a collective bargaining agreement in order to accommodate an employee's religious practices.

Finally, from a practical perspective, the Court also noted that it agrees that "a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by [its] clarifying decision." The Court indicates that it agrees with the EEOC that things like covering "administrative costs involved in reworking schedules, the infrequent or temporary payment of premium wages for a substitute, and voluntary substitutes and swaps when they are not contrary to a bona fide seniority system" would not be an undue hardship. But the Court does not ratify the EEOC guidance "in toto" given that the agency has not had the "benefit of the clarification" that the Court adopts today.

IMLA filed an amicus brief authored by Andrew Hessick of the University of North Carolina Law School highlighting the consequences for local governments of changing the test for religious accommodations in the workplace.

***Sackett v. EPA* –WOTUS**

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The case arose when the Sacketts began backfilling a housing lot near Priest Lake, Idaho. According to the EPA, this violated the Clean Water Act, which prohibits discharging pollutants including gravel into "navigable waters," defined as "waters of the United States." (WOTUS). Under the CWA, WOTUS has been construed to include "wetlands" that are "adjacent" to navigable water. The EPA determined that the wetlands on the Sacketts' lot ultimately fed into Priest Lake and issued a notice directing the couple to cease backfill activities and restore the property, under threat of fines exceeding $40,000 per day. The Sacketts sued, challenging the EPA's interpretation of the CWA.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court fractured when it considered the definition of WOTUS. Justice Scalia penned a narrow description of WOTUS, limiting it to "relatively permanent, standing or flowing bodies of water" and wetlands with "continuous surface connection" to permanent waters. In contrast, Justice Kennedy had found that wetlands with a "significant nexus" to navigable waters are WOTUS; the relevant inquiry was whether the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of navigable waters.

In this case, the Ninth Circuit adopted the more expansive Kennedy "significant nexus" test, asking whether the wetlands in question "significantly affect" navigable waters. Applying that standard, the Circuit held that the Sackett's property was covered by the CWA.

The Supreme Court reversed. Justice Alito, joined by Justices Roberts, Thomas, Gorsuch, and Barrett, expressly discarded Justice Kennedy's "significant nexus" test from *Rapanos* as "particularly implausible," facilitating inconsistent and unpredictable application by the EPA: "This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are 'left to feel their way on a case-by-case basis.'" While the majority acknowledged that the CWA has extended to "more than traditional navigable waters," it goes on to say that the use of the word navigable should be limiting and "[a]t a minimum, then, the use of 'navigable' signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans.'"

In terms of wetlands, the majority concedes that some will qualify as WOTUS. Whether the CWA can regulate a wetland depends on whether it is "adjacent" to WOTUS. The majority reprises and expands on the more rigorous "continuous surface connection" standard from *Rapanos* to define "adjacent." In that context, wetlands that are "adjacent" to navigable waters will only fall within the CWA if they are "as a practical matter indistinguishable" from WOTUS—meaning that there must be "a continuous surface connection" to navigable waters. It is not enough for the wetlands to be near WOTUS, though the Court does acknowledge that there may be temporary interruptions in a continuous connection due to events like low tides or dry spells. The majority rejected a broader reading of "adjacent" that would have included "neighboring," finding that such a definition is inconsistent with the text of the Act.

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The Court also noted that given the sweep of the CWA and the federalism principles at stake, Congress must enact "exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." And here, the Court found there was not clear Congressional intent for a broader definition of WOTUS.

Applying these standards, the majority held that Sacketts' property does not constitute wetlands falling within the CWA.

Justice Kavanaugh, joined by Justices Kagan, Sotomayor and Jackson, concurred that the CWA did not cover the Sacketts' property, but disagreed with the majority's analysis. He saw a linguistic inaccuracy in the use of "adjoining" and a failure to appreciate the crucial interrelationships between non-contiguous waters:

> In my view, the Court's "continuous surface connection" test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands. But "adjacent" and "adjoining" have distinct meanings . . . Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.

IMLA filed an amicus brief authored by Andre Monette and Roderick Walston arguing that local government infrastructure should not be considered WOTUS.

***United States v. Hansen* –First Amendment / Immigration**

At issue in this case was an overbreadth challenge to 8 U.S.C. §1324(a)(1)(A)(iv), which prohibits "encourage[ing] or induc[ing]" illegal immigration. The facts of this case were largely irrelevant to local governments, but because this same statute has been used by ICE to threaten local governments and local government officials with prosecution, the constitutionality of the statute has important First Amendment implications for local governments and their officials. Additionally, in the past, local governments were also forced to certify compliance with the statute (among others) in their Byrne Jag grant applications or forego millions of dollars, which resulted in significant litigation between local governments and the federal government. The concern with this case for local governments was that a broad reading of the statute could implicate health and welfare programs that local governments offer their residents regardless of citizenship status and chill local government speech regarding immigration.

In a 7-2 ruling authored by Justice Barrett, the Supreme Court concluded that the statute "reaches no further than the purposeful solicitation and facilitation of specific acts known to violate

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federal law." The overbreadth challenge therefore failed as it did not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep."

Hansen argued that the statute punishes so much protected speech, that it must be struck down as unconstitutional, even though he conceded that as applied to him and his behavior, it would not be unconstitutional. As the majority explains, "the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied. We have justified this doctrine on the ground that it provides breathing room for free expression." Thus, the overbreadth doctrine is a safeguard against chilling too much constitutionally protected speech, even though it may allow an undeserving litigant to escape punishment. However, the Court explained "to justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep."

In order to determine how much speech the law was sweeping in for the overbreadth challenge, the Court first had to determine how to interpret the key statutory terms. Specifically, whether "encourage" and "induce" should be interpreted in their criminal law context to require a mens rea element or whether they should be interpreted in their ordinary usage. Hansen argued in this case that the terms should be interpreted using their ordinary meaning, which would mean the statute would criminalize far more speech, which would have likely made it overbroad and therefore unconstitutional.

The Court rejected Hansen's interpretation, concluding that the terms "encourage" or "induce" as used in the statute should be interpreted in the criminal code context, which requires intent to be prosecuted. The Court looked at the statutory history, context, and the terms' criminal-law usage, which dates back hundreds or years, to all point to the fact that the terms should be used in their criminal law context. Because the Court interpreted the terms "encourage" and "induce" to refer to the crimes of solicitation and facilitation and there is overwhelming evidence of the United States prosecuting people for those crimes (e.g., smuggling noncitizens into the country and issuing fraudulent Social Security numbers) under the statute and not prosecuting people for protected First Amendment speech, the Court rejected the overbreadth challenge.

The Court grappled with some of the hypotheticals that local governments were concerned with including a "government official who instructs 'undocumented members of the community to shelter in place during a natural disaster'" and concluded that none of the parade of horribles offered by Hansen were "filtered through the elements of solicitation and facilitation" including most importantly, the mens rea / intention requirement. Because the Court found that the statutory terms had a narrower meaning, the Court concluded that it would not reach the speech Hansen claimed it did. Instead, it would only reach speech that is "integral to unlawful conduct," which is unprotected.

Because the Court could not grapple with all the hypotheticals posited by Hansen and the amici in this case, the Court did note that should a prosecution ever occur in a grayer area, litigants are

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free to bring up an as applied challenge to the statute and argue that the statute violates the First Amendment as applied to the particular litigant.

IMLA filed an amicus brief authored by Molly Alarcon and Jamie Huling Delaye of the San Francisco City Attorney's Office.

***Health and Hospital Corporation of Marion County, Indiana v. Talevski* – Spending Clause**

The issues in this case were: (1) Whether, in light of compelling historical evidence to the contrary, the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983; and (2) whether, assuming spending clause statutes ever give rise to private rights enforceable via Section 1983, the Federal Nursing Home Amendments Act of 1987's transfer and medication rules do so. The Court held that the provisions of the Federal Nursing Home Amendments Act of 1987 at issue unambiguously create rights enforceable under 42 U.S.C. § 1983, and private enforcement under Section 1983 is compatible with the FNHRA's remedial scheme.

IMLA filed an amicus brief authored by Christopher Wright and John Grimm of Harris, Wiltshire & Grannis LLP.

***Wilkins v. United States* – Quiet Title Act**

The issue in this case was whether the Quiet Title Act's statute of limitations is a jurisdictional requirement or a claim-processing rule. The Court held that it was a non-jurisdictional claims-processing rule.

IMLA filed an amicus brief authored by Daniel Bromberg and Jeffrey Mikoni of Pillsbury Winthrop. Local governments often find themselves in property disputes with the federal government and IMLA's amicus brief therefore argued that the Act's statute of limitations should be interpreted to be a claims-processing rule, rather than a jurisdictional rule.

***Allen v. Milligan* - Voting Rights Act**

In a 5-4 decision, the Supreme Court affirmed a 3-judge panel's decision preliminarily enjoining Alabama's legislative districting maps concluding that the State's maps likely violated Section 2 of the Voting Rights Act (VRA) by discriminating against black voters. While the majority, authored by Chief Justice Roberts, and the primary dissent, authored by Justice Thomas, traded barbs about who was tilting at windmills, the upshot of the decision is that not only did the Court strike down Alabama's legislative maps as violating Section 2 of the VRA, but in doing so, the Court also upheld a 40-year precedent interpreting the VRA, which the Court called the "heart" of the case.

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Alabama has seven congressional districts, each with a single representative. Alabama has one majority black voting district, despite black voters making up 27% of Alabama's population. In 2020, the census showed that Alabama's population grew by 5.1%. That growth was not enough to result in a new congressional seat, but because it was uneven across the State, the State began redrawing its congressional maps.

The mapmaker redrew district lines based on guidelines provided by the state to prioritize "population equality, contiguity, compactness, and avoiding dilution of minority voting strength." The State also prioritized, "as a secondary matter, avoiding incumbent pairings, respecting communities of interest, minimizing the number of counties in each district, and preserving cores of existing districts." The resulting map was similar to the previous 2011 map and again produced just one district where black voters constituted the majority despite making up more than 25% of the population. Three groups of plaintiffs sued the State, claiming the maps violated Section 2 of the VRA by diluting the votes of the States's black residents.

The Fifteenth Amendment provides: "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." Nearly 100 years later, Congress passed the Voting Rights Act. Section 2 of the VRA when it was originally passed tracked the Fifteenth Amendment. In 1980, the Supreme Court held that while Section 2 prohibits states from acting with a discriminatory motive, it does not prohibit laws that only have a discriminatory effect. *See City of Mobile v. Bolden,* 446 U. S. 55 (1980). In response to that decision, Congress amended Section 2 of the VRA to override the *Mobile* decision in what the Court describes as a compromise amendment, which now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U. S. C. §10301

After the plaintiffs in this case sued, a three-judge panel held a hearing on the preliminary injunction motion and concluded that whether the new map likely violated Section 2 "was not a

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close one," it likely did, and the Supreme Court affirmed that decision. The Supreme Court relied on *Thornburg v. Gingles,* 478 U.S. 30 (1986) and its decision was as much of an affirmance of the lower court's decision finding that Alabama abridged black voters' rights in the State as it was an affirmance and defense of *Gingles* itself. The Court reiterated that plaintiffs must demonstrate three "preconditions" under *Gingles* to bring a successful Section 2 case.

> First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district...Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate. Finally, a plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters.

The Supreme Court agreed with the lower court that the plaintiffs had met the *Gingles* preconditions and therefore demonstrated that Alabama had likely violated Section 2 of the VRA. First, the majority agreed that black voters in Alabama could constitute a majority in a second district and that district would be "reasonably configured." In so concluding, the Court noted that the maps the plaintiffs submitted into evidence which showed a second majority black district had "equal populations, were contiguous, and respected existing political subdivisions…" The Court rejected the State's argument that the plaintiffs' maps failed to keep traditional communities of interest intact (the Gulf Coast) or that the Black Belt is not a community of interest. Nor could the State rely on its adherence to previous districts to thwart the plaintiffs' claims here. If that were the case, the Court noted that "a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan."

The Court found the plaintiffs had met the other *Gingles* preconditions and the State did not seriously dispute that black voters are politically cohesive or that the white voters sufficiently block the black voters' preferred candidates in the State. The Court also found that the plaintiffs had demonstrated under the totality of the circumstances the political process was not equally open to black voters observing that "Black Alabamians enjoy virtually zero success in statewide elections."

After finding for the plaintiffs, the Court indicated that the "heart of the[] case" was the State's "attempt to remake [the Court's] §2 jurisprudence" with a "race-neutral benchmark." The State argued that using computer technology, mapmakers can make millions of maps to comply with traditional redistricting criteria but not consider race. If the maps are race-blind and there are the same number of majority-minority districts in the State's plan as compared to the "race-neutral benchmark," the State contends that it cannot violate Section 2. The Court rejected the State's theory and instead, reaffirmed its longstanding precedent, underscoring that *Gingles* recognized Congress' compromise in amending Section 2 in 1982 that that the Act turns on discriminatory effects, not just intent.

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The Court rejected Alabama's argument that only purposeful discrimination is prohibited under the VRA as well as its argument that Congress may not authorize race-based redistricting remedies under Section 2. In rejecting these arguments, the Court observed that its opinion was not "diminish[ing] or disregard[ing]" the concern that "§2 may impermissibly elevate race in the allocation of political power within the States," but the Court was faithfully applying its precedents in reaching its conclusion.

The Court also noted that prohibiting discriminatory effects does not automatically require racial proportionality (which the Court has rejected). Indeed, the Court noted that plaintiffs are rarely successful in Section 2 VRA claims and underscored that it is still a rigorous standard to meet. In his concurrence, Justice Kavanaugh notes that to prevent *Gingles* from turning into a requirement for proportionality, courts must "rigorously apply the 'geographically compact' and 'reasonably configured' requirements" and in this case, the fact that some of the plaintiffs' proposed maps that showed a second majority-minority district respected county lines as well as Alabama's plan did was "important."

In reaffirming *Gingles,* the majority underscored that *Gingles* is a statutory precedent case, meaning it is interpreting a congressional act, and since it was decided, Congress has never sought to change the *Gingles* framework, despite other amendments to the VRA. Statutory precedents are afforded a greater degree of *stare decisis*.

***Biden v. Nebraska* – Separation of Powers / Major Questions Doctrine / Standing**

The issue in this case was (1) whether six states have Article III standing to challenge the Department of Education's student-debt relief plan; and (2) whether the plan exceeds the secretary of education's statutory authority or is arbitrary and capricious.

The Court concluded that the Secretary of Education did not have authority under the Higher Education Relief Opportunities for Students Act of 2003 to establish a student loan forgiveness program that would have canceled roughly $430 billion in debt principal and affect nearly all borrowers.

***Students for Fair Admissions Inc. v. University of North Carolina* / *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* – Affirmative Action**

The issues in this case were: (1) whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

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The Supreme Court ruled that Harvard and the University of North Carolina's affirmative action programs violated the Equal Protection Clause.** The ruling gutted affirmative action in higher education and may have ramifications beyond the context of higher education.

Harvard and the University of North Carolina are both old and selective universities. They get tens of thousands more applicants from students than they can admit each year. And they each use race in the admissions process in what they describe as a holistic individualized fashion (i.e., it is one factor in their review) to achieve their goals of diversity. Ultimately, race can be a "plus" factor (among many factors) in the admissions process. The universities fashioned their admissions policies from *Grutter v. Bolinger,* which held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Students For Fair Admissions (SFFA) sued Harvard and UNC, arguing that their use of race in admissions violates Title VI and the Equal Protection Clause.

In a 6-3 decision authored by Chief Justice Roberts, the Court ruled in favor of SFFA. And while the Court did not explicitly overrule *Grutter,* it narrowed its holding to the point of near vanishing. The Court held that race-based admissions programs may only be used "within the confines of narrow restrictions." They must "comply with strict scrutiny, they may never use race as a stereotype or negative, and – at some point – they must end." Here, the Court concluded that while Harvard and UNC's programs were "well intentioned," they failed each criterion and therefore violated the Equal Protection Clause.

The Court relied on the landmark decision *Brown v. Board of Education,* indicating that *Brown* was "unmistakably clear: the right of public education 'must be made available to all on equal terms.'" And the majority noted that *Brown* and its progeny reflected the "core purpose of the Equal Protection Clause," which was to do "away with all governmentally imposed discrimination based on race." Indeed, the majority explains that "[e]liminating racial discrimination means eliminating all of it."

The court reaffirmed that if the government is to use race as a factor in any decision, it must survive strict scrutiny – i.e., the racial classification must be used to further a compelling governmental interest that is narrowly tailored to achieve that interest. The Court noted that it has only upheld the use of racial classifications outside the context of affirmative action in two circumstances: 1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute;" and 2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot."

The majority then turned to its prior affirmative action cases: *Regents of Univ. of Cal v. Bakke,* 438 U.S. 265 (1978) and *Grutter v. Bolinger,* 539 U.S. 306 (2003). Justice Powell, who announced the opinion of the Court in the fractured *Bakke* decision, rejected three of the four justifications the University put forth as not sufficiently compelling, but found that "the educational benefits that flow from a racially diverse student body" was "a constitutionally permissible goal for an institution of higher education. And then 25 years later in *Grutter,* the

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majority endorsed Justice Powell's view that "diversity is a compelling state interest that can justify the use of race in university admissions." The majority in this case then noted that the *Grutter* Court was reluctant to allow racial classifications even after outlining the circumstances when they could be used, and thus the Court in *Grutter* put a temporal requirement on any use of race, emphasizing that there must be a "termination point" or "sunset provisions."

After reviewing this precedent, the Court concluded that the diversity interests that Harvard and UNC put forward "cannot be subjected to meaningful judicial review." The Court called the goals "commendable," but concluded they are not "sufficiently coherent for purposes of strict scrutiny," explaining it is "unclear how courts are supposed to measure any of these goals." Moreover, even if these goals could be measured, according to the majority, it would be impossible to know when they had been reached.

Additionally, the Court noted that Harvard and UNC have failed to "articulate a meaningful connection between the means they employ and the goals [of diversity that] they pursue." Here, the Court took issue with the specific racial categories they utilize in their admissions process including: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African American; and (6) Native American." The Court explained the categories are overbroad (as they do not distinguish between East and South Asian, for example), arbitrary, and undefined. The Court reasoned that the use of these racial categories undermines the universities' goals.

In striking down the universities' admissions policies, the Court concluded that courts "may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." And here, that ability for measurable judicial review is lacking with regard to the diversity interest.

The Court then indicated that the race-based admissions programs employed by the universities would also fail because they use race as a negative. Here, the Court explained that the lower court found that Harvard's admission process has led to a decrease in Asian-American and white students being admitted. Because college is a "zero sum" game, a benefit to some applicants, according to the Court, will necessarily come "at the expense" of the other group; race is therefore being used as a negative. The Court also saw the university admissions programs as impermissibly stereotyping minority students by assuming "minority students always (or even consistently) express some characteristic minority viewpoint on any issue."

And finally, the Court would also strike down the admissions programs because they "lack a logical end point," which the Court found *Grutter* commands.

The Court did indicate that its opinion should not be construed to prohibit universities from considering an applicant's discussion of race in an essay. However, the Court cautioned that the universities should not do something indirectly that the Court has held they cannot do directly. Thus, for example, for the university to consider a discussion of race in an essay, it must be tied

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to something like the student's courage or determination - it must be "treated based on his or her experiences as an individual—not on the basis of race."

Finally, in response to the dissent, the majority also reiterated that affirmative action cannot be used to remedy the effects of societal discrimination, noting that this had been firmly rejected as a compelling interest in *Bakke* and *Croson,* which involved a preferential government contracting program.

The decision produced six separate writings totaling over 200 pages. Justice Thomas wrote a separate concurrence "to offer an originalist defense of the colorblind Constitution."

Justice Sotomayor authored a dissent, joined by Justices Kagan and Jackson, in which she accuses the majority of "subvert[ing] the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society." The dissent noted that the majority ended race-conscious college admissions and accused the majority of overruling decades of precedent. According to the dissent, the impact of the decision will be to "decrease the pipeline of racially diverse college graduates to crucial professions."

Justice Jackson (who was recused from the Harvard case), also wrote a dissent in which she provided a historical overview of race discrimination in this country. In her dissent, she opined that "[g]iven the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well documented intergenerational transmission of inequality that still plagues our citizenry."

**The Supreme Court noted that Harvard is a private university and therefore not subject to the Equal Protection Clause. But the Court explained that Harvard was sued under Title VI and the Court has held that a violation of the Equal Protection clause constitutes a violation of Title VI, and its analysis was therefore the same for both universities.

***Counterman v. Colorado* – First Amendment**

The issue in this case was whether to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence. The Court held in a 7-2 decision that to establish that a statement is a "true threat" unprotected by the First Amendment, the state must prove that the defendant had some subjective understanding of the statements' threatening nature, based on a showing no more demanding than recklessness.

***Haaland v. Brackeen* - Tribal Law / Tenth Amendment**

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The issues in this case were: (1) Whether various provisions of the Indian Child Welfare Act of 1978 (ICWA) — namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) — violate the anticommandeering doctrine of the 10th Amendment; (2) whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families" and for "Indian foster home[s]"; and (3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

The Supreme Court upheld ICWA and rejected Texas' and the individual plaintiffs' challenges to the statute. The Court rejected Texas' arguments that ICWA unconstitutionally commandeered the States in violation of the Tenth Amendment. There was also an Equal Protection challenge to ICWA (the challengers argued that ICWA's placement preferences discriminated on the basis of race in violation of the Equal Protection Clause), but the Court found the parties lacked standing to make this challenge so did not reach that question on the merits.

4. Other Cases of Interest

A. Pending Supreme Court Certiorari Cases in Which IMLA Participated as an Amicus

***Tekoh v. Vega* – Expert Testimony**

This case is a follow-on to *Vega v. Tekoh*, 597 U.S. 134 (2022), in which the Supreme Court held that a violation of *Miranda* rules does not automatically provide a basis for a Section 1983 cause of action. There, the Court reversed a Ninth Circuit decision which had held in favor of medical center employee Terence Tekoh (Tekoh), who provided Deputy Carlos Vega (Vega) of the Los Angeles Sheriff's Department (LASD) with a written confession to sexually assaulting a patient. Vega had questioned Tekoh about the incident without informing him of his *Miranda* rights, and the un-*Mirandized* statement was admitted into evidence. Tekoh was acquitted but brought a Section 1983 claim against Vega on the grounds that failure to provide a *Miranda* warning violated the Fifth Amendment. The Ninth Circuit held in Tekoh's favor, but the Supreme Court reversed: while *Miranda* established procedural protections for custodial interrogations, it did not inherently rise to the level of a Fifth Amendment violation when those rules were breached.

The Court's rejection of Tekoh's *Miranda* action did not end his Section 1983 campaign. On remand, the Ninth Circuit considered for the first time an alternate appeal asserted by Tekoh: that Vega had coerced Tekoh's confession, and that the district court had improperly excluded an expert witness who would have supported Tekoh's claims of coercion. Over a dissent from Judge Miller, the Ninth Circuit panel held that the district court had abused its discretion by excluding Tekoh's expert, in violation of FRE 702. (*Tekoh v. County of Los Angeles*, 75 F.4th 1264 (9th Cir. 2023) (*Tekoh II*)).

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Vega and LASD moved for rehearing *en banc* in *Tekoh II*, arguing that the expert's testimony had nothing to do with the key question for purposes of Tekoh's Section 1983 claim that Vega unconstitutionally coerced the written confession:

> As correctly found by the district court, the expert's opinions were irrelevant and an impermissible attempt by the expert to confuse the issues and rehabilitate the credibility of the Plaintiff by exploring why he may have falsely confessed if he was innocent, instead of offering relevant opinions as to whether Deputy Vega acted *unlawfully* in questioning the Plaintiff. . . .
>
> Notably, barring situations where an officer knew that a plaintiff was a minor or had a mental disorder or diminished mental capacity in which case testimony by an expert may *arguably* be relevant, *it is extremely doubtful that a "false confessions expert" should ever be allowed to testify in a civil action to determine, not whether the confession was actually false, but whether a police officer acted lawfully.* The district court gave careful consideration to whether the expert should be allowed to testify, repeatedly addressing the issue on *multiple* occasions, and found that the expert's testimony should be excluded, unless the defense opened the door as to certain topics. Clearly, it was not an *abuse of discretion* for the district court to exclude the expert, and a rehearing should be granted en banc and/or by the panel.

The Ninth Circuit denied the petition for rehearing *en banc*, with ten judges dissenting. In seeking Supreme Court certiorari, Vega and LASD will argue that exclusion of testimony from Tekoh's expert was not only appropriate but fully necessary to avoid a jury's improper inference about Tekoh's credibility. They plan to allege a conflict between the Ninth Circuit's allowance of this type of inapposite expert testimony and the posture of other federal and state courts that have rejected expert testimony in very similar circumstances. They will further emphasize the harmful consequences for law enforcement of the Ninth Circuit's holding, including language in the Circuit's opinion appearing to say that so-called minimization tactics (when police officers appear to minimize/justify a suspect's wrongdoing in an effort to encourage an admission of guilt) are inherently coercive.

B. Pending State Appellate Cases and United States Courts of Appeals Cases in which IMLA Participated as an Amicus

***Slaybaugh v. Town of Smyrna / Rutherford County* – Sixth Circuit / Takings**

This case, now being appealed to the Sixth Circuit, is another in a growing trend towards Fifth Amendment Takings claims seeking compensation for damage to private property during legitimate law enforcement activity.

Here, the plaintiffs are Mollie and Michael Slaybaugh, homeowners in the Town of Smyrna within Rutherford County, Tennessee. They seek recovery under the Takings Clause for damage caused

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to their home by the Rutherford County Sheriff's Department (RCSD) during the execution of an arrest warrant for Mrs. Slaybaugh's adult son who was wanted in connection with the murder of a police officer. While their son was visiting the Slaybaughs, approximately 25 officers from the RCSD and the Smyrna Police Department (SPD) arrived outside the home. Mrs. Slaybaugh exited the house and was informed that her son was allegedly involved in a homicide and was wanted for questioning. She was not permitted to re-enter the home; Mr. Slaybaugh also subsequently left the residence. Officers then attempted to convince the son to exit the property, requesting over a loudspeaker that he leave the house with his hands up. He did not comply and remained in the house overnight. The RCSD and SPD officers eventually left but returned the next morning with an arrest warrant. When the son again refused to exit, police fired approximately 35 canisters of tear gas into the property, effecting arrest without injury to anyone but damaging the residence.

The Slaybaughs then sought reimbursement of $70,000 for harm caused to their home, a demand that was refused.

The Slaybaughs filed suit against the Town of Smyrna, Rutherford County, and the RCSD. They did not dispute that the police action was a legitimate exercise of police powers but argued that the damage to their residence constituted an uncompensated governmental taking of private property for public use, supporting a Section 1983 claim for violation of the Fifth Amendment's Takings Clause and a similar claim under the Tennessee Constitution.

The Middle District of Tennessee first assessed the viability of the Slaybaugh's *Monell* claims, finding that, because the decision refusing to pay compensation was made by an "official[] with final decision-making authority" the City and County had acted pursuant to a policy or custom. But the court found that the Fifth Amendment did not afford relief to the homeowners, reviewing several cases which IMLA has also participated in as an amicus. Ultimately, the court agreed with the Tenth Circuit's analysis from *Lech v. Jackson,* 791 Fed.Appx. 711 (10th Cir. 2019) noting:

> The court finds the analysis in *Lech* to be persuasive, and it addresses all of the plaintiffs' arguments in this case (and more). While this area of the law continues to develop, the court finds it noteworthy that neither the Supreme Court nor any federal Court of Appeals has ever held that property damage incurred in the course of executing a valid arrest.

IMLA filed an amicus brief in support of the Town and County, authored by Erich Eiselt of IMLA.

***Scott v. County of Baltimore* – Fourth Circuit / FLSA**

This case involves the question of whether the Fair Labor Standards Act (FLSA) applies to inmates working at a County-run entity at a location away from their incarceration facility.

Here, Plaintiff Michael Scott and other inmates at the Baltimore County Detention Center (BCDC) were placed by the County Department of Corrections (DOC) at the County's Materials Recycling

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Facility (MRF), where they worked 10 hours per day sorting recyclables along conveyor belts. They were paid $20 per day. Scott and other current and former inmates brought a class action against the County, alleging that it violated the FLSA, 29 U.S.C. § 201 et seq. and its state-law equivalent, by failing to pay them minimum wage and overtime when they worked off-site during their incarceration.

The U.S. District Court for the District of Maryland granted summary judgment in favor of the County, ruling that inmates were not "employees" under the FLSA as a matter of law. It cited the relevant FLSA language:

> The FLSA requires an "employer" to pay an "employee" no less than the federal minimum wage. 29 U.S.C. § 206(a). Unhelpfully, the Act circularly defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The Act further defines "employer" as "any person acting . . . in the interests of an employer in relation to an employee," and defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(d), (g).

The court noted that the FLSA does not address inmate coverage, but the Fourth Circuit has done so, at least as to on-site work: "The Fourth Circuit has categorically excluded work conducted within a prison from the FLSA's purview; however, it has yet to directly opine on a case involving work conducted off-site."

The District Court looked to Fourth Circuit precedent to analyze whether those who participated in the MRF work detail were "employees" of the County, analyzing three factors that were first utilized by that Circuit in a 1993 opinion, *Harker v. State Use Industries*, and have been utilized since: "(1) the purpose of [the] work program, (2) the nature of the working relationship between Plaintiffs and Defendant, and (3) the purposes of the FLSA."

Regarding (1)--the purpose of the work, the District Court ruled that the work was unlike traditional employment for purely pecuniary reasons but was intended to be rehabilitative and "equip [inmates] with marketable skills, promote habits of work and responsibility and contribute to the expense of the employment program and the committed person's cost of incarceration."

Regarding (2) --the nature of the working relationship, the District Court focused on whether the plaintiffs had "made the 'bargained-for exchange of labor' for mutual economic gain that occurs in a true employer-employee relationship" or whether they rather had a "custodial relationship" with the County. Here, the District Court ruled that the nature of the working relationship weighed against FLSA coverage, as "the Fourth Circuit has been skeptical of inmates' negotiating power."

Finally, regarding (3)--the purpose of the FLSA, the District Court noted that the Act has two underlying purposes that must be considered in determining whether the plaintiffs were covered "employees" under the FLSA: "(1) the correction of labor conditions detrimental to the minimum standard of living, and (2) the prevention of unfair competition in commerce from the use of underpaid labor."

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The District Court ruled that the first underlying purpose of the FLSA – allowing workers to maintain their "standard of living" – would not be furthered by application to Plaintiffs, as it was "the jail's constitutional obligation to provide inmates with their basic needs," such that they did not require a minimum wage to provide for themselves. In discussing the second underlying purpose of the FLSA – the prevention of unfair competition by those who pay sub-minimum wages – the District Court observed that the economic advantage of inmate labor was retained by the County and not shared with, or transmitted to, any private third party. Thus, there was no risk of a private business obtaining an unfair advantage via sub-minimum wage labor.

The Court determined that the FLSA did not apply as a matter of law and granted summary judgment to the County. In so doing, it paralleled similar analyses in the Second, Fifth, Seventh, and Ninth Circuits. (The Third Circuit has found that off-site inmate work for a private entity does fall within the FLSA).

IMLA filed an amicus brief in support of Baltimore County, authored by Steven Klepper, Christopher Jeffries, and Summer Niazy with Kramon & Graham.

***U.S. News & World Report, L.P. v. Chiu* – N.D. California / Administrative Subpoenas**

This case involves administrative subpoenas served by San Francisco City and County (San Francisco) on US News and World Report (USNWR) seeking information about the publication's hospital rankings methodology and financial interactions with ranked hospitals. USNWR challenges the subpoenas as a First Amendment violation; San Francisco asserts that it has a legitimate right to obtain information about a program it suspects is biased and poorly substantiated. The case implicates a government's ability to investigate wrongdoing in its community.

For 34 years, USNWR has ranked US hospitals, producing a coveted "Best Hospitals" category awarded to those it determines worthy of that status. Promoting itself as an authoritative resource in comparing hospitals overall regionally, and with respect to specialties, procedures, and specific medical conditions, USNWR refers to its Best Hospitals rankings as "authoritative" and describes itself as "the global authority in hospital rankings." USNWR claims that it has been "[h]elping patients and families find the best healthcare for more than 30 years." It describes its hospital rankings as "a tool that can help these patients find sources of skilled inpatient care." And it encourages patients to follow its rankings even over physician referrals, claiming "[t]he hospital the doctor suggested for you might be right for you – but maybe not." Across its rankings, including rankings of hospitals, USNWR says it uses "world-class data and technology to publish independent reporting, rankings, journalism and advice."

Despite those assurances, USNWR does not disclose all the criteria used to determine its rankings, or the fact that some hospitals pay USNWR for the right to promote themselves as "Best Hospitals" and the amounts paid for such rights. In June 2023, City Attorney David Chiu (Chiu) wrote to

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USNWR, noting concerns by some experts that USNWR's rankings suffer from poor and opaque methodology and mislead those using the rankings. He also pointed to perverse incentives for hospitals to devote resources to practice areas which are the subject of particular USNWR scrutiny and explains how the rankings may be warping the provision of healthcare in the community.

Citing his duty on behalf of the City and County of San Francisco to ensure their access to accurate healthcare information, he requested information about USNWR's rankings methodology and its assertions about the quality of those rankings. He also demanded that USNWR comply with Federal Trade Commission regulations requiring prominent disclosure about the hospitals from which it receives payments.

Through its counsel, USNWR responded in July 2023, defending its processes and the legitimacy of its rankings and challenging Chiu's questions as an attempt to coerce changes in USNWR's results. Because its rankings are noncommercial speech, said USNWR, Chiu's questions violated the publisher's First Amendment rights and constituted viewpoint discrimination.

On January 23, 2024, after receiving no further response, Chiu's Office issued a Subpoena for Interrogatory Responses under the powers conferred by the California Business & Professions Code and California Government Code "as part of a pending investigation concerning potential violations of California Business and Professions Code section 17200, *et seq.* (Unfair Competition Law). As Chiu's Office stated, the Unfair Competition Law "prohibits USNWR from engaging in any unlawful, unfair, or fraudulent business act or practice." Specifically, it said "this Office's investigation relates to USNWR's advertising representations about its hospital rankings and its failure to disclose payments received from hospitals that it ranks." The Office demanded responses to questions about USNWR's methodologies, hospital payments, and so on.

USNWR rapidly moved for preliminary and permanent injunction in the Northern District of California, asserting that Chiu was acting on a disagreement with the publication's "editorial viewpoint":

> The Subpoenas make clear that the City Attorney is using governmental process to engage in viewpoint discrimination—and, indeed, is proceeding as though he holds censorial (or editorial) authority over how U.S. News performs its journalistic work ranking hospitals. . .. Simply put, the City Attorney believes his office has the power to second-guess and redirect the journalistic decision-making of U.S. News based on his own view of what factors should and should not be considered. This is the same power that governmental censors and licensors had claimed over the press until the Framers of the U.S. Constitution enshrined the First Amendment more than 200 years ago in order to abolish any such power.

IMLA filed an amicus brief on behalf of the City and County of San Francisco and David Chiu authored by Mara Elliott and David Ankcorn of the City of San Diego Law Department.

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***Simon v. City & County of San Francisco*, Ninth Circuit / Fourth Amendment / Electronic Monitoring**

This case challenges provisions of San Francisco's Pretrial Electronic Monitoring (PTEM) Program. The San Francisco Superior Court exercises discretion to hold an arrestee in custody or, based on an individualized analysis, to release a detainee from custody before trial, subject to the detainee's agreement to participate in the PTEM Program--which requires participants to allow warrantless four-way searches (person, residence, automobile or property) and allows sharing among law enforcement agencies of ankle bracelet information documenting the arrestee's movements and whereabouts. As a condition to obtaining pretrial release, three criminal defendants, each of whom had been charged with violent assault and domestic violence, agreed to be bound by the PTEM Program. However, they subsequently brought suit against the City and County of San Francisco and its Sheriff (collectively San Francisco), challenging the PTEM Program on Fourth Amendment and other grounds and seeking to enjoin the PTEM Program.

On February 23, 2024, a federal district court entered a preliminary injunction against San Francisco prohibiting it from enforcing the warrantless search condition for any defendants who did not have such a condition specifically stated in their release order from the court, and from sharing location data for PTEM Program participants with any other law enforcement agency (including the San Francisco Police Department)--even for PTEM Program participants who were specifically advised by the Superior Court that this sharing was a condition of their release and who agreed to that condition in court.

San Francisco has appealed to the Ninth Circuit and moved to stay the injunction pending appeal; on March 11, 2024, the district court denied that motion. The central issue on appeal will be whether San Francisco can constitutionally enforce the conditions of release entered on the record by a California Superior Court and agreed to by PTEM Program participants. The district court's enjoining the sharing of location information rests primarily on the "unconstitutional conditions" doctrine in *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), and a view that PTEM Program rules allow Superior Court judges to avoid determining conditions of release on an individualized basis. There is a circuit split on the effectiveness of consent in the context of the Fourth Amendment; other circuits hold that agreement by a criminal defendant to a condition of pretrial release is dispositive. *See United States v. Yeary*, 740 F.3d 569, 583 (11th Cir. 2014) (holding agreement to pretrial release condition dispositive); *United States v. Gates*, 709 F.3d 58, 64 (1st Cir. 2013) (same); *Norris v. Premier Integrity Sols., Inc.*, 641 F.3d 695, 699 (6th Cir. 2011) (same); *see also United States v. Barnett*, 415 F.3d 690, 691–92 (7th Cir. 2005) (holding an agreement to a probation condition was dispositive, focusing on contractual nature of waiver).

Many local governments provide supervision programs as an alternative to custody, pretrial or post-trial. These programs serve important purposes: limiting the number of individuals in county jails, reducing recidivism, promoting community integration/re-integration, and protecting public safety. During the COVID-19 pandemic, courts placed more defendants –

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including those charged with far more serious crimes than the plaintiffs – on the PTEM Program, seeking to reduce the number of those in custody pending trial. The district court's injunction undermines the ability of local governments to operate these programs, making them subject to uncertain, class-wide § 1983 liability even when they are implementing specific orders from state courts about conditions of release from custody. An adverse holding, enjoining operation of the PTEM Program, would be harmful not only to the public, left potentially unprotected from individuals charged with or convicted of serious offenses, but also criminal defendants, who will likely be held in custody rather than released.

IMLA's AMICUS PROGRAM

Since 1935, the International Municipal Lawyers Association has vigorously represented the interests of local government attorneys. IMLA's amicus program is among the most respected in the country. IMLA collaborates with leading advocates nationwide to deliver authoritative and impactful briefs to the Supreme Court and state and federal appellate courts on behalf of IMLA members, at no cost.

If your municipality would like to benefit from IMLA's amicus program—as well the many other benefits of IMLA membership--we invite you to join the many thousands of cities, towns and counties who are IMLA members. If you have any questions about membership or any of our programs, please contact Amanda Karras, IMLA's Executive Director, at akarras@imla.org or at 202-742-1018 or Erich Eiselt, IMLA's Director of Legal Advocacy, at eeiselt@imla.org or at 202-742-1017.

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