The Traveling Update of Federal Issues From Congress to the Courts

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1. U.S. SUPREME COURT – DECIDED CASES

Monuments and Municipal Messages – *Pleasant Grove City, Utah v. Summum*
Local governments had plenty to cheer about when a unanimous Supreme Court released its decision in *Pleasant Grove City, Utah v. Summum*,[1] arguably the most important decision of this Term. First and foremost, the Court's ruling recognized the right, under the First Amendment, of municipalities to express and shape their own local identity, even when the mode of expression concerned a traditional public forum. While government entities remained constrained with respect to regulating *private* speech in a public forum, pursuant to the First Amendment's Free Speech Clause, the same scrutiny did not apply when the entity itself was the speaker.

The case arose out of a dispute over the placement of a private monument in a public park. The park already contained a "Ten Commandments" monument, donated to the City of Pleasant Grove by the Fraternal Order of Eagles. The City's criteria for permanent displays in the park required that monuments be directly related to the City's history, or be donated by a group with "long-standing ties to the . . . community." Summum, a religious group, applied to have a monument of its "Seven Aphorisms" displayed in the park, indicating that its proposed monument would be similar to the Ten Commandments display. (The Summum religion includes the belief that, when Moses received stone tablets from God on Mount Sinai, he received two separate sets of tablets. According to Summum, the first was inscribed with the Seven Aphorisms, a "Higher Law." Moses only received the Ten Commandments – something of a poor second – after he destroyed the Aphorisms tablet.[2]) When the City denied Summum's request, citing its policy, Summum sued, alleging a violation of its free speech rights.[3]

When the matter came before the U.S. Court of Appeals for the Tenth Circuit, that court held that park monuments remained the speech of the donor entity and, thus, constituted private, not government, speech, in a traditional public forum. Because the City's content-based choices and policy failed strict scrutiny review, the City was ordered to accept Summum's monument. A divided Tenth Circuit subsequently denied the City's petition for a rehearing and rehearing *en banc*.[4] The judges who dissented on the denial of rehearing (who would be referred to in the Supreme Court decision), pointed out that parks, as traditional public forums, had to be open to speeches, demonstrations, and other forms of *transitory* expression. The City, in this case, had not, "by word or deed, invite[d] private citizens to erect monuments of their own choosing in these parks. It follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression."[5]

Following the grant of certiorari, the International Municipal Lawyers Association (IMLA) filed an *amicus* brief in support of the City, authored by Professor Mary Jean Dolan of the John Marshall Law School.[6] The brief included a questionnaire distributed to IMLA members regarding existing municipal practices regarding privately-donated monuments displayed in parks, and a summary of the responses received. The questions included whether "the

municipality you represent has been offered, accepted or rejected any monument(s) by/from a private person," whether the monument was accepted or rejected; whether the municipality applied "any content-related criteria (e.g., local historical significance) in determining" to accept or reject the monument; whether the municipality owned and maintained accepted monuments; and whether there was any "public opposition to the existence or location of a monument, whether proposed, new, or previously-existing."[7] Out of the 117 applicable responses, 112 of them indicated that the municipality clearly exercised some form of content control over the selection and display of donated monuments in public parks, either by way of a written policy, an ordinance, a legislative or executive decision that required prior submission and/or design input, or another form of regulation and review.[8] This information proved to be critically important, giving the Court a feel for how common it was for park monuments to be the donation of a private entity, and, second, by indicating that some form of content control and discretion was usually exercised by the donee (though this could fall short of a specific written policy).

The U.S. Supreme Court cited this survey of existing monuments and placement policies in determining that the placement of a permanent monument in a public park was a form of government, not private, speech; further, that although parks were a traditional public forum for speeches and other *transitory* expressive acts, the display of a permanent monument in a public park was not a form of expression to which forum analysis applied. Justice Samuel Alito wrote the opinion, with five justices filing concurring opinions – Justice Stevens (joined by Justice Ginsburg), Justice Scalia (joined by Justice Thomas), Justice Breyer, and Justice Souter.

The Court began by noting that there were no prior decisions on the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments. Like private entities, a government had a right of expression, the "right to speak for itself."[9] While the Free Speech Clause restricted the government's regulation of private speech, including speech in traditional public forums, it did not apply to the government's own speech. Permanent monuments accepted by governments and placed on public property, despite the fact that they were often donated or financed by private entities, "typically represent government speech."[10] Such displays were a traditional form of a government's expression, and "throughout our Nation's history, the general government practice with respect to donated monuments [was] one of selective receptivity,"[11] demonstrated by way of design input, prior submission requirements, requests for modifications, and legislative approval of the specific content. In addition, the public parks in which the displays were placed were generally "closely identified in the public mind with the government unit that own[ed] the land."[12] Accordingly, Pleasant Grove City, like other governments, was entitled to take into account content-based factors, like local history and culture, in deciding whether to accept a donated monument. Further, in making the decision to accept or reject a permanent monument, the municipality was legitimately choosing its own message and shaping its municipal identity.

The Court rejected Summum's argument that something more definite or formal (e.g., the municipal council actively passing a resolution) was needed before a government could be said to adopt a monument as its own expressive vehicle. "We see no reason for imposing a requirement of this sort," stated the Court, adding that the City, in this case, took ownership of most of the monuments in the park.[13] To require anything more would be a "pointless exercise that the Constitution does not mandate."[14] Moreover, this would be unworkable for other reasons: a monument, even a text-based one, could easily convey more than one message. As demonstrated by the Statue of Liberty, the message intended by monument's creator or donor could be different from that expressed by the government accepting the monument, and could change over time.[15]

Public form analysis was "out of place" in addressing such displays.[16] The installation of permanent monuments was not analogous to other forms of speech on government public property – unlike demonstrating or leafleting, parks could only accommodate a finite number of permanent displays – and the application of content-neutral time, place and manner restrictions was not feasible because the "obvious truth of the matter [was] that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations."[17]

Several of the justices touched briefly on the "shadow" in this case, the Establishment Clause. Justice Scalia, referring to the Court's earlier ruling in *Van Orden v. Perry*,[18] declared that the city did not need to "fear that [its] victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate any part of the First Amendment."[19] Justice Souter, taking a broader look, indicated that if a monument had "some religious character, the specter of violating the Establishment Clause" would require the city "to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized."[20] However, it was "simply unclear how the relatively new category of government speech [would] relate to the more traditional categories of Establishment Clause analysis, and this case [was] not an occasion to speculate."[21]

Justices Stevens and Breyer also echoed the need for municipalities to be careful. Justice Stevens indicated the Court's decision was not a "free license" for a government to "communicate offensive or partisan messages;"[22] and Justice Breyer likewise indicated that the government speech doctrine would not permit a city to "discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds."[23] Another limitation on the ruling is that it addresses only permanent displays: there may be issues with respect to more transient or temporary displays in public parks that will need to be addressed by other rulings.[24]

Questions clearly remain, and the debate over the parameters of the government speech doctrine will continue.[25] Indeed, the "fire" mentioned by Justice Scalia ignited a scant few days after the *Summum* ruling. In late February, the Court agreed to hear a case, *Salazar v. Buono*, that involves a cross erected on federal land – on what used to be part of the Mojave National

Preserve – by private citizens as a memorial to the "Dead of All Wars."[26] Subsequently, in light of an Establishment Clause challenge, Congress enacted legislation ordering the Secretary of the Interior to convey a one-acre parcel of land that included the monument to a veterans' group, in exchange for a parcel of privately-owned land of equal value, with the federal government retaining a reversionary interest in the event the memorial use lapsed. However, the statute did not mandate that a cross remain as part of the memorial. The Ninth Circuit determined that the presence of a cross on federal land violated the Establishment Clause; following the transfer, it held that the government continued impermissibly to endorse religion despite the divestiture, by allegedly retaining control and oversight over the land, and by continuing to endorse religion by permitting a cross at the site.[27]

Can a government entity sidestep an Establishment Clause challenge with respect to a sectarian display on public land by simply deeding or exchanging the land, and leaving the symbol intact? We'll know after the case comes up for argument in the Court's next Term, starting October 05. IMLA is participating in the *Salazar* case as an *amicus* in support of the government's position, and to support the concept that a solution to an Establishment Clause violation should include a sale of the property.

Section 1983 and Qualified Immunity – *Pearson v. Callahan*

Pearson v. Callahan[28] was the case in which the Court directed the parties to brief, in addition to the other questions presented, the issue of whether the two-step qualified immunity analysis in *Saucier v. Katz* "should be overruled." The facts of the case were as follows: after an informant identified Callahan as a drug dealer, police told the informant to set up a drug buy at Callahan's home. They "wired" the informant, gave him a marked bill, and agreed upon the signal that he was to give when the buy was completed. Receiving the signal, officers entered Callahan's home and found drugs and the marked bill on Callahan. The officers did not have an arrest or search warrant at any time. The trial court found that the evidence was admissible because the existence of exigent circumstances made the search reasonable, despite the absence of a warrant. When this was reversed on appeal, Callahan brought a Section 1983 action against the officers and municipality. Using the *Saucier v. Katz* analysis, the Tenth Circuit held that the officers had violated Callahan's clearly established rights, rejecting the application of the "consent once removed" doctrine. The doctrine applied when an undercover officer entered a house at the express invitation of someone with authority to consent, established probable cause to arrest or search, and then immediately summoned other officers for assistance. At the time, only the Seventh Circuit had adopted the doctrine's extension to private informants. The Tenth Circuit, however, held that because the informant was not a police officer, Callahan had never consented to any police entry into his home, directly or indirectly. Further, as neither the Tenth Circuit nor the Supreme Court recognized the application of the "consent once removed" doctrine to a civilian informant, the law was "clearly established" and the officers were not shielded by qualified immunity.

Dealing with the issues of whether, for qualified immunity purposes, officers could enter a home without a warrant on the theory that the owner consented to the entry by previously permitting an undercover informant into the home, and second, the validity of *Saucier*'s sequenced test, the Supreme Court reversed, with Justice Alito writing the opinion for the unanimous court. The officers were entitled to qualified immunity because their entry did not violate clearly established law. At the time of the entry, the "consent once removed" doctrine had "gained acceptance in the lower courts," and the Seventh Circuit had accepted its extension to cases involving consensual entries by private citizens acting as confidential informants. The officers here were entitled to rely on these cases, even though their own circuit had not yet ruled on the doctrine's extension. They were entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional. On the larger issue, the Court now held "that the *Saucier* procedure should not be regarded as an inflexible requirement." "[W]e now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained."[29] The judges of the district courts and the courts of appeals should instead exercise their "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[30] IMLA participated as an *amicus* in this case, in support of the petitioning officers and local government.

Search and Seizure – Negligent Mistakes By Police Clerks – *Herring v. U.S.*

This case dealt with whether the exclusionary rule applied to evidence seized incident to an unlawful arrest, made in reliance on erroneous information negligently provided by another law enforcement agency. When Herring came to pick up something at a police vehicle impound lot, an investigator asked the county's warrant clerk to check for any outstanding warrants. There were none in their county, but a clerk in the neighboring county advised that there was an active warrant for Herring's arrest in that jurisdiction. Herring was arrested and searched incident to arrest, and drugs and a gun (which he was not permitted to have, being a felon) were found. Shortly after the search, the county clerk received a call advising of a mistake: the warrant mentioned had actually been recalled five months previously. Herring sought to suppress the evidence of the search, claiming that it had been obtained pursuant to an illegal arrest. The Eleventh Circuit, finding that the arresting officers were entirely innocent of any wrongdoing or carelessness and that the failure to update records was simple negligence, ruled that the evidence was admissible under the good-faith rule in *United States v. Leon*, 468 U.S. 897 (1984).

The Supreme Court affirmed, in a majority opinion written by the Chief Justice. Justice Ginsburg filed a dissenting opinion, joined by Justices Stevens, Souter and Breyer.[31] Justice Breyer filed a dissenting opinion, joined by Justice Souter. The majority extended the ruling in *Arizona v. Evans*, 514 U.S. 1 (1995) (under *Leon*, the exclusionary rule did not require the suppression of evidence seized in violation of the Fourth Amendment because of clerical errors or mis-communications made by court employees) to certain mistakes made by law enforcement personnel. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that

exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[32] Here, it was clear that the mistake fell far short of a flagrant or deliberate violation of rights, deliberate misconduct, or systemic, reckless or routine failures to keep accurate records; further, suppressing the evidence would have marginal or nonexistent benefits with respect to deterrence. Accordingly, the mistake would not justify the application of the exclusionary rule.

Traffic Stops and "Stop and Frisk" of Passengers – *Arizona v. Johnson*

Police patrolling a gang-intensive neighborhood stopped the vehicle Johnson was a passenger in because the registration had been suspended for an insurance-related violation. The officers had no reason to suspect the car's occupants of criminal activity, but one of the officers thought Johnson was a gang member after she noticed his clothing and a scanner in Johnson's jacket pocket. He cooperated in answering her questions, but because the officer wanted to question Johnson away from the front-seat passenger to gather "intelligence about the gang [Johnson] might be in," she told him to get out of the car.[33] She suspected he might have weapons on him, so for "officer safety" she patted him down, and found a gun. Johnson moved to suppress the evidence, claiming that the gun was the product of an illegal search. The state court ruled that, although Johnson was lawfully seized prior to the frisk, the detention had evolved into a "consensual" and separate conversation about an unrelated investigation into gang affiliation. Absent "reason to believe Johnson was involved in criminal activity," the officer had no right to pat him down for weapons, even if she had reason to suspect he was armed and dangerous.

The Supreme Court reversed. Justice Ginsburg delivered the opinion for a unanimous Court, ruling that the patdown did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. Under *Terry*, "stop and frisk" searches were constitutionally permissible if police reasonably suspected both that the person was committing or had committed a crime and that the person was armed and dangerous. Most traffic stops resembled the kind of brief detention authorized in *Terry*, and previous caselaw confirmed that, for the duration of a traffic stop, police effectively seized "everyone in the vehicle" and could do a patdown of the driver and any passengers upon reasonable suspicion that they might be armed and dangerous. Accordingly, in a traffic-stop setting, the first *Terry* condition (a lawful investigatory stop) was met whenever it was lawful for police to detain a vehicle and its occupants pending inquiry into a vehicular violation. The police did not need to have cause to believe any occupant of the vehicle was involved in criminal activity. However, to justify a patdown of the driver or passengers during a traffic stop, the police were required to have a reasonable suspicion that the person subjected to the frisk was armed and dangerous. Here, Johnson was initially lawfully detained incident to the legitimate traffic stop. The Court questioned the lower court's characterization of the ensuing encounter with Johnson as "consensual," but found the officer's inquiries into matters unrelated to the justification for the stop did not convert the encounter into something other than a lawful seizure, as those inquiries "did not measurably extend the duration of the stop." "Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free 'to depart without police permission.'... [The officer] surely was not constitutionally required to give Johnson an opportunity to depart the scene after

he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."[34]

Employment – Title VII and Anti-Retaliation Protection and Covered Activities – *Crawford v. Metropolitan Government of Nashville*

Is a municipal employee's participation in an employer-initiated investigation a covered activity under the anti-retaliation provision of Title VII? In a unanimous decision, the Supreme Court ruled it was.[35] The employee, Vicky Crawford, was interviewed after the municipal employer launched an investigation of Crawford's superior, H. When interviewed, Crawford advised that she and other employees had been sexually harassed by H., but she had not filed a complaint on her own or reported the activity independently of the investigation. H. was not disciplined, but Crawford was later fired for alleged embezzlement, a charge subsequently found to be unsubstantiated. Crawford filed suit under Title VII, claiming the employer fired her in retaliation for her report of H's behavior, in violation of 42 U.S.C. §2000e–3(a), which makes it unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the participation clause). The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of her claim on the basis that Crawford, who had not initiated any complaint prior to the investigation, failed to meet the opposition clause's requirement of "active, consistent" opposing activities; second, the participation clause did not cover the employer's internal investigation because it was not conducted pursuant to a Title VII charge pending with the Equal Employment Opportunity Commission.

Justice Souter delivered the opinion of the Supreme Court. Because the word "oppose" in the legislation was undefined, it carried its ordinary dictionary meaning of "resisting or contending against." One could oppose behavior without active resistance: for example, someone who had taken no action at all to advance a position beyond disclosing it could still be in opposition to the death penalty. The statement Crawford alleged she gave to the investigators was, thus, covered by the opposition clause, being "an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee."[36] To hold otherwise would produce a "freakish rule" that protected an employee who reported discrimination on her own initiative, but not one who reported the same discrimination in the same words when her boss asked a question.[37] Because Crawford's conduct was covered by the opposition clause, the Court did not address the argument that the Sixth Circuit had misread the participation clause as well. Justices Alito and Thomas concurred but emphasized a qualification or limitation: that the Court's holding did not and should not "extend beyond employees who testif[ied] in internal investigations or engage[d] in analogous purposive conduct;" further, the opposition clause should only protect conduct that was "active and purposive," as it was questionable whether "silent opposition" was protected.[38] Commentators point out that Justice Souter's opinion avoided these restrictions and that none of the other Justices joined in the concurrence. Will this open the door to a very broad reading of "oppose" as including unspoken or silent opposition? We'll see.

Prosecutorial Immunity in Damage Lawsuits – *Van de Kamp v. Goldstein*
This case features the false testimony of a jailhouse informant gloriously named Fink. In 1980, Goldstein had been convicted of murder based, in part, on the false testimony that he had confessed to Fink. After 24 years in prison, Goldstein was released after filing a successful federal habeas petition that claimed Fink had received reduced sentences for providing prosecutors with favorable testimony in other cases; that prosecutors knew, but failed to give his attorney, this potential impeachment information; and that this failure led to his erroneous conviction. Goldstein brought a Section 1983 action against a former Los Angeles County district attorney, John Van de Kamp, and his chief deputy district attorney, Curt Livesay, alleging that the prosecution violated its constitutional duty to communicate impeachment information due to the failures of the defendant supervisory prosecutors to properly train or supervise prosecutors, or to establish an information system containing potential impeachment material about informants. Claiming absolute immunity, the defendants sought to dismiss the complaint. The district court declined, finding that the conduct was "administrative," not "prosecutorial," and thus outside the scope of an absolute immunity claim. The Ninth Circuit, on interlocutory appeal, affirmed. IMLA participated in this case as an *amicus* in support of the petitioners.

The Supreme Court, in a unanimous opinion written by Justice Breyer, reversed and remanded, finding that the defendants were entitled to absolute immunity with respect to Goldstein's supervision, training, and information-system management claims.[39] Those claims focused upon a "certain kind of administrative obligation – a kind that itself [was] directly connected with the conduct of a trial"[40] and distinguishable from administrative duties connected to workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Significantly, the kind of activities at issue necessarily required legal knowledge and the exercise of related discretion, and this weighed in favor of absolute immunity. The "faulty training" claim rested upon a consequent error by an individual prosecutor in the midst of trial, and because better training or supervision might prevent most, if not all, prosecutorial errors at trial, allowing the claim here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings. The analysis and outcome were similar with respect to the information-management claim – deciding what to include in an information system was "little different from making similar decisions in respect to training,"[41] and determining the criteria for inclusion or not required knowledge of the law. Because all these activities were connected with the prosecutor's basic trial advocacy duties, they were not "administrative," and were protected by absolute immunity.

Unions, Public Employees, and Non-Member Service Fees – *Locke v. Karass*
Locke was a state employee. Under the collective bargaining agreement between the employer and MSEA, the local union and the exclusive bargaining agent for certain state employees, MSEA was required to provide certain services to employees regardless of whether they were members. As a result, the union was entitled to receive an "agency fee" or "service fee" from nonmember employees. The amount of the fee was equal to the portion of union dues related to ordinary representational activities (collective bargaining or contract administration activities) given the union's status as the exclusive bargaining agent, but minus any expenses not related to

such activities (those for political, public relations, or lobbying activities). The fee also included a charge that represented the "affiliation fee" the local paid to the national union, SEIU. MSEA included, in its calculation of chargeable expenditures, the costs of litigation (by itself and SEIU) that was germane to collective bargaining, which meant nonmembers paid for union litigation conducted by or on behalf of other units or the national affiliate, including the salaries of SEIU lawyers. The nonmembers who objected could arbitrate the fee, with the all fees paid by nonmembers being placed in an interest-bearing escrow account until arbitration was complete. The plaintiffs, including Locke, brought a Section 1983 action alleging, among other things, that the inclusion of the cost of extra-unit litigation (the litigation related to or on behalf of other bargaining units) violated their First Amendment rights, as the State had no compelling state interest in SEIU's "far-flung litigation activities nationwide." The First Circuit disagreed, and affirmed the grant of summary judgment in favor of MSEA and the employer.

In an opinion written by Justice Breyer, the Supreme Court affirmed, finding that a local union could charge nonmembers for national litigation expenses provided the subject matter of the extra-local litigation was of a kind that would be chargeable if the litigation were local, and the charge was reciprocal in nature.[42]

Ban on Political Payroll Deductions – ***Ysursa v. Pocatello Educ. Association***
This case centered around a provision in the 2003 Idaho Voluntary Contributions Act. The law permitted public employees to authorize payroll deductions for general union dues, but § 44-2004(2) provided that deductions for "political activities" (defined as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure") "shall not be deducted from wages, earnings or compensation of an employee." The policy behind the enactment was to avoid the appearance that carrying out the public's business was tainted by partisan political activity. A group of Idaho public employee unions challenged the provision on the basis that the Act infringed their constitutional rights under the First and Fourteenth Amendments. The district court held that the ban was constitutional as applied to the State government and its employees, because the First Amendment did not compel the State to subsidize speech by providing, at its own expense, payroll deductions for the purpose of paying union dues or association fees for State employees. However, it found the ban was unconstitutional with respect to private and local government employers, on the basis that the State had failed to identify any subsidy it provided to such employers to administer the payroll deductions. When the State appealed the ruling with respect to local government employees, the Ninth Circuit affirmed, finding that § 44-2004(2) violated the First Amendment because it was a content-based law for which the State officials asserted no compelling justification. Further, while the State had the ultimate power of control over units of local government, it did not actually operate or control their payroll deduction systems, and its control was analogous to a State's regulatory power over a private utility.

The Supreme Court, in a 6-3 opinion, reversed.[43] Chief Justice Roberts delivered the opinion of the Court, ruling that the ban on political payroll deductions, as applied to local governmental units, did not infringe the unions' First Amendment rights. The Court drew a distinction between suppressing speech, on one hand, and declining to promote speech, on the other. The law in issue did not restrict the unions' speech rights, but simply required them to exercise such rights without the benefit of a State subsidy and without enlisting the State in support of their endeavors. Accordingly, the decision not to subsidize the exercise of a fundamental right did not infringe that right, and Idaho was under no obligation to aid the unions in their political activities. The State needed only to show a rational basis to justify the ban. Banning payroll deductions for political speech furthered the government's interest in "distinguishing between internal governmental operations and private speech" and in avoiding the appearance of government entanglement with partisan politics and, thus, was "plainly reasonable."[44] Turning to issue of the ban in relation to local governments and whether this amounted to something more akin to the "suppression" of speech (i.e., that the State was no longer declining to facilitate speech through its own payroll system, but was obstructing speech in the local governments' payroll systems), the majority held that this argument was "unpersuasive." "[W]e are aware of no case suggesting that a different analysis applies under the First Amendment depending on the level of government affected," and the State's interest in de-politicizing its operations extended "to all public employers at whatever level of government."[45] The lower court's "private utility" analogy was inapt, as local governments were subordinate units of government created by the State. Given that fact, it was irrelevant how payroll issues were dealt with by or between the two levels of government, and how the State allocated funding or management responsibilities between the different levels of government.

Vehicle Searches and Search Incident to Arrest – *Arizona v. Gant*

Gant arose out of an appeal from an Arizona Supreme Court decision which found that police officers were not entitled to conduct a warrantless vehicle search incident to an arrest, where the scene had been secured and the arrestee was handcuffed and under the supervision of a police officer. The officers had come to Gant's residence to investigate a tip about drug activity. They spoke with Gant, and later discovered that he had a suspended driver's license and an outstanding warrant for driving with a suspended license. They went back, and while they were there, Gant drove up and parked his car in the driveway. He was arrested on the traffic offence, and handcuffed and placed in the back of a police car, all without incident. The scene was secure, with at least four officers onsite. After Gant had been locked in the police car, the officers searched his car and found a weapon and cocaine. When asked why the search had been conducted, one of the officers testified: "Because the law says we can do it."[46] Gant moved to suppress the evidence seized in the vehicle search.

The Arizona Supreme Court held that the search violated the Fourth Amendment. Addressing the argument that the search fell within the constitutionally permissible scope of a vehicle search incident to arrest, as articulated by *New York v. Belton*,[47] the court held that the real issue was whether the police could conduct a search incident to arrest *at all* once the scene had been secured, citing the "twin rationales" for a search incident to arrest established in *Chimel v.*

California, 395 U.S. 752 (1969). The reasons supporting a warrantless search of the vehicle – the protection of the arresting officers and a need to preserve evidence – could not apply in the circumstances, and, as a result, the court held that the search was unreasonable.

In a 5-4 ruling, the Supreme Court affirmed, clarifying and limiting the scope of the rule established in *Belton*. Noting that its ruling in *Belton* had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search,"[48] the Court rejected this interpretation, pointing out that it "untether[ed] the rule from the justifications underlying the *Chimel* exception – a result clearly incompatible with [the Court's] statement in *Belton*"[49] affirming the fundamental principles established in *Chimel*. The majority opinion in *Gant*, written by Justice Stevens, formulated the rule as follows: police officers could validly search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it was reasonable to believe that the arrestee could access the vehicle at the time of the search (i.e., that he was within reaching distance) or that "evidence of the offense of arrest might be found in the vehicle."[50] However, *Belton* did not authorize a vehicle search incident to a recent occupant's arrest after the arrestee had been secured and was not in a position to access the interior of the vehicle. In this case, as neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search, the search of Gant's vehicle fell outside the incident to arrest exception to the Fourth Amendment's warrant requirement.

CERCLA and Apportionment of Liability – *Burlington Northern and Santa Fe Railway Company v. U.S.; Shell Oil Company v. U.S.*

Whether and to what extent can a party associated with a contaminated site be held responsible for the full costs of remediation? This case concerned the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[51] legislation designed to promote the cleanup of hazardous waste sites and to ensure that those responsible for site contamination were also responsible for the cleanup costs. Broadly speaking, CERCLA imposes liability on four classes of potentially responsible parties (PRPs): (i) owners and operators; (ii) those who, at the time of disposal of any hazardous substance, owned or operated a facility at which hazardous substances were disposed of; (iii) those who arranged for disposal or treatment, or arranged for transport for disposal or treatment, of hazardous substances owned or possessed by such person, and (iv) those who accepted any hazardous substances for transport to disposal or treatment facilities, from which there was a release or a threatened release of a hazardous substance, which caused the incurrence of response costs. Further, the Act did not mandate "joint and several" liability in each case, and allowed apportionment where there was "a reasonable basis for determining the contribution of each cause to a single harm."[52]

Since 1960, B&B, a company, operated an agricultural chemical distribution business on land in California – its own lot and a lot leased from two railway companies – with both lots graded toward a sump and drainage pond. B&B purchased pesticides and other hazardous chemical products from suppliers, including Shell Oil Company, and stored them on its land. During delivery, spills and leaks occurred; further, waste water and chemical runoff from the facility

seeped into the ground water below. Shell subsequently took steps to encourage the safe handling of its products by customers, including inspections and requiring self-certification of compliance with applicable laws and regulations, and was aware that B&B was a "sloppy operator." B&B became the target of both state and federal environmental agency investigations, and was insolvent by 1989. In 1991, EPA issued an administrative order to the railroads directing them, as owners of part of the property, to remediate the land. They complied, at a cost of over $3M. In addressing the governments' total response costs, the district court held that (1) both the railroads and Shell were PRPs under CERCLA because of ownership or because of "arranging for" the disposal of hazardous substances through sale and delivery, and (2) the contamination was divisible and capable of apportionment, so joint and several liability was not imposed. Shell's share of the total site response cost was 6%, and that of the railways was 9%. On appeal and cross appeal, the Ninth Circuit held Shell was properly held liable as an entity that had "arranged for disposal" of hazardous substances within the meaning of §9607(a)(3), but reversed the district court's apportionment of liability, finding Shell and the railroads to be jointly and severally liable for the governments' cost of responding to the contamination.

In an 8-1 opinion by Justice Stevens, the Supreme Court reversed and remanded; Justice Ginsburg filed a dissenting opinion. Shell was not liable as an "arranger" of disposal. Because CERCLA did not define what was included in arranging for disposal of a hazardous substance, the majority gave the phrase its ordinary meaning, one that required an intent to dispose of the product during the transfer process, by one or more of the methods described in §6903(3). Mere knowledge of minor, accidental spills or leaks that occurred during product delivery was insufficient, "particularly when the disposal occur[ed] as a peripheral result of the legitimate sale of an unused, useful product."[53] Further, the evidence indicated that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills. This conclusion made it unnecessary for the Court to determine if the apportionment of liability regarding Shell was justified; however, it did reverse the Ninth Circuit's imposition of joint and several liability with respect to the railroads. The district court had reasonably apportioned the railroads' share of the site remediation costs at 9%, given that it was "abundantly clear that the primary pollution" at the site was contained in the portion most distant from the railroads' parcel, and that the spills of hazardous chemicals that occurred on the railroad parcel contributed to no more than 10% of the total site contamination, some of which did not require remediation.

Voting Rights Act and Preclearance Requirements – *Northwest Austin Mun. Utility Dist. Number One v. Holder*

On June 22, the Court released its ruling in *Northwest Austin Mun. Utility Dist. Number One v. Holder*,[54] a case dealing with the preclearance obligation and bailout provision in the Voting Rights Act of 1965.

By way of background, Section 5 of the Act prohibits "covered jurisdictions" (states and political subdivisions with histories of racial discrimination in voting) from making any changes in their voting procedures without first demonstrating to the federal government (the Attorney General or a three-judge panel of the court) that the change "neither has the purpose nor will have the effect

of denying or abridging the right to vote on account of race or color." If the Attorney General makes no objection after sixty days, or if the district court grants a declaratory judgment, the jurisdiction may implement the change. Congress adopted a formula that utilized two proxies for discrimination to be used in determining which jurisdictions would be "covered jurisdictions," and incorporated two procedures for adjusting coverage over time, including those that allowed jurisdictions to earn exemptions. A "bail-out" provision, 42 U.S.C. § 1973b(a), allows jurisdictions meeting the stated requirements to terminate their Section 5 preclearance obligation. Congress has reauthorized and extended these provisions several times, most recently for a further 25 years in 2006.[55] Significantly, in 1975, Congress amended the legislation by the addition of a prohibition of voting discrimination against certain language minorities (persons of American Indian, Asian American, Native Alaskan, and Spanish descent). As a result of the language minority amendments, Texas (and all of its political subdivisions) became a covered jurisdiction, subject to Section 5. A week after the 2006 reauthorization was passed, the Northwest Austin Municipal Utility District Number One, a small utility district in Texas, filed suit seeking a bail-out or, in the alternative, bringing a facial challenge to the extension, alleging that, in 2006, when Congress extended the provision, it lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty. There was no evidence that the district had ever discriminated on the basis of race in its elections.

The district court rejected both the request for a bail-out (finding that the plaintiff was not a "political subdivision" eligible to seek a bail-out because it did not conduct voter registration) and the challenge to the validity of the legislation.[56] In upholding the law, the unanimous court held that, first, the applicable standard of review was the rationality standard in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and not the stricter "congruence and proportionality" test (i.e., that the statutory scheme to remedy and prevent violations of the protected right was congruent and proportional to the record Congress developed and to the risk of future constitutional harm) in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a Fourteenth Amendment case. The district appealed, as it was entitled to do, directly to the U.S. Supreme Court.

Chief Justice John Roberts, writing for the eight-member majority in a narrow ruling, reversed and remanded. Justice Clarence Thomas concurred in part and dissented in part. The majority found that the court below had erred in ruling that the district was not eligible for the bail-out, and this finding (particularly as the constitutional challenge was brought in the alternative) made it unnecessary for the Court to address the constitutionality of Section 5. Dealing with the entitlement to bail-out, "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision;" one in which all political subdivisions – not only the ones described in the definition – were eligible to file a bail-out suit.[57]

The majority concluded by pointing out that "we are now a very different Nation" than the America of the 1960s.[58] Whether current conditions continued to justify legislation like the Voting Rights Act was "a difficult constitutional question we do not answer today," although the majority floated a few federalism balloons.[59] First, Section 5 "impose[d] substantial 'federalism

costs,'" being intrusions into areas of state and local policymaking, raising serious constitutional issues.[60] Voter turnout and registration rates had changed significantly since the legislation was enacted, and current burdens had to be "justified by current needs" and political conditions. For example, "the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide."[61] Further, the Act differentiated between the States, contrary to the "fundamental principle" of equal sovereignty. In summary, regardless of whether the provisions were assessed using a rational basis standard or the stricter "congruence and proportionality" test in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the majority opined that the Act's "preclearance requirements and its coverage formula raise serious constitutional questions under either test."[62]

Justice Thomas's dissenting opinion held that the questions before the Court did require a consideration of the Section 5 constitutional issue. "[A]n interpretation of §4(a) that merely makes more political subdivisions eligible for bailout does not render §5 constitutional and the Court notably does not suggest otherwise."[63] Seizing the same theme of changing times and conditions that was touched upon slightly by the majority, he held that "the lack of current evidence of intentional discrimination with respect to voting renders §5 unconstitutional. The provision can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment."[64] The extraordinary conditions, the ingenious and "extensive pattern of discrimination" against minorities, which required Congress's intervention to safeguard voting rights, no longer existed and had "long since passed."[65] The remaining discrete and isolated incidents of discrimination had "never been sufficient justification for the imposition of §5's extraordinary requirements."[66] The resulting "acknowledgment of §5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved" by the Voting Rights Act.[67]

Disparate Impact, Promotional Exams, and "Reverse Discrimination"– *Ricci v. DeStefano*
Another important case recently decided is *Ricci v. DeStefano*.[68] *Ricci*, an appeal from a very brief ruling of the Second Circuit Court of Appeals, deals with Title VII of the Civil Rights Act of 1964 in the context of firefighter testing and promotion procedures. Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin. The plaintiffs were all firefighters employed by the City of New Haven, Conn., who applied for promotion and took the necessary exams in 2003. The exams were prepared by an Illinois company that specialized in entry-level and promotional examinations for police and fire departments. The company's vice-president subsequently testified that all of the questions were drawn from or based in the syllabus, and that the exam was facially neutral.

A city regulation provided that once the test results were "certified," the Fire Department had to promote from the group of applicants achieving the top three scores. All but one of the top candidates was white (the exception was Hispanic). New Haven's Civil Service Board, charged with certifying the results, held hearings in which the "very significant disparate impact" was raised by the City's corporation counsel, who "strongly advocated against certifying the exam results."[69] Ricci, a white candidate, testified before the Board in favor of certifying the results, pointing out that he had "studied 8 to 13 hours a day to prepare for this test and [spent] over

$1,000 in funds to study" for it, including purchasing books and paying an acquaintance to read them on tape because he was dyslexic.[70] The Board ultimately did not certify the promotional exams results, relying on federal, state and local anti-discrimination laws and arguing that it had a good-faith belief that Title VII mandated non-certification. When Ricci and some of the other applicants sued, alleging violations of Title VII and their equal protection rights, the district court upheld the City's decision and granted it summary judgment, finding that the defendants' preemptive "motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, [did] not, as a matter of law, constitute discriminatory intent;"[71] and that there was no Equal Protection violation in the decision not to use the promotional exam results. "None of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took" the exams.[72] In a two-page decision, the Second Circuit (a panel that included now Supreme Court nominee Sonia Sotomayor) affirmed.[73] When the Supreme Court decided to hear the case, IMLA filed an *amicus* brief in support of the City of New Haven.

In a 5-4 decision, the Supreme Court reversed and remanded, focusing only on the Title VII issue and finding it unnecessary to deal with the Equal Protection arguments. Justice Kennedy delivered the opinion of the Court, ruling that the City's action in discarding the tests violated Title VII: a "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The [City], we further determine, cannot meet that threshold standard."[74] Fear of litigation alone could not justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.

Certain government actions to remedy past racial discrimination – actions that were themselves based on race – were constitutional only where there was a "strong basis in evidence" that the remedial actions were necessary. Applying the strong-basis-in-evidence standard to Title VII, before an employer could engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer had to have a strong basis in evidence to believe it would be subject to disparate-impact liability if it failed to take the race-conscious, discriminatory action. Here, the Board's hearings produced no strong evidence of a disparate-impact violation. The majority of the Court concluded that all of the evidence demonstrated that the City rejected the test results only because the higher-scoring candidates were white.

Without some other justification, the Court held that this express, race-based decision-making was prohibited. A threshold showing of a significant statistical disparity and nothing more was far from the required strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That was because the City could be liable for disparate-impact discrimination only if the exams at issue were not job-related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt. Based on the record the parties developed through discovery, there was no substantial basis in evidence that the test was

deficient in either respect. Accordingly, the City's race-based rejection of the test results could not satisfy the "strong basis in evidence" standard. "On this basis, we conclude that petitioners have met their obligation to demonstrate that there is 'no genuine issue as to any material fact' and that they are 'entitled to judgment as a matter of law.'"[75]

The majority concluded by giving the City the green light to use the test results: "[o]ur holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[76]

However, the Court did not address the difficult question of how a public employer, complying with the "strong basis in evidence" standard, would fare under the Fourteenth Amendment and its directive of "equal protection of the laws." Justice Scalia, in his concurring opinion, pointed out that this case simply postponed "the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[77]

Preemption and Consumer Protection Laws – *Cuomo v. Clearing House Ass'n., L.L.C.*
On June 29, the Court also released its decision in *Cuomo v. Clearing House Ass'n., L.L.C.*,[78] addressing state fair-lending laws and possible preemption by the National Bank Act (NBA). The ruling, another 5-4 split, arose out of letters, "in lieu of subpoena," that Eliot Spitzer, then Attorney General for the State of New York, sent to national banks. These asked the banks to provide non-public information about their lending practices to determine whether the banks had violated the State's fair-lending laws. (Apparently, public data from the banks showed higher-interest residential mortgage rates for minorities, as compared to white borrowers, suggesting possible discrimination in violation of state fair-lending laws.) The Clearing House Association, a banking trade group, sued to enjoin the information request, claiming that the NBA and a federal Office of the Comptroller of the Currency regulation, promulgated under the NBA, prohibited that form of state law enforcement against national banks.

The NBA, Section 484(a), stated that: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."[79] "Visitorial powers," though undefined, generally referred to a right to oversee corporate affairs. The 2004 regulation provided, in part, that States had no right "to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law" (it did, however, provide that "production of a bank's records . . . may be required under normal judicial procedures").[80] The district court granted the injunction, prohibiting the AG from enforcing New York fair-lending laws through demands for records or judicial proceedings. The Second Circuit affirmed.

The Supreme Court, however, in a majority opinion written by Justice Scalia (joined by Justices Stevens, Souter, Ginsburg, and Breyer), struck the regulation, finding it could not be upheld as a reasonable interpretation of the NBA. Although there was "necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers,'" and, under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the Court was to defer to an agency's reasonable interpretation of a statute, this was insufficient to protect all of the Comptroller's interpretations of the NBA from judicial scrutiny.[81] Here, it was evident that the Act could not support the "Comptroller's expansive regulation" to shield the banks from "ordinary enforcement of the law."[82] While a State might not be able to exercise general supervision and control over a subsidiary of a national bank, this was something distinct from law enforcement, and the NBA preempted only the former. Neither the Comptroller's regulation, nor the Comptroller's interpretation of its regulation, comported with the NBA. However, as "visitorial powers" included "any form of administrative oversight" that allowed a sovereign "to inspect books and records on demand, even if the process [was] mediated by a court through prerogative writs or similar means,"[83] the "threatened issuance of *executive* subpoenas by the Attorney General" (issued on his own authority, and not as part of a civil or criminal action) fell outside of the "law enforcement" exemption from the ban on exercise of supervisory power. Accordingly, the injunction below was affirmed as applied to the threatened issuance of executive subpoenas.

2. U.S. SUPREME COURT – COMING ATTRACTIONS (CASES TO BE ARGUED IN THE COMING TERM)

The Supreme Court's new Term begins on October 05. In addition to the case of *Salazar v. Buono*, mentioned earlier[84] and dealing with the Establishment Clause, government property, and whether a divestiture or transfer "cures" any Establishment Clause violation, cases of interest to be argued in the coming October Term include *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 1401 (U.S. Feb. 23, 2009) (No. 08-351); *Maryland v. Shatzer*, 954 A.2d 1118 (Md. 2008), *cert. granted*, 129 S. Ct. 1043 (U.S. Jan. 26, 2009) (No. 08-680); and *Perdue, Governor of Georgia v. Kenny A*., 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3442 (U.S. Apr. 06, 2009) (No. 08-970). IMLA is participating as an *amicus* in the *Alvarez* and *Kenny A*. cases.

The last of the these three cases involves entitlement to over $10M in attorneys' fees (to be paid by the taxpayers of Georgia) arising from a class action lawsuit brought on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). The plaintiffs sued the state, the DHR, various counties, and each county's department of family and children services and its directors, alleging systemic deficiencies in the counties' foster care systems and asserting 15 causes of action under federal and state law. The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. The matter was resolved by way of a settlement agreement that stated: "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and

Fed.R.Civ.P. 23(h)." If the parties could not reach an agreement as to these amounts, then the amount of any award was to be determined by the court, which is what happened. Plaintiffs' counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic ("lodestar") fee of $6,012,802.90 and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[85] The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10,500,000 total fees awarded to them.

The U.S. Court of Appeals for the Eleventh Circuit noted that a merits-exceeding result for the plaintiffs had to be the product of one, or some combination, of "superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck,"[86] but that Supreme Court precedent held that superior lawyering by the plaintiffs' counsel was not a proper basis for an enhancement. Further, there was a "perverse irony" in the "seven figure, court ordered gratuity in this case," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens."[87] Nonetheless, it declined to interfere with the award, indicating that, under the prior panel precedent rule, it was not free to decide the enhancement issue.

The matter now comes before the Supreme Court, which will decide whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on quality of performance and results obtained, when these factors already are included in the lodestar calculation, and whether an enhancement to the lodestar based on the quality of representation and results was contrary to the Court's prior rulings, particularly after the lodestar has been reduced for excessive hours billed.

3. FEDERAL LEGISLATIVE ISSUES

H.R. 413, the Public Safety Employer-Employee Cooperation Act of 2009 – Mandatory Collective Bargaining

H.R. 413, introduced in January 2009 and sponsored by Representatives Dale Kildee (D-MI) and John J. Duncan, Jr. (R-TN), would impose a regime, administered by the Federal Labor Relations Authority (FLRA), of mandatory collective bargaining rights for public safety officers employed by States and their political subdivisions. (Previous versions of this bill include H.R. 980 and S. 2123, the Public Safety Employer-Employee Cooperation Act of 2007, introduced but not passed in 2007).

H.R. 413 defines "public safety officer" as an "employee of a public safety agency who is a law enforcement officer, a firefighter, or emergency medical services personnel," but not permanent supervisory or management employees. A "public safety agency" is defined to include a State,

political subdivision of a State, and the District of Columbia. Among other things, H.R. 413 requires the FLRA to review existing State law and determine if that law would adequately and "substantially provide" for the following rights and responsibilities for covered employees:

- the right to form and join a labor organization, that is, or seeks to be, recognized as the exclusive bargaining representative of such employees;
- requiring public safety employers to recognize such labor organizations, to agree to bargain with the labor organization, and to commit any agreements to writing in a contract or memorandum of understanding;
- providing for bargaining over hours, wages, and terms and conditions of employment;
- making available an interest impasse resolution mechanism, such as fact-finding, mediation, arbitration, or comparable procedures; and
- a requirement of enforcement through State courts of "all rights, responsibilities, and protections provided by State law," including any written contract or memorandum of understanding.

If the FLRA finds that the existing State law does not meet these standards, it "shall" issue regulations establishing the rights and responsibilities for public safety employers and employees in that State; further; it is authorized to "take such other actions as are necessary and appropriate to effectively administer this Act."

IMLA and other organizations – including the National League of Cities and the International Public Management Associations for Human Resources – oppose this proposed legislation because it aims to federalize what has traditionally been a state and local government responsibility: determining the terms and conditions of public safety employment. States and local governments are in the best position to make decisions about whether the collective bargaining process will benefit their constituents, and collective bargaining for these employees is by no means universal: according to one source, 35 states and the District of Columbia allow some form of collective bargaining, but 15 states have chosen not to mandate it.[88] Collective bargaining rights for public safety officers are best left to be resolved at the local level – given the specific labor market and what constitutes a competitive salary and benefits in that locality – and there is no compelling reason for the federal government to substitute the FLRA in this area as the entity in charge of establishing the rules and procedures for public safety employment. Further, most states and local governments already operate within a civil service system, and the proposed legislation would interfere with these existing civil service laws. Moreover, the law would create a disparity between federal public safety officers and those at the state and local level: *federal* public safety officers do not have the right to negotiate wages and conditions of employment.

Bill Status: The bill was referred to the House Committee on Education and Labor in January 2009.

Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222)
H.R. 4297, the Tax Increase Prevention and Reconciliation Act of 2006, was signed into law as P.L. 109-222 on May 17, 2006. Section 511 of this statute originally required that, as of January 01, 2011, federal, state and local governments withhold three percent from payments to contractors for goods and services, and remit this to the Internal Revenue Service (IRS). The recent stimulus package – the American Recovery and Reinvestment Act – provides for a one-year delay in the law's enactment, changing the effective date to January 01, 2012. The law applies to any government jurisdiction that spends more than $100 million annually on goods and services, but will not apply to the private sector. There is no minimum transaction threshold, and the only vendors or contractors that are exempted are other governments or nonprofit entities and government employees.[89]

This government "withholding tax" tax for goods and services contracts is something that IMLA and other organizations – the National Association of Counties, the Government Finance Officers Association, and the National Council for Public Procurement and Contracting – have worked to have repealed, on the basis that the requirement represents a significant unfunded mandate on state and local governments, and violates the Unfunded Mandates Reform Act. Implementing the law is sure to cause significant administrative and financial burdens (including the need to make costly programming changes to financial and accounting systems, and to keep documentation and reports), at a cost that one source estimates to be $62 million annually.[90] This financial burden is one that localities cannot afford in these constrained economic times. According to the National Association of Counties, the law:

> will also likely discourage contractors from bidding on government contracts and increase the costs of procurement. Many of its requirements are unworkable as written and will require the Treasury Department to issue 'administrability rules.' This mandate is particularly egregious because it was inserted into the final version of an omnibus tax bill that had already passed both the House and Senate and was never subject to a formal vote, hearings or consultation with any state and local government officials or their national organizations.[91]

For their part, contractors complain that the withholding applies to the total contract, not to the net revenue generated from the project; is based on revenues from government payments with no relationship to a company's taxable income; and that contractors are likely to see "significant amounts of their operating funds become unavailable for periods that could exceed 16 months," with a particular impact on small businesses.[92]

Previous unsuccessful bills to repeal Section 511 and the three percent withholding requirement. include H.R. 1023 (February 2007), introduced in the House by Representatives Wally Herger (R-CA) and Kendrick Meek (D-FL) and referred to the House Committee on Ways and Means; and S. 777 (March 2007), introduced in the Senate by Senator Larry Craig (R-ID) and referred to the Senate Committee on Finance. More recently, on January 07, 2009, Rep. Meek introduced

H.R.275, and on January 21, 2009, Sen. Arlen Spector introduced S. 292, The Withholding Tax Relief Act of 2009.

Bill Status: H.R. 1023 was referred to the House Committee on Ways and Means in January and there has been no subsequent activity. As of late May, S. 292 had been read twice and referred to the Committee on Finance, with no further activity.

Conclusion

As it has done since 1935, the International Municipal Lawyers Association continues to act as a strong advocate and resource for local government attorneys in these and coming matters before the Nation's courts and legislatures.

For additional information about IMLA's legal and legislative advocacy – including how to involve IMLA as an *amicus* – please contact **Chuck Thompson**, IMLA's Executive Director and General Counsel, at cthompson@imla.org.

Notes

1. 129 S. Ct. 1125 (Feb. 25, 2009).

2. *See* The Aphorisms of Summum and the Ten Commandments at http://www.summum.us/philosophy/ tencommandments.shtml.

3. Summum had raised, but abandoned, an Establishment Clause argument and no federal Establishment Clause argument was raised in the Summum complaint. Oral Argument Transcript, p. 2.

4. Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2007). For a more detailed discussion about the background to the case, see the author's previous article in the winter issue of the ABA's *State & Local Law News*.

5. 499 F.3d at 1175 (Justice McConnell, joined by Justice Gorsuch, dissenting from the denial of rehearing *en banc*).

6. Brief of Amicus Curiae International Municipal Lawyers Association in Support of Petitioners, 2008 WL 2550618 (U.S. June 23, 2008).

7. *Id*., Appendix B.

8. *Id*., Appendix D.

9.129 S. Ct. 1125, 1131 (Feb. 25, 2009) (citing *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)).

10. *Id*. at 1132.

11. *Id*. at 1133.

12. *Id*.

13. *Id*. at 1134.

14. *Id*.

15. The Court referred to the fact that the statue was given to the United States by the French Republic as an expression of "republican solidarity and friendship," but later came to be viewed as a "beacon welcoming immigrants to a land of freedom." *Id*. at 1136-37.

16. *Id*. at 1138.

17. *Id*.

18. 545 U. S. 677 (2005) (Ten Commandments monuments had an "undeniable historical meaning," not just a religious one).

19. 129 S. Ct. at 1139 (Justice Scalia, with Justice Thomas concurring).

20. *Id*. at 1141.

21. *Id*. at 1142.

22. *Id*. at 1139.

23. *Id*. at 1140.

24. Following its ruling, the Supreme Court directed the Tenth Circuit Court of Appeals to apply the ruling to another, similar case in the state, involving Summum and the City of Duchesne. *Duchesne City v. Summum*, No. 07-690, was on hold pending a decision in the Court's ruling in the Pleasant Grove City case, and involved a request by the Summum religious group to place a monument of its "Seven Aphorisms" in a city park. The group had also asked the City to *transfer*, to Summum, title to land in the park for its monument, because the City had previously transferred a plot of land in the park containing a Ten Commandments monument to the Duchesne Lions Club. On March 02, the Supreme Court granted the petition for a writ of certiorari and remanded the case back for further consideration in light of the *Pleasant Grove City* ruling, and on April 07, the Tenth Circuit remanded the case to the district court to conduct further proceedings consistent with the Supreme Court's decision.

25. For more on this case, Mary Jean Dolan, who authored the IMLA *amicus* brief, writes about the *Summum* case in the July/August issue of IMLA's *Municipal Lawyer* magazine.

26. Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, Salazar v. Buono, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472).

27. Buono v. Kempthorne, 502 F.3d 1069, 1082-86 (9th Cir. 2007) (noting that "carving out a tiny parcel of property in the midst of this vast Preserve – like a donut hole with the cross atop it – will do nothing to minimize the impermissible governmental endorsement." *Id*. at 1086).

28. Pearson v. Callahan, 129 S.Ct. 808 (2009).

29. *Id*. at 817.

30. *Id*. at 818.

31. Herring v. U.S., 129 S.Ct. 695 (2009).

32. *Id*. at 702.

33. Arizona v. Johnson, 129 S.Ct. 781, 785 (2009).

34. *Id*. at 788.

35. Crawford v. Metro. Gov't of Nashville and Davidson County, 129 S.Ct. 846 (2009).

36. *Id*. at 851.

37. *Id*.

38. *Id*. at 853-54.

39. Van De Kamp v. Goldstein, 129 S.Ct. 855 (2009).

40. *Id*. at 862.

41. *Id*. at 864.

42. Locke v. Karass, 129 S.Ct. 798 (2009).

43. Ysursa v. Pocatello Educ. Ass'n, 129 S.Ct. 1093 (2009).

44. *Id*. at 1099.

45. *Id*. at 1100.

46. Arizona v. Gant, --- S.Ct.---, 2009 WL 1045962 at *3.

47. 453 U.S. 454, 455 (1981) (police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest).

48. *Gant*, 2009 WL 1045962 at *7.

49. *Id*.

50. *Id*. at *2.

51. 42 U.S.C. §9601 *et. seq*. (West 2009).

52. Burlington Northern and Santa Fe Ry. Co. v. U.S., 129 S.Ct. 1870, 1881 (2009).

53. *Id*. at 1880.

54. Northwest Austin Mun. Utility Dist. Number One v. Holder, 2009 WL 1738645 (U.S. June 22, 2009).

55. The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577.

56. 573 F. Supp.2d 221 (D.C. Cir. 2008).

57. 2009 WL 1738645 at * 10.

58. *Id*. at *13.

59. *Id*.

60. *Id*. at *7.

61. *Id*. at *8.

62. *Id*.

63. *Id*. at *14.

64. *Id*. at *16.

65. *Id*. at *22.

66. *Id*. at *23.

67. *Id*. at *24.

68. 2009 WL 1835138 (U.S. June 29, 2009).

69. 554 F. Supp.2d 142, 150 (D. Conn. 2006).

70. *Id*. at 146. Ricci scored sixth highest on the exam, although at the hearings, none of the results were identified by name, and none of the candidates knew where they had placed.

71. *Id*. at 160.

72. *Id*. at 162.

73. 530 F.3d 87 (2d Cir. 2008). The court later denied an application for rehearing and rehearing *en banc*; *see* 530 F.3d 88 (2d Cir. 2008).

74. 2009 WL 1835138 at * 4 (U.S. June 29, 2009).

75. *Id*. at * 18.

76. *Id*. at * 22.

77. *Id*.

78. 2009 WL 1835148 (U.S. June 29, 2009).

79. 12 U.S.C. § 484(a) (West 2009).

80. 12 CFR § 7.4000 (2009).

81. 2009 WL 1835148 at *4.

82. *Id*.

83.*Id*. at * 10.

84. *See supra,* pp. 4-5.

85. Kenny A. ex rel. Winn v. Perdue, 454 F.Supp.2d 1260, 1289 (N.D. Ga. 2006).

86. 532 F.3d 1209, 1231 (11th Cir. 2008).

87. *Id*. at 1236.

88. NLC Fact Sheet, *Reject Mandatory Collective Bargaining*, undated.

89. NACo, *Toolkit on Repeal of New Non-Wage Withholding Requirement*, undated.

90. GFOA Issue Brief, *Withholding Requirement on Government Payments and Other General Tax Issues* (Feb. 2009) states that "[i]n 2006, the Congressional Budget Office estimated the cost to state and local governments for administering this provision to be $62 million per year."

91. NACo Fact Sheet, *Repeal Three Percent Withholding Tax on County Purchases* (March 2007).

92. National Defense Industrial Association, *Little Known Legislation Takes Federal Contractors By Surprise* (March 2007).