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ALERTS

SCOTUS Cert Recap: Two New Cases Address Retaliation For Free Speech Deference To Agencies

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Highlights

On Oct. 13, the Supreme Court agreed to consider several questions, including:

Should the Court overrule its earlier decision requiring courts to defer to agencies' interpretations of ambiguous statutory provisions?

Does probable cause for an arrest preclude a free speech retaliatory arrest claim where there is objective evidence the arrest was retaliatory and where the claim is not brought against the arresting officer?

On Oct. 13, the U.S. Supreme Court added four additional cases to its recently started 2023-24 term. This alert will cover two of these cases: a case concerning when probable cause bars free speech retaliatory arrest claims, and a second vehicle for the Court to consider whether to overrule *Chevron* deference (to pair with the already-granted *Loper Bright Enterprises v. Raimondo*).

Loper Bright's companion case likely will draw the most attention, but the free speech case will be important as well, for it could affect numerous

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retaliatory arrest cases going forward.

Court Adds Second Case on Whether to Overrule *Chevron* Decision on Deference to Agencies

In *Relentless v. Department of Commerce*, the Court added a second case presenting one of the most important questions it will consider this term – whether to overturn its 1984 decision in *Chevron v. Natural Resources Defense Council*, which directs courts to defer to a federal agency's interpretation of a statute so long as the interpretation is reasonable. Although *Chevron* deference is now frequently invoked in countless areas of administrative law, it has long been criticized – including by many of the justices on the Court. Whether *Chevron* will be overruled is thus a question that affects every administrative lawyer and every federally regulated entity in the country.

Notably, in May, the Court agreed to hear *Loper Bright*, a challenge to an agency rule that requires fishing vessels to pay agency at-sea monitors in situations beyond those circumstances enumerated by the applicable statute. The challengers in that case asked the Court to decide 1) whether to overrule *Chevron* and 2) whether the statute authorizes the agency's rule. The Court ultimately granted cert. on the *Chevron* question while denying cert. on the statutory-interpretation question.

Relentless involves a challenge to the same agency regulation, and, as in *Loper Bright*, the Court agreed to address *Chevron* while declining to address the underlying statute. The Court likely added *Relentless* to allow all nine members of the Court to participate in the deliberations on this important question: While Justice Ketanji Brown Jackson is recused in *Loper Bright* (she heard oral argument in the case when she was a judge on the D.C. Circuit), she is not recused in *Relentless*. Indeed, the Court specifically ordered a briefing schedule for *Relentless* that will allow it to be argued in tandem with *Loper Bright* in the January 2024 argument session. The Court's resolution of these cases – likely in June 2024 – will have consequences across every realm of administrative law.

Court to Clarify When Probable Cause Bars Retaliatory Arrest Claims

In *Gonzalez v. Trevino*, the Court will address retaliatory arrest claims under the Free Speech Clause, and will clarify what a plaintiff must show to overcome a finding that the police had probable cause to make the arrest. Four years ago, in *Nieves v. Bartlett*, the Court held that a plaintiff bringing a retaliatory arrest claim generally must show that the police did not have probable cause to make the arrest. The Court carved out a narrow exception to this rule, however, allowing plaintiffs to bring retaliatory arrest claims in the face of probable cause if they also present "objective evidence" that they were arrested when otherwise similarly situated plaintiffs were not.

In *Gonzalez*, the Court will clarify what plaintiffs must do to fall within this exception. The plaintiff in *Gonzalez* is a 72-year-old Texas city councilwoman who had vowed to organize a petition to unseat the city's longtime city manager. Upon her election, she organized the petition and presented it to the mayor at a city council meeting, which transformed the petition into a "government document." The petition was later discovered

in the plaintiff's binder and, after apologizing that she must have mistakenly picked it up at the meeting, she returned it to the mayor.

The plaintiff was then charged under a Texas law that criminalizes tampering with government documents. She disputed the charge and sued the mayor and the city, arguing that even though the law gave police officers probable cause for the arrest, the charge and consequent arrest were made to retaliate against her for exercising her First Amendment rights. To substantiate her claim, Gonzalez presented evidence that the vast majority of prosecutions under the statute involve forging government documents – not accidentally possessing a document.

In a split opinion, the U.S. Court of Appeals for the Fifth Circuit rejected the plaintiff's claim, holding that *Nieves* requires plaintiffs to present "comparative evidence" that similarly situated individuals were not arrested for engaging in the same type of criminal conduct. The dissenting member of the Fifth Circuit panel, endorsing the positions taken by the U.S. Courts of Appeals for the Seventh and Ninth Circuits, argued that *Nieves* instead "simply requires objective evidence … tending to connect the officers' animus to the plaintiff's arrest." The Supreme Court is now set to resolve this debate, and its answer will have significant consequences for the practical viability of retaliatory arrest claims going forward.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Kian Hudson at 317-229-3111 or kian.hudson@btlaw.com.